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'EXTREME CIRCUMSTANCES' LEAVE PUBLIC SERVICE EMPLOYEES SILENT AND UNCERTAIN: *CHIEF OF DEFENCE FORCE V GAYNOR* (2017) 246 FCR 298

I Introduction

In *Chief of Defence Force v Gaynor*,[1] the Full Court of the Federal Court of Australia was required to consider the implied freedom of political communication in the context of statements made by Army reservist Bernard Gaynor. The Chief of the Defence Force ('CDF') terminated Mr Gaynor's commission in the Australian Defence Force ('ADF') pursuant to reg 85(1)(d) of the *Defence (Personnel) Regulations 2002* (Cth) ('*Defence (Personnel) Regulations*') for his various intolerant comments on social media and ensuing conduct.

Justices Perram, Mortimer and Gleeson confirmed that the implied freedom is a limit on the legislature and not an individual right.[2] Finding that the broad discretion provided by reg 85 would only restrain an ADF member's ability to express political views in 'extreme circumstances', the Court concluded that the regulation was consistent with the *Australian Constitution*.[3] This case note explains the Court's reasoning and considers the broader implications of this decision on the rights of statutory employees to engage in political debate.

II Facts

Bernard Gaynor was a major in the Army Reserve.[4] During the years preceding Mr Gaynor's termination, the ADF was outwardly engaged in a 'process of cultural change towards greater diversity and gender equality'.[5] In pursuance of this objective, the ADF published various documents and guidelines, such as policy restricting use of social media in a manner that was 'offensive to any group or person based on

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1 (2017) 246 FCR 298 ('*Gaynor*').

2 Ibid 310 [47]–[48].

3 Ibid 324 [111]–[112].

4 Ibid 301 [9].

5 Ibid 300–1 [5], quoting Chief of Defence Force, 'Submissions', Submission in *Gaynor*, NSD 1685/2015, 29 April 2016.

personal traits, attributes, beliefs or practices'.[6] It also granted permission to ADF members to march in uniform in the 2013 Sydney Mardi Gras.[7]

Commencing in January 2013, Mr Gaynor made a series of comments on social media expressing 'antipathy to tolerance of homosexuality or transgender behaviour' and criticism of Islam.[8] He publically condemned the ADF's involvement in the Sydney Mardi Gras parade, its tolerance of transgender service members, and its approach to Islam.[9] He justified his statements as a manifestation of his strong religious views, which he attributed to the Roman Catholic Church.[10] While the statements were made in a personal capacity, it was not in dispute that he 'either identified himself, or could be easily identified by a reader, as an officer in the ADF' in making those statements.[11]

In response to these comments, the ADF directed Mr Gaynor to cease posting material in the public domain that identified him as an ADF officer.[12] However, despite the instructions of the ADF, he did not remove any of the material and continued to post — '[h]e engaged with the direction he had been given, rather than complying with it'.[13]

Following a series of internal procedures,[14] the CDF ultimately exercised the power conferred by reg 85 of the *Defence (Personnel) Regulation*s to terminate Mr Gaynor's commission on 10 December 2014 by reason of his intolerant public statements ('Termination Decision').[15]

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6 Ibid 301 [7], quoting Department of Defence, *Use of Social Media by Defence Personnel*, ADMIN 08-2 AMDT NO 1, 16 January 2013. This instruction was made pursuant to s 9A(2) of the *Defence Act 1903* (Cth).

7 *Gaynor* (2017) 246 FCR 298, 301 [6].

8 Ibid 301–2 [10], citing *Gaynor v Chief of Defence Force (No 3)* (2015) 237 FCR 188, 191 [11].

9 *Gaynor* (2017) 246 FCR 298, 302 [12].

10 Ibid 301–2 [10], quoting *Gaynor v Chief of Defence Force (No 3)* (2015) 237 FCR 188, 191 [11].

11 Ibid [12].

12 *Gaynor* (2017) 246 FCR 298, 302 [13]; Letter from Deputy Chief of Army (Major General Angus Campbell) to Bernard Gaynor, 22 March 2013.

13 *Gaynor* (2017) 246 FCR 298, 302 [14].

