

202. CORRECTIONAL SERVICES ACT 1982, S.A., IN FORCE AS AT FEBRUARY 2010

SECTION 63. POWERS OF THE BOARD

“63.(1) FOR THE PURPOSES OF PROCEEDINGS BEFORE THE BOARD UNDER THIS ACT OR ANY OTHER ACT, THE BOARD MAY —

(B) BY SUMMONS SIGNED ON BEHALF OF THE BOARD BY A MEMBER OF THE BOARD, REQUIRE ANY PERSON TO PRODUCE ANY DOCUMENT RELATING TO ANY MATTER BEFORE THE BOARD; OR

(C) REQUIRE ANY PERSON TO FURNISH THE BOARD WITH A WRITTEN REPORT OR WRITTEN INFORMATION IN RELATION TO ANY ASPECT OF A MATTER BEFORE THE BOARD; OR”

203. “63.(2) A PERSON WHO —

(A) HAVING BEEN DULY SERVED WITH A SUMMONS, FAILS TO ATTEND BEFORE THE BOARD, OR FAILS TO PRODUCE DOCUMENTS, AS REQUIRED BY THE SUMMONS; OR
“IS GUILTY OF AN OFFENCE.

MAXIMUM PENALTY IS \$5000 OR IMPRISONMENT FOR 3 MONTHS.”

204. WATSON V. THE STATE OF SOUTH AUSTRALIA [2010] SASCF 69 (9. DECEMBER 2010)

“PARA. 83: IN O'SHEA, WHERE THE ISSUE WAS THE RELEASE OF AN OFFENDER DETAINED AT THE GOVERNOR'S PLEASURE, THE STATUTORY SCHEME BORE CERTAIN SIMILARITIES TO THE PROVISIONS NOW UNDER QUESTION. THE PRISONER COULD NOT BE RELEASED UNLESS THE GOVERNOR WAS SATISFIED ON THE RECOMMENDATION OF THE BOARD THAT THE PRISONER WAS FIT TO BE AT LIBERTY; THE RELEVANT PROVISION IS SET OUT IN O'SHEA AT 384. REFERRING TO THIS STATUTORY SCHEME, MASON CJ SAID AT 389:

THE SCHEME FOR WHICH S. 77A PROVIDES IS NOT UNFAMILIAR.

PARA. 84:.... BUT IT IS TO BE NOTED THAT MASON CJ DID NOT SUGGEST ANY LIMITATION ON THE SCOPE OF THE POWER OF THE DECISION MAKING AUTHORITY WHEN CONSIDERING THE RECOMMENDATION MADE TO IT. ... WHEN ONE HAS REGARD TO WHAT MASON CJ SAID A LITTLE EARLIER IN HIS REASONS, WHERE HE REFERRED TO THE ROLE OF THE CABINET AND THE GOVERNOR IN COUNCIL IN RELATION TO PRISONERS* DETAINED AT THE GOVERNOR'S PLEASURE, HE SAID AT 388:

IN THE MAKING OF A DECISION UNDER S. 77A.

PARA. 88: TO MY MIND IT WOULD BE SURPRISING IF PARLIAMENT RESERVED TO THE GOVERNOR A DECISION WHETHER A LIFE SENTENCE PRISONER SHOULD BE RELEASED, IN CONTRAST TO OTHER PRISONERS AS TO WHOM THE DECISION IS MADE BY THE BOARD, IF THE GOVERNOR WERE TO EXERCISE ONLY A LIMITED POWER CONFINED BY THE FACT THAT THE BOARD HAD RECOMMENDED RELEASE.

PARA. 89: THE VESTING OF THE POWER IN THE GOVERNOR IN COUNCIL, ACTING ON ADVICE FROM THE EXECUTIVE COUNCIL THAT WILL HAVE BEEN BACKED BY A CABINET DECISION, SUGGESTS THAT PARLIAMENT TOOK THE VIEW THAT A DECISION OF THIS KIND WAS SUFFICIENTLY SENSITIVE TO WARRANT CONFERRING THE DECISION MAKING POWER ON A POLITICAL BODY LIKE THE GOVERNOR IN COUNCIL.

