University of New South Wales

University of New South Wales Faculty of Law Research Series 2012

Year 2012 *Paper* 39

Wotton v Queensland - 'Islands of power' and political speech on Palm Island

David Hume*

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

http://law.bepress.com/unswwps-flrps12/39

Copyright ©2012 by the author.

^{*}Australian Government Solicitor

Wotton v Queensland - 'Islands of power' and political speech on Palm Island

David Hume

Abstract

This paper discussed a few important aspects of the recent case Wotton v Queensland that would be later determined by the High Court regarding the custodians of land. It concludes that the decision on this case would have great significance for the nature and scope of the protection given by the implied freedom.

Wotton v Queensland - 'Islands of power' and political speech on Palm Island

David Hume¹

Introduction

I acknowledge the traditional custodians of the land where we are meeting and pay respect to the elders past, present and future.

As Christos suggested, the name, 'Recent Cases', is somewhat of a misnomer for my and Christos' papers, as neither of our cases have yet been handed down. No doubt, with our combined efforts, we tripled the traffic to the High Court's website last week in vain hopes that the daily court list would bring the relief of a foreshadowed judgment. It is perhaps embarrassing to admit that in public, but I feel that at the Gilbert + Tobin Conference I may be among friends.

When you deliver a paper on a forthcoming decision, you run the risk that the Court either won't decide the issues you discuss, or won't decide them in the way foreshadowed. As I turn to *Wotton*, I ask that you forgive me should either of these risks of irrelevance or inaccuracy eventuate. I also point out that, while I'm a lawyer at AGS, the views I express are my personal views, and not necessarily those of AGS.

Background

Wotton arose from the events on Palm Island in November 2004. An Aboriginal man died in custody and a riot occurred. Mr Wotton, one of two plumbers on the island, was on the island that day, but he wasn't supposed to be. He was supposed to be in Townsville; but a pipe had burst and the other plumber was drunk, so Mr Wotton stayed in town.² Mr Wotton played a leading role in the riot. Some four years later, in November 2008, he was convicted of the offence under Queensland law of rioting causing destruction, ³ and was sentenced to six years imprisonment.⁴ In July 2010,

Lawyer, Constitutional Litigation Unit, Australian Government Solicitor; Associate, Gilbert + Tobin Centre of Public Law. The views expressed are my personal views, not those of AGS.

Chloe Hooper, The Tall Man (2008) 63.

Further Amended Special Case at [16].

Mr Wotton was released on parole subject to a range of conditions imposed by the local Parole Board.⁵ The conditions included that he:⁶

- not attend public meetings on Palm Island without the prior approval of his corrective services officer; and
- that he receive no direct or indirect payment for dealings with the media.

A further condition which prohibited him from speaking to or having any interaction whatsoever with the media was deleted from his parole conditions shortly before the High Court hearing.⁷ These conditions were imposed pursuant to a power conferred on the parole board by the Queensland *Corrective Services Act* which authorised the imposition of conditions the board reasonably considered necessary either (a) to ensure the prisoner's good conduct; or (b) to stop him committing an offence.

In addition to this, the Queensland *Corrective Services Act* provided that, except in certain circumstances, a person would commit an offence if the person obtained a written or recorded statement from a prisoner (and that included a person on parole). The exceptions included if the person had obtained the prior written approval of the Chief Executive of Queensland Corrective Services.⁸

Mr Wotton commenced proceedings in the High Court, and his claim, in substance, was that the various provisions of the *Corrective Services Act* and the three parole conditions to which I have referred were invalid to the extent that they infringed the implied freedom of political communication. The Commonwealth, New South Wales and Victorian Attorneys-General intervened, and the High Court heard the matter on 2 and 3 August 2011. Judgment is reserved.

Wotton will be closely watched. It's the first case since APLA, in 2005, in which the High Court should examine the implied freedom at length. Since APLA, a majority of the Court has retired, being replaced by Chief Justice French and Justices Crennan, Kiefel and Bell. Wotton also has the claim to fame of being the first case in

Further Amended Special Case at [17].

⁵ Further Amended Special Case at [20].

Further Amended Special Case at [21].

Further Amended Special Case at [31A].

As to the meaning of 'Chief Executive', see Acts Interpretation Act 1954 (Qld) s 33(11).

