HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

LEX PATRICK WOTTON PLAINTIFF

AND

STATE OF QUEENSLAND & ANOR DEFENDANTS

Wotton v Queensland [2012] HCA 2
29 February 2012
S314/2010

ORDER

Order that the questions stated in the Further Amended Special Case filed on 15 August 2011 be answered as follows:

Question 1: *(a)* *Is s 132(1)(a) of the* Corrective Services Act *2006 (Q) invalid because it impermissibly burdens the freedom of communication of government and political matters, contrary to the Commonwealth Constitution?*

(b) *Is s 132(1)(a) of the* Corrective Services Act *2006 (Q) to be construed so as not to apply to a prisoner on parole?*

Answer: *Section 132(1)(a) must be read together with s 132(2)(d) and, so read, in its application to prisoners on parole it is not invalid for impermissibly burdening the freedom of communication about government and political matters.*

Questions 2 and 3 should be answered together.

Question 2: *Is s 200(2) of the* Corrective Services Act *2006 (Q) invalid to the extent it authorizes the imposition of the conditions (t) and (v) of the plaintiff's Parole Order?*

Question 3: *If s 200(2) of the* Corrective Services Act *2006 (Q) is construed so that the power it confers must be exercised in*

conformity with the freedom of communication with the government and political matters provided for under the Commonwealth Constitution, are conditions (t) and (v) of the plaintiff's Parole Order invalid because they impermissibly burden that freedom?

Answer: *Section 200(2), in its application to prisoners on parole, is not invalid for impermissibly burdening the freedom of communication about government and political matters and the question of the validity of conditions (t) and (v) of the plaintiff's Parole Order does not arise in this proceeding.*

Question 4: *Who should pay the costs of the special case?*

Answer: *Each party should bear its own costs.*

Representation

R Merkel QC with A D Pound and K L Walker for the plaintiff (instructed by Levitt Robinson Solicitors)

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar and A D Scott for the first defendant (instructed by Crown Solicitor (Qld))

Submitting appearance for the second defendant

Interveners

S J Gageler SC, Solicitor-General of the Commonwealth with C L Lenehan intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with K M Richardson intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

S G E McLeish SC, Solicitor-General for the State of Victoria with A M Dinelli intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Wotton v Queensland

Constitutional law (Cth) – Operation and effect of Constitution – Interpretation – Implied freedom of political communication about government or political matters – System of representative and responsible government – Validity of ss 132(1)(a) and 200(2) of *Corrective Services Act* 2006 (Q) – Whether statute complies with limitations on legislative power of State – Whether the impugned law effectively burdens freedom of communicating about government and political matters – Whether provisions reasonably appropriate and adapted to serve legitimate end in manner compatible with maintenance of representative and responsible government.

Administrative law – Relationship between *Judicial Review Act* 1991 (Q) and determination of issues of legislative validity – Whether validity of particular conditions imposed pursuant to s 200(2) of *Corrective Services Act* 2006 (Q) question of constitutional law or of compliance by repository of power with statutory limits.

Words and phrases – "constitutionally prescribed system of representative and responsible government", "effectively burdens freedom of communication", "impermissibly burdening", "implied freedoms", "political communication".

Acts Interpretation Act 1954 (Q), s 9(1).
Corrective Services Act 2006 (Q), ss 132(1)(a), 132(2)(d), 200(2).
Criminal Code (Q), s 7.
Judicial Review Act 1991 (Q), ss 20-40.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN AND BELL JJ. The plaintiff is an Aboriginal person who was born in 1967 on Palm Island which is located in the Coral Sea, north of Townsville in the State of Queensland. (That State is the first defendant.) The plaintiff has resided there for a substantial part of his life. He served from 1997 to 2000, and for some eight months in 2002-2003, as a councillor on the Palm Island Aboriginal Shire Council, which is established under the local government legislation of Queensland[1].

2 There is no dispute that the plaintiff, as a person under sentence but with the benefit of a parole order, has the necessary standing to maintain this action in the original jurisdiction of this Court. However, the plaintiff's interest does not go beyond that status to support a challenge to the operation of the legislation with respect to prisoners who are not released on parole.

3 There was before the Full Court a Further Amended Special Case filed 15 August 2011. The second defendant ("the Parole Board") entered a submitting appearance. The opposition to the plaintiff's submissions was presented by the first defendant. There were interventions by the Commonwealth, New South Wales and Victoria.

4 Some account of the plaintiff's circumstances may now be given. On 26 November 2004, there was a riot on Palm Island. This followed the death of an Aboriginal man, Mr Mulrunji Doomadgee, in police custody. Up to 300 persons were involved and there was significant damage to the Palm Island infrastructure. The plaintiff participated in that riot. At a jury trial in the District Court of Queensland, he was convicted of rioting causing destruction contrary to ss 61 and 65 of the *Criminal Code* (Q) ("the Code")[2]. On 7 November 2008, Shanahan DCJ imposed a head sentence of six years imprisonment and set a parole eligibility date after two years served.

5 In his comprehensive sentencing remarks, his Honour said:

> "The history and disadvantages of Palm Island is not something for which successive administrations of this State and the Commonwealth could in any way be proud. It is a community that faces a number of

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1 *Local Government Act* 2009 (Q).

2 Section 65 was omitted and a different provision was substituted for s 61 by s 11 of the *Criminal Code and Other Acts Amendment Act* 2008 (Q).

> serious problems and has for a number of years. Having said that there are a number of members of that community, a large number of members, who are working towards improving that community. They should be given due recognition and support."

Shanahan DCJ went on to describe the plaintiff as having played a lead role in the unacceptable acts of violence which took place over a period of three hours. However, his Honour added:

> "You've been involved in the Palm Island Men's Group. You've been involved with a program about alcohol and drug rehabilitation. You've made serious efforts to assist the youth of your community in relation to suicide problems and in recent years those efforts have continued. Many of the references speak highly of you and the four years that have passed since this offence enable the Court to see, in my view, that you are making significant steps to rehabilitate yourself in terms of returning to your own community and the wider community, something that was taken from it on this day."

6 The Parole Board is a regional parole board established pursuant to Ch 5, Pt 2, Div 2 (ss 230-240) of the *Corrective Services Act* 2006 (Q) ("the Corrective Services Act"). One of its functions is to decide applications for parole orders under Ch 5, Pt 1 (ss 176-215) of that statute. A prisoner may apply for a parole order if the prisoner has reached the applicable parole eligibility date (s 180(1)). Sections 187-194 contain detailed provisions for the hearing and making of decisions upon applications. A prisoner released on parole is to be taken as still under sentence (s 214)[3], and to remain in the custody of the chief executive until unconditionally released (s 7(4), Sched 4).

7 Subject to any direction of the Minister, the chief executive is responsible for matters including the safe custody and welfare of all prisoners and the supervision of offenders in the community (s 263(1)). However, in making decisions about particular individuals, the chief executive "must act independently, impartially and fairly" and "is not subject to direction by any Minister": *Public Service Act* 2008 (Q), s 100(2).

8 The purpose of the Corrective Services Act, stated in s 3(1), "is community safety and crime prevention through the humane containment,

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3 See further *Power v The Queen* (1974) 131 CLR 623 at 628-629; [1974] HCA 26.

supervision and rehabilitation of offenders". The statute also is said to recognise pursuant to s 3(2) that "basic human entitlements" of offenders should be safeguarded, "other than those that are necessarily diminished because of imprisonment or another court sentence".

9 It is important for the present case to note that s 9(1) of the *Acts Interpretation Act* 1954 (Q) ("the Interpretation Act") requires that the Corrective Services Act be interpreted to the full extent of, but not to exceed, the legislative power of the State legislature. The Corrective Services Act confers various discretionary powers which are expressed in broad terms. However, in accordance with general principles[4], these powers must be understood with regard to the subject matter, scope and purpose of the statute and must be exercised on application. Further, the discretionary powers must be exercised in accordance with any applicable law, including the Constitution itself.

