HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

Matter No S172/2012

MAN HARON MONIS APPELLANT

AND

THE QUEEN & ANOR RESPONDENTS

Matter No S179/2012

AMIRAH DROUDIS APPELLANT

AND

THE QUEEN & ANOR RESPONDENTS

Monis v The Queen
Droudis v the Queen
[2013] HCA 4
27 February 2013
S172/2012 & S179/2012

ORDER

In Matter No S172/2012:

Appeal dismissed.

In Matter No S179/2012:

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

G O'L Reynolds SC with J C Hewitt and G R Rubagotti for the appellant in S172/2012 (instructed by Aston Legal)

D M J Bennett QC with A K Flecknoe-Brown for the appellant in S179/2012 (instructed by CBD Criminal Defence Lawyers)

J V Agius SC with M G McHugh for the first respondent in both matters (instructed by Commonwealth Director of Public Prosecutions)

M G Sexton SC, Solicitor-General for the State of New South Wales with S E Pritchard for the second respondent in both matters (instructed by Crown Solicitor (NSW))

Interveners

T M Howe QC with R J Orr for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Hinton QC, Solicitor-General for the State of South Australia with L K Byers for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

S G E McLeish SC, Solicitor-General for the State of Victoria with A D Pound for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

G R Donaldson SC, Solicitor-General for the State of Western Australia with J E Shaw for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

G J D del Villar for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Monis v The Queen
Droudis v The Queen

Constitutional law – Implied freedom of communication on government and political matters – Criminal offence under s 471.12 of *Criminal Code* (Cth) for person to use postal or similar service in way that "reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive" – Appellants allegedly sent communications to relatives of Australian soldiers and officials killed in Afghanistan and Indonesia – Communications criticised deployment of Australian troops in Afghanistan in terms critical of deceased – Appellants charged with using and aiding and abetting use of postal service in way that reasonable persons would regard as offensive – Whether s 471.12 in its application to "offensive" uses of postal service effectively burdens implied freedom of political communication – Whether s 471.12 in its application to "offensive" uses of postal service is reasonably appropriate and adapted to legitimate end in manner compatible with system of representative and responsible government.

Statutes – Interpretation – Whether purpose of s 471.12 of *Criminal Code* (Cth) in its application to "offensive" uses of postal service is only to prohibit those offensive uses – Whether purpose of s 471.12 in its application to "offensive" uses of postal service is to prohibit misuse of service for intrusion of seriously offensive material into home or workplace – Whether s 471.12 in its application to "offensive" uses of postal service is limited to seriously offensive uses.

Words and phrases – "effectively burden", "legitimate end", "offensive", "proportionality", "reasonable person", "reasonably appropriate and adapted".

Constitution, ss 7, 24, 128.
Criminal Code (Cth), Div 471, s 471.12.

Introduction

1 These appeals arise out of charges laid against the appellants, one of whom, Man Haron Monis, is said, in 2007, 2008 and 2009, to have written letters[1] to parents and relatives of soldiers killed on active service in Afghanistan which were critical of Australia's involvement in that country and reflected upon the part played in it by the deceased soldiers. The other appellant, Amirah Droudis, is said to have aided and abetted him in relation to a number of those letters. The appellants were charged under s 471.12 of the *Criminal Code* (Cth) ("the Code"), which prohibits the use of a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, "offensive".

2 The Australian Constitution limits the power of parliaments to impose burdens on freedom of communication on government and political matters. No Australian parliament can validly enact a law which effectively burdens freedom of communication about those matters unless 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 in Australia. The question in these appeals is whether the provision under which the appellants were charged exceeds the limits of the legislative power of the Commonwealth Parliament because it impermissibly burdens freedom of communication about government or political matters.

3 The answer to the question is in the affirmative. That answer depends upon the proper interpretation, legal effect, operation and purpose of the impugned provision. It does not depend upon any opinion about or characterisation of the conduct said to have given rise to the charges. Nor does it involve any general conclusion about the extent of Commonwealth power to legislate in respect of such conduct.

Factual and procedural background

4 Mr Monis was charged on indictment in the District Court of New South Wales on 12 April 2011 with 13 offences against s 471.12 of the Code. Ms Droudis was charged on the same indictment with eight counts alleging that she aided and abetted the commission of offences against s 471.12 by Mr Monis. A typical count against Mr Monis alleged that he:

> "On about 27 November 2007 at Sydney, New South Wales, used a postal service, namely Australia Post, in a way that reasonable persons would regard as being, in all the circumstances, offensive by sending a letter

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1 In one case a sound recording was said to have been sent.

dated 25 November 2007 addressed to Mr John Worsley, the father of Private Luke Worsley, an Australian Defence Force Soldier killed in action on 23 November 2007 … Contrary to section 471.12 of the *Criminal Code 1995*".

5 Section 471.12 of the Code provides:

"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."

6 The letters that were the subject of the charges were described by Bathurst CJ in the Court of Criminal Appeal of New South Wales[2] as "at one level ... critical of the involvement of the Australian Military in Afghanistan" but also as referring "to the deceased soldiers in a denigrating and derogatory fashion."[3]

7 The appellants filed notices of motion in the District Court seeking to have the indictment quashed on the basis that s 471.12 was invalid because it infringed the constitutional implied freedom of political communication. On 18 April 2011, Tupman DCJ dismissed the motions. Appeals to the Court of Criminal Appeal under s 5F of the *Criminal Appeal Act* 1912 (NSW)[4] were dismissed on 6 December 2011.

