IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S314 of 2010

BETWEEN: **LEX PATRICK WOTTON**

Plaintiff

AND: **STATE OF QUEENSLAND**

10 First Defendant

AND **CENTRAL AND NORTHERN QUEENSLAND REGIONAL PAROLE BOARD**

Second Defendant

ANNOTATED SUBMISSIONS ON BEHALF OF THE FIRST DEFENDANT

I. CERTIFICATION

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

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II. CONCISE STATEMENT OF ISSUES

2. The issues raised by the special case are these:

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

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

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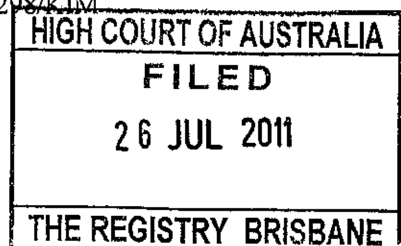

(c) Is section 200(2) of the CSA invalid to the extent it authorises the imposition of conditions (t) and (v) of the Plaintiff's Parole Order?

III. SECTION 78B NOTICES

3. The plaintiff has given notice to the Attorneys-General in compliance with s 78B of the *Judiciary Act 1903* (Cth).[1] The State does not consider that any further notice is required.

IV. STATEMENT OF RELEVANT FACTS

4. The material facts are set out in the special case.[2]

V. APPLICABLE PROVISIONS

10 5. The plaintiff has identified most of the relevant provisions. Others which are relevant to the resolution of these proceedings are found in the Annexure.

VI. ARGUMENT

Construction of s 132(1) of the CSA

6. It is necessary to start by construing s 132(1) of the CSA.

7. The terms of s 132(1) suggest that the act of interviewing and the act of obtaining 'a written or recorded statement' constitute the relevant offences.[3] An act that occurs independently of an exercise of the person's will does not give rise to criminal responsibility.[4] A person therefore does not commit an offence simply by
20 receiving an unsolicited written statement or recorded statement from a prisoner.

8. The CSA does not define 'interview' or 'written or recorded statement'. The context, however, suggests that 'interview' is a meeting in which one party asks questions in order to elicit facts or statements for some purpose, including the provision of legal advice or the investigations of complaints. That explains the reference in s 132(1) to the prisoner's lawyer, the ombudsman and employees of a 'law enforcement agency'.[5]

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1 SCB 14-19.

2 SCB 44-55.

3 See *Criminal Code* (Qld), s 2.

4 *Criminal Code* (Qld), s 23(1)(a).

5 The term has a very wide definition. It includes the Crime and Misconduct Commission, a commission of inquiry under the *Commissions of Inquiry Act 1950* (Qld), the Queensland Police Service, the Australian Crime Commission and the Australian Federal Police.

9. The same context suggests that a 'written or recorded statement' would be transcript or recording of an interview or the kind of statement that could be used for some purpose, including an investigation. On this construction, a 'written or recorded statement' is not synonymous with any written or recorded communication.[6] The significance of this construction will become apparent.

The implied freedom of political communication

Preliminary observations

10. The plaintiff submits that the implied freedom of political communication should be treated as part of the same principle that applies to legislative disqualification from universal adult suffrage. He submits that there is one underlying principle which 'limits legislative interference with any of the processes, activities or institutions necessary for the maintenance and continued operation of the system of representative and responsible government for which the Constitution provides'.[7] He alleges that s 132(1)(a) would produce incoherence in the law, and that is a reason for its invalidity.[8]

11. The Court should not hold that there is such an overarching principle. The cases on electoral disqualification turn largely on the meaning of the phrase 'directly chosen by the people' in ss 7 and 24 of the Constitution. They have held that the content of that phrase has changed so as to include universal adult suffrage.[9] In determining the extent to which parliamentary limitations on the right to vote are permissible, however, the Court still has had regard to 'nineteenth century colonial history, the development in the 1890s of the drafts of the Constitution, the common assumptions at that time, and the use of the length of sentence as a criterion of culpability founding disqualification'.[10] Necessarily, the range of objectives that will justify disqualification will be limited.[11]

12. As the historical material and case law on prisoner's rights below demonstrate,[12] however, there is no necessary correlation between any rights of prisoners to vote and an absence of restrictions on their right to communicate. The system of representative and responsible government that was created by the Constitution

[6] This construction is reinforced by another factor. If the legislature had intended to prohibit persons obtaining all written communications by prisoners it could easily have said so. Earlier legislation in Queensland and in several of the States had made it an offence in many circumstances to hold or attempt to hold 'any communication' with a prisoner: see, for example, *Prison Act 1870* (SA), s 28; *Prisons Act 1936* (SA), s 63(a); *Prisons Act 1890* (Qld), s 69(2); *Gaols Act 1915* (Vic), s 41(a). The legislature did not adopt that model and s 132(1)(a) could not be construed as if it did.

[7] Plaintiff's Submissions, para 31.

[8] Plaintiff's Submissions, para 54.

[9] *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*') at 173-174 [6]-[7] (Gleeson CJ).

[10] *Roach* (2007) 233 CLR 162 at 204 [102] (Gummow, Kirby and Bell JJ).

[11] *Roach* (2007) 233 CLR 162 at 199 [83]-[85] (Gummow, Kirby and Bell JJ).

[12] See paras 24 to 28.

was not regarded by the framers as inconsistent with the maintenance of extensive restrictions on the capacities of prisoners in the States to communicate on all manner of topics. Nor has any subsequent development in the system of representative and responsible government altered this situation. Universal suffrage is different. Any overarching principle should not be allowed to obscure this point.

13. Furthermore, notions of 'coherence' in this area of the law cannot be pushed too far. If it were otherwise, then, as Callinan J suggested in *Coleman v Power*,[13] *Lange* would suggest that the freedom of political communication only applies where the publication of such information amounts to reasonable conduct, and does not include threatening or abusive language. That, however, is not the law.

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Characterisation of s 132(1)(a) of the CSA

14. The plaintiff's challenge to s 132(1)(a) is premised on the claim that it is not a law that only incidentally burdens political communication but it does so directly and substantially.[14] As such, the plaintiff claims, s 132(1)(a) requires 'compelling justification'[15] in order to be valid.