10 In that latter regard, the following passage from the reasons of Brennan J in *Miller v TCN Channel Nine Pty Ltd*[5], a case concerning s 92 of the Constitution, is on point. His Honour said:

> "Of necessity, the area of the discretion must be large: the nature of the subject to be regulated requires that the discretion be wide. But it is not so wide that considerations foreign to the purpose for which the discretion is conferred can be taken into account. Nor can the discretion be exercised to discriminate against interstate trade, commerce and intercourse. That is because a discretion must be exercised by the repository of a power in accordance with any applicable law, including s 92, and, in the absence of a contrary indication, 'wide general words conferring executive and administrative powers should be read as subject to s 92': per Dixon, McTiernan and Fullagar JJ in *Wilcox Mofflin Ltd v New South Wales*[6]. In

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4 *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49; [1979] HCA 62.

5 (1986) 161 CLR 556 at 613-614; [1986] HCA 60. See also *McGinty v Western Australia* (1996) 186 CLR 140 at 288-289; [1996] HCA 48; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 157; [1997] HCA 27; *AMS v AIF* (1999) 199 CLR 160 at 176 [37], 227 [201]; [1999] HCA 26; *Minister for Immigration v SZMDS* (2010) 240 CLR 611 at 621 [25]; [2010] HCA 16; *Wainohu v New South Wales* (2011) 243 CLR 181 at 231 [113]; [2011] HCA 24.

6 (1952) 85 CLR 488 at 522; [1952] HCA 17.

Inglis v Moore [No 2][7] St John J and I stated the relevant rule of construction:

> '… where a discretion, though granted in general terms, can lawfully be exercised only if certain limits are observed, the grant of the discretionary power is construed as confining the exercise of the discretion within those limits. If the exercise of the discretion so qualified lies within the constitutional power and is judicially examinable, the provision conferring the discretion is valid.'"

The reference to judicial examination of the exercise of the discretion in question is significant for the present case, as will appear. It is sufficient immediately to note that the notion of "unbridled discretion" has no place in the Australian universe of discourse[8].

11 Section 200(3) of the Corrective Services Act requires compliance with the conditions included in a parole order; the chief executive may suspend a parole order upon the reasonable belief that there has been non-compliance (s 201(2)(a)).

12 Section 200(1), in pars (a)-(f), specifies conditions which must be included in a parole order. There is no challenge to the validity of that subsection. However, the plaintiff challenges the validity of s 200(2). The subsection (with the examples given[9]) reads:

> "A parole order granted by a parole board may also contain conditions the board reasonably considers necessary –
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> (a) to ensure the prisoner's good conduct; or
>
> (b) to stop the prisoner committing an offence.
>
> *Examples –*

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7 (1979) 46 FLR 470 at 476.

8 Cf *Bennett v Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 at 359-360; *Thomas v Chicago Park District* 534 US 316 at 323 (2002).

9 These are parts of the statute but are not exhaustive: Interpretation Act, s 14(3).

- 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".

13 If asked to do so, a parole board is required by Pt 4 (ss 31-40) of the *Judicial Review Act* 1991 (Q) ("the Judicial Review Act") to provide a statement of reasons, and Pt 3 (ss 20-30), dealing with statutory orders for review by the Supreme Court, may then be engaged. The grounds of review include error of law (whether or not this appears on the record of the decision) (s 20(2)(f)), and that the decision was otherwise contrary to law (s 20(2)(i)). The presence of the Judicial Review Act makes it unnecessary to consider the jurisdiction of the traditional kind which the Supreme Court has in public law matters.

14 The plaintiff applied on 17 February 2010 to the Parole Board. The written submissions to the Parole Board on behalf of the plaintiff (in pars (8)-(13)) included the following:

> "In our submission the safety of the community, both upon Palm Island and the broader Australian community is not threatened in any way by the release of Mr Wotton upon parole.
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> Firstly, since the events of 26 November 2004, media and political interest in Palm Island has increased significantly. There have been two coronial investigations into Mulrunji's death, the first of which recommended significant steps be taken to reduce the possibility of a further death in custody and revised procedures to ensure the integrity and impartiality of future police investigations into any deaths in custody. The Crime and Misconduct Commission has conducted a scathing review of the police investigation which not only validated Mr Wotton's concern with that investigation, but has provided a public validation of the capacity of the Queensland government to oversee police investigations into deaths in custody.
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> Secondly, the increased media exposure in relation to Palm Island has meant that the previously unknown Palm Island community, including Mr Wotton, now have access to effective avenues for the investigation of complaints of impropriety in police behaviour in the community.
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> In those circumstances, the unique circumstances that gave rise to the offence in this case are unlikely to occur again.

Moreover, Mr Wotton has committed himself since his arrest 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, including:

(a) Participating in interviews in relation to the history of Palm Island and the difficulties faced by the Palm Island community;

(b) Co-authoring chapters in academic texts relating to Palm Island;

(c) Giving speeches at universities and public events;

(d) Accepted a role as a community consultant to the Black and White Justice Foundation, a not-for-profit foundation which provides the subsidisation of legal services to Aboriginal clients; and

(e) Filing, along with his wife and mother, a complaint with [the Human Rights and Equal Opportunity Commission], utilising legal avenues to address concerns of the Palm Island community with the Queensland Police service.

Not only has Mr Wotton accepted the need to seek redress for perceived injustices through lawful means, these means are now available to him and are being utilised by him."

15 On 19 July 2010, the Parole Board directed that the plaintiff be granted and released on parole for a period until 18 July 2014 ("the Parole Order"), unless otherwise determined by the Parole Board. The release on parole was upon 22 conditions identified as (a)-(v). Conditions (a)-(g) largely reflected the mandatory requirements of s 200(1) of the Corrective Services Act. Condition (g) is significant. It imposed the condition that the plaintiff "not commit an offence".

16 The plaintiff objected to conditions (t)-(v). These were to be supported as an exercise of the power conferred by s 200(2) rather than by s 200(1). They required that the plaintiff:

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

(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."

17 Conditions (u) and (v) are to be read with an appreciation of the conduct proscribed by par (a) of s 132(1) of the Corrective Services Act and s 7 of the Code. Section 7 of the Code deems to have taken part in the commission of an offence a person who aids another in committing the offence, counsels or procures it, or does any act for the purpose of enabling or aiding another to commit it. Section 132 of the Corrective Services Act appears in Ch 3, Pt 3, headed "General offences". Paragraph (a) of s 132(1) makes it an offence for a person to "interview a prisoner, or obtain a written or recorded statement from a prisoner". The term "prisoner" is defined in Sched 4 to include a person, such as the plaintiff, who is released on parole. However, the offence is not committed by a person who has the written approval of the chief executive to carry out the activity in question (s 132(2)(d))[10]. If an offence under s 132(1)(a) were committed, and the plaintiff himself was so involved as to attract liability under s 7 of the Code, then he would be in breach of condition (g) of the Parole Order. This requires him not to commit an offence.

18 Something more should be said respecting par (d) of s 132(2). It states that:

> "A person does not commit an offence against [s 132(1)] if the person is ... a person who has the chief executive's written approval to carry out the activity mentioned in [s 132(1)]."

The Queensland Solicitor-General correctly submitted that to prosecute an offence against par (a) of s 132(1), the prosecution would need to prove both the elements under par (a) of s 132(1) and the absence of any exculpation under s 132(2)[11]. Further, the plaintiff correctly accepted that the reference in par (d) of s 132(2) to the written approval of the chief executive is a provision which impliedly confers authority on the chief executive to grant the approval and such

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10 The offence also is not committed if the activity in question is that of the prisoner's lawyer, an employee of a law enforcement agency or the ombudsman (pars (a), (b), (c) of s 132(2)).

11 *Griffiths v The Queen* (1994) 69 ALJR 77; 125 ALR 545; [1994] HCA 55.

a decision is "made ... under an enactment" within the definition of "decision to which the Act applies" in s 4 of the Judicial Review Act[12].