8 On 22 June 2012 the appellants were granted special leave to appeal to this Court from the decision of the Court of Criminal Appeal. The appeals to the Court of Criminal Appeal and to this Court were concerned only with the validity of s 471.12 in so far as it relates to "offensive" uses of a postal service. A challenge to the harassment limb of s 471.12, which was argued in the District

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2 *Monis v The Queen* (2011) 256 FLR 28.

3 (2011) 256 FLR 28 at 30 [4].

4 Section 5F of the *Criminal Appeal Act* 1912 (NSW) provides for appeals to the Court of Criminal Appeal against an interlocutory judgment or order given in proceedings to which the section applies. That includes proceedings for the prosecution of offenders on indictment in the Supreme Court or the District Court.

Court, was abandoned in the Court of Criminal Appeal and not pursued in this Court.

The statutory framework

9 Section 471.12 appears in Pt 10.5 of Ch 10 of the Code. Chapter 10 is entitled "National infrastructure". Part 10.5 is entitled "Postal services". Section 470.1 sets out an important definition of the term "postal or similar service". That term means, inter alia:

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

In reliance upon the legislative powers conferred on the Commonwealth Parliament by s 51(i) and (xx) of the Constitution the definition is extended to cover courier and packet or parcel carrying services provided in the course of or in relation to interstate or overseas trade or commerce[5] and such services provided by constitutional corporations[6]. The extended definition is not limited to courier or packet or parcel carrying services which are "postal or other like services" within the meaning of s 51(v) of the Constitution. Thus a packet or parcel carrying service conducted by a trading corporation and distributing pamphlets, brochures or other literature and video or audio recordings would appear to be within the extended definition.

10 Offences created under Div 471 include the theft and receiving, taking or concealing of mail-receptacles, articles or postal messages[7]. The Division creates offences relating to damaging or destroying mail-receptacles, articles or personal

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5 The Code, s 470.1.

6 The Code, s 470.1.

7 The Code, ss 471.1, 471.2, 471.3.

messages[8] and tampering with mail-receptacles[9]. It is an offence to cause an article to be carried by a postal or similar service with the intention of inducing a false belief that it consists of, encloses or contains an explosive or a dangerous or harmful substance or thing or that such a substance or thing has been or will be left in any place[10]. It is an offence to use a postal or similar service to make a threat to kill another person or to cause serious harm[11]. It is also an offence to cause a dangerous article to be carried by a postal or similar service[12] or to cause an explosive or a dangerous or harmful substance to be carried by post[13].

11 There is no doubt that a purpose of Div 471 of the Code is to prevent interference with or disruption of postal and similar services and the use of those services for criminal purposes. A number of the offences created by that Division cover conduct similar to conduct which would be criminal under provisions of State law[14] not specific to the use of postal services. The impugned provision, so far as it relates to "offensive" use of a postal or similar service, does not appear to have any precise counterpart in the general criminal law concerning offences involving the sending or delivering of things from one person to another. The offence of "stalking" under South Australian and Tasmanian law covers sending offensive material to a person but in a manner which would reasonably be expected to cause the recipient apprehension or fear[15]. There is no equivalent limitation on the offensive use limb of s 471.12. The latter offence does, however, have mental or "fault" elements.

12 The "general principles of criminal responsibility" set out in the Code apply to all offences under the Code. The elements of offences are classified as

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8 The Code, s 471.6.

9 The Code, s 471.7.

10 The Code, s 471.10.

11 The Code, s 471.11.

12 The Code, s 471.13.

13 The Code, s 471.15.

14 For example see *Crimes Act* 1900 (NSW), ss 31, 47, 93R; *Crimes Act* 1958 (Vic), s 317A; *Criminal Law Consolidation Act* 1935 (SA), ss 248, 250; *Criminal Code* (Q), s 321A; *Criminal Code* (WA), s 294(4); *Criminal Code* (Tas), ss 170, 192.

15 *Criminal Law Consolidation Act* 1935 (SA), s 19AA(1)(a)(iv), (iva) and (ivb); see also *Criminal Code* (Tas), s 192(1)(f) and (g) and (3).

physical and fault elements[16]. Physical elements may consist of conduct or a result of conduct or a circumstance in which conduct or a result of conduct occurs[17]. A fault element may be "intention, knowledge, recklessness or negligence"[18]. Where no fault element is specified for a physical element consisting only of conduct, the Code provides that intention is the fault element for that physical element[19]. If a physical element for which no fault element is specified consists of a circumstance or a result, recklessness is the fault element for that physical element[20]. A person is reckless with respect to a circumstance if[21]:

> "(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
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> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk."

A similar test applies to recklessness with respect to a result[22]. The question whether taking a risk is unjustifiable is a question of fact[23]. Where recklessness is a fault element, proof of intention, knowledge or recklessness will satisfy that element[24].

13 The Commonwealth, supported by the Attorney-General for Victoria, submitted that the offence created by s 471.12, in its application to offensive uses, comprises two physical elements:

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16 The Code, s 3.1(1).

