IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. s172 of 2012

BETWEEN:

**MAN HARON MONIS**
Appellant

and

**THE QUEEN**
First Respondent

and

**THE ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES**
Second Respondent



No. s179 of 2012

BETWEEN:

**AMIRAH DROUDIS**
Appellant

and

**THE QUEEN**
First Respondent

and

**THE ATTORNEY-GENERAL FOR THE STATE OF NEW SOUTH WALES**
Second Respondent

# WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

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## PART I: SUITABILITY FOR PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

## PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia intervenes pursuant to s. 78A of the *Judiciary Act 1903* (Cth) in support of the Respondents.

## PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

## PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. These are set out in the submissions of First Respondent and of the Attorney General of the Commonwealth.

## PART V: SUBMISSIONS

5. These submissions address the following matters. *First,* the first *Lange* question. *Second,* having regard to the first matter, construction and reading down of offending laws. *Third,* the second *Lange* question, in light of the submissions in respect of the first two matters.

**First matter – the first *Lange* question**

6. In *Wotton v Queensland* French CJ, Gummow, Hayne, Crennan and Bell JJ stated the relevant "test" in terms of responding to two questions:[1]

> Two questions (the *Lange* questions) arise... The first question asks whether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If this is answered affirmatively, the second question asks whether the law nevertheless is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government.

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[1] *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246, at 253 [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

7. It has become common place for those seeking to support the validity of laws contended to offend the *Lange* principle to concede that the first question is answered yes.[2] Such concessions have resulted in an absence of thorough consideration of the first question.

8. The *Wotton* formulation is not to be considered as if the Rule in *Phillips v Eyre*[3] or words of a statute. That said, the formulation has different aspects which may be considered separately. As formulated, it requires, *first*, a consideration of what is meant by a law's "terms, operation or effect". *Second*, it requires consideration of whether in each case (that is, in a law's terms or
10 operation or effect) the law effectively burdens the freedom. *Third*, is identification of that which the freedom protects; the burden must be upon "communication about government or political matters".

**The protected freedom**

9. The third aspect of the *Wotton* formulation has been addressed. It can be contended that the "protected freedom" is to be understood as referring to communication, whether orally in writing or by non-verbal conduct[4], referring to any subject that involves, expressly or inferentially[5], anything done or not done[6] by the legislature or the Executive Government of the Commonwealth or of any State[7] or Territory and including local government.[8]

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[2] See for example *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1, at 30 [27] (Gleeson CJ), at 43 [75] (McHugh J), at 78 [197] (Gummow and Hayne JJ), at 89 [230] (Kirby J), at 119-120 [317] (Heydon J) and *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246, at 253-254 [29] (French CJ, Gummow, Hayne, Crennan and Bell JJ), at 255-256 [41] (Heydon J).

[3] (1870) LR 6 QB 1.

[4] *Levy v The State of Victoria* [1997] HCA 31; (1997) 189 CLR 579, at 594 – 595 (Brennan CJ), at 613 (Toohey and Gummow JJ), at 617 (Gaudron J), at 622 – 623 (McHugh J), at 637 – 638 (Kirby J).

[5] McHugh J in *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322, at 361 [65].

[6] McHugh J in *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322, at 361 [65] – "acts or omissions of the legislature or the Executive Government".

[7] Though it is tempting to accept the Commonwealth Attorney General's Submissions at [42], it is a distinction that is difficult to sustain in light of *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506, at 414-415 [49] (French CJ), at 421-422 [92]-[99] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) and *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246, at 253 [26] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[8] *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520, at 571 – 572 (The Court); *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506, at 414 [48] (French CJ); *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246, at 253 [26] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

10. This means, in effect, any subject. With respect, it is doubtful that the reasoning of McHugh J in *APLA*,[9] to the effect that restrictions on communication concerning exercises of judicial power or "concerning the courts or judges or the exercise of judicial power", are beyond the scope of the *Lange* freedom, can be sustained. A law that prohibited discussion of decisions of this Court on matters arising under the *Constitution* would be a law in respect of communication about government or political matters. A case such as *Holland v The Queen*[10] is straight forward, and the contention that child pornography could be construed to be a communication about government or political matters simply absurd. Beyond the simply absurd, the line drawn in decisions of this Court as to what constitutes government or political matters is opaque.

