IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S314 of 2010

BETWEEN:

ORIGINAL

LEX PATRICK WOTTON
Plaintiff

and

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STATE OF QUEENSLAND
First Defendant

CENTRAL AND NORTHERN QUEENSLAND REGIONAL PAROLE BOARD
Second Defendant

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SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

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Filed on behalf of:	Attorney-General for the State of Victoria (Intervening)
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PART I: CERTIFICATION

1. The Attorney-General for the State of Victoria (**Victoria**) certifies that these submissions are suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. Victoria intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the State of Queensland to submit that, to determine the constitutional validity of s 132 of the *Corrective Services Act 2006* (Qld) (**the Queensland Act**), the section must be read as a whole, with the effect that the conferral of a discretion on the executive to approve what would otherwise contravene a prohibition on particular communication[1] between a prisoner and another person does not constitute an unconstitutional burden on the implied freedom of political communication.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. Victoria does not consider it necessary to add to the statements of applicable constitutional and statutory provisions set out in the annexures to the submissions of the plaintiff and the State of Queensland.

PART V: ARGUMENT

5. It is well settled that the application of the test which was formulated in *Lange v Australian Broadcasting Corporation*,[2] and modified in *Coleman v Power*,[3] involves a two-step process, namely:

   (a) first, asking whether the law effectively burdens communication about "government or political matters" in its terms, operation or effect; and

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1 Namely, the interviewing of a prisoner, or the obtaining of a written or recorded statement from a prisoner.

2 (1997) 189 CLR 520 at 567-568 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ. See also at 561-562.

3 (2004) 220 CLR 1 at 50-51 [92]-[96] per McHugh J, 77-78 [196] per Gummow and Hayne JJ, 82 [211] per Kirby J.

(b) second, asking whether, if the law effectively burdens such communication, the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

6. It is submitted that:

(a) the plaintiff fails to read s 132 of the Queensland Act as a whole and therefore overstates the relevant burden on communication about government or political matters;

(b) the burden imposed by s 132(1)(a) is a requirement to obtain approval before doing the things identified in the provision;

(c) such a requirement is reasonably appropriate and adapted to the legitimate ends concerning the administration of correctional services and related objectives identified in Queensland's submissions; and

(d) the potential operation of the implied freedom of political communication in relation to any decision by the chief executive upon on application for approval under s 132(2)(d) does not arise in this proceeding.

7. It is unnecessary for the purposes of this proceeding to consider the question left open in *Wainohu v New South Wales*, namely whether the implied freedom is confined to communication in relation to government or political matters "at the Commonwealth level".[4]

Section 132, *Corrective Services Act 2006* (Qld)

8. Section 132(1)(a) of the Queensland Act makes it an offence for a person to interview a prisoner or obtain a written or recorded statement from a prisoner. No offence is, however, committed if the person "has the chief executive's written approval to carry out the activity mentioned".[5]

9. Whether this statutory provision is reasonably appropriate and adapted to serve a legitimate end is to be determined in light of the burden it imposes on political communication. That burden must be identified from the terms of the provision read as a whole. The plaintiff seeks to rely on the prohibition standing alone without regard to the approval power that governs its operation. In so doing, the plaintiff attributes to

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4 (2011) 85 ALJR 746 at 776-777 [114] per Gummow, Hayne, Crennan and Bell JJ; 278 ALR 1 at 38.

5 Section 132(2)(d).

s 132 an operation that it does not have. He then contends that the approval power does not "save" the provision from invalidity.[6]

10. It is submitted that the burden on political communication cannot properly be identified by this method of reasoning. Instead, the whole provision must be examined to see what burden, if any, is imposed. That exercise reveals that the provision in substance imposes a requirement that a person (other than the prisoner's lawyer, an employee of a law enforcement agency or the ombudsman) must not interview a prisoner or obtain a written or recorded statement from a prisoner without the chief executive's written approval to do so.

