IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S172 of 2012

ON APPEAL FROM THE
NEW SOUTH WALES COURT OF CRIMINAL APPEAL

BETWEEN:

**MAN HARON MONIS**
Appellant

and

**THE QUEEN**
First Respondent

**THE ATTORNEY-GENERAL**
**FOR THE STATE OF NEW SOUTH WALES**
Second Respondent



IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S179 of 2012

ON APPEAL FROM THE
NEW SOUTH WALES COURT OF CRIMINAL APPEAL

BETWEEN:

**AMIRAH DROUDIS**
Appellant

and

**THE QUEEN**
First Respondent

**THE ATTORNEY-GENERAL**
**FOR THE STATE OF NEW SOUTH WALES**
Second Respondent



# FIRST RESPONDENT'S SUBMISSIONS

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**Part I:**

1. I certify that this submission is in a form suitable for publication on the internet.

**Part II:**

2. The primary question is whether a Commonwealth criminal law which, *inter alia*, prohibits the use of a postal service to send communications which reasonable persons would consider offensive, infringes the implied freedom of communication about political and government matters[1].

3. The resolution of that question turns on three matters:

   (a) the proper construction of the impugned law – s.471.12 of the *Criminal Code* (Cth), including the identification of its legitimate end;

   (b) whether the impugned law properly construed effectively burdens the freedom of communication about government or political matters either in its terms, operation or effect? - the first limb of *Lange*; and

   (c) if the impugned law does effectively burden that freedom, is it nevertheless reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s.128 for submitting a proposed amendment of the Constitution to the informed decision of the people? – the second limb of *Lange*.

**Part III:**

4. The First Respondent ("the **Crown**") has served s.78B notices (**JAB137** and **152**) regarding its Notices of Contention (**JAB134** and **149**) – which raise the first limb of *Lange.* That argument is set out under Part VII below.

**Part IV:**

5. The Crown states that the co-appellant Droudis is not, as the Monis narrative of facts states at [7], also charged under s.471.12. Droudis is charged under s.11.2 of the *Criminal Code* (Cth) with aiding and abetting her co-appellant Monis in the commission of the offences alleged in counts 6-13 in the joint indictment presented on 12 April 2012 (**JAB1**).

[1] The test is as set out in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ("***Lange***") as modified in *Coleman v Power* (2004) 220 CLR 1 ("***Coleman***") - *cf Wotton v Queensland* (2012) 86 ALJR 246, ("***Wotton***") at 253 [25] (French CJ, Gummow, Hayne, Crennan and JJ), 255 [40] (Heydon J), 262 [77] (Kiefel J); *Hogan v Hinch* (2011) 243 CLR 506 ("***Hogan***") at 542 [47] (French CJ), 555-556 [94]-[97] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

The Criminal Code Offences

**471.12 Using a postal or similar service to menace, harass or cause offence**

A person is guilty of an offence if:

(a) the person uses a postal or similar service; and

(b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Penalty: Imprisonment for 2 years.

**11.2 Complicity and common purpose**

**(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.**

(2) For the person to be guilty:

(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and

(b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:

(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or

(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(3A) Subsection (3) has effect subject to subsection (6).

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:

(a) terminated his or her involvement; and

(b) took all reasonable steps to prevent the commission of the offence.

(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the other person has not been prosecuted or has not been found guilty.

(6) Any special liability provisions that apply to an offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of subsection (1).

(7) If the trier of fact is satisfied beyond reasonable doubt that a person either:

(a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or

(b) is guilty of that offence because of the operation of subsection (1);

but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.

6. By way of a fuller outline, the Crown states that the matters have had a lengthy procedural history. An indictment against Monis was first presented on 13 July

2010 and the matter set down for hearing on 1 November 2010. It was vacated after a s.40 removal application was made. That was heard and dismissed by French CJ, Gummow and Crennan JJ on 8 April 2011.[2] The Joint Indictment was to be heard commencing 11 April 2011 - **JAB1**. By motion, both appellants sought orders from the trial judge Tupman DCJ, that the Joint Indictment be quashed based upon the argument that s.471.12 of the *Criminal Code* 1995 (Cth) is invalid because it is contrary to the implied freedom of political communication and therefore beyond the power of the Commonwealth Parliament. The Crown opposed the orders and, in summary submitted that there is no relevant contravention:

(a) The Crown did not concede that the law effectively burdens freedom of communication about government or political matters either in its terms, operation or effect – the '"first limb" of *Lange.*

(b) Moreover, *a*ny burden that did exist would only be light and would not be an "effective burden" on relevant communications.

(c) The legislation on its face is a reasonably appropriate response, fairly adapted to meet the legitimate end of prohibiting use of the post in a way that reasonable persons would regard as menacing, harassing or offensive – the '"second limb" of *Lange*.

7. The trial judge found the Crown's case on the second limb was made out. Her Honour also found the one charge alleging harassment by Monis did not effectively burden the implied freedom - the first limb (**JAB53**).

8. Monis and Droudis appealed (**JAB67, 70**) under s.5F of the *Criminal Appeal Act* 1912 (NSW) to the New South Wales Court of Criminal Appeal ("**CCA**"). There the Crown also contended that s.417.12 did not effectively burden freedom of communication about government or political matters either in its terms, operation or effect.