15. These submissions should be rejected. First, the plaintiff's claims about s 132(1)(a) of the CSA lack any empirical basis. Paragraph 132(1)(a) is not directed at the media but at everyone who falls outside the exceptions in s 132(2). It applies indiscriminately to all those who may want to interview a prisoner or obtain a written or recorded statement, whether they be academics, social workers, other people's lawyers, members of prisoners' support groups or simply concerned citizens. It applies regardless of whether the interview or statements would concern governmental policy or would concern matters such as the prisoner's history and the circumstances of the offences for which the prisoner was convicted. There is nothing to support the empirical claim that s 132(1)(a) disproportionately inhibits communications with the media about governmental and political matters which are subject to the implied freedom. On that basis alone, the test for validity should not be one of 'compelling justification'.

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13 (2004) 220 CLR 1 at 114 [300].

14 The State does not accept that s 132(1)(a) is, in practical terms, unique in Australia. Other jurisdictions impose restrictions on visits and interviews: see *Crimes (Administration of Sentences) Act 1999* (NSW), s 267; *Corrections Act 1986* (Vic), ss 32, 37, 39; *Correctional Services Act 1982* (SA), s 51(1); *Prisons Act 1981* (WA), ss 52, 65, 66; *Corrections Act 1997* (Tas), ss12, 18; *Prisons (Correctional Services) Act* (NT), ss 39, 40, 94.

15 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*') at 143 (Mason CJ).

16. Secondly, that conclusion is reinforced by the authorities from the United States dealing with the First Amendment and access to prisoners. The United States Supreme Court has repeatedly held that the media have no greater right of access to prisoners than other members of the general public.[16]

17. Paragraph 132(1)(a) operates, in form and substance, as a prohibition on all persons interviewing or obtaining written or recorded statements from a prisoner, subject to certain exceptions. It treats the media and others alike. For that reason, it cannot be characterised as a law that is directed to the restriction or prohibition of political communications[17] and that requires 'compelling justification' in order to be valid. The plaintiff's submissions to the contrary are baseless.

18. Thirdly, the plaintiff's reliance on *Bennett v Human Rights and Equal Opportunity* ('*Bennett*')[18] is misplaced. In that case, Finn J found that the reg 71(3) of the *Public Service Regulations* (Cth) burdened the implied freedom of political communication because its 'heartland' was concerned with information about political and governmental matters. As his Honour explained:[19]

> [I]t is the case that information caught by the regulation need not necessarily or of course be relevant to "political and governmental matters" of the kind described by McHugh J [in *Levy v Victoria*]. It may, for example, relate only to private or commercial information supplied by a member of the community to a government agency. As I have already indicated, the regulation is undifferentiating between the types and quality of the information it embraces. Nonetheless, *as a regulation that applies to public servants in departments and agencies of government who are charged with formulating and implementing government programs and policies*, its heartland is concerned with information about political and governmental matters and about the executive organs of the State for which ministers are in some measure responsible in our system of government. *One of the regulation's major concerns on its face is with "information about public business" of the Commonwealth.*

19. Finally, the plaintiff's claim that s 132(1)(a) is not a law that incidentally burdens political communication is mistaken. Like the provision considered in *Coleman v*

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16 See, for example, *Saxbe v Washington Post* (1974) 417 US 843 at 849 (explaining that a policy prohibiting media interviews was 'no more than a particularized application of the general rule that nobody may enter the prison and designate an inmate whom he would like to visit, unless the prospective visitor is a lawyer, clergyman, relative or friend of that inmate'); *Pell v Procunier* (1974) 417 US 817 at 833-834; *Houchins v KQED Inc* (1978) 438 US 1 at 10-15.

17 *ACTV* (1992) 177 CLR 106 at 169 (Deane and Toohey JJ) (referring to a law 'prohibiting or restricting political communications by reference to their character as such'); *Levy v Victoria* (1997) 189 CLR 579 at 598 (Gaudron J) (referring to a law the 'direct purpose' of which is to restrict political communication); *Coleman v Power* (2004) 220 CLR 1 at 31 [31] (Gleeson CJ).

18 (2003) 134 FCR 334.

19 (2003) 134 FCR 334 at [78] (emphasis added). As is apparent, the considerations do not apply to s 132(1)(a) of the CSA.

Power, it is not aimed at political communication, and it should be regarded (at most) [20] as only incidentally burdening the implied freedom.[21]

20. Accordingly, the submission that a law which has a disproportionate impact on the media requires 'compelling justification' should be rejected.

Subsection 132(1)(a) serves legitimate ends

Prisoners lose rights upon entry into prison

21. Consideration of whether s 132(1)(a) is valid should commence by recognising that prisoners have lose many rights upon entering prison.[22] In particular, persons in prison no longer have the freedom to associate with anyone they wish and they are subject to a host of restrictions that do not apply to ordinary members of the community. Similarly, they lose their previous freedom to engage in speech on topics of their choice, including politics.

22. In *R v Home Secretary; Ex parte Simms* ('*Simms*'), Lord Steyn (with whose reasons Lord Hoffman agreed) said of a prisoner's right to free speech:[23]

> Not all types of speech have an equal value. For example, no prisoner would ever be permitted to have interviews with a journalist to publish pornographic material or to give vent to so-called hate speech. *Given the purpose of a sentence of imprisonment, a prisoner cannot also claim to join in a debate on the economy or on political issues by way of interviews with journalists.* In these respects the prisoner's right to free

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[20] The State does not concede that s 132(1)(a) effectively burdens political communication. The implied freedom does not confer an individual right. The fact that an individual like the plaintiff might wish to engage in communications, including perhaps some of a political or governmental character, does not mean that any law that makes engaging in those communications more difficult burdens the implied 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. Nor is it apparent that all the subjects that the plaintiff wishes to discuss, such as the administration of the Palm Island Council, are relevant to the implied freedom: *Levy v Victoria* (1997) 189 CLR 579 at 596 (Brennan CJ), 626 (McHugh J); *John Fairfax Publications v Attorney-General (NSW)* (2000) 158 FLR 81 at 97 [87]-[89]. However, given the focus of the plaintiff's submissions is on the characterisation of s 132(1)(a) and whether that provision is reasonably appropriate and adapted to legitimate ends, that is also the focus of these submissions.

[21] (2004) 220 CLR 1 at 31 [31] (Gleeson CJ), 123 [326] (Heydon J). See also *Hogan v Hinch* (2011) 275 ALR 408.

