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

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

APPELLANT'S WRITTEN SUBMISSIONS

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Part I: Internet publication

1. These submissions are suitable for publication on the internet.

Part II: Issues

2. The principal issue in this case is whether s.471.12 of the *Criminal Code 1995* (Cth) ("the Code") is invalid because it infringes the implied freedom of political communication. That section provides as follows:

> "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 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."

3. Section 470.1 of the Code defines "postal or similar service" to include a "postal service within the meaning of paragraph 51(v) of the Constitution". The full definition of "postal or similar service" is to be found in the CCA judgment at [36] and in the annexure to these submissions.

4. The more particular issues raised by the appeal are the correct construction of s.471.12, the operation and effect of s.471.12, the scope of the second limb of the *Lange* test and whether s.471.12 infringes the second limb of the *Lange* test.

Part III: Section 78B notices

5. The appellant has served s.78B notices.

Part IV: Case citations

6. The judgment of Tupman DCJ is reported in (2011) 12 DCLR (NSW) 266. The CCA judgment is reported in (2011) 256 FLR 28.

Part V: Factual background

7. By an indictment presented on 12 April 2011 Monis was charged with various offences under s.471.12 of the *Criminal Code 1995* (Cth). His co-appellant (Droudis) was also charged with various offences under that section. Thirteen counts in the indictment concern Monis. Save for count 3 (which relates to harassing use of the post), they all relate to alleged "offensive" uses of the post.

8. By a notice of motion dated 13 April 2011 Monis sought to have the indictment quashed on the ground that s.471.12 of the Code was invalid because it infringed the implied freedom of political communication.

10 9. On 18 April 2011, Tupman DCJ dismissed Monis' application and held that s.471.12 was valid. Monis then appealed to the New South Wales CCA in relation to all counts except count 3. On 6 December 2011, his appeal was dismissed. The CCA held that, although the section infringed the first limb of the test in *Lange v ABC* (1997) 189 CLR 520, it did not infringe the second limb. Monis (and his co-accused) both appeal to this Court from the judgment of the CCA (special leave having been granted on 22 June 2012).

Part VI: Appellant's argument

10. It is convenient to consider the appellant's argument under the following headings.

(i) Construction of s.471.12

20 11. The key issue on construction is to give the correct meaning to the word "offensive" (which is not defined in the Act). In the courts below, Monis submitted that "offensive" meant likely to hurt feelings, arouse anger or resentment, or disgust or outrage in a reasonable person[1]: see *Inglis v Fish* [1961] VR 607, at 610; *Brooker v Police* [2007] 3 NZLR 91, at [55]; *R v Burgmann* (NSWCCA 4.5.73 unreported).[2]

[1] It is notable that the usual meaning of "offensive" includes a reference to a reasonable person (as in s.471.12).
[2] This construction is also assisted by the exclusion from s.471.12 of the word "grossly" which appeared in earlier versions of this statutory provision: this appears clearly from the document provided to this Court by the Crown at the special leave application.

12. At [44] Bathurst CJ (with whom Allsop P agreed: see [91]) defined "offensive" as "calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances". The Chief Justice added 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".

13. This definition is only a little different from that advocated by Monis in the CCA. Monis again submits that his construction is correct. The only substantive differences between Monis' construction and that of the CCA are as follows.

14. First, it is submitted that there is no warrant for excising from the definition of "offensive" material which would "hurt or wound the feelings of the recipient, in the mind of a reasonable person". The usual and ordinary meaning comprehends this (see *Patrick v Cobain* [1993] 1 VR 290, at 293 per Gobbo J: "material capable of giving offence to those persons likely to read it").[3] See also *Brooker v Police* [2007] 3 NZLR 91, at [55] ("capable of wounding feelings") and the cases referred to in [11] above. And the Chief Justice's definition arbitrarily excludes the feelings of the recipient when the section explicitly states that "all ... circumstances" are relevant.[4] Moreover hurt, injured or wounded feelings are difficult to distinguish from resentment, anger, outrage and hatred. If the Chief Justice's definition is correct, the jury would be obliged to perform a difficult subtraction from the general notion of offensive.

15. Secondly, the word "calculated" could only mean "likely" in this context: it could not be suggested that an intention to cause offence would be sufficient if there was no likelihood of anger etc. Because "likely" is also included in the definition, "calculated" is otiose and should be excised from it.