11. This requirement imposes a burden which consists of an obligation to seek and obtain written approval. That being the only burden imposed by the statute, it is that obligation which must be tested by reference to the second limb of the *Lange/Coleman* test. If any further burden is imposed at the administrative level, once an application for approval has been made, that burden may again be tested independently for constitutional validity. It would be incumbent on the chief executive, in exercising the power under s 132(2)(d), to have regard to the constitutional freedom, and ensure that approval was not withheld if to do so would constitute an impermissible limit on the implied freedom of political communication. At the same time, however, the purposes served by a sentence of imprisonment (including when a prisoner is on parole[7]) will necessarily affect the nature and extent of the implied freedom in any given case. There would therefore be matters which would properly permit the chief executive to withhold approval, particularly having regard to the deprivation of liberty effected by a sentence of imprisonment[8] and the purposes of sentencing more generally. However, no application having been made for approval, that issue does not arise in this proceeding.

12. To identify the burden in this way does not diminish the constitutional protection. To the contrary, the power to grant approval is itself to be read as being subject to any constitutional limitations including the implied freedom of political communication. In

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6 See plaintiff's submissions, paragraph 55.

7 In this regard, while the applicable considerations will necessarily differ, it must be borne in mind that a person on parole remains subject to their sentence and is "simply released on conditional parole": *Power v The Queen* (1974) 131 CLR 623 at 628 per Barwick CJ, Menzies, Stephen and Mason JJ.

8 See, for example, *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 126-127 per Lord Steyn (with whom Lord Browne-Wilkinson and Lord Hoffmann agreed).

this regard, in the context of s 92 of the Constitution, in *Miller v TCN Channel Nine Pty Ltd*,[9] Brennan J said:

> [A] discretion must be exercised by the repository of a power in accordance with any applicable law, ... and, in the absence of a contrary indication, "wide general words conferring executive and administrative powers should be read as subject to s 92". ... In *Inglis v Moore (No 2)* St John J and I stated the relevant rule of construction:
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> > " ... 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."
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> ... The discretion is effectively confined so that an attempt to exercise the discretion inconsistently with s 92 is not only outside the constitutional power – it is equally outside statutory power and judicial review is available to restrain any attempt to exercise the discretion in a manner obnoxious to the freedom guaranteed by s 92.

13. Put another way, where a law confers a discretionary power in general terms, it should not be taken to authorise the exercise of that power in a manner inconsistent with the Constitution.[10] There is nothing in the Queensland Act to exclude this approach in the context of the implied freedom of political communication. Being bound to exercise the discretion reposed in him or her by s 132(2)(d) consistently with the implied freedom of political communication, the chief executive therefore cannot lawfully refuse the permission sought if to so do would infringe the Constitution.[11]

14. The plaintiff contends that the chief executive enjoys an "unstructured and, in practice, largely unreviewable discretion".[12] As submitted above, the power is not "unstructured" but is subject to constitutional constraints. It must, like any statutory power, be exercised according to the subject matter, scope and purposes of the legislation by which it is conferred.[13] Moreover, the exercise of the power of the chief

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9 (1986) 161 CLR 556 at 613-614 (citations omitted). See also *AMS v AIF* (1999) 199 CLR 160 at 176 [37] per Gleeson CJ, McHugh and Gummow JJ, 227 [201] per Hayne J.

10 *Shrimpton v Commonwealth* (1945) 69 CLR 613 at 619-621 per Latham CJ, 629-630 per Dixon J, 632 per McTiernan J.

11 Cf. *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 614 per Brennan J.

12 See plaintiff's submissions, paragraph 55.

13 See, for example, *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at 298 [55] per McHugh, Hayne and Callinan JJ; *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 174-175 per Brennan CJ, Gaudron and Gummow JJ; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 per Mason J; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49-50 per Stephen, Mason, Murphy, Aickin and Wilson JJ; *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J; *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-758 per Dixon J.

executive under s 132(2)(d) is "a decision of an administrative character" and thus susceptible to judicial review pursuant to the *Judicial Review Act 1991* (Qld). Accordingly, to say that the discretion is "largely unreviewable" is misconceived.[14]

15. Furthermore, it is not useful or determinative to say that s 132 results in "censorship", as the effect of the regulation in issue in *Bennett v President, Human Rights and Equal Opportunity Commission* was described.[15] Any requirement for approval before written statements are made or interviews are given to third persons might be described as censorship, but it is the legitimate ends sought to be achieved by imposing the requirement, and the relationship between those ends and the nature of the requirement, that must be examined in every case.