[22] This is both an inevitable and intended consequence of a sentence of imprisonment as well as a practical necessity that arises from the need to maintain discipline and control within prisons: *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 120G-H and 127B (Lord Steyn) and at 144H (Lord Millett); *R v (Mellor) v Home Secretary* [2002] QB 13 at [50]-[57], [70]-[71]; *McEvoy v Lobban* [1990] 2 Qd R 235 at 241 (Thomas J). As an example of the practical reasons why prisoners are necessarily deprived of rights as a consequence of their incarceration, see *Palmer v Chief Executive, Qld Corrective Services* [2010] QCA 316 at [35]. See also *R v Secretary of State for the Home Department; Ex parte Leech* [1994] QB 198, particularly 209E.

[23] [2000] 2 AC 115 at 127 (emphasis added).

speech is outweighed by deprivation of liberty by sentence of the court, and the need for discipline and control in prisons.

23. In the same case, Lord Hobhouse[24] and Lord Millett[25] accepted that interviews with journalists could be restricted to exceptional situations and that a prisoner did not have rights to be visited by whomever he or she wished. None of these views was premised, in any way, on prisoners lacking a right to vote.

24. The views in *Simms* are consistent with the restrictions that were placed on prisoners in the nineteenth and twentieth centuries in a number of Australian jurisdictions. In South Australia, for example, s 28 of the *Prisons Act 1869* (SA) made it an offence, among other things, for any person to hold or attempt to hold 'any communication with a prisoner undergoing sentence' or to deliver or caused to be introduced into any gaol or labor prison article or any letter not allowed by the rules and regulations.[26]

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25. In Queensland, s 28(13) of the *Prisons Act 1890* (Qld) made it a minor offence for a prisoner to write, send or have in his possession 'unauthorized letters, writings, newspapers or documents of any kind whatsoever'. Paragraph s 69(a) made it an offence for a person, contrary to the regulations of a prison, to communicate or attempt to communicate with a 'prisoner'.[27]

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26. The regulations under the *Prisons Act 1890* (Qld) imposed further restrictions. Among other things, they required an officer to 'use every precaution and the utmost vigilance in preventing prisoners from escaping or *holding communication with unauthorized persons*' (emphasis added).[28]

27. The variety of these restrictions demonstrates how the right of prisoners to communicate with others, by speech or in writing, has long been subject to extensive prohibition or restriction. It suggests that any right of the prisoner to engage in political debate or discussion, at federation and for decades afterwards, was treated as something abrogated by imprisonment.

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24 [2000] 2 AC 115 at 143.

25 [2000] 2 AC 115 at 144-145.

26 The *Prisons Act 1936* (SA) contained an equivalent provision: see *Prisons Act 1936* (SA), s 63.

27 See *Prisons Act 1890* (Qld), s 5 sv 'prisoner': a 'prisoner' was defined as 'any person committed to prison on remand, or for trial, safe custody, punishment or otherwise'.

28 Regulations, s 22 (made in 1927). See also s 226(4) (providing that the Warden engaged in attending upon visitors to prisoners 'shall take care that the interviews are confined to matters which personally concern the prisoners and their friends, and that no general information or news of the day, or matters connected with the prison and its discipline, are discussed between the prisoners and their friends'). Other States imposed various similar types of restrictions: see, for example, *Statute of Gaols 1864* (Vic), s 24; Regulations relating to Visitors, 1886 (Vic), r 7; *Gaols Act 1890* (Vic), s 41; *Gaols Act 1915* (Vic), s 41(a); Prisons Act Regulations 1940, s 136(h) (WA).

28. Furthermore, the restrictions demonstrate that these restrictions were not tied to the inability of prisoners to vote at Commonwealth or State elections.[29] At federation, for example, South Australia only disqualified persons who had been convicted of 'any Treason, felony or infamous offence within any part of Her Majesty's dominions' but it restricted rights of communication with all prisoners. The situation in Queensland was the similar.

29. The imposition of restrictions on prisoners' communication was therefore not based on 'an understanding of what was required for participation in the public affairs of the body politic'.[30] That aspect of *Roach* formed an important part of the reasoning of the majority. It has no application here.

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Considerations of prison administration

30. Another consideration relevant to validity is that prisons are difficult and potentially volatile environments, and throw up difficult questions of administration to which courts are ill-suited. In rejecting the view that strict scrutiny should apply to prison regulations that impinge on the First Amendment, for example, the Supreme Court of the United States has remarked:[31]

> Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.

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31. The difficulties with second-guessing the judgment of officials are reflected in Australian case law.[32] These matters are relevant to the assessment of whether s 132(1)(a) is reasonably appropriate and adapted to achieving legitimate ends.

The legitimate ends

32. The plaintiff makes several observations about the objectives that the State has identified in its defence. It is necessary to say something about their observations.

33. The plaintiff observes, without elaboration, that the object of protecting the good order and security of correctional centres and the object of protecting the safety and welfare of correctional staff can have no relevance to persons on parole.[33]

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[29] For a history of the Commonwealth provisions, see *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 195-197 [71]-[74] (Gummow, Kirby and Crennan JJ). For the history of disqualification in the States at federation, see *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 212-213 [134]-[136] (Hayne J).

[30] *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 192 [62] (Gummow, Kirby and Crennan JJ)

[31] *Turner v Safley* (1987) 482 US 78 at 79.

[32] *Flynn v The King* (1949) 79 CLR 1 at 7 (Dixon J); *McEvoy v Lobban* [1990] 2 Qd R 235 at 240-241 (Thomas J); *Palmer v Chief Executive, Qld Corrective Services* [2010] QCA 316 at [38] (Chesterman JA).

[33] Plaintiff's Submissions, para 47.

That is not so. Prisons are notoriously volatile environments.[34] It is easy to imagine circumstances in which information disclosed by someone on parole may pose a risk to the welfare or safety of correctional staff or prisoners both inside and outside such centres. An example would be a detailed, step-by-step description of a correctional centre in an interview that would enable the recipient of the information to draw a plan of the facility.[35] Another might be disclosure of the information in an interview suggesting that a particular prisoner inside a correctional centre is an informer.[36]

10 34. It is also easy to imagine circumstances in which the media profile of a prisoner within a correctional centre poses a risk to the good order and security of correctional centres. In *Pell v Procunier*,[37] the Supreme Court of the United States dealt with a situation in California where the interest of the press in certain prisoners had resulted in their becoming virtual 'public figures' within the prison society. This led to serious disturbances. In *Saxbe v Washington Post*, the Supreme Court observed that the experience of the Federal Bureau of Prisons accorded with that of the California Department of Corrections in *Pell*[38] and upheld a general ban on interviews with the press.

