IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S314 OF 2010**

BETWEEN: **LEX PATRICK WOTTON**
Appellant

AND: **STATE OF QUEENSLAND**
First Respondent

CENTRAL AND NORTHERN QUEENSLAND REGIONAL PAROLE BOARD
Second Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes under s78A of the *Judiciary Act 1903* (Cth), without supporting any party.

PART IV LEGISLATIVE PROVISIONS

3. The Commonwealth adopts the list of legislative provisions in the submissions of the first defendant.

PART V ARGUMENT

4. These submissions address several points of general principle regarding the implied freedom of political communication and its application in the present case.

5. The Commonwealth:

   (a) submits that ss132(1)(a) and 200(2) of the *Corrective Services Act 2006* (Qld) (**CS Act**) and conditions (t) and (u) of Mr Wotton's parole conditions (to the extent condition (u) remains in issue) burden relevant political communications;

   (b) submits that condition (v) does not burden relevant political communications; and

   (c) makes submissions of principle which bear generally on the validity of statutory provisions and parole conditions of the kind challenged by Mr Wotton.

6. The Commonwealth also submits that there is no free-standing freedom of association or of assembly implied by the Constitution and that any such freedom or freedoms would only exist as a corollary to the implied freedom of political communication (and therefore add nothing to Mr Wotton's claims).

Part one: doctrinal basis for the implied freedom of political communication

7. The implied freedom of political communication is a restriction on legislative and executive power.

8. It is not a constraint that is imposed for its own sake, but rather serves and is defined by certain specific purposes.[1] The fundamental and overarching purpose may be articulated as follows: to allow a free and informed choice by electors[2] so as to avoid the impairment of the effective operation of:

   (a) responsible and representative government as prescribed by the Constitution;[3] and

   (b) the prescribed procedure for the amendment of the Constitution.[4]

9. As to representative government, the effect of ss7 and 24 (read with s25) is to provide that Senators and Members of the House of Representatives are to be chosen by "the people" voting at elections.[5] Read with ss1, 8, 13, 28 and 30,[6] the Constitution thereby ensures that the Parliament of the Commonwealth is representative of the people of the Commonwealth.[7] Although none of those provisions expressly mentions freedom of communication, the choice conferred by ss7 and 24 would be a stunted one unless it is a "true choice" with "an opportunity to gain an appreciation of the available alternatives".[8] That is not a new insight originating in the implied freedom jurisprudence – it was rather well understood by the framers.[9] It follows that those provisions of the Constitution support the implication of a constraint upon legislative and executive power, to the extent necessary to protect communications concerning political and governmental matters relevant to the exercise of such a choice. Similar reasoning applies to the

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1 See *Coleman v Power* (2004) 220 CLR 1 (***Coleman***) at 125, [331] per Heydon J.

2 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 560.

3 *Lange* at 561; *Coleman* at 49 [91] per McHugh J and at 77 [195] per Gummow and Hayne JJ; *APLA v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at 350 [27] per Gleeson CJ and Heydon J.

4 *Lange* at 561; *Levy v State of Victoria* (1997) 189 CLR 579 (***Levy***) at 622 (footnote 149) per McHugh J.

5 *Lange* at 557-8.

6 As to the prohibition on plural voting in ss8 and 30, see *Rowe v Electoral Commissioner* (2010) 85 ALJR 213 (***Rowe***) at 239 [122] per Gummow and Bell JJ and at 278 [345] and 280 [354] per Crennan J.

7 *Lange* at 558; *Rowe* at 238-239 [120]-[121] per Gummow and Bell JJ and at 275 [329] per Crennan J.

8 *Lange* at 560; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 187 per Dawson J.

9 For example, in the course of discussing the perceived difficulties in Senators being elected by the people voting "until the Parliament otherwise provides, as one electorate" (in what was to become s7), it was said: *... I should have thought myself that, upon the principle underlying all our representative government, the main question was, how we can best give the people the means of determining upon their particular choice...If you are to give the people the choice of representatives for any particular purpose the great object is to accompany it by providing them with the best available means of forming an opinion and of selecting the best men* (emphasis added): *Official Report of the National Australasian Convention Debates*, Monday 13 September 1897, Second Session, Sydney 1897, Vol II, Mr Symon, page 384. See also *R v Smithers; Ex Parte Benson* (1912) 16 CLR 99 at 108 per Griffith CJ and 109-110 per Barton J, referred to in *Lange* at 560, footnote 245.

choice conferred by the procedure for constitutional amendment by popular referenda in s128.