Noting the implied freedom issues in Wainohu, Hogan v Hinch and Aid/Watch.

which a member of the High Court has referred in argument to the social media tool, Twitter. Twitter will be pleased that the High Court has only ever mentioned Facebook once as well,¹⁰ and that was only in a special leave hearing and Chief Justice Gleeson called it Facebooks. I note also that our Chair, the Honourable President Margaret McMurdo, also holds the award for having referred to Facebook in the most judgments amongst the members of the Queensland Court of Appeal, all of them as Facebook and none as Facebooks.¹¹

The issues in Wotton

There are many issues in *Wotton*. I will mention some of these briefly and examine two of them in more detail.

Some of the issues that may arise are:

- whether the implied freedom is engaged by a law which prohibits the receipt
 of remuneration for political expression. This arises in the context of the
 condition prohibiting Mr Wotton from obtaining payments from the media –
 and the point of principle on which the Court might diverge is whether a mere
 'chilling effect' on speech is sufficient to engage the freedom or whether an
 actual prohibition on speech is necessary to do so;
- another is whether the courts should give greater deference to judgments by the legislature and executive about what is appropriate and adapted to a legitimate end in the context of the administration of prisons and parole;
- also, what are the 'legitimate ends' of prison administration and of parole;

See *R v McMullen* [2011] FCA 153 at [5], [6] (McMurdo P); *R v GAM* [2011] QCA 288 at [21] (McMurdo P); *R v Stallan* [2010] QCA 68 at [13] (McMurdo P).

Page- 3

See State of New South Wales v Jackson [2008] HCATrans 193 (16 May 2008) at [367] (Gleeson CJ). Google has, as at 17 February 2012, been mentioned on eight separate days of hearing. Neither 'Twitter' nor 'Facebook' have yet been referred to in a judgment. 'Google' was referred to in the judgment in *Dupas v The Queen* [2010] HCA 20 at [8] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

- a further issue is what is the significance for the implied freedom of the development of the internet and social media;¹²
- another is whether there is a relationship between rights of political communication and the rights of political participation guaranteed by ss 7 and 24, which, as *Roach* shows, include some rights for prisoners;
- also, the scope of any implied freedom of political association noting that one of Mr Wotton's conditions prohibited him from attending public meetings.

I now turn to discuss two further issues in more detail. The first I will discuss is how the implied freedom applies to the *receipt* of communications, and the second is how the implied freedom applies to discretionary powers.

(a) The freedom to receive communications

Turning to the first of these. The thesis I would like to present arises from a couple of issues in *Wotton*.

The first is that, before he was released on parole, Mr Wotton was *not* free to do some of the things which his parole conditions restricted him from doing. For example, by reason of his incarceration, he was not free to attend meetings on Palm Island. There is a strand of implied freedom jurisprudence in which the Court has suggested that the implied freedom is only engaged where there is a *pre-existing* right, freedom or privilege which the law burdens. ¹³ One of the issues in *Wotton* may be whether the implied freedom simply can't be engaged because Mr Wotton had no prior freedom to do the things which the parole conditions prohibited. ¹⁴

See Wotton v State of Queensland [2011] HCATrans 189 at [1464]-[1494] and [2061]. At [2061], Kiefel J noted that, though, as a practical matter, the parole conditions might restrict the plaintiff from appearing on Q&A in person, he could participate by 'Twitter'. At [1493]-[1494], Gummow J suggested that ACTV might be of 'historical interest' in the light of it having been decided in the age of the old media.

Mulholland v Australian Electoral Commission (2004) 220 CLR 1, 222 [107], 224-5 [111]
 (McHugh J), 246-6 [186]-[190] (Gummow and Hayne JJ), 298 [337] (Callinan J), 304 [354]
 (Heydon J); Levy v State of Victoria (1997) 189 CLR 579, 622 (McHugh J).

Queensland put these facts in issue in its written submissions: see Wotton v Queensland – High Court (S314/2010), Written Submissions of Queensland at [71]. See also at [21]-[27].

A second feature of Wotton is that Mr Wotton was, in a sense, singled out for special prohibition. Only he was prohibited from attending public meetings; and only he was prohibited from obtaining financial payments for dealings with the media. A question which arises is whether it matters that he alone was singled out for special burdens; that he might be said to have been treated discriminatorily or unfairly? The US Supreme Court has said that 'restrictions distinguishing among different speakers, allowing speech by some but not others'15 are prohibited. In part, that is because (as the Supreme Court said in the 2010 political speech case of Citizens United) '[b]y taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person ... of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice'. 16

The thesis I suggest as a 'view' or 'perspective' on the implied freedom illuminates the approach to both of these factors. The thesis is this: the implied freedom, at its core, does not protect the expression of information; it protects the receipt of relevant information by those responsible for making constitutionally-prescribed decisions.