20 35. Although the plaintiff has suggested that monitoring of phone calls and mail, and the capacity to keep audiovisual or visual recordings of a visit adequately protect the objectives of good order and security in prisons,[39] he has not explained how these facilities would eliminate the risks identified in *Pell* and *Saxby*.

36. Raising the media profile of prisoners on parole may also entail problems. Interviews with the media can turn the prisoner into a celebrity and create the perception that prisoners are obtaining benefits from their offences.[40] The result is to risk undermining public confidence in the correctional system. Paragraph 132(1)(a) serves to reduce the risk of this occurring.

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37. The claim that the broad category of prisoners is unlikely to be in possession of information capable of jeopardizing law enforcement investigations is unsupportable.[41] Cases like *Harms* demonstrate that some prisoners may well have information that puts law enforcement investigations or informers at risk.

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34 See, for example, *McEvoy v Lobban* [1990] 2 Qd R 235 at 241 (Thomas J).

35 It is an offence for a prisoner to draw a plan of a prison: CSA, s 123 and Corrective Services Regulations 2006 (Qld), s 20(x).

36 Compare *Harms v Queensland Parole Board* [2008] QSC 163 at [5]-[6], [19] (Douglas J).

37 (1974) 417 US 817.

38 (1974) 417 US 843 at 848-849.

39 Plaintiff's Submissions, paras 59-60.

40 This is also one of the ends served by provisions for 'special forfeiture orders' under the *Criminal Proceeds Confiscation Act 2002* (Qld), Chapter 4.

41 Plaintiff's Submissions, para 62.2.

38. The scenarios in which interviews or statements from prisoners may cause difficulties are many. It was for this reason that s 132(1)(a) was framed as a prohibition on interviewing and obtaining written or recorded statements with a discretion being left in the hands of the chief executive. As will be explained below, that is a reason for regarding the provision as valid, not as invalid.[42]

No incongruities

39. The plaintiff's claim that s 132(1)(a) is not reasonably and adapted to any of the objectives is based partly on asserted incongruities[43] that, upon analysis, do not exist. Persons on remand are typically those who have been denied bail. They are incarcerated until the trial process is complete and a verdict of acquittal is rendered or the prosecution is discontinued. Their incarceration necessarily means that they lose rights to associate with whomever they wish, and their capacity to communicate with other persons is restricted.[44] The plaintiff has not explained how the chief executive can sensibly be expected to maintain the good order and security of correctional centres while being compelled to give a subset of those in remand—those able to run for the Commonwealth Parliament—the capacity to mount a political campaign from inside a correctional centre and the access to the media that such a campaign would presumably entail. It is evident that such a situation would pose risks to the good order of correctional centres, including the risks recognised by the Supreme Court of the United States in *Pell* and *Saxbe*.

40. Furthermore, the plaintiff's position is incongruous: he seems to acknowledge that individuals' rights to associate and to campaign for election are restricted upon their becoming prisoners on remand[45] but simultaneously suggests that such persons should have the ability to enter into public debate and interact with the media[46] largely without restriction because they have not been convicted.

41. Persons in prison who are able to vote in federal elections[47] raise similar issues. The risks to the good order of correctional centres if a group of prisoners are routinely given access to the media and other visitors are real, as *Pell* and *Saxbe* recognise. Furthermore, the plaintiff's submission would mean that the scope of the implied freedom, and its impact on State correctional laws and policies, would effectively expand or contract according to the extent of voting disqualifications in Commonwealth law. This is more incongruous than the alternative.

[42] Paras 51 to 52.
[43] Plaintiff's Submissions, para 53.
[44] The explanatory notes to the Corrective Services Bill 2006 indicate that provisions such as s 132(1)(a) serve a legitimate purpose of ensuring that prisoners on remand awaiting trial do not have the unrestricted right to communicate with the media on matters relating to their trial that would be in contempt of court.
[45] Plaintiff's Submissions, para 59.
[46] And presumably others.
[47] Plaintiff's Submissions, para 53.2.

42. Persons released on parole remain prisoners who have been sentenced to a term of imprisonment and cannot be equated with ordinary members of the public, as the plaintiff implicitly seeks to do. That point is developed below.[48]

43. Further, the possibility—and it is no more than that—that a greater proportion of indigent homeless or mentally ill persons in some areas may be imprisoned owing to lack of sentencing alternatives does not mean that the chief executive should have less control over the communications of prisoners. The alleged incongruity
10 involves a non-sequitur.[49]

44. Even if it could be said that there were incongruities, the plaintiff's observations on the coherence of the law should be rejected for the reasons stated in paragraphs 12 and 13 above. As the survey of historical restrictions in paragraph 24 to 28 above demonstrates, there has never been a close connection between the prisoners having the right to vote and the extent of restrictions that have been placed upon them. That was the case at federation and remains so now.

45. Furthermore, there is no logical reason why a community could not retain the right
20 of all prisoners to vote but restrict their ability to communicate with or associate with others, including the media, during the term of their imprisonment.[50] Again, that demonstrates that there need be no correlation between the rights of prisoners and the extent of the franchise.

Alternatives means of communication

46. The plaintiff ignores the specific means by which a prisoner is able to communicate with others about prison conditions and the like. Under the CSA, the prisoner can send privileged and ordinary mail. Privileged mail can be sent to specified persons including the Commonwealth Attorney-General and State parliamentarians, the ombudsman, the Director of Public Prosecutions and the
30 President of the Australian Human Rights Commission.[51] Such mail can only be intercepted in limited circumstances.[52] The plaintiff therefore has the capacity to raise his concerns about Aboriginal health and prison conditions with some of the persons who are most likely to act upon his representations.

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[48] See paras 61 ff.

[49] Plaintiff's Submissions, para 53.5.

[50] The situation in the American States of Maine and Vermont is an example: all prisoners, except for those convicted of electoral fraud, can vote. However, that presumably does not mean that prisoners are not subject to the restrictions on the right to associate or have unrestricted or largely unrestricted rights to access the media and vice versa.

[51] Corrective Services Regulations 2006 (Qld), s 18.

[52] CSA, ss 46, 47.

47. Furthermore, as explained earlier, s 132(1) of the CSA does not prevent a prisoner from sending unsolicited mail to the media or indeed anyone else. Subject to the controls on outgoing mail from correctional centres,[53] which the plaintiff has not challenged, there is nothing to prevent the prisoner from writing unsolicited letters to the editor of newspapers or sending in manuscripts of books or essays to publishers. Indeed, it is difficult to see how an essay would ordinarily be a 'written or recorded statement' within the meaning of s 132(1)(a).

