SUPREME COURT OF QUEENSLAND

CITATION:	*Tonkin v Queensland Parole Board* [2015] QSC 334
PARTIES:	**KAREN JANETTE TONKIN** (applicant) **v** **QUEENSLAND PAROLE BOARD** (respondent)
FILE NO/S:	BS No 6907 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	30 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	14 May 2015
JUDGE:	Justice Peter Lyons
ORDER:	**1. The respondent's decisions made on 20 December 2013 and 21 February 2014, to the extent they relate to condition 12 of the applicant's parole order, are set aside and are of no effect.** **2. The respondent is to pay the applicant's costs of and incidental to the proceeding to be agreed or assessed on the standard basis.**
CATCHWORDS:	CONSTITUTIONAL LAW – OPERATION AND EFFECT OF THE COMMONWEALTH CONSTITUTION – RIGHTS AND FREEDOMS IMPLIED IN COMMONWEALTH CONSTITUTION – FREEDOM OF POLITICAL COMMUNICATION – PARTICULAR CASES – where the applicant was released on parole – where the respondent refused to approve the applicant's request to write a book – where, amongst other additional conditions, the respondent imposed a condition that the applicant not publish any document substantially connected with or describing any detail of the offence for which she is on parole, nor any offence committed by any other person – where, amongst other reasons the respondent gave for its decision, the respondent referred to its belief that the applicant posed an unacceptable risk of committing an offence and that the condition was reasonably necessary to ensure the applicant's good conduct – whether the scope of the power to include conditions in a parole order is restricted as a result of the

implied constitutional freedom of communication on Government and political matters – whether the inclusion of the condition is an exercise of power which comes within that scope – whether the parole board's decision to impose the condition impermissibly burdens the implied freedom of communication on Government and political matters – whether the parole board's decision was not reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of Government – whether the condition can be seen with "reasonable clearness" to be "really… referable" to and explicable by the purpose of stopping the commission of an offence by the applicant; or the purpose of ensuring the applicant's good conduct

ADMINISTRATIVE LAW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – DECISIONS UNDER AN ENACTMENT – PARTICULAR CASES – where the applicant applied for a statutory order of review with respect to the respondent's decision to impose the condition – where, amongst other reasons the respondent gave for its decision, the respondent referred to its belief that the applicant posed an unacceptable risk of committing an offence and that the condition was reasonably necessary to ensure the applicant's good conduct – whether the inclusion of the condition is an exercise of power which comes within the scope of respondent's power – whether the imposition of the condition was a proportionate exercise of power – whether the respondent reasonably considered that the condition was necessary for the purposes stated in the statute

Corrective Services Act 2006 (Qld) s 132, s 200, s 205
Criminal Proceeds Confiscation Act 2002 (Qld), s 200, s 202
Judicial Review Act 1991 (Qld) s 20, s 24

A v Independent Commission Against Corruption (2014) 88 NSWLR 240; (2014) 319 ALR 670, cited.
Aid/Watch Inc v Commissioner of Taxation (2010) 241 CLR 539; [2010] HCA 42, cited.
Attorney-General (South Australia) v Adelaide City Corporation (2013) 249 CLR 1; [2013] HCA 3, discussed.
Castlemaine Tooheys Ltd v South Australia (1990) 169 CLR 436; [1990] HCA 1, applied.
Commonwealth v Tasmania (1983) 158 CLR 1; [1983] HCA 21, cited.
Cunliffe v Commonwealth (1994) 182 CLR 272; [1994] HCA 44, cited.
Hogan v Hinch (2011) 243 CLR 506; [2011] HCA 4, cited
Inglis v Moore [No 2] (1979) 46 FLR 470; (1979) 25 ALR 453, cited.

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520; [1997] HCA 25, applied.
Miller v TCN Channel Nine Pty Ltd (1986) 161 CLR 556; [1986] HCA 60, cited.
Monis v The Queen (2013) 249 CLR 92; [2013] HCA 4, cited
Richardson v Forestry Commission (1988) 164 CLR 261; [1988] HCA 10, applied.
South Australia v Tanner (1989) 166 CLR 161; [1989] HCA 3, applied.
Unions New South Wales v New South Wales (2013) 304 ALR 266; [2013] HCA 58, applied.
Wotton v Queensland (2012) 246 CLR 1; [2012] HCA 2, discussed.

COUNSEL: D O'Gorman SC with C McKeon for the applicant
M Hinson QC with S A McLeod for the respondent

SOLICITORS: Prisoners Legal Service for the applicant
Crown Law for the respondent

[1] On 21 February 2014, the respondent ultimately confirmed its decision to impose additional conditions on the applicant's parole, including a condition that the applicant not publish any document substantially connected with or describing any detail of the offence for which she is on parole, nor any offence committed by any other person. The applicant has applied for a statutory order of review, directed at this condition.

Background

[2] On 27 March 1974, the applicant was convicted of manslaughter, and sentenced to life imprisonment. An order was made by the Queensland Community Corrections Board for her release on parole on 9 October 1991, subject to certain requirements[1]. The order has been varied from time to time.

[3] A report to the respondent by a Probation and Parole Officer, and a District Manager, dated 19 September 2013[2], recorded the applicant's request for approval of the Board to write a book at one point described as a "fiction book", at another described as a "Creative Non-Fiction book", and at yet another described as a "novel with supervised guidance from the University". The report recorded the applicant was complying with

1 Exhibits to the Supplementary Affidavit of Helen Blaber filed 21 October 2014 (*Blaber exhibits)* p 15.
2 Exhibits to the Affidavit of James Male (*Male exhibits*) p 4.

every condition of her order; and stated, "If there ever became the opportunity for Life Parolees to be unsupervised, this offender would be considered suitable". On 11 October 2013, the respondent issued a memorandum to the Mackay Probation and Parole District Office[3], apparently in response to the report, recording that it was not prepared to allow the applicant to publish a book about her life but seeking further details regarding the book she was proposing to write.

