IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S179 of 2012

BETWEEN:

Amirah Droudis
Appellant

and

The Queen
First respondent

Attorney-General for the State of New South Wales
Second respondent

APPELLANT'S SUBMISSIONS

PART I: PUBLICATION ON THE INTERNET

1. It is certified that this submission is in a form suitable for publication on the internet.

Part II: STATEMENT OF ISSUES

2. The threshold question in this appeal is the proper construction of s 471.12 of the *Criminal Code* (Cth). In particular, was the Court of Criminal Appeal (Bathurst CJ, with Allsop P ultimately agreeing) correct in construing s 471.12 as prohibiting a use of a postal service which is "*calculated or likely to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person in all the circumstances*", as distinct from a use which "*would only hurt or wound the feelings of the recipient, in the mind of a reasonable person*"?[1]

3. The following constitutional issues then arise:

   (a) Is s 471.12, properly construed, invalid because it serves ends which are not "legitimate" for the purposes of the principles laid down by this Court in *Lange v Australian Broadcasting Corporation*[2] and *Coleman v Power*?[3] In particular, is an "end" which consists of controlling the civility of discourse not "legitimate", because it is not compatible with the maintenance of the constitutionally prescribed system of government?

   (b) If s 471.12 serves some "legitimate end", does it do so in a manner compatible with maintenance of the constitutionally prescribed system of government?

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[1] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 39 [44].
[2] (1997) 189 CLR 520 ("*Lange*").
[3] (2004) 220 CLR 1 ("*Coleman*").

CBD Criminal Defence Lawyers
Level 1, 299 Elizabeth St
Sydney NSW 2000

Telephone: 02 8251 0006
Fax: 02 8251 0097
Ref: Victoria Havryliv

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (Cth)

4. The appellant filed a notice under s 78B of the *Judiciary Act 1903* (Cth) on 5 July 2012, and served the same on 5 and 13 July 2012.

PART IV: CITATIONS

5. The reasons of the District Court of New South Wales (Tupman DCJ) are published at *R v Monis; R v Droudis* (2011) 12 DCLR (NSW) 266.

6. The reasons of the New South Wales Court of Criminal Appeal are published at *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28.

PART V: FACTS AND DECISIONS BELOW

The charges against the appellant

7. The appellant was indicted on eight counts of aiding and abetting the commission of offences by his co-accused, Man Haron Monis ("Monis"). Monis is alleged to have used a postal service, namely Australia Post, in a way that reasonable persons would regard as being, in all the circumstances, offensive, contrary to s 471.12 of the *Criminal Code*. The eight counts alleged against the appellant (counts 14 to 21) are for aiding and abetting the commission of the offences alleged in counts 6 to 13 in the joint indictment presented on 12 April 2011.

8. The alleged offences involve sending letters, accompanied by a CD-ROM or DVD-ROM, which were critical of Australian defence force personnel serving overseas. Copies of some letters were sent to government agencies and politicians including the Prime Minister, the Leader of the Opposition and the Minister for Defence.[4]

The findings of the primary judge

9. In the District Court, the applicant and Monis moved that their indictments be quashed on the ground that s 471.12 is constitutionally invalid. Tupman DCJ dismissed the application.[5]

10. Her Honour's approach to the construction of s 471.12 focused on the meaning of the word "offensive". Her Honour concluded that, in context, "offensive" means

> *"something that would be likely to wound (as opposed to merely hurt) the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person in all of the circumstances. On this construction, it would not be sufficient for an offence to be committed under this section if all the postal article did was to vex, annoy or displease the recipient or to lead only to hurt feelings on the part of the recipient."*[6]

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[4] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 30 [4].
[5] *R v Monis; R v Droudis* (2011) 12 DCLR (NSW) 266.
[6] *R v Monis; R v Droudis* (2011) 12 DCLR (NSW) 266 at [24].

11. Her Honour accepted that the first question asked in the *Lange* test should be answered in the affirmative. As to the second question, for present purposes it is necessary only to note the two "legitimate ends" which Tupman DCJ identified. The first was to "*protect the integrity of the post both physically and as a means of communication in which the public can have confidence*". The second was "*to prevent breaches of the peace which might flow from receipt of an offensive postal article and also to protect the recipient of such an article from harm*".[7]

The findings of the Court of Criminal Appeal

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12. The Court of Criminal Appeal (Bathurst CJ, Allsop P and McClellan CJ at CL) dismissed an appeal. Their Honours were unanimous in the result, but their reasoning differed in significant respects, in particular on the construction of s 471.12 and on the application of the second limb of the *Lange* test.

13. In construing s 471.12, Bathurst CJ considered authorities dealing with the concept of "offensive" in the context of public order offences;[8] provisions surrounding s 471.12; and the words of s 471.12 in its current form.[9] His Honour concluded that

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> "*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. However, it is not sufficient if the use would only hurt or wound the feelings of the recipient, in the mind of a reasonable person.*"[10]

14. Referring back to this construction when considering the constitutional question, his Honour said that "*words which are calculated or would be likely to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of*
30 *a reasonable person have the potential to provoke physical retaliation*".[11]

15. Allsop P was "*content to rest*" with Bathurst CJ's construction,[12] although his Honour acknowledged some doubt about whether it was restrictive enough to avert constitutional invalidity. His Honour considered an alternative, more restrictive construction, with "*an additional requirement of causing real emotional or mental harm, distress or anguish*".[13]

16. McClellan CJ at CL simply stated that s 471.12

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> "*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.*"[14]

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[7] *R v Monis; R v Droudis* (2011) 12 DCLR (NSW) 266 at [45]-[46].
[8] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 36-38 [27]-[35].
[9] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 39 [37]-[42].
[10] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 39 [44].
[11] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 44 [67].
[12] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 48 [83], 50 [91].
[13] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 50 [89].
[14] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 54-55 [118].

