IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S172 OF 2012**

On appeal from
NSW Court of Criminal Appeal

BETWEEN: **MAN HARON MONIS**
Appellant

AND: **THE QUEEN**
First Respondent

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

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S179 OF 2012**

On appeal from
NSW Court of Criminal Appeal

BETWEEN: **AMIRAH DROUDIS**
Appellant

AND: **THE QUEEN**
First Respondent

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

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form that is suitable for publication on the Internet.

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (Commonwealth) intervenes under s 78A of the *Judiciary Act 1903* (Cth) in support of the first respondent.

PART IV LEGISLATIVE PROVISIONS

3. The Commonwealth adopts the first respondent's statement of legislative provisions in both appeals. Additional constitutional and legislative provisions are set out in an annexure to these submissions.

PART V ISSUES PRESENTED BY THE APPEAL AND ARGUMENT

4. The implied freedom operates as a limitation on legislative power. It operates to invalidate legislation that effectively burdens freedom of communication about political and governmental matters in a manner or to an extent that is not reasonably appropriate and adapted to the attainment of constitutionally permissible ends to which the legislation is directed.

5. As with any question concerning the validity of laws, the first step in that analysis is one of statutory construction. That step necessarily requires consideration of the legislative text. It also requires consideration of the 'purpose' of the law understood in an objective sense, the discernment of which is itself an exercise in construction.[1] Only then can the Court properly consider the two *Lange/Coleman* questions.[2] The existence of any burden and its extent or manner will turn upon the proper construction of the statute and the objective purpose will supply the putative constitutionally permissible end.[3] Understood in that way, these appeals give rise to essentially three issues which are to be resolved as follows.

6. First, did the Court of Criminal Appeal (CCA) err in its construction of s 471.12 of the *Criminal Code Act 1995* (Cth) (Criminal Code)? No. The objective purpose of s 471.12 is to proscribe use of the postal service or similar services in a manner that intrudes upon members of the community so as to threaten their legitimate sense of safety or security of domain. That, in turn, serves the broader purpose of preserving public confidence in the use of those services. Considered in light of those purposes and applying orthodox principles of construction, s 417.12 does not prohibit conduct that merely causes hurt to feelings or vexation. Nor does it

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1 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at 462, [423] per Hayne J.

2 The term *Lange/Coleman* test or questions will be used here to refer to the two part test for validity identified in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 567 per the Court as modified in *Coleman v Power* (2004) 220 CLR 1 (***Coleman***).

3 Of course, that analysis may not be strictly sequential. If a position is reached where different constructions are available, one of which would lead to a conclusion of invalidity, the Court should prefer a construction which avoids that result: *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553, [11] per Gummow, Hayne, Heydon and Kiefel JJ.

prohibit conduct falling within the widely drawn boundaries of robust Australian political debate.

7. Secondly, does s 471.12 of the Criminal Code 'effectively burden' the freedom of political communication for the purposes of the first limb of the *Lange/Coleman* test? No. When properly construed, that provision is not a real burden upon the class of communications that fall within the area protected by the freedom.

8. Thirdly and alternatively, even if an 'effective' burden upon the freedom does exist, is the provision reasonably appropriate and adapted to the attainment of constitutionally permissible ends? Yes. The objective purposes identified above are ends of that nature. Section 471.12 is reasonably appropriate and adapted to the achievement of those ends.

Construction of section 471.12

9. The task of construing s 471.12 commences with the observation that it, like all other offences against a law of the Commonwealth, consists of certain physical elements and fault elements(s 3.1(1) of the Criminal Code).[4]

10. There are two physical elements in s 471.12. The first is that the person uses a postal service or similar service (para (a)). That is a physical element in the nature of 'conduct' (ss 4.1(1)(a) and (2)) to which the fault element of intention applies (s 5.6(1)).

11. The second physical element is the 'circumstance' in which that conduct occurs (s 4.1(b)). That is, the circumstance that the use of the service would be regarded by reasonable persons in a particular 'way', having regard to all the circumstances. The fault element of recklessness applies to that element (s 5.6(2)).[5]

12. The 'way' in which the use is required to be regarded by the reasonable person is described by the composite expression 'menacing, harassing or offensive'. It would be wrong to seek to discern the meaning of the word 'offensive' in isolation from that larger statutory expression or from the other words which describe the circumstance comprising the second physical element of s 471.12.[6]

13. Taking that circumstance as a whole, the question that then arises is what is it about the way in which a postal or similar service is used which could be objectively regarded as falling within the statutory description, so as to warrant a criminal sanction? That naturally requires consideration of the nature of those services, and their definition in s 470.1.

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4 See also *DPP (Cth) v Poniatowska* (2011) 244 CLR 408 at 416, [20] per French CJ, Gummow, Kiefel and Bell JJ.

5 A defendant will be relevantly reckless if they are aware of a 'substantial risk' that that circumstance exists or will exist; and (having regard to the circumstances known to the defendant) it is unjustifiable to take the risk: (s 5.4(1)). Intention or knowledge will also satisfy that fault element (s 5.4(4)).

6 See eg *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 305, [68] per Hayne, Heydon, Crennan and Kiefel JJ. See also *Coleman* at 72, [174] per Gummow and Hayne JJ.

14. As can be discerned from the other provisions of Part 10.5, that definition includes services provided by a statutory authority – the Australian Postal Corporation continued in existence by s 12 of the *Australian Postal Corporation Act 1989* (Cth).[7] It also includes such private operators that provide postal or other like services within the meaning of s 51(v) and other specified courier and packet and parcel carrying services. But be they public or private, all of those services serve important public interests - see the title to Chapter 10, which is 'National Infrastructure'. In particular, they provide a means of conveying written and other communications and other articles into the homes or places of work or business of people. Generally (but not always) the envelopes and packages in which those communications and articles are carried will be addressed to a particular person and opened by them (Allsop P at [75] (**JAB 103**)). They are also one of the 'essential mechanisms' by which communication about political and governmental matters is carried out and made (Allsop P at [84] (**JAB 108-109**)), albeit that the majority of uses of those services will be unrelated to those matters (McClellan CJ in CL at [115] (**JAB 118**)).

15. There are certain commonplace aspects of the use of those services that might fall within the lower registers of the term 'menacing, harassing or offensive'. At a level of generality, 'offensive' refers to some manner of negative response on the part of one person to the words or conduct of another person and may (at the more trivial end of possible meanings) refer to conduct which is merely 'hurtful'[8] or 'vexing'[9] to another. The terms 'harassing' and 'menacing' are more clearly limited to conduct that has a serious quality of objectionability in civil society (Allsop P at [73] (**JAB 103**) and McClellan CJ at CL at [100] (**JAB 113-114**)). A contextual construction would therefore suggest that 'offensive' is similarly limited to conduct that is more serious than mere hurt to feelings (as was held by Bathurst CJ at [42] (**JAB 93**) and Allsop P at [73] (**JAB 103**) and see similarly *Coleman* at 76-77, [191]-[193] per Gummow and Hayne JJ). But those other terms also have different shades of meaning. The term 'harassing' may refer to conduct that is no more than 'annoying', albeit with a possible element of repetition. 'Menacing' used in connection with a communication most obviously suggests some form of threat of harm. However, the possible meanings of that word also extend to more trivial matters such as the merely 'annoying' or some form of nuisance – hence, 'Dennis the Menace'.

16. Absurd possibilities would abound if the circumstance in sub-paragraph (b) was to be understood as addressed to such matters. That includes the example given by Bathurst CJ (at [41] (**JAB 93**)) - wounding or hurtful letters written in the aftermath of a relationship breakdown. And the examples could be multiplied: unsolicited advertising material sent by post might be regarded as a method of use that is annoying or vexing (so as to be 'menacing' or 'offensive') and if sent more than once might be said to be 'harassing'. Unsolicited electoral material for a candidate advocating policies with which some or most electors profoundly disagree might

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7 See also in particular ss 471.1-471.8 of the Criminal Code and the definitions of the terms used therein in s 470.1 of the Criminal Code.