[4] A Probation and Parole Officer provided a further report dated 14 October 2013[4]. It recorded that, when the applicant was asked for further details about her proposed book she became extremely agitated and referred to her sentence, life in prison and life after prison. However, no clear details about the content of the proposed book were provided. The applicant's response was recorded as being consistent with previous conduct and it was also said that her compliance with the conditions of her parole order remained positive.

[5] Having apparently been orally advised that the respondent had made a decision on 27 September 2013 to refuse her permission to write and publish a book, the applicant wrote on 17 October to the respondent, requesting a statement of reasons[5]. The respondent replied on 18 November, advising that it had not refused the respondent permission to write and publish a book; rather it had refused her permission to write and publish a book about her life and crime. On this basis, the respondent refused the request for a statement of reasons. The letter also advised the respondent that she would not be able to profit from her crime.[6]

[6] In the meantime, on 25 October 2013, the respondent ordered that the applicant's parole order be amended by the insertion of four conditions[7]. Condition 12 prohibited the applicant from publishing any document, directly or indirectly, connected with her offence or with any experience in prison or other experience with the Department of Corrective Services, or with any offence committed by any other person. The order recited that, "the (respondent) reasonably believes that (the applicant) poses an unacceptable risk of committing an offence"; and referred to the applicant's proposal to

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3 Male exhibits p 6.
4 Male exhibits pp 42-43.
5 Male exhibits p 9.
6 Male exhibits p 10.
7 Male exhibits p 7.

write a book. The offence was not otherwise identified. An Information Notice dated 8 November 2013 gave a similar explanation for the order, and invited submissions in support of a change of the order.[8]

[7] A letter dated 3 December 2013 was sent from the Prisoners' Legal Service Inc. (*PLS*) to the respondent, on behalf of the applicant[9]. The letter referred to the statement that the respondent considered the applicant was at risk of committing an offence by writing a book. The letter stated that it was not an offence to write a book, but referred to restrictions on publishing material found in s 132 of the *Corrective Services Act* 2006 (Qld) (*the CS Act*), which, the letter stated, the applicant intended to abide by. The letter challenged the lawfulness of condition 12. The letter also stated that the proposed book was not about the crime which led to the applicant's imprisonment and the parole order. Rather it would be about the difficulties she had faced in her life, and her response to them, which ultimately led to prison; and the troubling conditions she experienced there. The letter asserted that the applicant's experiences in prison "reflect on politics of imprisonment, rehabilitation and punishment"; and that "the voices of people who have directly experienced prison is (*sic*) a vital part" of the political debate about society's response to crime.

[8] On 20 December 2013, having considered the letter from PLS of 3 December, the respondent made "a preliminary decision" to insert different conditions to those previously identified[10]. It is sufficient at this point to note the conditions were in the form ultimately adopted. They were recorded in an Information Notice to the applicant, dated 16 January 2014, which also included the following:-

> "Reason(s) for the board's decision:
>
> The Board reasonably believe that you pose an unacceptable risk of committing an offence. You advised that you are proposing writing a book."

[9] The Information Notice did not otherwise identify any offence. It invited the applicant to provide a submission to the effect that the respondent should change its decision.

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8 Male exhibits p 8.
9 Male exhibits p 11.
10 Male exhibits p 14.

[10] PLS responded by a letter dated 4 February 2014[11]. The letter again pointed out that it was not an offence to write a book, but referred to s 132 of the CS Act, relating to publication. It stated that the applicant would seek authority should she seek to publish her book. It submitted that condition 12 was unlawful.

[11] On 21 February 2014, the respondent confirmed the amendment inserting the following conditions

> "12. that the prisoner not publish any document substantially connect (*sic*) with, or which describes any detail of her offence or any offence committed by any other person;
>
> 13. that the prisoner be prohibited from speaking to and from having any interaction whatsoever with the media, unless prior approval is obtained from the Board and/or an authorised corrective services officer;
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> 14. that the prisoner receive no direct or indirect payment or benefit from the media with respect to the offence for which she was convicted;
>
> 15. that the prisoner shall not be permitted to profit financially or otherwise directly or indirectly with respect to any aspect of the offence for which she was convicted."[12]

[12] The order included a statement, in identical terms to the reason given in the Information Notice of 16 January 2014, about the respondent's belief that the applicant posed an unacceptable risk of committing an offence, and again referring to her statement that she proposes to write a book. The respondent issued an Information Notice dated 25 February 2014, again identifying this, in the same language, as the reason for the respondent's decision[13].

[13] The applicant subsequently requested a statement of reasons (*SOR*) under the *Judicial Review Act* 1991 (Qld) (*JR Act*)[14]. These were provided under cover of a letter dated 2 June 2014[15].

[14] The SOR commenced with an introductory section. It recorded the applicant's request "for approval to write a creative non-fiction book", and continued,

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[11] Male exhibits p 15.
[12] Male exhibits p 16.
[13] Male exhibits p 17.
[14] Male exhibits p 18.
[15] Male exhibits p 19.

> "The Board advised that it is not prepared to allow the Applicant to publish a book about her life and she will not be able to profit from her crime however requested further details regarding the book she is proposing to write."[16]

[15] The SOR then referred to the decision of 25 October 2013, and subsequent communications and decisions.