10. As to responsible ministerial government, the effect of ss6, 49, 62, 64 and 83 is to provide the means for enforcing the responsibility of the Commonwealth executive to the organs of representative government.[10] Those provisions embrace the notion that the actual government of the Commonwealth is conducted by officers who enjoy the confidence of the people, as ultimately expressed or denied by the operation of the electoral process[11] - the process of executive decision-making is thereby bound to the popular will.[12] They therefore necessitate a similar implied restriction on legislative and executive power to that required by the constitutional prescription of representative government, to protect the availability of a true choice (in the sense of an informed one) in the electoral process. Although largely congruent, the restriction arising from the prescription of responsible government more clearly extends to communications concerning the conduct of the executive branch of the Commonwealth throughout the life of a federal Parliament.[13]

11. As with other constitutional limitations (express or implied) the underlying purpose or object informs and limits the scope of the constraint.[14] The implied freedom is not at large or subject to extension by reference to ill-defined, free-standing concepts or political theories of representative government or freedom of expression.[15] It is rather firmly tied to the structure of the Constitution in the manner just described. That tethering of the implied freedom to the constitutional structure and the fact that the implication arises by necessity leads to the conclusion that it has effect only to the extent necessary to effectively maintain the constitutionally prescribed system of representative and responsible government that gives rise to it.[16] Put another way, the constraint on legislative and executive power is circumscribed by the extent of the need.[17]

12. It follows that the implied freedom is directed to (and only to) the preservation of those features of the institutional landscape for which the Constitution there provides, rather than the protection of values more closely associated with the rights and freedoms of individuals.[18] That is, it operates at a purely

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10 *Lange* at 558-9.

11 *Lange* at 559.

12 *Rowe* at 238 [120] per Gummow and Bell JJ.

13 *Lange* at 561; *Coleman* at 45 [80] per McHugh J.

14 Eg *Ha v New South Wales* (1997) 189 CLR 465 at 494-5 per Brennan CJ, McHugh, Gummow and Kirby JJ; *Cole v Whitfield* (1988) 165 CLR 360 (***Cole***) at 394-5.

15 *McGinty v Western Australia* (1996) 186 CLR 140 at 231-2 per McHugh J; *Lange* at 566-7; *Coleman* at 48, [88] per McHugh J.

16 *Lange* at 561; *Coleman* at 49 [89] per McHugh J.

17 *APLA* at 361 [66] per McHugh J.

18 It does not follow from the fact that there exists a "coherent system of law" (emphasis added) that there is, as Mr Wotton contends at PS [31], but one "underlying and coherent principle" which has

"systemic" level. So understood, it is clear that the implied freedom does not confer "personal rights" upon individuals.[19] Mr Wotton's references to the "rights" and "freedoms" of individuals (PS [40],[43], [63], [78]) are in that regard inapt. So too are those submissions of Queensland, suggesting that the matter may turn, in part, upon whether Mr Wotton did or did not have certain rights (see particularly QS [77] referring to condition (t) of the plaintiff's parole conditions – see also QS [22]-[23] and [27]).

13. It also follows that there are dangers in seeking to borrow from jurisprudence dealing with constitutional provisions conferring rights upon individuals[20] (although, aspects of the reasoning in such authorities may be instructive by way of analogy or illumination). In that regard, Mr Wotton's suggestion that such authorities may be directly relevant to this case (see PS [50], [56] and [63]) is one which requires further examination for the reasons given below.

14. Of course, the question whether the freedom is infringed in a particular case falls to be determined under the two limbs of the test laid down in *Lange*, as modified in *Coleman*. Accordingly, the Commonwealth addresses each of those limbs in the submissions that follow. However, that test is not to be approached in some mechanical fashion – at each stage, the doctrinal matters outlined above inform the interpretation and application of that test.[21]

Part two: Is there a burden on political communication? (First limb of the test)

15. There are two aspects to the first limb of the test. The first requires analysis of the putative "communication about government or political matters" (which has some analogy with the notion of "coverage" used in connection with the United States First Amendment authorities).[22] The second concerns the existence of a relevant "burden" upon communications which may be so characterised.

Coverage

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universal application to "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...". While there is obvious overlap between the jurisprudence concerning electoral disqualification and that concerning the implied freedom (by reason of the fact that both revolve around the "central conceptions of representative government" – see *Roach v Electoral Commissioner* (2007) 223 CLR 162 (***Roach***) at 198 [80] per Gummow, Kirby and Crennan JJ), the principles to be applied remain discrete (for the reasons given by Queensland at QS [10]-[11] and [13]).

19 *Lange* at 560; *Levy* at 625-6 per McHugh J; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 (***Mulholland***) at 223-224 [107]-[108] per McHugh J and at 245 [180] per Gummow and Hayne JJ.