8 A possibility accepted by Cussen ACJ in *Anderson v Kynaston* [1924] VLR 214 at 218.

9 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 (***Bropho***) at 123, [67]-[68] per French J.

involve a method of use and content that could be said to be annoying or vexing and which may cause anger or hurt.[10] Sent frequently (as is often the case in an election campaign) it might also be said to be a trivial form of harassment. And letters written by the protagonists in a dispute arising in the context of close familial or business relationships can readily result in hurt feelings.[11]

17. Parliament should not be taken to have intended to impose a criminal sanction upon commonplace uses of the postal service of that nature. Such a radical incursion upon the common law freedom of expression would require far clearer words than those used in s 471.12 (see Allsop P at [72] (**JAB 102-103**)). The 'powerful' common law principle of legality requires that statutes be construed, where (as here) constructional choices are open, so as to minimise their encroachments upon rights and freedoms at common law.[12]

18. The formulation adopted by Bathurst CJ at [44] (**JAB 93**) (with which Allsop P agreed at [83] and [91] (**JAB 108 and 111-112**)) does no more than aptly encapsulate that which appears from the whole of the context[13] - including, in particular, the nature of the services to which s 471.12 applies and the common law freedom of expression upon which it potentially encroaches. That is, the expression 'menacing, harassing or offensive' does not extend to the full range of possible meanings that might otherwise be suggested by each of the component words, divorced from their context (illustrated by the examples above). The second physical element of s 471.12 rather directs attention to the more 'significant' or 'serious' end of the spectrum of semantic possibilities.

19. Where, as here, the indictment requires attention to the concept of 'offensive' within that broader expression, the term 'significant' is apposite to indicate that it does not extend to use of a postal service in a way that would be merely vexing or hurtful to feelings.[14] It is rather confined to such use as would produce a 'significant emotional reaction'.[15] Bathurst CJ's reference to a use that is 'calculated or likely to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person' (at [44], emphasis added (**JAB 93**)) is best regarded as identifying matters that would fall within that conception of offensiveness, although it may not exhaust them. His Honour's reference to 'likely' should be understood as shorthand for the mental element of

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10 See, by way of analogy, *Worcester v Smith* [1951] VLR 316 at 317.

11 See also *Romeyko v Samuels* (1972) 19 FLR 322 (***Romeyko***) at 361 per Bray CJ; cf *Johnson v Collier* (1997) 142 FLR 409 at 412.

12 See *Momcilovic v R* (2011) 85 ALJR 957 (***Momcilovic***) at 984-985, [42]-[45] per French CJ and the authorities there collected and *Coleman* at 25, [11] per Gleeson CJ and 75, [185] per Gummow and Hayne JJ. Again, the ascertainment of legislative 'intention' by reference to that principle does not refer to a divination of the collective mental state of the legislators. It refers instead to the application of rules of interpretation accepted by all arms of government in the system of representative democracy: *Lacey v Attorney-General (Queensland)* (2011) 242 CLR 573 (***Lacey***) at 591-592, [43]-[44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

13 *APLA* at 462, [423] per Hayne J.

14 Cf Mr Monis at [14] and Ms Droudis at [53].

15 *Ball v McIntyre* (1966) 9 FLR 237 (***Ball***) at 243 per Kerr J – a passage extracted with apparent approval by Gleeson CJ in *Coleman* at 26, [13]. See also *Malvern v Bradley* (1971) 17 FLR 345 at 348-349.

recklessness.[16]

20. Even if a wider construction remains available after the application of those common law principles of construction, it must be rejected when one has regard to the interpretative approach mandated by s 15AA of the *Acts Interpretation Act 1901* (Cth) - which requires that the interpretation that best achieves the purpose or object of the Act be preferred to each other interpretation.[17] Identification of the relevant purposes requires consideration of the text and structure of the Criminal Code, including the other provisions of Part 10.5 that were (with s 471.12) added to the Criminal Code by the *Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002* (Cth) (Anti-Hoax Act).

21. Those provisions are properly regarded as a legislative package.[18] The elements of that package were, as Bathurst CJ observed at [37] (**JAB 92**), directed to protecting people from being 'harmed' by misuse of the postal service. That harm takes different forms. Sections 471.13 and 471.15 (dangerous articles and explosives or dangerous or harmful substances) obviously deal with actual and potential physical harm to or from the use of that infrastructure. Sections 471.10-471.12 deal with a somewhat different subject matter, involving a number of potential harmful effects. First, the uses proscribed by those provisions stand to induce undesirable emotional responses in recipients – for example, the fear, apprehension, anxiety and distress that may be induced in recipients where those services are used to effect hoaxes relating to explosives or dangerous substances (s 471.10) or make threats to kill or cause serious harm (s 471.11).[19] Secondly, particularly in the case of hoaxes, they may induce a similar emotional response in those providing those services. Thirdly, they may disrupt public order and cause inconvenience and expense to public and private interests. That is particularly true of hoaxes, which may require extensive evacuations and a response from police and other authorities. But objectively menacing, harassing or offensive mail may also result in individuals, businesses or government expending money and resources in relation to matters such as security, staff support services and counselling.

22. Although addressed to that broad range of subject matter, the offences added to Part 10.5 by the *Anti-Hoax Act* may be seen to be united by the broader objective purposes identified in the extrinsic materials. That is, protecting the 'safety, security and integrity of Australia's information infrastructure, including postal and courier services' so as to ensure that those services 'are not compromised'.[20] An

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16 Cf Mr Monis at [15]. 'Intention' or 'knowledge' will also satisfy the fault element for that physical element (s 5.4(4)).

17 That provision was amended to overcome the difficulty identified in *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 by the *Acts Interpretation Amendment Act 2011* (Cth). It is now substantially similar to the provision considered in *Lacey*: see at 592-593, [45]-[46] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. It applies to all Acts, including those which predated its enactment (see s 2 and note *Lacey* at 592, [45] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

18 Note in that regard that the Minister's second reading speech suggests that ss 471.11-471.13 and 471.15 were 'complementing [the] measures' in s 471.10. *Hansard*, Senate, 11 March 2002, p 439 (Senator Campbell).

19 Those emotional responses overlap, at least in part, with the matters which Allsop P tentatively proposed as an 'additional qualification' (at [89] (**JAB 111**)).

20 *Hansard*, Senate, 11 March 2002, p 440 (Senator Campbell).

aspect of that is the preservation of public confidence in the use of those services. As Allsop P observed (at [87] (**JAB 113**)(that confidence stands to be undermined by matters that threaten the legitimate sense of security and domain of recipients. The features of the services to which the Part applies give rise to a unique vulnerability to such threats – as submitted above, mail and other articles are generally addressed to and opened by particular people in their private homes or places of business or work. In different ways, each of the harms identified above poses a threat of that nature. For example, physical harm caused to a person or to postal infrastructure or the need for large scale evacuations and emergency responses may lead those directly affected and those who otherwise perceive those events (including through media reports) to be fearful or apprehensive about receipt of mail or parcels. Words and conduct that arouse strong emotional responses in an addressee stand to produce a similar outcome – invading their private space without warning and without their consent in a way that undermines their sense of civil peace and security and thus their confidence in those services (Allsop P at [78] (**JAB 105**)).

23. The construction of s 471.12 that best achieves those statutory purposes is that identified above, which is therefore to be preferred to each other possible interpretation. The more trivial matters that might on a broader construction be encompassed in the composite term 'menacing, harassing or offensive' (including a use that is merely vexing or that causes injury to feelings) are unlikely to pose a threat to an individual's sense of security and domain. Nor is public confidence in the relevant services likely to be undermined by such matters. That confidence would rather be undermined if those provisions were to be understood as applying the criminal law to commonplace and accepted uses of postal and similar services.