So to show why I think this is the case I'll start with three uncontested propositions, then move on two possible corollaries.

- 1. First, the bases or reasons for the implied freedom are the constitutionallyprescribed systems of representative and responsible government and the process for amending the Constitution by referendum.¹⁷
- 2. Second, each of those systems involves the making of choices. Representative government requires that the House and Senate be chosen by the people.¹⁸ Responsible government requires that parliamentarians choose or decline to choose the Executive. The system for amending the

Page- 5

¹⁵ Citizens United v Federal Election Commission, 558 U.S. ____ (2010) 1, 24 (Kennedy J, for the Court).

Citizens United v Federal Election Commission, 558 U.S. ____ (2010) 1, 24 (Kennedy J, for the Court).

Hogan v Hinch (2011) 275 ALR 408, 425 [48] (French CJ).
See ss 7 and 24 of the Constitution.

Constitution requires that Parliament and the people choose or decline to choose a particular alteration.

3. The third point is that the efficacy of the systems requires that government not restrict the choosers' opportunity to access relevant information concerning the choices contemplated by the Constitution.¹⁹ It's this that makes the implied freedom necessary. Although the High Court didn't elaborate on this in *Lange*, presumably, the systems' efficacy requires this because²⁰ the better informed the choices are the more likely the systems will operate in aid of self-government²¹ and the public welfare.²²

I now move on to two possible corollaries.

1. The first proposition is that, because the freedom operates in aid of constitutionally-prescribed choices, the core of the freedom's protection is the *receipt* or *opportunity of receipt* of relevant information by those responsible for making those choices.²³ The core of the freedom's protection is not the *expression* of information - either in general, by any particular person or through any particular medium; it doesn't exist to protect self-

As to representative government, see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). As to responsible government, see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See generally referring to the purposes which the implied freedom serves, being purposes involving the receipt of information by constitutionally-prescribed choosers, *Coleman v Power* (2004) 220 CLR 1, 125 [331] (Heydon J).

Presumably because, all other beings equal, an informed choice is likely to be better than an uninformed choice.

See Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

See Aid/Watch Incorporated v Commissioner of Taxation for the Commonwealth of Australia (2010) 241 CLR 539, 557 [48] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

I put to one side questions as to whether the systems' efficacy also requires that *private individuals* not limit choosers' opportunity to access relevant information or that choosers *actually have* relevant information.

See, e.g., *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 51 (Brennan J), referring to the prohibition on legislative or executive infringement of the freedom 'to an extent which substantially impairs the capacity of, or opportunity for, the Australian people to form the political judgments required for the exercise of their constitutional functions'.

One consequence of adopting this first proposition is that it moves the implied freedom further from the jurisprudence concerning the common law freedom of speech.

expression or civic participation through expression per se;²⁴ it doesn't protect the mass media per se; it exists to protect constitutionally-prescribed choices. *Expression* of information is only protected as an incident of that core protection; and is not an end-in-itself.²⁵

2. The second proposition is this: because the freedom operates in aid of informed choice, in considering a particular restriction it's relevant to consider whether, despite the restriction, the constitutionally-prescribed choosers have adequate information to make the prescribed choices. In other words, the freedom doesn't protect more speech per se; it protects the receipt of speech which is relevant in the sense of making choices more informed. A corollary of this is that a burden on political communication is relatively more likely to withstand scrutiny if there are alternative means for the constitutionally-prescribed choosers to access the relevant information contained in the communications.²⁶ I pause to note that it was in relation to a proposition of this kind that Justice Kiefel mentioned Twitter. In response to the suggestion that the conditions would restrict Mr Wotton's capacity to appear on Q&A because the ABC couldn't pay to fly him to the set, Justice Kiefel pointed out that his views could still be tweeted. Mr Merkel took that as a comment.

These propositions relate to *Wotton* in a couple of ways.

In Wotton, the Plaintiff argued that there was a relationship between constitutional requirements as regards the franchise and constitutional requirements as regards political expression: Wotton v Queensland – High Court (S314/2010), Written Submission of the Plaintiff at [53]-[54].