17. Bathurst CJ (Allsop P agreeing generally) further held that s 471.12 "*does effectively burden freedom of communication about government and political matters*".[15] McClellan CJ at CL appeared to hold that it was not necessary to decide this question, while assuming that it did.[16]

18. Bathurst CJ held that s 471.12 has two ends:[17]

> "*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.*"

19. His Honour went on to say that:[18]

> "*In the present case, it seems to me that offensive communications of the nature which I have described ... would be communications which could provoke retaliation and thus be legitimate for Parliament to prohibit.*
>
> *"Further, accepting that communications through the post are less likely to provoke retaliation than spoken words, it seems to me it is a legitimate end to protect recipients of postal articles from such material and that such protection is compatible with the maintenance of the system of government prescribed by the Constitution. The only political or governmental communications which would be affected would be those calculated or likely to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person in all the circumstances.*"

20. Allsop P identified a legitimate end for the provision as follows:[19]

> "*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.*"

21. Citing United States authority, Allsop P said that there "*may be seen to be a clear interest in prohibiting intrusion into the homes, workplaces and private domains of people of communications calculated to offend in this way*".[20]

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[15] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 42 [56].
[16] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 53 [108].
[17] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 42 [59].
[18] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 43 [64]; see also 44 [67].
[19] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 46 [78].
[20] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 49 [87], citing *Cohen v California*, 403 US 15 (1971) and *Rowan v United States Post Office Department*, 397 US 728 at 736-737 (1970).

22. Allsop P expressed this conclusion on the second limb of the *Lange* test:[21]

> "*Though there is a not insignificant potential impact upon communications that could be on political or governmental matters, the considerations of the protection of the confidence of people using the postal services and the prevention of a sense of invasion into the lives of addressees or recipients of post, uncalled for and uninvited, through the postal services are such as to make the means compatible in the relevant respects called for.*"

10 23. McClellan CJ at CL stated that "*the section is reasonably appropriate and compatible with the system of government prescribed by the Constitution*".[22] His Honour's reflections on the relevant principles as analysed in *Coleman*,[23] and on the construction and purposes of s 471.12 (as described above), appear to be the basis of that conclusion.

PART VI: THE APPELLANT'S ARGUMENT

The errors in the Court below

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24. The appellant submits that the Court below erred in the following ways:

(a) Their Honours relied on authorities concerned with provisions creating public order offences, which pre-dated *Coleman*.

(b) Their Honours applied a selective analysis of the statutory "context" which ignored the legislative history of s 471.12.

(c) Their Honours placed an unsustainable gloss on s 471.12 ("significant").

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(d) Their Honours treated the "ends" served by s 471.12, each of which is concerned with controlling the civility of discourse, as "legitimate".

(e) Their Honours held that s 471.12 serves those ends in a manner "compatible" with the effective operation of the constitutional system of government.

The relevance of existing authority to construction of s 471.12

25. Bathurst CJ relied on the decisions of *Worcester v Smith*;[24] *Ball v McIntyre*;[25] and
40 *R v Burgmann*.[26] As summarized by his Honour, each of those decisions involved offences consisting of "offensive" conduct *in a public place*.[27] To each such offence, the reasoning of this Court in *Coleman*, insofar as it construed an offence provision concerning "insulting" conduct in a public place, would now apply.[28]

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[21] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 50 [91]; but see at 49-50 [88].
[22] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 55 [119].
[23] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 52 [102]-[105], 53-54 [111]-[113], [117].
[24] [1951] VLR 316.
[25] (1966) 9 FLR 237.
[26] Unreported, NSW Court of Criminal Appeal, 4 May 1973.
[27] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 36-37 [27]-[31].
[28] (2004) 220 CLR 1; see especially at 73 [179], 76 [189]-[190], 77 [193] per Gummow and Hayne JJ.

Coleman

26. In *Coleman*, this Court considered the constitutional validity of a provision of the *Vagrants, Gaming and Other Offences Act* 1931 (Qld) which prohibited the use of insulting words in a public place. The Court held the provision valid by majority, but on the basis of differing constructions of the provision (Callinan and Heydon JJ dissented on both the construction and validity of the provision).

27. Gummow and Hayne JJ construed the statutory provision in question by reference, in particular, to the history and purposes of public order offences. It was the "*public*" purposes[29] of the statutory provision, and the fact that it concerned behaviour in public places, which were critical to the conclusion that "insulting" words are only those which are "*so hurtful as either they are intended to, or they are reasonably likely to provoke unlawful physical retaliation*".[30] Kirby J supported that construction, for different reasons.[31]

28. So construed, their Honours accepted that the provision complied with the second limb of the *Lange* test. Gummow and Hayne JJ observed that, if it were not construed in the way just described, "*but is construed as prohibiting the use of any words to a person that are calculated to hurt the personal feelings of that person*", then the provision would not serve a "legitimate end".[32] Kirby J reached the conclusion that the provision, given the limited construction described, was "*proportionate*" to attainment of its ends.[33]

29. McHugh J differed on the construction of the provision under challenge, giving "insulting" its "*natural and ordinary meaning*".[34] On that basis his Honour held that the provision failed the *Lange* test and was invalid. In the course of reaching that conclusion, McHugh J accepted that "*[r]egulating political statements for the purpose of preventing breaches of the peace by those provoked by the statements is an end that is compatible with*" the Constitution, but an "*unqualified prohibition*" on use of insulting words would not be appropriate and adapted to serving that end "*in a manner compatible with the prescribed system*". His Honour held that, without exhaustively defining the "qualifications" that might be appropriate, "*the law would have to make proof of a breach of the peace and the intention to commit the breach elements of the offence*".[35] His Honour's conclusion of invalidity followed from this requirement not being met on his Honour's construction of the provision.

30. If McHugh J's reasons are taken with those of Gummow, Kirby and Hayne JJ, *Coleman* can be said to hold that a provision which seeks to prohibit the use of insulting words will only be valid if the offence includes, on its proper construction, qualifications requiring that the use of insulting words have the intention to provoke a breach of the peace, and that it had (or perhaps was likely to have) that effect.

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[29] (2004) 220 CLR 1 at 73 [179], 77 [193].
[30] (2004) 220 CLR 1 at 77 [193].
[31] (2004) 220 CLR 1 at 98 [254]-[255].
[32] (2004) 220 CLR 1 at 78-79 [198]-[199].
[33] (2004) 220 CLR 1 at 98-99 [256]-[257].
[34] (2004) 220 CLR 1 at 40 [64]. Callinan J (at 108 [287]) and Heydon J (at 118 [314]) took a similar view.
[35] (2004) 220 CLR 1 at 53 [102].