24. There is a further important aspect of the context which informs the construction of s 471.12. That emerges from Gleeson CJ's reasons in *Coleman* (at 25, [12]), where his Honour observed that concepts of what is 'offensive' and 'insulting' vary with time and place and will be affected by the circumstances in which the relevant conduct takes place. The same is true of the somewhat malleable terms 'harassing' and 'menacing', as may be seen from the accommodation within those terms of the examples given above. As his Honour also observed the relevant circumstances that will inform those concepts include contemporary standards applicable to the subject matter of the legislation.[21] The fact that s 471.12 deals with an important mechanism for political communication directs attention to the widely drawn boundaries applicable to the robust nature of Australian political debate. Accepted features of that debate (that is, those within contemporary standards) include the use of insult, irony, acerbic criticism and invective[22] and extreme views that may be a matter of visceral and passionate conviction rather than analytical reason.[23] Those matters form an important element of the 'circumstances', regard to which is expressly required by s 471.12 (see, to similar effect Allsop P at [76] (**JAB 104**)). Further or alternatively, as was suggested by Bathurst CJ (at [34] (**JAB 90**)) and McClellan CJ at CL (at [118] (**JAB 119**)), the

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21 *Coleman* at 26, [15] per Gleeson CJ.
22 *Coleman* at 45, [81] per McHugh J, 78, [197] per Gummow and Hayne JJ and 91, [239] per Kirby J.
23 *Roberts v Bass* (2002) 212 CLR 1 at 78, [227] per Hayne J.

reasonable person test posits a person not overly sensitive to robust debate of that nature. Use of the post to engage in communication which falls within the contemporary standards applicable to that debate will not amount to conduct that a reasonable person would regard as falling within the statutory description.[24]

25. Beyond those matters, it is difficult (and for present purposes unnecessary) to chart the precise metes and bounds of the conduct proscribed by s 471.12. Much will depend upon the particular circumstances and the elastic concept of reasonableness. Similar concepts (leading to similarly grey areas at the margins of criminal liability) exist elsewhere in the criminal law and give rise to no particular difficulty in application.[25]

Historical context

26. The correctness of the CCA's construction is confirmed by the legislative pedigree of s 471.12. The conduct proscribed by analogous predecessor offences has changed over time. Prior to Federation, Colonial statutes prohibited the sending of postal articles containing or bearing material variously described as 'grossly offensive', 'indecent', 'obscene', 'profane', 'libellous' or ' blasphemous'.[26] The *Post and Telegraph Act 1901* (Cth) (1901 Act) combined those various concepts — prohibiting, in s 107, the sending of articles having 'thereon or therein or on the envelope or cover thereof any words marks or designs of an indecent obscene blasphemous libellous or grossly offensive character'.

27. The 1901 Act was repealed in 1975[27] and the matter was for a time dealt with by regulations made under the *Postal Services Act 1975* (Cth) (regulations 53 and 53A of the *Postal Services Regulations 1975* (Cth) (Postal Services Regulations)).[28] Two important changes were made at that time. First the term 'libellous' was omitted from the terms of the proscribed matter (as was 'blasphemous'). That omission, continued in later enacted legislation, is important – it suggests a deliberate choice to excise matters that might, at a level of generality, be considered to be directed at the preservation of civility of written discourse and protection of reputation.[29] Secondly, the Postal Services Regulations required that the 'matter not [be] solicited by the person to whom it is sent'. In contrast, the 1901 Act seemingly caught at least some articles requested by the recipient. In particular, the prohibition on use of the post to send indecent

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24 See similarly, in the context of public order offences: *Morse v Police* [2012] 2 NZLR 1 at 26, [64] per Blanchard J and at 34-35, [103] per McGrath J; *Worcester v Smith* [1951] VLR 316 at 318; and *Ball* at 243-244.

25 As McClellan CJ at CL observed (at [99] (**JAB 113**)). See eg s 5.5 of the Criminal Code.

26 Section 98 of the *Post and Telegraph Act 1891* (Qld); s 63 of the *Postage Act 1867* (NSW); s 18 of the *Postage Acts Amendment Act 1893* (NSW) – note that that provision did not create an offence and that the consequence was merely that the contents of the letters were liable to destruction – see ss 27, 30 and 33 of the *Postage Act 1867* (NSW); s 60 of the *Post Office Statute 1864* (Vic); s 71 of the *Post Office Statute 1865* (Vic); s 71 of the *Post Office Statute 1866* (Vic); s 115 of the *Post Office Act 1883* (Vic); s 118 of the *Post Office Act 1890* (Vic), as amended by s 2 of, and the first schedule to, the *Post Office Act 1897* (Vic).

27 By s 4 of the *Postal and Telecommunications Commissions (Transitional Provisions) Act 1975* (Cth).

28 Only the latter, made on 21 September 1982, forbade the sending of unsolicited indecent, obscene or offensive material per se. Regulation 53 applied only to unsolicited material that advised, notified or advertised such material.

29 See *Coleman* at 79, [199] per Gummow and Hayne JJ.

and obscene material in the 1901 Act seemingly caught material sent by such mail order pornography enterprises as existed at that time. From 1975, the focus was more clearly upon unwanted material sent by post.[30]

28. More extensive changes were made in 1989 when the *Crimes Act 1914* (Cth) (Crimes Act) was amended to introduce in s 85S an offence of using a postal or carriage service supplied by Australia Post to menace or harass a person or in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive. That provision obviously bore a close resemblance to the terms of s 471.12 – albeit that the objective test in s 85S applied only to offensiveness and not to menacing or harassing uses.

29. The concept of menacing or harassing use was drawn from an existing provision of the Crimes Act dealing with telecommunications (s 86). That provision also prohibited the sending of communications via a telecommunications system objectively likely to cause a person to be 'seriously alarmed or seriously affronted'. The extrinsic materials suggest that the latter term was to be understood as dealing with the sending of 'indecent, obscene or offensive communications'[31] – that is, it was similar in content to the Postal Services Regulations. Eschewing both formulations, Parliament chose instead to employ the concept of uses that are objectively offensive. The omission of the terms 'indecent' and 'obscene' and the earlier omission of 'profane' and 'blasphemous' suggest that, by that time, any object of ensuring 'decorum or seemly [postal] discourse' or protecting public morality had been abandoned.[32] Unadorned by any of those former terms, the word 'offensive' took its meaning from the subject matter (at that time confined to services supplied by Australia Post) and the only other uses proscribed by s 85S of the Crimes Act, being those that menaced or harassed. That subject matter and the context lead to the conclusion that the full semantic potential of those words (particularly 'offensive') was constrained in a similar fashion to the equivalent words of s 471.12.

30. The requirement in the Postal Services Regulations that the article sent by post not be solicited by the addressee was not included in s 85S (nor is it an element of s 471.12). However, material that is 'menacing', 'harassing' or 'offensive' in the sense identified above (or which a reasonable person would regard as such) is self evidently unlikely to be material that is desired or sought by the addressee.

31. Having regard to those matters, the enactment of s 471.12 may be seen as the latest step on a regulatory trajectory commenced in 1975. The measures since that time have each been directed to objective purposes that are broadly similar to those identified above. That is, the prevention of the misuse of postal services to effect unwanted and undesirable intrusions into private spaces, so as to

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30 That focus had been emerging for some time — see as regards the Victorian colonial legislation *Lomax v Wilson* (1893) VLR 404 at 406 and, dealing with 'grossly offensive' in the context of the 1901 Act, *Romeyko* at 360. The intensifier 'grossly' was also omitted in 1975. But that did not alter the meaning of the word 'offensive' (as is accepted by Ms Droudis at [51] - although cf Mr Monis at [16]).

