ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

Nº S314 OF 2010

BETWEEN

LEX PATRICK WOTTON

Plaintiff

10 AND

STATE OF QUEENSLAND

First Defendant

CENTRAL AND NORTHERN QUEENSLAND REGIONAL PAROLE BOARD

Second Defendant

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PLAINTIFF'S REPLY SUBMISSIONS

Dated of document: 29 July 2011

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I. **Certification:** These submissions are suitable for publication on the internet.

II. **Construction of s 132(1)(a)**

1. The submissions of the first defendant contend that s 132(1)(a) does not render criminal the receipt of an "unsolicited" statement and give the example of a letter to the editor.[1] This construction is far from clear.

   1.1. The primary meaning of "obtain" in the Macquarie dictionary is "to come into possession of", which is apt to cover an editor's receipt of a letter from a prisoner to the address designated by the newspaper.

   1.2. The Explanatory Memorandum to the Corrective Services Bill 2006 (the **EM**) explains the intended operation of s 132 as follows:[2]

> It is not the intent of the clause to unduly restrict access to prisoners from journalists seeking to conduct interviews for *bona fide* purposes. However, it is intended that the clause will operate so that if a journalist wishes to publish an unsolicited letter from a prisoner, the journalist must first seek permission of the chief executive prior to publishing it.

2. In any event, even if s 132(1)(a) is construed in the manner for which the Qld submissions contend, the practical operation and effect of the section, particularly in relation to the media, remains a burden on communication about government and political matters (**political communication**) that is not reasonably appropriate and adapted to a legitimate end.

Section 132 "substantially and directly" burdens political communication

3. As the Attorney-General of the Commonwealth contends, s 132(1)(a) imposes an effective burden on political communication that is not insubstantial or *de minimis*. The criminalising of the conduct set out in the section and the requirement to seek approval of the Chief Executive constitutes the burden.[3]

4. In that regard, the Chief Executive is a member of the executive branch of government, responsible to, and subject to the direction of, the relevant Minister in respect of his or her functions under the Act.[4] As was said in *Saxbe v Washington Post*, in relation to federal prisons in the United States:[5]

> The Government has no legitimate interest in preventing newsmen from obtaining the information they may learn through personal interviews or from reporting their findings to the public. Quite to the contrary, federal prisons are public institutions. The administration of these institutions, the effectiveness of their rehabilitation programs, the conditions of confinement that they maintain, and the experiences of the individuals incarcerated therein are all matters of legitimate societal interest and concern...
>
> What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs.

5. Further, the uncertainty surrounding the operation of s 132(1)(a) is such that its mere presence in the CSA will serve to "muffle"[6], or have a "chilling effect"[7] on, the

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1 Submissions on Behalf of the State of Queensland (**Qld submissions**) at [47].

2 It is no coincidence that the example in the extract from the EM and the example of breach in the EM ("[a] journalist visits a prisoner claiming to be a friend of the prisoner and, without the chief executive's approval, conducts an interview") relate to the media. See also Plaintiff's Submissions at [41].

3 *Cf.* Submissions of the Attorney-General of the Commonwealth (**Cth Submissions**) at [18], [24], [29].

4 CSA, s 263(1).

5 417 US 860 (1974) at 861-2 (Powell, Brennan & Marshall JJ, dissenting). In *Pell v Procunier* 417 US 817 (1974) at 835 Powell J referred to an absolute ban on press interviews as restraining the ability of the press to perform its "constitutionally established function of informing the people on the conduct of their government". The plaintiff accepts that US cases cannot be directly applied in the Australian context, but contends that they can be considered by way of analogy: see Cth Submissions at [44], [45].

6 *Davis v Commonwealth* (1988) 166 CLR 79 at 116 (Brennan J).

7 *Roberts v Bass* (2002) 212 CLR 1 at [102] (Gaudron, McHugh & Gummow JJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 131, 134, 135 (Mason CJ, Toohey & Gaudron JJ), 174, 185 (Deane J). See also *Procunier v Martinez* 416 US (1974) 396 at 425-426 (Marshall J), 428 (Douglas J).

freedom of political communication. Even if an unsolicited communication may be received by the media, s 132(1)(a) will prevent the media from evaluating the veracity or reliability of the source by, for example, engaging in any "follow-up" interview with, or obtaining any "follow-up" statement from, the prisoner without the prior authorisation of the Chief Executive.[8]

6. The burden imposed on political communication by s 132(1)(a) is "direct and substantial"[9] such that, at the least, a substantial reason or close scrutiny,[10] or even compelling justification, is required to support it. Contrary to the Qld submissions and of the Attorneys-General for New South Wales[11] and Victoria,[12] the focus is on the practical operation and effect of the law,[13] not on its purpose, although the purpose may affect the law's operation through statutory construction.