16. Thirdly, the word "significant" should also be excised from the definition. It raises further uncertainty for the jury (how much is "significant"?), it unnecessarily introduces matters of opinion on the part of the jury, it raises further complexity for the jury, it does not sit well with the deletion of "grossly" from the section and it

[3] At 293 Gobbo J suggested that "offensive" material included "hurtful" material although the meaning of "offensive" was not confined to hurtful.
[4] The explanation for this excision may be *Coleman v Power* (2004) 220 CLR 1, at [199].

introduces matters of degree which are more appropriately dealt with on sentence or as part of the exercise of the prosecutorial discretion to prosecute.

(ii) Operation and effect of s.412

17. The primary judge made a number of observations as to the operation and effect of s.471.12 which Monis respectfully adopts. At [51] (fourth bullet point) it is noted that there are no defences to the offence created by s.471.12. Accordingly, truth is no defence.[5] Nor are any of the many other defences to defamation, eg forms of qualified privilege, fair comment or fair report.[6] At [51] (third bullet point) Tupman DCJ states that the limits of the statutory proscription are uncertain and that this may have a "chilling effect" on political communications because of the uncertainty of the operation of the section. And at [51] (third bullet point) it is stated that the provision is capable of being characterised as a "massive overreach to achieve its legitimate ends" and of "leading to the risk of selective prosecution".

18. The CCA held that the effect of the section is to burden freedom of communication about government or political matters: [53]-[57]. The section clearly catches communications which are "political" within the implied freedom jurisprudence. At [54] Bathurst CJ notes that the definition of "governmental" and "political" in this context is "wide":

> "In *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46; (1994) 182 CLR 104 at 124, Mason CJ, Toohey and Gaudron JJ stated that the implied freedom covers "all speech relevant to the development of public opinion on the whole range of issues which an intelligent person should think about". In *Hogan v Hinch* [(2011) 243 CLR 506] ... at [49], French CJ stated that the range of matters that may be characterised as "governmental and political matters" for the purpose of the implied freedom is broad and "arguably includes social and economic features of Australian society"."

19. The section will not only proscribe "offensive" matter which is political or governmental in this broader sense, it will also proscribe "offensive" material which lies at the heart of the implied freedom such as "how to vote" material during an election period: contrast the exceptions in the regulation in *Adelaide City Corp v Corneloup* (2011) 110 SASR 334, at [5].

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[5] In *Patrick v Cobain* [1993] 1 VR 290, at 294 Gobbo J notes that "a statement could be offensive even if it was true".

[6] However, standard Code defences are applicable: eg capacity, duress, self-defence.

20. Thus any person who places material in the post (or a similar service) the content[7] of which a jury later regards as "offensive" to a reasonable person is liable to be convicted of a criminal offence for which the prescribed penalty is imprisonment for two years.

(iii) Second limb of *Lange*: *Wotton v Queensland*

21. The decision of the CCA in the present case predated the decision of this Court in *Wotton v Queensland* (2012) 86 ALJR 246. *Wotton* contains a number of important observations about the second limb of the *Lange* test.[8] At [25] of *Wotton* French CJ, Gummow, Hayne, Crennan and Bell JJ articulated the second limb of the *Lange* test as follows:

> "[T]he 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."

22. The relevant passage from *Aid/Watch v FCT* (2010) 241 CLR 539 is a passage at [44] (set out in *Wotton* at [20]):

> "The provisions of the *Constitution* mandate a system of representative and responsible government with a universal adult franchise, and s 128 establishes a system for amendment of the *Constitution* in which the proposed law to effect the amendment is to be submitted to the electors. Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is "an indispensable incident" of that constitutional system." (footnotes omitted)

23. At [20] of *Wotton* the five justices made the following additional observations:

> "Their Honours [i.e. in *Aid/Watch* at [45]] added that the system of law which applies in Australia thus postulates, for its operation, communication in the nature of agitation for legislative and political changes. This freedom of communication operates both upon the formulation of common law principles and as a restriction of the legislative powers of the Commonwealth, the States and the Territories." (footnotes omitted)

24. Also relevant is the following passage in *Wotton* at [30]:

> "In answering the second *Lange* question, there is a distinction, recently affirmed in *Hogan v Hinch*, between laws which ... incidentally restrict political communication, and laws which prohibit or regulate communications which are inherently political or

[7] It is noteworthy that "offensive" use of the mail is explicitly stated to include communications by mail which are "offensive" only by reason of their "content".

[8] It is noteworthy that in *Coleman v Power* (2004) 220 CLR 1, a majority rejected a submission that the test should "be weakened by requiring only that the law in question be 'reasonably capable of being seen as appropriate and adapted'" ([196] per Gummow and Hayne JJ). See also [87] (McHugh J) and [212] (Kirby J).

