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 REPLY

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PART I: CERTIFICATION

1. This reply is in a form suitable for publication on the internet.

PART II: REPLY

2. What follows primarily replies to the key points contained in the detailed submissions for the Commonwealth Attorney-General ("Commonwealth"), most of which are also raised by the respondents and other interveners. Silence on any other issue does not represent assent.

Upholding the decision below would undermine "the very basis of *Lange*"

3. The most significant issue in this appeal is the impact that a holding that s 471.12 is valid would have on the scope of the implied freedom generally. Dismissing this appeal would not just have an impact on freedom of communication through use of postal services. It would call into question "the very basis of *Lange*".[1] Recognition of that wider issue is also the most significant omission from the respondents' and interveners' written submissions.

4. The point itself is outlined in Droudis' written submissions in chief.[2] In short, dismissing this appeal would indicate that criminal penalties may be applied to objectively "offensive" communications, without the availability of defences like that of reasonableness or pursuit of some public interest, in the context of public broadcasts as well as communications (like those at issue in this case) to a small number of recipients.[3] That, with respect, is a result with very significant implications which this Court cannot endorse unless *Lange* itself is overturned.

5. The submissions in chief explain the logic underlying Gummow and Hayne JJ's dictum in *Coleman* about the "very basis of *Lange*". No respondent or intervener has argued that Gummow and Hayne JJ were wrong. The Commonwealth seeks to sidestep the correctness of that dictum by twisting Droudis' argument, saying that Droudis uses Gummow and Hayne JJ's reasoning to dictate the conclusion that preventing inducement of negative emotional states amounts to controlling civility of discourse.[4]

6. That is not so. The dictum in *Coleman* sustains the major premise of Droudis' main argument, i.e. that an end of ensuring the civility of discourse is incapable of satisfying the second limb of *Lange*. The minor premise is that the ends of s 471.12 are of ensuring the civility of discourse. The minor premise follows not from the major premise (as the Commonwealth's attempted reworking of the argument suggests), but from the construction of s 471.12.

7. The Commonwealth seeks comfort in the contrast between s 471.12 and the provision at issue in *Coleman*.[5] It may be fair to say that the latter provision sought to prevent inducement not just of hurt, but of anger, and that its "ultimate purpose" was to prevent violence in public spaces. But achieving that purpose turned on preventing circumstances (including emotional states) that could lead to breaches of the peace, not just any "hurt". It was thus a narrower provision than s 471.12. That is why the provision in *Coleman* was valid but s 471.12, properly construed, should be held invalid. So the Commonwealth's response only confirms the correctness of Droudis' main argument. That also disposes of a similar argument by Queensland.[6]

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[1] *Coleman* (2004) 220 CLR 1 at 79 [199] per Gummow and Hayne JJ.
[2] Droudis submissions in chief paras 74-86.
[3] Cf the statutory provisions cited in footnotes 89 and 90 (page 17) of Droudis' submissions in chief.
[4] Commonwealth submissions para 65.
[5] Commonwealth submissions para 65.
[6] Queensland submissions para 40.

Div 471, the "context", and hoaxes and threats

8. It is fair to observe, as the Commonwealth does, that Div 471 was enacted as a legislative "package".[7] Nothing in Droudis' submissions in chief suggests that surrounding provisions are irrelevant as context. But they are of little real assistance. That is primarily because, as noted in submissions in chief, each of the other (much more long-standing[8]) provisions addresses some quite different evil which can arise through misusing a postal service. Each of them serves an end which, depending on the subject-matter, is to be described in terms more specific than merely preventing misuse of postal services or protecting the "safety, security and integrity of Australia's information infrastructure" or "public confidence" in the post.

9. Indeed, no provision of Div 471 actually refers to those matters. The fact that the terms of s 471.12 do not require any adverse consequence for the post itself confirms that it serves an end the proper description of which is "supplied by the text of" the section.[9] And even if s 471.12 did require identification of some adverse consequence for public infrastructure, that would not necessarily make the section valid. So, a section requiring that the post be brought into disrepute would have to contend with the result in *Nationwide News Pty Ltd v Wills*.[10]

10. The Commonwealth relies in particular on the example of hoaxing,[11] attempting to assimilate it with the conduct prohibited by s 471.12 in its application to the present case. As the Commonwealth notes, hoaxes can disrupt public order.[12] That stamps s 471.10 of the *Criminal Code* with a different character to s 471.12, irrespective of any emotional response a hoax may cause. Similarly, the long history of criminal penalties for common assault suggests that conduct intended to induce a fear of physical harm (s 471.11) is materially different from conduct which merely makes a person angry, disgusted etc (to *any* degree). Even if s 471.10 and 471.11 are compatible with the constitutional freedom, it does not follow that s 471.12 is also compatible. The legislative "package" of Div 471 thus only highlights that s 471.12, a provision conspicuous in its breadth and novelty, goes too far.