[16] In a section identifying evidence and other material upon which the respondent's findings were based, some 164 documents were recited. Many were of considerable age, extending back to the applicant's original sentence, and including the period prior to her release on parole.

[17] The SOR then set out what were described as "Findings on material questions of fact"[17]. Among them were -

> "3. On 27 September 2013, the Board noted the Applicant's Annual Progress Report and request for approval to write a creative non-fiction book. The Board advised that it is not prepared to allow the Applicant to publish a book about her life and she will not be able to profit from her crime however requested further details regarding the book she is proposing to write.
>
> 4. On 25 October 2013, the Board considered a submission from the Applicant dated 17 October 2013. The Board was mindful of the *Criminal Proceeds Confiscation Act* 2002 in particular s200 and any depiction the Applicant may represent regarding her thoughts, opinions or emotions during the time of her offending, incarceration and period of parole. The Board decided to amend the Applicant's order by adding the following conditions …
>
> 5. On 20 December 2013, the Board considered correspondence from Prisoners' Legal Service Inc. and decided to rescind its decision of 25 October 2013. The Board reasonably believed the Applicant was at risk of committing an offence and decided to make a preliminary amendment to the parole order in accordance with section 205(1)(a)(i) of the *Corrective Services Act* 2006 as follows …"

[18] It will be noted that the reference in paragraph 3 to concern relating to the applicant profiting from her crime also appeared in paragraph 4 of the Introduction to the SOR, but did not appear in the memorandum of 11 October 2013. The SOR then referred to s 205 of the CS Act. It recited some further matters of history and then continued,

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[16] Male exhibits p 22.
[17] Male exhibits pp 30 ff.

> "11. On 16 May 2014, the Board noted in accordance the *Criminal Proceeds Confiscation Act* 2002 s200, the Applicant is not allowed to profit from her crime. The resultant publicity and sensationalism which the Applicant's book could attract would be an impediment to the Applicant's good behaviour, reintegration and successful compliance with her parole order and has potential to negatively impact upon the Applicant's victim's family.
>
> Reasons for decision
>
> Based on the findings listed above, in particular the Applicant is not allowed to profit from her crime; the publicity and sensationalism created as a result of the Applicant publishing her book would be an impediment to her compliance with her parole order; and the Applicant's book has the potential to negatively impact upon her victim's family, the Board decided to amend the her parole order."

[19] It might be noted that paragraph 11 is the first occasion on which concern about the applicant's good behaviour, and compliance with her parole order, is mentioned in the documents filed in this application.

[20] The applicant then filed the present Application for a Statutory Order of Review. As filed, the application related to the decision given on 21 February 2014. After alleging that the applicant was a person aggrieved by the respondent's decision, the application set out the following grounds:-

> "1. The decision under review in its terms, operation or effect, impermissibly burdens the applicant's freedom to communicate about government and/or political matters;
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> 2. The decision under review is not reasonably proportionate to the power under which it was made;
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> 3. In making the decision under review the respondent exceeded the authority conferred upon it by the *Corrective Services Act* 2006, particularly s.200(2) of the *Corrective Services Act* 2006;
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> 4. The decision was so unreasonable that no reasonable person could so exercise the power; and
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> 5. There was no evidence or other material to justify the making of the decision."

[21] The applicant sought an order that the respondent's decision was invalid and of no effect.

[22] Notices were given to the Attorneys-General for the Commonwealth, the States, the Northern Territory and the Australian Capital Territory under s 78B of the *Judiciary Act* 1903 (Cth). None has expressed an interest in participating in these proceedings.

Submissions relating to implied freedom of communication on political matters

[23] For the applicant it was submitted that condition 12 "impermissibly burdens the applicant's freedom of communication on government and political matters in its terms, operation or effect in that it impermissibly burdens the applicant's freedom to communicate about government and/or political matters".

[24] It was submitted that the conferral by statute of a power or discretion upon the respondent is constrained by the constitutional restrictions upon the legislative power. It was submitted that condition 12 effectively burdens the applicant's freedom of communication about Government or political matters; and that the condition is not reasonably appropriate and adapted to serve a legitimate end, and controls communication upon political and Government matters in a manner which is inconsistent with the system of representative Government enshrined in the Commonwealth Constitution. Nor could it be said that the imposition of condition 12 was reasonably necessary to ensure the applicant's good conduct, or to stop her committing an offence.

[25] For the respondent, it was submitted that the question whether a law impinges on the freedom of communication on matters of Government and politics is dependent upon the answers to the two question which originate in *Lange v Australian Broadcasting Corporation*[18] (*Lange*) and were formulated in *Unions NSW v New South Wales*.[19] The respondent set those questions out in the following terms:-

> "(a) does the law effectively burden the freedom of political communication either in its terms, operation or effect;
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> (b) if so, is the provision reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government."

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[18] (1997) 189 CLR 520.
[19] (2013) 304 ALR 266 at [115].

[26] The respondent's submissions pointed out that the relevant freedom of communication "is not a personal right" but a limit upon legislative power. The respondent accepted that ss 200(2) and 205 of the CS Act could be assumed to result in a positive answer to the first of these questions. With respect to the second, it was submitted that any complaint about the exercise of power under statute in a given case "does not raise a constitutional question as distinct from a question of the exercise of statutory power", that question being whether the repository of power "has complied with the statutory limits of the power, or whether it has exceeded the authority conferred upon it by the valid statutory provision". It was submitted that condition 12 imposed "a permissible burden because it is authorised by a valid law which does not impermissibly burden" freedom of communication. It was submitted that "a condition which serves the legitimate end of ensuring a parolee's good conduct or stopping a parolee from committing an offence" was authorised to impose a burden on freedom of communication, under s 200(2) of the CS Act. It was submitted that it was irrelevant to ask whether condition 12 itself impermissibly burdens the applicant's freedom of communication on Government and political questions, the restraint being on legislative power.