11. The prediction of Mason CJ, Toohey and Gaudron JJ in *Theophanous v Herald & Weekly Times Ltd*[11] now seems forlorn:

> But it is desirable to consider the question: what is the content of the expression "political discussion", bearing in mind that the underlying purpose of the freedom is to ensure the efficacious working of representative democracy. In approaching that question, the fact that it is not possible to fix a limit to the range of matters that may be relevant to debate in the Commonwealth Parliament is again a relevant consideration. That consideration prompted Mason CJ to remark in *Australian Capital Television* that the questions "(w)hether freedom of communication in relation to public affairs and political discussion is substantially different from an unlimited freedom of communication and, if so, what is the extent of the difference" did not call for decision in that case. Notwithstanding that consideration and the difficulty of drawing a satisfactory and workable distinction between political discussion and other forms of expression, it should be possible to develop, by means of decisions in particular cases, an acceptable limit to the type of discussion which falls within the constitutional protection.

12. It is doubtful that much assistance can now be derived from their Honours approving reference[12] to the observation of Professor Barendt:

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[9] *APLA Limited v Legal Services Commissioner (NSW)* [2005] HCA 44; (2005) 224 CLR 322, at 360-361 [63]-[66].
[10] *Holland v The Queen* [2005] WASCA 140; (2005) 30 WAR 231.
[11] *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46; (1994) 182 CLR 104, at 123.
[12] *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46; (1994) 182 CLR 104, at 124.

> "political speech" refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.

13. Likewise, their Honour's contended distinction between entertainment and politics[13] has proved elusive.[14]

14. With respect, Gleeson CJ's observation in *Coleman v Power*[15] as to the breadth of political communication is apposite:

> Because the constitutional freedom identified in *Lange* does not extend to speech generally, but is limited to speech of a certain kind, many cases will arise, of which the present is an example, where there may be a degree of artificiality involved in characterising conduct for the purpose of deciding whether a law, in its application to such conduct, imposes an impermissible burden upon the protected kind of communication...Almost any conduct of the kind prohibited by s 7, including indecency, obscenity, profanity, threats, abuse, insults, and offensiveness, is capable of occurring in a "political" context, especially if that term is given its most expansive application. Reconciling freedom of political expression with the reasonable requirements of public order becomes increasingly difficult when one is operating at the margins of the term "political".

15. The consequence of all of this is starkly illustrated by the latest decision dealing with such matters; in *Liu v Age Co Ltd*[16] McCallum J was driven to answer that r 5.2 of the *Uniform Civil Procedure Rules 2005* (NSW)[17] was a

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[13] *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46; (1994) 182 CLR 104, at 123.
[14] An example is the distinction between Karl Rove and Rove McManus.
[15] *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1, at 30-31 [28].
[16] [2012] NSWSC 12; (2012) 257 FLR 360.
[17] Rule 5.2 provides:
(1) This Rule applies if it appears to the court that:
(a) the applicant, having made reasonable inquiries, is unable to sufficiently ascertain the identity or whereabouts of a person (the person concerned) for the purpose of commencing proceedings against the person, and
(b) some person other than the applicant (the other person) may have information, or may have or have had possession of a document or thing, that tends to assist in ascertaining the identity or whereabouts of the person concerned.
(2) The court may make either or both of the following orders against the other person:
(a) an order that the other person attend the court to be examined as to the identity or whereabouts of the person concerned;
(b) an order that the other person must give discovery to the applicant of all documents that are or have been in the other person's possession and that relate to the identity or whereabouts of the person concerned.

law that burdened freedom of communication about government or political matters.[18]

16. Further to all of this; inevitably any person who, in the course of communicating, states or suggests that their communication, on whatever topic, is pursuant to, in furtherance of or protected by the "freedom of political communication" is, *ipso facto,* engaging the freedom. The freedom itself is a political or government matter and this would be so even though, in invoking the freedom, the person incorrectly considers that the doctrine confers a right upon them.