48. It is thus an exaggeration for the plaintiff to claim that s 132(1)(a) puts the ability of prisoners and the media to expose issues such as the adequacy of prison conditions in the hands of those who have an interest in prohibiting public exposure of such information.[54] The provision does not affect the alternative means by which the plaintiff can convey his views to others.

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49. The plaintiff also ignores the practical difficulties that the chief executive may have in monitoring and supervising persons who are no longer in correctional centres. Such persons are not subject to the intrusive monitoring powers, and parole makes it inappropriate routinely to impose such restrictions. Subsection 132(1)(a) is designed to ensure that the prisoner, and persons who wish to interview him or her, approach the chief executive before interviews take place and before recordings are made. As such, it facilitates the chief executive's exercise of his responsibilities under the CSA.

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Discretion not unreviewable

50. The Plaintiff attacks s 132(1) of the CSA as an 'unstructured' discretion that is 'practically unreviewable'.[55] These submissions should be rejected.

51. First, the whole purpose of a power being conferred in discretionary terms is to enable the exercise of the power to be responsive to the particular facts of each individual case. As Dixon J observed in *Swan Hill Corporation v Bradbury*:[56]

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> The reason for leaving the ambit of the discretion unconfined may be that legislative foresight cannot trust itself to formulate in advance standards that will prove apt and sufficient in all the infinite variety of facts which may present themselves.

52. Thus, the discretionary character of the power in s 132(1) of the CSA *enhances* its capacity to be reasonably appropriate and adapted to the legitimate ends which they are intended to serve. That character permits the discretion to be exercised

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[53] CSA, ss 45, 48.

[54] Plaintiff's Submissions, para 55.

[55] Plaintiff's Submissions, para 55.

[56] (1937) 56 CLR 746 at 757, cited with approval in *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 613 (Brennan J). See also *Klein v Domus Pty Ltd* (1963) 109 CLR 458 at 473 (Dixon CJ).

responsively according to the facts of individual cases.[57] This may be contrasted with inflexible policies and rules.[58]

53. Secondly, the plaintiff ignores the fact that decisions under section 132(1)(a) would qualify as decisions 'of an administrative character...under an enactment' within the meaning of the *Judicial Review Act 1991* (Qld) ('the JR Act').[59] The availability of review is significant.[60] Persons aggrieved with the chief executive's decisions, such as a journalist, may therefore seek judicial review of those decisions and the reasons for them.[61] Review is available on grounds such as breach of the rules of natural justice, failure to take into account relevant considerations, and improper purpose.[62]

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54. Although the discretion in s 132 is unconfined in terms, this does not mean that it is an unfettered power. The considerations that must and must not be taken into account and the purposes for which the power may be exercised are confined by the subject matter, scope and purpose of the CSA.[63] Parliament, moreover, must be presumed to have intended that the discretion would be exercised in conformity with the Constitution absent a manifest intention to the contrary.[64]

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55. The Court therefore should not accept an assertion by the plaintiff that the chief executive's discretion is 'practically unreviewable'.

56. Thirdly, to the extent that *Bennett* suggests that any discretion to lift a prohibition is incompatible with the implied freedom of political communication, then it is respectfully submitted that the case was wrongly decided or should be distinguished. Justice Finn's analysis of the impugned regulation assumes that the

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57 This is confirmed by the explanatory notes for the Corrective Services Bill 2006, pp 118-119. It should be noted that a similar, flexible approach exists for 'public interest' tests in the context of freedom of information legislation: *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 443-444 [55] (Hayne J); *Osland v Secretary, Dept of Justice* (2008) 234 CLR 275 at 287-288 [20] (Gleeson CJ, Gummow, Heydon and Keifel JJ).

58 See *Simms* [2000] 2 AC 115; *Herald Weekly Times v Correctional Services Commissioner* [2001] VSC 329.

59 See the definition in s. 4 of the JR Act and this Court's consideration of that definition in *Griffith University v Tang* (2005) 221 CLR 99.

60 This significance was recognised in *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 303 (Mason CJ), 331 (Brennan J), and 381 (Toohey J). See also *Miller v TCN Channel Nine Pty Ltd* (1986) 181 CLR 556 at 614 (Brennan J).

61 JR Act, ss 31, 32. Such reasons must disclose findings on material questions of fact, the evidence or other material considered, as well as the reasons for decision (Section 3 of the JR Act).

62 JR Act, ss 20, 23 and 24.

63 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; *Klein v Domus Pty Ltd* (1963) 109 CLR 467; *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170.

64 *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488 at 522 (in the context of s 92), cited with approval in *Miller v TCN Channel Nine Pty Ltd* (1986) 181 CLR 556 at 614 (Brennan J). See also *AMS v AIF* (1999) 199 CLR 160 at 176 [37] (Gleeson CJ, McHugh and Gummow JJ).

discretion in that case was 'unbridled'; in the case of s 132(1)(a), that is not the case. More importantly, Finn J ignored the rationale for having a general discretionary power that Dixon J identified in *Swan Hill Corporation v Bradbury.*

57. Fourthly, *Davis v Commonwealth* does not assist the plaintiff. The issue in that case was whether a Commonwealth law was authorised by a head of power. The only ground on which the law could have been upheld was it fell within the so-called nationhood power or the executive power in s 61, coupled with s 51(xxxix) of the Constitution. The absence of connection was demonstrated by the far-reaching effect of the law, which applied to 'countless situations [which] could not conceivably prejudice the commemoration of the Bicentenary'.[65] *Davis* has nothing to do with reasonable proportionality in the context of constitutional guarantees. In any event, the suggested lack of proportionality between a law and its subject matter is no longer the test for determining whether the law is with respect to a head of power.[66]

Conclusion: s 132(1)(a) is reasonably adapted and appropriate

58. An inquiry into whether a law is reasonably appropriate and adapted requires a court to identify the ends of the law and to ascertain whether it is a reasonable means of achieving those ends. It is not, however, necessary for those seeking to uphold the law to show that it is the best means of achieving the legitimate end. As Heydon J explained in *Coleman v Power*:[67]

> [W]hether a law is reasonably appropriate and adapted to achieving a legitimate end does not call for a judicial conclusion that the law is the sole or best means of achieving that end. Apart from the fact that that would be an almost impossible task for which the judiciary is not equipped, this Court has not said anything of the kind either in *Lange v Australian Broadcasting Corporation* or in any other case. This Court has only called for an inquiry into whether the law was reasonably appropriate and adapted to serve a legitimate end. This implies that, in a given instance, there may be several ways of achieving that end. It also implies that reasonable minds may differ about which is the most satisfactory... The question is not "Is this provision the best?", but "Is this provision a reasonably adequate attempt at solving the problem?"