[27] The respondent's formulation of the second question set out above included the words "or proportionate", not found in the formulation of analogous questions in *Lange*. However it was not submitted that these words affected the test[20].

Legislative provisions

[28] At this point, it is convenient to set out the relevant provisions of the CS Act. They are as follows

> "**200 Conditions of parole**
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> (2) 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.
>
> *Examples—*
> • a condition about the prisoner's place of residence, employment or participation in a particular program

[20] See *Lange* at 562, 567 and 572; and *Monis v R* (2013) 249 CLR 92 at [344].

- a condition imposing a curfew for the prisoner
- a condition requiring the prisoner to give a test sample.

…

205 Amendment, suspension or cancellation

(1) A parole board may, by written order, amend a parole order

(a) by amending or removing a condition imposed under section 200(2) if the board reasonably believes –

(i) the condition, as amended, is necessary for a purpose mentioned in the subsection; or

(ii) the condition is no longer necessary for a purpose mentioned in the subsection; or

(b) by inserting a condition mentioned in section 200(2) if the board reasonably believes the condition is necessary for a purpose mentioned in the subsection; or

(c) if the board reasonably believes the prisoner poses a serious risk of harm to himself or herself.

(2) A parole board may, by written order –

(a) Amend, suspend or cancel a parole order if the board reasonably believes the prisoner subject to the parole order –

(i) has failed to comply with the parole order; or

(ii) poses a serious risk of harm to someone else; or

(iii) poses an unacceptable risk of committing an offence; or

(iv) is preparing to leave Queensland, other than under a written order granting the prisoner leave to travel interstate or overseas; or

(b) amend, suspend or cancel a parole order other than a court ordered parole order, if the board receives information that, had it been received before the parole order was made, would have resulted in the parole board that made the order making a different parole order or not making a parole order; or

(c) amend or suspend a parole order if the prisoner subject to the parole order is charged with committing an offence. "

[29] Because of the reference in the SOR to s 200 of the *Criminal Proceeds Confiscation Act* 2002 (Qld) (*Confiscation Act*), it is convenient to set out the following:-

"**200 Application for special forfeiture order**

(1) This section applies if—

(a) a person (the ***prescribed respondent***) has been convicted of a confiscation offence; and

(b) the prescribed respondent, or someone else for the prescribed respondent, has derived, is deriving, or is to derive, benefits (***benefits***) from a contract entered on or after 12 May 1989 (***relevant contract***) about either of the following—

(i) a depiction of the confiscation offence or alleged confiscation offence in a movie, book, newspaper, magazine, radio, or television production, or in any other electronic form, or live or recorded entertainment of any kind;

(ii) an expression of the prescribed respondent's thoughts, opinions or emotions about the confiscation offence.

(2) The State may apply to the Supreme Court at any time for an order (***special forfeiture order***) that the prescribed respondent pay to the State an amount equal to all or part of the prescribed respondent's benefits under the relevant contract.

(3) This section applies to a contract made before or after the prescribed respondent's conviction, whether in Queensland or elsewhere, including outside Australia.

…

202 Making of special forfeiture order

(1) If the Supreme Court is satisfied the prescribed respondent has derived, is deriving or will derive benefits under the relevant contract, the court may make a special forfeiture order.

(2) The order must –

(a) state, as the amount to be paid to the State, the amount assessed under part 2 as the value of the benefit derived under the relevant contract; and

(b) direct any person who, under the relevant contract, is required to pay amounts to the prescribed respondent or another person, at the request or by the direction of the prescribed respondent, to pay the amounts to the State."

[30] For reasons which will become apparent, it is also relevant to set out the following provisions of the CS Act:-

"**132 Interviewing and photographing prisoner etc.**

(1) A person must not—

(a) interview a prisoner, or obtain a written or recorded statement from a prisoner, whether the prisoner is inside or outside a corrective services facility; or

Note—

Prisoner, as defined in schedule 4, includes a prisoner released on parole.

(b) photograph or attempt to photograph—

(i) a prisoner inside a corrective services facility; or

(ii) a part of a corrective services facility.

Maximum penalty—100 penalty units or 2 years imprisonment.

(2) A person does not commit an offence against subsection (1) if the person is—

(a) for subsection (1)(a) or (b)(i)—the prisoner's lawyer; or

(b) an employee of a law enforcement agency; or

(c) the ombudsman; or

(d) a person who has the chief executive's written approval to carry out the activity mentioned in the subsection."

The implied freedom of communication ground

[31] The submissions of both parties relied upon *Wotton v Queensland*[21] (*Wotton*). In support of its submission that questions of the kind formulated initially in *Lange* are not to be applied to a decision made in the exercise of a statutory power, the respondent referred to the acceptance by five members of the Court (French CJ, Gummow, Hayne, Crennan and Bell JJ) of the Commonwealth's submission that, 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[22]. It also submitted that its contention was supported by paragraph [32] of *Wotton*; and by what was said in the joint judgment of Crennan and Kiefel JJ in *Attorney-General (South Australia) v Adelaide City Corporation*[23] (*Adelaide Corporation*). *Wotton* was concerned with the validity of (amongst other provisions) s 200(2) of the CS Act[24].

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21 (2012) 246 CLR 1.
22 *Wotton* at [22].
23 (2013) 249 CLR 1 at [215], [216].
24 At [32].