31. Gleeson CJ upheld the validity of the provision, but on a different construction. His Honour did not consider that the provision incorporated a requirement that the insulting words be calculated or likely to induce a breach of the peace, as such. Rather, the provision had "*built into it a requirement related to serious disturbance of public order or affront to standards of contemporary behaviour*"[36] or "*contemporary standards of public good order*"; it must go "*beyond what, by those standards, is simply an exercise of freedom to express opinions on controversial issues*".[37]

32. Gleeson CJ's construction was based on the view that, where legislation "*potentially impairs freedom of speech and expression, 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*" – because, implicitly, such a prohibition would unduly impair that freedom of speech and expression.[38]

33. Notwithstanding that Gleeson CJ's construction of the provision at issue differed from that of Gummow, Kirby and Hayne JJ, Gleeson CJ's reasoning is consistent with that of the plurality in two critical respects. Firstly, his Honour recognized that imposing criminal penalties upon conduct which merely wounds feelings would be an undue incursion upon political communication. Secondly, his Honour's construction of the provision turned upon considerations of public order.

34. Even apart from its significant reformulation of the *Lange* test,[39] *Coleman* is therefore significant in this case in two distinct respects. First, at the level of general principle, *Coleman* says something about the nature of the public discourse which the "effective" operation of the constitutional system of government assumes and requires. That is, it is beyond legislative power to make laws which protect individuals' feelings from hurtful communications. That affects how particular "ends", as well as the manner of attaining those ends, may be "compatible" with the constitutional system of government. That aspect of *Coleman* is expanded upon at paragraphs 74-86 below.

35. Secondly, at the level of the construction of statutory provisions which may impinge upon such communication, the reasoning in *Coleman* is confined to provisions which are concerned with public order (that is, safe and orderly conduct in public places). In that respect, *Coleman* distinguishable from the present case, for the reasons set out below in relation to the construction of s 471.12. No comparable exercise in reading down is possible in this case.

36. For the same reasons, the earlier cases concerned with public order offences containing the word "offensive" are equally distinguishable. The objects of the statutory provisions considered in each of those cases were the same as the objects of the provision which was at issue in *Coleman*. More importantly, after *Coleman*, the construction placed on those provisions in the earlier authorities can no longer be regarded as authoritative. It was therefore erroneous for the Court of Criminal Appeal to rely upon those earlier authorities in construing s 471.12.

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[36] (2004) 220 CLR 1 at 29 [23].
[37] (2004) 220 CLR 1 at 26 [14].
[38] (2004) 220 CLR 1 at 25 [12].
[39] See *Coleman* (2004) 220 CLR 1 at 50 per McHugh J (Gleeson CJ, Gummow, Kirby, Hayne JJ agreeing).

The "context" of s 471.12, as relied upon in the Court below

37. Each of Bathurst CJ,[40] Allsop P[41] and McClellan CJ at CL[42] relied upon the collocation of "offensive" with "menacing" and "harassing" in s 471.12.

38. Bathurst CJ[43] and Allsop P[44] also sought to draw inferences from the surrounding provisions in Div 471 of the *Criminal Code*. Bathurst CJ further relied upon the definition of "postal or similar service" in s 470.1.[45]

39. Bathurst CJ referred to the maximum penalty applicable to a breach of s 471.12, by way of contrast to other offences.[46]

40. McClellan CJ at CL relied upon the fact that s 471.12 had been inserted after this court's decision in *Lange*, speculating that Parliament must have been aware of the requirements of the implied freedom at the time.[47]

The legislative history

41. The antecedents to s 471.12 are, it is submitted, crucial to its proper construction. The Court of Criminal Appeal's reasons did not have regard to the legislative history, save to note when s 471.12 was enacted. In that respect, their Honours took the words of s 471.12 out of "context".[48] It is submitted that, in this case, the element of "context" which their Honours did not consider is critical.

42. Section 471.12 was inserted by the *Criminal Code Amendment (Anti-Hoax and Other Measures) Act* 2002 (Cth).[49] This replaced s 85S of the *Crimes Act* 1914 (Cth). Section 85S(1), as in force just before its replacement, provided that:[50]

> *"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."*

43. The Explanatory Memorandum for the 2002 amendment explained that the revised drafting served to extend the objective "reasonable persons" test to the "menaced or harassed" limb, as well as to the "offensive" limb. There is no evidence of any intention to alter what had been meant by "offensive" in s 85S.

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[40] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 39 [42], [45].
[41] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 45 [73].
[42] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 51-52 [100]-[101].
[43] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 39 [37]-[38].
[44] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 45 [74].
[45] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 38 [36].
[46] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 39 [39]-[40].
[47] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 51 [98].
[48] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.
[49] Paragraph (b) was substituted by No. 127 of 2004, so as essentially to add the words in parentheses.
[50] Quotations of statutory provisions in these submissions generally omit references to maximum penalties. As to the relevance of *maximum* penalties in statutory construction, see para 66 below.

44. Part VIIA of the *Crimes Act* 1914, including s 85S, was inserted by the *Telecommunications and Postal Services (Transitional Provisions and Consequential Amendments) Act* 1989 (Cth), No 63 of 1989, s 5. The relevant Explanatory Memorandum mentioned that "*the opportunity has been taken to revise the offences, taking into account developments since 1975 and treating Australia Post and the three carriers (Telecom, OTC and AUSSAT) consistently*", and that s 85S "*replaces offences currently in Regulations 53 and 53A of the Postal Services Regulations*".

45. It appears that the "menaced or harassed" limb of s 85S was drawn from s 86 of the *Telecommunications Act* 1975 (Cth), which relevantly provided:[51]

> *"A person shall not—*
>
> *(a) use a telecommunications service for the purpose of menacing or harassing another person; ... or*
>
> *(c) without reasonable excuse, send over a telecommunications system a communication or information likely to cause reasonable persons, justifiably in all the circumstances, to be seriously alarmed or seriously affronted."*

46. The offences in the regulations made under the *Postal Services Act* 1975 (Cth) were concerned with something entirely different. Regulations 53 and 53A of the *Postal Services Regulations* 1975 (Cth) (authorized by s 116(g) of the *Postal Services Act*, which was in similar terms) provided:

> *"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.*
>
> *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."*

47. Those regulations replaced s 107 of the *Post and Telegraph Act* 1901 (Cth):

> *"Any person who knowingly sends or attempts to send by post any postal article which – ...*
>
> *(b) encloses an indecent or obscene print painting photograph lithograph engraving book card or article; or*

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[51] Section 86 was inserted by s 17 of the *Communications Legislation Amendment Act* 1985 (Cth), No 119 of 1985. Paragraph (b) prohibited "send[ing] over a telecommunications system a false communication or false information knowing it to be false where the communication or information is likely to cause death or injury to a person, substantial loss of, or substantial damage to, property or substantial financial loss to a person". Section 86 replicated offence provisions previously contained in regulations or by-laws under the 1975 Act, following the report of the Vincent Review of Matters Affecting the Australian Telecommunications Commission. The second reading speech was made in the House of Representatives on 8 May 1985, and in the Senate on 28 May 1985.