19 On the Special Case, the plaintiff challenges the validity of s 132(1)(a) of the Corrective Services Act in its application to prisoners on parole on the ground that it impermissibly burdened freedom of communication on governmental and political matters. However, as is emphasised below, the plaintiff's case is weakened by a focus upon s 132(1)(a), without sufficient attention to its integration with par (d) of s 132(2). Initially, the plaintiff also challenged the validity of s 200(2) to the extent that it authorises the inclusion in the Parole Order of conditions (t), (u) and (v), and, if that challenge failed, the validity of those conditions as impermissibly burdening that freedom. However, on 22 July 2011, the Parole Board amended the Parole Order by deleting condition (u) and the Special Case was amended accordingly.

20 The starting point for consideration of the constitutional principles which the plaintiff seeks to engage is supplied by the statement in the joint reasons in *Aid/Watch Incorporated v Federal Commissioner of Taxation*[13]:

> "The provisions of the Constitution mandate a system of representative and responsible government[14] with a universal adult franchise[15], and s 128 establishes a system for amendment of the Constitution in which the proposed law to effect the amendment is to be submitted to the electors. Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is 'an indispensable incident' of that constitutional system[16]." (emphasis omitted)

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12 See *Griffith University v Tang* (2005) 221 CLR 99 at 121-122 [60]; [2005] HCA 7.

13 (2010) 241 CLR 539 at 556 [44]; [2010] HCA 42.

14 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-559; [1997] HCA 25.

15 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 174-175 [7]-[8], 186-188 [44]-[49]; [2007] HCA 43.

16 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560.

Their Honours added[17] that the system of law which applies in Australia thus postulates, for its operation, communication in the nature of agitation for legislative and political changes. This freedom of communication operates both upon the formulation of common law principles and as a restriction on the legislative powers of the Commonwealth, the States and the Territories[18].

21 As remarked earlier in these reasons, with particular reference to what was said by Brennan J in *Miller*, while the exercise of legislative power may involve the conferral of authority upon an administrative body such as the Parole Board, the conferral by statute of a power or discretion upon such a body will be constrained by the constitutional restrictions upon the legislative power, with the result that in this particular respect the administrative body must not act *ultra vires*.

22 The Commonwealth submitted that: (i) where a putative burden on political communication has its source in statute, the issue presented is one of a limitation upon legislative power; (ii) whether a particular application of the statute, by the exercise or refusal to exercise a power or discretion conferred by the statute, is valid is not a question of constitutional law; (iii) rather, the question is whether the repository of the power has complied with the statutory limits; (iv) if, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, any complaint respecting the exercise of power thereunder in a given case, such as that in this litigation concerning the conditions attached to the Parole Order, does not raise a constitutional question, as distinct from a question of the exercise of statutory power. These submissions, which were supported by Victoria, should be accepted.

23 The Commonwealth further, and correctly, developed these points by emphasising in oral submissions that if the power or discretion be susceptible of exercise in accordance with the constitutional restriction upon legislative power, then the legislation conferring that power or discretion is effective in those terms. No question arises of severance or reading down of the legislation. There then

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17 *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 556 [45].

18 *Coleman v Power* (2004) 220 CLR 1 at 77 [195]; [2004] HCA 39.

would be no occasion presented for application of the principle explained as follows by Dixon J in *Shrimpton v The Commonwealth*[19]:

> "[F]inality, in the sense of complete freedom from legal control, is a quality which cannot, I think, be given under our Constitution to a discretion, if, as would be the case, it is capable of being exercised for purposes, or given an operation, which would or might go outside the power from which the law or regulation conferring the discretion derives its force. An exercise of a power, whether legislative or administrative, cannot rise higher than its source, viz., the power itself, and an attempt under the power to make unexaminable what is done in ostensible pursuance of a further delegation of authority must, to that extent, fail."

24 Accordingly, this litigation turns upon the restraint imposed by the Constitution upon the legislative power of the Queensland legislature. It is no part of this dispute to canvass any question whether conditions (t) and (v) of the Parole Order should not have been included. That would be for agitation in other proceedings, in particular, proceedings under the Judicial Review Act.

25 Two questions ("the *Lange*[20] questions") arise with respect to each statutory provision which the plaintiff puts in contention. The terms of the questions are settled. They were recently stated, and applied, by the whole Court in *Hogan v Hinch*[21] as follows. The first question asks whether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If this is answered affirmatively, the second question asks whether the law nevertheless is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government described in the passage from *Aid/Watch* set out above.

26 A question arises as to what is the relevant field of communication respecting government or political matters upon which the plaintiff relies. This may be identified as follows. The executive governments of the Commonwealth and all the States include Ministers with responsibilities for Aboriginal and

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19 (1945) 69 CLR 613 at 629-630; [1945] HCA 4.

20 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

21 (2011) 243 CLR 506 at 542 [47] per French CJ, 555-556 [94]-[97] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; [2011] HCA 4.

Indigenous affairs, including the administration of various statutes enacted in exercise of concurrent legislative powers. The public discussion of matters relating to Aboriginal and Indigenous affairs, including perceived or alleged injustices, involves communication at a national rather than purely State level about government and political matters, in the sense of the first *Lange* question. The submissions, to this effect, by the Commonwealth should be accepted.

27 Further, in Australia, law enforcement and policing depends both practically and structurally (through bodies such as the Australian Crime Commission) upon close co-operation of federal, State and Territory police services[22]. The interaction between those services and Aboriginal persons is a matter of national rather than purely local political concern.

28 The relevant burden imposed by par (a) of s 132(1) is the obligation to seek and obtain under par (d) of s 132(2) the written approval of the chief executive to interview a parolee, such as the plaintiff, outside a corrective services facility. The relevant burden imposed by s 200(2) is the observance of conditions the Parole Board reasonably considers necessary to ensure good conduct of the parolee and to stop the parolee committing an offence.

29 The Commonwealth correctly submits that the issues between the parties are appropriately considered on the assumption that with respect to the challenged legislation, the first *Lange* question may be answered favourably to the plaintiff, so that the second *Lange* question arises for decision.

30 In answering the second *Lange* question, there is a distinction, recently affirmed in *Hogan v Hinch*[23], between laws which, as they arise in the present case, incidentally restrict political communication, and laws which prohibit or regulate communications which are inherently political or a necessary ingredient of political communication. The burden upon communication is more readily seen to satisfy the second *Lange* question if the law is of the former rather than the latter description.

31 With respect to s 132(1)(a), as qualified by the discretion conferred by s 132(2)(d), the legitimate end, for the second *Lange* question, is sufficiently identified by the statutory purposes set out in s 3(1). This expresses the need to

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22 *Coleman v Power* (2004) 220 CLR 1 at 45 [80], 78 [197].

23 (2011) 243 CLR 506 at 555-556 [95]-[99].

consider community safety and crime prevention through humane containment, supervision and rehabilitation of offenders. Further, it would be incumbent upon the chief executive in exercising the power of approval under s 132(2)(d) to have regard to the restraint upon legislative power in the sense explained by Brennan J in *Miller*, and the reasoned decision of the chief executive is judicially examinable under the system established by the Judicial Review Act. However, no application for approval by the chief executive has been made by or with respect to the plaintiff. Rather, the plaintiff has sought to isolate s 132(1)(a), without regard to the power of approval which governs its operation and which is an element of the burden imposed upon political communication.

32 With respect to s 200(2), the legitimate end, for the second *Lange* question, is supplied by the text of the subsection, namely the imposition of conditions the Parole Board considers reasonably necessary to ensure good conduct and to stop the parolee committing an offence. The phrase "reasonably considers necessary" in s 200(2) is akin to the phrase "reasonably appropriate and adapted" for the second *Lange* question. Again, it would be incumbent upon the Parole Board to have regard to what was constitutionally permissible, and the reasoned decision of the Parole Board is judicially examinable under the Judicial Review Act.