59. In deciding whether the law is a reasonable means of achieving legitimate ends, the extent of the burden on political communication is relevant.[68]

60. For the reasons above, s 132(1)(a) of the CSA does no more than incidentally burden freedom of political communication. It leaves the prisoner free to communicate or write to a host of persons, and the discretion that it vests in the

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65 (1988) 166 CLR 79 at 99 (Mason CJ, Deane and Gaudron JJ).

66 *Leask v Commonwealth* (1996) 187 CLR 579.

67 (2004) 220 CLR 1 at 123-1243 [328].

68 See, for example, *Coleman v Power* (2004) 220 CLR 1 at 99 [319] (Heydon J).

chief executive is not unreviewable. The ends which it serves are legitimate, and the means that it employs are reasonable. It follows that it does not infringe the implied freedom of political communication.

The Nature of Parole

61. In its ordinary meaning, the term 'parole' connotes a formal promise; the giving of a pledge or undertaking.[69] In a correctional context, parole is best defined as the early release of an inmate from a custodial sentence on licence (that is, subject to supervision and, in the event of breach, recall to custody).[70]

10 62. In a society where imprisonment for the punishment of crime is accepted as being sometimes unavoidable, the parole system represents an important influence for the reform and rehabilitation of those in gaol.[71] It affords a prisoner hope for early release and thereby creates an incentive for rehabilitation.[72] The parole system also has benefits beyond those directed to rehabilitation, such as release of prisoners in exceptional circumstances on compassionate grounds.[73]

63. Connected both to the rehabilitative and compassionate rationale for parole is the purpose that it serves in providing for the reintegration of prisoners' into the community. The conditional nature of liberty afforded by parole enables a 20 prisoner's release into the community to be supervised prior to the completion of his or her sentence when such supervision is not available[74]. In this way, parole serves the purpose of the CSA to provide for community safety through the humane containment, supervision and rehabilitation of offenders.[75]

64. Notwithstanding a prisoner's release on parole, the prisoner remains in the chief executive's custody and a prisoner for the purposes of the CSA except in relation to certain stipulated provisions.[76] A prisoner released on parole is taken to be still

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69 *Shorter Oxford English Dictionary.* For example, the term was used to describe the formal undertaking given by prisoners of war that they will not try to escape, or that, if liberated, will return to custody under stated conditions, or will refrain from taking up arms against their captors for a stated period.

70 Morgan M, 'Parole and Sentencing in Western Australia' (1992) 22 UW Aust LR 94.

71 *R v Shrestha* (1991) 173 CLR 48 at 69 (Deane, Dawson and Toohey JJ). See also the observations at 67.

72 *Bugmy v The Queen* (1990) 169 CLR 525 at 536. See also *R v Shrestha* (1991) 173 CLR 48 at 69 (Deane, Dawson and Toohey JJ).

73 *R v Shrestha* (1991) 173 CLR 48 at 69-70 (Deane, Dawson and Toohey JJ). See also ss 176-177 of the CSA.

74 Subject to other forms of statutory supervised release such as the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

75 CSA, s 3(1). See also *Queensland Parole Board v Moore* [2010] QCA 280 at [17].

76 CSA, ss 4, 7 and Schedule 4. Those provisions are ss. 22-24, 28-40, 43, Divisions 4-9A of Part 2 of Chapter 2, Parts 1 and 2 of Chapter 3, Parts 2 and 4 of Chapter 4, Parts 5 and 6 and 11 of Chapter 6.

serving their sentence.[77] The conditions of the parole order, including the minimum statutory conditions as well as the conditions imposed by the board in its discretion, provide the terms of the 'promise' or 'undertaking' given by the prisoner in return for his or her liberty.[78]

The Power to Impose Conditions

65. Subsection 200(1) of the CSA sets out a number of mandatory conditions to which a parole order must be subject. Those mandatory conditions include a condition that the prisoner not commit an offence[79]. Subsection 200(2), on the other hand, confers a discretionary power on a parole board to include in a parole order conditions the board reasonably considers necessary to ensure the prisoner's good conduct and to stop the prisoner committing an offence. There are a number of features of the statutory scheme for parole under the CSA which are relevant to the construction of this discretionary power.

66. First, there is a contrast between the mandatory condition that a prisoner not commit an offence in s 200(1) and the discretionary power to impose conditions under s 200(2) to *stop* a prisoner committing an offence. Subsection 200(2) is preventative in nature, and is aimed at *stopping* the prisoner from committing an offence. A similar purpose is apparent in the discretion to impose a condition to ensure a prisoner's good conduct.[80] This is illustrated by the examples[81] in the section.[82] They demonstrate that the power enables a parole board to impose conditions aimed at preventing a prisoner from engaging in behaviour that may lead to further offending. This serves the dual objectives of protecting the community[83] and reducing prisoners' likelihood of committing further offences.[84]

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77 CSA, s 214. See also *Power v The Queen* (1974) 131 CLR 623 at 628-629 (Barwick CJ, Menzies, Stephen and Mason JJ).

78 See the provisions for cancellation of parole orders in sections 204-206 of the CSA.

79 CSA, s 200(1)(f).

80 A condition aimed at ensuring a prisoner be of 'good conduct' is comparable to the purpose of conditions in one of the early models for probation legislation, the *Probation of Offenders Act 1907* (Eng). That legislation permitted conditions on probation to secure 'that the offender lead an honest and industrious life': see *The King v Davies* [1909] 1 KB 892; *Grant v Leekong* (1996) 85 A Crim R 298; *Cobiac v Liddy* (1969) 119 CLR 257 at 270. See also the *Offenders Probation Act of 1886* (Qld). The preamble of that Act stated: 'That many offenders might be induced to reform if, instead of being committed to prison upon their conviction, and opportunity of reformation were afforded to them'. That Act provided for release of offenders subject to conditions.

81 *Acts Interpretation Act 1954* (Qld), s 14D.

82 A condition about the prisoner's place of residence, employment or participation in a particular program, a condition imposing a curfew for the prisoner, and a condition requiring the prisoner to give a test sample.