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

shall be liable to a penalty ..."

48. Section 107 was drawn from s 98 of the *Post and Telegraph Act* 1891 (Qld), which in turn was modeled on s 4(1) of the *Post Office (Protection) Act* 1884 (UK). The 1884 provision prohibited sending a postal packet which either enclosed "*any indecent or obscene*" article, or had "*on such packet, or on the cover thereof, any words, marks or designs of an indecent, obscene or grossly offensive character*" (the provision did not deal with blasphemy or libel, or with words etc. "therein").

49. During House of Commons committee debates on the Bill which became the 1884 Act, there was a motion to amend the expression "indecent, obscene or grossly offensive", on the basis that they could be misinterpreted as meaning[52]

"something very different to indecent or obscene ... the words "grossly offensive" might be taken to mean something that was extremely offensive to the person who received it, although it did nothing more than lacerate the feelings of the person receiving it."

The motion was negatived, on the basis that, in this statutory context,[53]

"there was no doubt that any tribunal would understand it was "grossly offensive" in the sense in which indecent or obscene were offensive, not offensive to a particular person, but offensive to public morality, to the general community."

(The same would of course not apply in a statutory context where words which were previously used in different ways are grouped together in order to change another aspect of the provision – as occurred when s 471.12 was introduced.)

50. What constitutes an "obscene" publication, under the *Obscene Publications Act* 1857 (UK), was decided by *R v Hicklin*[54] to be material the tendency of which "*is to deprave or corrupt those whose minds are open to such immoral influences*".

What the history means for the construction of s 471.12

51. Based on the legislative history set out above, the term "offensive" in the postal offences in regs 53 and 53A under the 1975 Act might have been construed as something tantamount to "indecent or obscene". The omission of "grossly" in those provisions was perhaps just stripping surplus verbiage. Thus, "offensive" in that context might have referred to pornography or something akin to it (or at least especially morally objectionable material, e.g. depicting bestiality or child abuse).

52. The same might have been said of the removal of "indecent" and "obscene" in the 1989 Act, were it not for the fact that there was evidently an intention to use

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[52] Hansard, 3rd series, vol 292, cc 370-371 (House of Commons, 9 August 1884).
[53] Hansard, 3rd series, vol 292, cc 371-372 (House of Commons, 9 August 1884).
[54] (1868) LR 3 QB 360 at 371-372.

"offensive" to extend to something more – namely, conduct which offends in the ordinary sense of the word. That intention is plain because of the antecedent provision in s 86(c) of the *Telecommunications Act* 1975.

53. The legislative change in 1989 marks a significant point of departure from the long prior history of the postal offences. These things are precisely what "grossly offensive" in the 1884 Act and its progeny, and similarly "offensive" in the 1975 Act and Regulations, was intended *not* to cover: namely, something which merely "lacerate[s] the feelings of the person receiving it".

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54. The appellant therefore accepts that s 471.12 can extend to conduct which gives rise to some negative emotional state in the mind of a hypothetical reasonable recipient. Given the broader language in s 471.12 compared to s 86(c), that emotional reaction is not limited to "alarm" or "affront". It may include "anger, ... resentment, outrage, disgust or hatred" – if there is any difference. Nor is it limited to such a state of mind as is "serious", for the reasons at paragraphs 60-66 below.

55. Section 85S as inserted in 1989 served to envelop, and thus "harmonize", several different pre-existing offences. Thus, an "offensive" "use" of a postal service might
20 still include dissemination of material which could be considered to be in the nature of "indecent" or "obscene". But, since "offensive" in s 471.12 has been shorn of the contextual words "indecent, obscene" and "grossly", and was intended to extend to other types of conduct, the present provision cannot be construed as *limited to* prohibiting distribution of "obscene" or "indecent" material.

56. Moreover, there may be a range of "uses" of the postal service which might not tend to induce any particular negative emotional state in their recipient, nor involve disseminating "obscene" material, but still may be considered "offensive" in an objective sense. For instance:

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(a) While child pornography or similarly morally perverse material would be caught irrespective of whether it was solicited by the intended recipient, more commonplace erotic material may be caught if it is sent unsolicited, because such unsolicited dissemination may be considered "offensive" in itself.

(b) Inscribing profane, blasphemous or defamatory words or marks on the *exterior* of a postal article may be an offensive use of a postal service, because the public is exposed to the profanity, blasphemy or defamation.

40 Each of these "ways" of using a postal service was explicitly prohibited by one of the precursors to s 471.12.

57. The breadth of s 471.12 in this respect is confirmed by the fact that services which are either "postal services" or "similar services", within the definition in s 470.1, may be used in quite different "ways". Section 471.12 must be capable of application to an unconfined range of situations, rather than just one form of "use of a postal or similar service".

58. The legislative history also makes plain that the Court of Criminal Appeal's
50 *noscitur a sociis* construction of s 471.12, drawing a link between the terms "menacing, harassing" and "offensive", was erroneous:

(a) Each of s 86 of the *Telecommunications Act* 1975 and s 85S of the *Crimes Act* 1914 regulated menacing or harassing conduct separately and differently from the objective inducement of some negative emotional state. While the former was altered when s 471.12 was enacted in 2002, there was no intention to change the content of the latter.

(b) The qualification of "serious" in the pre-existing telecommunications offence was dropped when s 85S was enacted, when it could easily have been retained. Instead, the simple, broad, everyday term "offensive" was adopted from the context of the postal offences. This must refer to something materially less serious than conduct in the nature of intimidation.[55]

(c) The intention to use the term "offensive" to embrace "indecent" or "obscene" communications, as well as potentially many other types of "use" of a postal service, shows that the recipient's state of mind – "serious" or otherwise – is not the only way that the "offensive" limb of s 471.12 may be engaged.