10 **The burdensome "terms, operation or effect" of a law**

17. Any law which creates a criminal offence for, or attaching to, communicating, burdens speech or discussion; and does so in its terms. Such a law likely also does so in its effect. Even if not enforced, the existence of such a law would be contended to be, in effect or operation, burdensome because of its chilling effect on speech and discourse. Such an argument could hardly, realistically, be rebutted.[19]

18. It is unlikely that the notion of a law "effectively burdening" political speech or discourse prescribes the scope of the protection.[20] As the Commonwealth Attorney General's submissions in this matter demonstrate,[21] substituting
20 "effectively" with terms such as "meaningful" or "substantial" or "not *de minimis*" simply substitutes one vague simile for another[22]. Likewise, the notion that a restriction on one form of communication is not an effective burden if other forms of communication are available seems an unlikely criterion.[23]

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[18] [2012] NSWSC 12; (2012) 257 FLR 360, at 368 [36].
[19] *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1, at 54 [105] (McHugh J); *Monis and Another v The Queen* [2011] NSWCCA 231; (2011) 256 FLR 28, at 48 [82] (Allsop P) (**Joint Appeal Book ("JAB") 107**).
[20] The requirement adds an element in addition to the requirement that the law in its "terms, operation or effect" burden. "Effectively" does not mean in effect.
[21] See Commonwealth Attorney General's Submissions, at [44]-[56], in particular [47].
[22] It is similar to the lack of utility of notions such as "fundamental" or "serious" mistake in the law of mistaken payments.
[23] See *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579, at 624-625 (McHugh J):

19. Necessarily, the *Lange* inquiry will mostly occur in the context of laws that seek to criminalise communication.[24] When considering the first *Lange* question in the context of criminal laws that affect or apply to communication,[25] the answer is axiomatically: yes. Being axiomatic, the first *Lange* question is in substance a tautology, akin to a legal fiction.[26]

20. If this is so, the Court ought to, with respect, re-consider the desirability of asking the first *Lange* question.

**Second matter - construction and the difficulty in saving laws by reading down in this context**

21. This submission addresses a matter which emerges from the judgment of McHugh J in *Coleman v Power*[27], which is also addressed by the Appellant, Monis.[28]

22. In *Coleman v Power* the offence under consideration was that created by s.7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld); being, using "threatening, abusive, or insulting words to any person" in or near to any public place. In *Coleman v Power* the Court was invited to sever the words "or insulting".[29] McHugh J preserved the validity of the provision by reading it down:

> Accordingly, the issue is whether that part of s.7(1)(d) which concerned insulting words should be severed from the paragraph or read down. In my opinion, the clear intention of s.9 of the Queensland *Acts Interpretation Act* is that, where possible, an invalid law should be saved

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It is beside the point that their arguments against the alleged cruelty of duck shooting could have been put by other means during the periods when the Regulations operated. What the Regulations did was to prevent them from putting their message in a way that they believed would have the greatest impact on public opinion and which they hoped would eventually bring about the end of the shooting of game birds.

[24] Examples are *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579, *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506, *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1. Similar in effect are laws that give rise to civil liability for communication: *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 itself; *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46; (1994) 182 CLR 104.

[25] As explained above, this includes conveying thought orally, in writing or by non-verbal conduct.

[26] As to the contemporary unfashionability of which see - *Harriton v Stephens* [2006] HCA 15; (2006) 226 CLR 52, at 132 [269] (Crennan J); *Blunden v Commonwealth* [2003] HCA 73; (2003) 218 CLR 330, at 342-343 [31] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

[27] *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1.

[28] Monis Submissions, at [67]-[70].

[29] *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1, at 55-56 [109].

> to the extent that it is within the power of the Queensland legislature. In the present case, the relevant part of par (d) of s.7(1) was within the power of the Queensland legislature except to the extent that it penalised insulting words uttered in discussing or raising matters concerning politics and government in or near public places. It should be read down accordingly.[30]

23. This process exemplifies a difficulty which emerges in this case, and will in all cases. It is illustrated by the judgment of Allsop P in the Court of Criminal Appeal in this matter, where his Honour, having regard to s.15A of the *Acts Interpretation Act 1901* (Cth), refers to construction and reading down co-extensively.[31]

24. As McHugh J's judgment in *Coleman v Power* exemplifies, superficially, all challenges to the validity of laws that affect or apply to communication can be readily resolved as a matter of construction or by reading down. Section 7(1)(d) of *Vagrants, Gaming and Other Offences Act 1931* (Qld) was (in effect) construed by McHugh J to mean that:

> It is an offence to use threatening, abusive, or insulting words, other than insulting words uttered in discussing or raising matters concerning politics and government, to any person in or near to any public place.[32]

25. So, in this case, s.471.12 of the *Criminal Code 1995* (Cth) could be construed or read down as follows:

> A person is guilty of an offence if:
>
> (a) the person uses a postal or similar service; and
>
> (b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all of the circumstances:
>
> (i) menacing or harassing; or
>
> (ii) offensive (other than if such use of a postal service or similar service involves communication about government or political matters).