17 The Code, s 4.1(1).

18 The Code, s 5.1(1).

19 The Code, s 5.6(1).

20 The Code, s 5.6(2).

21 The Code, s 5.4(1).

22 The Code, s 5.4(2).

23 The Code, s 5.4(3).

24 The Code, s 5.4(4).

- The use of a postal or similar service;
- The circumstance that the use of the service would be regarded by reasonable persons as being, in all the circumstances, offensive.

That submission was not disputed and, subject to one qualification, should be accepted. The qualification is that the characterisation of the use of a postal or similar service as "offensive" is better regarded as a "circumstance" than as a "result" of the conduct[25]. It is not a "result" because, being framed objectively by reference to how "reasonable persons" would regard the conduct, it does not import a requirement that any person was actually offended[26]. On that basis the fault element of intention applies to the use of the postal or similar service. The fault element of recklessness applies to the characterisation of the use as offensive.

14 It follows that to establish the offence of offensive use of a postal or similar service it is necessary to prove at least that:

- The accused used a postal or similar service;
- The accused intended to do so;
- The accused did so in a way, whether by method of use or the content of a communication, that reasonable persons would regard as being in all the circumstances offensive;
- The accused was aware of a substantial risk that the way in which he or she used the service would be regarded by reasonable persons as being in all the circumstances offensive; and
- Having regard to the circumstances known to the accused it was unjustifiable to take the risk.

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25 See similarly worded s 474.17 of the Code, which applies to the use of carriage services, the elements of which were considered in *Crowther v Sala* [2008] 1 Qd R 127 at 136–137 [47]–[48] per Philip McMurdo J, Muir J concurring at 133 [30].

26 A longstanding construction of "offensive" as distinct from "offend" or "offends": *Inglis v Fish* [1961] VR 607 at 611 per Pape J; *Ellis v Fingleton* (1972) 3 SASR 437 at 440–443 per Mitchell J and authorities there cited; *Khan v Bazeley* (1986) 40 SASR 481 at 483 per O'Loughlin J. It nevertheless does not resolve the difficulty of determining the assumed perspective of the "reasonable person", discussed at [44]–[47] of these reasons.

In its application to the content of communications delivered using postal or similar services, the prohibition applies to communications the content of which reasonable persons would regard as being in all the circumstances offensive, whether or not anyone was actually offended by it.

15 A provision of the law of the United Kingdom, which bears some resemblance to s 471.12 but is not confined to postal or similar services, is s 1(1) of the *Malicious Communications Act* 1988 (UK). That provision makes it an offence to send a person any article "which is, in whole or part, of an indecent or grossly offensive nature". However, unlike the offence created by s 471.12 of the Code, the sender must have the purpose of causing distress or anxiety to the recipient. As appears from the discussion of the physical and fault elements of the offence created by s 471.12, it is not necessary, in order to prove that offence, to demonstrate that the use of the postal or similar service was for a particular purpose.

16 Another imperfect analogue of the offence created by s 471.12 is found in s 127(1)(a) of the *Communications Act* 2003 (UK). That provision makes it an offence to send a message that is grossly offensive by means of a "public electronic communications network"[27]. Its object, as formulated in the decision of the House of Lords in *Director of Public Prosecutions v Collins*[28], is "to prohibit the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of our society."[29] Lord Brown, who joined in that formulation, also described the provision as "intended to protect the integrity of the public communication system"[30]. The purpose of s 1(1) of the *Malicious Communications Act*, which is not linked to the use of postal or other communications systems, was described in *Collins* as "to protect people against receipt of unsolicited messages which they may find seriously objectionable."[31]

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27 Defined as "an electronic communications network provided wholly or mainly for the purpose of making electronic communications services available to members of the public": *Communications Act* 2003 (UK), s 151.

28 [2006] 1 WLR 2223; [2006] 4 All ER 602.

29 [2006] 1 WLR 2223 at 2227 [7] per Lord Bingham, Lord Nicholls and Baroness Hale agreeing at 2229 [16], [17]; [2006] 4 All ER 602 at 607, 609.

30 [2006] 1 WLR 2223 at 2232 [27]; [2006] 4 All ER 602 at 612.

31 [2006] 1 WLR 2223 at 2227 [7] per Lord Bingham; [2006] 4 All ER 602 at 607.

17 The *Malicious Communications Act* gave effect to a recommendation of the Law Commission in a report, published in 1985, on "Poison-Pen Letters"[32]. The Commission observed that there were no judicial decisions on the meaning of the term "grossly offensive" but had no reason to suppose that it had given rise to any difficulty[33]. More than twenty years later in *Connolly v Director of Public Prosecutions*[34] those words were held to be ordinary English words and to apply to the conduct of an anti-abortion campaigner who sent photographs of aborted foetuses through the mail to pharmacists. Dyson LJ, with whom Stanley Burnton J concurred, construed s 1(1), pursuant to the requirements of the *Human Rights Act* 1998 (UK), in light of the freedom of expression declared in Art 10(1) of the European Convention on Human Rights. Section 1(1) was found to infringe that freedom. It was nevertheless held to be justified under Art 10(2) as "necessary in a democratic society … for the protection of the … rights of others". Those were the "rights" of the recipients of the letters not to receive grossly offensive photographs of aborted foetuses at their place of work where the photographs were sent for the purpose of creating distress or anxiety[35]. They were rights formulated by applying the statutory prohibition to the facts of the particular case[36].