16. So, a prohibition on persons (including, but not limited to members of the media) interviewing prisoners without approval is different in character to a regulation which prohibits disclosure without approval of "any information about public business or anything of which the employee has official knowledge".[16] In particular, the objects of the two provisions are quite different. It therefore does not assist to say of the provision for approval in s 132(2)(d), as Finn J said of the regulation in issue in *Bennett*,[17] that it is "not an appropriate filtering device to protect the efficient workings of government in a way that is compatible with the freedom". The considerations applicable to the administration of correctional services are quite different to those applicable to the efficient workings of government more broadly.

17. The plaintiff accepts that objectives (a)-(d) of those identified by Queensland may constitute legitimate ends for the purposes of the second limb of the *Lange/Coleman* test (albeit contending that objectives (a), (b) and (c)(i) have no relevance to prisoners on parole).[18] Victoria contends, and the submissions made by Queensland

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14 See further, Queensland's submissions, paragraphs 53-55.

15 (2003) 134 FCR 334 at 359 [103] per Finn J, citing *Wolf v City of Aberdeen* (1991) 758 F Supp 551 at 555.

16 See r 7(13) of the Public Service Regulations 1999 (Cth) in issue in *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 at 337 [3] per Finn J.

17 (2003) 134 FCR 334 at 359-360 [103].

18 See plaintiff's submissions, paragraph s 47 and 51. Those objectives are [SCB 30, 40]:

> "(a) protecting the good order and security of correctional centres;
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> (b) protecting the safety and welfare of correctional staff and prisoners;
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> (c) ensuring that prisoners do not become media celebrities and thereby:
>
> (i) benefit from their crimes; and/or
>
> (ii) pose a risk to the good order and security of correctional centres;

demonstrate, that the imposition of a requirement that persons obtain the chief executive's approval before interviewing a prisoner or obtaining a statement from a prisoner, is reasonably appropriate and adapted to achieving those legitimate ends. In particular, the volatility of the correctional environment and the diversity of circumstances in which interviews or statements may compromise the objectives identified by Queensland mean that the conferral of a discretion on the chief executive is calculated to enable a suitably flexible approach having regard to the facts of each case.

18. In this regard, as the plaintiff identifies,[19] there is a distinction between a law whose direct purpose is to restrict communication about "government or political matters" and a law which "only incidentally restricts political communication".[20] The burden a law imposes on a communication about government or political matters can more readily be seen to be appropriate and adapted to a legitimate end in the latter circumstance. Contrary to the plaintiff's contention,[21] it does not follow from the burden placed on political communication by s 132(1) that its direct purpose is to restrict political communication. Rather, to the extent it does limit such communication, it does so only indirectly.

19. For the foregoing reasons, when proper regard is had to the existence of the chief executive's power of approval, the imposition of the prohibition under s 132(1) does not impermissibly burden the implied freedom of political communication.

Implied freedom of assembly and association

20. To the extent that the plaintiff seeks to imply from the text and structure of the Constitution a separate and distinct implied freedom, namely one of assembly and association,[22] that contention should be rejected. It should now be taken to be well-

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

19 See plaintiff's submissions, paragraphs 37-38.

20 See, for example, *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 at 143 per Mason CJ; *Levy v Victoria* (1997) 189 CLR 579 at 619 per Gaudron J; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 126-128 per Gaudron J; *Coleman v Power* (2004) 220 CLR 1 at 31 [30] per Gleeson CJ; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40] per Gleeson CJ.

21 See plaintiff's submissions, paragraph 38.

22 See plaintiff's submissions, paragraph 77.

established that there is no such "free-standing" right to be implied from the Constitution.[23]

21. Rather, to the extent that any such freedom does exist it "would exist only as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply".[24] The reliance on such a freedom, therefore, adds nothing to the plaintiff's argument.

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23 *Wainohu v New South Wales* (2011) 85 ALJR 746 at 776 [112] per Gummow, Hayne, Crennan and Bell JJ; 278 ALR 1 at 37-38; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 [148] per Gummow and Hayne JJ, 297 [334]-[335] per Callinan J; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 45 per Brennan CJ, 68-69 per Dawson J, 157 per Gummow J, cf. 126-128 per Gaudron J, 142 per McHugh J.

24 *Wainohu v New South Wales* (2011) 85 ALJR 746 at 776 [112] per Gummow, Hayne, Crennan and Bell JJ; 278 ALR 1 at 37-38. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 [148] per Gummow and Hayne JJ.