11. The legislative history is important as it, too, is part of the "context". One does not subordinate that part of the "context" to the surrounding words and provisions, nor use it merely to confirm a conclusion on construction arrived at solely by reference to the present words of the statute – both of which the Commonwealth does.[13] Despite taking the history more seriously than do the respondents and the other interveners, the Commonwealth still misuses it, and construes s 471.12 as if "menacing, harassing or offensive" is a single static concept.

12. As to the Commonwealth's submissions on particular features of the legislative history:

    (a) The "omission" of "libellious" in describing the proscribed matter in 1975[14] does not mean s 471.12 now lacks a purpose of regulating civility of discourse. If such a departure occurred in 1975, it was reversed in 1989, when the postal offences were revised to absorb the content of the former s 86 of the *Telecommunications Act* 1975. So the Commonwealth is incorrect to propound a progressively narrowing "regulatory trajectory".[15] Rather, any such "trajectory" was to broaden (and simplify) the offences.

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[7] Commonwealth submissions para 21.
[8] As observed at para 65 of Droudis' submissions in chief, most of those types of conduct have been regulated since before 1900. See, eg, *Post Office (Protection) Act* 1884 (UK) 33 & 34 Vict c 79, ss 3, 4(1)(a), 6, 7, 8. 11.
[9] *Wotton* (2012) 86 ALJR 246 at 254 [32].
[10] (1992) 177 CLR 1.
[11] Commonwealth submissions paras 21, 67.
[12] Commonwealth submissions para 21. It is possible that the former s 86 of the *Telecommunications Act* 1975 (Cth), referring to conduct causing "serious alarm or serious affront", was itself intended to deal with hoaxes and threats, rather than the kind of conduct now described as "offensive". If that is so, it only highlights that – even if perhaps a result of a draftsman's error – s 85S of the *Crimes Act* 1914 (Cth) went further than had any provision before.
[13] As seen in the Commonwealth's submissions paras 9 to 32, especially para 26 and the heading "Historical context".
[14] Commonwealth submissions para 27.
[15] Cf Commonwealth submissions para 31.

(b) The limited content of regs 53 and 53A of the *Postal Services Regulations* 1975 (Cth)[16] must be taken together with the broader terms in which the relevant authorizing provision, s 116(g) of the *Postal Services Act* 1975 (Cth), was expressed.[17] Given the broad terms of s 85S of the *Crimes Act* 1914 (Cth), there is no reason to think that s 85S prohibited only unsolicited "offensive" material. Nor for that matter does s 471.12 – a problem with the Commonwealth's "trajectory" argument which it has tried to avoid accepting.[18] This also shows that the way Victoria expresses its propounded "legitimate end" is erroneous.[19]

(c) The fact that, in 1989, Parliament "[e]schew[ed] both formulations" of "indecent, obscene or offensive" and "seriously alarmed or affronted", in favour of "offensive", does not suggest that an objective of controlling the civility of discourse had been abandoned.[20] Rather, the adoption of the structure of one pre-existing provision (s 86 of the *Telecommunications Act* 1975), combined with the broadest part of the wording of the other (s 116(g)(ii) of the *Postal Services Act* 1975), suggests that s 85S extended to incorporate at least the content of *both* of the previous formulations.[21] That accords with the stated objective of "revising" the offences to make them "consistent" for the two contexts of postal and telecommunications offences.[22]

(d) Those difficulties were only exacerbated when the two-limbed structure of s 85S was revised into the present structure of s 471.12. As to that revision, the Commonwealth is wrong to say that the construction of s 471.12 advanced by Droudis hinges upon some "narrow notion of the *noscitur a sociis* maxim".[23] Droudis argues that there is a clear contrast between the structure of the former s 85S and the structure of s 471.12, which grounds an inevitable inference as to the immediate intention when s 471.12 was introduced – namely, merely extending the "reasonable person" test to the menacing/harassing limb, to which it had not previously applied, without otherwise changing the offence. That view is merely confirmed by, not based upon, the EM.[24]

(e) The Commonwealth's reference to some kind of "impermeable barrier"[25] in relation to the structure of s 85S appears to assume that s 85S would have been construed on a *noscitur a sociis* basis but otherwise without regard to its own "context". That is the same flawed form of reasoning which was relied upon by the Court below, and now by the respondents and interveners, in relation to the words of s 471.12 itself. In any event, Droudis does not seek to construe the former s 85S, as such. Droudis' argument rests instead upon a view of the terms of s 471.12, read within a context which includes the whole continuum of past structural, linguistic and contextual changes.