59. It is also plain from the foregoing that s 471.12, as with its various predecessors, has nothing to do with notions of public order of the kind which were significant to the construction of the provision at issue in *Coleman*. Bathurst CJ's suggestion that "offensive" postal communications may provoke a breach of the peace[56] is unsustainable, both as a matter of construction and of ordinary human experience. Even his Honour considered that there is at best a tenuous connection between breaches of the peace and receipt of a postal article ("*accepting that communications through the post are less likely to provoke retaliation than spoken words...*").[57] His Honour did not go far enough. There is no such link at all. There is therefore no basis to construe s 471.12 as implicitly requiring an intention to induce or a likelihood of inducing a breach of the peace.

Questions of degree

60. The remaining question is how to answer the questions of degree raised by the varying constructions preferred in the courts below. Tupman DCJ drew a distinction between merely "hurting" feelings and "wounding" feelings. Bathurst CJ evidently found that distinction unpersuasive, and sought to avoid it by focusing on a "significant" negative emotional reaction by the hypothetical recipient.

61. Allsop P's supposedly stricter alternative construction, with an "additional requirement of causing of real emotional or mental harm, distress or anguish to the addressee", was evidently not confined to the inducement of some medically cognizable "harm" (nor would there be any sensible means of doing so). Rather, it included inducement of "distress" and "anguish".

62. All these distinctions involve subjective, unreasoned and inarticulate qualitative judgments about a hypothetical recipient's emotional state. The differences of degree they postulate are all but illusory.

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[55] Cf *Coleman* (2004) 220 CLR 1 at 54 [104].
[56] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 43 [64] and 44 [67]; see para 19 above.
[57] Cf the "public acts" considered in *Sunol v Collier (No 2)* [2012] NSWCA 44 at [70] per Allsop P.

63. Recognizing the similarity of those constructions highlights the key deficiency in Bathurst CJ's construction of s 471.12. His Honour, like Tupman DCJ, construed s 471.12 by adopting a string of emotionally inflammatory adjectives. Unlike Tupman DCJ, Bathurst CJ qualified those adjectives with the question-begging word "significant". The various adjectives are merely synonyms for "offensive". The qualification of "significant" is thus a gloss upon the words of the statute.

64. Where, as a matter of construction, can support be found for such a gloss? The words "menacing, harassing or offensive" provide no support, for the reasons above. The "reasonable persons" element says nothing about the degree of "offence" that such hypothetical persons would have to feel. The legislative history stands against such a qualification, given the abandonment of "serious" in 1989.

65. The surrounding provisions in the *Criminal Code* say nothing about the gravity of the wide range of possible breaches of s 471.12 – much less about the content of the words of the section. Other provisions prohibit conduct unrelated to conduct which is "offensive" in the sense described above; they are linked only through the shared concern with postal and similar services. Indeed, provisions dealing with e.g. theft, fraud, tampering with or destroying postal articles have existed since before 1900 – unlike the sweeping prohibition on "offensive" uses of the post.

66. The only other factor upon which the Court of Criminal Appeal relied was the maximum penalty for breach of s 471.12. But a *maximum* penalty allows for judicial discretion which, far from supporting a limited construction of s 471.12, is more consistent with the wide range of ways in which s 471.12 may be breached (as outlined above). And the penalty for a particular "offensive" use of the postal service does not need to be pegged to the penalty which *might* be imposed for some hypothetical "menacing" or "harassing" use of the postal service. Nor, given the width of the term "offensive", is there any rational way to do so.

Conclusion on the construction of s 471.12

67. Ultimately, Bathurst CJ's qualified construction of s 471.12 was unsupportable on accepted methods of statutory construction. The vagueness of a limitation based on the "significant" degree of a hypothetical recipient's emotional response stands in contrast to the quite concrete external standard which this Court laid down for public order offences in *Coleman*. The Court of Criminal Appeal's approach was simply a rationalization of the ultimate assertion of constitutional validity.

68. All that can be said of the construction of s 471.12 is that an "offensive" use of the postal service means just that. "Offensive" is an ordinary English word, which the context shows was intended to be used in a very general sense. That is the sense of the word which is invoked in the charges against the appellant in this matter. The constitutional validity of s 471.12 must be considered on that footing.

69. Given the breadth of s 471.12, it does not distinguish between "offensive" communications which are about government and political matters and those which are not. That being so, s 471.12 should be understood as capable of burdening all such communications, for the purposes of the first limb of the *Lange* test. Since this question is agitated primarily by the respondents on their notices of contention, it will be considered further in the appellant's reply submissions.

The "ends" which s 471.12 serves in its present application

70. In its application in the present case, the "end" s 471.12 serves is to prevent a state of mind of alarm or affront, or anger, outrage or disgust, or some similar "laceration of feelings", from being (objectively) induced. In that respect, the appellant does not cavil with the reasoning of Bathurst CJ.[58] Of course, s 471.12 serves this end irrespective of whether the provision requires a "significant" negative emotional state to be induced.

71. It may be said that s 471.12 also operates to protect the "integrity of the post", or "public confidence in the postal service", or some ill-defined sense of "security of domain". However, all of those objectives are derivatives of the immediate object of preventing laceration of feelings. A recipient of a postal article would have diminished "confidence" in the postal service (and hence the "integrity" of the service would be impacted upon) only *because of, and to the extent of*, the recipient's feelings having been lacerated.

72. This can be contrasted to the "ends" of the postal offence provisions which existed before 1989 (i.e. those which dealt with dissemination of material in the nature of indecency or obscenity). Those provisions could perhaps have been described as directed to "preventing antisocial influences on susceptible individuals", or else "protecting public morality" or "protecting the moral integrity of the general community". Such purposes might have meant that those older provisions served ends which were not necessarily concerned with the emotional consequences of a particular communication for a private recipient. They would, rather, have been provisions in the same vein as were upheld by the Western Australian Court of Appeal in *Holland v The Queen*.[59] There may still be a question as to the legitimacy of such ends. No such question arises in this appeal.

When is an end "legitimate"?