20 *Lange* at 567; *Levy* at 598 per Brennan J; at 622 per McHugh J and at 641 per Kirby J; *Coleman* at 76 [188] per Gummow and Hayne JJ; *Mulholland* at 295 [325] per Callinan J; *APLA* at 350 [27] per Gleeson CJ and Heydon J; 358 [56] and 362 [69] per McHugh J. See also *Roach* at 178-179 [17] per Gleeson CJ and at 224-225 [181] per Heydon J.

21 *Mulholland* at 244-245 [179] per Gummow and Hayne JJ.

22 See A Stone "The Freedom of Political Communication since Lange", in A Stone and G Williams (Eds) *The High Court at the Crossroads* (2000) at 2; and F Schauer *Freedom of Speech: A Philosophical Enquiry* (1982) at 89-91.

16. The implied freedom does not extend to all communications about politics and government. It applies only to communications in relation to government or politics at the Commonwealth level. The restriction upon legislative and executive power is therefore confined to matters that could affect 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".[23] That is the logical consequence of its doctrinal foundation.

17. It follows that a communication about a matter concerning State legislation[24] or the actions of the executive of a State[25] will not, without more, amount to a communication about a government or political matter so as to engage the first limb of the *Lange/Coleman* test. That also flows from the requirement (as an essential element of the first limb of the test) that a law must "effectively burden" a relevant communication.[26] A law which involves "no realistic threat to any freedom of communication about federal political or governmental affairs" will not impose such a burden.[27] There must be a real and not remote connection between the subject matter of the communication and a federal issue (albeit that such a connection may be indirect). The nature of that nexus must be such that it can be said that the issue affects the choices and evaluative processes identified above (federal elections, voting to amend the Constitution or evaluation of Federal ministers and their departments and other Commonwealth agencies).

18. It is of course true that the "increasing integration of social, economic and political matters in Australia"[28] (including through cooperative executive and legislative arrangements between Commonwealth and State and Territory governments[29]) means that communications which principally concern State or local issues may also constitute communications in relation to politics or government at the Commonwealth level in the sense just discussed. The Commonwealth agrees, in that regard, that Mr Wotton's proposed communications (identified in paras 2(d),(e) and 3 of the Special Case) concern federal governmental and political issues and are therefore within the coverage of the implied freedom.

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23 *Lange* at 571.

24 *Levy* at 596 per Brennan CJ and at 626 per McHugh J (although their Honours did not decide the matter on that issue) – cf 609 per Dawson J.

25 Cf *Coleman* per McHugh J at 45 [80].

26 *Lange* at 567 (emphasis added).

27 *Coleman* at [298] per Callinan J.

28 *Lange* at 572.

29 A point made by French CJ in *Hogan v Hinch* (2011) 85 ALJR 398 (***Hogan***) at 414 [48].

19. Whether or not Mr Wotton has a right to vote[30] is immaterial for the purposes of the first limb. Even in the case of a person who has no right to vote, that person's political communications may nevertheless influence "the people" who do make the choice referred to in ss7 and 24 of the Constitution (recalling that the freedom operates at the institutional level identified above and is not directed at the personal rights of particular participants engaged in political communication). That is consistent with the well established proposition that the coverage of the implied freedom extends to "both sides" of communication – that is, to the dissemination and to the reception of information concerning government and political matters.[31] It is also consistent with the acceptance in previous cases that the implied freedom extends to a course of communication involving, as a participant on one side, a corporation[32] or an alien,[33] who would equally not form part of "the people" making electoral choices referred to in ss7 and 24.

20. For similar reasons, save in so far as it might bear on the reality of any burden imposed, whether or not Mr Wotton did or did not have a right to attend public meetings on Palm Island prior to the grant of his parole is immaterial for the purposes of the first limb (cf Queensland's submissions at QS [77] regarding condition (t)). The common law principle is that everybody is free to do anything subject only to restrictions imposed by law.[34] Mr Wotton challenges the validity of one of those restrictions; that there may be others is beside the point.

21. *Mulholland* upon which Queensland relies for that submission (see footnote 97 of Queensland's submissions) concerned a somewhat unusual claim, which was characterised as the assertion of a right to have the name of the DLP placed on the "above the line" ballot paper. In other words, it was a claim that there existed an "obligation to publicise" or a right to compel the Commonwealth executive to make available a particular "means" or medium of communication. The implied freedom, not being concerned with the personal rights of individuals, does not confer upon a person a "positive" right

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30 See for example, s132(1)(a), insofar as it applies to the communications of those who are incarcerated for a period of more than three years (and note ss 4(1A) and 93(8AA) of the *Commonwealth Electoral Act 1918* (Cth)). It may also be (as appears to be the case with Mr Wotton until 19 July 2011 – see Para 31B of the special case) that such a person has no right to vote at federal elections by reason of the fact that they were removed from the electoral roll by operation of an earlier form of s93(8) of the *Commonwealth Electoral Act 1918* (Cth).