9. The judgment is at **JAB73**. On the first limb question, two members of the CCA, Bathurst CJ and Allsop P held that the legislation could effectively burden freedom of communication about government and political matters within the first limb of *Lange*. McClellan CJ at CL found it was unnecessary to decide whether any communication touching upon matters of politics or government, however extreme, is a communication about government or political matters and will fall within the first limb in *Lange,* accepting for present purposes that it was, although noting the contrary argument had merit.[3]

10. All justices answered the second limb question in the affirmative.[4]

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[2] *Monis v Regina; Droudis v Regina* [2011] HCATrans 97 (8 April 2011).
[3] First limb: Bathurst CJ at [53] – [57], Allsop P at [84] and McClellan CJ at CL at [108].
[4] Second limb: Bathurst CJ at [67] – [68], Allsop P at [88]-[90] and McClellan CJ at CL at [118]-[119].

**Part V:**

11. Both co-appellant's statements of applicable constitutional provisions, statutes and regulations are, respectively, accepted as correct. However, the Crown would add the whole of Division 471 of the *Criminal Code* (Cth) – entitled "Postal offences" – to give full context to s.471.12 and as Allsop P referenced at [74] and [75] of the judgment below. Further, the predecessor provisions to s.471.12 are annexed hereto as directed by Gummow J on the grant of special leave.

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**Part VI:**

12. Before referencing the appellants' submissions, it can be noted that the Crown supports the Orders of the CCA and gratefully adopts their Honours' reasoning in the following respects:

The construction of s.471.12

13. Bathurst CJ and Allsop P applied standard statutory construction techniques[5] and concluded that for the use of a postal service to be offensive within the meaning of s.471.12 it is necessary that the use be calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances. And that it is not sufficient if the use would only hurt or wound the feelings of the recipient, in the mind of a reasonable person – Bathurst CJ at [44]; Allsop P at [91]. Such a construction is required by the context and subject matter of s.471.12.

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14. In construing 'offensive' their Honours also took into account the implied freedom – Bathurst CJ at [25] and [45], Allsop P at [76], [81]-[83]. See also McClellan CJ at CL at [106].

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The legitimate end of s 471.12

15. The Chief Justice's construction also informed his Honour's view about the legitimate end of the law:

> "*to protect persons first, from being menaced by use of a postal service. Second, it is to protect persons being harassed by the use of such a service and third, to protect persons from being subjected to material that is offensive in the sense I have described, namely material which is calculated or likely to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person.*" at [59].

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16. In considering the legitimate end of s.471.12, Allsop P stated that:

> "*It is legitimate in the maintenance of an orderly, peaceful, civil and culturally diverse society such as Australia that services that bring*

[5] Bathurst CJ at [25]-[42]; Allsop P at [72]-[80].

*communications into the homes and offices of people should not be such as to undermine or threaten a legitimate sense of safety or security of domain, and thus public confidence in such services.*" at [78].

17. McClellan CJ at CL referred more generally to the legitimate end of regulating the postal service which is compatible with the system of government prescribed by the Constitution – at [109].[6] All are legitimate ends compatible with the maintenance of the constitutionally prescribed system of government.

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Section 471.12 requires a positive answer to the second limb of *Lange*

18. Section 471.12 *is* reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government - and for the reasons set out in each of their Honours' judgments: Bathurst CJ at [64]-67]; Allsop P at [85]-[91] and McClellan CJ at CL at [117]-[118].

The Monis submissions

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19. The appellant Monis seeks to broaden the construction of the word 'offensive' in s.471.12 from that given by the CCA and thereby supporting his invalidity argument under the implied freedom of political communication – contrary to selecting a construction that avoids, rather than leads to, a conclusion of constitutional invalidity[7] - and in circumstances when there is no warrant to do so in a law imposing a significant criminal sanction - see Bathurst CJ at [40]-[43].

20. Monis' concerns for jury uncertainty are misplaced. A jury is ideally positioned
30 to distinguish what reasonable persons would consider in all the circumstances as an offensive use of the post from that which is not. It is the very type of thing that juries do every working day in Australia. Indeed, the phrase "reasonable persons would regard as being, in all the circumstances, offensive" is part of the test of the meaning of "child abuse material" in the *Crimes Act 1900* (NSW) – s.91FB and see s.473.4 of the *Criminal Code Act* (Cth), which lists the matters to be taken into account in determining whether "child abuse material" is offensive in Part 10.6, which deals with telecommunications services. Furthermore, the jury is not left at large without any assistance, and the trial judge will have the benefit of giving directions based upon intermediate
40 appellate and High Court consideration of the section.

21. There is no writ for Monis criticizing the absence of the law of defamation's particular defences, such as truth and fair comment, in a criminal statute - see his submissions at [47] and [52]-[54]. The impugned law in *Nationwide News*[8] was held invalid, *inter alia*, because the protection it afforded the Commission

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[6] The judgment uses the word "proscribed", yet it is clear from his Honour's immediate reference to *Lange* at (CLR) 562 that his Honour meant "prescribed".
[7] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [11].
[8] *Nationwide News Pty Ltd v Wills* [1992] HCA 46; (1992) 177 CLR 1.

was so disproportionate that it stood outside the incidental power in s 51(xxxv) said to support it, not because truth or fair comment were not to be implied.