31 See second reading speech to the Communications Legislation Amendment Bill 1985, *Hansard*, Senate, 28 May 1985, p 2653 (Senator Grimes).

32 See similarly *Coleman* at 76, [190] per Gummow and Hayne JJ.

preserve public confidence in the use of those services.

Submissions of the Appellants on construction and history

32. Mr Monis attacks the conclusions of the CCA, primarily by reference to what has been said in the authorities about the range of meanings of the word 'offensive' in the context of public order offences and a statutory power to refuse to register election material to be distributed to the public at large (at [11], [14]). It is said to follow that the term 'offensive' in s 471.12 includes hurt feelings. That argument fails when regard is had to the very different context in which s 471.12 appears. The word 'significant' employed by Bathurst CJ, with which Mr Monis takes issue, is no 'gloss'[33] – it was, rather, properly derived from the statutory text and context.

33. The submissions of Ms Droudis hinge critically upon two propositions concerning the historical chronology of postal regulation. Both are wrong. First, much significance is attributed to the fact that harassing and menacing conduct was dealt with in sub-paragraph (a) of s 85S of the Crimes Act and offensive conduct in sub-paragraph (b) of the very same section. It is said that one can discern from those matters that s 85S 'regulated menacing or harassing conduct separately and differently' from offensive conduct (at [58]). As such, Ms Droudis argues that one cannot draw anything about the meaning of 'offensive' from the words 'menace or harass' in s 85S – the semicolon separating the sub-paragraphs is seemingly an impermeable barrier to construction by reference to context. That appears to rest upon some narrow notion of the *noscitur a sociis* maxim, which Ms Droudis submits the Court wrongly applied. But that principle is no more than a specific manifestation of the general approach to construction of reading an Act as a whole.[34]

34. Even if it were otherwise, any textual divorce was reconciled when the composite term 'menacing, harassing or offensive' was employed in s 471.12.[35] Ms Droudis seeks to answer that difficulty in her second proposition concerning the historical context, arguing that the Explanatory Memorandum to the Bill which inserted s 471.12 contains 'no evidence of any intention to alter what had been meant by 'offensive' in s 85S' (at [43]). To the extent such matters could govern the content of s 471.12, the Explanatory Memorandum reveals an understanding that s 85S was addressing menacing, harassing or offensive conduct in a compendious fashion.[36] Any 'intention' to be drawn from the oblique words of the Explanatory Memorandum is contrary to Ms Droudis' argument.

35. More fundamentally, it is not merely the presence of the words 'menacing' and 'harassing' which requires the construction adopted by the CCA. For the reasons

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33 See the submissions of Ms Droudis at [60]-[66] and note also the submissions of Mr Monis at [16].

34 D Pearce and R Geddes, *Statutory Interpretation in Australia*, LexisNexis Butterworths (2011) p 134, [4.23].

35 It is notable, in that regard, that Ms Droudis appears to accept that the words 'indecent' and 'obscene' formerly informed the construction of the word 'offensive' in the provisions which preceded s 85S: at [51] and [55].

36 In particular, immediately above the description of s 471.12, it is said: 'At present, the Crimes Act only contains an offence relating to the sending of menacing, harassing or offensive material, which attracts a penalty of 1 year imprisonment (s 85S)' (see Explanatory Memorandum, Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002, p 7 (emphasis added)).

given above, that construction is required by consideration of the broader statutory context and subject matter.

Systemic nature of the implied freedom

36. Understanding of the implied freedom has developed during the 20 year period since it was first recognised by this Court. It is now well accepted that it is tied to the constitutional text and serves a particular purpose which has been discerned from that text. That purpose is best described as being to avoid the impairment of the 'constitutional system' identified in *Aid/Watch Inc v Federal Commissioner of Taxation*:[37] that is, a system of representative and responsible government, with a universal adult franchise and in which s 128 establishes a mechanism for the amendment of the Constitution in which the proposed law to effect the amendment is to be submitted to the electors.[38]

37. Consideration of the extent to which the implied freedom restricts legislative power requires careful attention to the purpose just identified. The freedom does not exist for its own sake and its reach is not to be determined by reference to free-standing concepts or political theories of representative government or freedom of expression. Rather, proceeding by reference to the purpose it serves, one must look to what is prescribed by the provisions of the Constitution providing for representative and responsible government (principally ss 7, 24 and 64) and also to s 128. The implied freedom is directed to (and only to) the preservation of the features of the institutional landscape provided for by those provisions of the Constitution. That is why it has often been said that it does not confer personal rights upon individuals. The reference to a 'constitutional system' in *Aid/Watch* (of which the implied freedom is an 'indispensible incident') points to the fact that its operation and the relevant inquiry are at a 'systemic' level.[39]

38. There is an analogy to be drawn in that regard with the approach to the freedom guaranteed by s 92 – which similarly serves a systemic or functional purpose.[40] The implied freedom no more confers upon an individual a right to express or receive information than s 92 confers upon an individual a right to engage in interstate trade. The implied freedom may, of course, invalidate a particular law which burdens an individual's communications. But it is only in that 'limited sense' that the activities of such an individual are a 'surrogate' for the subject matter of the freedom.[41] Emphasis upon the circumstances of particular individuals or their communications risks confusing the constitutional issue with the effect of the law upon particular speakers and recipients.[42]

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37 (2010) 241 CLR 539 (***Aid/Watch***) at 555-556, [44] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

38 See *Lange* at 560-561.

39 See also *Wotton v Queensland* (2012) 285 ALR 1 (***Wotton***) at 7, [20] and 9, [25] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

40 Being the preservation of national unity and the creation and fostering of national markets: *Betfair v Western Australia* (2008) 234 CLR 418 (***Betfair No 1***) at 452, [12], 474, [88], 477, [102] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

41 cf *Betfair Pty Limited v Racing New South Wales* (2012) 286 ALR 221 (***Betfair No 2***) at 232-233, [44] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

42 Such matters are only material insofar as they are relevant to standing or may assist in identifying the area of communication affected by the impugned provisions: *Wotton* at 22, [80] per Kiefel J.

39. It also follows from the purpose of the freedom that the area of immunity it confers is not principally concerned with the expression of information in itself. There is a more precise focus, being the flow of information necessary to sustain the constitutionally mandated system of government. That has two aspects: first, the flow of information between electors and elected representatives or candidates for election and between electors themselves on political matters necessary to ensure that the constitutionally protected choice at general elections or referenda is a true choice in the sense of an 'informed' one (thus maintaining representative government and the procedure required by s 128).[43] The focal point of that process is the elector, who is to be informed. Secondly, the similarly constructed flow of information concerning the conduct of the executive branch necessary to ensure the workings of responsible government. That process is primarily concerned with the provision of information to electors and their representatives.[44] That understanding explains the importance attributed to the means by which information flows, particularly the mass media.[45] Expression of information is only protected in so far as it stands to be channelled into those information streams. Thus, for example, a discussion on relevant political matters between aliens (not having the right to vote) will not necessarily fall within the area protected by the implied freedom unless it is, say, perceived by an elector.[46]

40. The question of whether the freedom is infringed in a particular case falls to be determined under the two limbs of the *Lange/Coleman* test. However, at each stage, the doctrinal matters outlined above intersect with and inform the application of that test.

Is there a burden on political communication? (First limb of the test)

41. There are two aspects to the first limb of the test. The first requires analysis of the putative 'communication about government or political matters' (which has some analogy with the notion of 'coverage' used in connection with the United States First Amendment authorities).[47] The second concerns the existence of an 'effective burden' upon the freedom to engage in such communications.