14 Ibid 302–3 [15].

15 Ibid 303 [16].

III Proceedings in the Federal Court

Mr Gaynor commenced proceedings in the Federal Court on 8 August 2014 to have the CDF's decisions set aside.[16] He submitted that the decisions were in administrative error, raising 17 different grounds under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*AD(JR) Act*').[17]

He also advanced two constitutional arguments:

i. that the decisions were in conflict with s 116 of the *Australian Constitution* as they imposed a religious test on him;[18] and

ii. that the decisions breached the implied freedom to communicate with respect to political and governmental matters.[19]

Justice Buchanan rejected the administrative law grounds,[20] and the argument based on s 116 of the *Australian Constitution*.[21] Yet, his Honour found that the Termination Decision was in breach of the implied freedom of political communication.[22]

His Honour found that the Termination Decision was not 'adequate in its balance'[23] as it was based on Mr Gaynor's expression of political opinion as a private citizen, when he was not on duty or in uniform, and otherwise free from military discipline.[24] While reg 85 did not directly contravene the implied freedom, Buchanan J accepted the proposition 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 of boundaries'.[25] Thus, his Honour made orders setting aside the Termination Decision.[26]

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16 *Gaynor v Chief of Defence Force (No 3)* (2015) 237 FCR 188, 190 [6]–[8]: Mr Gaynor sought to challenge three asserted 'decisions': the decision by the CDF on 10 December 2013 to terminate Mr Gaynor's commission ('Termination Decision'); the decision by the CDF on 30 June 2014 to finally reject the applicant's Redress of Grievance; and an earlier report dated 24 January 2013 prepared by Mr Gaynor's commanding officer.

However, it was only the Termination Decision which was the subject of the appeal to the Full Court of the Federal Court: *Gaynor* (2017) 246 FCR 298, 324 [27].

17 *Gaynor v Chief of Defence Force (No 3)* (2015) 237 FCR 188, 234 [177]; *Gaynor* (2017) 246 FCR 298, 321–2 [17].

18 Ibid.

19 *Gaynor* (2017) 246 FCR 298, 303 [17].

20 *Gaynor v Chief of Defence Force (No 3)* (2015) 237 FCR 188, 238–9 [192]–[203].

21 Ibid 240–1 [212]–[221].

22 Ibid 256 [289].

23 Ibid 255 [284].

24 Ibid 256 [287].

25 Ibid 240 [208], cited in *Gaynor* (2017) 246 FCR 298, 303 [20].

26 *Gaynor v Chief of Defence Force (No 3)* (2015) 237 FCR 188, 256 [290].

IV Appeal to the Full Federal Court

The CDF filed a notice of appeal to the Full Court of the Federal Court of Australia on 16 December 2015.[27] The CDF's submissions raised two central propositions:

i. that the primary judge applied the implied freedom tests at the wrong level — his Honour erred by applying the *Lange v Australian Broadcasting Corporation*[28] test to the Termination Decision rather than directly to the legislative instrument, reg 85, which did not infringe the implied freedom; and

ii. if the Termination Decision must satisfy the relevant tests, his Honour erred in holding that it did not do so.[29]

Mr Gaynor refuted the appeal, submitting that the CDF 'sought to classify [Mr] Gaynor's political opinions … as unacceptable behaviour.'[30] He argued that the CDF used the 'guise of "discipline" to silence political opinion' which is contrary to the implied freedom of political communication.[31] By way of an amended notice of contention, Mr Gaynor also submitted that the Termination Decision was in administrative error under various grounds pursuant to the *AD(JR) Act*, and was contrary to s 116 of the *Australian Constitution.*[32]

A *Implied Freedom of Political Communication*

The test for determining whether an exercise of power infringes the implied freedom of political communication has been established through the High Court's dicta in *Lange*[33] as redefined and developed in *Coleman v Power*[34] and *McCloy v New South Wales*.[35]

The first inquiry is whether the law effectively burdens the freedom of communication about government or political matters either in its terms, operation or effect.[36] If the law does effectively burden that freedom, the second limb requires the Court to

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27 *Gaynor* (2017) 246 FCR 298, 306–7 [27].

28 (1997) 189 CLR 520 ('*Lange*').