22. The impugned laws here and in *Coleman* are very different with analogies between them likely to mislead. The appellant in *Coleman* had been charged with using insulting words pursuant to s.7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Q). The words had been about a police officer and had been directed towards him in a public place. However the focus was on the meaning of "*insulting*" in the context in which that word appears in the section. In the present case Monis is charged with using a postal service by method of use and by content of communication that reasonable persons would regard as being, in all of the circumstances harassing (for one offence) or offensive (for the remaining 12 offences). As McHugh J noted in *Coleman* itself, that case is limited to a rule that, if insulting words have a political content or purpose and burden the freedom of political communication protected by the Constitution, s.7(1)(d) was (or was not) invalid to the extent that it penalised persons using such words (at [79]).

23. Moreover, unlike *Coleman* where the offence was unqualified in any way, the test of whether the offence is made out in the present case is qualified by the words: "*that reasonable persons would regard as being in all of the circumstances, menacing, harassing or offensive.*" It is not only the 'reasonable persons test' but the phrase *"all of the circumstances"* which are crucial. The circumstances serve as a real qualifier of the conduct. The absence of any qualifier in *Coleman* was significant for those members of the High Court who held the offence there to be invalid,[9] as no doubt was the relatively benign nature of the conduct i.e. the conduct was limited to "*insulting*" words.

24. On the same qualifier in s.474.17 of the *Criminal Code* (using a carriage service to menace, harass or cause offence), Higgin CJ in *R v PM* said:[10]

> *"A communication of the kind prescribed by s 474.17 must menace, harass or cause offence to the recipient, as the case may be, whether or not the person, to whom the communication is addressed, feels subjectively menaced, harassed or offended, as long as, by the standards of reasonable adults, it would be so regarded."*

25. The 'reasonable persons in all the circumstances' test operates very much as an appropriate qualification on the prohibition and, it is submitted, is considered to leave room for the operation of the implied freedom on political and government matters. In this regard, Allsop P stated (at [76]):

> *"It is to be noted, however, that the operation of the provision of itself caters, to a degree, for the Constitutional principle. The offending conduct must be such that reasonable persons would*

[9] For example McHugh J in *Coleman* at [102] and [105] (the latter set out by Allsop P at [82]).
[10] *R v PM* [2009] ACTSC 171 (16 December 2009) at [10].

*regard, in all the circumstances, the use as offensive. Such circumstances would be taken to include the recognition by reasonable persons of the existence and importance to Australian democracy and representative government of the freedom and thus of a possibly legitimate purpose for the use of the post, even if the use, through the communication, may offend the recipient of the communication."*

26. The Monis criticism of the legitimate ends of s.471.12 as discerned by the CCA, do no more than set up straw men which stand or fall elsewhere - either in the proper construction of the impugned law or in answer to the *Lange* tests. There is nothing "grossly disproportionate" in the "regime of protection" used by the Commonwealth to serve the legitimate ends as found here.[11]

27. They are also 'legitimate' ends in the sense used in *Nationwide News* by Gaudron J,[12] in that they secure some end within power, here s.51(v) of the Constitution.

The Droudis submissions

28. The lengthy discussion of the legislative history by Droudis ends with criticism of the Chief Justice's use of the word 'significant' as: "a gloss upon the words of the statute" – at [63]. Yet, the critique fails to traverse the underlying rationale of the Chief Justice, and Allsop P who relevantly agreed with the construction of s 471.12 - that it is directed to serious matters:

(a) *"It would be unlikely that the legislature intended this kind of conduct [bitter letters following a relationship breakdown] would be visited with a potential sanction of two years imprisonment: cf* Coleman v Power *at [12], [183]."* - Bathurst CJ at [41]

(b) *"[T]he word "offensive" is used in conjunction with the words "menacing" and "harassing". This tends to suggest, in my opinion, that the word is directed to conduct more serious than using the postal service to hurt or wound the feelings of a recipient"* - Bathurst CJ at [42]

(c) *"It is a criminal offence and it would be wrong to attribute to Parliament an intention to criminalise conduct to this extent unless it was of a serious character"*- Allsop P at [72].

(d) *"To predicate satisfaction of a provision such as s 471.12, insofar as it refers to "offensive", on the finding that the person to whom the communication was made was offended would be an intolerably wide meaning for a criminal provision. The use of the service must be offensive in a serious way and judged so*

[11] Compare the observations of *Davis v The Commonwealth* (1988) 166 CLR 79 (at 100), by Mason CJ in *Nationwide News v Wills* (1992) CLR 1 at 29.
[12] *Nationwide News Pty Ltd v Wills* (1991) 177 CLR 1 at 95.

> *intrinsically by reference to a standard against which the quality of the communication sent via the post can be judged. The need for a standard to assess the quality of the act in question is assisted by the requirement that it is what reasonable persons in all the circumstances would regard as offensive use of a postal service."* - Allsop P at [79].

29. Hence "significant" is not a gloss – it is a recognition, after using standard statutory construction techniques, that the adjective ought be used to bolster 10 'anger' and 'resentment' in the meaning given to the proper construction of the word 'offensive' in s.471.12 and to preclude "hurt feelings".

30. The assumption by each of the appellant that "offensive" in s.471.12 includes "*hurt feelings*" or "*wounded feelings*" is unsupported by authority or the context in which the word appears in the section.

31. The judgment of Gleeson CJ in *Coleman* in its reference to *Ball v McIntyre*[13] stands as an example of the importance of context when looking for a meaning of the word "offensive". Kerr J there looked at the meaning of 20 "offensive" in the context of "*threatening, abusive and insulting*" and in that context concluded that it "*carried the idea of behaviour likely to arouse significant emotional reaction*". The judgment of Kerr J makes plain that it is not "offensive" where that word appears in the context of "threatening, abusive and insulting" to express contrary political opinions or views. His Honour distinguished between *political behaviour* and *offensive behaviour*. The judgment of Kerr J stands as a warning not to too readily accept the appellation of *offensive* or *offensiveness* – see particularly at 241 and 244.