Coverage

42. The implied freedom does not extend to all communications about politics and government – it is rather concerned with communications at the Commonwealth level. A communication about a matter concerning State legislation[48] or the actions of the executive of a State[49] will not, without more, amount to a

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43 *Lange* at 560.
44 *Lange* at 561.
45 *Levy* at 623 per McHugh J.
46 *Cunliffe v Commonwealth* (1994) 182 CLR 272 (***Cunliffe***) particularly at 327-328 per Brennan J and 336 per Deane J (see also 365 per Dawson J) – cf 298-299 per Mason CJ.That also explains why communications made by a non-natural person may, if likely to be perceived by an elector, attract the freedom: see the position of the defendant in *Lange* and the first plaintiff in *APLA*.
47 See A Stone 'The Freedom of Political Communication since Lange' in A Stone and G Williams (eds) *The High Court at the Crossroads*, Federation Press (2000) p 2.
48 *Levy v Victoria* (1997) 189 CLR 579 (***Levy***) at 596 per Brennan CJ and 626 per McHugh J (although their Honours did not decide the matter on that issue) – cf 609 per Dawson J.
49 Cf *Coleman* at 95, [80] per McHugh J.

communication about a government or political matter so as to engage the first limb of the *Lange/Coleman* test. There must be a real and not remote connection between the subject matter of the communication and a federal issue, such that it can be said that the issue affects the choices and evaluative processes identified above (federal elections, voting to amend the Constitution or evaluation of Federal ministers and their departments and other Commonwealth agencies). That requirement is not satisfied if all potentially affected communications are at the 'purely state level'[50].

43. Nevertheless, the 'increasing integration of social, economic and political matters in Australia'[51] means that communications which principally concern State or local issues may also constitute communications in relation to politics or government at the Commonwealth level in the sense just discussed. In this matter, the issue is to be determined by reference to whether s 471.12 could apply to communications that concern federal governmental and political issues within the coverage of the implied freedom, rather than by reference to the communications themselves (as Bathurst CJ held at [46]-[51] (**JAB 94-96**)). The Commonwealth accepts that it could so apply.

Burden

44. It has been said that a law will not 'burden' such communications unless, by its operation or practical effect, it directly and not remotely restricts or limits the content of those communications or the time, place, manner or conditions of their occurrence.[52]

45. That may suggest that the first limb will be satisfied whenever a law actually or potentially restricts or limits a communication identified as relevantly 'political'. If that were correct then, subject to the requirement for a federal connection identified above, almost any law that incidentally touches upon information or its communication is within the purview of the implied freedom.[53] For, as may be seen from the discussion of coverage, the concept of communication about 'political or governmental' matters is rightly described as 'vague' and 'broad',[54] extending to most social and economic features of Australian society.

46. But the first question in the *Lange/Coleman* test is not formulated in those terms. It rather asks whether the impugned law 'effectively' burdens 'freedom of communication' about government or political matters.

47. The term 'effectively' requires attention to the extent and nature of the burden. Again, there are useful analogies to be drawn from jurisprudence concerning s 92.[55] In particular, the burden must be meaningful, in the sense of not

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50 *Wotton* at 9, [26] per French CJ, Gummow, Hayne, Crennan and Bell JJ.
51 *Lange* at 572. See also *Hogan v Hinch* (2011) 293 CLR 506 (***Hogan***) at 542, [48] per French CJ.
52 *Coleman* at 49, [91] per McHugh J
53 *Wotton* at 15, [53] per Heydon J.
54 Respectively, *Coleman* at 30, [28] per Gleeson CJ and *Hogan* at 544, [49] per French CJ.
55 Eg *Williams v Metropolitan and Export Abbattoirs Board* (1953) 89 CLR 66 at 74 per Kitto J, referring to *Wilcox Mofflin Limited v New South Wales* (1952) 85 CLR 488 at 523 per Dixon CJ, McTiernan and Fullagar JJ. See also *Betfair No 1* at 483, [131] per Heydon J and *Cole v Whitfield* (1988) 165 CLR 360 at 408 per the Court.

insubstantial or *de minimis*. That is, it must be a real or an actual burden upon relevant communications: a real impediment; an obstacle in their way.[56] Put another way, the relevant measure must amount to a 'realistic threat' to the freedom.[57] The institutions of representative and responsible government hardly require protection from insubstantial burdens, which pose no realistic threat.

48. The requirement to consider whether 'freedom of communication' about relevant political matters is effectively burdened involves a question as to how the impugned legislative provisions 'may affect the freedom generally'.[58] Particular political communications and the activities of particular individuals engaged in political discourse will be a 'surrogate' for the subject matter of the freedom only in the limited sense identified above. The relevant inquiry is rather directed to burdens upon the 'freedom generally' in the sense of an 'area' of immunity.[59] That requires consideration of the effect of the measure upon the class of actual and potential communications on political matters that may fall within that protected area – just as s 92 requires consideration of the effect upon interstate trade as a class of transactions, rather than the activities and circumstances of individual traders.[60]

49. Three consequences follow. First, a law that restricts only some of the communications which comprise the class of communications on political matters will not necessarily constitute an 'effective burden' on the freedom. In particular it is unlikely to do so if the restricted communications are only marginal to the object of maintaining the constitutionally prescribed system of government. Consideration of that issue may require attention to the traditions and practices that characterise Australian political debate as a whole (akin to the analysis undertaken by members of this Court in *Coleman*),[61] for that will tend to reveal what matters are essential to the constitutional system identified in *Aid/Watch* (those communications which are an 'indispensible incident' of that system).

50. Secondly, given that the focus of the implied freedom is upon the flow of information essential to the viability of the prescribed governmental system, the question of whether there exists an effective burden on the freedom may require consideration of whether there are avenues other than those proscribed by which the relevant information could be conveyed.[62] The ready availability of such avenues may suggest that the measure is not a real impediment to the necessary flow of information. That issue arises more acutely after the advent of electronic

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56 *Wotton* at 16, [54] per Heydon J (accepting the Commonwealth's analogy with s 92 jurisprudence).
57 *Coleman* at 112, [298] per Callinan J; *Wotton* at 16, [55] per Heydon J.
58 *Wotton* at 22, [80] per Kiefel J (emphasis added).
59 See *Lange* at 560 referring to *Cunliffe* at 327 per Brennan J.
60 *Betfair No 2* at 233-234, [46], [50] per French CJ, Gummow, Hayne, Crennan and Bell JJ and note the parallel with s 92 drawn by Brennan J in *Cunliffe* at 326-327 (in the passage which immediately precedes that extracted in *Lange* at 560).
61 McHugh J at 45-6, [81], Gummow and Hayne JJ at 78, [197] and Kirby J at 91, [239]. See also *Levy* at 623 per McHugh J and *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 200, [87] per Gummow, Kirby and Crennan JJ, explaining *Coleman* in terms of the 'established use of insult and invective in political discourse'.
62 See, *United States Postal Service v Council of Greenburgh Civic Associations* 453 US 114 at 127 (1980) (footnote 5) referring with apparent approval to a passage from the dissenting reasons of Holmes J in *United States; Ex rel Milwaukee Social Democratic Publishing Company v Burleson* 255 US 406 at 437 (1921).

media and internet communications.[63]

51. Thirdly, it may also be relevant for the Court to consider whether the effect of the measure is to enhance, rather than diminish, relevant political discourse: see the analysis suggested by Basten JA in *Sunol v Collier* (No 2) [2012] NSWCA 44 (***Sunol***) (at [86]).[64] To use the example there given by his Honour, a particular faction in a political debate may engage in conduct (including conduct involving intimidating communications on political matters) by which it monopolises a debate and prevents a second faction from being heard. Such conduct burdens political discourse as effectively as a statutory prohibition on speaking directed to the members of the second faction. A law may constrain the behaviour of the first faction but nevertheless not effectively burden the 'freedom generally' (even if it restricts particular communications on political matters). It will not do so if it promotes or enhances political discourse, considered as a class of communications. Unlike the US First Amendment jurisprudence, the implied freedom requires analysis at that systemic level rather than an inquiry directed to the infringement of a private right to speak. Indeed, the US cases provide stark examples of protected speech that would contribute 'not one jot or title to public knowledge or the advancement of public debate',[65] a point that has been acknowledged by some members of the US Supreme Court.[66]

52. Applying those principles to the current proceeding, s 471.12 imposes no effective burden on the freedom of political communication by reason of the following matters. First, the potential reach of s 471.12 is significantly limited by the circumstances to which the section directs attention and the nature of the reasonable person test. As submitted above at para [24], one or both of those features will accommodate 'robust' Australian political debate.