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[16] As to which, see Commonwealth submissions para 27.

[17] Section 116(g) authorized regulations for or in relation to:
"*prohibiting, restricting, regulating or imposing conditions with respect to the sending by post, by the courier service or by an electronic mail service of-*
(i) articles that are or could be dangerous or noxious;
(ii) articles consisting of, containing or bearing matter of an indecent, obscene or offensive nature; and
(iii) *articles consisting of or containing matter not solicited by the persons to whom the articles are sent*".

[18] Cf Commonwealth submissions para 30. Cf *Crowe v Graham* (1968) 121 CLR 375 at 386, 388.

[19] Victoria submissions para 10: "to protect individuals ... receiving *unsolicited and* offensive material".

[20] Cf Commonwealth submissions para 29.

[21] Furthermore, contrary to the Commonwealth's suggestion, material which would cause a reasonable person to be "seriously alarmed or seriously affronted" would not have been the same as that which was "indecent, obscene or offensive" (however one might read the second reading speech). Not many people are "seriously alarmed" by pornography. Offences of indecency and obscenity were regulated by State legislation throughout the 20th century in terms which were similar to those of Commonwealth laws (e.g. *Post and Telegraph Act* 1901 (Cth) s 107).

[22] Explanatory Memorandum to the House of Representatives, Telecommunications and Postal Services (Transitional Provisions and Consequential amendments) Bill 1989 (Cth), p3.

[23] Cf Commonwealth submissions para 33.

[24] Contrary to the way the Commonwealth crafts the "second proposition" upon which Droudis' argument supposedly relies: Commonwealth submissions para 34. The same Memorandum (for the Criminal Code Anti-Hoax and Other Measures Bill 2002), at p7, states that s 471.12 covers not just threatening material, or that which would have derogatory religious, racial or sexual connotations, but also "*material containing offensive or abusive language*". Again, this merely *confirms* that the words of s 471.12 have their ordinary, broad meaning.

[25] Commonwealth submissions para 33.

The first limb of *Lange* – the nature of the "burden" and the relevant communication

13. The Court below was correct to find that s 471.12 effectively burdens political communication.

14. Both the Commonwealth and Queensland refer with criticism to McHugh J's comments on the first limb in *Coleman*.[26] But McHugh J's comments were made in the course of an explanation of how the second limb operates – which was adopted by a majority of the Court. That means the proper approach to the second limb is predicated on the view McHugh J took of the first limb. That precludes Queensland's suggested adoption of Callinan J's and Heydon J's views.[27]

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15. Moreover, given McHugh J's explanation of what is required for the second *Lange* question to be answered "No", it is entirely fair to say that the first limb is relatively easy to satisfy.[28] The function of the first *Lange* question is to establish that, as a threshold matter, an occasion arises in the instant case for a consideration of whether a particular law is compatible with the constitutional system of government. The second question is where matters of evaluation and degree are considered. In this respect, it should be noted that the passages in Heydon J's reasons in *Coleman* and *Hogan v Hinch*, as well as that of Gleeson CJ in *Mulholland*, to which the Crown refers are all observations on how to apply the *second* limb, not the first.[29]

20 16. Within the sense of McHugh J's observations on the first limb, s 471.12 directly restricts either or both of the "content" or the "manner" of communication. In its very terms, s 471.12 applies by reference to either or both of "*the method of use or the content of a communication*". To illustrate, it is clearly the "content" of the letters, in the sense of the words they use and the topics they cover, which the charges against Monis and Droudis rely upon. So it is not apt to describe s 471.12 as only "incidentally" or "lightly", and hence not effectively, imposing a burden. The burden is direct. And as the Commonwealth accepts, the post is, and always has been recognized as, an important mechanism for political communication.[30]

17. In considering what constitutes an "effective burden", it is unsound to draw an analogy to
30 authorities on s 92 of the Constitution, notwithstanding any superficial similarities between the *Lange* test and the principles emerging from *Cole v Whitfield*. As illustrated by the passage from Heydon J's reasons in *Betfair v Western Australia* cited by the Crown,[31] s 92 requires a comparison between interstate and intrastate trade. That comparison occurs under the rubric of "discriminatory" protectionism. No such notion applies under the *Lange* principles. Indeed, an impact on trade is much easier to measure than an impact on freedom of communication.