31 See *Cunliffe* at 298-9, 301 per Mason CJ; 336 per Deane J, 360 per Dawson J and 379 per Toohey J; *Lange* at 560, 570; *Levy* at 622, 623 per McHugh J; *Mulholland* at 195-196 [28]-[29] per Gleeson CJ, at 219 [95] per McHugh J; *Coleman* at 125-126 [331]-[332] per Heydon J; *APLA* at 195-196 [216] per Gummow J; *Hogan* at 414-415 [49]-[50] per French CJ.

32 See the position of the first plaintiff in *APLA*.

33 See *Cunliffe* at 298-9 per Mason CJ; 328 per Brennan J; 336 per Deane J, 378-9 per Toohey J (cf Dawson at 365).

34 *Lange* at 564, referring to *Attorney-General (UK) v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283.

to have their views disseminated by another person or entity[35] let alone via the ballot paper which plays a unique role in the electoral system.[36] Nor, for similar reasons, could it require that individuals be permitted to enter upon a particular parcel of land owned by another person for the purposes of making such a communication (see *Levy at* 622 per McHugh J upon which Queensland also relies). Mr Wotton does not in these proceedings assert a right of that nature. Outside circumstances of the kind which existed in *Mulholland* an inquiry directed to the precise identification of a pre-existing right is likely to distract from the real issues, given that one is dealing with a constraint upon power which operates at the institutional level.

Effective burden

22. As to the second aspect of the first limb, a law will not effectively burden relevant communications unless, by its operation or practical effect, it directly and not remotely restricts or limits the content of those communications or the time, place, manner or conditions of their occurrence.[37]

23. As is the case in the context of s92,[38] the burden must be meaningful, in the sense of not insubstantial or *de minimis*. That is, it must be a real or an actual burden upon relevant communications: a real impediment; an obstacle in their way. Again, that follows from the formulation of the test in terms of an "effective burden" and from the notion that the freedom does not merely exist for its own sake: the institutions of representative and responsible government hardly require protection from insubstantial burdens.

24. Relevantly to s132(1)(a) and condition (t) of Mr Wotton's parole conditions, a measure imposing a restriction upon communications within the coverage of the implied freedom may impose such a burden, even if there is a discretion to relax that restriction. The very requirement to seek approval constitutes the burden in that it at least restricts or limits, in a meaningful way:

    (a) the time of such a communication (not before approval is given); or

    (b) its conditions of occurrence (conditioned upon the granting of such an approval).

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35 *Cunliffe* per Brennan J at 327; *Lange* at 560; *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086 at 1090 [28] per Hayne J. See also *Haque v Commissioner of Corrective Services* (2008) 216 FLR 271 at 293 [68] per Fullerton J.

36 See L Zines *The High Court and the Constitution* (2008, 5th ed) at 549.

37 *Coleman* at 49 [91] per McHugh J.

38 Eg *Williams v Metropolitan and Export Abbattoirs Board* (1953) 89 CLR 66 at 74 per Kitto J, referring to *Wilcox Mofflin Limited v New South Wales* (1952) 85 CLR 488 at 523 per Dixon CJ, McTiernan and Fullagar JJ. See also *Betfair v Western Australia* (2008) 234 CLR 418 at 483 [131] per Heydon J and *Cole* at 408.

25. Condition (v) of the plaintiff's parole conditions stands in a different position. Condition (v) does not effectively burden relevant communications.

26. While its meaning is opaque, the parties appear to have proceeded on the basis that condition (v) should be understood as a condition that Mr Wotton "receive no direct or indirect payment or benefit from the media 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".[39]

27. If the submission be put that condition (v) effectively burdens relevant communications simply because it restricts or limits the conditions of the occurrence of such a communication (in that it requires that the communication take place gratuitously)[40] that submission is unduly abstract and should be rejected. That such a condition should be regarded as imposing an effective burden, in the sense of imposing a real impediment in the way of such communications, is neither self evident nor disclosed by the facts in the special case.[41] It leaves Mr Wotton entirely free to communicate on any matter he chooses and imposes no restriction upon the time, place or manner of such a communication. All opportunities for communication that would exist without the imposition of that condition continue to exist, unaffected by it.[42]

28. It is difficult to see that the effective operation of responsible and representative government depends upon the entitlement of the citizenry to charge for their contributions to political debate. Indeed, it might be said that such a phenomenon would have a distorting effect upon Australian political discussion and the choice that is to be made at elections.