83 It does so by minimising the risk that the prisoner will commit offences whilst on parole.

84 It does so by compelling the prisoner to develop more pro-social behaviours.

67. Secondly, the discretionary power in s 200(2) facilitates the objectives of parole by ensuring public confidence in the system of parole. It has been recognised that the public acceptability of early release and the need to maintain public confidence in the system of justice are relevant considerations for parole authorities considering whether a prisoner ought to be granted parole.[85] The compatibility of a prisoner's release on parole with the welfare of society has always been a feature of parole legislation in Queensland.[86] A parole board's power to impose conditions aimed at stopping prisoners from committing offences and to ensure their good conduct enables the board to impose conditions aimed at preventing prisoners from engaging in conduct that offends community standards.[87] This assists to ensure that the early release of a prisoner on parole prior to the completion of their sentence is on terms acceptable to the community.

68. Condition (v) of the Plaintiff's Parole Order is an example of this. Many in the community would find a prisoner profiting from their notoriety to be unacceptable. Condition (v) may be seen as being aimed at the purpose of preventing the Plaintiff from obtaining such a benefit. The condition supports public confidence in the system of parole by preventing the Plaintiff from engaging in conduct that the community would regard as unacceptable.

Section 200(2) does not offend the implied freedom

69. Properly construed, s 200(2) of the CSA does not authorise the imposition of conditions on parole orders that impermissibly burden the implied freedom. This is because:

    (a) any burden imposed by s 200(2) is indirect and incidental; and

    (b) s 200(2) only permits the imposition of conditions for legitimate ends in a manner which is reasonably appropriate and adapted to achieving those ends.

70. Section 200(2) of the CSA is not a law that may be characterised as being with respect to the prohibition of communications on political and government matters.[88] To the contrary, s 200(2) is directed to stopping prisoners from

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85 *In re Findlay* [1985] AC 318 at 332-333; *South Australia v O'Shea* (1987) 163 CLR 378 at 401-402 (Wilson and Toohey JJ).

86 See s 8 of the *Prisoners' Parole Act 1937* (Qld).

87 There are parallels between what is encompassed by 'good conduct' and what is encompassed by the ancient power to bind over for good behavior. That power was available for anti-social behavior. *Lansbury v Riley* [1914] 3 KB 229; Williams, G, 'Preventative Justice and the Rule of Law' (1953) 16 *Modern Law Review* 417-427.

88 See *Hogan v Hinch* (2011) 275 ALR 408 at [95] and [96].

committing offences and ensuring that they are of good conduct for the purpose of facilitating the objects of the scheme of parole under the CSA.

71. Furthermore, there is a clear contrast between s 200(2) of the CSA and laws which burden the implied freedom by their impact on pre-existing rights.[89] Section 200(2) of the CSA provides for *conditions* on a prisoner's liberty under a parole order. The prisoner has no entitlement to that liberty; such liberty is a privilege. The conditions only burden that privilege.

10 **The Legitimate Ends Served by Section 200(2)**

72. Section 200(2) of the CSA Act serves the following legitimate ends:

   (a) ensuring that prisoners are of good conduct and do not commit offences whilst on parole.

   (b) supporting the statutory scheme of parole under the CSA, an object of which is to reintegrate prisoners into the community.

73. These are legitimate ends for the purpose of the implied freedom, as the plaintiff 20 concedes.[90] They further the objects of protecting public safety and maintaining public order.[91] Facilitating the statutory scheme of parole under the CSA is intrinsically a legitimate end for the purpose of the implied freedom, given the objects the scheme aims to serve; namely, supervised rehabilitation and reintegration of offenders to reduce recidivism.

Section 200(2) is reasonably appropriate and adapted

74. Section 200(2) only authorises conditions reasonably appropriate and adapted to these ends because a parole board's power is subject to the board reasonably 30 considering that the conditions imposed are necessary. That the board must 'reasonably' consider such conditions to be necessary is a jurisdictional fact which determines whether the board may impose such conditions.[92] The board can only lawfully consider such conditions to be necessary on logical and rational grounds.[93] For the same reasons that apply for decisions under s 132(1) of the

89 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 245-246 [180]-[184] (Gummow and Hayne JJ).

90 Plaintiff's Submissions, para 71.

91 *Levy v Victoria* (1997) 189 CLR 579 at 599 (Brennan CJ), 609 614-15 and (Toohey and Gummow JJ), 619 (Gaudron J), 627 (McHugh J), 647-8 (Kirby J); *Coleman v Power* (2004) 220 CLR 1 at 24 [9], 32 [32] (Gleeson CJ), 53 [102] (McHugh J), 78 [198] (Gummow and Hayne JJ), 99 [256] (Kirby J), 121 [323] (Heydon J).

92 *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at [122]-[147] (Gummow J).

93 *Minister for Immigration v SZMDS* (2010) 240 CLR 611.

CSA, decisions under s 200(2) are also decisions capable of review under the JR Act. The right to reasons ensures the exposure of illogical or irrational grounds.[94]

75. Thus, the limits on a parole board's power under s 200(2) of the CSA, in combination with the provisions of the JR Act, ensure that any conditions imposed by the board are reasonably appropriate and adapted to the ends of ensuring that a prisoner is of good conduct and stopping the prisoner from committing an offence.[95] In turn, s 200(2) is reasonably appropriate and adapted to facilitating the objects which the scheme of parole aims to serve.

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The Validity of the Conditions

76. The Second Defendant has removed condition (u) from the Plaintiff's Parole Order. It is not proposed to address that question.[96]

77. Neither conditions (t) or (v) impose any burden on the implied freedom. Before the grant of the parole order, the Plaintiff had no right to attend public meetings on Palm Island. It is a necessary implication of his sentence of imprisonment that he had no such right. Accordingly, condition (t) is incapable of imposing any burden on the implied freedom.[97] There can be no burden on the implied freedom imposed by the condition[98] prohibiting the Plaintiff from obtaining any benefit from members of the media. That has no affect on his ability to communicate on political or government matters. It is not necessary to obtain a benefit from members of the media in order to communicate on political matters.[99]

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78. The Plaintiff has not availed himself of his right to obtain a statement of reasons under the JR Act for the Second Defendant's decision to impose the conditions. This is relevant to assessing whether the conditions are a reasonably appropriate and adapted manner of serving legitimate ends for two reasons.