33 The result is that both s 132(1)(a), as qualified by s 132(2)(d), and s 200(2), comply with the constitutional limitation upon the legislative power of the State. With respect to conditions (t) and (v) of the Parole Order, their validity then depends on whether, in implementing them, the Parole Board exceeded the authority conferred upon it by the valid statutory provision made by s 200(2). That would be a question for determination by the Supreme Court of Queensland on an application made under the Judicial Review Act. Again, the Special Case discloses no request by the plaintiff for approval to attend any public meeting on Palm Island, nor any negotiation or dealing on the plaintiff's behalf with the media for the receipt of payments or benefits.

34 The amended questions presented by the Special Case ask whether s 132(1)(a) of the Corrective Services Act is to be construed so as not to apply to a prisoner on parole (Qu 1(b)). If the provision is to be construed so as to apply to a prisoner on parole, it is then asked whether s 132(1)(a) of the Corrective Services Act is invalid because it impermissibly burdens the freedom of communication about government or political matters (Qu 1(a)).

35 Question 2 asks whether s 200(2) of the Corrective Services Act is invalid to the extent it authorises the imposition of conditions (t) and (v) of the Parole Order. Question 3 posits a construction of s 200(2) requiring the exercise of the

power it confers in conformity with the freedom of communication about government or political matters; it then asks whether conditions (t) and (v) of the Parole Order are invalid because they impermissibly burden that freedom.

36 Question 1 should be answered compendiously as follows:

> "Section 132(1)(a) must be read together with s 132(2)(d) and, so read, in its application to prisoners on parole it is not invalid for impermissibly burdening the freedom of communication about government and political matters."

37 Questions 2 and 3 should be considered together and answered:

> "Section 200(2), in its application to prisoners on parole, is not invalid for impermissibly burdening the freedom of communication about government and political matters and the question of the validity of conditions (t) and (v) of the plaintiff's Parole Order does not arise in this proceeding."

38 In the circumstances, Qu 4, which is addressed to the payment of the costs of the Special Case, should be answered: "Each party should bear its own costs".

39 HEYDON J. The plaintiff seeks to invalidate legislation by relying on the implied freedom of political communication stated in *Lange v Australian Broadcasting Corporation*[24]. The provenance of that freedom may be traced to at least three judgments of Murphy J delivered in the years 1977-1986 in which he was in isolated dissent[25]. The last was delivered on the day he died. The statements of Murphy J were one unacknowledged source of two decisions delivered in 1992, 20 years ago[26], and their successors[27]. That provenance is disputed. In *Australian Capital Television Pty Ltd v The Commonwealth*[28] Mason CJ said that statements in the majority judgments in *Miller v TCN Channel Nine Pty Ltd* that it was not possible to imply a separate guarantee of freedom of communication "were directed to the rejection of an argument for the implication of a guarantee of freedom of *interstate* communication, that is, a guarantee operating in the very area provided for by s 92" (emphasis in original). Murphy J's doctrine in that case was not limited to interstate communications, for it extended to "freedom of speech and other communications … not only between the States and the States and the Territories but *in and between every part of the Commonwealth*" (emphasis added)[29]. The sources from which Murphy J derived the implied freedom of which he spoke did not relate entirely to freedom of interstate communication. In *McGraw-Hinds (Aust) Pty Ltd v Smith*[30] he placed the source partly in "the nature of our society". And what was

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24 (1997) 189 CLR 520; [1997] HCA 25.

25 *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth* (1977) 139 CLR 54 at 88; [1977] HCA 71; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 670; [1979] HCA 19; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 581; [1986] HCA 60. A fourth case is sometimes cited: *Buck v Bavone* (1976) 135 CLR 110 at 132-138; [1986] HCA 24. But in it Murphy J did not specifically deal with any implied constitutional guarantee of free speech. The contrary is, however, asserted in *Miller v TCN Channel Nine Pty Ltd* at 561 (argument for defendant), 569 (per Gibbs CJ) and 579 (per Mason J).

26 *Nationwide News Pty Ltd v* Wills (1992) 177 CLR 1; [1992] HCA 46; *Australian Capital Television Pty Ltd v The* Commonwealth (1992) 177 CLR 106; [1992] HCA 45. The birthday is celebrated in the contents of vol 30, No 1, of the *University of Queensland Law Journal*.

27 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; [1994] HCA 46; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; [1994] HCA 45; *Cunliffe v The Commonwealth* (1994) 182 CLR 272; [1994] HCA 44.

28 (1992) 177 CLR 106 at 133 n 82.

29 (1986) 161 CLR 556 at 581-582.

30 (1979) 144 CLR 633 at 670.

said in *Lange's* case is narrower than what was said in its somewhat divided predecessors. Its source was also narrower: it was ascribed not to the principles of "representative and responsible government" in general, but to particular constitutional provisions relating to representative and responsible government.

40 Unlike its predecessors from 1992, or 1977-1986, onwards, the judgment in *Lange's* case was unanimous and joint. But unlike Renan's conception of a nation, it has not been the subject of a *plébiscite de tous les jours*. Parties in *Lange* litigation have not given the Court even occasional plebiscitary opportunities because in the 15 years since *Lange's* case was decided there has been no fundamental challenge to its correctness. It must therefore be applied, at least until the unlikely event of a successful challenge to its correctness, or until, perhaps, a particular exception to the stare decisis doctrine in constitutional cases operates[31]. *Lange's* case required two questions to be asked. The first is: "does the [impugned] law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?" If the answer is affirmative, the second question arises: "is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 [of the Constitution]?"[32]

41 Although the *Lange* principles must be applied, they are fluid. They have been subject to change, or the possibility of change, since they were enunciated. For example, first Kirby J[33], then McHugh J, Gummow J and Hayne J[34], and now all members of the Court have indicated that the words "the fulfilment of" in the second limb should be replaced by "in a manner"[35]. These indications were given in cases the outcome of which does not appear to have been affected by the change of wording. A very great deal of attention has been given to the second limb, which will be called "the second *Lange* limb". But little has been given to what will be called "the first *Lange* limb". Indeed it is often conceded or assumed by those defending validity that the party challenging validity has satisfied the first limb. It happened in *Coleman v Power*[36]. And to a large extent

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31 See *Coleman v Power* (2004) 220 CLR 1 at 109 [289] and 114 [301]; [2004] HCA 39.

32 (1997) 189 CLR 520 at 567.

33 *Levy v Victoria* (1997) 189 CLR 579 at 646; [1997] HCA 31.

34 *Coleman v Power* (2004) 220 CLR 1 at 51 [95], 78 [196] and 82 [211].

35 *Hogan v Hinch* (2011) 243 CLR 506 at 542 [47] and 556 [97]; [2011] HCA 4.

36 (2004) 220 CLR 1 at 119-120 [317].

it happened in the present proceedings. One intervener expressly conceded that the impugned legislation, except in one respect, "directly or indirectly" imposed a burden on the relevant freedom. The others silently agreed that the first *Lange* limb was either largely or wholly satisfied. This common practice of concession or assumption that the first *Lange* limb is met tends to generate an insidious belief that it will always be met. But in this case the first defendant made no such concession. It is therefore necessary to ask whether the interveners' concessions were sound.

42 What "burdens" fall within the first *Lange* limb? It is convenient to begin with a statement by McHugh J, a party to the *Lange* judgment and a member of the majority in *Coleman v Power*. In the latter case McHugh J said[37]:

> "In all but exceptional cases, a law will not burden [communications on political or governmental matters] 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."

The words "directly and not remotely" invalidate the concession quoted in the preceding paragraph so far as the concession extended to "indirectly" placed burdens.

43 Legislation which, though not constitutional in character, seeks, like the *Lange* principles, to vindicate freedom of expression, though for different purposes, illustrates the problems raised by the first *Lange* limb. Section 16(2) of the *Human Rights Act* 2004 (ACT) provides:

> "Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her."

Section 37 of that Act requires the Attorney-General to prepare a "compatibility statement" about each Bill presented to the Legislative Assembly by a Minister. The compatibility statement must say whether, in the Attorney-General's opinion, the Bill is consistent with human rights, and, if it is not consistent, how it is not consistent. A relevant provision in that regard is s 28(1). It provides that human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

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37 (2004) 220 CLR 1 at 49 [91].