29 *Gaynor* (2017) 246 FCR 298, 306–7 [27]–[28]: Four grounds of appeal were raised by the CDF which were distilled in the appellant's written submissions into two central propositions.

30 *Gaynor* (2017) 246 FCR 298, 307 [32], citing Bernard Gaynor, 'Submissions', Submission in *Gaynor*, NSD 1685/2015, 2 May 2016, [4].

31 Ibid.

32 *Gaynor* (2017) 246 FCR 298, 306 [30].

33 (1997) 189 CLR 520.

34 (2004) 220 CLR 1.

35 (2015) 257 CLR 178, 230–2 [125]–[132] (Gageler J) ('*McCloy*').

36 *Lange* (1997) 189 CLR 520, 561–2; *McCloy* (2015) 257 CLR 178, 194 [2] (French CJ, Kiefel, Bell and Keane JJ), 230 [126] (Gageler J).

consider whether the burden is 'reasonably appropriate and adapted' to give effect to a legitimate end,[37] in the sense that the end is 'suitable, necessary and adequate in its balance'.[38]

1 *Level of Application*

The Court found that the primary judge erred in the level at which he applied the test for determining whether the implied freedom of political communication had been infringed.[39] The Court clearly iterated that the freedom of political communication is a limit on the legislative and executive power of the government, and not an individual right.[40]

The Court accepted the existence of authority for the implied freedom being a restriction on executive power in addition to legislative power,[41] but noted that the scope of this restriction had not yet been 'squarely confronted' in a case where there was no statutory source for the impugned power.[42] Their Honours expressed the view that such a limitation could only apply in circumstances where the executive power is sourced only from the *Australian Constitution*, without a statutory grant of authority.[43]

As the termination power granted by reg 85 was already limited by the legislative instrument conferring it, there was no need to separately consider whether the executive action infringed the implied freedom.[44] The correct test was whether reg 85 itself breached the implied freedom of political communication.[45]

2 *Application to Reg 85*

The Court proceeded to correctly apply the *Lange* test; considering whether the specific grant of power under reg 85 contravened the implied freedom of political

37 *Lange* (1997) 189 CLR 520, 562; *McCloy* (2015) 257 CLR 178, 194 [2] (French CJ, Kiefel, Bell and Keane JJ).

38 *McCloy* (2015) 257 CLR 178, 194 [2], 217–19 [79]–[87] (French CJ, Kiefel, Bell and Keane JJ).

39 *Gaynor* (2017) 246 FCR 298, 310 [47].

40 Ibid 310–11 [48], citing *Unions New South Wales v New South Wales* (2013) 252 CLR 530, 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

41 See, eg, *Lange* (1997) 189 CLR 520, 560–1; *Levy v Victoria* (1997) 189 CLR 579, 594 (Brennan CJ); *Wotton v Queensland* (2012) 246 CLR 1, 13–14 [21] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 33 [88] (Kiefel J); *McCloy* (2015) 257 CLR 178, 206 [42] (French CJ, Kiefel, Bell and Keane JJ), 227 [114] (Gageler J), 280 [303] (Gordon J).

42 *Gaynor* (2017) 246 FCR 298, 314–15 [68].

43 Ibid 315 [71]–[72].

44 Ibid [72].

45 Ibid 317–18 [82].

communication.[46] The *Defence (Personnel) Regulations* provided that a member's service could be terminated on various grounds, with reg 85 setting out the procedure for termination of an officer's service for 'other reasons'.[47] This regulation granted a broad discretion to terminate an officer's service if their retention was 'not in the interest of' the ADF.[48] The regulation required consideration of various factors, including the officer's behaviour or conviction of an offence, in making this decision.[49] Regulation 85 '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'.[50] In this regard, the Court found no basis to view the position of reservists differently from other ADF members given that they are 'liable to be called up at any time' and are 'subject to the same disciplinary and hierarchical requirements'.[51]

Considering the first limb of the *Lange* test, the Court accepted that the 'wide discretionary power to terminate the service of an officer in the ADF [was] capable of restricting political communication' in operation and effect.[52] Regulation 85 granted a broad power to terminate an ADF member's service when their communications were considered to be 'no longer "in the interests" of the ADF'.[53] Thus, the operation of reg 85 effectively burdened the freedom of political communication; officers were liable to 'pay a price' for engaging in political communication that the ADF considered to be against its interests.[54]