18 A similar approach, albeit in a different statutory context, appears in a number of the judgments of the House of Lords in *R (ProLife Alliance) v British Broadcasting Corporation*[37]. Their Lordships reversed a decision of the Court of Appeal allowing judicial review of a refusal by the BBC to transmit a political party broadcast showing images of aborted foetuses. The refusal was based on the opinion that the material would be "offensive to public feeling" within the meaning of s 6(1)(a) of the *Broadcasting Act* 1990 (UK). That statutory standard was linked to a general rubric of "taste and decency". Lord Nicholls said it was not for the Court to carry out a balancing exercise "between the requirements of

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32 The Law Commission, *Criminal Law: Report on Poison-Pen Letters*, Law Com No 147, (1985).

33 The Law Commission, *Criminal Law: Report on Poison-Pen Letters*, Law Com No 147, (1985) at 17 [4.15].

34 [2008] 1 WLR 276; [2007] 2 All ER 1012.

35 *Connolly v Director of Public Prosecutions* [2008] 1 WLR 276 at 285 [28] per Dyson LJ; [2007] 2 All ER 1012 at 1021–1022.

36 For a critical discussion of the "rights of others" approach, see Khan, "A 'Right Not to be Offended' Under Article 10(2) ECHR? Concerns in the Construction of the 'Rights of Others'", (2012) *European Human Rights Law Review* 191.

37 [2004] 1 AC 185.

freedom of political speech and the protection of the public from being unduly distressed in their own homes."[38] Parliament had struck the balance[39]. Lord Hoffmann referred to the statutory standard as having "created expectations on the part of the viewers as to what they will and will not be shown on the screens in their homes."[40] Lord Walker referred to the "right" of the citizen "not to be shocked or affronted by inappropriate material transmitted into the privacy of his home."[41] Putting to one side whether such a right existed under the European Convention, his Lordship characterised it as an "indisputable imperative"[42].

19 No negative juristic right, equivalent to those formulated in *Connolly* and *ProLife*, can be derived from s 471.12 of the Code. It was not suggested that such a thing exists at common law. Nor should such a right be conjured in order to erect a statutory purpose to protect it. The use of the term "rights of others" as a source of rights beyond those enumerated in the European Convention on Human Rights and derogating from the freedom of expression in Art 10(1) has been criticised in terms relevant to "rights of others" analysis in Australia[43]:

> "Such a potentially limitless pool of 'countervailing rights' is deeply unattractive and troubling, threatening as it does to swallow up the right to freedom of expression."

20 It is sufficient to observe that a relevant statutory purpose of s 471.12 is the prevention of offensive uses of postal and similar services. That purpose does not aid in the construction of s 471.12 as it is a purpose derived from the text itself. It can only be given content by the construction of the section

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38 *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 226 [16], Lord Millett agreeing at 241 [82].

39 *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 226 [16], Lord Millett agreeing at 241 [82].

40 *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 239 [70].

41 *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 252 [123].

42 *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 252 [123]. The term was used in *Chassagnou v France* (1999) 29 EHRR 615 at 687 [113] as a justification for interference with the enjoyment of a Convention right in order to protect rights or freedoms not enumerated in the Convention.

43 Cram, "The Danish Cartoons, Offensive Expression, and Democratic Legitimacy", in Hare and Weinstein (eds), *Extreme Speech and Democracy*, (2009) 311 at 320.

applying other criteria. Criteria relevant in this case are that the provision attaches a criminal sanction to an offensive use of postal or similar services and that such uses may include the content of a communication thereby affecting freedom of expression. The criminal sanction and the application of the principle of legality both indicate a requirement for a high threshold to be surmounted before the content of a communication made using a postal or similar service can be characterised as "offensive". A useful definition of any larger statutory purpose based upon common attributes of or significance to be attached to "postal or similar services" is elusive.

The District Court decision

21 In the District Court Tupman DCJ construed the term "offensive" as meaning "something that would be likely to wound (as opposed to merely hurt) the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person in all of the circumstances." Her Honour rejected a submission that it should be construed as including "repugnant in a moral sense".

22 Tupman DCJ accepted that even on her construction of the term "offensive" s 471.12 could cover "legitimate political or governmental discourse or communication". Her Honour held that the purposes of the provision are:

- To protect the "integrity of the post both physically and as a means of communication in which the public can have confidence";
- To prevent breaches of the peace which might arise out of the receipt of an offensive communication;
- To prevent harm in the nature of wounded feelings, anger, resentment, disgust or outrage on the part of the recipient.

23 Her Honour concluded that s 471.12 is reasonably appropriate and adapted to serve legitimate legislative ends and that it does so in a manner compatible with the maintenance of the system of government prescribed by the Constitution. The provision thus met the criteria for validity enunciated by this Court in *Lange v Australian Broadcasting Corporation*[44] and the challenge to its validity failed.