[32] In *Wotton,* referred to in the respondent's submissions, the following appears[25]

> "Two questions (the *Lange* 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*[26] 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."

[33] The *Aid/Watch*[27] description refers to the system of representative and responsible Government with a universal adult franchise mandated by the Commonwealth Constitution; and communication, including between electors themselves, on matters of Government and politics, there described as "an indispensable incident" of the constitutional system[28].

[34] A little later in the judgment in *Wotton*[29] the following appeared

> "With respect to s 200(2), the legitimate end, for the second *Lange* question, is supplied by the test of the sub-section, 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*."

[35] It is relevant to note that this passage follows a passage in generally similar terms, dealing with another provision of the CS Act which was in issue in *Wotton*, namely s 132(1)[30]. In that context, their Honours wrote, with respect to answering the second *Lange* question,

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25 At [25].
26 (2011) 243 CLR 506 at [47] per French CJ; at [94]-[97] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.
27 (2010) 241 CLR 539.
28 See *Wotton* at [20].
29 At [32].
30 See *Wotton* at [31].

> "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*."

[36] The reference to *Miller* appears to be a reference back to a passage set out earlier in the judgement in *Wotton*[31] from the judgment of Brennan J[32] where his Honour noted limitations on a discretion conferred in wide terms. Thus, considerations foreign to the purpose for which the discretion is conferred could not be taken into account; nor could the discretion under consideration in *Miller* be exercised contrary to the provisions of s 92 of the Commonwealth Constitution. His Honour then cited a passage from the joint judgment of St John J and himself in *Inglis v Moore [No 2]*[33] stating what his Honour described as a rule of constructions in the following terms

> "… 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."

[37] It will be apparent that Brennan J regarded constitutional limitations as relevant to the construction of a statutory provision granting a discretionary power; and that its validity depended both upon an exercise of the power so qualified, being within the constitutional power, and being judicially examinable. It might be noted that with respect to s 132 and s 200 of the CS Act, their Honours specifically referred to the availability of review under the JR Act[34].

[38] In the judgment in *Wotton*, their Honours considered it necessary for the repository of the statutory discretion "to have regard to the restraint upon legislative power in the sense explained by Brennan J in *Miller*"[35]; and "to have regard to what was

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31 At [10].
32 *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, at 613-614.
33 (1979) 46 FLR 470, at 476.
34 *Wotton* at [31], [32].
35 At [31].

constitutionally permissible"[36]. I read these statements as reflecting what their Honours said earlier[37], again with reference to the judgment of Brennan J in *Miller*,:-

> "…while the exercise of legislative power may involve the conferral of authority upon an administrative authority 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."

[39] Their Honours had also noted earlier the importance of s 9(1) of the *Acts Interpretation Act* 1954 (Qld)[38], which requires the CS Act to be interpreted not to exceed the legislative power of the State legislature.

[40] For the purpose of the debate advanced before me, I would respectfully read their Honours' reasons in the following way. A statute may not confer a discretionary power on an entity, to act in a way that would conflict with a constitutional limitation. If a statute confers a power in terms which, if read literally might authorise its exercise both in ways which would be consistent with a constitutional limitation, and in ways which would not be, then the grant is to be construed as limited to authorising the exercise of the power in ways consistent with the constitutional limitation. Notwithstanding the width of the language of the statute, its validity is dependent upon this construction, and the availability of judicial review to give effect to it. It is for these reasons that the repository of the power, when exercising it, must bear in mind the constitutional limitation, at least in the sense that a failure to observe such a limitation may well result in a purported exercise of the power which is outside the statutory grant[39].

[41] On this analysis, it seems to follow that a statute would not authorise an exercise of a power which would give the statute a range of operation exceeding the limits identified by *Lange* and *Hogan*; in other words the exercise of the power must not exceed "what was constitutionally permissible"[40]. In this case, it would follow that the provisions of the CS Act do not authorise a decision which impermissibly burdens freedom of

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36 At [32].
37 At [21].
38 At [9].
39 In *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240, the Court pointed out that the implied freedom does not operate as a "mandatory consideration" for a decision maker; but rather limits the scope of the conferred power: see [56] per Basten JA; [7] per Bathurst CJ; [149] per Ward JA.
40 *Wootton* at [32].

communication on Governmental and political matters. The impermissibility would arise if the decision is not reasonably appropriate and adapted to serve a legitimate end, in a manner compatible with the maintenance of the constitutionally prescribed system of Government, referred to earlier. One basis for saying this is that it is the CS Act which confers the power on the respondent to include conditions in a parole order; as well as making the conditions effective[41]; so that the legislation would otherwise make effective conduct which encroaches on the implied immunity.

[42] It seems to me that these conclusions are not inconsistent with the submissions accepted by their Honours[42]. The submission referred to earlier in these reasons is followed by a submission, also accepted, that the question would be "whether the repository of the power has complied with the statutory limits". A further submission, also accepted, was that, if, on its proper construction, the statute complies with the constitutional limitation, without any need to read it down to save its validity, then a complaint about an exercise of power under the statute "does not raise a constitutional question as distinct from the question of the exercise of statutory power". As I read these submissions, they contend that once the statute is properly construed (including by reference to the constitutional limitation) then the validity of an act purportedly done under it will depend upon whether the act is within the statute, so construed. That question is not a constitutional question, in the sense intended by the submissions.

