IN THE HIGH COURT OF AUSTRALIA
SYDNEY ~~MELBOURNE~~ REGISTRY

Nº MS314 OF 2010

BETWEEN

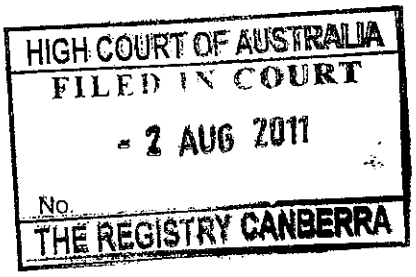
LEX PATRICK WOTTON
Plaintiff

AND

STATE OF QUEENSLAND
First Defendant

CENTRAL AND NORTHERN QUEENSLAND REGIONAL PAROLE BOARD
Second Defendant

PLAINTIFF'S CORRECTED OUTLINE OF SUBMISSIONS



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I. CERTIFICATION

1. These submissions are suitable for publication on the internet.

II. CONCISE STATEMENT OF ISSUES

2. The special case raises the following questions:

   2.1. Is s 132(1)(a) of the *Corrective Services Act 2006* (Qld) (**CSA**) invalid because it impermissibly burdens the freedom of communication about government and political matters contrary to the Commonwealth Constitution?

   2.2. Are conditions (t), (u) and (v) of the Plaintiff's Parole Order invalid because they impermissibly burden the freedom of communication about government and political matters contrary to the Commonwealth Constitution?

   2.3. Is s 200(2) of the CSA invalid to the extent it authorises the imposition of conditions (t), (u) and (v) of the Plaintiff's Parole Order?

III. SECTION 78B NOTICES

3. Notices under s 78B of the *Judiciary Act 1903* (Cth) were filed and served on 22 December 2010 [**SCB 14-19**]. The Plaintiff does not consider that any further notices are necessary.

IV. STATEMENT OF RELEVANT FACTS

4. The material facts are set out in the special case [**SCB 44-55**]. In short, they are as follows.

5. The Plaintiff is an Aboriginal person and an Australian citizen. Since his release from detention on 8 July 2010 he has become re-entitled to vote in elections for the Commonwealth and Queensland parliaments as well as in Queensland municipal elections. [1]

6. The Plaintiff was born on Palm Island, in Queensland, and has resided there for most of his life. He has been, and wishes to continue to be, an active participant in the public life of Palm Island and a leader in the Palm Island Aboriginal community[2]. He also has been, and wishes to continue to be, a participant in public discussion on political and social issues affecting Aboriginal persons on Palm Island and in Australia more generally. He also wishes to participate in public discussion on issues relating to the prison system about which he became aware during his incarceration.

7. On 7 November 2008, the Plaintiff was sentenced to six years' imprisonment for his part in the riot that occurred on Palm Island on 26 November 2004 following

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1 As explained at para 53.4 below, provisions in both federal and Queensland law that disentitle a prisoner from voting apply only to persons in fact detained.

2 As recognised by Shanahan DCJ at pp 13-14 of his sentencing remarks [**SCB 96-97**].

the death of an Aboriginal man whilst in police custody.[3] He was made eligible for parole on 18 July 2010.[4]

8. On 19 July 2010, the Plaintiff was released on parole pursuant to an order made by the Board on 8 July 2010 under Ch 5 Pt 1 Div 2 of the CSA [**SCB 145-147**] (**the Plaintiff's Parole Order**).

9. The Plaintiff's Parole Order imposed a number of conditions on the Plaintiff, including those required by s 200(1) of the CSA and a number of special conditions imposed in purported exercise of the power in s 200(2). These special conditions included conditions (**the impugned conditions**) that the Plaintiff:

10 (t) not attend public meetings on Palm Island without the prior approval of the corrective services offer;

(u) be prohibited from speaking to and having any interaction whatsoever with the media;

(v) receive no direct or indirect payment or benefit to him, or through any members of his family, through any agent, through any spokesperson or through any person or entity negotiating or dealing on his behalf with the media.

10. The Plaintiff's Parole Order will expire on 18 July 2014.

V. THE PLAINTIFF'S ARGUMENT

Applicable constitutional and legislative provisions

20 Commonwealth Constitution

11. Section 7 of the Constitution provides for the representation of the people of the States in the Senate, to be directly chosen by the people of the State as one electorate until Parliament otherwise provides.

12. Section 24 of the Constitution provides for the representation of the people of the Commonwealth in the House of Representatives, to be directly chosen by the people of the Commonwealth.

13. In addition, s 44(ii) of the Constitution provides that any person who "has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or a State by imprisonment for
30 one year or longer" is incapable of being chosen or of sitting as a member of the Commonwealth Parliament.[5]

Corrective Services Act 2006 (Qld)

14. Section 132(1)(a) is found in Pt 3 of Ch 3 of the CSA, "General offences", relating to offences by persons other than prisoners concerning conduct relating to prisoners and corrective services officers and facilities.[6] It relevantly provides:

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3 The sentencing remarks of Shanahan DCJ are at [**SCB 83-100**].

4 This represented a non-parole period of two years after taking into account time already served: see [**SCB 98-99**].

5 In *Roach* (2007) 233 CLR 162 at 188 [51], Gummow, Crennan and Kirby JJ expressed the views the "under sentence' includes a person on parole.

6 Other Parts of Ch 3 of the CSA relate to breaches of discipline and offences by prisoners (Parts 1 and 2), (Part 3) and other matters (Parts 4 and 5).

(1) A person must not--

(a) interview a prisoner, or obtain a written or recorded statement from a prisoner, whether the prisoner is inside or outside a corrective services facility; ...

Note--

Prisoner, as defined in schedule 4, includes a prisoner released on parole.

...

Maximum penalty--100 penalty units or 2 years imprisonment.

(2) A person does not commit an offence against subsection (1) if the person is-

(a) for subsection (1)(a) or (b)(i)--the prisoner's lawyer; or

(b) an employee of a law enforcement agency; or

(c) the ombudsman; or

(d) a person who has the Chief Executive's written approval to carry out the activity mentioned in the subsection.

15. The dictionary in Schedule 4 to the CSA relevantly defines "prisoner" to mean "a person who is in the Chief Executive's custody, including a person who is released on parole".[7]

16. Section 7 of the CSA defines the circumstances in which a person is taken to be in the Chief Executive's custody. It relevantly provides:

(2) When admitted to a corrective services facility for detention, a person is taken to be in the Chief Executive's custody.

...

(4) Except for any time when the person is lawfully in another person's custody, the person remains in the Chief Executive's custody until discharged, even if the person is lawfully outside a corrective services facility.

...

Examples of when a person is lawfully outside a corrective services facility –

- *while the person is released on parole ...*

17. "Detention" is not defined in the CSA, but "detained" is defined in Sched 4 to mean "detained in custody". "Discharge", when used in relation in relation to a prisoner, means "unconditionally release the person from lawful custody".

18. The effect of s 7 and the relevant definitions is that a person will be a prisoner, for relevant purposes, from the time at which they are admitted to a corrective services facility for detention (including on remand) to the time that they are no longer under sentence, such as when they are released unconditionally at the end of any term of imprisonment; and, importantly, that a person will be a prisoner within the meaning of the CSA while released from prison on parole.