18. Finally, it is unsound to distinguish between the "political" content of the letters and the "offensive" content.[32] As a matter of principle, it undermines what *Coleman* said about the place of the latter within the former. In this case, the charged conduct was sending the letters,
40 not sending particular lines or extracts of them. Even if the charges could be fixed to particular lines or extracts, the effect would be to attach criminal penalties to the act of sending a letter which as a whole constitutes political communication. The whole content of each letter, including apparently derogatory expressions, evinces an attempt (even if misguided) at persuading the recipient to oppose the Australian government's involvement in contentious military activities overseas. The offensive cannot be "severed" from the political.[33]

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[26] (2004) 220 CLR 1 at 49-50 [91], Queensland submissions para 22; Commonwealth submissions paras 44-45.
[27] Queensland submissions para 27; *Coleman* (2004) 220 CLR 1 at [298]; *Wotton* (2012) 86 ALJR 246 at [54], [58].
[28] Cf Queensland submissions para 26.
[29] *Coleman* (2004) 220 CLR 1 at 120 [319]; *Hogan v Hinch* (2011) 243 CLR 506 at 555 [95]; *Mulholland* (2004) 220 CLR 181 at 200 [40] cited in Crown submissions para 43.
[30] Commonwealth submissions paras 60-61.
[31] (2008) 234 CLR 418 at 483 [131]; Crown submissions para 41 footnote 21.
[32] Crown submissions para 50. Cf Commonwealth submissions paras 51 and 54, which posit a false distinction between "political discourse, considered as a class of communications" and "the communications caught by s 471.12".
[33] Cf Crown submissions para 51, citing *APLA* (2005) 224 CLR 322 at 362 [70] per McHugh J. Indeed, McHugh J's observations in *APLA* were premised on severance, in the common law sense of the word, being in fact possible.

Arguments as to the second limb of *Lange*

19. Droudis' arguments on the second limb of *Lange* are based not on a modification of the question posed by the second limb,[34] but on the approach to the second limb articulated by McHugh J and approved by a majority in *Coleman*. The focus of the inquiry is now on the "compatibility" with the constitutional system of government of the "manner" in which the law attains its ends (and, implicitly, of the ends themselves). As McHugh J emphasized, that is not a question of some "ad hoc balancing" which might be thought to be required by the expression "reasonably appropriate and adapted". "*Freedom of communication always trumps ... [legislative] powers ... The question is ... whether the [law] is so framed that it impairs or tends to impair the effective operation of the constitutional system*".[35] The rubric of "compatibility" concisely states the permissible relationship between an impugned law and the requirements of the text and structure of the Constitution. Droudis' argument on the second limb is framed by that rubric. That is not inconsistent with anything in *Hogan* or *Wotton*.[36]

20. Given the broad terms of s 471.12, Droudis submits that it is "reasonably appropriate and adapted" only to serving an "end" framed in correspondingly broad terms. It is not reasonably appropriate and adapted to serving an end of, for instance, preventing conduct which may cause or exacerbate some recognized psychological illness; preserving public order; or preventing conduct causing some identifiable damage to the physical integrity or good repute of the postal service. On any plausible application of the principles of statutory construction, an "offensive" "way" of "using" a postal service extends to conduct outside the scope of a pursuit of any of those "ends". That precludes accepting the alternative "ends" proffered by the respondents and interveners. That cannot be changed by relying on the principle of legality.

21. It should be understood that Droudis does not merely argue that s 471.12 has no legitimate end. The second limb of *Lange* poses a single question, albeit a question with several dimensions. The main argument discussed at paragraphs 73-93 of Droudis' submissions in chief focuses on the expression "legitimate end" as a shorthand description of the dimension of the second limb with which Gummow and Hayne JJ's dictum as to the civility of discourse is concerned. Within the framework of the second limb described above, the dictum encapsulates a proposition that no law which serves ends amounting to ensuring the civility of discourse can be compatible with the requirements of the constitutional system.

22. The wider question of the "compatibility" of the "manner" in which s 471.12 pursues its "ends", even if those ends are not in themselves fundamentally "incompatible", is informed by the same considerations about the significance of "uncivilized" discourse within the constitutional system of government. Hence Droudis puts an alternative argument in answer to that wider question. Insofar as consideration of the "manner" in which the law pursues its end may be a more complex inquiry than a consideration of the "end" itself, Droudis relies not just on the absence of a defence for political communications,[37] but on (without limitation) all the features of s 471.12 which have been analyzed in the submissions on behalf of Monis. The lack of such a defence is just one illustration of the serious constitutional shortcomings of s 471.12.

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[34] Commonwealth submissions para 69.
[35] See (2004) 220 CLR 1 at 48-51 [88]-[96], especially 49 [91].
[36] Cf Commonwealth submissions para 69.
[37] Commonwealth submissions para 70.