73. A "legitimate end", in the context of the implied freedom of political communication, is one which is compatible with the effective operation of the constitutionally prescribed system of representative and responsible government.[60] McHugh J recognized this aspect of *Lange* when restating the *Lange* test in *Coleman*.[61] A law with such an "incompatible" end is not necessarily limited to one that is aimed at the destruction, subversion or frustration of the constitutionally prescribed system of government,[62] although that may be an example.[63] As Gummow J said in *Fardon v Attorney-General (Qld)*, incompatibility with requirements which follow from the structure of the Constitution is a notion which is "*insusceptible of further definition in terms which necessarily dictate future outcomes.*"[64]

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[58] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 42 [59], quoted at paragraph 18 above.
[59] (2005) 30 WAR 231 at 269-274 [213]-[233] per Roberts-Smith JA; see also 250 [100] per Malcolm CJ and 288 [300] per McLure JA.
[60] To that may be added that the "end" need not be shown to be supported by findings or assumptions of fact: *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 37-38 [74] per French CJ.
[61] (2004) 220 CLR 1 at 50 [92].
[62] Cf Appellant's Submissions, *Attorney-General (SA) v Corporation of the City of Adelaide & Ors* (No A16 of 2012 in this Court), paragraphs 21.1-21.2.
[63] (2004) 220 CLR 1 at 50 [92]
[64] (2005) 223 CLR 575 at 618 [104].

Controlling the civility of discourse is "incompatible" with maintenance of the effective operation of the constitutional system of government

74. The appellant submits that Gummow and Hayne JJ were correct to say, in *Coleman*, that:[65]

> *"If [the challenged provision] ... is construed as prohibiting the use of any words to a person that are calculated to hurt the personal feelings of that person, ... the ends served ... 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*."*

75. The change to the common law effected in *Lange* was explained by Hayne J in *Roberts v Bass*.[66] The common law defence of qualified privilege had not applied in circumstances where the audience was too wide to be regarded as having an interest in the publication. That defence was extended in order to prevent the action for defamation from burdening communications which were made in pursuit of the shared interest of the community in receiving communications on government and political matters. As Gummow and Hayne JJ said in *Coleman*, the extended defence "*would not have been necessary if the civil law of defamation ... was itself, without the extension..., compatible with the maintenance of the constitutionally prescribed system of government.*"[67] The defence would be defeated if the plaintiff showed that the publication was not "reasonable"[68] or otherwise was actuated by malice[69] – qualifications which served the legitimate end of protection of reputation.

76. The concept of malice is of particular significance in understanding the nature of the communication which *Lange* protects. In *Roberts v Bass*, Gleeson CJ said that the honest expression of views which are "*wrong-headed, or prejudiced, or carelessly formed, or even irrational, would not constitute, or demonstrate, malice*" so as to destroy an occasion of qualified privilege.[70] Gaudron, McHugh and Gummow JJ wrote to similar effect.[71] Those observations expand on the statement in *Lange* itself that "*the vigour of an attack or the pungency of a defamatory statement*" cannot alone establish malice.[72]

77. So, the privilege extends to protect honest expressions of opinion which are wrong-headed, irrational, prejudiced or careless – in a general sense, *uncivilized*. Such communications may be very likely to inflame negative sentiments in their audience, if for instance they are "*robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self-interest ... passionate and sometimes irrational and highly charged interchange.*"[73]

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[65] (2004) 220 CLR 1 at 78-79 [199].
[66] (2002) 212 CLR 1 at 76-78 [221]-[225].
[67] (2004) 220 CLR 1 at 79 [199].
[68] *Lange* (1997) 189 CLR 520 at 573; see *Roberts v Bass* (2002) 212 CLR 1 at 76-77 [222].
[69] (1997) 189 CLR 520 at 574.
[70] (2002) 212 CLR 1 at 13 [13].
[71] (2002) 212 CLR 1 at 31 [76].
[72] (1997) 189 CLR 520 at 574.
[73] *Roberts v Bass* (2002) 212 CLR 1 at 63 [171] per Kirby J.

78. The extension of qualified privilege in *Lange* was premised on those uncivilized qualities being integral to the "effective" operation of the constitutionally prescribed system of government. The underlying point was expressed by McHugh J in *Coleman*: "*insults are a legitimate part of the political discussion protected by the Constitution*" and an "*unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom*".[74] The rationale, as Kirby J put it, is that "*insult and emotion, calumny and invective ... are part and parcel of the struggle of ideas.*"[75] Gummow and Hayne JJ observed that "*[i]nsult and invective have been employed in political communication at least since the time of Demosthenes*".[76] Restricting such qualities enervates an integral part of the constitutional system.[77]

79. It may be noted that US First Amendment jurisprudence recognizes and protects the very same qualities. The First Amendment is said to reflect a principle that "*debate on public issues should be uninhibited, robust, and wide-open*",[78] and that, "*in public debate, [we] must tolerate insulting, and even outrageous, speech, in order to provide 'adequate "breathing space" to the freedoms protected'*".[79]

80. It must of course be acknowledged that the US jurisprudence is based on an individual right to free speech, rather than a limitation on legislative power. But the correspondence between the protected qualities of communication in the two different constitutional contexts reflects more general considerations which are equally applicable in the two systems. First, in both contexts, there is recognition of the protean nature of the act of communication itself, and the fluid nature of public debate. People may communicate in ways which are virtually limitless.[80] They may persuade through means which are too subtle to perceive, and not always rational (indeed, perhaps irrational more often than not). And issues raised in public debate may be linked to other issues, either through the development of public policy itself, or in the minds of the participants in that debate. Secondly, there is a shared recognition of the centrality of "outrageous" or "robust" communication on issues of public significance to agitation for political change.[81]

81. In this last respect, the Supreme Court has considered a case involving ideological conflict over international military activities in which both the US and Australia have participated. *Snyder v Phelps*[82] involved a suit for, among other claims, the tort of intentional infliction of emotional distress. The Supreme Court upheld the right of members of the Westboro Baptist Church to picket the funeral of a US Marine Corps soldier who had died in Iraq with placards reading, among other things, "Thank God for Dead Soldiers", "Fag Troops", and "Semper Fi Fags".[83]

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[74] (2004) 220 CLR 1 at 54 [105] (emphasis added).
[75] (2004) 220 CLR 1 at 91 [239].
[76] (2004) 220 CLR 1 at 78 [197].
[77] Gleeson CJ's reasons also implicitly support this view: see paragraph 32 above.
[78] *New York Times Co v Sullivan*, 376 US 254 at 270 (1964).
[79] *Boos v Barry*, 485 US 312 at 322 (1988), citing *Hustler Magazine, Inc v Falwell*, 485 US 46 at 56 (1988). The expression "breathing space" traces to *NAACP v Button*, 371 US 415 at 433 (1963).
[80] For example, the "communication" which was at issue in *Levy v Victoria* (1997) 189 CLR 579. Cf the difficulties with "symbolic or expressive conduct" referred to in *Coleman* (2004) 220 CLR 1 at 76.
[81] *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 556 [45]; *Wotton v Queensland* (2012) 86 ALJR 246 at [20].
[82] 131 S Ct 1207 (2011).
[83] 131 S Ct 1207 at 1216-1217 (2011).