Applying the second limb of the *Lange* test, the Court found that the regulation did not infringe the implied freedom as the 'broad discretion conferred by reg 85 was suitable, necessary, and adequate in balance'.[55] The Court noted that the law did not explicitly purport to control communications, but was directed at the 'suitability … of individuals to remain officers in the ADF'.[56]

The Court found that reg 85 served multiple purposes. While reg 85 served a primarily disciplinary role,[57] it also operated to 'ensure, and enforce, the maintenance of objectively appropriate standards of behaviour and conduct by officers' of the ADF.[58]

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46 Ibid.

47 Ibid 308 [37].

48 *Defence (Personnel) Regulations* reg 85(1)(d).

49 Ibid regs 85(1A)(b) and (c).

50 *Gaynor* (2017) 246 FCR 298, 323–4 [108].

51 Ibid 320 [97].

52 Ibid 322 [104].

53 Ibid 323 [105].

54 Ibid.

55 Ibid [107].

56 Ibid 323–4 [108].

57 Ibid 320 [95].

58 Ibid 321 [99].

The ADF is a unique arm of the Commonwealth public service. One distinct aspect of the ADF is its 'central attribute as a disciplined organisation based on a command structure'.[59] Defence personnel must be able to 'operate in circumstances of grave danger in which reliance upon one another and instantaneous obedience of orders are essential'.[60] The broad power to terminate the service of officers whose retention was 'not in the interests' of the ADF enabled the ADF to control membership and guarantee that officers were willing to 'adhere to the hierarchical requirements of the Defence Force' and 'comply with standards set by those in command'.[61] In light of its unique command structure, it was vital for the ADF to ensure the proper conduct of its personnel.

Looking to the purpose of the discretion granted by reg 85, the Court concluded that any restriction of the freedom of political communication resulting from this regulation 'would be confined to extreme circumstances'.[62] Given Mr Gaynor's blatant disregard of orders and directions given by the ADF, their Honours considered the circumstances of Mr Gaynor's comments to be 'aptly described as extreme'.[63]

The basis of the Termination Decision was not the subject matter of the communications but rather the respondent's conduct and behaviour. The 'tone and attributes of the communications' infringing ADF policies and Mr Gaynor's disobedience to lawful command were all 'matters that [went] to the suitability of the officer, and the interests of the ADF'.[64] Thus, Mr Gaynor's conduct was 'sufficiently serious' to justify his dismissal pursuant to reg 85.[65]

B *Notice of Contention*

Their Honours quickly dismissed Mr Gaynor's challenge to the Termination Decision based on s 116 of the *Australian Constitution*. The Court found that Mr Gaynor's attribution of his public statements to the teachings of the Roman Catholic Church[66] was 'simply too far removed' to suggest that 'reg 85 imposed a religious test on the respondent'.[67]

The Court considered each of the administrative law grounds in turn, and did not identify any error in the primary judge's conclusion or the Termination Decision.[68]

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59 Ibid 307 [33].

60 Ibid 320 [96], quoting *White v Director of Military Prosecutions* (2007) 231 CLR 570 [233] (Callinan J).

61 Ibid 320–1 [98].

62 Ibid 324 [111].

63 Ibid.

64 Ibid [110].

65 Ibid [111].

66 Ibid 326 [122].

67 Ibid [123].

68 Ibid 326–36 [124]–[167].

V Appeal to the High Court

Mr Gaynor applied for special leave to appeal the decision to the High Court of Australia. On 8 August 2017, Keane and Edelman JJ refused the application.[69]

VI Comment

Public servants, like all other members of society, should be free to engage in political debate; they cannot be 'silent members of society'.[70] However, the Commonwealth government has persistently sought to curtail the political expression of its employees.[71] While the immediate aftermath of *Gaynor* was met with concerns of the potential for the Commonwealth to silence all public servants,[72] this case has only limited application. The unique factual matrix of the termination of Mr Gaynor's commission does little to clarify the permissible limits on the capacity of statutory employees outside the ADF to engage in political debate.