19. Chapter 5 of the CSA relates to parole. Prisoners who have reached their parole eligibility date may apply for a parole order under s 180 to a parole board that may, under s 187, hear and decide the application. In the present case, the

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[7] Par 1(a) of the definition of "prisoner" in Schedule 4 to the Act. There are some exceptions to this extended definition, none of which apply to s 132: see pars 2 and 3 of the definition.

Second Defendant (**the Board**) had authority under s 187 to hear and decide the Plaintiff's application.

20. A parole board must decide to grant or refuse an application for parole: s 193. If the parole board decides to grant the application, the parole order must contain the conditions set out in s 200(1), which include conditions that the prisoner must: remain under the supervision of the Chief Executive until the end of the prisoner's period of imprisonment (s 200(1)(a)(i)); carry out the lawful instructions of the Chief Executive (s 200(1)(b)); and not commit an offence (s 200(1)(f)).[8]

21. In addition, s 200(2) permits the parole board to impose additional conditions for limited purposes. It provides:

> A parole order granted by a parole board may also contain conditions the board reasonably considers necessary –
>
> (a) to ensure the prisoner's good conduct; or
>
> (b) to stop the prisoner committing an offence.
>
> *Examples –*
>
> • *a condition about the prisoner's place of residence, employment or participation in a particular program*
>
> • *a condition imposing a curfew for the prisoner*
>
> • *a condition requiring the prisoner to give a test sample*

22. Section 200(3) provides that the prisoner must comply with the conditions included in the parole order. In the event of a failure to comply with a condition in a parole order the Chief Executive may suspend the order: s 201(2). The Chief Executive may also issue a warrant for arrest: s 202(1).

23. A parole board has a power under s 205 to amend, suspend or cancel a parole order. This power may be exercised where, for example, a prisoner has failed to comply with a condition of the parole order or poses a serious risk of harm to someone else or an unacceptable risk of committing another offence: s 205(2). The power of amendment may also be exercised where, amongst other cases, the parole board reasonably believes that the condition, as amended, is necessary for a purpose mentioned in s 200(2) or is no longer necessary for such a purpose: s 205(1)(a).

Criminal Code (Qld)

24. Section 7 of the *Criminal Code* (Qld) makes provision for accessory liability for the commission of an offence.[9] It provides:

> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or

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8 The mandatory conditions in s 200(1)(a)-(f) are reflected in conditions (b)-(g) of the Plaintiff's Parole Order **[SCB 146-147]**.

9 An offence is defined in s 2 as an act or omission which renders the person doing the act or making the omission liable to punishment.

aiding another person to commit the offence;

(c) every person who aids another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence.

(2) Under subsection (1)(d) the person may be charged either with committing the offence or with counselling or procuring its commission.

(3) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(4) Any person who procures another to do or omit to do any act of such a nature that, if the person had done the act or made the omission, the act or omission would have constituted an offence on the person's part, is guilty of an offence of the same kind, and is liable to the same punishment, as if the person had done the act or made the omission; and the person may be charged with doing the act or making the omission.

Underlying rationale of the implied freedom of political communication

25. As was explained by the Court in *Lange v Australian Broadcasting Corporation*,[10] the requirement in ss 7 and 24 of the Constitution that members of the Senate and the House of Representatives be directly chosen at periodic elections by the people of the States and of the Commonwealth "embraces all that is necessary to effectuate" the system of representative and responsible government to which the text and structure of the Constitution gives effect.[11]

26. Freedom of communication between electors and legislators and the officers of the executive, and between electors themselves, about government and political matters (**freedom of political communication**) is "an indispensable incident" of the system of government established by the Constitution.[12] The cases have stated the reason for that conclusion in various ways, but in general by reference to the role that the freedom of political communication plays in ensuring "the capacity of, or opportunity for, the Australian people to form the political judgments required for the exercise of their constitutional functions."[13] In *Australian Capital Television Pty Ltd v The Commonwealth*,[14] Mason CJ referred to the importance of the media in this process. He said:[15]

> The efficacy of representative government depends also upon free communication on such matters between all persons, groups and other bodies in the community. That is because individual judgment, whether that of the elector, the representative or the candidate, on so many issues turns upon free public discussion in the media of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion.

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10 (1997) 189 CLR 520.

11 *Lange* (1997) 189 CLR 520 at 557, 566-567.

12 *Lange* (1997) 189 CLR 520 at 559; *Roach* [2007] 233 CLR 162 at 198 [80] (Gummow, Kirby and Crennan JJ); *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 ~~[2010] HCA 42~~ at [44] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

13 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 51 (Brennan J). See also numerous statements made in *Lange* (1997) 189 CLR 520 as to the purposes served by the freedom, collected by Heydon J in *Coleman v Power* (2004) 220 CLR 1 at 125 [331].

14 (1992) 177 CLR 106 at 139.

15 *ACTV* (1992) 177 CLR 106 at 139.

27. In the footnote to the last sentence quoted, Mason CJ noted that Lord Simon of Glaisdale had made the same point in *Attorney-General v Times Newspapers Ltd*[16] when he said:

> People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument.

28. Both Gaudron J[17] and McHugh J[18] referred to the same passage in support of the role of the press in ensuring the effective operation of the institutions of representative and responsible government by facilitating the communication of, and access to, information, ideas and argument concerning "the business of government".[19]

29. More recently, in *Roach v Electoral Commissioner*, this Court considered provisions that disqualified prisoners from "participation as an elector in the central processes of representative government".[20] Gummow, Kirby and Crennan JJ described such participation as "a subject even closer to the central conceptions of representative government" [21] than communication about government and political matters. Referring to the judgment of Brennan J in *McGinty*,[22] their Honours said:[23]

> [R]epresentative government as that notion is understood in the Australian constitutional context comprehends not only the bringing of concerns and grievances to the attention of legislators but also the presence of a voice in the selection of those legislators.

30. Accordingly, any legislative disqualification from universal adult suffrage must be reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government.[24]

31. These cases are not examples of the operation of separate principles. Rather they are different emanations of the one underlying and coherent principle which limits legislative interference with any of the processes, activities or institutions necessary for the maintenance and continued operation of the system of representative and responsible government for which the Constitution provides. As was said in *Aid/Watch Inc v Federal Commissioner of Taxation*:[25]

> The system of law which applies in Australia thus postulates for its operation the very 'agitation' for legislative and political changes of which Dixon J spoke in *Royal North Shore Hospital*.

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16 [1974] AC 273 at 315.

17 *ACTV* (1992) 177 CLR 106 at 211-212.

18 *ACTV* (1992) 177 CLR 106 at 231.

19 *ACTV* (1992) 177 CLR 106 at 231 (McHugh J).

20 (2007) 233 CLR 162 at 186 [43] (Gummow, Kirby and Crennan JJ).

21 (2007) 233 CLR 162 at 198 [80].

22 (1996) 186 CLR 140 at 170.

23 (2007) 233 CLR 162 at 198-199 [83] (footnote omitted).

24 (2007) 233 CLR 162 at 199 [85].