82. The Court noted that these messages "*may fall short of refined social or political commentary*",[84] they were "*certainly hurtful and [their] contribution to public discourse may be negligible*".[85] But the issues highlighted were "*matters of public import*".[86] The Court concluded that constitutional protection for such speech "*cannot be overcome by a jury finding that the picketing was outrageous*".[87]

83. This jurisprudence articulates a point which is undeniable as a matter of everyday experience. One need only listen to talkback radio to recognize that, in this country at least, political communication and powerful emotional responses go hand in hand. If the appellant's conduct is to be subject to criminal penalties, then why should similar standards not be applied to emotionally provocative public broadcasts on political matters, which reach a much wider audience?

84. Indeed, in *Lange* it was suggested that the greater harm caused by a public broadcast warranted the application of a *stricter* standard (which is the standard of "reasonableness").[88] If broadcasters are allowed to cause widespread outrage in the course of expressing political opinions "reasonably and in good faith",[89] then all citizens must be free to cause at least the same degree of offence in private, irrespective of the reasonableness of their conduct. And broadcasters are not presently prohibited from being "offensive" generally.

85. If passionate, irrational, angry, wrong-headed, prejudiced, careless, inflammatory, and otherwise uncivilized qualities are part and parcel of the communication on governmental and political matters protected by the Constitution, then suppressing such uncivilized qualities may be justified only by pursuing some public interest which does not detract from the constitutional system of government.[90]

86. It is of no moment that this "end" is pursued in respect of both political and non-political communications indiscriminately. *Ex hypothesi*, the law which pursues that "end" burdens communication on government and political matters in its terms, operation or effect. That is a separate question from the legitimacy of the "end". Illegitimacy is a matter of incompatibility, not strict contrariety. A judgment as to incompatibility is informed by a consideration of what "impairs or tends to impair" the "effective" operation of the constitutional system of government.[91] Incivility is integral to the fluid process of public debate. For that reason, suppression of incivility is an end which is not "compatible" with maintenance of the "effective" operation of the constitutional system of government.

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[84] 131 S Ct 1207 at 1217 (2011).
[85] 131 S Ct 1207 at 1220 (2011).
[86] 131 S Ct 1207 at 1217, 1220 (2011).
[87] 131 S Ct 1207 at 1219 (2011).
[88] (1997) 189 CLR 520 at 572.
[89] Commercial Radio Australia Codes of Practice clause 1.2 (September 2011); Commercial Television Industry Code of Practice clause 1.10 (January 2010). The prohibited conduct is that which, in broad terms, misleads, vilifies, defames or exploits, or promotes violence or some other substantial social evil. Those are "legitimate ends", pursuit of which is required to strike a balance with political communication (the balance being struck by the "reasonable and good faith" defence).
[90] For example, the prevention of racial vilification; cf s 18C of the *Racial Discrimination Act 1975* (Cth), which was applied in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 (see also *Toben v Jones* (2003) 129 FCR 515; *Eatock v Bolt* (2011) 197 FCR 261). Even that provision only penalized conduct done "otherwise than in private", and provided a defence for acts done "reasonably and in good faith" for an artistic or other public interest purpose.
[91] *Coleman* (2004) 220 CLR 1 at 49 per McHugh J.

The illegitimacy of the "ends" identified by the Court of Criminal Appeal

87. For reasons set out above, the "ends" identified by the Court of Criminal Appeal - the preservation of a hypothetical recipient's "*legitimate sense of safety or security of domain*" or prevention of a "*sense of invasion*", the integrity of the post, and the prevention of retaliation – are all concerned with protecting the emotional state of individual recipients of postal communications.

88. In particular, the "clear interest" Allsop P identified explicitly turns upon a "sense" – a feeling – of security or safety. It does not depend on an actual threat to safety or security of domain. Moreover, Allsop P's reasoning was based upon United States authority which applied the maxim that "*a man's home is his castle*"[92] – a notion which has never found such a foothold in this country. Even in the United States, that principle has been used to restrict speech "*only sparingly*".[93]

89. Allsop P hinged his reference to preserving "public confidence" in the postal service upon preserving that "sense" of security or safety.[94] That must be correct. That "sense" directly reflects the object of the "offensive" limb of s 471.12 in its application to the present case. It is at best difficult to see any other rational connection between "offensive" communications, as construed above, and "public confidence" in, or the "integrity" of, the postal system.

90. As discussed above, prevention of breaches of the peace has no part to play in the "ends" of s 471.12, as properly construed. Maintenance of order in public places and the prevention of violent crime are simply too remote from the operation of s 471.12 to be taken into account. In any event, such an "end" would also be dependent upon preventing inducement of a negative emotional state.

91. In each case, the negative emotional state required to be induced under s 471.12 would be induced by conduct of a character which lacks civility. That is plain from the very words of s 471.12, which fix upon the "offensive" character of a "use" of a communications system. The qualitative assessment of a hypothetical recipient's emotional state measures the consequences of that lack of civility (in order to make a qualitative assessment of the conduct itself).

92. It follows that the ends of s 471.12, in its application in the present case, must be described in terms of ensuring the civility of discourse. They are therefore not "legitimate". Section 471.12 serves those ends, and no other, in its application to the charges against the appellant. It is therefore invalid to that extent.

93. It is no answer to say that s 471.12 only "incidentally" rather than "directly" imposes a burden on political communication.[95] The "incidental" nature of a burden warrants a chary approach only to deciding whether the law is "appropriate and adapted" to achieving a legitimate end. If the end served by the law is not legitimate, there is no basis for hesitation in declaring the law invalid.