32. The judgment of Kerr J has been approved in many cases since. Most 30 relevantly Higgins CJ, in *R v PM* dealing with the almost identical s.474.17 of the Code, stated:[14]

> *"What is offensiveness? Well, I take the judgment of Kerr J, in Ball v McIntyre (1966) 9 Federal Law Reports 237, as still being good law."*

33. Similarly, the Droudis criticism, at [58], of the use by the CCA of the *noscitur a sociis* maxim, is unfounded, hanging as it apparently does on construing old legislation. Section 471.12 was inserted by the *Criminal Code Amendment* 40 *(Anti-Hoax and Other Measures) Act* 2002 (Cth). In 2009, Higgins CJ, in construing "offensive" in the context of s.474.17 of the Criminal Code,[15] found:

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[13] *Ball v McIntyre* (1969) 9 FLR 237 referred to at para. 13 of the judgment of Gleeson CJ in Coleman.

[14] *R v PM* [2009] ACTSC 171 (16 December 2009) at [7].

[15] Section 474.17 is entitled - "Using a carriage service to menace, harass or cause offence" and is contained within Division 474 - "Telecommunications offences". The section is otherwise in identical terms to 471.12 of the *Criminal Code*.

*"The word in this case is associated with menace and harassment. It carries the idea of behaviour likely to arouse significant emotional reactions of a similar nature".*[16]

34. In other words and contrary to the appellants' submissions, it must be taken to mean more than *insulting* or *annoying*. Criminal sanctions are imposed.[17] In context it must mean seriously offensive or grossly offensive, or repugnant in a moral sense. In this way its meaning would be in keeping with *menacing*: which means threatening to cause evil, harm or injury; and *harassing* - tormenting by repeated attacks. In context *offensive* means conduct which is more deserving of opprobrium than mere annoyance. It derives from the Latin and encompasses the notion of an attack and in this context a serious attack, one which is in keeping with its placement alongside the word *menacing*. In construing "offensive" in s.471.12, the CCA properly considered a range of matters including the context and subject matter.

35. Droudis then uses her construction of s.471.12 to submit the (legitimate) end of the law as only "ensuring the civility of discourse". Rather, the legitimate ends of s.471.12 include, in addition to the characterisations found by the CCA,[18] to protect the integrity of the post and avoid breaches of the peace.[19]

(a) It protects the integrity of the post as a means of communication in which the public can have confidence. It is important as a matter of public policy that the public has confidence in the post and like services and that the public be encouraged to use them as a means of communication.

(b) The law is directed at a further legitimate end and that is to avoid breaches of the peace. In the same way in which a prohibition on offensive conduct is directed at avoiding breaches of the peace a prohibition on menacing, harassing or offensive use of the post can be seen as a justified enactment. It is not to the point to submit that menacing, harassing or offensive behaviour via the use of the post is too remote to be causative of a breach of the peace. Words can be inflammatory when written. Menacing, harassing or offensive letters can provoke violence or self-harm. They can inflict pain upon and adversely affect the health of the recipient. They can induce depression. For example the receipt of a harassing or offensive letter by a widow in a remote area can be expected to have a more deleterious effect than if that same person saw the same words in a newspaper or heard them uttered in a town meeting where others were present.

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[16] *R v PM* [2009] ACTSC 171 (16 December 2009) at [10].
[17] And see Gleeson CJ in *Coleman* at [12], in the context of legislation imposing criminal sanctions for breaches of public order – "*...it would be wrong to attribute to Parliament an intention that any words or conduct that could wound a person's feelings should involve a criminal offence.*"
[18] Bathurst CJ at [59], Allsop P at [78]; McClellan CJ at CL at [109].
[19] See primary judge at [45]-[46].

**Part VII:**

36. The Crown contends – **JAB135** and **150** - that the NSW Court of Criminal Appeal erred in holding that s.471.12 of the *Criminal Code Act 1995* (C'th) effectively burdens the freedom of communication about government or political matters. And further that if such a provision touches or burdens the implied freedom lightly, then whether the second limb of the two stage test of invalidity as formulated in *Lange* and modified in *Coleman v Power*, is more easily answered in the affirmative.

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37. As noted, two members of the CCA, Bathurst CJ and Allsop P, agreed with the applicants that the legislation could effectively burden freedom of communication about government and political matters within the first limb of *Lange*. McClellan CJ at CL found it was unnecessary to decide whether any communication touching upon matters of politics or government, however extreme, is a communication about government or political matters and will fall within the first limb in *Lange,* accepting for present purposes that it was, although noting the contrary argument had merit.[20]

20 38. There are two aspects of the first limb of the test. The first requires analysis of the putative "communication about government or political matters". The second concerns the existence of a relevant "burden" upon communications which may be so characterised.

<u>An effective burden?</u>

39. As to the second aspect of the first limb, in all but exceptional cases, a law will not burden relevant communications unless, by its operation or practical effect, it directly and not remotely restricts or limits the content of those
30 communications or the time, place, manner or conditions of its occurrence - *Coleman at* 49 [91] per McHugh J.

40. The adverb "effective" has work to do in the first limb – it qualifies the verb "burden". It requires the court to ask to what extent, as a matter of practical reality, compliance with the impugned law will constrain political discourse – *Sunol v Collier (No 2)* [2012] NSWCA 44 at [90] per Basten JA.