53. It follows that, to the extent s 471.12 applies to political communication, it is communication which lies outside the accepted boundaries of Australian political debate and at the outer fringes of political discussion.[67] Its terms, operation and effect may mean that a relatively confined group of individuals (those who wish to engage in such communications) are unable to express themselves in the way that they desire. But, as submitted above, the constitutional question is not answered by reference to the effect of the law upon particular speakers or communications. The implied freedom does not confer a 'positive right' upon those individuals to engage in the conduct which is the subject of s 471.12. Nor does it require that the recipients of mail suffer the intrusions upon their private space which that provision seeks to prevent. There is an analogy to be drawn with the notion that the implied freedom does not require that individuals be permitted

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63 See *University of California v Martinez* 561 US __ (2010) (Slip Op at 24-25) (Ginsburg J, for the Court).

64 See also *Catch the Fire Ministries Inc v Islamic Council Inc* (2006) 15 VR 207 at 246, [113] per Nettle JA, 246, [119] per Ashley JA and 265, [208] per Neave JA and *Owen v Menzies* [2012] QCA 170 at [72]-[76] per McMurdo P cf [3] per de Jersey J and [156] per Muir JA.

65 P Keane 'Sticks and stones may break my bones, but names will never hurt me' (2011) 2 *NTLJ* 77 at 86 referring to *Virginia v Black* 583 US 343 (2003) (***Black***).

66 See eg the dissenting reasons of Alito J in *Snyder v Phelps* 562 US __ (2011) (***Snyder***) (Slip Op at 14).

67 A step further removed from the conduct in issue in *Coleman*, which Gleeson CJ identified as being *at the margins of the term 'political'* (at 31, [28]).

to enter upon a particular parcel of land owned by another person for the purposes of making a protected communication.[68]

54. Secondly, the communications caught by s 471.12 are likely to detract from political discourse and the constitutionally mandated choice in a similar manner to that identified in the example given by Basten JA in *Sunol*. Such communications stand to undermine public confidence in postal and related services, which have historically been an essential mechanism by which communications about political and government matters are carried out and made (Allsop P at [84] (**JAB 108-109**)). The critical flows of information that the freedom seeks to protect may be partially occluded as a result. To the extent an elector is actuated or influenced by 'menacing, harassing or offensive' communications, their electoral choice may be seen to be induced by intimidation, fear or some form of emotional pressure or duress. Such a choice is not a 'true choice' or alternatively is incompatible with the notion of a 'free election'.[69] By addressing those matters, s 471.12 enhances political communication (securing the integrity of its means) and the constitutional system which the implied freedom serves.

55. Thirdly, there are many other avenues by which the relevant information could be conveyed. All such avenues (apart from those involving harm to recipients of mail or otherwise contrary to law – see eg s 474.17) remain available to persons in the position of the appellants. There is no real impediment to the required flow of information.[70]

56. When regard is had to those matters, it is apparent that s 471.12 does not effectively burden freedom of communication about government or political matters. The first *Lange/Coleman* question should be answered 'no'.[71] The decision of the CCA should be affirmed on the grounds set out in the notices of contention (**JAB 135, 150 and 158**).

Alternative argument: Second limb of the *Lange/Coleman* test

57. These submissions are made in the alternative, in the event the first question is answered 'yes'. As with other constitutional freedoms and guarantees, it is well established that the implied freedom does not confer an 'absolute' area of immunity.[72] Recognition of that matter brings with it a need for a test of what constitutes a legitimate type or level of restriction.[73] In the case of the implied freedom, that involves asking (as the second *Lange/Coleman* question) whether the law is reasonably appropriate and adapted to serve a 'legitimate end' in a manner compatible with the maintenance of the constitutionally prescribed system of government identified in *Aid/Watch*.

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68 See *Levy* at 622 per McHugh J. See also *Cunliffe* at 327 per Brennan J; *Lange* at 560; *McClure v Australian Electoral Commission* (1999) 73 ALJR 1086 at 1090, [28] per Hayne J.

69 *Lange* at 560.

70 See to similar effect *Snyder* per Alito J (in dissent) at 2.

71 The conclusions of Bathurst CJ (at [56] (**JAB 97**)) and Allsop P (at [84] (**JAB 108-109**)) about the existence of an 'effective burden' on the freedom appear to be premised on an assumption that it is sufficient for the purposes of the first question that a law actually or potentially restricts or limits '[s]ome political communications'. For the reasons given above, that is incorrect.

72 See eg *Lange* at 561.

73 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 (***Rowe***) at 136, [444] per Kiefel J.

58. The requirement for a 'legitimate end' involves measuring the objective purpose of the statute against the constitutional imperative. It is sufficient if that purpose is a constitutionally permissible one, recognising that there are some ends that are incompatible with that imperative and therefore impermissible (for example, that of undermining the constitutionally prescribed system.[74] That involves an analysis that is similar to that applied in respect of other constitutional guarantees or freedoms. So a permissible purpose (or legitimate end) in the context of s 92 is one that is 'non-protectionist';[75] in the context of s 99 it is one that is 'non-preferential'.[76] The Court has taken care to ensure that the class of non-permissible ends is not identified in overly broad terms – the notion that there are wide ranging areas in which the exercise of legislative power is absolutely forbidden may lead to stultification.[77] Indeed, that consideration assumes particular importance in the context of the implied freedom by reason of the wide approach to its coverage (see above).

59. The manner or means of achieving the constitutionally permissible end must also be compatible with the constitutional imperative.[78] That principle has informed the application of the 'reasonably appropriate and adapted test'. It explains (at least in part) the distinction, accepted by six members of this Court in *Hogan*[79] and reiterated in *Wotton*[80] between a law which incidentally restricts political communication, and a law which prohibits or regulates communications which are inherently political or a necessary ingredient of political communication. Assume both those laws have a constitutionally permissible end. The means by which the second law achieves that end will be more closely scrutinised than in the case of the first law, because the burden concerns matters that relate more directly to the constitutionally mandated system of government.

60. Applying those principles here, the second *Lange/Coleman* question should be answered 'yes' for the following reasons. First, the ends (supplied by the objective purposes of s 471.12) are constitutionally permissible. To adapt what was said by McHugh J in *Coleman*,[81] they involve promotion or protection of an important mechanism for political communication – which has been recognised as an aspect of the power conferred by s 51(v) since federation.[82] They also involve protection of those who participate in the constitutionally mandated system of government. Indeed, as submitted above, the prohibition may be seen to protect the choice to be made by electors at the 'free elections' required by the Constitution.

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74 *Coleman* at 50 [92] per McHugh J.

75 Cf the object identified in *Betfair No 1* at 479, [108] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ.

76 *Permanent Trustee Australia Limited v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388 at 424-425, [91] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

77 See eg *S.O.S. (Mowbray) Pty Ltd v Mead* (1972) 124 CLR 529 at 574-575 per Windeyer J.

78 *Coleman* at [93] per McHugh J, with whom Gummow and Hayne JJ at 77-78, [196] and Kirby J at 82, [211] agreed and the example of *ACTV* to which McHugh J referred at 50-51, [93]-[94].