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[30] *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1, at 55-56 [110].

[31] *Monis and Another v The Queen* [2011] NSWCCA 231; (2011) 256 FLR 28, at 46 [77] (Allsop P) (JAB 104).

[32] Following the formulation in *Wotton* it would be construed or read down as; "It is an offence to use threatening, abusive, or insulting words, other than insulting words about government or political matters, to any person in or near to any public place".

26. If construed in this way, the *Lange* inquiry can be avoided altogether by an antecedent process of construction.

26. This is, in effect, the consequence of the *Lange* doctrine in civil law. Though vaguely expressed, *Lange* provides a defence in an action for libel or slander. In this context, a degree of imprecision might be considered necessary or desirable. Being a defence of qualified privilege, vagueness in its articulation is inevitable.

27. Such vagueness in the context of criminal statutes is different. Because of the breadth or arguable breadth of the meaning of communication about government or political matters, it is undesirable that criminal guilt be determined by direct resort to it. Further to this, and as noted above, it can be contended that the mere fact that an accused person seeks to invoke the "freedom" by communicating engages it.

28. If this process of reading down were open, the *Lange* notion would never apply to State legislation, as it could be imputed in all cases that State legislation does not as a matter of construction (and indeed power) apply to restricting speech about the constitutionally prescribed system of government.

**A further matter about construction**

29. Both Appellants refer to the construction given to s. 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) by Gummow, Hayne and Kirby JJ in *Coleman v Power*[33] and attach significance to the fact that the Court of Criminal Appeal did not give a "fighting words" construction to s. 471.12 of the *Criminal Code* 1995 (Cth) here.[34]

30. The judgments of Gummow and Hayne JJ, and Kirby J in *Coleman v Power* disclose that consideration of the *Lange* questions and the validity of laws that affect or apply to communication can be avoided by a particular method of construction of public order laws; the "fighting words" construction. This

[33] [2004] HCA 39; (2004) 220 CLR 1.
[34] Monis Submissions, at [50] and [56]; Droudis Submissions, at [27]–[30], [59] and [90].

method or process intrudes into the second *Lange* question, but is principally a matter of construction.

31. In *Coleman v Power* the offence was using "threatening, abusive, or insulting words to any person" in or near to any public place. Gummow and Hayne JJ construed "insulting" as follows:[35]

> ..."abusive" and "insulting" words can be understood as anything that is intended to hurt the hearer. But in the context of this provision "abusive" and "insulting" should be understood as those words which, in the circumstances in which they are used, are so hurtful as either they are intended to, or they are reasonably likely to provoke unlawful physical retaliation. Only if "abusive" and "insulting" are read in this way is there a public purpose to the regulation of what is said to a person in public.

32. The effect of the fighting words construction is that criminal guilt of a person making an abusive or insulting statement in public is determined by whether the content of the statement made is reasonably likely to provoke an unlawful, that is, violent, response. The validity of the law is then determined by the likelihood of unlawful violent conduct by others.

33. It follows that a law directed at prohibiting the abuse or insult of elderly nuns would likely be invalid; because the utterer would know that the words would not provoke unlawful violence. A law directed at the protection of convicted violent offenders from abuse or insult would doubtless be valid.

34. This much was accepted by Gummow and Hayne JJ:[36]

> If s.7(1)(d) is not construed in the way we have indicated, but is construed as prohibiting the use of any words to a person that are calculated to hurt the personal feelings of that person, it is evident that discourse in a public place on any subject (private or political) is more narrowly constrained by the requirements of the Vagrants Act. And the end served by the Vagrants Act (on that wider construction of its application) would necessarily be described in terms of ensuring the civility of discourse. The very basis of the decision in *Lange* would require the conclusion that an end identified in that way could not satisfy the second of the tests articulated in *Lange*. What *Lange* decided was that the common law defence of qualified privilege to an action for defamation must be extended to accommodate constitutional imperatives.