6.1. Section 132(1)(a) in its terms applies to a person "interviewing" or obtaining a "written or recorded statement" from a prisoner. These modes of communication are quite different from the ordinary modes of communication a prisoner might have with persons such as family members or friends. They are particularly modes of communication associated with the media.

6.2. In any event, a primary purpose of s 132(1)(a), as the EM reveals, was to limit and regulate communications with, and so publications by, the media.[14]

6.3. Communication by a prisoner with the media would, primarily, be in relation to matters of public interest, which would substantially concern political and government matters, such as prison conditions, experiences and amenities as well as the efficacy of rehabilitation programs.

6.4. The effect of s 132(1)(a) on political communication is thus direct and substantial, even if it also incidentally affects non-political communications (*cf* Qld Submissions at [15]).

III. Section 132 is not reasonably appropriate and adapted to a legitimate end

7. The Qld Submissions attempt to justify s 132(1)(a) on the basis of the pleaded "legitimate ends", without due regard for the different circumstances of prisoners in fact detained in prison and "prisoners" on parole. The circumstances of the two groups are quite different, yet the section treats indifferently persons in prison and on parole.[15] Considerations that might justify the application of a restriction to prisoners in detention do not establish that the same restrictions are reasonably and appropriately adapted in their application to "prisoners" released on parole.

8. The imposition of a legislative restriction on political communication of this kind on parolees is unprecedented in Australia. The examples the first defendant gives (in fn 14) of comparable legislation in other States and Territories apply only to persons detained in prison; not to persons on parole.

9. In so far as the *possibility* of the consent of the Chief Executive is said to render the burden on political communication effected by s 132(1)(a) reasonably appropriate

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8 As Powell, Brennan & Marshall JJ observed in *Saxbe v Washington* 417 US 860 (1974) at 853-4, "personal interviews are crucial to effective reporting in the prison context. ... Only in face-to-face discussion can a reporter put a question to an inmate and respond to his answer in with an immediate follow-up question ... [and] pursue a particular line of inquiry to a satisfactory resolution". See also *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 128 (Lord Steyn).

9 *Hogan v Hinch* (2011) 275 ALR 408 at [95].

10 *Roach v Electoral Commissioner* (2007) 223 CLR 162 at [85]; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [42].

11 Submissions on Behalf of the Attorney-General for NSW (Intervening) (**NSW Submissions**) at [10]-[11].

12 Submissions of the Attorney-General for the State of Victoria (Intervening) (**Vic Submissions**) at [18].

13 *Lange* (1997) 189 CLR 520 at 567; *Coleman v Power* (2004) 220 CLR 1 at [27], [147], [230].

14 See n 2 above and EM at 118, 119. Also, the statutory provisions referred to in the EM at 118 as comparable, or analogous, to the prohibition in s 132 in relation to "unauthorised publications" all concern non-publication orders.

15 Cf *Roach* (2007) 223 CLR 162 at 201 [93].

and adapted to a legitimate end, where legislation burdens the freedom of political communication the presence of such a discretion does not demonstrate that the legislation is reasonably appropriate and adapted to achieving a legitimate end.[16] Here, the discretion does not save s 132(1)(b) from invalidity because:

9.1. the discretion is "unconfined" in the sense that term was used by Brennan J in *Davis v Commonwealth*[17] — as in both *Davis* and *Bennett*, the discretion contains no express criteria governing its exercise;[18]

9.2. the discretion is conferred on a person with an interest in limiting political communication concerning conditions in prisons — as Powell, Brennan and Marshall JJ observed in *Saxbe*: [19]

> The line between a good-faith denial of an interview for legitimate reasons and a self-interested determination to avoid unfavourable publicity could prove perilously thin;

9.3. the discretion is subject to political direction by the relevant Minister.