Several accepted principles of implied freedom law are related to this.

First, because the implied freedom does not protect expression per se, the implied freedom does not confer an individual right to express oneself: *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086, 1090 [28]; 163 ALR 734, 740-741 (Hayne J). See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 245 [182] (Gummow and Hayne JJ), 304 [354] (Heydon J).

Second, because the implied freedom protects the receipt of information, the expression of *some* expression by particular speakers can be restricted in aid of *other* political expression: *Coleman v Power* (2004) 220 CLR 1, 51-52 [97] (McHugh J).

This proposition also helps explain why the implied freedom jurisprudence charts such a different course to the First Amendment jurisprudence.

By analogy, see *Saxbe v. Washington Post Co*, 417 U.S. 843, 849 (1974). There, in considering the validity of restrictions on prisoner communication, the US Supreme Court indicated that it was relevant that there was 'a large group of recently released prisoners who are available to both the press and the general public as a source of information about conditions in the federal prisons'.

First, they suggest that it may be irrelevant whether or not Mr Wotton or indeed any prisoner had had a pre-existing freedom, right or privilege to express his or their views. What is relevant is whether the law in issue has the capacity to burden the opportunity of the constitutionally-prescribed choosers to access information concerning their choices. Focusing on the existence and scope of prisoners' rights and freedoms to communicate comes at the inquiry from the wrong direction. If pre-existing rights, freedoms and privileges are relevant at all, it would seem to be the rights, freedoms and privileges of those who *receive* speech.²⁷

And, second, these propositions also suggest it's not in itself relevant that Mr Wotton was 'singled out' by the executive for 'ad hominem' prohibition. If the implied freedom protects a freedom to receive adequate communications, the fact that Mr Wotton is singled out for prohibition on his expression does not determine validity. What may be relevant is whether the prohibition on Mr Wotton's expression restricts the capacity of constitutionally-prescribed choosers to exercise their constitutionally-prescribed choices in an informed way. That, in turn, may depend on whether Mr Wotton has and intends to communicate relevant information and that information is not otherwise available.²⁸

(b) Discretions and the implied freedom

A further factor in *Wotton*, and one which played a big role in the hearing, was the fact that many of the statutory powers in issue were discretionary powers to impose or lift restrictions on communication.

This is the second issue I'd like to discuss: how might the implied freedom apply to these kinds of discretionary powers? The High Court's answers will be relevant to its

The law rarely restricts the receipt of communications – presumably, in part, because receipt is characteristically involuntary. Section 132 of the *Corrective Services Act* is a notable exception to this, being directly targeted at the receipt of communications. Although note that an involuntary act may not be capable of constituting an offence under the Queensland Criminal Code: *Criminal Code* (Qld) s 23(1)(a).

The receiver of communication may be less likely to have an interest sufficient to support standing than the expresser of communication. Accordingly, even if the implied freedom protects the receipt of information at its core, it is unsurprising that it is often actual or intended expressers of communication who bring litigation.

Taken to its logical conclusion, what the thesis means is that, if it can be assumed that an individual has 'nothing to add' there is nothing in the implied freedom to say that that individual cannot be 'silenced'. The strength of this consequence may provide some ground for rejecting, or qualifying, the thesis.

approach generally to discretionary powers in the context of constitutional guarantees.²⁹

In the context of the implied freedom, broadly, there are two kinds of discretionary powers.³⁰

- 1. There are qualified permissions being circumstances in which conduct is permitted unless the executive or judiciary prohibits it.³¹
- 2. There are qualified prohibitions being circumstances in which conduct is prohibited unless the executive or judiciary lifts the prohibition.³² *Corneloup*, the case mentioned by Robertson J, involved an example of this speech was prohibited unless permitted.

Wotton involved both kinds of power. The Parole Board's power to authorise release on parole, subject to imposed conditions, may be seen as a kind of qualified permission: presumptively, parolees are free to do certain things (including to engage in political communication) unless the Parole Board exercises its power to prohibit them. Alternatively, the parole condition prohibiting Mr Wotton from attending public meetings without prior approval was a kind of qualified prohibition:³³ his attendance was prohibited, subject to a power in the executive to relax that prohibition.

In both cases,³⁴ the scope of permissible political communication depends on the exercise of power by the executive or judiciary. I'll start by setting out some

Different issues may arise where the *actual* scope of communications depends on the conduct of private individuals e.g. the media. These issues were discussed in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

The High Court will consider a similar issue in the context of s 92 in the *Betfair* and *Sportsbet* appeals.