25 [2010] HCA 42 at [44] (French CJ, Gummow, Hayne, Crennan and Bell JJ), citing *Royal North Shore Hospital of Sydney v Attorney-General (NSW)* (1938) 60 CLR 396 at 426.

32. Just as "the method for the conduct of the ballot is not an end in itself but the means to the end indicated in ss 7 and 24 of the Constitution, namely the election of legislative chambers 'directly chosen by the people' of the respective States ... and of the Commonwealth",[26] so too the freedom of political communication is not an end in itself but a means to the constitutional end of ensuring that the legislature is "directly chosen by the people".

Subject matter of the freedom of political communication

33. The freedom of political communication is not narrowly confined. It "extends to all matters of public affairs and political discussion, notwithstanding that a particular matter at a given time might appear to have a primary or immediate connexion with the affairs of a State, a local authority or a Territory and little or no connexion with Commonwealth affairs."[27] As this Court observed in *Lange*:[28]

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

34. Indeed, as French CJ observed in *Hogan v Hinch*:[29]

> The range of matters that may be characterised as "governmental and political matters" for the purpose of the implied freedom is broad. They are not limited to matters concerning the current functioning of government. They arguably include social and economic features of Australian society. For these are, at the very least, matters potentially within the purview of government.

35. In any event, the Commonwealth has power to legislate for Aboriginal people in s 51(xxvi) of the Constitution and approaches to the improvement of the living conditions of Aboriginal people in Australia have historically involved co-operative efforts at national and State or Territory level.[30] More particularly, issues such as the treatment of prisoners, including Aboriginal prisoners, Aboriginal deaths in custody and the treatment of Aboriginal persons generally, including the Aboriginal community on Palm Island, are notoriously issues of continuing public debate and variable legislative and governmental responses[31] at State, Territory and Commonwealth level.[32]

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26 *Rowe v Electoral Commissioner* (2010) 273 ALR 1; 85 ALJR 213; [2010] HCA 46 at [126] (Gummow and Bell JJ).

27 *ACTV* (1992) 177 CLR 106 at 142 (Mason CJ); and see 169 (Deane and Toohey JJ), 215 (Gaudron J). See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 75 (Deane and Toohey JJ).

28 (1997) 189 CLR 520 at 571-572.

29 [2011] HCA 4 at [49].

30 Cf *Coleman v Power* (2004) 220 CLR 1 at 45 [80] (McHugh J), at 78 [197] (Gummow and Hayne JJ).

31 *Roach* (2007) 233 CLR 162 at 201 [92] (Gummow, Kirby and Crennan JJ).

32 Annexure 2 comprises a selection of articles relating to Palm Island. The Plaintiff also proposes to add to Annexure 2 the multi award winning book by Chloe Hooper '*The Tall Man: Death and Life on Palm Island*'. When the book is added, the Plaintiff will indicate to the Court and to the Defendants the extracts upon which he proposes to rely. The

Test for validity

36. In order to determine the validity of s 132(1)(a) of the CSA and the impugned conditions, it is necessary to apply the two step test laid down in *Lange* and refined in *Coleman v Power*[33] (the ***Lange/Coleman* test**). First, it is necessary to ask whether the law effectively burdens freedom of communication about government or political matters either in its terms, operation of effect. Secondly, if so, the law will be valid only if it is reasonably and appropriately adapted to serve a legitimate end in a manner which is compatible or consistent with the maintenance of the constitutionally prescribed system of representative and responsible government.[34]

37. The *Lange/Coleman* test applies regardless of whether the burden imposed on freedom of communication by a law is the direct object of the law or an incidental consequence of the law's pursuit of some other purpose.[35] However, in the assessment of what is "reasonable" and "appropriate" in the circumstances "regard must be had to the character of the impugned law"[36] and the manner and extent to which the law limits freedom of political communication. Laws that have a more direct or substantial effect on the freedom require "close scrutiny"[37] and "compelling justification".[38] They will be "much more difficult to justify" than laws that have merely an incidental effect.[39]

38. For the reasons discussed below, the practical operation and effect of s 132(1)(a) of the CSA and the impugned conditions makes them akin to laws "whose character is that of ... law[s] with respect to the prohibition or restriction of [political] communications"[40] rather than laws which impose only an incidental prohibition on such communications. The present case affords an example of laws (including the impugned parole conditions) the practical operation of which

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Plaintiff will rely on the articles and book at the hearing to demonstrate the national significance of recent events concerning Palm Island. The subject matter of the articles and the book is evidence of the matters concerning Palm Island that would be likely, and be reasonably expected, to be the subject of the Plaintiff's participation in public discussion during his parole period. See *Thomas v Mowbray* (2007) 233 CLR ~~23~~07 at 512 [614], [~~514~~] – [~~522~~], [620] – [639] per Heydon J as to the admissibility of the material.

33 *Lange* (1997) 189 CLR 520 at 567-568; *Coleman v Power* (2004) 220 CLR 1 at 50-52 [92]-[96] (McHugh J), 51 [95], 77-78 [196], 82 [121], 90-91 [236]; *Aid/Watch Inc* (2010) 241 CLR 539 ~~[2010] HCA 42~~ at [44].

34 *Lange* (1997) 189 CLR 520 at 567-568; *Coleman v Power* (2004) 220 CLR 1 at 50-52 [92]-[96] (McHugh J), 51 [95], 77-78 [196] (Gummow and Hayne JJ), 82 [210]-[211], 90-91 [236] (Kirby J). See also *Aid/Watch Inc* (2010) 241 CLR 539 ~~[2010] HCA 42~~ at [44].

35 Cf *Levy v Victoria* (1996) 189 CLR 579 at 619 (Gaudron J).

36 *ACTV* (1992) 177 CLR 106 at 169 (Deane and Toohey JJ).

37 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40] (Gleeson CJ).

38 See *Nationwide News Pty Limited* (1992) 177 CLR 1 at 76-77 (Deane and Toohey JJ; *ACTV* (1992) 177 CLR 106 at 143 (Mason J), 234-235 (McHugh J; *Mulholland* (2004) 220 CLR 181 at 200 [40] (Gleeson CJ; *Coleman v Power* (2004) 220 CLR 1 at 30-32 (Gleeson CJ), 123 [326] (Heydon J).

39 *ACTV* (1992) 177 CLR 106 at (Deane and Toohey JJ), quoted with approval by Gleeson CJ in *Mulholland* (2004) 220 CLR 181 at [42]; and see *Hogan v Hinch* (2011) 275 ALR 408; 85 ALJR 398; [2011] HCA 4 at [95]-[96] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

40 *ACTV* (1992) 177 CLR 106 at 169 (Deane and Toohey JJ).

will have a direct and substantial effect on the freedom of political communication.[41]

Question 1: Is section 132(1)(a) of the CSA invalid because it impermissibly burdens the freedom of political communication?

Section 132(1)(a) of the CSA burdens the freedom of political communication

39. Section 132(1)(a) of the CSA prohibits any person other than a prisoner's lawyer, an employee of a law enforcement agency, the ombudsman or a person who has first obtained the Chief Executive's written approval, from interviewing a prisoner (whether in prison or on parole) or obtaining a written or recorded statement from a prisoner on pain of a penalty of up to 100 penalty units or 2 years imprisonment.