79 At 555-556, [95] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ. See also *ACTV* at 143 per Mason CJ; *Levy* at 619 per Gaudron J and *Mulholland v Australian Electoral Commission* (2009) 220 CLR 181 (***Mulholland***) at 200, [40] per Gleeson CJ.

80 See at 9, [30] per French CJ, Gummow, Hayne, Crennan and Bell JJ and 25, [90] per Kiefel J.

81 At 52, [98].

82 See J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth*, The Australian Book Company (1901) p 560.

61. Secondly, like the measures in issue in *Hogan* and *Wotton*, s 471.12 only incidentally restricts political communication in the course of regulating uses of the post that are objectively offensive.[83]

62. Thirdly, as in *Wotton*, the provision itself is constrained by notions of reasonableness.[84] Like the defence of qualified privilege developed in *Lange* (572-573), it is concerned with the objective reasonableness of particular conduct. That formulation readily conforms to the requirements of the second limb of the *Lange/Coleman* test.

63. Fourthly, construed in the manner outlined above, s 471.12 is tailored to the harm sought to be addressed. Given that the fault element of recklessness applies to paragraph (b), the prosecution would be required to show that the defendant was aware of a 'substantial risk' that their conduct would be objectively regarded as meeting the statutory description; and (having regard to the circumstances known to the defendant) that it was unjustifiable to take the risk. Mere inadvertence is not sufficient. Further, as submitted above, s 471.12 leaves alternative avenues by which a message may be communicated. The constitutionally protected flow of information is relatively undisturbed. All that is taken is the capacity to engage in communications which are, for the reasons given above, likely to be at the outer margins of relevant political debate.

Submissions of the Appellants on the second limb

Permissible end

64. The submissions of Ms Droudis on the second limb are primarily directed to the issue of whether there exists a constitutionally permissible end. Ms Droudis relies upon the reasons of Gummow and Hayne JJ in *Coleman* at 78-79, [199] to submit that an end identified as ensuring the 'civility of discourse' is not a permissible one. That proposition does not find support in the reasons of the other members of the Court.[85]

65. But even if correct, Ms Droudis' argument rests upon a distorted reading of that passage – in particular she contends that it supports the further proposition that any provision prohibiting words calculated to prevent the inducement of a 'negative emotional state' is necessarily characterised as serving the end of ensuring civility (at [90]-[92]). Their Honours said no such thing. Indeed, the construction of s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld) that their Honours adopted involved a prohibition of precisely that character. Properly construed, the conduct proscribed was 'so hurtful' as to be intended to or

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83 Even if it were otherwise and the nature of the burden called for close scrutiny, the question can never rise higher than asking whether there is a compelling justification: *Mulholland* at 200, [40] per Gleeson CJ.

84 At 10, [32] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

85 McHugh J, particularly at 54, [105], appears to allow for the possibility of a 'qualified prohibition' directed to such an end. Kirby J appears to have seen the question in terms of 'proportionality' rather than the existence of a permissible end (91, [237] and 98-99, [256]). Heydon J would have accepted promotion of standards of civilisation as a legitimate end (122, [324]). Although less clear, Callinan J was seemingly of the same view (111, [295] and 113-114, [299]-[300]). Gleeson CJ did not express a view on that issue.

likely to provoke unlawful physical retaliation.[86] So understood, that provision had, as an immediate objective, the prevention of the inducement of two 'negative emotional states' in the addressee: hurt and anger. The ultimate purpose, which depended upon preventing the inducement of those emotions, was that of keeping public spaces free from violence.[87] But equally, here the ultimate purpose is the protection of the integrity of National infrastructure, which also involves important public interests. That travels well beyond ensuring civility of discourse.[88]

66. Many restrictions upon speech serving constitutionally permissible ends are in some sense directed at the medium of human emotions or thought processes. *Lange* provides a further example – the permissible end of protecting reputation involves the inhibition of speech that diminishes the esteem in which a person is held by others (that diminution equally involving 'negative' perceptions or emotions). That is simply a product of the fact that the effect of any communication depends crucially upon the manner in which it is perceived. Ms Droudis' suggestion that the touchstone for invalidity is whether the permissible purpose is 'dependent upon preventing inducement of a negative emotional state' (at [90]) overlooks those matters and approaches the constitutional question at too high a level of abstraction. The submissions that flow from that erroneous approach involve a false syllogism.

67. It is also wrong to suggest that all political communication, however 'outrageous', occupies a position of 'centrality' in the context of the implied freedom (cf Ms Droudis at [80]). A politically motivated hoax inducing a false belief that there is an explosive device or anthrax in the mail may be regarded as a form of 'outrageous' expressive conduct,[89] directed at achieving fundamental social change by arousing strong emotional responses (fear and alarm). Yet that could not be regarded as a legitimate aspect of Australian political debate, despite its robust characteristics. The same is self evidently true of intimidation and threats of political violence – which may take various insidious forms, including the burning cross considered in *Black*. The appellation 'political' does not make any of that 'central' to the systemic concerns at the heart of the implied freedom.[90] Those systemic matters, rather than an undiscriminating appeal to the virtues of free expression, provide the appropriate frame of reference here. The attempt by each of the appellants to call in aid the US authorities usefully illustrates that point.[91]

68. Like Ms Droudis, Mr Monis' submissions (at [49]-[50]) involve a misreading of *Coleman*. Nowhere was it said that a proscription on offensive conduct or words could be valid only if it was directed to the purpose of preventing unlawful retaliation. Indeed, McHugh J expressly accepted that prevention of intimidation was a permissible purpose.[92] It is also incorrect to suggest that the range of

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86 See 77, [193] per Gummow and Hayne JJ.
87 See 78, [198] per Gummow and Hayne JJ.
88 Nor, contrary to Mr Monis' submissions at [39], is that permissible end aptly described as 'nebulous'. Note in that regard that this Court seemingly accepted in *Betfair No 1* that a similarly described purpose could be a legitimate or permissible one in the context of s 92 (at 479-480, [109]-[112] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).
89 *Levy* at 623 per McHugh J.
90 See *Coleman* at 30, [28] per Gleeson CJ.
91 See Ms Droudis at [79]-[82] and Mr Monis at [48] and [55].
92 See 54, [104]. See also 32, [32] (Glesson CJ).

legitimate ends is confined to matters 'traditionally recognised as worthy of protection' (at [56]). For the reasons given above, the inquiry goes no further than whether a particular end is a permissible one. It would be a startling outcome if Parliament had to bring itself within one of the (seemingly few) 'traditional' formulae suggested by Mr Monis.

The inquiry posed by the second question

69. Ms Droudis submits that the second question is to be asked in terms of whether the law serves the end in a manner that is compatible with the constitutional framework of government, rather than by reference to the accepted formulation 'reasonably appropriate and adapted' to a constitutionally permissible end or ends (at [94]-[95]). That submission overlooks this Court's recent re-affirmation of that formulation of the second question in *Wotton*[93] and in *Hogan*.[94] The suggestion made by Mr Monis that the test for the second limb was altered by what was said in *Wotton* and is now subdivided into two 'portions' (at [21]-[28]) seemingly involves a similar error. Far from 'breaking new ground' as regards the formulation of the second *Lange/Coleman* question, the plurality in *Wotton* observed that 'the terms of the questions are settled' (referring to the statement and application of those matters in *Hogan*).[95]