The decision of the Court of Criminal Appeal

24 There were three separate sets of reasons for judgment in the Court of Criminal Appeal. Bathurst CJ held that for the use of a postal service to be offensive within s 471.12 it had to be "calculated or likely to arouse significant

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44 (1997) 189 CLR 520; [1997] HCA 25.

anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances."[45] It would not be sufficient if the use would only hurt or wound the feelings of the recipient in the mind of a reasonable person[46]. Allsop P adopted the same limiting construction[47] and in the alternative proposed a further requirement, not adopted by Bathurst CJ, that the conduct must be such as to cause "real emotional or mental harm, distress or anguish" to the addressee[48]. That alternative, directed to the infliction of harm on the recipients of offensive communications, involved, with respect, an unjustifiable gloss on the meaning of "offensive". McClellan CJ at CL took a more open-textured approach, holding that[49]:

> "The section will only be breached if reasonable persons, being persons who are mindful of the robust nature of political debate in Australia and who have considered the accepted boundaries of that debate, would conclude that the particular use of the postal service is offensive."

25 Bathurst CJ and Allsop P correctly held that s 471.12 effectively burdened freedom of communication about government and political matters[50]. As Allsop P observed[51]:

> "Some political communications may, by their very nature, be objectively calculated or likely to cause or arouse significant anger, significant resentment, outrage, disgust or hatred."

McClellan CJ at CL, although not expressly stating that he did so, appears to have reached a similar conclusion[52].

26 Bathurst CJ identified the legislative purposes of s 471.12 as including the protection of persons from being subjected to material that is "offensive" in the

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45 (2011) 256 FLR 28 at 39 [44].

46 (2011) 256 FLR 28 at 39 [44].

47 (2011) 256 FLR 28 at 48 [83].

48 (2011) 256 FLR 28 at 50 [89].

49 (2011) 256 FLR 28 at 54–55 [118].

50 (2011) 256 FLR 28 at 42 [56] per Bathurst CJ, 48–49 [84]–[85] per Allsop P.

51 (2011) 256 FLR 28 at 48 [84].

52 (2011) 256 FLR 28 at 53 [108].

sense in which his Honour had construed that term. His Honour inferred that the legislature considered such protection necessary having regard to the features of a postal service including:

- That the post is generally sent to a person's home or business address and therefore personalised;

- That material sent by post is often unable to be avoided in the ordinary course of things[53].

Allsop P accepted a submission that the purpose of the provision was to protect "the integrity of the post"[54]. His Honour said[55]:

> "It is legitimate in the maintenance of an orderly, peaceful, civil and culturally diverse society such as Australia that services that bring communications into the homes and offices of people should not be such as to undermine or threaten a legitimate sense of safety or security of domain, and thus public confidence in such services."

McClellan CJ at CL did not expressly identify the purpose of the provision. Each of the members of the Court of Criminal Appeal held that s 471.12, in its application to offensive uses of a postal service, was reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the system of government prescribed by the Constitution[56] and was valid.

27 Their Honours placed some emphasis upon the use of postal and similar services to deliver letters and articles to "homes and offices". Their emphasis was reflected in the Commonwealth Attorney-General's submission to this Court that the purpose of s 471.12 is to prevent "the misuse of postal services to effect unwanted and undesirable intrusions into private spaces, so as to preserve public confidence in the use of those services." That approach echoes the observation by the Supreme Court of the United States in *Rowan v Post Office Department*[57] that:

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53 (2011) 256 FLR 28 at 42–43 [59].

54 (2011) 256 FLR 28 at 46 [78].

55 (2011) 256 FLR 28 at 46 [78].

56 (2011) 256 FLR 28 at 44 [67] per Bathurst CJ, 50 [91] per Allsop P, 55 [119] per McClellan CJ at CL.

57 397 US 728 at 737 (1970).

> "The ancient concept that 'a man's home is his castle …' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another."

In that case the Supreme Court upheld the validity, against a First Amendment challenge, of legislation under which a recipient of "pandering advertisement[s]"[58] could request the Postmaster-General to direct the sender to refrain from further postings to that address. A shadow of that approach may also be seen in the observation made in the majority opinion in *United States Postal Service v Council of Greenburgh Civic Associations*[59] that:

> "There is neither historical nor constitutional support for the characterization of a letterbox as a public forum."

What might seem to be a trite common law analogue of that proposition appears in the observation of Stamp LJ in *Hubbard v Pitt*[60]:

> "Judges may ardently believe in the liberty to speak, the liberty to assemble and the liberty to protest or communicate information: but the necessity to preserve these liberties would not constrain the court to refuse a plaintiff an injunction to prevent defendants exercising those liberties in his front garden."

The analogy breaks down to the extent that it posits an exercise of the liberty which infringes the legal rights of a third party[61]. A closer analogy may be found in the reasoning involving the "rights of others" and "indisputable imperatives" mentioned in *Connolly* and *ProLife*.

28 Reference to United States authority must have regard to the particular history of postal services in that country as a means of political communication of such importance that postal services policy and legislation is said to have shaped First Amendment doctrine[62]. That is not to deny the historical

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58 397 US 728 at 728 (1970).

59 453 US 114 at 128 (1981).

60 [1976] 1 QB 142 at 187.

61 In that case an interlocutory injunction was upheld to restrain protesters picketing the premises of a real estate agent, there being a serious issue to be tried whether the defendants were committing the tort of private nuisance.