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[35] *Coleman v Power* [2004] HCA 39; 220 CLR 1, at 77 [193]. See also Kirby J at 87 [226] and 98 [254].
[36] *Coleman v Power* [2004] HCA 39; 220 CLR 1, at 78-79 [199].

> That *extension* would not have been necessary if the civil law of defamation (which requires in one of its primary operations that a speaker not defame another) was itself, without the extension of the defence of qualified privilege, compatible with the maintenance of the constitutionally prescribed system of government.

35. If this construction of criminal laws is transposed into the second *Lange* question, the analysis is as follows: a criminal law that affects or applies to communication will be valid, as being reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government, if its purpose is to proscribe communication that is likely to provoke unlawful physical retaliation. So, the constitutional validity of a criminal law that affects or applies to communication is determined by whether a legislative purpose of protecting the communicator from unlawful physical retaliation can be discerned.

36. With respect, it is difficult to conceive of any legislature, enacting criminal laws that proscribe communication, having such a purpose.[37] This can be illustrated by a slight variation to the facts of *Coleman v Power*. The conclusion of Gummow and Hayne JJ and Kirby J imputed to the Queensland Parliament a purpose, in enacting s.7(1)(d) of *Vagrants, Gaming and Other Offences Act 1931*, of seeking to protect Mr Coleman from being belted by a police officer, Mr Power, who Mr Coleman insulted by falsely and maliciously[38] accusing him of corruption. In this sense, the more insulting the words used, the more likely they are to provoke an unlawful response, and so, the more likely it is that the law will be valid.

**Third matter – the second *Lange* question**

37. Putting the submissions at [29]-[36] above to one side, the consequence of the submissions advanced is that where the validity (on *Lange* grounds) of criminal laws that affect or apply to communication arises, the only real issue is the second *Lange* question. In respect of the answer to this question, no error is

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[37] See, *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1, at 25 [12] (Gleeson CJ).

[38] *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579, at 623 (McHugh J):

> ...the constitutional implication does more than protect rational argument and peaceful conduct that conveys political or government messages. It also protects false, unreasoned and emotional communications as well as true, reasoned and detached communications.

disclosed in the reasoning of the Court of Criminal Appeal, whether the words of s.471.12 of the *Criminal Code 1995* (Cth) are construed in the manner found by Bathurst CJ,[39] or in the alternative manner of Allsop P,[40] or indeed in any other sensible manner.

38. In considering the second *Lange* question, the nature of the judgment that consideration of the answer requires involves fine issues of politics. Whether a law is "reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government" involves an evaluative process in which the Court can properly be guided by the judgment already made by the legislature and/or executive. As Brennan J reasoned in *Australian Capital Television Pty Ltd v Commonwealth,* when engaged in by the Court, this evaluative process is one in which "the Court must allow the Parliament ... a 'margin of appreciation'",[41] or expressed otherwise, "it [is] for the Parliament to make that assessment; it is for the Court to say whether the assessment could be reasonably made".[42]

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[39] *Monis and Another v The Queen* [2011] NSWCCA 231; (2011) 256 FLR 28, at 39 [44] (**JAB 93**).
[40] *Monis and Another v The Queen* [2011] NSWCCA 231; (2011) 256 FLR 28, at 50 [89] (**JAB 111**).
[41] *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45; (1992) 177 CLR 106, at 159 (Brennan J).
[42] *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* [1992] HCA 45; (1992) 177 CLR 106, at 160 (Brennan J). See also *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1, at 31-32 [29]-[32] (Gleeson CJ), at 123-124 [328] (Heydon J); *Rann v Olsen* [2000] SASC 83; (2000) 76 SASR 450, at 483 [184] (Doyle CJ); *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579, at 598 (Brennan CJ); *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246, at 258 [53] (Heydon J).

## PART VI: LENGTH OF ORAL ARGUMENT

39. It is estimated that the oral argument for the Attorney General for Western Australia will take 20 minutes.

Dated: 11 September 2012.

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