70. The only matter upon which Ms Droudis relies in submitting s 471.12 involves an 'incompatible manner' of achieving a permissible end is 'the absence of any exception or defence for offensive communications relevant to government and political matters' (at [96]). Mr Monis seemingly makes a similar point (at [47]). However, the various forms of political speech that Ms Droudis seeks to emphasise (at [77] and [85]) do not, without more, offend against s 471.12. Any restriction of political communication effected by that provision applies only at the extreme margins, being a form of communication that stands to detract from political discourse and the constitutionally mandated choice. No question of 'incompatible manner' arises in those circumstances, even if that were the correct test. Nor, contrary to what is said by Mr Monis (at [53], [54]), does invalidity follow from the fact that defences of truth, fair comment, fair report or the defence of qualified privilege developed in *Lange* are unavailable – for the same was true of the offence in *Coleman*.[96]

71. Apart from the absence of such defences, Mr Monis' submissions regarding that issue turn largely upon various assertions about the 'small portion' of mail caught by s 471.12 that would threaten a legitimate sense of safety and security of domain or undermine public confidence in postal and similar services (at [39]). But that argument is premised on an impermissibly broad construction of s 471.12. In addition, Mr Monis asserts that supposed difficulties in formulating an

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93 See 9, [25] and 10 [32] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

94 at 542-544, [47], [50] per French CJ and 556, [97] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

95 See at 9, [25] per French CJ, Gummow, Hayne, Crennan and Bell JJ. It is also incorrect to assert that *Wotton* required, as an additional matter, that the law be compatible with a *'postulate', namely agitation for legislative and political change* (cf Mr Monis at [27], [28] and [41]). In any event Mr Monis makes no attempt to explain how s 471.12 is incompatible with any such postulate.

96 See eg at 41-42, [69] per McHugh J and 74, [181] per Gummow and Hayne JJ.

appropriate direction to the jury and in scrutinising its reasoning are relevant to the second *Lange/Coleman* question (see at [57]-[66]). That is also incorrect. The constitutional issue presented in this matter involves a limitation upon legislative power. That requires attention to whether s 471.12, properly construed, infringes that limitation. For the reasons given above, it does not. A failure by a judge properly to direct the jury as to so much of the law as they need to know in deciding the real issues in the case[97] may give rise to errors liable to correction in an appeal. The same is true of a verdict of the jury that is wrong as a matter of law, 'unreasonable' or such as 'cannot be supported, having regard to the evidence'.[98] But those matters do not give rise to constitutional questions and cannot affect the validity of s 471.12.[99]

Orders

72. The appeals should be dismissed. As an intervener, the Commonwealth does not seek costs and an order for costs should not be made against it.

PART VI ESTIMATED HOURS

73. It is estimated that 2 hours will be required for the presentation of the oral argument of the Commonwealth.

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97 See, discussing that 'fundamental division of functions in a criminal trial between the judge and the jury', *Azzopardi v The Queen* (2001) 205 CLR 50 at 69, [49] per Gaudron, Gummow, Kirby and Hayne JJ.

98 Section 6(1) of the *Criminal Appeal Act 1912* (NSW) and *SKA v R* (2011) 243 CLR 400 at 405-406, [11]-[14] per French CJ, Gummow and Kiefel JJ.

99 See by way of analogy *Wotton* at 8, [22]-[24] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

ANNEXURE: RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

1. The relevant constitutional provisions are found in ss 7, 24, 64 and 128 of the Constitution. The relevant legislative provisions are found in Schedule 1 of *Criminal Code Act 1995* (Cth) (Criminal Code), in particular ss 3.1, 4.1, 5.1, 5.6, 470.1, 471.11, 471.12, 471.13 and 471.15.

2. This Annexure sets out verbatim the relevant provisions as they existed at 12 April 2011 (which continue in force).

RELEVANT CONSTITUTIONAL PROVISIONS

7 The Senate

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

24 Constitution of House of Representatives

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the

Parliament otherwise provides, be determined, whenever necessary, in the following manner:

(i) a quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators;

(ii) the number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

64 Ministers of State

The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

Ministers to sit in Parliament

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

128 Mode of altering the Constitution

This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the

election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, Territory means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law

allowing its representation in the House of Representatives.

3. The following provisions are contained in the *Criminal Code*.

3.1 Elements

(1) An offence consists of physical elements and fault elements.

(2) However, the law that creates the offence may provide that there is no fault element for one or more physical elements.

(3) The law that creates the offence may provide different fault elements for different physical elements.

4.1 Physical elements

(1) A physical element of an offence may be:

(a) conduct; or

(b) a result of conduct; or

(c) a circumstance in which conduct, or a result of conduct, occurs.

(2) In this Code:

conduct means an act, an omission to perform an act or a state of affairs.

engage in conduct means:

(a) do an act; or

(b) omit to perform an act.

5.1 Fault elements

(1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.

(2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence.

5.6 Offences that do not specify fault elements

(1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Note: Under subsection 5.4(4), recklessness can be established by proving intention, knowledge or recklessness.

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*.

471.10 Hoaxes—explosives and dangerous substances

(1) A person is guilty of an offence if:

(a) the person causes an article to be carried by a postal or similar service; and

(b) the person does so with the intention of inducing a false belief that:

(i) the article consists of, encloses or contains an explosive or a dangerous or harmful substance or thing; or

(ii) an explosive, or a dangerous or harmful substance or thing, has been or will be left in any place.

Penalty: Imprisonment for 10 years.

(2) To avoid doubt, the definition of ***carry by post*** in section 470.1 does not apply to this section.

471.11 Using a postal or similar service to make a threat
Threat to kill

(1) A person (the ***first person***) is guilty of an offence if:

(a) the first person uses a postal or similar service to make to another person (the ***second person***) a threat to kill the second person or a third person; and

(b) the first person intends the second person to fear that the threat will be carried out.

Penalty: Imprisonment for 10 years.

Threat to cause serious harm

(2) A person (the ***first person***) is guilty of an offence if:

(a) the first person uses a postal or similar service to make to another person (the ***second person***) a threat to cause serious harm to the second person or a third person; and

(b) the first person intends the second person to fear that the threat will be carried out.

Penalty: Imprisonment for 7 years.

Actual fear not necessary

(3) In a prosecution for an offence against this section, it is not necessary to prove that the person receiving the threat actually feared that the threat would be carried out.

Definitions

(4) In this section:

fear includes apprehension.

threat to cause serious harm to a person includes a threat to substantially contribute to serious harm to the person.

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.

471.13 Causing a dangerous article to be carried by a postal or similar service

Offence

(1) A person (the ***first person***) is guilty of an offence if:

(a) the first person causes an article to be carried by a postal or similar service; and

(b) the person does so in a way that gives rise to a danger of death or serious harm to another person; and

(c) the first person is reckless as to the danger of death or serious harm.

Penalty: Imprisonment for 10 years.

Danger of death or serious harm

(2) For the purposes of this section, if a person's conduct exposes another person to the risk of catching a disease that may give rise to a danger of death or serious harm to the other person, the conduct is taken to give rise to a danger of death or serious harm to the other person.

(3) For the purposes of this section, a person's conduct gives rise to a danger of death or serious harm if the conduct is ordinarily capable of creating a real, and

not merely a theoretical, danger of death or serious harm.

(4) For the purposes of this section, a person's conduct may give rise to a danger of death or serious harm whatever the statistical or arithmetical calculation of the degree of risk of death or serious harm involved.

(5) In a prosecution for an offence against subsection (1), it is not necessary to prove that a specific person was actually placed in danger of death or serious harm by the conduct concerned.

Definition

(6) To avoid doubt, the definition of **carry by post** in section 470.1 does not apply to this section.

471.15 Causing an explosive, or a dangerous or harmful substance, to be carried by post

Offence

(1) A person is guilty of an offence if:

(a) the person causes an article to be carried by post; and

(b) the article consists of, encloses or contains:

(i) an explosive; or

(ii) a dangerous or harmful substance or thing that the regulations say must not, without exception, be carried by post.

Penalty: Imprisonment for 10 years.

Geographical jurisdiction

(2) Section 15.3 (extended geographical jurisdiction—category C) applies to an offence against subsection (1).