PARA. 90: AS I HAVE SAID, THERE IS GOOD REASON TO THINK THAT THE POWER TO MAKE THE DECISION TO RELEASE IS VESTED IN THE GOVERNOR BECAUSE OF THE NATURE OF THE DECISION, THE RELEASE OF A PRISONER SENTENCED TO LIFE IMPRISONMENT BEING OF PARTICULAR SENSITIVITY. THE CONFERRAL OF THE POWER ON THE GOVERNOR IN COUNCIL NECESSARILY EXPOSES THE DECISION TO POLITICAL SCRUTINY, IN A MANNER IN WHICH A DECISION BY THE BOARD OR A COURT CANNOT BE EXPOSED TO SCRUTINY. THIS ALSO SUGGESTS THAT THE GOVERNOR WAS INTENDED TO BE THE EFFECTIVE DECISION MAKER, MAKING HIS OWN ASSESSMENT OF WHAT THE PUBLIC INTEREST REQUIRES, AND ~~EXPOSES~~ EXPOSING THE ADVICE BASED ON A CABINET DECISION TO POLITICAL SCRUTINY.

PARA. 121: THERE IS ALSO AN ASPECT OF THIS CASE THAT WARRANTS A FURTHER COMMENT. ... TO MY MIND, IF THERE IS AN OBLIGATION TO GIVE REASONS, IT SEEMS NECESSARY TO SAY THAT THE OBLIGATION ARISES BECAUSE IT IS NOT CLEARLY EXCLUDED BY THE CSA, AND BECAUSE OF THE NATURE OF THE DECISION THAT THE GOVERNOR MAKES. IF THAT IS THE APPROPRIATE REASONING, THEN IN ALL CASES UNDER S. 67(7) OF THE CSA, THE GOVERNOR MUST PROVIDE REASONS FOR REFUSING TO RELEASE A PRISONER. BUT IN HIS SUBMISSIONS MR MEAD SEEMS TO ATTACH SOME WEIGHT TO THE CIRCUMSTANCE THAT THE GOVERNOR'S DECISION WAS ONE OF A SERIES OF DECISIONS TO THE SAME EFFECT.

PARA. 125: IT IS NOT NECESSARY TO DECIDE WHETHER THERE WAS ANY OBLIGATION ON THE GOVERNOR TO GIVE REASONS FOR HIS DECISION. I INCLINE TO THE VIEW THAT THERE IS NO SUCH ~~REASON~~ OBLIGATION. NOR IS IT NECESSARY TO DECIDE WHAT WOULD BE REQUIRED

BY WAY OF REASONS, IF REASONS WERE REQUIRED.

PARA. 130: IN RELATION TO THE STATUS OF THE PASSAGE IN THE JUDGMENT OF GIBBS CJ IN PUBLIC SERVICE BOARD OF NSW v OSMOND¹ ("OSMOND") REFERRED TO BY DOYLE CJ, I WOULD AGREE WITH THE FOLLOWING STATEMENT BY CREYKE AND MCMILLAN:²

IN OSMOND THE HIGH COURT HELD THAT THERE IS NO DUTY AT COMMON LAW, OR RULE OF PROCEDURAL FAIRNESS, THAT REQUIRES ADMINISTRATIVE (OR JUDICIAL) DECISION-MAKERS TO PROVIDE REASONS FOR THEIR DECISIONS, BUT THAT SUCH A DUTY MAY ARISE IN 'SPECIAL' (GIBBS CJ AT 670) OR 'EXCEPTIONAL' (DEANE J AT 676) CIRCUMSTANCES.

PARA. 131:.... HOWEVER, I ACKNOWLEDGE THAT DISCUSSION IN OSMOND ITSELF AND ~~IN~~ IN SUBSEQUENT CASES WAS NOT ADDRESSED TO THE TOPIC OF THE EXECUTIVE COUNCIL WHICH, OF COURSE, RAISES IMPORTANT ADDITIONAL MATTERS OF CONFIDENTIALITY FOR CONSIDERATION.