The postulated "legitimate ends"

10. As a starting point, it should be observed that there is no evidence in the special case of any existing mischief that s 132(1)(a) is said to address. As French CJ observed in *Rowe v Electoral Commissioner*, "the presence or absence of evidence of an existing mischief may be relevant in ascertaining whether the detriment imposed by a law ... is disproportionate to the benefit to be derived"[20] from it. And, as Gummow and Bell JJ observed in *Roach*, in relation to an argument that limits on the franchise were justified by the "prophylactic" need to prevent electoral fraud: [21]

> A legislative purpose of preventing such fraud "before it is able to occur", where there has not been previous systemic fraud associated with the operation of the seven day period before the changes made by the 2006 Act, does not supply a substantial reason for the practical operation of the 2006 Act in disqualifying large numbers of electors. That practical operation goes beyond any advantage in preserving the integrity of the electoral process from a hazard which so far has not materialised to any significant degree.

11. So too here: in the absence of evidence that political communication with the media by persons on parole generates real problems that require a legislative response, the mere assertion of such a problem does not provide the requisite, or a substantial, reason for restricting political communication. As Gummow, Kirby and Crennan JJ observed in *Roach*,[22] such circumstances are supportive of a conclusion that the relevant restriction (in this case, on political communications by parolees) not be regarded as "reasonably appropriate and adapted" to the asserted ends.

12. Nor is there evidence that s 132(1)(a) is necessary to deal with any mischief relating to persons in detention, particularly given that prisoners' communication is generally

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16 See Cth Submissions at [34] and Plaintiff's Submissions at [55]-[58].

17 (1988) 166 CLR 79 at 116. Contrast regs 108, 109 of the Corrections Regulations 2005 (NZ), which make detailed provision about the matters the Chief Executive must consider in relation to an application to interview a person in detention; see also the Prison Rules 1999 (UK), discussed in *Nilsen v United Kingdom* [2010] ECHR 470 at [22].

18 There are no express criteria qualifying the subject matter (eg categories of information to be protected) and no guidance in relation to how the discretion is to be exercised (eg specification of relevant or irrelevant considerations). It may, however, be accepted that every statutory discretionary power is confined by the subject matter, scope and purpose of the Act (*Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24) and by constitutional requirements (*Cunliffe v Commonwealth* (1994) 182 CLR 272) and that no statutory discretion is immune from judicial review (*Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531). As to the practical difficulty in reviewing a discretion of this kind, see *Herald and Weekly Times Ltd v Correctional Services Commissioner* [2001] VSC 329.

19 417 US 851 (1974) at 871 (dissenting); *Procunier v Martinez* (416) US 396 (1973) at 415, 423, 426.

20 (2010) 273 ALR 1 at [73].

21 (2010) 273 ALR 1 at [167].

22 (2007) 223 CLR 162 at 199 [85]

controlled and limited.[23] Where restrictions on prisoner communication have been upheld in other jurisdictions they have been the subject of persuasive evidence that justified the restrictions in question.[24]

13. Of particular relevance to any assessment of whether s 132(1)(a) is reasonably appropriate and adapted to achieve a legitimate end is the question of whether it is tailored to achieve the ends sought; as the US Supreme Court observed in *Procunier v Martinez*, "a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad".[25] *A fortiori* the same applies to communications by parolees. Section 132(1)(a) is "unnecessarily broad", because it treats indifferently persons in detention and parolees and because it is not tailored to restrict communications that might impact on prison security and good order, impair the safety and welfare of correctional staff and prisoners; permit a prisoner to benefit from his or her crime; or jeopardise law enforcement investigations.

14. Rather, s 132(1)(a) applies to all interviews and written statements, regardless of their content.[26] To adapt the remarks of Porter CJ in *Wolf v City of Aberdeen*,[27] where a law is not narrowly drawn, or is "overbroad", its very existence may inhibit or chill the constitutionally mandated freedom of political communication. That is so even where, as in *Wolf*, the restriction is subject to a discretionary power of dispensation.

15. In addition, the first defendant accepts that, because s 132(1)(a) does not apply to forms of prisoner and parolee communication other than interviews and "written or oral statements",[28] it does not in fact prevent a prisoner or parolee from engaging in communications that are likely to impact on prison security and good order, impair prisoner and staff welfare or jeopardise law enforcement obligations.