In August 2017, the Australian Public Service Commission ('APSC') issued a guide for public service employees regarding their rights to make public comments on social media under the Australian Public Service ('APS') *Code of Conduct* ('Code').[73] Impartiality is an APS value.[74] As such, employees must not post material that would suggest that they are unable to serve the government in an unbiased manner.[75] The Guidelines specifically provide that it would be a breach of the Code if an employee

69 Transcript of Proceedings, *Gaynor v Chief of Defence Force* [2017] HCATrans 162 (18 August 2017) 752–3.

70 *Bennett v Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334, 357 [91] (Finn J), citing *Re Fraser and Public Service Staff Relations Board* (1985) 23 DLR (4th) 122 [131] Dickson CJC.

71 John Wilson, *Opportunity Missed in the High Court on the Free Speech of Public Servants* (13 October 2017) The Mandarin <https://www.themandarin.com.au/84858-opportunity-missed-high-court-free-speech-public-servants/>.

72 See, eg, John Wilson, 'We Need the Clarity of a High Court Ruling on Bernard Gaynor's Free Speech Crusade', *Canberra Times* (online), 4 April 2017 <http://www.canberratimes.com.au/national/public-service/we-need-the-clarity-of-a-high-court-ruling-on-bernard-gaynors-free-speech-crusade-20170329-gv9foz.html>; Neil Foster, 'Religious Free Speech in Australia: CDF v Gaynor' on Law and Religion Australia (11 March 2017) <https://lawandreligionaustralia.blog/2017/03/11/religious-free-speech-in-australia-cdf-v-gaynor/>; Tess Delbridge, *Danger: Religious Displays at Work Could Get You Fired* (15 March 2017) Eternity News <https://www.eternitynews.com.au/in-depth/danger-religious-displays-at-work-could-get-you-fired/>.

73 Australian Public Service Commission, *Making Public Comment on Social Media: A Guide for APS Employees*, 7 August 2017 ('Guidelines').

74 Ibid 2.

75 Ibid.

criticised the work of their agency, Minister or seniority.[76] These restrictions extend to statements made outside of work, in a personal capacity, regardless of whether the person is identifiable as an APS employee.[77]

Although the APS does have a legitimate interest in maintaining impartiality, such a gross infringement on the private lives of public servants — approximately 2 million Australians[78] — seems to undermine the operation of the systems of representative and responsible government, which the implied freedom of political communication exists to protect.[79] In the Guidelines, the APSC states that '[n]one of the litigation brought before various courts has successfully argued that the *Public Service Act*, or the *Code of Conduct*, amounts to an undue limitation of the freedom of political communication'.[80] While technically correct, this unfairly implies that this contentious issue of law has been settled,[81] failing to consider the implications of analogous cases, such as *Gaynor*, on the validity of the Code.[82] While it is too strong to suggest that the APSC is seeking to 'gag public servants',[83] the statement clearly intends to foster unwavering compliance.

The Full Court's decision in *Gaynor* leaves uncertain the constitutional validity of the Code.[84] Their Honours found the broad discretion granted by reg 85 was 'adequate in balance' as it would only operate to curtail the implied right to communicate on political and governmental matters in 'extreme circumstances'.[85] The Court was satisfied that the circumstances of Mr Gaynor's comments were indeed 'extreme'.[86]

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76 Ibid 3–4.

77 Ibid 6.

78 Australian Bureau of Statistics, *Employment and Earnings, Public Sector, Australia 2015–16* (15 December 2016) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/3BF6A482829799AFCA2581D2000E95FA?opendocument>.

79 *Lange* (1997) 189 CLR 520, 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

80 Australian Public Service Commission, above n 73, 7.

81 Gary Hansel and Adrienne Stone, 'Public Servants, Social Media and the Constitution' on Australian Public Law (5 September 2017) <https://auspublaw.org/2017/09/public-servants-social-media-and-the-constitution/>. See Transcript of Proceedings, *Gaynor v Chief of Defence Force* [2017] HCATrans 162 (18 August 2017) 703–5 (Mr Kirk).