44 The Revised Explanatory Statement for the Evidence Bill 2011 (ACT) repeatedly refers to s 16 of the *Human Rights Act*. It does so in discussing the terms of cl 17(2) of the Evidence Bill 2011 (now s 17(2) of the *Evidence Act* 2011 (ACT)): "A defendant is not competent to give evidence as a witness for the prosecution." The Revised Explanatory Statement says[38]:

> "The clause engages the right to freedom of expression under section 16 of the *Human Rights Act 2004*. However, clause 17 of the Bill constitutes a lawful restriction on the freedom of expression under section 16 of the *Human Rights Act 2004* as it acts as an important essential safeguard for the defendant to have a fair trial (section 21 Human Rights Act)."

These are strange remarks about a provision which prevents the prosecution from calling defendants as witnesses in the prosecution case, while leaving defendants free to give evidence in the defence case if they wish to do so. The provision does not prevent the defendant from exercising a right to freedom of expression, if that is what testifying in a desperate struggle to preserve one's liberty involves. The calling by one party of the opposing party as a witness is not well characterised as an exercise in freedom of expression by the first party.

45 Similarly, the Revised Explanatory Statement, on the theory that the s 16(2) right to freedom of expression includes "the right to say nothing or the right not to say certain things"[39], examines cl 12 of the Evidence Bill 2011 (now s 12 of the *Evidence Act* 2011) in the light of s 16 of the *Human Rights Act*. Subject to other provisions, s 12 renders all competent witnesses compellable. This is said to be a "restriction on the right to freedom of expression" because "a witness may be compelled to answer certain questions or express certain information to the court."[40] However, the provision is also said to be a "lawful restriction … as it is essential to ensuring the peaceful and effective functioning of society."[41] The word "essential" is hard to square with the fact that societies have functioned peacefully and effectively with compellability regimes different from that involved in s 12.

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38 Australian Capital Territory, Legislative Assembly, Evidence Bill 2011, Revised Explanatory Statement at 12.

39 Australian Capital Territory, Legislative Assembly, Evidence Bill 2011, Revised Explanatory Statement at 4-5.

40 Australian Capital Territory, Legislative Assembly, Evidence Bill 2011, Revised Explanatory Statement at 10.

41 Australian Capital Territory, Legislative Assembly, Evidence Bill 2011, Revised Explanatory Statement at 10.

46 The Revised Explanatory Statement engages in similar analysis for cl 41 (now s 41 of the *Evidence Act* 2011)[42]. Section 41 requires various kinds of improper questions in cross-examination to be disallowed. This is said to restrict the cross-examiner's freedom of expression. On that basis any exclusionary rule of evidence would limit the freedom of expression of the party asking a question or tendering a document or thing which the rule requires to be rejected. Yet the Revised Explanatory Statement does not analyse every exclusionary rule in that light.

47 The Revised Explanatory Statement raises various questions in relation to the first *Lange* limb. Does s 17(2) of the *Evidence Act* 2011 fall within it? Do any of its equivalents in the *Evidence Act* 1995 (Cth), the *Evidence Act* 1995 (NSW), the *Evidence Act* 2001 (Tas) and the *Evidence Act* 2008 (Vic) do so? Indeed, does any provision in those enactments which restricts the capacity of a party to tender evidence fall within the first *Lange* limb? Are common law rules of evidence which restrict the capacity of a party to tender evidence to be modified after applying the second *Lange* limb because they fall within the first *Lange* limb?

48 Most trials are not used by parties or witnesses to engage in communications on political or governmental matters. But some have been. Hitler in 1924, Dimitrov in 1933, Radek in 1937 and Goering in 1946 – each of them were defendants who wished to make political points, and used the witness box to make them. Any exclusionary rule of testimonial evidence, above all the rule against irrelevant testimony, can in a sense burden communications on political or governmental matters so far as they form part of testimony. But it is rare for parties in litigation or their witnesses to attempt to make political or governmental communications. It is not the point of trials to provide a facility for communications on political or governmental matters. Of course a "burden" can be imposed by legislation even though that was not its "purpose"[43]. But is there not incongruity in inquiring whether the rules of evidence fall into the first *Lange* limb?

49 Another category of questions includes the following. Does legislation create a "burden" under the first *Lange* limb if it forbids employees of the Executive from disclosing government secrets? Or from joining political parties? Or from making public speeches? Or from conducting political meetings within the workplace? In the distinct but related field of First Amendment litigation, it has been said in the United States of America that "a public employee does not

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42 Australian Capital Territory, Legislative Assembly, Evidence Bill 2011, Revised Explanatory Statement at 21-22.

43 *Levy v Victoria* (1997) 189 CLR 579 at 619 per Gaudron J.

have an absolute right to speak out on matters of public concern yet keep his job. If what he says interferes unduly with the mission of his employer, the employer can fire him"[44]. It has also been said in a First Amendment case that[45]:

> "the workplace is for working and not, unless the employer consents, for holding meetings at which employees can discuss matters of great importance to themselves, perhaps to society as a whole, but not to the employer.
>
> … A public employer does not, by permitting its employees to use their lunch breaks or coffee breaks or other down time during the workday to talk to each other, turn over its premises to the employees for organized and scheduled meetings on topics unrelated to work. Just because like other workers they can converse on varied topics during slack periods of work or breaks between work, public employees do not obtain squatters' rights to take over the employer's property and turn it into Hyde Park corner or town hall."

50 A further category of questions relates to the criminalisation of communications. Is a statute within the first *Lange* limb if it criminalises threats of physical harm, or communications in the course of a conspiracy, or incitements to substantive crimes, or fraudulent communications?

51 What of the law of copyright, or the rules protecting confidential information?

52 It may be that the answer to some of these questions is that there is a burden, but it is not a burden which will produce invalidity because the second *Lange* question will be answered affirmatively. Thus before the *Lange* test had been worked out, Deane and Toohey JJ said in *Nationwide News Pty Ltd v Wills*[46]:

> "a law whose character is that of a law with respect to the prohibition or control of some or all communications relating to government or

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44 *Jungels v Pierce* 825 F 2d 1127 at 1131 (7th Cir 1987) per Judge Posner, Chief Judge Bauer and Judge Fairchild concurring.

45 *May v Evansville-Vanderburgh School* 787 F 2d 1105 at 1110 (7th Cir 1986) per Judge Posner, Judge Flaum and Judge Easterbrook concurring.

46 (1992) 177 CLR 1 at 76-77. This has been adopted in post-*Lange* cases: *Levy v Victoria* (1997) 189 CLR 579 at 618-619; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40]; [2004] HCA 41; and *Hogan v Hinch* (2011) 243 CLR 506 at 558 [95].

> governmental instrumentalities will be much more difficult to justify as consistent with the implication than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as communications of the relevant kind. Thus, a law prohibiting conduct that has traditionally been seen as criminal (e.g. conspiring to commit, or inciting or procuring the commission of, a serious crime) will readily be seen not to infringe an implication of freedom of political discussion notwithstanding that its effect may be to prohibit a class of communications regardless of whether they do or do not relate to political matters."

53 The first defendant submitted that legislation which merely made it more difficult for an individual to engage in communications, some of which might be of a political or governmental character, did not necessarily create a burden on the relevant freedom. "Otherwise, all laws that restricted the publication or disclosure of information would effectively burden freedom of political communication, since there is no information that could not conceivably be used as part of a political communication." There is force in this submission. To construe the first *Lange* limb in such a way that there will always or almost always be a burden, so that the proponent of legislative validity will always or almost always have to fall back on the second limb, is to bring into play indeterminate considerations and render them crucial in every or almost every case. Those considerations are capable of being applied by each particular judge in a different way. They are considerations which tend to lead to sharp divisions of judicial opinion, with cases being decided by the reasoning of a bare majority or by majority agreement on the orders but not the reasoning that leads to them[47]. The forms of analysis appearing in the Revised Explanatory Statement regarding the Evidence Bill 2011 (ACT) may appear in judgments. None of this tends to certainty.