    15.1. Thus, to use the examples given in the Qld Submissions at [33], although s 132(1)(a) would prevent a prisoner or parolee from *giving an interview* in which he or she gives a step-by-step description of a correctional centre, or suggests that another prisoner is an informer, it would not prevent a prisoner or parolee doing so in conversation with another person or by an unsolicited letter to the media (on the first defendant's construction of s 132(1)(a)). In any event, such communications are prohibited by other laws, which are tailored to the particular dangers identified in the Qld Submissions.[29]

    15.2. Division 4 of Pt 2 of the CSA provides for extensive restrictions on, and surveillance of, prisoners' mail, phone calls and other communications. There is no evidence as to why the various and extensive means adopted to achieve the postulated legitimate ends by those provisions do not do so, thereby justifying the enactment of s 132(1)(a). The existence, or absence, of alternative means of achieving the legitimate ends has been treated as a significant factor in determining whether the particular restriction on prisoners' communications is justified.[30]

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23 See CSA, Div 4 of Pt 2 of Ch 2 and Pt 2 of Ch 4; and see Walsh, "Suffering in Silence: Prohibitions on Interviewing Prisoners in Australia, the US and the UK" (2007) 33 *Monash Law Review* 72 at 77, 85.

24 See, eg, *Pell v Procunier* 417 US 817 (1974) at 831; *Saxbe v Washington Post* at 847-849; *Olson v Canada* [1996] 2 FC 168.

25 416 US 414 (1974) at 413-4.

26 It may be accepted that various restrictions on communications by persons in detention may be permissible; a prisoner does not have a right to be visited by whomever he or she wishes and whenever he or she wishes (see, eg, *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 143, 144-5). But s 132(1)(a) is not a restriction of this kind.

27 758 F Supp 551 (DSD 1991) at 553.

28 Qld Submissions at [47].

29 See s 123 of the CSA and reg 20(x) of the Corrective Services Regulations 2006 (Qld) in relation to drawing a plan of a prison; and s 86 of the *Criminal Code* (Qld) in relation to publication of the identity of an informer. The former offence does not apply to parolees; the latter offence is not limited to prisoners.

30 See *Pell v Procunier* 417 US 817 (1974) at 823-4; *Turner v Safely* 482 US 78 (1987) at 90.

15.3. The above matters further support the proposition that s 132(1)(a) is not reasonably appropriate and adapted to achieve the asserted legitimate ends; rather, the sub-section is intended to, and does, preclude prisoner communication with the media on matters of public interest, including government and political matters.

16. Finally, the first defendant's reliance on historical practice in relation to communication by persons in detention is misplaced for several reasons:

16.1. it has no relevance to communications by a person on parole; and

16.2. it has limited relevance in relation to principles derived from the requirement that members of the Commonwealth Parliament be chosen "directly by the people", which have evolved over time so that practices that might have been constitutionally valid in 1900 are no longer valid.[31]

17. Nor does the plaintiff suggest that the courts should subject "the day-to-day judgments of prison officials to an inflexible strict scrutiny"[32] — the plaintiff contends that s 132(1)(a), which embodies the judgment of the *legislature*, is invalid. Rather, day-to-day scrutiny of the conduct of prison officials would be a consequence of the first defendant's approach, which relies upon judicial review of individual decisions of the Chief Executive to ensure that s 132(1)(a) does not transgress the freedom of political communication.

18. In any event, *Turner v Safley*, on which the first defendant relies, identified four factors relevant to the assessment of the "reasonableness" (rather than "strict scrutiny") of decisions of prison officials (as explained in *Thornburgh v Abbott*[33]): (i) whether the governmental objective underlying the regulations at issue is legitimate and neutral and that the regulations are rationally related to that objective; (ii) whether there are alternative means of exercising the right that are open to prison inmates; (iii) the impact that accommodation of the asserted constitutional right will have on others, such as prison guards and other inmates; and (iv) whether there are obvious, easy alternatives to achieve the same objectives. There is a clear parallel with the *Lange/Coleman* test; and s 132(1)(a) fails any assessment of this kind.

19. If s 132(1)(a) was in fact intended to achieve the objectives for which the first defendant contends, it would target, by reference to statutory criteria, the kinds of communications the objectives seek to protect, rather than singling out forms of communication particularly engaged in by the media.

IV. Severance

20. If s 132(1)(a) is invalid in its application to persons on parole, but not (or not necessarily) invalid in relation to its application to persons detained in prison, the plaintiff contends that it can be read down so as not to apply to such persons. Section 32A of the *Acts Interpretation Act 1954* (Qld) provides that "[d]efinitions in ... an Act apply except so far as the context or subject matter otherwise indicates or requires". It is thus possible to conclude that the context of s 132(1)(a) requires that the extended definition of "prisoner" in the dictionary to the CSA does not apply to s 132(1)(a). Also, s 9 of the *Acts Interpretation Act* requires a construction that does not exceed Parliament's legislative power. In particular, s 9(3) provides that the application of a provision to a person (eg a parolee) that would be beyond power be interpreted to apply to the other persons in respect of whom the provision would be within power (eg persons in prison).