40. The prohibition is directed at the person who conducts the interview or obtains the statement and hence burdens that person's freedom of political communication. In addition, it is an effective restriction on political communication by a prisoner, including a prisoner who is on parole. Moreover, by virtue of s 7 of the *Criminal Code*, a prisoner who participates in an interview with, or provides a written or recorded statement to, a person who does not fall within one of the excepted categories in s 132(2) is liable to prosecution for an offence against s 132(1)(a) of the CSA. Accordingly, s 132(1)(a), of its own force and in combination with s 7 of the *Criminal Code*, effectively burdens prisoners' freedom of political communication, the freedom of political communication of the media as well as the freedom of those who would otherwise receive such communication — that is, the wider pool of Australian electors.

41. The prohibition in s 132(1)(a) is not, in terms, expressly directed at communication on government and political matters.[42] Nor is it a general prohibition on communication by a prisoner that only indirectly prohibits political communication.[43] Rather, the fact that its operation is limited to "interviews" and the obtaining of "written or recorded statements"[44] means its practical operation will disproportionately affect communications with the media that relate to a matter of public interest, which are likely to include matters of political or governmental significance, such as criticisms by prisoners of inadequate prison conditions or rehabilitation programmes. The prohibition in s 132(1)(a) of the CSA cannot be viewed as merely having an incidental effect on political or governmental matters. It is, in this respect, similar to the regulation in question in *Bennett v Human Rights and Equal Opportunity Commission*[45] which, although it did not differentiate between the type or quality of information it embraced, nevertheless was at its heart "concerned with information about political and governmental matters and about the executive organs of the State".[46]

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41 See *Ha v New South Wales* (1997) 189 CLR 465~~9~~ at 498 (Brennan CJ, McHugh, Gummow and Kirby JJ).

42 Cf *ACTV* (1992) 177 CLR 106.

43 Cf *Coleman v Power* (2004) 220 CLR 1 at 30 [27] (Gleeson CJ).

44 Neither of the expressions is defined in the CSA.

45 (2003) 134 FCR 334.

46 (2003) 134 FCR 334 at [78]. The regulation in question was reg 7(13) of the *Public Service Regulations 1999* (Cth) which prohibited the disclosure by a public service employee of "any information about public business or anything of which the employee has official knowledge" otherwise than in the course of the employee's duties or with the express authority of the agency head.

42. Thus, the answer to the first question of the *Lange/Coleman* test is yes.

Section 132(1)(a) is not reasonably and appropriately adapted to a legitimate end

43. A consideration of the validity of s 132(1)(a) of the CSA should commence with the proposition that prisoners do not lose all rights by the fact of imprisonment. Rather they retain such rights as are not incompatible with the fact and purposes of the deprivation of their liberty.[47] This principle is also reflected in s 3(2) of the CSA, which provides:

> This Act recognises that every member of society has certain basic human entitlements, and that, for this reason, an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded.

44. Although the implied freedom of political communication operates as a limitation upon Commonwealth and State legislative power, rather than as an individual right,[48] this principle is consistent with the proposition that the immunity conferred by the constitutional implication does not stop at the prison gate. So much was recognised by Gummow, Kirby and Crennan JJ in *Roach* ,[49] where their Honours said:

> Prisoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration. Indeed, upon one view, the *Constitution* envisages their ongoing obligations to the body politic to which, in due course, the overwhelming majority of them will be returned following the completion of their sentence.

45. Close attention should then be given to the purposes for which the curtailment of the freedom of communication by s 132(1)(a) is said to be necessary. The First Defendant [**SCB 29**] and the Board [**SCB 40**] contend that s 132(1)(a) serves the following legitimate ends (the **specified objectives**):

(a) Protecting the good order and security of correctional centres.

(b) Protecting the safety and welfare of correctional staff and prisoners.

(c) Ensuring that prisoners do not become media celebrities and thereby:

(i) benefit from their crimes; and/or

(ii) pose a risk to the good order and security of correctional centres.

(d) Ensuring that prisoners do not jeopardise law enforcement investigations by disclosing information about them.

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47 See, eg, *R v Secretary of State for the Home Department, Ex parte Simms* [2000] 2 AC 115 at 120 (Lord Steyn), referring to *Raymond v Honey* [1983] AC 1 at 10H and *Reg v Secretary of State for the Home Department, Ex parte Leech* [1994] QB 198 at 209D; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [5] (Lord Bingham); *Muir v R* (2004) 206 CLR 189 at [25] (Kirby J); *Procunier v Martinez* 416 US 396 (1973) at 422-423 (Marshall J), 428 (Douglas J); *Pell v Procunier* 417 US 817 (1974) at 822 (Powell J), 837 (Douglas J); *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41 at [69]; *Nilsen v United Kingdom* [2010] ECHR 470 at [49]-[50].

48 *Lange* (1997) 189 CLR 520 at 561, 566, 567-568; *Roach* (2003) 233 CLR 162 at 199-200 [86] (Gummow, Kirby and Crennan JJ).

49 (2007) 233 CLR 162 at 199 [84].

(e) Facilitating the discharge by the Chief Executive of his or her responsibilities under the CSA and the common law with respect to persons in his or her custody.

46. Three observations may be made at the outset about these specified objectives.

47. First, objectives (a), (b) and (c)(ii) can have no relevance to prisoners who are on parole.

48. Second, objective (e) is stated at such a level of generality, and without support from or reference to any factual material in the Special Case, that it is not possible to accept that it constitutes an end which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, let alone whether s 132(1)(a) is reasonably and appropriately adapted to its fulfilment. It should be disregarded.

49. Third, neither Defendant seeks to support s 132(1)(a) by reference to the statement in the Explanatory Memorandum to the Corrective Services Bill 2006 that s 132 would permit the Chief Executive to "take into consideration the likely impact the publication of an interview with a prisoner may have upon a victim, the victim's family and other community members": ~~[at p 119]~~.[50] This is not surprising given that such an object would require the restriction to be specifically limited in order to give effect to that object.

50. It is not claimed that the prohibition is imposed for the purpose of preserving the integrity of debate on political or governmental matters by excluding, for a time, those whose criminal conduct suggests a lack of fitness and probity of character.[51] On the contrary, by precluding the publication of information or comment by prisoners, s 132(1)(a) may in fact inhibit access to information pertinent to debate on topics such as prison conditions, prison reform and the rehabilitation of prisoners. As Douglas J said in *Pell v Procunier*,[52] in dissent, the provision "flatly prohibits interview communication with the media on the government's penal operations by the only citizens with the best knowledge and real incentive to discuss them."[53] Section 132(1)(a) goes even further, by preventing the publication of written or recorded statements by prisoners on such topics. The alternative means of communication between prisoners and the media, which were critical to the decision of the majority of the United States Supreme Court in *Pell v Procunier* to uphold a ban on media interviews with specific prisoners, are precluded by s 132(1)(a). Moreover, in *Saxbe v Washington Post Co*,[54] the majority of the Supreme Court upheld a similar ban on media interviews with prisoners in light of the existence of alternative means of communication and the existence of "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."[55] Section 132(1)(a) again goes further than the prohibition in question in that case by foreclosing access to released prisoners who remain subject to a parole order.