> a necessary ingredient of political communication. The burden upon communication is more readily seen to satisfy the second *Lange* question if the law is of the former rather than the latter description."

25. As interpreted in *Wotton*, the second limb requires that the law be reasonably appropriate and adapted to serve a legitimate end, and that the law be compatible with the Constitution and the prescribed system of government described in *Aid/Watch* at [44]. The "constitutionally prescribed system of government" referred to in *Aid/Watch* at [44] is that described in *Wotton* at [20].

26. The first portion of the second limb (see [25] above) requires that the law be reasonably appropriate and adapted to serve a legitimate end. This exercise involves a delineation of the relevant end (or ends), a determination that in truth the law has that end (or ends), a determination of whether that end is legitimate, and a determination of whether the law is reasonably appropriate and adapted to serve the stated end (or ends).

27. The second portion of the second limb requires that the law be compatible:

    (a) with the maintenance of the following matters as indispensable incidents of the constitutional system: communication between electors and legislators; communication between electors and officers of the executive; communication between electors themselves;

    (b) with the maintenance of communication in the nature of agitation for legislative and political changes as a fundamental principle of our system of government.

28. The second portion of the second limb as formulated in *Wotton* breaks some new ground. It focuses on compatibility between the law and the indispensable nature of three specified forms of political communication. It also focuses on the compatibility of the law with a "postulate", namely, agitation for legislative and political change.

(iv) First portion of second limb in this case

29. It is convenient to consider the first and second portions of the second limb separately.

30. The primary focus of the first portion of the second limb is the purpose or end of the statutory provision. See [26] above.

31. The primary judge held that s.471.12 had three purposes:

(i) to protect the integrity of the post both physically and as a means of communication in which the public can have confidence: [45];

(ii) to prevent breaches of the peace which might flow from receipt of an offensive postal article: [46];

(iii) to protect the recipient of an offensive postal article from harm: [46].

32. Before the CCA, Monis submitted that the legislation was not "reasonably appropriate and adapted" to fulfil any of these three purposes and made the following submissions in relation to these three purposes:

> "As to (i): postal articles which would affect the physical integrity of the post must form only a very small portion of the articles which could be viewed to be offensive. Moreover, preservation of the physical integrity of the post is clearly more appropriately achieved by specific statutory proscription (e.g. a ban on dangerous material). Likewise, the presence in the post of material which can be characterised as offensive is unlikely to have any substantial effect on whether the public have confidence in the post.
>
> As to (ii): if the purpose of s.471.12 is to prevent breaches of the peace flowing from receipt of offensive articles it is most ill-adapted to this purpose. The provision covers an enormous number of communications which could not incite a breach of the peace. If this was the legislature's purpose, much narrower wording could have been used: e.g. "so offensive that the use of the post is intended to provoke unlawful physical retaliation" (compare *Coleman v Power* at [193] per Gummow and Hayne JJ).
>
> As to (iii): most material which can be characterised as "offensive" will not occasion physical (or other) harm. And if this was the legislature's intention, the provision could have been limited so as to proscribe only offensive material intended or likely to cause [specified] harm. Again, s.471.12 is not reasonably appropriate and adapted for this purpose."

33. Each of the three judges of the CCA approached the issue of purpose differently from each other (and differently from the primary judge).

34. Bathurst CJ disagreed with the primary judge's analysis and indicated his views at [58]-[59]:

> "As I indicated earlier the primary judge held that the section had two purposes. The first was to protect the integrity of the post both physically and as a means of communication in which the public could have confidence. I am unable to accept this

> conclusion. First, the integrity of a postal or similar service is expressly dealt with in s 471.13 and offensive material would not threaten the physical integrity of the post. Second, the suggested purpose of maintaining confidence in the integrity of the postal system is a somewhat ephemeral concept particularly having regard to the wide variety of services to which the section could apply. It does not seem to me that the legislative purpose in prohibiting the dissemination of offensive material was to protect such integrity - presumably of its efficiency and reliability.
>
> Her Honour also held that the second purpose was to protect breaches of the peace which may flow from the receipt of offensive material and protect the recipients from harm. In my opinion, the purpose of s 471.12 can be shortly stated. It is 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."