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[92] See *Rowan v United States Post Office Department*, 397 US 728 at 737 (1970).
[93] *Snyder v Phelps*, 131 S Ct 1207 at 1220 (2011).
[94] *Monis v Regina; Droudis v Regina* (2011) 256 FLR 28 at 46 [78], quoted at paragraph 20 above.
[95] *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40]; *Hogan v Hinch* (2011) 243 CLR 506 at 555-556; *Wotton v Queensland* (2012) (2012) 86 ALJR 246 at 254 [30].

Alternatively, s 471.12 does not serve a legitimate end in a compatible *manner*

94. The appellant submits in the alternative that the reasoning at paragraphs 74-86 above also supports the conclusion that, if the "end" served by s 471.12 in its application to the appellant is "legitimate", the section does not serve that end *in a manner which is compatible* with the constitutional system of government.

95. This is not so much a question of whether the law is "reasonably appropriate and adapted" to serve such an end. Asking that question merely serves to ask if the law truly does serve that end, or if it is better characterized as serving some other end (which may not be legitimate).[96] It is the *compatibility* of the law with the constitutional framework of government which is critical in the second limb of the *Lange* test. That is why McHugh J reframed the second limb in *Coleman*.[97]

96. The assessment of compatibility in this respect is informed by the same considerations described above. Therefore, even if controlling the civility of discourse generally, or non-political discourse only, is a legitimate end, the absence of any exception or defence for offensive communications relevant to government and political matters plainly renders the particular *manner* of attaining that end incompatible with the constitutional system of government.

Section 471.12 cannot be construed so as validly to apply to the appellant

97. Given that the ends which s 471.12 serves are illegitimate, there is no way of reading the provision down so as to preserve some valid application to the present case. That conclusion is reinforced by the proper construction of s 471.12. The breadth of the ends of controlling the civility of discourse in postal communications reflects the intention that s 471.12 be unconfined in its application to "offensive" "ways" of "using" the postal service.

98. Hence, on the accepted approach to reading down,[98] s 471.12 cannot be read as:

    (a) limited to conduct which induces some "significant" or "serious" negative emotional state in a hypothetical recipient of a postal article;

    (b) limited to prohibiting the distribution of obscene material; or

    (c) requiring an intention to induce, or likelihood of inducing, a breach of the peace.

99. In *Miller v California*,[99] the Supreme Court gave a qualified definition to "obscenity", so that State laws could accommodate the First Amendment – excluding material with serious political, scientific, religious or artistic value.[100] Such a construction cannot be applied to "offensive" in s 471.12, for the same reasons already given.

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[96] Cf *Cole v Whitfield* (1988) 165 CLR 360 at 408; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473-474; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 27-29 per Mason CJ.
[97] (2004) 220 CLR 1 at 49-50.
[98] See *Momcilovic v The Queen* (2011) 85 ALJR 957 at [399] per Heydon J and the authorities there cited.
[99] 413 US 15 at 24 (1970). See also, e.g., *Reno v ACLU*, 521 US 844 at 872 (1997).
[100] Cf s 473.4 of the *Criminal Code* (Cth), in its application to s 474.17 (use of carriage services), which makes the artistic, scientific or religious value of a communication merely a factor to be taken into account in a factual consideration of whether a use of a carriage service is "offensive".

PART VII: STATUTORY PROVISIONS RELIED UPON

100. The applicable statutory provisions as they existed at the relevant time are set out verbatim in the Annexure to these submissions. There are no applicable regulations, and this appeal does not require reference to specific provisions of the Constitution. The provisions that are reproduced are as follows:

(a) *Criminal Code* (Cth) ss 11.2, 470.1, 471.12 (reprint No 4).

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(b) *Acts Interpretation Act* 1901 (Cth) s 15A.

101. Those provisions were not amended at any time between the first and last offences charged in the indictment of the appellant. They are still in force, in that form, at the date of making these submissions.[101]

PART VIII: ORDERS SOUGHT

20 102. The appellant seeks the following orders:

1. Appeal allowed with costs.

2. Set aside the orders of the Court of Criminal Appeal dated 6 December 2011 and in their place order that:

(a) The appeal to the Court of Criminal Appeal be allowed with costs.

(b) The order of Tupman DCJ dated 18 April 2011 be set aside, and in its place
30 order that the joint indictment presented on 12 April 2011 be quashed insofar as it alleges counts 14 to 21 against the appellant.

PART IX: ORAL ARGUMENT

103. It is estimated that the appellant's oral argument will take two to three hours.

Dated: 14 August 2012

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D. M. J. Bennett
Tel: (02) 8815 9108
david.bennett@5wentworth.com

A. K. Flecknoe-Brown
Tel: (02) 8815 9184
alexander.flecknoe-brown@5wentworth.com

[101] Subdivisions B through D of Div 471 of the *Criminal Code*, together with s 470.4 and the heading of what is now Subdiv A of Div 471 (which includes s 471.12), were added by the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth), effective 15 April 2010.

ANNEXURE TO APPELLANT'S WRITTEN SUBMISSIONS

Relevant legislative provisions, as in force at all relevant dates between 4 May 2008 and 14 August 2009

Criminal Code (Cth)

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.

470.1 Definitions

In this Part:

article has the same meaning as in the *Australian Postal Corporation Act 1989*.

article in the course of post means an article that is being carried by post, and includes an article that has been collected or received by or on behalf of Australia Post for carriage by post, but has not been delivered by or on behalf of Australia Post.

Australia Post means the Australian Postal Corporation.

carry, in relation to an article, has the same meaning as in the *Australian Postal Corporation Act 1989*.

carry by post has the same meaning as in the *Australian Postal Corporation Act 1989*.

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

mail-receptacle means a mail-bag, package, parcel, container, wrapper, receptacle or similar thing that:

(a) belongs to, or is in the possession of, Australia Post; and

(b) is used, or intended for use, in the carriage of articles by post (whether or not it actually contains such articles).

postage stamp has the same meaning as in the *Australian Postal Corporation Act 1989*.

postal message means:

(a) a material record of an unwritten communication:

(i) carried by post; or

(ii) collected or received by Australia Post for carriage by post; or

(b) a material record issued by Australia Post as a record of an unwritten communication:

(i) carried by post; or

(ii) collected or received by Australia Post for carriage by post.

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.

property has the same meaning as in Chapter 7.

unwritten communication has the same meaning as in the *Australian Postal Corporation Act 1989*.

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)

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.