62 Desai, "The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine", (2007) 58 *Hastings*

(Footnote continues on next page)

importance, in Australia, of the post as a mechanism of political communication. In *Bradley v The Commonwealth*[63], Barwick CJ and Gibbs J described postal and telephone services as "among the most important amenities available to the people of the Commonwealth" and as "essential to the conduct of trade and commerce as well as to the enjoyment of any real freedom in the dissemination of information and opinion."[64] Their Honours added that it was legitimate to have regard to those considerations when interpreting the *Post and Telegraph Act* 1901 (Cth)[65]. The interpretive task in these appeals makes reference to those considerations not only legitimate but necessary. *Bradley* supports a restrictive construction of the constraint imposed by the term "offensive" in s 471.12. Such an approach accords with and does not exceed the principle of legality requiring a construction, if it be available, that would minimise the incursion of the statutory prohibition into the common law freedom of speech and expression. On the other hand, what was said in *Bradley* would not support a restrictive interpretation of laws enacted to prevent disruption to, or interference with, postal and other services as a medium of communication or their use for criminal purposes. However, what was said in that case does not lead to the identification of a mischief particularly relevant to postal and similar services, to which the impugned part of s 471.12 is directed.

29 The Court of Criminal Appeal's formulation of the legitimate ends served by s 471.12 in its application to offensive conduct invites scrutiny because of the very wide definition of postal and similar services in s 470.1 and the range of uses of such services which might be characterised as "offensive". Because of the definition of "postal or similar service" the scope of the prohibition extends well beyond cases involving the delivery of letters and parcels to homes and businesses through publicly owned or regulated postal services. For that reason formulations of the purposes served by s 471.12 beyond prevention of the conduct which it prohibits are of limited utility. General statements about "protection of the integrity of the post" or protection against delivery of unwanted and unavoidable communications to home or office do not adequately explain the scope of the offence. There is nothing in the section which would necessarily exclude the characterisation as "offensive" of communications sent to persons who are pleased to receive them. The sending by a racist organisation of

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Law Journal 671; see also Ammori, "First Amendment Architecture", (2012) *Wisconsin Law Review* 1 at 37–38.

63 (1973) 128 CLR 557; [1973] HCA 34.

64 (1973) 128 CLR 557 at 566.

65 The interpretive task in that case concerned the power of the Postmaster-General to deprive any person of the liberty to use the postal and telephonic services.

"hate literature" to members or sympathisers could, depending upon its content, fall within the section. If that possibility is open so are many others.

Grounds of appeal and contentions

30 The appellants took issue with the Court of Criminal Appeal's construction of s 471.12 and particularly of the term "offensive". Each also asserted that the Court of Criminal Appeal ought to have found that s 471.12 infringed the implied freedom of political communication. The first respondent filed a notice of contention in each appeal asserting that the Court of Criminal Appeal erred in holding that s 471.12 effectively burdened the implied freedom of communication about government or political matters. Before turning to the construction of s 471.12 it is useful to consider its legislative antecedents and history.

Postal services offences—legislative antecedents

31 The provision by government of postal services available to the general public dates back, in England, to 1635 in the reign of Charles I, when the Royal Mail was made available for that purpose. Imperial legislation in the reign of Queen Anne[66] created the office of Postmaster-General for the United Kingdom and provided for that official to establish post offices in the colonies.

32 The first postal legislation in the Colony of New South Wales was the *Postage Act* 1825 (NSW)[67]. It was a temporary measure to provide for the posting and conveyance of letters until a post office was established under the *Postage Act* 1835 (NSW)[68]. The New South Wales Government took control of postal services from private entrepreneurs who had been vice-regal appointees. Nevertheless, various functions of the postal service were contracted out[69]. Postal services developed in each of the colonies. By the end of the 19th century colonial postal services were established throughout the Australian continent and were supported by an array of statutes. Those statutes included offence-creating

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66 *Post Office (Revenues) Act* 1710 (9 Anne c 11).

67 6 Geo IV No 23.

68 5 Gul IV No 24.

69 Lee, *Linking a Nation: Australia's Transport and Communications 1788–1970*, (2003), Ch 7; available at <http://www.environment.gov.au/heritage/ahc/publications/commission/books/linking-a-nation/chapter-7.html>.

provisions relating to the posting of letters bearing or containing indecent or obscene, profane or libellous publications[70].

33 In the Australasian Convention Debates at Adelaide in 1897, there was some discussion about whether the Commonwealth Parliament should have legislative responsibility for both postal and telegraphic services[71]. However, the national significance of those services never seems to have been in doubt[72]. A proposal to limit federal power to postal and telegraphic services outside the boundaries of the Commonwealth[73] was unsuccessful. The example of the United States Constitution was invoked against objections that postal services should remain in the hands of State governments. Alfred Deakin said[74]:

> "If there has been one great federal success it has been the American post office".

Postal services were properly seen as a species of national communications infrastructure.

34 A power was conferred upon the Commonwealth Parliament by s 51(v) of the Constitution to make laws with respect to:

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70 *Postage Acts Amendment Act* 1893 (NSW), s 18; *Post Office Act* 1890 (Vic), s 118; *Post Office Act* 1876 (SA), s 91; *Post and Telegraph Act* 1891 (Q), s 98; *Post and Telegraph Act* 1893 (WA), s 86; *Post Office Act* 1881 (Tas), s 107.