Qualified permissions are not a new concept for the High Court in implied freedom cases. Recently, both *Hogan v Hinch* and *Wainohu* involved qualified permissions.

Cunliffe involved a qualified prohibition. See also Corporation of the City of Adelaide v Corneloup (2011) 110 SASR 334.

Section 132(1) of the *Corrective Services Act*, which prohibited the obtaining of a written or recorded statement without the chief executive's approval, was also an example of a qualified prohibition.

In addition to the issues described below, there is a question as to whether the effective burden imposed by a qualified prohibition is either: (a) the general prohibition (which can be relaxed); or (b) the requirement to obtain approval before speaking. This distinction may be more a matter of language than anything else.

accepted propositions, then move on to where there might be a divergence in *Wotton*.

- First, the legislature is not absolutely prohibited from leaving the scope of permissible political communication to the exercise of power by the executive or judiciary.³⁵
- However, the fact that the scope of permissible political communication under a law depends on such an exercise of power may be relevant to whether the law is reasonably appropriate and adapted to a legitimate end.³⁶
- 3. Where a statute confers a facially unconfined power on the executive or judiciary to permit or prohibit communication, that power can't lawfully be exercised in a manner contrary to the implied freedom. In Australia, there is no such thing as an 'absolute' or 'unconfined' discretion: all public powers are subject to the Constitution³⁷ and will be read, if possible, so as not to authorise their exercise in a way that infringes a constitutional guarantee.³⁸

This is implicit in, for example, *Wainohu v State of New South Wales* (2011) 243 CLR 181 (qualified permissions) and *Cunliffe v Commonwealth* (1994) 183 CLR 272 (qualified permissions) in which the schemes were held valid.

See, by analogy, *Le Mesurier v Connor* (1929) 42 CLR 481, 505-6 (Isaacs J), discussing circumstances in which executive conduct provides a factum for the operation of a law.

See generally *Liu v The Age Company Limited* [2012] NSWSC 12 at [30]-[33] (McCallum J).

The fact that the scope of permissible communications depends on the exercise of power by the executive or judiciary may be relevant to invalidity. In the case of qualified permissions, see *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 147 (Mason CJ), 174 (Deane and Toohey JJ):

In the case of qualified prohibitions, see *Bennett v Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 at [103] (Finn J), saying of the need to obtain permission to speak: 'it unreasonably compromises the freedom by transforming the freedom into a dispensation. It is not an appropriate filtering device to protect the efficient workings of government in a way that is compatible with the freedom'.

Of course, the existence of a discretion cannot render valid a scheme which is already invalid: *Liu v The Age Company Limited* [2012] NSWSC 12 at [50]-[54] (McCallum J).

The existence of a discretion may also militate in favour of validity: Liu v The Age Company Limited [2012] NSWSC 12 at [56]-[57] (McCallum J). In Wotton, referring to Swan Hill Corporatoin v Bradbury (1937) 56 CLR 746, 757 (Dixon J), Queensland argued that the existence of the discretion could allow restrictions to be closely tailored to the ends which they are intended to serve: see Wotton v Queensland – High Court (S314/2010), Written Submissions of the First Defendant at [52].

Shrimpton v The Commonwealth (1945) 69 CLR 613, 629-630(Dixon J); Gerlach v Clifton Bricks Pty Ltd (2002) 209 CLR 478, 503-4 [69]-[70] (Kirby J).

In addition, broad discretionary powers are, according to ordinary principles, read in the light of the nature, scope and purpose of the power and the context in which it is found:

- 4. If there's jurisdictional error in the exercise of such a power, it will be amenable to judicial supervision.³⁹
- 5. But even if a power is subject to legal limits, it's always possible, as a matter of practice, that those limits may be exceeded.⁴⁰
- 6. While that may be the case, the mere possibility that a power may be abused cannot render the statutory conferral of power invalid: any statutory power can be abused and all laws would be invalid if the possibility of abuse was fatal to validity.

It's at this point that there might be a divergence of opinion in *Wotton*.

The issue is - to what extent is the Court willing to inquire into the practical burdens, as distinct from legal burdens, which a law imposes on political communication?

In the United States, there is a deep scepticism towards laws which confer discretionary powers the use of which may in practice burden speech.⁴¹ This

Minister for Aboriginal Affairs v Peko-Wallsend Pty Ltd (1986) 162 CLR 24, 38-40 (Mason J).