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50 Explanatory Memorandum to the Corrective Services Bill 2006 at p 119.

51 Cf *Roach* (2003) 233 CLR 162 at 192 [62], 200 [88] per (Gummow, Kirby and Crennan JJ).

52 417 US 817 (1974).

53 417 US 817 (1974) at 838-839.

54 417 US 843 (1974).

55 417 US 843 (1974) at 84~~8~~9.

51. It can be accepted that objectives (a)-(d) may constitute legitimate ends for the purposes of the second *Lange/Coleman* question. However, for the following reasons, s 132(1)(a) is not reasonably and appropriately adapted to the achievement of those objectives in a manner which is consistent or compatible with the constitutionally prescribed system of representative government, whether in respect of prisoners in custody or of prisoners released on parole.

52. Subject to limited exceptions, s 132(1)(a) imposes a blanket ban on interviewing and obtaining written or recorded statements of prisoners without prior authorisation. It operates without regard to the purpose of the interview or statement or the nature and content of the information to be conveyed. In particular, it is not limited or related to communications that may imperil the good order and security of the prison or any other of the specified objectives. In addition, as explained above, the combined effect of s 7 of the CSA and the relevant definitions is that a person will be a "prisoner" for the purposes of s 132(1)(a) from the time that they are admitted to a corrective services facility for detention, even on remand before conviction, to the time that they are released unconditionally at the end of any sentence of imprisonment, including any period whilst released on parole. A blanket ban on communication throughout this period — especially in relation to parolees — is unrelated to the specified objectives. Further, s 132(1)(a) operates without regard to the length or purpose of imprisonment or the particular circumstances of the offender.[56]

53. This over-reaching is productive of several incongruities. For example:

53.1. Persons on remand or under sentence in Queensland for an offence punishable by a term of imprisonment of less than one year would be entitled to continue to be a member of the Commonwealth Parliament and would be entitled to stand for re-election or election (as the case may be) to the Commonwealth Parliament,[57] but would be prevented by s 132(1)(a) from interviewed by, or giving a statement to, the media about government or political matters (**engaging in political communication with the media**).

53.2. Persons in prison serving sentences of less than 3 years are entitled[58], and obliged, to vote in Commonwealth elections but would be prevented

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56 Cf similar comments made by Gummow, Kirby and Crennan JJ in relation to the operation of s 93(8AA) of the *Commonwealth Electoral Act 1918* (Cth) in *Roach* (2007) 233 CLR 162 at 200 [90].

57 Section 44(ii) of the Constitution. However, a prisoner in detention or on parole is disqualified from being a candidate or elected as a member of the Queensland Legislative Assembly (see s 64 of the *Parliament of Queensland Act 2001* (Qld)) or a local councillor (see s 154 of the *Local Government Act 2009* (Qld)).

58 Section 93(8AA) of the *Commonwealth Electoral Act 1918* (Cth) provides that a person who is serving a sentence of imprisonment of 3 years or longer is not entitled to vote at any Senate or House of Representatives election. Section 4(1A) provides that, for the purposes of the Act, a person is serving a sentence of imprisonment "only if (a) the person is in detention on a full-time basis for an offence against a law of the Commonwealth or a State or Territory; and (b) that detention is attributable to the sentence of imprisonment concerned." That would not include a person on remand or a person released on parole.

by s 132(1)(a) from engaging in political communication with the media. This group is a significant proportion of the prison population. [59]

53.3. Persons on remand pending the hearing of a criminal charge against them have not, by definition, been convicted of any crime. They will be prevented by s 132(1)(a) from engaging in political communication with the media, despite being entitled to vote at Commonwealth [60] and Queensland State[61] and local government[62] elections. Again, this may be a significant proportion of the State prison population.[63]

53.4. Persons released on parole, irrespective of the length of their sentence, are entitled to vote at Commonwealth and Queensland State and local government elections,[64] but would be prevented by s 132(1)(a) from engaging in political communication with the media.

53.5. There are practical constraints on the sentencing options of the kind referred to by Gleeson CJ[65] and Gummow, Kirby and Crennan JJ[66] in *Roach*, such as the facilities and resources available to support alternative sentencing options and the personal circumstances of offenders who are indigent homeless or mentally, which may result in a greater proportion of offenders in certain areas or of certain backgrounds being sentenced to a term of imprisonment.

54. Section 132(1)(a) produces incongruities in the application of the constitutional requirements in relation to electoral representation, participation and communication. These incongruities would undermine the coherence of the law in

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59 In *Roach* (2007) 233 CLR 162 at 202 [93], Gummow, Kirby and Crennan JJ referred to the statistic that, in 2006, 17.6 per cent of the total Australian prison population was serving a sentence of less than one year and, at 201 [91], that "a very substantial proportion of prisoners serve sentences of six months or less". Gleeson CJ, at 180 [20], referred to statistics from the New South Wales Bureau of Crime Statistics and Research which put the percentage of adult offenders sentenced to terms six months or less in New South Wales in 2000-2001 at 65 per cent of all prisoners sentenced to a term of imprisonment. Also, the statistical evidence before the Court in *Roach* in the Special Case Book at 25-26 and 89 showed that 35% of the Australian prison population in June 2006 were serving sentences of 2 years or less.

60 See footnote 58 above.

61 Section 101(3) of the *Electoral Act 1992* (Qld) disqualifies from voting "a person who is serving a sentence of imprisonment". Section 101(4) provides that, for the purposes of subs (3), a person is serving a sentence of imprisonment "only if (a) the person is in detention on a full-time basis for an offence against a law of the Commonwealth or a State or Territory; and (b) the detention is attributable to the sentence of imprisonment concerned." That would not include a person on remand or a person released on parole

62 Section 276 of the *Local Government Act 2009* (Qld) provides that a person is entitled to vote in local elections if they are an elector under the *Electoral Act 1992*.

63 The statistics referred to by Gleeson CJ in *Roach* (2007) 233 CLR 162 at 176 [10] show that, according to the Australian Bureau of Statistics, "[u]nsentenced prisoners (typically persons on remand awaiting trial) comprised 22 per cent ...(5,581 [persons]) of the total prisoner population" in Australian prisons.

64 See footnotes 58, 61 and 62 above.

65 *Roach* (2003) 233 CLR 162 at 181 [22].

66 *Roach* (2003) 233 CLR 162 at 201 [91].

this area[67] because they would be inconsistent with the underlying rationale of the freedoms applied in *Lange* and *Roach*.