41. As submitted to the CCA, as in the context of s.92 cases,[21] the burden must be meaningful, in the sense of not insubstantial or *de minimus*. It must be a real or
40 an actual burden upon relevant communications: a real impediment, an obstacle in their way. An early characterisation of the relevant burden is worth considering:

> *"If the restriction imposes a burden on free communication that is disproportionate to the attainment of the competing public interest, then the existence of the disproportionate burden*

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[20] Bathurst CJ at [53] – [57], Allsop P at [91] and McClellan CJ at CL at [108].
[21] E.g. *Williams v Metropolitan and Export Abbatoirs Board* (1953) 89 CLR 66 at 74 per Kitto J, see also *Betfair v Western Australia* (2008) 234 CLR 418 at 483 [131] per Heydon J.

*indicates that the purpose and effect of the restriction is in fact to impair freedom of communication"*[22]

42. Section 471.12 cannot be said to have any such dis-proportionality. As the historical examination undertaken by the Commonwealth shows, such prohibition on the use of postal services has long been part of the law of the land. Moreover, s.471.12 was enacted in 2002, and accordingly, it may be assumed that the Parliament when enacting the amendment was mindful of the High Court's decision in *Lange* – McClellan CJ at CL at [98].

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43. To the extent that there is any burden on the implied freedom by s.471.12, it can only be indirect and light and so, it is submitted, as not to *effectively* burden the implied freedom - see Heydon J in *Coleman* at [319] and *Hinch* at [95] referring to Gleeson CJ in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40], citing Deane and Toohey JJ, where their Honours said that:

> "[A] *law whose character is that of a law with respect to the prohibition or restriction of [political] communications ... will be*
> 20 *much more difficult to justify ... than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications".*[23]

The passage was also cited by Gaudron J in *Levy v Victoria* (1997) 189 CLR 579 at 618-619. And see Mason CJ in *Australian Capital Television* to like effect where his Honour stated, under the heading "*Infringement: the test to be applied*" (at CLR 143);

> 30 *"A distinction should perhaps be made between restrictions on communication which target ideas or information and those which restrict an activity or mode of communication by which ideas or information are transmitted. In the first class of case, only a compelling justification will warrant the imposition of a burden on free communication by way of restriction and the restriction must be no more than is reasonably necessary to achieve the protection of the* competing *public interest which is invoked to justify the burden on communication. ... On the other hand, restrictions imposed on an activity or mode of communication by*
> 40 *which ideas or information are transmitted are more susceptible of justification."*

44. Section 471.12 can only be in the latter category. It regulates a particular type of communication and one which is not inherently political in its nature: see *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 339. Such a distinction has been recognised even in the United States First Amendment

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[22] Per Mason CJ in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143.
[23] In *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169.

jurisprudence.[24]

45. The court will not strike down a law restricting conduct which may incidentally burden freedom of political speech simply because it can be shown that some more limited restriction "could suffice to achieve a legitimate purpose". This is consistent with the respective roles of the legislature and the judiciary in a representative democracy – Gleeson CJ in *Coleman* at [31].

46. As outlined by Heydon J in *Wotton,*[25] the potential width of the freedom of political and government communications to intrude into the criminal sphere via the first limb is real. More and more criminal statutes are being challenged on this ground.

47. In the alternative, the Crown submits that if an impugned provision touches or burdens the freedom indirectly and lightly, then the second limb is more easily answered in the affirmative. This is a worthwhile extension of the first limb of *Lange,* is consistent with authority, gives the first limb real work to do and serves the public interest in discouraging the vexatious invocation of the implied freedom by accused person in matters where communications on political and government matters are not directly sought to be controlled.

The communications are not political and cannot be so characterized

48. If there is to be any reading down by reference to the implied freedom then the Crown says these communications are not political. As McHugh J stated in *APLA Pty Ltd v Legal Services Commissioner* [2005] 224 CLR 322 at [59]:

> *"The first question then is whether the communication falls within the protected area of communication. That is, is it a communication concerning a government or political matter? If the answer to that question is "No", then the question of whether the law is reasonably appropriate and adapted does not arise."*

49. Focus on the specific conduct in question is appropriate where the conduct may fall outside the statutory prohibition, properly construed, as in *Coleman v Power - Sunol v Collier (No 2)* [2012] NSWCA 44 at [81] per Basten JA. The courts have undertaken the task of analysing subject matter in order to distinguish material protected by the implied freedom from that which is not: see, eg *Brown v Classification Review Board* (1998) 82 FCR 225 at 238 (French J), 246 (Heerey J) and 258 (Sundberg J); *Holland v The Queen* [2005] WASCA 140; 30 WAR 231 at [93]- [100] (Malcolm CJ), [235] (Roberts-Smith JA), [297]-[298] (McLure JA); and see *APLA Pty Ltd v Legal Services Commissioner* [2005] 224 CLR 322 at [28].