54 These difficulties, and some of the questions raised above, suggest that McHugh J's formulation of the operative test for "burden" under the first *Lange* limb is too favourable to persons challenging validity. That suggestion may be supported by the language of the first *Lange* limb itself – "*effectively* burden"[48]. In *Coleman v Power*[49] Callinan J took a view different from that of McHugh J. He said of legislation criminalising the use of insulting words:

> "understood in the sense … of an insult in a public place delivered to the person the subject of it, or to some person associated with that person, or a

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47 For example, *Coleman v Power* (2004) 220 CLR 1.

48 (1997) 189 CLR 520 at 567 (emphasis added).

49 (2004) 220 CLR 1 at 112 [298].

> person who, having regard to the role or any particular position of the person insulted, might be aroused to respond, offers no realistic threat to any freedom of communication about federal political, or governmental affairs. It is no burden upon it."

The views of other justices of this Court suggest that the word "federal" should be qualified in this passage, for non-federal matters can relate to federal affairs[50]. On the assumption that it should be, Callinan J's approach appears, with respect, to be correct. The *Lange* "freedom" generates a limitation on legislative power. It is not a personal right. It exists to protect the institutions of representative and responsible government created by the Constitution. Those institutions are strong enough not to require protection from insubstantial burdens or unrealistic threats. The Solicitor-General of the Commonwealth correctly submitted that in the case of burdens contravening s 92 of the Constitution the practical effect of a law must be to burden inter-State trade to a significantly greater extent than it burdens intra-State trade[51]. He correctly submitted that in the same way the burden to which the first *Lange* limb directs attention must be "meaningful". That is, it must not be "insubstantial or *de minimis*" – it must be "a real or an actual burden upon relevant communications"; it must be "a real impediment"; and it must be "an obstacle in their way".

55 On Callinan J's approach, the Evidence Acts, for example, offer no "realistic threat" to the relevant freedom and do not burden it within the meaning of the first *Lange* limb. And on Callinan J's approach neither of the legislative provisions challenged in this case creates a "burden" within the meaning of the first *Lange* limb.

56 One of the legislative provisions challenged by the plaintiff is s 200(2) of the *Corrective Services Act* 2006 (Q)[52]. Pursuant to s 200(2), conditions were imposed in the plaintiff's parole order. The plaintiff objects to two of those conditions. The validity of s 200(2) can be determined by inserting those conditions into the subsection. Thus, if condition (t)[53] were inserted, s 200(2) would read:

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50 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142, 169 and 215-216; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 75; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571-572.

51 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 483 [131]; [2008] HCA 11.

52 The text is set out at [12] above.

53 Conditions (t) and (v) are set out at [16] above.

> "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,
>
> including a condition that the prisoner not attend meetings in a particular area without the prior approval of a corrective services officer."

And if condition (v) were inserted, s 200(2) would read:

> "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,
>
> including a condition that the prisoner 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 personal entity negotiating or dealing on his behalf with the media."

57 Although the plaintiff is on parole, he is a "prisoner" because he falls within par 1(a) of the definition of "prisoner" in Sched 4 of the *Corrective Services Act*, and does not fall within any of the exclusions set out in par 2 of that definition.

58 In relation to each version of s 200(2) the question would be: Does a condition of that kind realistically threaten any freedom of communication about political and governmental affairs?

59 The first version limits the place at which a communication may be made. But it does not deprive the plaintiff, the relevant "prisoner" – who, though still under sentence, is actually not in prison because he is on parole – of any freedom of communication on political or governmental matters to which a corrective services officer has not given prior approval except at meetings in a particular area. He is free to say what he likes except at meetings in that area. The restriction on the place of communication does not prevent the substance of what he wants to communicate from being communicated.

60 The second version of s 200(2) does not realistically threaten the freedom either. A ban on payment for making communications about political or governmental matters does not prevent the making of unpaid communications about those matters. What the prisoner could communicate without payment is identical with what he could have communicated, but for the parole condition,

with payment. All opportunities for communication that exist independently of the second version of s 200(2) continue to exist[54]. As the Solicitor-General of the Commonwealth correctly submitted:

> "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."

61 The other legislative provision challenged by the plaintiff is s 132(1)(a) of the *Corrective Services Act*. The effect of s 132(1)(a), s 132(2)(d) and Sched 4 of the *Corrective Services Act*, taken with s 7 of the *Criminal Code* (Q), is that where a person, without the chief executive's approval, interviews the plaintiff, or obtains a written or recorded statement from the plaintiff, and the plaintiff is a secondary participant in that person's conduct, the plaintiff will have committed an offence and will be in breach of condition (g) of his parole order[55]. But that does not create a "realistic threat" to the plaintiff's freedom of communication.

62 The ordinary meaning of obtaining something is to acquire it as a result of one's own efforts, for example, by request or procurement. Further, s 23(1)(a) of the *Criminal Code* provides that, subject to express provisions relating to negligent acts and omissions, an act that occurs independently of an exercise of a person's will does not give rise to criminal responsibility. Hence a person who receives a prisoner's unsolicited written statement, or the record of an oral statement, does not commit an offence. A person may be said to "interview" a prisoner when that person meets or telephones a prisoner and asks questions with a view to eliciting information. A written or recorded statement includes a document in the nature of a transcript or recording of an interview. The exceptions in s 132(2) for the prisoner's lawyer, an employee of a law enforcement agency and the Ombudsman suggest that the expression also means a relatively formal document to be used for some instrumental purpose like an investigation. Section 132(1)(a) does not prohibit receiving all oral or written communications emanating from prisoners, and it does not prohibit prisoners from making them. That conclusion is supported by the stark contrast between s 132(1)(a) and earlier Queensland enactments. Thus the *Prisons Act* 1890 (Q), s 69, provided:

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54 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 305 [356].

55 See the provisions analysed above at [17].

> "Every person who, contrary to the regulations of a prison –
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> …
>
> (2) Communicates or attempts to communicate with a prisoner;
>
> ... shall be liable on conviction to a penalty".

And reg 22 of the Regulations made under that Act provided:

> "Officers shall use every precaution and the utmost vigilance in preventing prisoners from … holding communications with unauthorised persons."

63 The plaintiff rejected the above construction of s 132. The plaintiff argued that the correct construction of s 132 appears in the Explanatory Notes to the Corrective Services Bill 2006[56]:

> "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."

It quite often happens that a document like the Explanatory Notes – a document in the nature of an Explanatory Memorandum or a Second Reading Speech – is inconsistent with the legislative language. That is so of the passage just quoted. It incorrectly overlooked the fact that s 132(1)(a) creates a prohibition on *obtaining* a statement from a prisoner, not on *publishing* an unsolicited statement. It correctly assumed, however, that the mere receipt of an unsolicited letter from a prisoner is not prohibited.

64 The plaintiff also argued that s 132(1)(a) is directed at the person who conducts the interview or obtains the statement, and burdens that person's freedom of political communication. The argument appears to be that s 132(1)(a) affects that person's methods of learning about a prisoner's communications, and hence that person's capacity to formulate communications to others. But that person can gain access to what the prisoner communicates by other means. That person can thereby use the content of what the prisoner says as a step towards whatever communications that person wishes to formulate.

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56 Queensland, Legislative Assembly, Corrective Services Bill 2006, Explanatory Notes at 119.

65 In these circumstances s 132(1)(a) does not create practical impediments to a prisoner making an oral or written communication without being interviewed by a person and without responding to the request of a person in such a way as to cause that person to have "obtained" it. There is nothing to stop the content of a communication which, but for s 132(1)(a), could have been made in an interview or obtained being identical with the content of a communication made in other ways.

66 The form of the questions put to the Court should be modified slightly and they should be answered as follows:

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

   No.

   (b) Is s 132(1)(a) of the *Corrective Services Act* 2006 (Q) to be construed so as not to apply to a prisoner on parole?

   No: it applies to prisoners on parole not falling within par 2 of the definition of "prisoner" in Sched 4 of the *Corrective Services Act* 2006 (Q).