55. The facility for written authorisation by the Chief Executive does not save s 132(1)(a) from invalidity. A law that seeks to achieve an end by the imposition of a blanket prohibition on communication that may be relieved only by the exercise of an unstructured and, in practice, largely unreviewable discretion by a member of the executive or a statutory office holder is not one that is reasonably and appropriately adapted to serve that end. That must at least be so where the discretion is reposed in a person or body who may have a vested interest in prohibiting the communication of matters that may be of public concern. In this case, s 132(1)(a) puts the ability of prisoners and the media to expose from within the prison system information relevant to issues, such as the adequacy of prison conditions and rehabilitation programmes, in the hands of the very persons who may have an interest in prohibiting the public exposure of such information.[68]

56. A similar issue arose in *Bennett v Human Rights and Equal Opportunity Commission*,[69] which concerned reg 7(13) of the *Public Service Regulations 1999* (Cth). Regulation 7(13) prohibited the disclosure by a public service employee of "any information about public business or anything of which the employee has official knowledge" otherwise than in the course of the employee's duties or with the express authority of the agency head. Finn J held that reg 7(13) infringed the implied freedom of political communication:[70]

> The difficulty in giving an affirmative answer to the second Lange question inheres in the "catch-all" character of the regulation...
>
> ...
>
> It is one thing to regulate the disclosure of particular information for legitimate reasons relating to that information and/or to the effects of its disclosure. It is another to adopt the catch-all approach of reg 7(13) which does not purport either to differentiate between species of information or the consequences of disclosure...
>
> The Commonwealth in its submissions has suggested that the authorisation exception in reg 7(13) in effect provides for this differentiation to be made and in somewhat the same way as authorised officers make determinations under Freedom of Information legislation. Further, it is said, the discretion given the agency head would not offend the implied freedom as it must be read down so as to conform with that freedom.
>
> There is a number of responses that can be made to this, the most blunt being that placing 'an unbridled discretion' in the hands of an Agency Head may, or may appear to, 'result in censorship': cf Wolf v City of Aberdeen 758 F Supp 551 (1991) at 555. Distinctly, when this authorisation mechanism is considered as part of the

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67 *Miller v Miller* [2011] HCA 9 at [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

68 In T Walsh, "Suffering in Silence: Prohibitions on Interviewing Prisoners in Australia, the US and the UK" (2007) 33 Mon LR 72 at 74 and 84-85, the author refers to a Queensland Department of Correction Services 'Operations and Procedures Manual Media Access' dated 2005, which suggested that decisions regarding media access should be directed towards "maximising positive media coverage and outcomes for the Department's activities" and that access would not be granted where it "could embarrass' the Department or where its purpose was to 'investigate issues related to the offender's alleged innocence." The Department's present website does not reveal any similar policy but the Plaintiff is not aware of any policy that would preclude these factors from being taken into account in relation to decisions concerning media access to prisoners.

69 (2003) 134 FCR 334.

70 (2003) 134 FCR 334 at [80], [101]-[103]

balancing process required by the second Lange test, 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. The suggested 'reading down' proposed by the Commonwealth merely highlights that inappropriateness.

57. Similarly, in *Davis v The Commonwealth*,[71] the High Court was concerned with the validity of s 22(1)(a) of the *Australian Bicentennial Authority Act 1980* (Cth), which made it an offence for a person, inter alia, to use a "prescribed expression" in connexion with a business, trade, profession or occupation without the written consent of the Authority. Prescribed expressions included words such as "Bicentenary", "Bicentennial" and "200 years" when used in conjunction with "1788" "1988" or "88". Mason CJ, Deane and Gaudron JJ said:[72]

> [T]he effect of the provisions is to give the Authority an extraordinary power to regulate the use of expressions in everyday use in this country, though the circumstances of that use in countless situations could not conceivably prejudice the commemoration of the Bicentenary or the attainment by the Authority of its objects. In arming the Authority with this extraordinary power the Act provides for a regime of protection which is grossly disproportionate to the need to protect the commemoration and the Authority. *It is therefore no answer to say that the Authority's power to refuse written consent is exercisable only for the purpose of ensuring such protection, assuming that to be a permissible construction of s 22(1).*
>
> ... Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.

58. Their Honours were there concerned with whether s 22 fell within the scope of, or was incidental to, the federal executive power as a law for the purpose of commemorating the Bicentenary, rather than whether it was invalid by reason of the implied freedom of political communication. Nevertheless, the affinity of that inquiry with the second *Lange/Coleman* question is apparent.

59. In so far as the specified objectives relate to the good order and security of prisons and the welfare of staff and prisoners,[73] the CSA makes extensive provision for the maintenance of order and security in prisons and the welfare of prison staff. In particular:[74]

59.1. Div 4 of Pt 2 of Ch 2 regulates mail, phone calls and other communications by prisoners, including in s 52 by the conferral on the Chief Executive of power to record or monitor prisoner communications; and

59.2. Pt 2 of Ch 4 regulates visits to corrective services facilities by other persons, including in s 158 by the conferral on the Chief Executive of

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71 (1988) 166 CLR 79.

72 (1988) 166 CLR 79 at 99-100 (emphasis added).

73 Paragraphs (a), (b) and (c)(ii) of the specified objectives.

74 In addition to the provisions referred to in the text, Ch 2 of the CSA makes provision for matters such as the security classification of individual prisoners (s 12), the management of prisoners generally (Pt 2 Div 1), the carrying on of a business or dealing in artwork by a prisoner (Pt 2 Div 1A), searches of prisoners (Pt 2 Div 3) and the making of safety orders (Pt 2 Div 5) and maximum security orders (Pt 2 Div 6); and Parts 1 and 2 of Ch 3 concern breaches of discipline and offences by prisoners.

power to monitor personal visits and to make and keep audiovisual or visual recordings of a personal visit.

60. It is not apparent what risks to the security and good order of prisons are left inadequately protected by these provisions or how s 132(1)(a) is calculated to prevent those risks eventuating in a manner that is not achieved by other provisions of the CSA and other relevant laws. In the light of these other restrictions, there is no compelling justification for the additional prohibition imposed by s 132(1)(a). And in any event, as noted above, the extension of s 132(1)(a) to persons not detained in custody is unrelated to the objectives directed at the good order and security of correctional facilities or the safety of persons in those facilities (namely objectives (a), (b) and (c)(ii)).

61. It is relevant to note in this context that s 132(1)(a) is unique in Australia. All Australian jurisdictions make provision for the maintenance of the security and good order of prisons. No other jurisdiction, however, makes it a criminal offence for a person to interview or obtain a statement from a prisoner, whether in prison or on parole.

62. In relation to the two objectives that can have some relevance to persons on parole, neither is capable of justifying the broad reach of s 132(1)(a).

62.1. In so far as s 132(1)(a) is intended to prevent prisoners benefiting from their crimes (paragraph (c)(i) of the specified objectives), specific and detailed provision is made against that possibility by the *Criminal Proceeds Confiscation Act 2002* (Qld).[75] In addition, the application of s 132(1)(a) to parolees who wish to speak to the media about issues (including political issues) unrelated to their crime(s), either with or without remuneration, is not reasonably appropriate and adapted to the legitimate end.

62.2. In so far as s 132(1)(a) is intended to prevent prisoners from jeopardising law enforcement investigations by disclosing information about them (paragraph (d) of the specified objectives), an objective of this particular nature could, as Finn J said in *Bennett v Human Rights and Equal Opportunity Commission*,[76] "reasonably be secured by greatly less burdensome and more precise and particular restrictions." In any event, there is no evidence that the broad category of prisoners subject to s 132(1)(a) is likely to be in possession of information capable of jeopardising law enforcement investigations.

63. The operation of provisions limiting the ability of prisoners to communicate with the media and other non-prisoners has been considered in the United States,[77] the United Kingdom[78] and Canada[79] and by the European Court of Human Rights[80] (albeit in different constitutional contexts). The principles applied in those jurisdictions offer no support for the validity of the provisions in issue in this proceeding. To the contrary, cases from these jurisdictions support the

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75 See in particular Ch 4 relating to "Special Forfeiture Orders".