50. While that particular submission did not find favour with Bathurst CJ at [46]-[51] (as it was not relevant to validity), it is respectfully submitted that the

[24] See the case law collected by Mason CJ in *Australian Capital Television* at 177 CLR 143 – footnote 25.
[25] At [43]-[48].

communications in some instances and portions of the communications which are properly the subject of the charges in this matter do not impinge upon the implied freedom as they do not concern matters protected by it. Mere references to political or government matters, or the fact that some only are, apparently, copied to politicians cannot save them. These prosecutions concern communications which are offensive, not in respect of any political or government content properly the subject of the implied freedom, but offensive because of other content such as the personal attacks that are made upon the deceased *in the circumstances* of having been sent to the homes of the wives and families. They were Exhibit E on the motion before Tupman DCJ **JAB50.**

51. The fact that a letter may refer in part to political matters does not save those parts of the letter that are not directed to political and government issues. In order to be saved by the implied freedom a statement in a communication must be directed at promoting political discussion. An irrational statement directed at political discussion is caught by the freedom. However, even a rational statement not so directed is not caught. That part of a communication can fall outside of the protection of *Lange* and that a part within might be severed from a communication was acknowledged in *APLA Pty Ltd v Legal Services Commissioner* [2005] 224 CLR 322 at [70] per McHugh J.

Incompatible communications

52. The rationale of the rule in *Lange* as modified in *Coleman* is the promotion or furthering of political discussion by a prohibition on any legislative power or common law rule that would prevent it. These communications do not do this. To the extent to which they purport to do so they are disingenuous. The Crown's case is the overall motive or purpose of the appellant Monis was to offend the families of the deceased and to denigrate the deceased. This was not a genuine attempt at political discourse. One does not win a person over to a political cause by denigrating their son or husband. Much of the material evidencing the offence concerns matters which are not political issues and cannot be a part of political discourse protected by *Lange*. Notwithstanding the robust nature of Australian political discourse, there must be limits to the level of offence which may be occasioned by a protected communication – McClellan CJ at CL at [105].

53. Reconciling freedom of political expression with the reasonable requirements of public order becomes increasingly difficult when one is operating at the margins of the term "political" – Gleeson CJ in *Coleman* at [28]. The freedom is not absolute - *Lange* at 561. The consequence of this view, it is submitted, is that there should be no call for the protection of communications that are calculated to cause significant anger, significant resentment, disgust, outrage or hatred.

54. Any communication that can be described as "menacing, harassing or offensive" in s.471.12 as properly understood – that is not merely *insulting* or *annoying* - is itself not compatible with the implied freedom that the Constitution gives effect to, in ensuring that debate about "representative government" is conducive to that institution and would therefore not be protected by the

implied freedom.

55. This must be so notwithstanding the properly robust nature of Australian political debate (see the various comments in *Coleman* to this effect – e.g. McHugh J at [105] re insulting words, and Kirby J at [260]). However, communications or conduct that cross the line into the criminal sphere cannot be protected by the implied freedom as they are antithetical to its purpose – consider the letter at JAB32 *in the circumstances* that the addressee, the deceased's father, is Jewish.

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**Part VIII:**

56. It is estimated that one hour will be required for the presentation of the First Respondent's oral argument.

Dated 4 September 2012

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per EAgius

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S172 of 2012

ON APPEAL FROM THE
NEW SOUTH WALES COURT OF CRIMINAL APPEAL

BETWEEN:

**MAN HARON MONIS**
Appellant

and

**THE QUEEN**
First Respondent

**THE ATTORNEY-GENERAL**
**FOR THE STATE OF NEW SOUTH WALES**
Second Respondent

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S179 of 2012

ON APPEAL FROM THE
NEW SOUTH WALES COURT OF CRIMINAL APPEAL

BETWEEN:

**AMIRAH DROUDIS**
Appellant

and

**THE QUEEN**
First Respondent

**THE ATTORNEY-GENERAL**
**FOR THE STATE OF NEW SOUTH WALES**
Second Respondent

# ANNEXURE 1
# TO THE
# FIRST RESPONDENT'S SUBMISSIONS

## HISTORY OF THE POSTAL OFFENCE PROVISIONS IN AUSTRALIA

Filed on behalf of the First Respondent by:
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## HISTORY OF THE POSTAL OFFENCE PROVISIONS IN AUSTRALIA

### *Post and Telegraph Act 1901* – 1 December 1901 to 30 June 1975

The *Post and Telegraph Act 1901* commenced on 1 December 1901 and included the following offence provision:

**Section 107**

*Any person who knowingly sends or attempts to send by post any postal article which-*

a) *has thereon or therein or on the envelope or cover thereof any words marks or designs of an indecent obscene blasphemous libellous or grossly offensive character,*

*shall be liable to a penalty not exceeding Two hundred dollars or to imprisonment for a term not exceeding two years.*

Prior to the enactment of the *Post and Telegraph Act 1901* the states and territories had responsibility for their postal services.

### *Postal Services Regulations 1975* – 1 July 1975 to 1 July 1989

The *Postal and Telecommunications Commissions (Transitional Provisions) Act 1975* commenced on 1 July 1975 and repealed the *Post and Telegraph Act 1901*. The *Postal Services Regulations 1975* were made pursuant to the *Postal Services Act 1975*.