See also *Wotton v State of Queensland* [2011] HCATrans 189 at [388]-[389] (French CJ): 'Every discretion is confined if only by the scope, purposes and subject matter of the statute under which it is made'.

In addition, a broad discretionary power may be construed so as not to interfere with the common law freedom of speech: see, e.g., *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Evans v State of New South Wales* [2008] FCAFC 130 at[78] (French, Branson and Stone JJ).

- See, e.g., Wainohu v State of New South Wales (2011) 243 CLR 181, 227 [97] (Gummow, Hayne, Crennan and Bell JJ).
 - One question is whether the reading of a statutory power involving a qualified prohibition in light of the implied freedom can have the effect that the power to relax the prohibition is subject to a duty that the power be exercised within a reasonable time.
- Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476, 483-4 [9] (Gleeson CJ), 505 [73] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); Kirk v Industrial Court (NSW) (2010) 239 CLR 531.
- See, e.g., Stenhouse v Coleman (1944) 69 CLR 457, 472 (Dixon J).
- See Tribe, American Constitutional Law (2nd ed, 1988) at 1056-1061; Kunz v. New York, 340 U.S. 290, 295 (1950) (Vinson CJ, for the Court; Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 617, 621-2 (1975) (Burger CJ, for the Court); FW/PBS, Inc v. Dallas, 493 U.S. 215, 225-228 (1989) (O'Connor J, for the Court), 241-2 (Brennan J, concurring in the judgment); Freedman v. Maryland, 380 U.S. 51, 58-9 (1964) (Brennan J, for the Court); City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 755-757 (1987) (Brennan J, for the Court); Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 130-131 (1991) (Blackmun J, for the Court); Thomas v. Chicago Park District, 534 U.S. 316, 323-5 (Scalia J, for the Court).

tradition is particularly strong in the case of qualified prohibitions, commonly called 'prior restraints'. The US Courts say: if a statute, on its face, provides limited guidance to a decision-maker on how to exercise a power, there's a real risk that the power may be abused. Also, if there are inadequate remedies to correct that abuse for example, if the decision-maker doesn't need to explain the reasons for the decision or if the review isn't timely - then there is a further risk that abuses of power will go undetected or uncorrected. The result is that, even if the statute does not authorise any invalid exercises of the power, the statute may be invalid because its practical effect is to impermissibly burden speech.

In *Wotton*, the Court may decide the extent to which this line of jurisprudence will be adopted in Australia. There are broadly two views.

One view is more facilitative of government power. According to this view, the conferral of power will only be invalid if the statute can't permissibly be read so that there's at least one valid exercise of the power and exercise of the power is subject to judicial review. On this view, the Court is concerned solely with whether the statute purports to confer power which cannot validly be conferred. That the power might be abused is irrelevant; it's no function of the Court to adopt as a plank of its reasoning that public power might be so abused. Abuse of power is to be corrected ex post through review of the impugned decisions and the operation of responsible government, not ex ante through a challenge to the statutory power. Justice Robertson expressed a sentiment related to this this morning: a statute conferring a discretion is rarely likely to be invalid at the level of the statute; if necessary and available, the statute will be read down.

The alternative view - and one which is less facilitative of government action - is that, in some cases, perhaps where the risk that a power will be abused is sufficiently high and the consequences of abuse for the constitutional systems sufficiently grave, the statute conferring the power may be invalid even though the

_

It was generally accepted in *Wotton* that the mere availability of judicial review might be relevant. This was consistent with what the High Court had said in *Cunliffe v The Commonwealth* (1994) 182 CLR 272. See also *Inglis v Moore [No 2]* (1979) 46 FLR 470, 476 (St John and Brennan JJ), cited in *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 614 (Brennan J).

statute doesn't purport to confer power which it cannot validly confer. ⁴³ If the Court adopts this view, it will implicitly take a position on how far down the path it can follow the practical consequences of a law in determining whether that law burdens political communication. Can the Court cognise the practical risk that a discretionary power will be exercised invalidly? Can the Court cognise the practical risk that any abuse of that power will not be corrected by review or will not be corrected in time for communication to aid the constitutional systems? ⁴⁴ For example, is it relevant to determine whether, if Mr Wotton had been refused permission to attend a public meeting, there was no real mechanism for him to challenge that refusal in time for him to attend the meeting? If the Court were to follow down the path of inquiring into the practical effects of the law, a relevant issue will be the adequacy of any remedies against abuse of the power ⁴⁵ Is the repository of power obliged to give reasons for decision in a timely fashion? Is the conduct amenable to collateral

This appeared to be relevant to the reasoning of the Full Court of the Supreme Court of South Australia in a recent case. In the context of a challenge to a qualified prohibition. See Kourakis J (with whom Doyle CJ and White J agreed) at 373-4 [158]-[159]. See also Bennett v Human Rights and Equal Opportunity Commission (2003) 123 FCR 335 at [103] (Finn J).