Conclusions as regards the first limb

29. For the reasons given above, each of s 132 of the CS Act (offence to interview a prisoner); parole condition (t) (not attend a public meeting without approval); parole condition (u)[43] (no interaction with the media); and s200(2) of the CS Act to the extent it authorised the imposition of those conditions, burden political communication in the relevant sense insofar as they apply to

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39 See para 19 of the statement of claim (SCB 11), para 19(d) the defence of the first defendant (SCB 26) and para 19(c) of the defence of the second defendant (SCB 36).

40 The basis on which Mr Wotton says a relevant burden is imposed by condition (v) is unclear – see PS [75].

41 See para [26] of the Special Case (SCB 53). Note also the reference to Mr Wotton obtaining employment with a plumbing and drainage firm at SCB 126, line 28 and the reference to Mr Wotton participating in "interviews in relation to the history of Palm Island and the difficulties faced by the Palm Island community" at SCB 123, line 24 (it not being suggested that participation in such interviews was to be subject to payment).

42 *Mulholland* at 298 [337] per Callinan J and at 305 [356] per Heydon J

43 To the extent that condition remains in issue.

Mr Wotton's proposed communications (identified in paras 2(d),(e) and 3 of the Special Case). However, condition (v) imposes no such burden and the first limb of the *Lange/Coleman* test is not satisfied as regards that measure.

Part three: Is the burden reasonably appropriate and adapted to the achievement of a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government (2nd limb of the test)?

30. For the reasons given concerning the first limb of the *Lange/Coleman* test, the measures impugned by Mr Wotton (other than parole condition (v)) fall to be considered under the second limb of that test. The Commonwealth does not make submissions as to how the question under the second limb should be answered in respect of each of those measures. It addresses a number of matters of general principle concerning: the nature of the test to be applied; the approach to administrative discretions under the second limb; the approach to prisoners and parolees; and the relevance of alternative means of communication.

Nature of the test

31. It is important to bear in mind the distinction, accepted by six members of this Court in *Hogan*,[44] between a law which has a "direct and substantial" effect upon protected communications, as opposed to a law which has only an "incidental or indirect" effect. The burden a law imposes on a communication about government or political matters can more readily be seen to be reasonably appropriate and adapted to a legitimate end in the latter case than in the former.

32. One consequence of that is that a measure which does no more than prescribe when, where or how protected communications can occur, or which affects those communications in the course of or as an aspect of the regulation of some other activity, will more readily satisfy the second limb of the *Lange/Coleman* test than one which directly restricts the content of such communications.[45]

33. Even where the nature of the burden calls for close scrutiny, expressions in some of the authorities[46] of that scrutiny as requiring demonstration that the

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44 At 421-422 [95]. See also *ACTV* at 143 per Mason CJ; *Levy* at 619 per Gaudron J; and *Mulholland* at 200 [40] per Gleeson CJ.

45 *ACTV* at 143 per Mason CJ; at 169 per Deane and Toohey JJ and at 234-5 per McHugh J; *Levy* at 618 per Gaudron J. A further consequence may be that measures which burden communications which have only a remote federal connection (albeit one which is sufficient for the purposes of the first limb) are more readily justified than are those which impose a burden upon communications which have a comparatively stronger nexus to Federal issues. That may be another way of analysing the matters raised by Queensland in footnote 20 of its submissions.

46 *ACTV* at 143 per Mason CJ; *Levy* per Gaudron J at 618.

law is "no more than is reasonably necessary" to achieve a legitimate end should not be understood to mean "unavoidable" or "essential". The question can never rise higher than asking whether there is a compelling justification.[47] Although not entirely clear, it may be that a different approach is suggested by Mr Wotton at PS [52]-[53] and [60].

Administrative discretion to relax a burden

34. Where a prohibition coexists with a discretionary power to relax that prohibition (as in s132(2)(d) of the CS Act and condition (t)), it would obviously be erroneous to analyse the prohibition as if it were absolute. The legislative scheme must be considered as a whole. Equally, the mere existence of such a discretionary power cannot be sufficient to conclude that the scheme is reasonably appropriate and adapted to a legitimate end in the requisite sense. The question of the validity of the scheme must rather depend upon the totality of the circumstances, most relevantly: the nature and extent of the prohibition, the significance of the practical burden imposed by the need to seek an exercise of the discretion for the prohibition to be relaxed, the breadth of the discretion, the availability and practicability of any right of review; and the end said to be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

35. There can be no presumption that a broad discretionary power will render such a scheme invalid. So much is illustrated by *Cunliffe*, where all five members of the Court who considered it rejected the submission that the breadth of the discretion conferred on a Board to determine whether or not a person should be registered (that being a pre-requisite for engaging in the communications said in that case to be protected by the implied freedom) rendered the migration agents registration scheme invalid.[48] Two members of the Court emphasised that there existed avenues of review in both the Administrative Appeals Tribunal and under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and that reasons were able to be sought under s13 of that enactment.[49] The availability of those procedures was said to "ensure that decisions of the Board will conform to constitutional requirements and limitations".[50] That approach is consistent with the analysis

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47 *Mulholland* at 200 [40] per Gleeson CJ. See also *Roach* at 199 [85] per Gummow, Kirby and Crennan JJ; *Rowe* at 245-246 [161]-[163] per Gummow and Bell JJ and at 282 [374] per Crennan J (cf Kiefel J at 292-293 [436]-[444]).