35. Allsop P adopted a different view at [78] (which is closer to the view of the primary judge):

> "The purpose of the provision was said by the Director of Public Prosecutions to be "the integrity of the post". The appellants' submissions tended to deride this expression of the matter as inappropriately vesting services with some animate form or essence. I respectfully disagree with that criticism. Part of an ordered and civil society involves communications that come to individuals, personally addressed to them, at their homes or other places by some form of postal service. Use of the postal service that is menacing, harassing, or offensive intrudes upon members of the community in a way which could undermine a sense of civil peace and security by permitting the intrusion of such communications into the lives of members of the community, without warning and without their consent. It is legitimate in the maintenance of an orderly, peaceful, civil and culturally diverse society such as Australia that services that bring 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."

36. McClellan CJ at CL did not discuss the relevant end or purpose of the legislation in detail but appears to have held that the legislation had "the legitimate end of regulating the postal service". That statement appears at [109], where his Honour made the following statement:

> "The question in the present case is whether the section is a reasonably appropriate response fairly adapted to meet the legitimate end of regulating the postal service which is compatible with the system of government proscribed by the constitution (*Lange* at 562)."

37. It is respectfully submitted that there are problems with each of these three different approaches.

38. Bathurst CJ's approach has difficulties. First, it formulates the purpose of the provision solely in terms of its precise construction: it is submitted that this is inappropriate in relation to this provision because it ignores the general purpose of the

provision (as ascertained from its practical operation, its effects and other relevant material). Secondly, Bathurst CJ includes references to the purposes of proscribing "menacing" and "harassing" use of the post which do not assist in discerning the purpose of proscribing "offensive" uses of the post. Thirdly, to create a criminal offence for all communications in the post which are "offensive" is not a legitimate end because of its effect on political and governmental speech and communication: see *Coleman v Power* at [199] per Gummow and Hayne JJ.

39. Allsop P's approach (which adopts the legislative purpose articulated by the Crown) is also problematical (see the observations of Bathurst CJ at [58]). A number of observations (in addition to those made by the Chief Justice) are apposite. First, "the integrity of the post" is a nebulous and uncertain concept. Secondly, postal articles which would affect the *physical* integrity of the post from only a very small portion of the articles which could be viewed to be offensive and this purpose is much more appropriately achieved by a specific statutory proscription (e.g. of dangerous material). Thirdly, Allsop P unnecessarily includes a discussion of "menacing" and "harassing" use as part of the legislative purpose: that is not the issue. Fourthly, to state that mail which is offensive in content "could undermine a sense of civil peace and security by permitting the intrusion of such communications into the lives of members of the community, without warning and without their consent" does not front up to the difficulty that only a very small proportion of material which is merely "offensive" would have the capacity to affect the "peace and security" of members of the community: the provision would have to be much more narrowly tailored in order to be reasonably appropriate and adapted to achieve that purpose. Fifthly, the assertion that it is legitimate to proscribe communications which "undermine or threaten a legitimate sense of safety or security of domain" again does not deal with the difficulty that only a very small portion of "offensive" postal communications would be likely to have that consequence. Sixthly, only a small portion of communications which are offensive in content would be likely to undermine "public confidence" in the mail. The proscription on material which is offensive in content is not reasonably appropriate and adopted to achieve these various ends, which are more easily achieved by more specific provisions.

40. McClellan CJ at CL's approach, which states that the proscription has "the legitimate end of regulating the postal service" also raises problems. First, the legislative

purpose is stated at an unduly high level of generality by reference to the head of legislative power. Secondly, to create a criminal offence in respect of mail which is "offensive" in content is not a reasonably appropriate and proportional regulation of postal services: see (for example) *Nationwide News v Wills* (1992) 177 CLR 1, at 29-31 per Mason CJ (applying *Davis v Commonwealth* (1988) 166 CLR 79, at 100).

(v) Second portion of second limb in this case

41. The second portion of the second limb focuses on the compatibility between the law and the indispensable nature of three specified forms of communication; and the compatibility of the law with a "postulate", namely agitation for legislative and political change. It is submitted that a number of matters are relevant to this question.

42. First, the mail and similar services are modes of communication very often utilised for communication between electors and legislators, between electors and officers of the executive, and between electors themselves. In the famous words of Holmes J, "the use of the mails is almost as much a part of free speech as the right to use our tongues": *United States ex rel Milwaukee Social Democratic Publishing Co v Burleson* (255) US 407, at 437 (1921). As Allsop P noted (at [84]):

> "Undoubtedly, the postal services are essential mechanisms by which communication about political and governmental matters are carried out and made."