PARA. 143:.... HOWEVER, IT IS WELL TO NOTE THAT DEANE J STATED IN AN INTERESTING PASSAGE:¹⁴

... THAT BEING SO, THE STATUTORY DEVELOPMENTS REFERRED TO IN THE JUDGMENTS OF KIRBY P AND PRIESTLY JA IN THE COURT OF APPEAL IN THE PRESENT CASE ARE CONDUCIVE TO AN ENVIRONMENT WITHIN WHICH THE COURTS SHOULD BE LESS RELUCTANT THAN THEY WOULD HAVE BEEN IN TIMES PAST TO DISCERN IN STATUTORY PROVISIONS A LEGISLATIVE INTENT THAT THE PARTICULAR DECISION MAKER SHOULD BE UNDER A DUTY TO GIVE REASONS OR TO ACCEPT THAT SPECIAL CIRCUMSTANCES MIGHT ARISE IN WHICH CONTEMPORARY STANDARDS OF NATURAL JUSTICE OR PROCEDURAL FAIR PLAY DEMAND THAT AN ADMINISTRATIVE DECISION MAKER PROVIDE REASONS FOR A DECISION TO A PERSON WHOSE PROPERTY, RIGHTS OR LEGITIMATE EXPECTATIONS ARE ADVERSELY AFFECTED BY IT. WHERE SUCH CIRCUMSTANCES EXIST, STATUTORY PROVISIONS CONFERRING THE RELEVANT DECISION-MAKING POWER SHOULD, IN THE ABSENCE OF A CLEAR INTENT TO ~~THE~~ THE CONTRARY, BE CONSTRUED SO AS TO IMPOSE UPON THE DECISION MAKER AN IMPLIED STATUTORY DUTY TO PROVIDE SUCH REASONS. ⁹⁹

205. THE STATE OF SOUTH AUSTRALIA v. O'SHEA (1987) 163 CLR 378.

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PARA. 50: THERE IS ONE OTHER MATTER THAT IT IS CONVENIENT TO DISPOSE OF NOW. NO SUBMISSION WAS ADVANCED THAT THE GOVERNOR IN COUNCIL WAS REQUIRED TO GIVE MR WATSON AN OPPORTUNITY TO MAKE REPRESENTATIONS TO THE GOVERNOR IN COUNCIL IN RELATION TO THE BOARD'S RECOMMENDATION BEFORE THE GOVERNOR IN COUNCIL MADE A DECISION. I ASSUME THAT THIS WAS BECAUSE MR MEAD ACCEPTS THAT MR WATSON HAD AN OPPORTUNITY TO MAKE REPRESENTATIONS TO THE BOARD ON ANY ASPECT OF ITS DECISION THAT HE WISHED TO RAISE, AND THAT ANY REQUIREMENT TO ACT FAIRLY BY ALLOWING AN OPPORTUNITY TO MAKE REPRESENTATIONS RELATING TO MR WATSON'S RELEASE WAS MET THROUGH THE ABILITY TO DO SO TO THE BOARD. THAT, BRIEFLY, IS THE EFFECT OF THE HIGH COURT DECISION IN O'SHEA.

PARA. 76: I BEGIN BY CONSIDERING THE SCOPE OF THE POWER VESTED IN THE GOVERNOR IN COUNCIL BY S. 67(7). ALTHOUGH THAT PROVISION REFERS ONLY TO THE GOVERNOR ORDERING THAT A PRISONER BE RELEASED ON PAROLE, BY NECESSARY IMPLICATION IT CONFERS A POWER TO DECLINE OR REFUSE TO MAKE SUCH AN ORDER.

PARA. 77: I DO NOT PROPOSE TO ATTEMPT TO IDENTIFY THE PRECISE SCOPE OF THE POWER, LET ALONE ALL MATTERS THAT MIGHT BE RELEVANT TO THE EXERCISE OF THE POWER IN A GIVEN CASE. THERE IS NO POINT IN TRYING TO DO SO IN THE ABSTRACT.

PARA. 78: THE QUESTION TO BE CONSIDERED IS WHETHER THE POWER CONFERRED ON THE GOVERNOR IS LIMITED AS SUGGESTED BY MR MEAD, OR IN SOME OTHER WAY. CAN THE GOVERNOR MAKE HIS OWN ASSESSMENT OF WHETHER ... MR WATSON BE RELEASED? THE ULTIMATE QUESTION FOR THE GOVERNOR WOULD BE THE PUBLIC INTEREST ...