[43] The respondent's submissions relied on *Adelaide Corporation* for the propositions that some burden on the freedom of communication on government and political matters may be lawful[43]; and that the burden on that immunity is not to be assessed by reference to its effect on an individual, "but on the need to maintain the system of representative government"[44]. While these submissions are accurate, they are not directly related to the primary questions, which are whether the scope of the power to include conditions in a parole order is restricted as a result of the implied constitutional immunity; and if so, whether the inclusion of the contested condition is an exercise of power which comes within that scope.

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41 See ss 200(3); 201(1) and (2); 202; 205; 206.
42 *Wootton* at [22].
43 *Adelaide Corporation* at [210], [222].
44 *Adelaide Corporation* at [220].

[44] There is no reason to think that the implied freedom of communication operates only to invalidate or otherwise restrict the operation of legislation. In *Lange* it was held to affect what would otherwise be the common law of defamation in this country[45]. The Court referred with approval[46] to a passage from the judgment of Brennan J in *Cunliffe v Commonwealth*[47] where his Honour said that the implied freedom "creates an area of immunity from legal control", the latter expression in context appearing broader than "legislative control". It follows that the implied freedom of communication extends to creating an area of immunity from control which would otherwise result from the exercise of a statutory discretionary power. That, however, seems to me to be a consequence of the limitation on legislative power which results from the implied freedom of communication.

[45] Put another way, if the respondent's submissions are correct, the validity of s 200(2) having been determined in *Wotton,* a decision would be within its scope which effectively burdens freedom of communication about Government or political matters and which is not reasonably appropriate and adapted to serve a legitimate end in a matter compatible with the maintenance of the constitutionally prescribed system of Government, previously described. That result seems unlikely.

[46] It follows, in my view, that the statutory provisions conferring power on the respondent to impose conditions as part of a parole order are to be construed as limited by the implied freedom of communication on political and Governmental matters; and accordingly by reference to questions analogous to those formulated in *Lange*. Nevertheless, the nature of the decision (being directed at a single person) is relevant in considering this limitation.

[47] I turn then to a question analogous to the first question posed by *Lange*. It is whether the contested condition, in its terms, operation or effect, effectively burdens freedom of communication about Government and political matters.

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45 See in particular at 556.
46 At 560.
47 (1994) 182 CLR 272, at 326.

[48] The respondent's submission that the freedom in question is not a personal right reflects what was said in *Unions NSW*[48] and should be accepted. Nevertheless, it is apparent from the same passage that the identification of the limiting effect of a provision on a person's opportunity of expression may be necessary to an understanding of the effect "upon the freedom more generally". Moreover, it seems to me that communication is not an activity in which a person engages in isolation; rather, it involves a consideration both of the person with whom the communication originates, and of those to whom it is made. Thus the Court in *Lange*[49] spoke of "the freedom to receive and disseminate information".

[49] The condition is directed to publication. I have not had the benefit of substantial submissions about the effect of condition 12. It seems to me that the condition would prohibit an account by the applicant of what led to her offending, and what she experienced in the prison system as a consequence, and similar accounts relating to the offending of others, for the purpose of commenting on society's response to offending. Since that response is primarily effected by legislation and administrative action, the condition prohibits publication, and thus communication, on Government and political matters.

[50] On its face, the condition burdens freedom of communication on Government and political matters.

[51] The second question is whether the condition is reasonably appropriate and adapted to achieving a legitimate object or end, in a manner compatible with the maintenance of the previously described system of Government. There is no reason to doubt that the object stated in s 200(2) of the CS Act, and incorporated by reference into s 205(1)(b) of that Act, identifies legitimate purposes for the inclusion of a condition in a parole order. They reflect two of the general purposes of the Act, crime prevention and rehabilitation[50]. These are by no means inconsistent with the implied immunity, for a system of representative government is effective only if the government's laws are complied with. The question remains whether condition 12 is reasonably appropriate and adapted to achieving a legitimate purpose, in a manner compatible with the

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48 At [36]; see *Cunliffe* at 326, per Brennan J, cited with approval in *Lange* at 560.
49 At 561.
50 See s 3 of the CS Act.

maintenance of the constitutionally prescribed system of Government; or, using language which appears to have been preferred by three members of the Court in *Monis*[51] (Crennan, Kiefel and Bell JJ), whether the condition is proportionate to such a purpose[52].

[52] In dealing with such questions when considering the validity of legislative provisions in *Cunliffe*[53], Brennan J adopted the following passage from the judgment of Deane J in *Richardson v Forestry Commission*[54]

> "First, there must be identified a purpose or object, itself a legitimate subject of external affairs … Secondly, … that purpose or object must pervade and explain the operation of the law to an extent that warrants the overall characterisation of the law as one with respect to external affairs; it 'must be seen, with "reasonable clearness", upon consideration of its operation, to be "really … referrable" to and explicable by the purpose or object which is said to provide its character': *The Tasmanian Dam case*[55]. While the question of what is the appropriate method of achieving a desired result is a matter for the Parliament and not for the court, the operation of a law will not properly be seen as explained by the designated purpose or object unless it appears that the operation is capable of being reasonably considered to be appropriate and adapted to achieve it. Such a law will not be capable of being so seen unless it appears that there is 'reasonably proportionality' between that purpose or object and the means which the law adopts to pursue it."