43. Secondly, much material which is "political" within the meaning of the implied freedom would be caught by the proscription. See Bathurst CJ at [54]. The section "may be seen to strike at a range of a legitimate type of communications on political or governmental matters" and has "a not insignificant potential impact upon communications that could be on political or governmental matters": [86] and [91] per Allsop P. For this reason, Allsop P was "initially of the view ... that the provision was not compatible with the ends that the freedom seeks to maintain": [88]. As McClellan CJ at CL noted at [109] "[t]o prohibit the use of the mail service in the Dictionary sense of to offend would *clearly* infringe the implied constitutional freedom of political communication and would be incompatible with the maintenance of the system of government prescribed by the Constitution" (emphasis added). The problem is: the CCA's definition of "offensive" is very close to the usual dictionary meanings. The provision substantially curtails the ability of citizens to participate in the political process.

44. Thirdly, the proscription also necessarily applies to much material which lies at the core of the implied freedom. In *Roberts v Bass* (2002) 212 CLR 1, at [73] Gaudron, McHugh and Gummow JJ referred to "statements made by electors or candidates or those working for a candidate, during an election, to electors in a State electorate, concerning the record and suitability of a candidate for election to a State Parliament", and noted that "[s]uch statements are at the heart of the freedom of communication protected by the Constitution". Such material is often sent through the mail or like services: in *Patrick v Cobain* [1993] 1 VR 290 Gobbo J held that how to vote cards were capable of amounting to offensive material.

10 45. Fourthly, a majority of justices in *Coleman v Power* (2004) 220 CLR 1 held that offensive words are part and parcel of political debate, particularly in this country: see [105], [197], [237]-[239] and [28]. Because the mail is often used as the vehicle for such debate the section is not compatible with the implied freedom. Communications between electors and officers of the executive would necessarily often contain matter which is arguably offensive. Likewise, communications between candidates for election and electors would often contain offensive matter (cf the how to vote cards in *Roberts v Bass*). And agitation for change (legislative or political) could often not be made effectively without criticism of others (some or all of which would be offensive). Indeed, it is difficult to think of any form of political discussion which
20 would not need to be offensive from time to time to be efficacious.

46. Fifthly, the proscription will also potentially catch general media material which is delivered by post (or similar services): eg, magazines sold by subscription, newspapers which arrive by mail (or similar services) etc. Obviously such material will often contain material which is governmental or political within the implied freedom and which is offensive. And such material is a key component of political debate.

47. Sixthly, the section has no defences of truth, fair report, fair comment, reasonable discussion and publication made pursuant to a legal duty: compare *Coleman* at [69]. This constitutes a very substantial fetter on discussion of political matters within the
30 implied freedom.

48. Seventhly, the extent of that fetter is exacerbated by the vagueness of the word "offensive", particularly when that word is interpreted by an ordinary citizen. This is likely to have a chilling effect on political discussion: *Coleman* at [84] per McHugh J ("uncertainty produces a 'chilling' effect on political speech"). See also Gummow and Hayne at [195], McHugh J at [105] and Allsop P at [82]. That is, citizens are likely to give the proscription ample clearance so that its effective operation is to curtail discussion of matters which are not only offensive, but also outside that concept. The criminalising of offensive publications only enhances this chilling effect: see Allsop P at [86]. One may compare *Reno v American Civil Liberties Union* 521 US 844 (1997) where the US Supreme Court held invalid a statute that criminalised material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary standards, sexual or excretory activities or organs". At 871-872 and 882, Stevens J (Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer JJ joining) stated:

> "The *vagueness* of the [regulation] ... is a matter of special concern for two reasons. First ... [t]he vagueness of such a regulation raises special First Amendment concerns because of its obvious *chilling effect* on free speech ... Second, the [regulation] is a criminal statute ... The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas and images..." (at 871-872; emphasis added)

> "[The regulation] places an unacceptably heavy burden on protected speech, and ... the defenses do not constitute the sort of "narrow tailoring" that will save an otherwise patently invalid unconstitutional provision." (at 882)

49. Eighthly, the decision of the CCA does not sit well with a number of decisions of this Court. Thus, the decision of the CCA is inconsistent with the decision of this Court in *Coleman v Power* (2004) 220 CLR 1. It is clear that a majority in *Coleman* was of the view that a proscription on insulting or offensive words simpliciter offended the second limb of *Lange*: see [91], [100]-[102], [185], [191]-[193], [199], [227]-[253], [260]. It is beyond argument that if the relevant provision in that case had been construed as a proscription on offensive conduct (whether on the CCA's construction of "offensive" or on the definition advocated above), McHugh, Gummow, Hayne and Kirby JJ would have held it to be invalid.