2. Is s 200(2) of the *Corrective Services Act* 2006 (Q) invalid to the extent it authorises the imposition of conditions (t) and (v) of the plaintiff's Parole Order?

   No.

3. If s 200(2) of the *Corrective Services Act* 2006 (Q) is construed so that the power it confers must be exercised in conformity with the freedom of communication about government and political matters provided for by the Commonwealth Constitution, are conditions (t) and (v) of the plaintiff's Parole Order invalid because they impermissibly burden that freedom?

   No.

4. Who should pay the costs of the special case?

   The plaintiff.

67 KIEFEL J. The relevant facts and the statutory provisions in question are set out in detail in the joint reasons.

68 The plaintiff is an Aboriginal man and a member of the Palm Island Aboriginal community. On 26 November 2004, he actively participated in a riot on Palm Island, which followed upon the death of an Aboriginal man who was in the custody of the police. Serious damage was caused by the rioters to the building housing the police station and courthouse, a dwelling house and a police vehicle. The plaintiff was convicted of the offence of rioting causing destruction[57]. He was sentenced to six years imprisonment and was to be eligible for parole after serving two years of the head sentence.

69 Prior to his arrest and conviction, the plaintiff had been involved in the Palm Island Men's Group, as well as a program addressed to alcohol and drug rehabilitation and youth suicide within the Palm Island community. In submissions to the second defendant ("the Parole Board") on behalf of the plaintiff it was explained that, since his arrest, he has sought to use legal and political avenues, including the media, to express his feelings of anger over perceived injustices within the Palm Island community. The plaintiff wishes to participate in public discussion of political and social problems affecting Aboriginal persons in Australia and of problems within the prison system in Queensland.

70 Section 200(2) of the *Corrective Services Act* 2006 (Q) provides that a parole order granted by a parole board may contain conditions that it "reasonably considers necessary – (a) to ensure the prisoner's good conduct; or (b) to stop the prisoner committing an offence." On 8 July 2010, the Parole Board granted the plaintiff's application for parole and released him on parole from 19 July 2010 until 18 July 2014, upon certain conditions. Conditions (t) and (v) of the Parole Order respectively require that the plaintiff not attend public meetings on Palm Island without the prior approval of the corrective services officer; and that he not receive, directly or indirectly, payment or benefit to him or through the agency of others negotiating or dealing on his behalf with the media[58].

71 The release of a prisoner on parole does not mean that that person is no longer subject to measures of control and discipline. Under the *Corrective*

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57 *Criminal Code* (Q), ss 61 and 65. By s 11 of the *Criminal Code and Other Acts Amendment Act* 2008 (Q), s 65 was omitted and s 61 was replaced by a different provision.

58 Condition (u) was that he be prohibited from speaking to and having any interaction whatsoever with the media, but was subsequently deleted by the Parole Board on 22 July 2011.

Services Act the term "prisoner" is defined (subject to exceptions) to include a person released on parole[59]. A prisoner released upon parole is taken to be still serving the sentence imposed[60]. A prisoner remains in the custody of the chief executive[61], even if the person is lawfully outside a corrective services facility[62]. The chief executive is responsible for the security and management of all corrective services facilities, the safe custody and welfare of all prisoners and the supervision of offenders in the community[63].

72 Section 132(1)(a) of the *Corrective Services Act* provides that a person must not interview a prisoner, or obtain a written or recorded statement from a prisoner, whether the prisoner is inside or outside a corrective services facility[64]. Certain exceptions are made in s 132(2). So far as concerns sub-s (1)(a), it provides that an offence is not committed if the person is the prisoner's lawyer, an employee of a law enforcement agency, the ombudsman or is "a person who has the chief executive's written approval to carry out the activity mentioned in the subsection." Where the person is not one of the class of persons excepted under s 132(2), the offence to which s 132 refers is properly described as one where an activity referred to in s 132(1) is carried out without the approval of the chief executive.

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59 *Corrective Services Act* 2006 (Q), Sched 4.

60 *Corrective Services Act* 2006, s 214. However, a parolee is not disqualified from voting in Queensland and federal elections. Section 106(3) of the *Electoral Act* 1992 (Q) disqualifies a person who is serving a sentence of imprisonment from voting, but s 106(4) provides that for the purposes of sub-s (3), a person is serving a sentence of imprisonment only if they are in detention on a full-time basis for an offence against a Commonwealth, State or Territory law and the detention is attributable to the sentence of imprisonment concerned; s 93(8AA) of the *Commonwealth Electoral Act* 1918 (Cth) provides that a person who is serving a sentence of imprisonment of three years or longer is not entitled to vote at any Senate or House of Representatives election, but s 4(1A)(a) provides that for the purposes of the Act, a person is serving a sentence of imprisonment only if, inter alia, they are in detention on a full-time basis.

61 The term "chief executive" is defined in s 10(1) of the *Public Service Act* 2008 (Q) as the person who holds appointment under that Act as the chief executive of that department.

62 *Corrective Services Act* 2006, s 7(4).

63 *Corrective Services Act* 2006, s 263(1).

64 The note to this provision refers to the definition of prisoner in Sched 4 as including one released on parole.

73 No approval has been sought from the chief executive to the taking of a statement from the plaintiff or the undertaking of an interview by a person other than a person referred to in s 132(2)(a)-(c). The plaintiff has not sought a statement of reasons[65] from the Parole Board as to its decision to impose the conditions in question and has not sought judicial review of that decision[66]. The plaintiff challenges the validity of ss 132 and 200(2) of the *Corrective Services Act*. The question to be addressed in connection with these sections, arising from the questions stated for the Court, is whether they, directly or indirectly, impermissibly burden the freedom of communication about government and political matters which the Constitution guarantees[67].

74 I agree with the opinion expressed in the joint reasons[68] that questions as to the imposition of conditions (t) and (v) in the Parole Order do not arise in these proceedings. They may arise on an application for judicial review of the decision of the Parole Board. These proceedings raise a constitutional question, arising from the freedom mentioned and the restrictions it may render necessary upon legislative power.

75 I agree that, having regard to the questions posed in *Lange v Australian Broadcasting Corporation*[69], it cannot be concluded that ss 132 and 200(2) impermissibly burden the freedom of political communication.

76 In *Lange*[70] it was said that the freedom of communication about government and political matters "is an indispensable incident of that system of representative government which the Constitution creates". In ensuring the maintenance of that system, the freedom may operate as a restriction upon the legislative powers of the Commonwealth, the States and Territories[71]. Understood in this way, the maintenance of the system of representative government is a constitutional imperative which the freedom supports.

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65 *Judicial Review Act* 1991 (Q), ss 31-40.

66 *Judicial Review Act* 1991, ss 20-30.

67 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25.

68 At [24].

69 (1997) 189 CLR 520.

70 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559.

71 *Coleman v Power* (2004) 220 CLR 1 at 49 [90] per McHugh J, 77 [195] per Gummow and Hayne JJ; [2004] HCA 39.

77 The questions stated in *Lange*, as relevant to determining whether a law could be said to infringe the freedom, are[72]:

> "First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government". (footnote omitted)

The second question in *Lange* may be taken to import considerations of proportionality. It was said in *Lange*[73] and in *Roach*[74] that, in this context, there is little difference between the phrase "reasonably appropriate and adapted" and the notion of proportionality.

78 The first question directs attention to the aspect of the freedom of communication about government or political matters which the law may effectively burden. A legislative provision may be said generally to burden the freedom when it effects a restriction upon it or hinders or limits its exercise. A distinction has been drawn between a law which has a direct and substantial effect upon communications and a law which has only an incidental or indirect effect[75]. It is necessary to identify the aspect of the freedom which is said to be burdened, in order to identify the effects of the law.

79 Because of the constitutional context in which the freedom arises, it is necessary that the law affect communications that are of the kind which the freedom protects and that the communications have a Commonwealth dimension. As was said by the Commonwealth, intervening, in its written submissions, the increasing integration of social, economic and political matters in Australia[76], including through co-operative arrangements, means that communications regarding State issues may also constitute communications regarding problems at the Commonwealth level.