PARA. 85: THERE IS NO HINT IN THESE REASONS THAT THE POWER CONFERRED ON THE GOVERNOR IN COUNCIL IS ANY NARROWER THAN THAT CONFERRED ON THE BOARD, AND IF ANYTHING THE SUGGESTION IS THAT THE POWER IS A WIDER ONE. TENOR OF THIS PASSAGE [FROM MASON CJ, AT 388, FROM WATSON JUDGMENT, PARAGRAPH 84, THEREIN] IS THAT THE POWER CONFERRED ON THE GOVERNOR IN COUNCIL IN RELATION TO A PRISONER HELD AT THE GOVERNOR'S PLEASURE IS A BROAD ONE.

PARA. 86: A SIMILAR APPROACH TO THE SCOPE OF THE POWER UNDERLIES WHAT WAS SAID BY BRENNAN J, WHEN CONSIDERING WHETHER THE GOVERNOR WAS REQUIRED TO ACCORD A FURTHER HEARING TO THE PRISONER.

He said at 409:

THE ADMINISTRATIVE SCHEME FOR THE RELEASE OF OFFENDERS WHO HAVE BEEN DECLARED UNABLE TO CONTROL THEIR SEXUAL INSTINCTS...

PARA. 87: THIS APPROACH TO THE SCOPE OF THE POWER IS FURTHER SUPPORTED BY OBSERVATIONS MADE BY WILSON AND TOOHEY JJ IN O'SHEA AT 402, WHERE THEY SAID:

IN THE SAME WAY, THE DUALITY OF THE LEGISLATIVE SCHEME EMBODIED IN S. 77A OF THE CRIMINAL LAW ACT CHARACTERISES THE GOVERNOR'S DECISION AS AN EXPRESSION OF AN UNFETTERED DISCRETION AS TO WHAT THE PUBLIC INTEREST REQUIRES IN THE INSTANT CASE.

PARA. 106: THE ISSUE FOR THIS COURT IS NOT, AS I HAVE ALREADY SAID, WHETHER IT AGREES OR DISAGREES WITH THE GOVERNOR'S DECISION. NOR IS IT A QUESTION OF WHETHER IT DISAGREES EMPHATICALLY WITH THE GOVERNOR'S DECISION, OR CONSIDERS THAT THE DECISION TO BE UNREASONABLE. IT IS WHETHER THE DECISION THAT THE GOVERNOR MADE IS ONE WHICH NO REASONABLE DECISION MAKER COULD HAVE REACHED.

PARA. 67: THE ANSWER TO THE QUESTIONS, AND OTHER SUCH QUESTIONS, AND THE RESPONSE TO MR MEAD'S SUBMISSIONS, TURNS ON THE PROPER CONSTRUCTION OF THE STATUTORY SCHEME ~~OUTLINED~~ OUTLINED ABOVE, AND ON THE PLACE OF S. 67(7) OF THE CSA IN THAT SCHEME.

PARA. 93:.... BUT THERE IS NOTHING IN THE CSA TO SUGGEST THE BOARD'S POWER IS LIMITED IN THAT WAY. TO READ THE BOARD'S POWER AS LIMITED BECAUSE OF THAT CIRCUMSTANCE WOULD BE INCONSISTENT WITH THE SCHEME OF THE CSA. THE SAME REASONING APPLIES WHEN CONSIDERING THE POWER OF THE GOVERNOR.

PARA. 107: IN ANSWERING THIS QUESTION THE COURT HAS TO BEAR IN MIND THAT THE GOVERNOR IS ENTITLED TO HAVE REGARD TO THE GOVERNOR'S ASSESSMENT OF THE PUBLIC INTEREST.

... THE GOVERNOR IS ENTITLED TO HAVE REGARD TO THE PUBLIC REACTION TO A DECISION TO RELEASE MR WATSON. AS THE MEMBERS OF THE HIGH COURT NOTED IN O'SHEA, THERE CAN BE AN ELEMENT OF POLICY IN A DECISION OF THIS KIND: SEE MASON CJ AT 388 AND BRENNAN J AT 409.

PARA. 108:.... THIS COURT CAN INTERVENE ONLY IF NO REASONABLE PERSON, EXERCISING

(REF. 52.)

THE POWER ON PROPER GROUNDS, COULD COME TO A CONCLUSION DIFFERENT TO THAT REACHED BY THE BOARD. AND I AM NOT PURSUADED OF THAT.

PARA. 119:.... AS THINGS STAND, MR WATSON HAS NO IDEA WHY THE GOVERNOR HAS REFUSED TO RELEASE HIM ON PAROLE,...