50. In *Coleman* three justices of that majority only found the relevant provision valid because they construed "insulting words" to mean "words which, in the circumstances in which they are used, are provocative, in the sense that either they are intended to

provoke unlawful physical retaliation, or they are reasonably likely to provoke unlawful physical retaliation from either the person to whom they are directed or some other who hears the words uttered": [183] and [193] (Gummow and Hayne JJ) and [254] (Kirby J). The CCA construction comes nowhere near such a "fighting words" construction of "offensive". This underlines the clear discordance between the decision in *Coleman* and the decision of the CCA.

51. Of critical importance in the present context are the observations of Gummow and Hayne JJ in *Coleman* at [199]:

> "If [the section] is not construed in the way we have indicated, but is construed as prohibiting the use of any words to a person that are calculated to hurt the personal feelings of that person, it is evident that discourse in a public place on any subject (private or political) is more narrowly constrained by the requirements of [the Act]. And the end served by the [Act] (on that wider construction of its application) would necessarily be described in terms of ensuring the civility of discourse. The very basis of the decision in *Lange* would require the conclusion that an end identified in that way could not satisfy the second of the tests articulated in *Lange*. What *Lange* decided was that the common law defence of qualified privilege to an action for defamation must be extended to accommodate constitutional imperatives. That *extension* would not have been necessary if the civil law of defamation (which requires in one of its primary operations that a speaker not defame another) was itself, without the extension of the defence of qualified privilege, compatible with the maintenance of the constitutionally prescribed system of government."

52. This passage is presently important for a number of reasons: (i) it notes a close correlation between insulting/offensive language and defamation (see also Griffith CJ quoted in *Coleman* at [166]); (ii), it shows that the decision in *Lange* is not consistent with a narrow view of the operation of the second limb; (iii) it suggests that the decision of the CCA is contrary to the holding in *Lange*.

53. In *Lange v ABC* (1997) 189 CLR 520 it was held that defamatory (cf offensive) publications, in order to comply with the implied freedom, needed to be subject to a defence of reasonable discussion of political matter (in addition to defences of truth, fair comment, fair report etc) in order to comply with the freedom. Here, the proscription is very similar and has *no such defences*, and yet has been held by the CCA to comply with the freedom.

54. The decision of the CCA also sits uncomfortably with *Nationwide News v Wills* (1992) 177 CLR 1. There a criminal offence based on (offensive) criticism of the IRC (or its members) without defences of truth, fair comment, fair report etc, was held to conflict with the freedom of political communication. Here, the similar proscription

on offensive publications in the mail (without any such defences) was held valid by the CCA.

55. Ninthly, so far as it may be relevant, comparison with decisions of the US Supreme Court on the First Amendment gives the Crown no comfort. In *Bolger v Young Drug Products Corp* 463 US 60 (1983) at 72, Marshall J (Rehnquist CJ, O'Connor and Stevens JJ concurring) made the following observation: "we have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be *offended*" (emphasis added).[9] In *Snyder v Phelps* 562 US 1 (2011)[10] at [18]-[20] Roberts CJ (Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor and Kagan JJ joining) stated:

> "If there is a *bedrock principle* underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself *offensive* or disagreeable. ... In a case such as this, a jury is "unlikely to be neutral with respect to the content of [the] speech," posing "a real danger of becoming an instrument for the suppression of 'vehement, caustic, and sometimes unpleasan[t]'" expression ... Such a risk is unacceptable; "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment." (emphasis added)

56. Tenthly, it cannot be said that the provision is necessary (or even desirable) for the protection of public order (compare the "fighting words" provision in *Coleman*), the protection of public morals (compare a ban on obscene or lewd material), the protection of public health (compare a ban on dangerous or infectious material), or the protection of other matters traditionally recognised as worthy of protection (eg, national security) or even protection of the "legitimate claims of individuals to live peacefully and with dignity" (*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, at 174 per Deane and Toohey JJ). All of these purposes could have been accommodated in a provision specifically drafted to deal with particular issues. And the legislature has made no effort to create exceptions or defences which would make the provision more easily justifiable. The provision is overly broad.

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[9] In that case the relevant statutory provision provided that "[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing contraception is nonmailable matter, shall not be carried or delivered by *mail*, and shall be disposed of as the Postal Service directs". This provision was held invalid.