76 (2003) 134 FCR 334 at 354-355 [80].

77 *Procunier v Martinez* 416 US 396 (1973); *Pell v Procunier* 417 US 817 (1974); *Saxbe v Washington Post* 417 US 843 (1974).

78 *Re Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115.

79 *Hunter v Canada* [1997] FC 936; *Olson v Canada* [1996] 2 FC 168.

80 *Nilsen v United Kingdom* [2010] ECHR 470.

proposition that limitations on prisoners' freedom of communication can be upheld only where the provisions in question are a proportionate method to achieve a legitimate end. The cases have identified a number of legitimate government interests that could justify restrictions on communications by prisoners, including the preservation of order and discipline within prisons, the rehabilitation of prisoners and the protection of victims, their families and others from further harassment. Restrictions could not, however, be imposed to stifle "unflattering or unwelcome opinions"[81] or legitimate and serious comments about the criminal justice and corrections system[82], or to avoid offending public opinion.[83] Moreover, measures intended to serve a legitimate end but which imposed blanket bans[84] or reposed broad discretionary powers in corrections officials[85] have been held invalid because they went beyond what was reasonably necessary for the protection of the particular end involved. Summaries of cases in other jurisdictions which have considered the validity of restrictions upon communication by prisoners with the media are set out in Annexure 2.

64. In conclusion, s 132(1)(a) of the CSA goes well beyond what is reasonably and appropriately adapted, or proportionate, [86] to the maintenance of the constitutionally prescribed system of representative and responsible government. The answer to the second question in the *Lange/Coleman* test is "No". Thus, s 132(1)(a) is invalid to the extent that it infringes the freedom of political communication. Question 1 of the Special Case should be answered "Yes".

65. The above conclusion is a significant factor in the consideration of the validity of conditions (t), (u) and (v) of the Plaintiff's Parole Order as, on the Plaintiff's case, s 132(1)(a) cannot be considered to be part of the statutory framework that can support the imposition of those parole conditions.

Question 2. Are conditions (t), (u) and (v) of the Plaintiff's Parole Order invalid because they impermissibly burdens the freedom of political communication contrary to the Commonwealth Constitution?

The Plaintiff's Parole Conditions

66. Each of the impugned conditions of the Plaintiff's Parole Order is a special condition purportedly imposed pursuant to s 200(2) of the CSA. That section confers a power to impose conditions that a parole board "reasonably considers

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81 *Procunier v Martinez* 416 US 396 (1973) at 413.

82 See, for example, rule 34(9)(c) of Standing Order 5, promulgated in the United Kingdom under the *Prison Act 1952* and the Prison Rules 1999, which permitted prisoners to engage in correspondence "where it consisted of serious representations about conviction or sentence or forms part of serious comment about crime, the process of justice or the penal system". The rule is set out in *Nilsen v Governor of Full Sutton Prison* [2004] EWCA Civ 1540 at [9] and this exception was critical to the conclusion of the Court in that case, and of the European Court of Human Rights in *Nilsen v United Kingdom* [2010] ECHR 470, that the censorship regime imposed by rule 34 was proportionate to the legitimate aims that it pursued: See Annexure 3.

83 *Nilsen v United Kingdom* [2010] ECHR 470 at [50].

84 *Re Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115. Cf *Pell v Procunier* 417 US 817 (1974); *Saxbe v Washington Post* 417 US 843 (1974).

85 *Procunier v Martinez* 416 US 396 (1973).

86 *Roach* (2007) 233 CLR 162 at 199 [85], 202 [95] (Gummow, Kirby and Crennan JJ).

necessary" to secure one or both of two purposes: (a) to ensure the prisoner's good conduct; and (b) to stop the prisoner committing an offence.[87]

67. Before turning to the conditions themselves, it is relevant to consider the course by which the impugned conditions found their way into the Plaintiff's Parole Order:

67.1. The Plaintiff applied to the Board for parole in early 2010 **[SCB 102-104]**.

67.2. The Assessment Report prepared by a delegate of the Board on 22 June 2010 **[SCB 110-118]** recommended that parole be granted subject to certain special conditions, which did not include any prohibition on interaction with the media.[88]

67.3. On 6 July 2010, subsequent to the Assessment Report and immediately before the Board's determination of the Plaintiff's application, the Plaintiff's solicitors filed written submissions with the Board **[SCB 120-144]** which noted that, whilst on bail pending the determination of the charges against him, the Plaintiff had "committed himself ... to the use of legal and political avenues (including the media) to express any feelings of anger over perceived injustices within the Palm Island community" and listed a number of such activities in which the Plaintiff had engaged.[89] These included participating in interviews in relation to the history of Palm Island and the difficulties faced by the Palm Island community and giving speeches at universities and public events.

67.4. On 8 July 2010, the Board made the Plaintiff's Parole Order subject not only to the mandatory conditions but also to a number of special conditions which included the conditions restricting the Plaintiff from attending any public assembly on Palm Island without prior authorisation and from having any interaction whatsoever with the media.

68. Against this background, and given their nature, it is difficult to divorce the imposition of the impugned conditions by the Board from the Plaintiff's activities as a leader of, and prominent spokesperson for, the Palm Island Aboriginal community. That is particularly so in respect of condition (t), which prohibits the Plaintiff from attending public meetings on Palm Island without the prior approval of a corrective services officer.[90] The letter of the President of the Board to the Plaintiff on 1 September 2010 set out what was intended by the Board to fall within the phrase 'public meeting'. The Board informed the Plaintiff that a public meeting generally has characteristics that will include that it be open to the public and that it relate to a matter of public interest or concern or be for the advocacy of a candidature for public office **[SCB 152]**.

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87 These are the legitimate ends the Defendants contend are served by the impugned conditions of the Plaintiff's Parole Order **[SCB 31, 41]**.

88 See par 9.1 of the Assessment Report **[SCB 118]**.

89 See par 12 of the submissions **[SCB 123]**.

90 It should be noted that the Assessment Report for the Plaintiff's parole application records the fact that his own strategies for "managing his frustrations" at the plight of the Aboriginal community on Palm Island, if released, included not attending public meetings **[SCB 115]**. Nevertheless, there is a great deal of difference between an individual taking it upon himself to avoid an activity where he is concerned about the risk of relapsing into criminal behaviour and prohibiting that person by force of law, and on pain of having his parole suspended or cancelled, from participating in that activity.

69. Matters of interest or concern that would be expected to arise at public meetings on Palm Island, which the Plaintiff may be likely to attend, will include matters of importance to the Aboriginal community on the Island and the Aboriginal population of Australia more generally. These subject matters and those referred to in the letter fall within the scope of the constitutional freedom.

70. Conditions (u) and (v) are expressly directed at communication with the media and hence are clearly directed at the Plaintiff's ability to communicate on matters of public interest, including matters such as those, referred to above, relating to prisons, the treatment of prisoners, Aboriginal deaths in custody and the treatment of Aboriginal persons generally, including the Aboriginal community on Palm Island.