In *Wotton*, the Plaintiff drew attention to the fact that, in the case of s 132 of the *Corrective Services Act*, the power to relax the prohibition was the Chief Executive of the Department of Corrective Services, a member of the executive who may be expected to have a vested interest in the content of the communications: *Wotton v Queensland* – High Court (S314/2010), Written Submission of the Plaintiff at [55].

The issues here are related to the United States First Amendment 'overbreadth' jurisprudence. See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972) (Brennan J), referring to the risk that 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression'. See also Karst, 'Equality as a Central Principle in the First Amendment' (1975) 43 U. Chi. L. Rev. 20, referring to the risk of 'selective enforcement' at the discretion of law enforcement officials.

See Cunliffe v The Commonwealth (1994) 182 CLR 272. See at 303 (Mason CJ), referring to 'legal remedies ... which will effectively provide protection against an abuse of power'. Mason CJ referred to the obligation to provide reasons on request, the availability of appeal to the AAT and the availability of judicial review under the Administrative Decisions (Judicial Review) Act 1977 (Cth). See at 330-332 (Brennan J), referring to the existence of 'ample machinery' to ensure that the discretion was exercised or the legitimate purpose for which it was conferred. The machinery to which he referred was the same as that referred to by Mason CJ: the obligation to provide reasons on request and appeal and judicial review. See at 342 (Deane J), referring to the 'safeguard of administrative review procedures' in relation to a refusal of registration. See at 381 (Toohey J), referring to the availability of appeal to the AAT and judicial review. See at 397 (McHugh J), referring to the right of review by the AAT.

See also *Wotton v Queensland* [2011] HCATrans 189 at [1109]-[1115] (Merkel QC), suggesting that the adequacy of remedies is relevant to the severity of the burden.

See generally *Wotton v Queensland* [2011] HCATrans 189 at [2385]-[2424] (Merkel QC). See also *Tasmanian Dams Case* (1982) 158 CLR 1, 237 (Brennan J), suggesting that the validity of a qualified prohibition might depend on whether the law provided for adequate 'administrative systems', including 'for the reception and disposition of applications for consent'.

attack? Is merits review available?⁴⁶ What are the costs of obtaining review? Can political communication occur pending review or judgment, even if the speaker or listener is nevertheless subject to potential civil or criminal sanction? Is the onus, in some sense, on the government to 'justify' the burden? And can review be prosecuted and appropriate remedies obtained in a sufficiently timely manner so as not to render the information 'moot' by the time of any successful review?⁴⁷ Each of these matters goes to the gravity of the effective burden which the law imposes on political communications. The less adequate the remedies, the less protected speech will as a matter of practice occur; the more adequate the remedies, the more speech will occur. The gravity of the burden on communication then goes to whether the law, despite imposing a burden of that gravity, is proportionate to a legitimate end:⁴⁸ the greater the burden, all other things being equal, the less likely is the law to be proportionate to the end.

The extent to which the Court may trace through the practical consequences of a law, and what it can cognise along the way, may be where the judges diverge in *Wotton*. The Court may be reluctant to cognise the degree of risk that the executive will abuse power; ⁴⁹ however, in *Rowe*, there was some support for the view that a predictable violation of the law could form part of the analysis of the practical effect of a law on a constitutional guarantee. ⁵⁰ The Court may also be reluctant to cognise the risk that judicial review may, in some circumstances, be an inadequate remedy to sustain protected communications. A further issue is that the more one travels

This point was suggested in argument: *Wotton v Queensland* [2011] HCATrans 189 at [995]-[1010] (Merkel QC).

See, eg, *Corporation of the City of Adelaide v Corneloup* (2011) 110 SASR 334, 373 [158] (Kourakis J, with whom Doyle CJ and White J agreed).