[10] Compare *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, at 445H-I where Li CJ (with whom Sir Anthony Mason NPJ and Litton and Ching PJJ agreed) made the following observation about the guarantee of freedom of speech in article 27 of the Hong Kong Basic Law: "This freedom includes the freedom to express ideas which

57. Eleventhly, the judges of the CCA suggest (in three different ways) that the trial judge (by direction or suggestion) and the jury (by its verdict) would bring the operation of the section in this particular case into conformity with the implied freedom by factoring in the political nature of any impugned communication as part of "all the circumstances" taken into account by a "reasonable person". It is respectfully submitted that the difficulties (and divergences) apparent in their Honours' various approaches strengthen Monis' argument for invalidity.

58. Bathurst CJ at [43] emphasised that "the use of the service has to be offensive in the eyes of a reasonable person in all the circumstances" and added that this was relevant "in considering the answer to the second question posed by *Lange*". At [33]-[34] the Chief Justice explains how this is relevant to the second limb: a "reasonable person" may be said to have various attributes and "[o]ne *might* add to that characterisation ... a person not overly sensitive to robust political debate". This suggests that the trial judge *might* be able to suggest to the jury (but not direct them) that they *might* take the nature of political debate (which they *might* characterise as "robust") into account in determining whether the publication was "offensive" to a "reasonable person" in "all the circumstances".

59. Allsop P adopted a quite different approach. At [88] the President noted that there was "difficulty" in determining whether the provision was "adapted in a manner that is compatible with the ends of the freedom protected". Although he was "initially of the view" that "the provision was not compatible with the ends that the freedom seeks to maintain", it was important that the "tribunal of fact [i.e. the jury] would, of course, be *required* to recognise that one of the circumstances that reasonable persons would take into account would be the recognition of the existence and importance of the freedom of political expression" (emphasis added). The only way a jury could be so "required" would be if the judge gave them a direction that they needed to take into account "the freedom of political expression" in determining whether the communications were "offensive" to "a reasonable person ... in all the circumstances".

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the majority may find disagreeable or *offensive* and the freedom to criticise governmental institutions and the conduct of public officials" (emphasis added).

60. McClellan CJ at CL adopted a third approach. At [115] the Chief Judge noted that a "reasonable person ... will ... be aware of the robust nature of *accepted* political discourse in Australia" (emphasis added). And at [118] he made the following observations as a basis for upholding the validity of the section.

> "As I understand the view of the majority in *Coleman* the Parliament is entitled by statute to provide a boundary beyond which political or government communications may be constrained as a breach of the criminal law. However, in the present context given the robust nature of *legitimate* political or governmental communications, before any statutory control will be valid it must operate to allow the *accepted* latitude in the use of the postal service. To my mind s 471.12 conforms to this requirement. A political communication which in the ordinary meaning of the word is offensive does not fall within the section. The section will *only* be breached if reasonable persons, being persons who are mindful of the robust nature of political debate in Australia and who have considered the *accepted* boundaries of that debate, would conclude that the particular use of the postal service is offensive." (emphasis added)

61. Thus McClellan CJ at CL envisages that the jury must be directed that they can "only" find the relevant communication "offensive" if they determine that "reasonable persons ... mindful of the robust nature of political debate in Australia and who have considered the *accepted* boundaries of that debate would conclude that the particular use of the postal service is offensive".

62. It is respectfully submitted that there are difficulties with each of these three different approaches.

63. Bathurst CJ's approach focuses on the *possibility* of a *suggestion* being made by the trial judge that the jury *might* take into account the robust nature of political debate on whether the section has been infringed and the *possibility* that the jury may give some weight to this matter in giving their verdict. This raises a number of difficulties: (i) the jury may not take the robust nature of political debate into account; (ii) they may give it no weight (or little weight); (iii) their decision (given that they provide no reasons) would not be reviewable[11] by a Court (compare *Wotton* at [13] and [31]-[32]); (iv) if the suggestion is made, the compliance of the section with the implied freedom in the particular case would be effectively delegated to the jury; (v) if the suggestion is not made, this increases the likelihood of tension between the freedom and the jury's decision.

[11] The only caveat on this proposition is an appeal to the CCA on the usual grounds (but without examination of the jury's reasons).

64. Allsop P's approach also has a number of difficulties. First, (as noted above) the only way that the jury could be "required to recognise" and "take into account ... the existence and importance of the freedom of political expression" would be by a direction that they must take these matters into account. Secondly, such a direction clearly could not be given: it is too vague and arguably delegates issues of law to the jury. Thirdly, the jury may give little weight to the "freedom of political expression". Fourthly, this effectively delegates to the jury the compliance of the section with the implied freedom in the particular case. Fifthly, the jury do not give reasons and their decision is unreviewable.