48 See at 302-3 per Mason CJ; at 330-332 per Brennan J; at 342 per Deane J; at 381 per Toohey J and at 397 per McHugh J (his Honour considered that issue in the context of s92, but his analysis appears to be equally applicable to the implied freedom). Mason CJ and Deane J held that certain provisions of the scheme infringed the implied freedom, but the existence of the discretion was not central to each of their Honour's reasoning on those matters.

49 See Mason CJ at 303 and Brennan J at 331.

50 Mason CJ at 303. See similarly, Brennan J at 331-2.

of Brennan J in a s 92 context in *Miller v TCN Channel Nine Pty Limited* (***Miller***).[51]

36. In this respect, Mr Wotton at PS [56] and [78] places too much emphasis on reasoning of Finn J in *Bennett v Human Rights and Equal Opportunity Commission*[52] that was significantly influenced by a United States line of authority establishing a rule in respect of so called "unbridled discretions".[53] The notion underlying those cases is that a statute placing "unbridled discretion" in the hands of a government official infringes the First Amendment guarantee in that it constitutes a "prior restraint" and may result in censorship.[54] Such censorship, as embodied by the scheme of licensing directed to the printing press in 16th and 17th century England, was the principal evil or mischief which the drafters of the First Amendment guarantee of free speech sought to address.[55] That line of cases ought not be imported into analysis of the implied freedom under the Australian Constitution. The implied freedom has a more focussed foundation and "unbridled discretion" in the hands of a government official is impossible.[56] Discretionary powers (even those left "at large") are to be read in the context of the relevant statutory scheme and subject to the Constitution.[57]

37. It may be accepted that the combination of a broad prohibition with a broadly drawn discretion might create the potential for some applications of a particular scheme to result in a burden on political communications which might be regarded as undue if imposed as a discrete legislative measure. However, when analysing such a scheme, it is important that the central inquiry requires analysis of what the impugned law (as a whole) does. The analysis is not directed to how an individual might in a particular case wish to construct a particular communication.[58] A level of generality is required, consistent with the systemic nature of the freedom.[59] A broadly drawn discretion may in fact facilitate such an outcome by allowing any restriction upon communication to be more precisely tailored to the particular context in

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51 (1986) 161 CLR 556 at 613-5.

52 (2003) 134 FCR 334.

53 See, in addition to *Wolf v City of Aberdeen* (1991) 758 F Supp 551 (to which Finn J referred at [103]): *Lovell v. Griffin*, 303 U.S. 444 (1938) at 451-2; *Kunz v. New York*, 340 U.S. 290 (1950) at 293-4; *Freedman v. Maryland*, 380 U.S. 51 (1964) at 58-60; *City of Lakewood v. Plain Dealer Publishing Co,* 486 U.S. 750 (1987) (***Plain Dealer***) at 757-759; *FW/PBS, Inc v. Dallas*, 493 U.S. 215 (1989) (***FW/PBS***) (to which the Court in Wolf referred in footnote 1, which is partially extracted by Finn J in *Bennett*) at 223-230; *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1991) (***Forsyth***) at 129-130; *Thomas v. Chicago Park District,* 534 U.S. 316 at 325 (2002) (***Thomas***) at 320-1.

54 *Plain Dealer* at 763 (Brennan J, for the Court).

55 *Thomas* at 320.

56 See e.g., *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 503-504 [69]-[70] per Kirby and Callinan JJ. See also *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 512-513 [102]-[103].

57 Note s9(1)(a) of the *Acts Interpretation Act 1954* (Qld) and see *Miller* at 613-4. See also, more generally, *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J.

58 *Hinch* at 426 [50] per French CJ, *APLA* at 451 [381] per Hayne J.

59 See *Coleman* per McHugh J at 51-52 [97].

which it is exercised. There is some analogy to be drawn between such a situation and that which applies to an administrative tribunal empowered to determine the existence of facts relevant to a required nexus with a head of Commonwealth legislative power – while such a body cannot be empowered to finally determine those matters,[60] it is within the Commonwealth's legislative power to provide that such decisions bind while they stand.[61] Provided there exists an adequate procedure for challenge to the validity of those decisions, any infringement of the Constitution arising from the exercise of the tribunal's powers may be seen as "necessary and incidental" to the discharge by the tribunal of its constitutionally valid functions.