*Regulation 53*
*A person shall not knowingly send by post or by the courier service an article consisting of or containing matter not solicited by the person to whom the article is sent, being matter that advises, notifies or advertises the existence or availability of matter of an indecent, obscene or offensive nature.*
*Penalty: $200 or imprisonment for 6 months, or both.*
(Notified in the Government Gazette on 30 June 1975)

*Regulation 53A*
*A person shall not knowingly send by post an article consisting of, containing or displaying on the outside of its envelope, wrapping or other cover, matter not solicited by the person to whom the article is sent, being matter of an indecent, obscene or offensive nature.*
*Penalty: $200 or imprisonment for 6 months, or both.*
(Notified in the Government Gazette on 21 September 1982)

***Crimes Act 1914* – 1 July 1989 to 3 April 2002**

Section 85S was added to the *Crimes Act 1914* by the *Telecommunications and Postal Services (Transitional Provisions and Consequential Amendments) Act 1989.*

**Section 85S Improper use of postal services**

**Scope: 1 July 1989 to 30 June 1997**

*(1) A person must not intentionally use a postal or carriage service supplied by Australia Post:*

*(a) with the result that another person is menaced or harassed; or*

*(b) in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive.*

*Imprisonment for 1 year.*

*(1A) For the purposes of an offence against paragraph (1)(a) or (b), absolute liability applies to the physical element of circumstance of the offence, that the postal or carriage service is supplied by Australia Post.*

*Note: For absolute liability, see section 6.2 of the Criminal Code.*

*(2) In subsection (1): carriage service has the same meaning as in the Telecommunications Act 1997.*

**Scope: 1 July 1997 to 23 May 2001**

(1) A person shall not knowingly or recklessly:

(a) use a postal or carriage service supplied by Australia Post to menace or harass another person; or

(b) use a postal or carriage service supplied by Australia Post in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive.

Penalty: Imprisonment for 1 year.

**Scope: 24 May 2001 to 3 April 2002**

*(1) A person must not intentionally use a postal or carriage service supplied by Australia Post:*

*(a) with the result that another person is menaced or harassed; or*

*(b) in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive.*

*Imprisonment for 1 year.*

*(1A) For the purposes of an offence against paragraph (1)(a) or (b), absolute liability applies to the physical element of circumstance of the offence, that the postal or carriage service is supplied by Australia Post.*

*Note: For absolute liability, see section 6.2 of the Criminal Code.*

***Criminal Code 1995* – 4 April 2002 to present**

Section 471.12 of the *Criminal Code* replaced section 85S *Crimes Act 1914* by the *Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002.*

**Scope: 4 April 2002 to 28 February 2005**
*A person is guilty of an offence if:*
*(a) the person uses a postal or similar service; and*
*(b) the person does so in such a way as would be regarded by reasonable persons as being, in all the circumstances, menacing, harassing or offensive..*

*Penalty: Imprisonment for 2 years.*

**Scope: 1 March 2005 to present**
*471.12 Using a postal or similar service to menace, harass or cause offence*
*A person is guilty of an offence if:*
*(a) the person uses a postal or similar service; and*
*(b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.*
*Penalty: Imprisonment for 2 years.*

Sending explosives or noxious substance or indecent articles, &c.
Qd. P. & T. Act 1891 s. 98.
Amended by No. 7, 1966, s. 9; and No. 216, 1973, s. 3.

**107.** Any person who knowingly sends or attempts to send by post any postal article which—

(a) encloses an explosive or a dangerous filthy noxious or deleterious substance or a sharp instrument not properly protected or a living noxious creature or any other thing likely to injure other postal articles in course of conveyance or to injure an officer of the department or other person; or

(b) encloses an indecent or obscene print painting photograph lithograph engraving book card or article; or

(c) has thereon or therein or on the envelope or cover thereof any words marks or designs of an indecent obscene blasphemous libellous or grossly offensive character,

shall be liable to a penalty not exceeding Two hundred dollars or to imprisonment for a term not exceeding two years.

Penalty on postmasters and others for breach of duty.
N.S.W. P. Act 1867 s. 64.
Amended by No. 7, 1966, s. 9.

**108.** Any postmaster or other officer employed in the Department or any master of a vessel or other person employed or authorized by or under any postmaster to receive sort carry or deliver any mail or any postal article sent by post or otherwise who shall offend against or wilfully neglect or omit to comply with any of the regulations to be made as in this Act mentioned or with any of the provisions of this Act (for breach or neglect of which no other punishment is hereby provided) shall be liable to a penalty not exceeding Fifty dollars.

Penalty for losing or not delivering letters, &c.
N.S.W. P. Act 1867 s. 65.
Amended by No. 7, 1966, s. 9.

**109.** Any person employed by or under the Department or in the conveyance of mails who negligently loses or who wilfully detains or delays or procures or suffers to be detained or delayed any mail or any postal article, shall be liable to a penalty not exceeding Fifty dollars.

Penalty on mail-coach driver or guards loitering.
Qd. P. & T. Act 1891 s. 101.
Amended by No. 7, 1966, s. 9.

**110.** Any driver of a vehicle used for the conveyance of mails any guard or other person in charge of a mail, whether conveyed by a vehicle or on horseback or on foot who—

(a) loiters on the road; or

(b) wilfully mis-spends or loses time; or

(c) is under the influence of intoxicating liquor; or

(d) does not in all possible cases convey the mail at the speed fixed by the Postmaster-General for the conveyance thereof unless prevented by the weather or the bad state of the roads or an accident the proof whereof shall be on the person charged,

shall be liable to a penalty not exceeding Twenty dollars.

# Statutory Rules

## 1975 No. 130

REGULATIONS UNDER THE POSTAL SERVICES ACT 1975.*

I, THE GOVERNOR-GENERAL of Australia, acting with the advice of the Executive Council, hereby make the following Regulations under the *Postal Services Act* 1975.

Dated this thirtieth day of June, 1975.

JOHN R. KERR
Governor-General.