65. McClellan CJ at CL's approach also has problems. First, the direction envisaged is characterised by vague criteria of indeterminate reference: "robust", "political", "governmental", "accepted latitude", "accepted boundaries of [political] debate [in Australia]". Secondly, this effectively delegates to the jury the role of conforming the operation of the provision in the particular case to the implied freedom. Thirdly, the jury may give these "accepted boundaries" little (if any) weight. Fourthly, the jury's reasoning is not reviewable.

66. It is respectfully submitted that all of these different approaches are unsatisfactory and underline the difficulties involved in giving the section an operation which complies with the implied freedom. Moreover, none of the judges envisages any direction being given which would allow for a defence of truth, fair comment, etc. This highlights the critical importance of the Crown specifying with precision in its written submissions the relevant directions to be given to the jury (which it has so far failed to do).

(vi) Reading down

67. The primary judge and the CCA (having found s.471.12 to be valid) did not need to consider the issue of whether the legislation could be read down so as to conform with the implied freedom.

68. Monis submits that, if this Court finds that the proscription on "offensive" use of the post infringes the implied freedom, the section would survive but the expression "or offensive" would be invalid and would effectively be deleted from the provision.

69. This, however, is not the view which McHugh J took in *Coleman v Power* (2004) 220 CLR 1 in relation to an analogous statutory provision. In that case McHugh J held that the relevant section could be read down in accordance with s.9 of the *Acts Interpretation Act* 1954 (Qld) so as not to apply to political or governmental discussion: see [107]-[111].

70. It is respectfully submitted that McHugh J erred and that the general proscription on offensive communications in s.471.12 cannot be read down so as to exclude political and governmental discussion from its purview. It is well established that where a law is intended to operate in an area where Parliament's legislative power is subject to a *clear* limitation, it can be read subject to that limitation. However, governmental and political discussion falling within the implied freedom cannot amount to a clearly delimited restriction: see *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104, at 124 per Mason CJ, Toohey and Gaudron JJ (the implied freedom covers "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about"); *Hogan v Hinch* (2011) 243 CLR 506, at [49] per French CJ (the "range of matters that may be characterised as 'governmental and political matters' for the purpose of the implied freedom is broad" and "they arguably include social and economic features of Australian society"): see also Bathurst CJ at [54].

Part VII: Legislation

71. Sections 471.12 and parts of 470.1 of the Code are in issue. Together with, s.15A of the *Acts Interpretation Act* 1901 (Cth) they are reproduced in the annexure to these submissions.

Part VIII: Orders

72. Monis seeks the following orders:

(a) Appeal allowed.

(b) Set aside all of the orders made by Tupman DCJ and the Court of Criminal Appeal.

(c) Quash counts 1-2 and 4-13 of the indictment.

Part IX: Oral argument

73. On the information currently available to counsel for the appellant, it is estimated that the appellant's oral argument will take 3-4 hours.

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Dated: 14 August 2012

ANNEXURE: RELEVANT LEGISLATIVE PROVISIONS

Criminal Code 1995 (Cth):

s.470.1: Definitions

In this Part:

...

postal or similar service means:

(a) a postal service (within the meaning of paragraph 51(v) of the Constitution); or

(b) a courier service, to the extent to which the service is a postal or other like service (within the meaning of paragraph 51(v) of the Constitution); or

(c) a packet or parcel carrying service, to the extent to which the service is a postal or other like service (within the meaning of paragraph 51(v) of the Constitution); or

(d) any other service that is a postal or other like service (within the meaning of paragraph 51(v) of the Constitution); or

(e) a courier service that is provided by a constitutional corporation; or

(f) a packet or parcel carrying service that is provided by a constitutional corporation; or

(g) a courier service that is provided in the course of, or in relation to, trade or commerce:

  (i) between Australia and a place outside Australia; or

  (ii) among the States; or

  (iii) between a State and a Territory or between 2 Territories; or

(h) a packet or parcel carrying service that is provided in the course of, or in relation to, trade or commerce:

  (i) between Australia and a place outside Australia; or

  (ii) among the States; or

  (iii) between a State and a Territory or between 2 Territories.

...

s.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.

Acts Interpretation Act 1901 (Cth):

s.15A: Construction of Acts to be subject to Constitution

Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.