71 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 25 March 1897 at 114; 29 March 1897 at 233–234, 252; 30 March 1897 at 266–267, 318–319, 327–328; 31 March 1897 at 376; 17 April 1897 at 769–774; 22 September 1897 at 1068–1069.

72 The national character of postal and telegraphic services was foreshadowed long before Federation. Earl Grey's Privy Council Committee in 1849 designated the "conveyance of letters" as a matter of federal power. In 1853 Wentworth's Constitutional Committee identified "postage between the said colonies" as a matter of federal responsibility. His Memorial in 1857 conferred on a proposed Federal Assembly legislative power with respect to "intercolonial telegraphs and postage". Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 85, 91 and 94.

73 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 559.

74 *Official Record of the Debates of the Australasian Federal Convention*, (Adelaide), 17 April 1897 at 770.

> "postal, telegraphic, telephonic, and other like services".

The Commonwealth was also given exclusive power under s 52(ii) of the Constitution to make laws with respect to:

> "matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth".

Section 69 of the Constitution provides that on a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth, specified departments of the public service in each State should be transferred to the Commonwealth. One of the departments so specified was "posts, telegraphs, and telephones". The proclaimed date for the transfer of those departments was 1 March 1901.

35 The first Commonwealth legislation relating to postal services was the *Post and Telegraph Act* 1901. That Act provided, in s 107(c), that it was an offence to send by post any postal article which:

> "has thereon or therein or on the envelope or cover thereof any words marks or designs of an indecent obscene blasphemous libellous or grossly offensive character".

That provision was based upon s 98 of the *Post and Telegraph Act* 1891 (Q), which was in turn based upon s 4(1) of the *Post Office (Protection) Act* 1884 (UK). Section 4(1) prohibited, inter alia, the sending of a postal packet which enclosed "any indecent or obscene" article or had "on such packet, or on the cover thereof, any words, marks, or designs of an indecent, obscene, or grossly offensive character." The scope of the term "grossly offensive" was discussed in the Committee debate on the 1884 Bill in the House of Commons. A concern was expressed that the provision could pick up something that "did nothing more than lacerate the feelings of the person receiving it."[75] That concern was met by the assertion that any tribunal would understand "grossly offensive" as "not offensive to a particular person, but offensive to public morality"[76].

36 Reference to the Committee debate in 1884 supports the conclusion available from the text of s 107(c) that the epithet "grossly" conveyed an instruction to courts that criminal liability was confined to conduct in the higher

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75 United Kingdom, House of Commons Debates, 9 August 1884, vol 292, cc370–371.

76 United Kingdom, House of Commons Debates, 9 August 1884, vol 292, cc371–372.

ranges of offensiveness. The Full Court of the Supreme Court of South Australia in *Romeyko v Samuels*[77] construed "grossly offensive" in s 107(c) as "offensive to a very substantial degree."[78] The application of both the statutory expression and its judicial translation required an evaluative judgment by the Court. Such judgments are sometimes informed by a policy or purpose attributable to the statute in which the relevant provision appears. Where no such purpose can be formulated the evaluative judgment will be informed by the construction of the provision. *Romeyko v Samuels* may be regarded as an example of such a case. No purposive aspect of s 107(c) particular to postal or telegraphic services was identified in that case as relevant to the application of the term "grossly offensive". In the present appeals the purpose of s 471.12 was said to be illuminated by its history and antecedents.

37 The *Post and Telegraph Act* 1901 was repealed in 1975[79] and replaced by the *Postal Services Act* 1975 (Cth)[80]. The Act contained no equivalent to s 107(c) of the *Post and Telegraph Act* 1901; however, it did provide in s 116 that regulations could be made for the specific purpose of prohibiting, restricting, regulating or imposing conditions with respect to the sending by post or by courier service of articles that are indecent, obscene or offensive or contained material of this nature. Regulation 53A of the Postal Services Regulations, made under that Act in 1982, prohibited the sending by postal service of an article containing "matter not solicited by the person to whom it is sent, being matter of an indecent, obscene or offensive nature"[81].

38 The Australian Postal Commission was incorporated as the Australian Postal Corporation in 1989[82] and was continued in operation by the *Australian Postal Corporation Act* 1989 (Cth)[83]. Section 85S of the *Crimes Act* 1914 (Cth) ("the Crimes Act"), the most direct textual precursor of s 471.12, was enacted in

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77 (1972) 2 SASR 529.

78 (1972) 2 SASR 529 at 566 per Bray CJ, Bright and Sangster JJ agreeing at 567.

79 *Postal and Telecommunications Commissions (Transitional Provisions) Act* 1975 (Cth), s 4, Sched 1.

80 Enacted following the completion of the *Report of the Commission of Inquiry into the Australian Post Office*, (1974).

81 Postal Services Regulations (Amendment) 1982.

82 *Postal Services Amendment Act* 1988 (Cth), s 5; *Commonwealth of Australia Gazette*, S402, 20 December 1988.

83 *Australian Postal Corporation Act* 1989 (Cth), ss 12, 13.