82 Hansel and Stone, above n 81. The APSC also failed to consider *Bennett v Human Rights and Equal Opportunity Commission* (2003) 204 ALR 119, in which Finn J upheld a challenge to a regulation under the *Public Service Act 1922* (Cth) because it contravened the implied freedom of political communication: Ibid.

83 Australian Broadcasting Corporation, 'Silencing Public Servants', Background Briefing, 8 May 2016 (Di Martin).

84 Wilson, *Opportunity Missed in the High Court*, above n 71.

85 *Gaynor* (2017) 246 FCR 298, 324 [111].

86 Ibid.

Mr Gaynor was clearly identifiable as an ADF member in making his statements.[87] He then refused to comply with direct instructions to stop posting the material in a manner that connected him to the ADF.[88] The ADF was in a process of cultural change; it 'did not wish to censor Mr Gaynor's personal views, but did not want those views to be associated with the ADF'.[89] The unique nature of the ADF means that there is also a heightened need for compliance and cooperation in this organisation. Mr Gaynor's conduct, which exhibited complete disregard for ADF policies and directions, was therefore 'sufficiently serious' to warrant his dismissal pursuant to reg 85.[90]

Given the 'extreme circumstances' in *Gaynor*,[91] this decision provides little guidance on the constitutional validity of other laws seeking to limit the ability of public servants to engage in political debate. Further, the Court's reliance on the ADF's unique command structure in considering the legitimate objectives of reg 85 cannot be imported to other arms of the Commonwealth government.

It is arguable that the importance placed on the observable connection between Mr Gaynor's statements and the ADF in the Termination Decision implies that the restrictions in the Code could not validly extend to anonymous statements — despite the APSC's assertion in the Guidelines.[92] However, the absence of any clear judicial comment to this end leaves the issue unresolved.

The appeal to the High Court was highly anticipated as an opportunity for this uncertainty to finally be settled.[93] However, the 'obvious difference' between army reservists and public servants,[94] and the 'extreme circumstances' of Mr Gaynor's statements meant that this was not the case for the High Court to conclude on the permissible limits on Commonwealth employees' freedom to express political views.[95] These issues remain 'just over the horizon'.[96] Public servants must silently await another case capable of 'elucidat[ing] the boundaries of their right to free speech'.[97]

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87 Ibid 302 [12].

88 Ibid 302 [12]–[14].

89 James Mattson, 'Expressing an Opinion on Social Media: Speech or Employment Peril' (2017) 20 *Internet Law Bulletin* 50, 50.

90 *Gaynor* (2017) 246 FCR 298, 324 [111].

91 Ibid.

92 Australian Public Service Commission, above n 73, 6.

93 Wilson, 'We Need the Clarity of a High Court Ruling on Bernard Gaynor's Free Speech Crusade', above n 72.

94 Transcript of Proceedings, *Gaynor v Chief of Defence Force* [2017] HCATrans 162 (18 August 2017) 389–91 (Keane J).

95 Ibid 404–11 (Mr Kirk), 749–54 (Keane J); Wilson, *Opportunity Missed in the High Court*, above n 71.

96 Transcript of Proceedings, *Gaynor v Chief of Defence Force* [2017] HCATrans 162 (18 August 2017) 410–11 (Mr Kirk).

97 Wilson, *Opportunity Missed in the High Court*, above n 71.

VII Conclusion

In *Gaynor*, the Full Court found that reg 85 — which allowed the dismissal of an Army Reservist for statements made on social media, when not in uniform or otherwise under military command — did not contravene the implied freedom of political communication. The broad discretion provided by reg 85 was suitable, necessary and adequate in balance to enable the ADF to effectively ensure that its members were able to operate within its unique command structure.

While commentators viewed this decision with apprehension,[98] given the 'extreme circumstances' of Mr Gaynor's statements, the decision provides little clarification on the constitutional validity of legislative instruments regulating the political expression of Commonwealth employees. With the High Court refusing to consider the appeal, the ability of public servants to freely engage in political debate remains uncertain.

98 See, eg, Wilson, 'We Need the Clarity of a High Court Ruling on Bernard Gaynor's Free Speech Crusade', above n 72; Foster, above n 72; Delbridge, above n 72.