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72 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

73 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 fn 272.

74 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85]; [2007] HCA 43.

75 *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]; [2011] HCA 4.

76 Quoting *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 572.

80 The nature and aspect of the communication affected by the impugned provisions are not to be discerned by reference to restrictions upon the plaintiff's ability to communicate or the manner in which he communicates. The question is how the legislative provisions, which are sought to be impugned, may affect the freedom generally. The freedom is not a personal right, although its protection may serve also to ensure that citizens are able to communicate freely on the matters the subject of the freedom. The issues which the plaintiff identifies as those which he wishes to discuss may nevertheless assist in the identification of the area of communication which may be affected by the statutory provisions and they are relevant to his standing. I agree with the joint reasons that the communications which may be affected by the provisions in question concern matters relating to Aboriginal and Indigenous affairs[77]. These are matters which are the concern of both State and Commonwealth governments, and involve communications at both levels.

81 The second question in *Lange* requires that the fulfilment of the statutory objective or purpose (the "legitimate end") be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. As expressed it may be read as a test of statutory purpose. However, if a statute's objective was not so compatible, that would be an end to the matter. There would be no occasion for testing the statute as "reasonably appropriate and adapted" or proportionate to its purpose and that aspect of the second question in *Lange* would be otiose.

82 In *Coleman v Power*[78] McHugh J expressed the view that the Court in *Lange* had intended the adjectival phrase "compatible with the maintenance of the constitutionally prescribed system of representative and responsible government" to govern not only the end or purpose sought to be achieved by the statute, but also *the manner of achieving* that end. This was confirmed, in his Honour's view[79], by the reference which followed, in the reasons in *Lange*, to what had been held in *Australian Capital Television Pty Ltd v The Commonwealth*[80], namely that there were "other less drastic means by which the objectives of the law could be achieved."[81] His Honour therefore read the second question as "is the law reasonably appropriate and adapted to serve a legitimate

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77 At [26] of the joint reasons.

78 (2004) 220 CLR 1 at 50 [92].

79 *Coleman v Power* (2004) 220 CLR 1 at 50 [93].

80 (1992) 177 CLR 106; [1992] HCA 45.

81 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568.

end [in a manner] which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?"[82].

83 The second *Lange* question, as restated by McHugh J in *Coleman v Power*, may be thought to require even further clarification in respect of two matters: (1) as to the relationship, if any, between the means chosen by the statute to achieve its objective and the constitutional imperative of the maintenance of the system of representative government; and (2) as to whether that imperative is intended to be part of the test of proportionality which inheres in the second question in *Lange*, or whether it serves only to underline the importance and purpose of the freedom. These matters were not addressed in argument and may be put to one side. It is sufficient presently to observe that the second question identifies a relationship between the legislative objective, or "end", and the means chosen to achieve that objective. I take the reference to a "legitimate" end to be to an objective or purpose within power, but subject to a test which may determine whether it exceeds that power. A lawful purpose, in the sense first mentioned, is a necessary condition for the application of any test of proportionality. It is not itself sufficient to answer the question whether a law is proportionate. That question requires, at the least, consideration of statutory ends and means.

84 Sections 132 and 200(2) must be considered in light of the objects of the *Corrective Services Act*. Section 3(1) states the purpose of corrective services as "community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders." Sub-section (2) of that section, whilst recognising that every member of society has "certain basic human entitlements", also recognises that some entitlements are "necessarily diminished" because of imprisonment or court sentence.

85 The diminution spoken of may result, in part, from the need for control and discipline in relation to prisoners. This was recognised in *R v Secretary of the State for the Home Department; Ex parte Simms*[83] and is recognised by the nature of the powers given to the chief executive in Ch 2 of the *Corrective Services Act*, which concern, relevantly, the management of prisoners and include powers to supervise and record communications of various kinds, and Ch 3, which deals with breaches of discipline and offences and contains s 132. Control and discipline may be seen as necessary in many respects: to the safety of the community, prisoners, and prison staff, to the security of the prison

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82 *Coleman v Power* (2004) 220 CLR 1 at 50 [93] per McHugh J, 78 [196], 82 [211] per Gummow and Hayne JJ and Kirby J, respectively, agreeing.

83 [2000] 2 AC 115 at 127 per Lord Steyn.

environment and to the rehabilitation of offenders. It was observed in *Pell v Procunier*[84] that isolation in prison serves a protective function, quarantining offenders for a time whilst the rehabilitation processes take their course. Challenges to legislative restrictions must be considered in light of their legitimate objects[85].

86 The need for some measure of supervision and control over a prisoner's conduct may not cease when they are released upon parole. Although parolees are no longer detained, their rehabilitation may not be regarded as complete. Further, their conduct, including public statements made by them, may have repercussions for other prisoners and the prison system. *Pell v Procunier* provides an example. It was there observed that press attention to a small number of prisoners had resulted in them becoming "public figures" within the prison society, gaining a degree of notoriety and influence with other prisoners and becoming the source of severe disciplinary problems[86]. Whilst that case involved detained prisoners, the effects spoken of could apply to those on parole.

87 The requirement of approval by the chief executive is consistent with the objects of the *Corrective Services Act*. It may be inferred from the terms of s 132(2)(d) that, although it applies generally, the requirement of approval will more commonly apply to the media. It provides the chief executive with the opportunity to assess the ramifications of an interview or the taking of a statement, having regard to the circumstances of the prisoner and the circumstances prevailing within the correctional facility.

88 Section 132 does not prevent a prisoner communicating with others on matters relating to government and politics. It is directed to the method by which the media and others obtain information or opinions from a prisoner. It does not prohibit interviews or the taking of statements. The limitation it effects is to require approval from the chief executive, whose consideration of the matter must be informed by the objects of the *Corrective Services Act* and the existence of the freedom, and whose refusal is subject to judicial review.

89 In the measures s 132 adopts, the section goes no further than is reasonably necessary in seeking to achieve the relevant objectives of the *Corrective Services Act* and is proportionate. A test of this kind has been applied

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84 417 US 817 at 822-823 (1974).

85 *Pell v Procunier* 417 US 817 at 822 (1974).

86 417 US 817 at 831-832 (1974).

in decisions of this Court[87]. It is evident in what was held in *Australian Capital Television*, to which McHugh J referred in the passage from *Coleman v Power* set out above[88]. It could not be said that the means employed by a statute were reasonably necessary if there were other, less drastic, means available by which the legislative objective could be achieved.

90 In some cases the extent of the burden imposed by legislation on the freedom of communication on government and political matters, and the importance of the particular aspect of the freedom burdened, might require further consideration, in order to determine whether a legislative provision is proportionate. It has been said that a burden might in some cases require a "compelling justification"[89] or a "'substantial' reason"[90]. A requirement that a burden be justified or explained suggests that substantial importance is attributed to the aspect of the freedom burdened and that the burden is significant. It also directs attention to the statutory objective sought to be achieved, as the source of the justification or explanation. But no occasion for considerations of this kind arises in the present case. The burdens imposed are not excessive in their requirements.

91 The question with respect to s 200(2) may be dealt with shortly. The restriction allows a parole board to attach only such conditions as are reasonably necessary to the achievement of the objectives of ensuring the good conduct of a parolee and preventing that person offending. The sub-section therefore imports a requirement of proportionality into a parole board's decision-making process. That requirement would also form part of any judicial review of a decision of a parole board. The grant of power in s 200(2) cannot be said to be excessive, having regard to the manner in which it is required to be exercised.

92 Neither s 132 nor s 200(2), tested by reference to the questions in *Lange*, is invalid. I agree with the answers proposed in the joint reasons, including that as to costs.

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87 *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 616; [1975] HCA 45; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 477 [102]; [2008] HCA 11.

88 At [82] of these reasons.

89 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143 per Mason CJ, 235 per McHugh J.

90 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85]; albeit with reference more directly to burdens on the franchise given by the Constitution.