Whether any challenge to an exercise of power involves a matter arising under the Constitution or involving its interpretation will be relevant to the timely nature of review. If a question arises under the Constitution, s 78B notices will need to be issued and the proceedings stayed until sufficient time has elapsed for the Attorneys-General to consider intervening in or seeking the removal of the proceedings: *Judiciary Act 1903* (Cth) s 78B(1). See, referring to the possibility of an issue arising under the Constitution when a State statute is read down to comport with the implied freedom, *Wotton v Queensland* [2011] HCATrans 189 at [4060]-[4064], [4089]-[4097] (Gummow J).

See, suggesting that the severity of a burden is relevant to the second limb of the *Lange / Coleman* analysis: *Coleman v Power* (2004) 220 CLR 1, 99 [319] (Heydon J).

See *Wotton v Queensland* [2011] HCATrans 189 at [1193]-[1197] (Hayne J). Mr Merkel QC denied that the Plaintiff was asking the Court to assume disobedience: at [1199]-[1208].

See Rowe v Electoral Commissioner [2010] HCA 46 at [78] (French CJ); [159]-[160], [167] (Gummow and Bell JJ); [381] (Crennan J) . Compare [252] (Hayne J); [312]-[314] and particularly [314] (Heydon J); [488] (Kiefel J).

down the path of inquiring into the practical effect of a law, the more there may be a risk that a law will appear to fade in and out of validity as circumstances change.

In confronting these issues, an important question for the Court will be whether the implied freedom has a prophylactic operation. If the Court adopts the second view, it will effectively be saying to the government: you could validly burden the communications covered by this law; but, because of the way you've done it, there's a real risk that you might end up practically burdening communications which you can't validly burden. For the Court to adopt this position would express a value judgment about the importance of freedom of communication. Is it necessary to the efficacy of the constitutional systems that the freedom of communication have 'breathing space';⁵¹ just as the beyond reasonable doubt standard is a value choice which results in some guilty people going free to protect those who are innocent, does the implied freedom protect communications which can validly be restricted in aid of those which cannot?

The answer is practically significant. The less the prophylactic operation of the freedom, the more that challenges to exercises of power must be made on a case-by-case basis and not at the level of the statute. Those individual challenges may require individuals to bear the burden of litigating constitutional questions;⁵² and the result is likely to be less political communication.

Any answer given in this part of the case may very well be unfulfilling.⁵³ The answer will be context-specific: it will be that this law, imposing in a practical sense this

Page- 15

See, e.g., *FW/PBS*, *Inc v. Dallas*, 493 U.S. 215, 241-2 (1989) (Brennan J, concurring in the judgment): 'Mistakes are inevitable; abuse if possible. In distributing the burdens of initiating judicial proceedings and proof, we are obliged to place them such that we err, if we must, on the side of speech, not on the side of silence'.

During the hearing, Mr Merkel QC relevantly said: 'The constitutional limit ... would require Mr Wotton to put before initially the corrective services officer who makes the decision and then the court the task of really fighting the very case that we are fighting before your Honour': Wotton v State of Queensland [2011] HCATrans 189 at [405]-[410]. At [1201]-[1207], Mr Merkel QC said: 'What we are asking your Honours to look at is the complexity of the determination of whether [laws] had been obeyed or disobeyed in the decision in question. As this case demonstrates, we are arguing that those very question before seven of your Honours with the whole Bar table here and maybe 100 or more pages of submissions and a great deal of evidence. To expect that would occur and not constitute a burden we say is unrealistic ...'

See also, providing some analogy, *R v Federal Court of Australia; Ex parte WA National Football Leage* (1979) 143 CLR 190, 199 (Barwick CJ).

This was foreshadowed by Gummow J in Wotton v Queensland [2011] HCATrans 189 at [2979]-[2982].

effective burden, was or was not proportionate to the particular legitimate ends. Even if 'adequate' reviewability is always essential, the denotation of the concept of 'adequacy' may vary – and much would depend on the severity of the burden on communication, the regulatory scheme of which it is part and the end in relation to which it is imposed.

Conclusion

To conclude: *Wotton* should be handed down some time over the next couple of months. The issues I've outlined may, if the Court takes a view, appear only below the surface of the judgment. In my view, they have great significance for the nature and scope of the protection given by the implied freedom. And at the very least, we might see the first mention of Twitter in a High Court judgment.

David Hume 17 February 2012