[53] In particular, when considering cases where the legislative power is subject to a limitation, Brennan J[56] referred to *Castlemaine Tooheys Ltd v South Australia* (*Castlemaine Tooheys*)[57]. That case concerned a State law which imposed a levy on the sale of beer in non-refillable bottles, to the disadvantage of interstate traders. His Honour[58] adopted the following statement from *Castlemaine Tooheys*[59]

> "If we accept, as we must, that the legislature had rational and legitimate grounds for apprehending that the sale of beer in non-refillable bottles generates or contributes to the litter problem and decreases the State's finite energy resources, legislative measures which are appropriate and adapted to the resolution of those problems would be consistent with s. 92 so long as

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51 *Monis* [344]-[345].
52 See also *Monis* at [347].
53 At pp 321-324.
54 (1988) 164 CLR 261, at 311-312.
55 *Commonwealth v Tasmania* (1983) 158 CLR 1, at 260.
56 *Cunliffe* at 324.
57 (1990) 169 CLR 436.
58 In *Cunliffe* at p 324.
59 *Castlemaine Tooheys* at 473-474.

> any burden imposed on interstate traders was *incidental and not disproportionate to their achievement*" (emphasis added by his Honour)

[54] His Honour then reached conclusions which included the following[60]

> "If the means adopted by a law are disproportionate to a purpose or object which is within power, those means are not 'appropriate and adapted' to achieving that purpose or object. If the means are excessive, the purpose or object which the law in fact achieves does not 'pervade and explain the operation of the law to an extent that warrants the overall characterization of the law as one with respect to' the subject matter of the power …"

[55] Finally in this context, his Honour referred to[61] his own statement in *South Australia v Tanner*[62] which included the following

> "A regulation which is so widely drawn as needlessly to embrace a field of operation which is quite unconnected with the statutory object cannot reasonably be adopted in exercise of a power so limited."

[56] On the basis of these passages, it seems to me appropriate to ask, in determining this matter, whether the purposes set out in s 200(2) of the CS Act, or either of them, pervade and explain the operation of the condition, to an extent that warrants its characterisation as a being for those purposes or either of them. Equally, it seems to me appropriate to ask whether the condition is so widely drawn as needlessly to embrace a field of operation which is quite unconnected with either purpose. In *Cunliffe*, Brennan J recognised that in applying such tests in a legislative context it was appropriate to recognise "a margin of appreciation" which might be exercised by the body exercising the power, in choosing the appropriate means to do so; and thus adapted the language of Deane J in *Richardson*[63] to ask whether the operation of the law under consideration was capable of being reasonably considered to be appropriate and adapted to achieve the relevant purpose of object[64]. Some latitude was also recognised by Crennan, Kiefel and Bell JJ in *Monis*[65]. Their Honours were speaking in the context of considering the validity of legislation adopted by Parliament. It is not immediately clear that such considerations directly apply to an exercise of a discretionary power conferred on a body by statute, in proceedings which are of the nature of judicial review. Nevertheless,

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60 *Cunliffe* at p 324.
61 *Cunliffe* at 324.
62 (1989) 166 CLR 161, 179.
63 *Richardson* at 311.
64 *Cunliffe* at 325.
65 At [347].

it is not a function of the Court to determine whether a power has been exercise as well as possible, or even particularly well (whether in terms of its effectiveness or otherwise). It seems to me that it will be sufficient to attempt to answer the questions previously identified in terms.

[57] The first of the relevant purposes may be identified as ensuring the applicant's good conduct; and the second as stopping the applicant committing an offence.With respect to the second of these purposes, reliance was placed on s 132 of the CS Act[66]. The focus of the submission was on those provisions of s 132 which prohibit a person from obtaining a written or recorded statement from a person such as the applicant. The submission also referred to what are commonly described as the parties' provisions of the *Criminal Code* (Queensland)[67].

[58] For the applicant it was submitted that the book is not a written or recorded statement. While some books might satisfy this description, others would not. Moreover, s 132(2) provided an exception, where the written approval of the Chief Executive was obtained.

[59] Before dealing specifically with these submissions, it is appropriate to say something more about the respondent's decision.

[60] The respondent's initial response to the applicant's request for its permission to write a book was to state that it was not prepared to allow her to publish a book about her life. The memorandum which issued on its behalf included the statement "The offender will not be able to profit from her crime".[68]

[61] The first prohibition of any publication is found in the Board's decision of 25 October 2013. The conditions then imposed are significantly similar to those finally imposed, including condition 2. The order included the following[69]

> "The Board reasonably believes that the prisoner poses an unacceptable risk of committing an offence. The Board noted information provided in a Board Report from the prisoner's supervising Probation and Parole District

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66 T 1-67.
67 See ss 7 and 8 in particular.
68 Male p 6.
69 Male exhibits p 7.

> Office dated 19 September 2013 and 14 October 2013 advising that the prisoner is proposing writing a book."

[62] An Information Notice to the applicant relating to that decision repeated this statement[70]. The SOR identified only one potentially relevant statutory provision considered by the Board at this time, namely, s 200 of the *Confiscation Act*. The SOR shows it to be the basis for its decision to impose conditions similar to those ultimately imposed, including condition 12 (then more widely drawn). The SOR did not identify any other basis for the statement recited in the order made on 25 October 2013, that the Board considered the applicant to pose an unacceptable risk of committing an offence.

[63] The Board's letter of 18 November 2013 also related its decision of 27 September 2013, that the applicant was not permitted to write and publish a book about her life and crime, to the proposition that she would not be able to profit from her crime.

[64] None of the documents issued on behalf of the respondent identified any offence which it was concerned the applicant might commit, or any potentially relevant statutory provision other than s 200 of the *Confiscation Act*. It would appear that the respondent considered that the applicant would commit an offence if she received any financial reward from a book related to her offence. That view is not supported by the relevant provisions of the *Confiscation Act*. Their effect is simply to permit the State, should it choose to do so, to obtain an order for the forfeiture of an amount to be assessed by the Court as the value of the benefit which the applicant might derive from a book (or other document) containing a depiction of the applicant's offence, or an expression of the applicant's thoughts, opinion or emotions about that offence. No provision was identified which would make it an offence to derive a benefit from a contract about such a book. In my view, the purpose for which the conditions were imposed was to prevent the applicant from receiving profit from a book about her crime, the respondent believing that it would be an offence for her to do so.