V. The Parole Conditions

21. The grant of parole to the plaintiff was subject to three conditions that were challenged in these proceedings: conditions (t), (u) and (v). On 22 July 2011 the second defendant amended the plaintiff's parole order to remove condition (u) and,

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31 See, eg, *Roach* (2007) 223 CLR 162 at [7] (Gleeson CJ); [45] (Gummow, Kirby & Crennan JJ).

32 Qld Submissions at [30].

33 490 US 401 (1989) at 414-418.

as a consequence, the first defendant's submissions do not address condition (u). However, condition (u) forms an important part of the relevant factual matrix to this proceeding and cannot be ignored — it was imposed upon the plaintiff, and it was removed contemporaneously with the delivery of the first defendant's submissions.

22. Taken together, the conditions imposed on the plaintiff reveal an intention to prevent the plaintiff from engaging in political communication by preventing him from speaking with the media, attending a public meeting or receiving a benefit or payment benefit from the media by way of, for example, being flown to a major city for an interview, or being paid for out of pocket expenses in respect of an interview — by, in effect, preventing the plaintiff from re-establishing his responsible leadership role on Palm Island.[34] They are not directed at the asserted end of ensuring the Plaintiff's good behaviour; still less are they reasonably appropriate and adapted to that end. Condition (u) is particularly revealing as it was a blanket ban that is more wide-ranging than s 132(1)(a) and did not provide for any discretion to grant dispensation.

23. Condition (t) precludes the plaintiff from attending at any public meeting on Palm Island (where he lives and which is his electorate) without permission from a corrective services officer. The plaintiff was informed by the Parole Board that imposed condition (t) that a "public meeting" has characteristics that include a meeting that "relates to a matter of public interest or public concern or for the advocacy of the candidature of a person for public office" (SCB 152); and the plaintiff was denied permission to attend (and speak at) a meeting about youth crime and juvenile justice chaired by the Queensland Department of Justice and Attorney-General (Special Case at [12]; SCB 47). This meeting, and the Board's definition, were clearly in relation to government and political matters protected by the freedom of political communication and/or by the implied freedom of political association. The communications intended to be prevented, and in fact prevented, by the parole conditions are closer to the heartland of the freedom of political communication than those considered in *Coleman v Power.*

24. In response to the first defendant's contention that condition (t) does not burden political communication because, immediately prior to being released on parole, the plaintiff had no right to attend public meetings, the plaintiff adopts the Cth Submissions at [20]-[21].

25. The first defendant asserts that the legitimate end served by conditions (t), (u) and (v) is "ensuring that the Plaintiff is of good behaviour and does not commit offences while on parole". However, the three conditions together, and also together with s 132(1)(a) and the other parole conditions in relation to offences (eg (a) and (b)), could not be regarded as reasonably appropriate and adapted to achieve the asserted end. Condition (u) went further than s 132(1)(a). There is no apparent connection between condition (v) and this asserted end; and condition (t) is not tailored to achieving this end — its blanket ban on attendance at public meetings without approval is, like the similar blanket ban in s 132(1)(a), unnecessarily broad and not saved by the existence of an administrative discretion.

26. Finally, although a number of the regulatory regimes in Australia provide for "core" conditions, and "additional" discretionary parole conditions, there is no precedent for the imposition of conditions analogous to s 132(1)(a) or conditions (t), (u) and (v) of the Plaintiff's parole order.[35]

Dated: 29 July 2011

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[34] Cf the agreed facts in [2] to [12] (SCB 44 -47), the sentencing remarks of the trial judge (SCB 96ff); the Parole Board's assessment of the plaintiff (SCB 110-118); the plaintiff's professed desire to return to a leadership role on Palm Island (SCB 123-129).

[35] See Crimes (Administration of Sentences) Regulations 1999 (NSW), reg 224; Corrections Regulations 2009 (Vic), Schedule 4, Form 1; *Sentence Administration Act 2003* (WA), ss 29, 30. See also examples of conditions set out in the following Parole Board annual reports: Adult Parole Board of Victoria, *Annual Report 2009-2010* at 18; Parole Board of Tasmania, *2009 Annual Report*, at Part 8; Parole Board of the Northern Territory, *2009 Annual Report*, at 3-4.

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