38. As with other constitutional limitations upon power, the implied freedom "is not directed at making government impossible".[62] The implied freedom (particularly given its provenance) is not inured to the need of the modern state to provide for the realities of administrative decision making, where not all matters relevant to the exercise of statutory discretions are able to be formulated with precision in advance.[63]

Prisoners and parolees

39. In considering the compatibility with the constitutionally prescribed system of representative and responsible government of a restriction which burdens political communications involving those convicted of an offence punishable under the law of the Commonwealth or a State for a period of more than one year, it is necessary to bear in mind that the scheme of the Constitution (particularly ss8, 30, 44(ii) and 51(xxxvi)) contemplates that there will be some degree of "symbolic separation"[64] of those people from the Australian community for the duration of their sentence.

40. That is so even in the case of a parolee. For example, if convicted of an offence punishable under the law of the Commonwealth or a State for a period of more than one year such a person would be "under sentence" for the purposes of s44(ii) of the Constitution and thus incapable of sitting as a member of the Commonwealth Parliament or as a Senator: *Roach* at [51] per Gummow, Crennan and Kirby JJ. Further, although such a person would be eligible to vote under existing law,[65] current authority supports the proposition

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60 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 1 at 579-80 [95] and *Plaintiff S157* at 512 [98].

61 See *O'Toole v Charles David Pty Limited* (1991) 171 CLR 232 at 290 per Deane, Gaudron and McHugh JJ.

62 Adapting what was said by Webb J as regards s92 in *R v Wilkinson; Ex Parte Brazell, Garlick & Co* (1952) 85 CLR 467 at 486.

63 See, e.g., *Miller* at 613.

64 See *Roach* at 176-177 [12] and 179 [18]-[19] per Gleeson CJ. See also *Sauvé v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 (**Sauve**) at 585 [119] to which his Honour referred.

65 Sections 4(1A) and 93(8AA) of the *Commonwealth Electoral Act 1918* (Cth) and s101 of the *Electoral Act 1992* (QLD).

that she or he could be disenfranchised for the duration of their parole, without giving rise to issues of invalidity.[66] The vulnerability of the franchise is important, because it has been said to reflect a citizen's "membership of, and participation in, the political life of the community".[67]

41. Further, in the case of the communications of those detained in a prison, exclusion or separation from the Australian community is a recognised aspect of constitutionally permissible detention in Australia.[68]

42. Of course, even in the case of prisons, that separation is not complete - a point which was made by Gummow, Crennan and Kirby JJ in *Roach* at [84].[69] Prisoners who are citizens and members of the Australian community remain so and also retain an interest in, and duty to, that community and its governance which survives incarceration. However, particularly given that the implied freedom of political communication and the principle identified in *Roach* share (at least in part) a common provenance in ss7 and 24 of the Constitution, those constitutionally recognised notions of exclusion or separation bear upon the issues to be addressed under the second limb.

43. One way in which they do so, is to point to the range of legitimate ends which are compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. By way of analogy, in *Pell v Procunier* (1973) 417 US 817 at 822-3 Stewart J (on behalf of the majority) said the ends which are served by separating or isolating prisoners from broader society include that of deterrence, the premise being that "confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offenses". His Honour further observed that that such isolation would serve a protective function ("quarantining" criminal offenders for a period of time) while the rehabilitative processes took their course. Those various matters (together with that of retribution) correspond to the purposes of criminal punishment identified by this Court in *Veen v R [No 2]*.[70] It is also undoubtedly correct that, consistent with what was said in *Procunier* at 823, the "institutional consideration of internal security within the corrections facilities themselves"

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66 See, noting the relevance of the terms of s44(ii) to that issue, *Roach* at 179-180 [19]-[20] per Gleeson CJ and at 200-201 [90], 204 [102] per Gummow, Crennan and Kirby JJ.

67 *Rowe* at 282 [372] per Crennan J; *Roach* at 174 [7] per Gleeson CJ and at 198-199 [83] per Gummow, Kirby and Crennan J.

68 *Roach* at 176-177 [12] per Gleeson CJ. See also, in the context of "administrative detention", *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584-585 [46] per McHugh J and at [247] per Hayne J (with whom Heydon J agreed) and (although not deciding the point) Callinan J at [289] and *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 71 per McHugh J.

69 See similarly, in Canada, *Sauvé* at [46] (McLachlin CJ, delivering the judgment of McLachlin CJ, Iacobucci, Binnie, Arbour and LeBel JJ).