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79. First, there is no evidence to displace the presumption that the Second Defendant considered the conditions to be necessary to ensure the Plaintiff's good conduct or

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94 *Minister for Immigration v SZMDS* (2010) 240 CLR 611 at 623 [34] (Gummow ACJ and Keifel J).

95 See *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 303 (Mason CJ), 331 (Brennan J), and 381 (Toohey J). See also *Miller v TCN Channel Nine Pty Ltd* (1986) 181 CLR 556 at 614 (Brennan J).

96 The question of whether that condition is constitutionally invalid has therefore become hypothetical.

97 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 223-225 [105]-[112] (McHugh J), 245-246[180]-[184] (Gummow and Hayne JJ), 298 [337] (Callinan J), 303 [354] (Heydon J); *Levy v Victoria* (1997) 189 CLR 579 at 622, 625-626 (McHugh J); *McClure* (1999) 163 ALR 734 at 740-741.

98 Condition (v).

99 It is submitted that the implied freedom does not constitutionally entrench the recent phenomena of 'cheque book journalism' (as to which, see *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 226 [172]).

to stop him committing an offence.[100] Thus the ends served by the conditions may be inferred as being for one or both of those purposes.

80. Secondly, in the absence of reasons, there is no evidence that the Second Defendant considered the conditions to be necessary on illogical or irrational grounds. Any complaint that the conditions were not authorised by s 200(2) of the CSA is therefore limited to a complaint that the conditions *could not* have been reasonably considered necessary for the purposes enumerated by s 200(2).[101] This limits any complaint that they are not reasonably appropriate and adapted.

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81. It cannot seriously be argued that the Second Defendant *could not* have reasonably considered condition (t) necessary to ensure the Plaintiff's good conduct or to stop him committing an offence. The condition is directly related to the circumstances of the offence for which he was imprisoned. Before the Second Defendant were the remarks of the sentencing judge which outlined the serious nature of the Plaintiff's offence. Those remarks point to the Plaintiff's leadership role in the riot and the fact that it started from a public meeting at which the Plaintiff was a speaker.[102] The matters discussed at that meeting fall within the same class of matters on which the Plaintiff now claims an entitlement to speak.[103] One of the members of the Second Defendant is an aboriginal person who is actively involved in the indigenous affairs of Northern Queensland and is in regular contact with the indigenous communities of that region including that of Palm Island.[104] The Second Defendant therefore had the experience of that member available to it to inform its understanding of the circumstances on Palm Island at the time of its decision and the risk that the Plaintiff posed if released back into that community.[105] It was open to the Second Defendant to impose condition (t) to address the risk associated with public meetings.

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82. The Plaintiff's reliance on his submission to the Second Defendant that he had 'committed himself...to the use of legal and political avenues (including the media) to express any feelings of anger over perceived injustices within the Palm

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[100] It is to be presumed that the conditions have been imposed because the Second Defendant considered them necessary to stop the Plaintiff committing an offence or to ensure his good conduct because the Second Defendant's satisfaction in that regard is a condition precedent to its power under s. 200(2) of the CSA and there is no evidence to displace this presumption: *Western Stores Ltd v Orange County Council* [1971] 2 NSWLR 36 at 46-47 (Moffitt JA, Asprey JA and Taylor AJA concurring); *Attorney-General for the Northern Territory v Minister for Aboriginal Affairs* (1986) 67 ALR 282 at 297 (Wilcox J); *Wilover Nominees Ltd v IRC* [1973] 2 All ER 977 at 983; *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 671-2 (Gaudron J).

[101] *RP Data Pty Ltd v Brisbane City Council* (1995) 90 LGERA 42.

[102] Special Case, para 17 and Attachment 3: SCB 49-51.

[103] Special Case, para 3(d): SCB 45.

[104] Paragraph 13(c)(iii)(I) of the Special Case. SCB 47-48.

[105] It was open to the Second Defendant to rely on that member's knowledge and experience: *Muin v Refugee Review Tribunal* (2002) 190 ALR 601 at 661 (Hayne J).

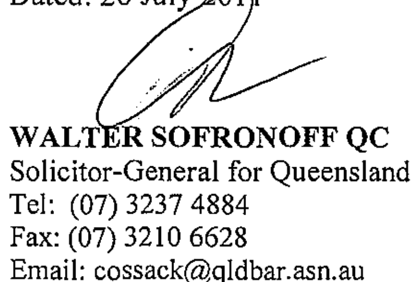
Island community'[106] ignores the fact that reasonable minds may differ as to the significance of that submission.[107] The Plaintiff had been a leader in inciting a serious riot that caused a number of police officers to fear for their lives and resulted in significant destruction of public infrastructure on Palm Island. In the face of that history, it was not incumbent on the Second Defendant to accept at face value the Plaintiff's claims that he would now confine himself to legal and political avenues to express his feelings of anger and injustice.

83. Condition (t) does not have the substantial effect on discussion of political and government matters that the Plaintiff asserts.[108] It is confined in terms to restricting *only* public meetings on Palm Island. There is no restriction, for example, on the Plaintiff's capacity to attend public meetings in Townsville.[109] It is therefore specifically adapted to the circumstances of the riot on Palm Island which the Plaintiff was convicted of inciting. Furthermore, the Plaintiff can attend public meetings on Palm Island with the approval of a corrective services officer. That his attendance at such meetings should be restricted, subject to a discretion to be exercised in appropriate cases, is rationally justifiable in light of his offence.

84. For the reasons submitted above, it was open to the Second Defendant to reasonably consider condition (v) to be necessary to ensure that the Plaintiff is of 'good conduct' within the meaning of s 200(2) of the CSA. The plaintiff's submission that the condition impermissibly burdens the implied freedom because it is rendered otiose by the *Criminal Proceeds Confiscation Act* is circular.[110] The effect of the submission is that the condition imposes no burden on the implied freedom beyond that imposed by that Act. If that were the case, the condition could not impermissibly burden the implied freedom.

85. For the foregoing reasons, it is submitted that conditions (t) and (v) are a reasonably appropriate and adapted to ensure the Plaintiff is of good conduct and to stop the Plaintiff from committing an offence.

Dated: 26 July 2011



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106 Plaintiff's Submissions, para 67.3.
107 See *Minister for Immigration v SZMDS* (2010) 240 CLR 611.
108 Plaintiff's submissions, para 71.
109 Palm Island lies just off the coast of Townsville.
110 Plaintiff's Submissions, paragraph 75.