By His Excellency's Command,

R. BISHOP
Postmaster-General.

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## POSTAL SERVICES REGULATIONS

### PART I—PRELIMINARY

1. These Regulations may be cited as the Postal Services Regulations. Citation.

2. These Regulations shall come into operation on the date fixed by Proclamation under sub-section 2 (2) of the Act. Commencement.

3. In these Regulations, unless the contrary intention appears— Definitions.

"Council" means the Consultative Council established by sub-section 113 (1) of the Act;

"disciplinary appeal" means an appeal under section 65 of the Act;

"officer of Customs" has the same meaning as in the *Customs Act* 1901-1975;

"promotion appeal" means an appeal under section 54 of the Act;

"Review Tribunal" means a Review Tribunal established under regulation 31;

"Senior Chairman" means the Chairman of a Promotions Appeal Board appointed by the Minister under regulation 8 to be the Senior Chairman;

"the Act" means the *Postal Services Act* 1975.

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* Notified in the *Australian Government Gazette* on 30 June 1975.

(4) The Registrar of Trade Marks, the Registrar of Designs, or the authority of a State or Territory who, under the law of that State or Territory, performs functions relating to the incorporation or registration of companies or business names, shall not register as a trade mark or as a design, or as the name of or part of the name of a company, or as or as part of a business name, as the case may be, the words the assumption or use of which would constitute an offence against sub-regulation (2).

Prohibition on sending certain unsolicited matter.

**53.** A person shall not knowingly send by post or by the courier service an article consisting of or containing matter not solicited by the person to whom the article is sent, being matter that advises, notifies or advertises the existence or availability of matter of an indecent, obscene or offensive nature.

Penalty: $200 or imprisonment for 6 months, or both.

Disposal of dangerous, &c., thing.

**54.** A postal article that contains or may contain an article or thing that is or could be explosive, dangerous or deleterious may be dealt with in such manner as the Commission directs.

Disposal of physically offensive postal article.

**55.** A postal article that is or has become physically offensive may be destroyed by an authorized person forthwith.

AUSTRALIA

**Statutory Rules 1982 No. 230**[1]

# Postal Services Regulations[2] (Amendment)

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Regulation under the *Postal Services Act* 1975.

Dated 15 September 1982.

N. M. STEPHEN
Governor-General

By His Excellency's Command,

N. A. BROWN
Minister of State for Communications

The Postal Services Regulations are amended by inserting after regulation 53 the following regulation:

**Prohibition on sending matter of an indecent, obscene or offensive nature**

"53A. A person shall not knowingly send by post an article consisting of, containing or displaying on the outside of its envelope, wrapping or other cover, matter not solicited by the person to whom it is sent, being matter of an indecent, obscene or offensive nature.

Penalty: $200 or imprisonment for 6 months, or both.".

NOTES

1. Notified in the *Commonwealth of Australia Gazette* on 21 September 1982.

2. Statutory Rules 1975 No. 130 as amended by 1977 No. 53; 1981 No. 151; 1982 No. 147.

## Section 85S. Improper use of postal services

*Scope: 1 July 1989 to 30 June 1997*

Related Material Case Link Amendments Versions

A person shall not knowingly or recklessly:

(a) use a postal or telecommunications service supplied by Australia Post to menace or harass another person; or

(b) use a postal or telecommunications service supplied by Australia Post in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive.

PenaltyImprisonment for 1 year.

## Section 85S. Improper use of postal services

*Scope: 1 July 1997 to 23 May 2001*

Related Material Case Link Amendments Versions

(1) A person shall not knowingly or recklessly:

(a) use a postal or carriage service supplied by Australia Post to menace or harass another person; or

(b) use a postal or carriage service supplied by Australia Post in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive.

PenaltyImprisonment for 1 year.

(2) In subsection (1):

**carriage service** has the same meaning as in the Telecommunications Act 1997.

## Section 85S. Improper use of postal services

*Scope: 24 May 2001 to 3 April 2002*

Related Material Case Link Amendments Versions Repealed By

(1) A person must not intentionally use a postal or carriage service supplied by Australia Post:

(a) with the result that another person is menaced or harassed; or

(b) in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive.

Imprisonment for 1 year.

(1A) For the purposes of an offence against paragraph (1)(a) or (b), absolute liability applies to the physical element of circumstance of the offence, that the postal or carriage service is supplied by Australia Post.

Note: For **absolute liability**, see section 6.2 of the Criminal Code.

(2) In subsection (1):

**carriage service** has the same meaning as in the Telecommunications Act 1997.

## Section 471.12. Using a postal or similar service to menace, harass or cause offence

*Scope: 4 April 2002 to 28 February 2005*

Related Material Amendments Versions

A person is guilty of an offence if:

(a) the person uses a postal or similar service; and

(b) the person does so in such a way as would be regarded by reasonable persons as being, in all the circumstances, menacing, harassing or offensive.

PenaltyImprisonment for 2 years.

## Section 471.12. Using a postal or similar service to menace, harass or cause offence

*Scope: 1 March 2005 to 14 April 2010*

Related Material Amendments Versions

A person is guilty of an offence if:

(a) the person uses a postal or similar service; and

(b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

PenaltyImprisonment for 2 years.

## Section 471.12. Using a postal or similar service to menace, harass or cause offence

*Scope: 15 April 2010 current to 11 April 2011*

Related Material Amendments Versions

A person is guilty of an offence if:

(a) the person uses a postal or similar service; and

(b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

PenaltyImprisonment for 2 years.