71. The practical operation of the impugned conditions will therefore have a substantial effect on the discussion of political and governmental matters by the Plaintiff. Accordingly, for the reasons referred to above, "compelling justification" must be offered to ensure their validity. The Defendants pleaded that the legitimate ends served by the impugned conditions are "[e]nsuring that the Plaintiff is of good conduct and does not commit offences whilst on parole" [**SCB 31, 41**]. This is substantially the same as the purposes for which special conditions may be imposed under s 200(2) of the CSA. It can be accepted that these may be legitimate ends for the purposes of the second *Lange/Coleman* question. However, for the following reasons, the impugned conditions, if conducive to those ends at all, are not reasonably and appropriately adapted to serve those ends in a manner that is consistent with the constitutionally prescribed system of representative government.

Other Parole Conditions

72. Other parole conditions, particularly conditions (b), (c), (d), (e), (f) (g) (i) (l) (n), (o), (q), (s) are reasonably appropriately adopted to serve these legitimate ends. There is no justification for the impugned conditions to be imposed in those circumstances.

Condition (u) – interaction with the media

73. The case for the invalidity of condition (u) of the Plaintiff's Parole Order is, in substance, the same as the case for invalidity of s 132(1)(a). However, it may be noted that condition (u) goes further than s 132(1)(a) in two respects:

73.1. it is not restricted to the conduct of interviews or the obtaining of a statement – it prohibits the Plaintiff from "speaking to or having any interaction whatsoever with the media"; and

73.2. there is no facility for prior authorisation.

74. For these reasons and those given above in relation to s 132(1)(a), condition (u) burdens the freedom of political communication and is a grossly disproportionate interference with the freedom.

Condition (v) – receiving payment or benefit from the media

75. Condition (v) of the Plaintiff's Parole Order does not serve either of the ends for which special conditions may be imposed under s 200(2). It prohibits the Plaintiff from receiving *any* direct or indirect payment or benefit from the media,

irrespective of the service for which the payment is provided. A payment or benefit received by the Plaintiff from the media would be liable to confiscation if it was caught by the provisions of the *Criminal Proceeds Confiscation Act*, but it would not constitute the commission of an offence. Also, there are any number of reasons why the Plaintiff might legitimately receive a payment or benefit from the media in respect of political communications which would neither constitute a crime nor have anything to do with the offence for which he was imprisoned. By any measure, condition (v) is also a disproportionate limitation on the Plaintiff's freedom, as a citizen and as an elector, to engage in political communications irrespective of whether the communications are with, or without, reward.

Condition (t) – public meetings on Palm Island

76. Condition (t) prohibits the Plaintiff from attending public meetings on Palm Island without the prior approval of a corrective services officer. For the reasons given above, it is clearly directed at preventing the Plaintiff from participating in the public discussion of political or governmental matters on Palm Island. In doing so, it infringes not only the freedom of communication on such matters, but also the corollary of that freedom, namely the freedom of association and assembly necessary to enable communication on political and governmental matters.[91]

77. As stated above, the implication to be drawn from the text and structure of the Constitution is one that limits legislative or executive interference with *any* of the processes, activities or institutions necessary for the maintenance and continued vitality of the system of representative and responsible government for which the Constitution provides. For this reason, to the extent that it is necessary to do so in order to determine the validity of condition (t) of the Plaintiff's Parole Order, it should now be declared that the text and structure of the Constitution require the implication of a freedom of assembly and association for the purposes of participating in communication about government and political matters. The freedom limits legislative and executive power to interfere with an individual's participation in an assembly whether by way of active participation, such as by speaking at a public meeting, or merely by the communication of support for or opposition to a particular issue by one's presence at a meeting or other lawful assembly. The same test of infringement and validity as applies to the freedom of political communication would apply.[92]

78. Applying those tests, condition (t) is not reasonably and appropriately adapted to the maintenance of the constitutionally prescribed system of representative and responsible government. It imposes a blanket prohibition on the Plaintiff's freedom to attend public meetings in the place where he lives subject only to the unstructured discretion to permit his attendance that is conferred on a corrections officer. For the reasons given above in relation to s 132(1)(a), condition (t) of the Plaintiff's Parole Order is invalid. Accordingly, the answer to the second question raised in the Special Case is "Yes".

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91 See *Wainohu v New South Wales* (2011) 278 ALR 1; [2011] HCA 24 at [112] (Gummow, Hayne, Crennan and Bell JJ); *South Australia v Totani* (2010) 242 CLR 1 at [31] (French CJ); *Kruger v The Commonwealth* (1997) 190 CLR 1 at 91 (Toohey J), 116 (Gaudron J), 142 (McHugh J); *Mulholland* (2004) 220 CLR 181 at 234 [148] (Gummow and Hayne JJ); *ACTV* (1992) 177 CLR 106 at 212 (Gaudron J), 231-232 (McHugh J).

92 *Wainohu* (2011) 278 ALR 1; [2011] HCA 24 at [112] (Gummow, Hayne, Crennan and Bell JJ).

Question 3. Is section 200(2) of the CSA invalid to the extent it authorises the imposition of the conditions (t), (u) and (v) of the Plaintiff's Parole Order?

79. Section 200(2) confers a seemingly broad power to impose special conditions, including conditions (t), (u) and (v), in a prisoner's parole order that a parole board "reasonably considers necessary" for either or both of the purposes set out in the subsection. As s 200(2) is relied upon to support the impugned conditions, it would go beyond what could be regarded as reasonably appropriate and adapted to maintaining the constitutionally prescribed system of representative government and is, to that extent, invalid. Question 3 in the Special Case should therefore be answered "Yes".

80. An alternative view is open if the Court concludes that there are constitutional constraints upon the discretion in s 200(2)(d) and the section is read down so as not confer power to infringe the constitutional freedom of political communication or the associated freedom of assembly and association. If that conclusion is reached, Question 3 in the Special Case may be answered "Read subject to the constitutional freedom of communication on political and governmental matters, No".

81. On either approach, s 200(2) does not support any of the impugned conditions of the Plaintiff's Parole Order.

VII ORDERS SOUGHT

82. The Plaintiff seeks the following orders:

A. A declaration that s 132(1)(a) of the *Corrective Services Act* 2006 (Qld) is invalid and of no force or effect.

B. Alternatively, a declaration that s 132(1)(a) is invalid and of no force or effect to the extent that it operates to prohibit communication about government and political matters.

C. A declaration that conditions (t), (u) and (v) of the Plaintiff's Parole Order are invalid and of no force or effect.

D. Alternatively, a declaration that conditions (t), (u) and (v) are invalid and of no force or effect to the extent that they operate to prohibit communication about government and political matters.

E. A declaration that s 200(2) of the *Corrective Services Act* 2006 (Qld) is invalid to the extent it authorises the imposition of the conditions (t), (u) and (v) of the Plaintiff's Parole Order.

F. An injunction restraining the Defendants from enforcing against the Plaintiff, or otherwise giving effect to, s 132(1)(a) or conditions (t), (u) and/or (v) of the Plaintiff's Parole Order.

G. An order that the Defendants pay the Plaintiff's costs of the proceeding.

Dated: 29 July 2011

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KRISTEN WALKER

ALISTAIR POUND