70 (1988) 164 CLR 465 at 476 per Mason CJ and Brennan, Dawson and Toohey JJ. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [69] per Gummow J and *Thomas v Mowbray* (2007) 233 CLR 307 at [28] per Gleeson CJ and [109] per Gummow and Crennan JJ.

is a legitimate end (in the relevant sense) which is associated with a necessary degree of isolation or separation of prisoners from broader society.[71]

44. The fact that the physical and symbolic separation or isolation associated with those objects is an established element of the Australian constitutional landscape also suggests that the objects identified above (particularly that of security within prisons) are compelling and that the second limb of the *Lange/Coleman* test may be readily satisfied by measures in pursuit of such objects. Again, some analogy may be drawn with the First Amendment jurisprudence, which is characterised by a "broad hands-off attitude towards problems of prison administration"[72] and an "intermediate" form of scrutiny.[73] While that approach is in part informed by notions of judicial deference which may be inappropriate in an Australian constitutional context, it is nevertheless instructive.[74]

Relevance of alternative means of communication

45. Finally, as regards the second limb, it appears that Mr Wotton accepts that it is relevant to consider whether the legislative scheme leaves open alternative means of communication (PS [50]). Mr Wotton discusses that notion by reference to the US authorities dealing with prisoners under the first amendment. That line of authority (including the authorities to which Mr Wotton refers)[75] establishes that alternative avenues of communication may weigh in favour of the validity of the scheme, notwithstanding the fact that the alternatives may involve different means of communication, different immediate participants or be considered by those participants to be less desirable than the restricted modes of communication.[76]

46. That usefully illuminates a more general proposition which flows from the object of the implied freedom identified above. For, if alternative avenues of communication are left open by a particular burden, it may be (depending on the circumstances) that it remains the case that electors are able to make a full and informed choice and that the effective operation of responsible and

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71 The position under the *Canadian Charter of Rights and Freedoms* is broadly consistent with those propositions: *Sauvé* at [47] (McLachlin CJ, delivering the judgment of McLachlin CJ, Iacobucci, Binnie, Arbour and LeBel JJ). See similarly, in the United Kingdom, *Re Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 126-127.

72 *Procunier v. Martinez*, 416 U.S. 396 (1973) at 404, cited in *Shaw v. Murphy*, 532 U.S. 223 (2001) (***Shaw***) at 228. See also *Shaw* at 230; *Turner v. Safley*, 482 U.S. 78 (1986) (***Turner***) at 92; *Bell v Wolfish*, 441 U.S. 520 (1978) (***Bell***) at 547; *Jones v North Carolina Prisoners' Labor Union, Inc*, 433 U.S. 119 (1976) (***Jones***) at 126 and 128.

73 *Turner* at 84, 89; and *Shaw* at 232. Cf *Sauvé* at [12]-[13].

74 See, referring to *Sauvé*, for a similarly limited purpose, Gleeson CJ in *Roach* at 178-179 [17]-[19].

75 *Procunier* and *Saxbe v Washington Post Co* 417 US 843 (1974).

76 *Thornburgh v. Abbott*, 490 U.S. 401 (2002) at 417-418; *Turner* at 92; *Bell* at 552; *Jones* at 130.

representative government and the procedure provided for by s128 is left unimpaired.

47. Another way of analysing the relevance of an alternative avenue of communication applying established principles from the implied freedom authorities is as follows: if a measure leaves open the possibility of communicating the same content via a different medium, it may (depending upon the circumstances and the extent of the restriction) be seen to be no more than a regulation of the manner or form of the particular communication. As such, it is more readily justified than a law which leaves open no alternative avenues of communication (see above). Either way, the Commonwealth submits that the proposition which Mr Wotton seemingly accepts at PS [50] is correct, and (properly analysed) is not limited to the particular context of communications involving prisoners.

Part four: Freedom of assembly and association?

48. There is no free-standing freedom of association or of assembly implied by the Constitution.[77] Such freedom to associate or assemble as exists is a corollary of the operation of the implied freedom of political communication. The same test of infringement and validity applies.[78] Mr Wotton's argument that condition (t) infringes such freedoms (PS [77]) therefore adds nothing to the argument that that measure infringes the implied freedom of political communication.[79]

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77 See, as regards the asserted freedom of association, *Wainohu v New South Wales* [2011] HCA 24 (***Wainohu***) at [112] per Gummow, Hayne, Crennan and Bell JJ and see also at [72] per French CJ and Kiefel J, apparently agreeing; *Mulholland* at 234 [148] per Gummow and Hayne JJ; 297 [334]-[335] per Callinan J.

78 *Wainohu* at [112] per Gummow, Hayne, Crennan and Bell JJ; *Mulholland* at 234 [148] per Gummow and Hayne JJ.

79 *Kruger* at 45 per Brennan CJ; at 68-69 per Dawson J; at 92 per Toohey J (dissenting); at 126-128 per Gaudron J (dissenting). Compare at 142 per McHugh J and at 157 per Gummow J.