[65] It follows that the purpose for which condition 12 was imposed was not to prevent the applicant from committing an offence under s 132 of the CS Act. This conclusion is consistent with the Respondent's description in November 2013 of its earlier decision as not being a refusal of permission to write and publish a book, but as being a refusal of

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[70] Male exhibits p 8.

permission to write and publish a book about her life and crime. Condition 13 might arguably suggest some concern about the provisions of s 132. However, at no time do the documents prepared by the respondent refer to the section. As will be seen, the prohibition in condition 12 does not match s 132, and is not consistent with the respondent's being aware of its provisions. The respondent's limited refusal of permission to publish a book is also inconsistent with a consciousness of the provisions of s 132. In context, the likely explanation for condition 13 is a concern that the respondent would circumvent condition 12, and receive a profit, by giving an interview or otherwise dealing with the media.

[66] I also note that the respondent ultimately accepted that the material supports a finding that condition 12 was not based on a consideration that the applicant might commit an offence under s 132 of the CS Act[71].

[67] In case it is nevertheless relevant, I propose to consider whether it could be said that condition 12 is reasonably appropriate and adapted to achieving a legitimate object or end, namely, stopping the applicant from committing an offence under s 132 of the CS Act, in a manner compatible with the maintenance of the previously described system of Government.

[68] There is no apparent connexion between condition 12, and the prohibitions found in s 132 of the CS Act. Thus s 132 prohibits a person from interviewing someone such as the applicant; or from obtaining a written or recorded statement from such a person. The condition, however, is directed only to documents which satisfy a particular description. The condition is an absolute bar; but the section is not breached if the chief executive's written approval is obtained. Indeed, the language of the condition as a whole does not suggest it was directed to stopping the commission of an offence under s 132.

[69] In my view, the provisions of s 132 do not "pervade and explain" the condition's operation to an extent which would warrant the characterisation of the condition as one related to the prevention of the commission by the applicant of an offence against s 132. It cannot be seen with "reasonable clearness" to be "really … referrable" to and

[71] Respondent's submissions dated 25 November 2015 (*R 2*) at [13].

explicable by the purpose of stopping the commission by the applicant of an offence against s 132 of the CS Act.

[70] Although the SOR contained an assertion that the publicity generated by a book written by the applicant might affect her good behaviour, no basis for that assertion was identified. It may be that a book written by the applicant describing her offending in detail could be regarded as sensationalistic, and would attract a great deal of publicity. Nothing was identified in the material as providing a rational basis for thinking that such publicity might prejudice the applicant's continued good conduct[72]. In any event, it is not difficult to think of types of book which the applicant might write which are substantially connected with her offending which could not be so described. The same observations apply with greater force to a book the applicant might write about the offending of others.

[71] It follows that the purpose of ensuring the applicant's good conduct does not "pervade and explain" the operation of condition 12 to an extent which would warrant the characterisation of the condition as one related to ensuring such conduct. Nor can the condition be seen with "reasonable clearness" to be "really … referrable" to and explicable by that purpose. It seems to me that the condition needlessly embraces a field of operation unconnected with this purpose.

[72] I also note that the first time concern about the applicant's conduct was referred to by the respondent was on 16 May 2014, after receipt of the applicant's request for the SOR. The summary of reasons which appears at the end of the SOR[73] on its face might be taken as suggesting the matter was considered when the conditions were imposed; but it is apparent that the summary refers to what was recorded earlier in the SOR, including the matters considered on 16 May 2014, subsequent to the decision. It might also be noted that this summary is inconsistent with the respondent's identification of reasons at the time when it made its preliminary[74] and final[75] decisions to impose the conditions, making no reference to the ground then stated.

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72 See T 1-66.
73 Male exhibits p 32.
74 Male exhibits p 14.
75 Male exhibits pp 16, 17.

Other matters

[73] It was accepted by the respondent that if I found its decision to impose condition 12 was based on the erroneous view that the applicant would commit an offence if she received profit from a book about her earlier offence, then the condition was imposed unlawfully[76]. It follows that the decision should be set aside on this ground.

[74] The decision to impose condition 12 was not based on a consideration of the possibility that the applicant might commit an offence under s 132 of the CS Act. I have found, based on the respondent's published statements at the time of the decisions, and contrary to what appears in the summary at the end of the SOR, that its reason for imposing the condition was to stop the applicant committing an offence. It can impose such conditions where it reasonably considers them necessary to stop the applicant from committing an offence[77]. No potentially relevant offence has been identified. Assuming the respondent considered the condition necessary to stop the applicant committing an offence, its conclusion was not reasonable. I would add that there was no material before the respondent to suggest any likelihood that the applicant would engage in any unlawful conduct. On the contrary, the reports to the respondent spoke well of her.

[75] It would also follow from my earlier findings that the decision was not a proportionate exercise of the power conferred on the respondent. Although some other matters were raised by the applicant's grounds and submissions, it is unnecessary for me to deal further with them.

Conclusion

[76] In my view, condition 12 is not one which the Board could validly impose. I would be prepared to declare that the condition is invalid and of no effect. I propose to invite the parties to make submissions as to what orders should be made in light of these reasons.

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[76] R 2 at [8].
[77] See ss 200(2), 205(1) of the CS Act.