1989[84]. That section replicated the offences previously set out in the Postal Services Regulations. Section 85S provided:

> "A person shall not knowingly or recklessly:
>
> (a) use a postal … service supplied by Australia Post to menace or harass another person; or
>
> (b) use a postal … service supplied by Australia Post in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive."

There were amendments to the text and section numbering in 1997 and 2001 but the phrase "in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive" remained unchanged.

39 The text of s 85S was drawn in part from s 86 of the *Telecommunications Act* 1975 (Cth). That section prohibited the use of a telecommunications service for the purpose of menacing or harassing another person. It also prohibited the sending over a telecommunications system of a communication or information "likely to cause reasonable persons, justifiably in all the circumstances, to be seriously alarmed or seriously affronted." The Explanatory Memorandum relevant to s 85S included a statement that the opportunity had been taken to treat Australia Post and the telecommunications carriers consistently[85]. That statement suggested that the level of offensiveness contemplated by s 85S was consistent with serious affront.

40 In 2002, s 85S of the Crimes Act was repealed and replaced by the first version of s 471.12 of the Code. That section was in the same terms as the present s 471.12 save that it did not contain the words in parentheses in s 471.12(b) and used the passive voice "would be regarded by reasonable persons" instead of the active voice "reasonable persons would regard as being" used in the present version of the section.

41 The Explanatory Memorandum for the Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002, which enacted s 471.12 in its original form, observed that the new offence drew on the existing offence in s 85S of the

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84 *Telecommunications and Postal Services (Transitional Provisions and Consequential Amendments) Act* 1989 (Cth), s 5.

85 Telecommunications and Postal Services (Transitional Provisions and Consequential Amendments) Bill 1989, Explanatory Memorandum at 3.

Crimes Act but broadened its scope with respect to menacing and harassing material[86]. The Explanatory Memorandum further stated:

> "In practice, the offence would cover material that would make a person apprehensive as to his or her safety or well-being or the safety of his or her property as well as material containing offensive or abusive language or derogatory religious, racial or sexual connotations."

In the Second Reading Speech for the Bill in the Senate, the Minister observed that[87]:

> "Protecting the safety, security and integrity of Australia's information infrastructure, including postal and courier services, is a priority for this Government.
>
> The measures contained in this bill will ensure that these important communication services are not compromised by irresponsible, malicious or destructive behaviour."

42 The appellant Ms Droudis submitted that s 85S marked the advent of a concept of offence that covered a broader range of conduct than that covered by the Postal Services Regulations. That broad coverage was said to have been continued in s 471.12 and could include the use of a postal service inducing anger, resentment, outrage, disgust or hatred. It was broader than the concepts of "alarm" or "affront" in s 86(c) of the *Telecommunications Act* 1975. It did not take its colour from the words "menacing" or "harassing". Menacing conduct can be offensive. So too can harassing conduct. They offer no logical basis for preferring one construction of "offensive" over another.

43 In this case the legislative history supports the following conclusions:

- The term "offensive" in s 471.12 has an ancestry traceable to the *Post Office (Protection) Act* 1884 (UK);
- The textual setting in which the term "offensive" has been used in successive statutes and regulations relating to postal services has changed from time to time;
- The scope of the offence created by s 471.12, in its application to offensive conduct, does not reflect the culmination of a logical

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86 Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002, Explanatory Memorandum at 7.

87 Australia, Senate, *Parliamentary Debates* (Hansard), 11 March 2002 at 440.

progression of regulation or what the Commonwealth called metaphorically a "regulatory trajectory";

- It is not a purpose of the term "offensive" in s 471.12 to proscribe uses of postal or similar services which convey insults or slights or which are likely to engender hurt feelings;

- As a corollary of the preceding conclusion it is not a purpose of the offence created by s 471.12 to secure civility or courtesy in communications which use postal or similar services;

- The meanings of "offensive" as used in s 471.12 are in the higher ranges of seriousness.

Offensive to reasonable persons

44 The requirement that the prohibited use of a postal or similar service be one "that reasonable persons would regard as being, in all the circumstances, … offensive" imports an objective but qualitative criterion of criminal liability. Similar criteria have been judicially applied to "offensive conduct" in public order statutes notwithstanding the absence of express words of the kind found in s 471.12[88]. The characteristics of the reasonable person, judicially constructed for the purpose of such statutory criteria, have been variously described. A "reasonable man" in *Ball v McIntyre*[89] was "reasonably tolerant and understanding, and reasonably contemporary in his reactions." A reasonable person was said, in the Supreme Court of New South Wales, to be "neither a social anarchist, nor a social cynic"[90]. The reasonable person is a constructed proxy for the judge or jury. Like the hypothetical reasonable person who is consulted on questions of apparent bias[91], the construct is intended to remind the judge or the jury of the need to view the circumstances of allegedly offensive conduct through objective eyes and to put to one side subjective reactions which

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88 *Worcester v Smith* [1951] VLR 316 at 318 per O'Bryan J; *Inglis v Fish* [1961] VR 607 at 611 per Pape J; *Ball v McIntyre* (1966) 9 FLR 237 at 242–243 per Kerr J.

89 (1966) 9 FLR 237 at 245 per Kerr J; see also the recent decision of the Supreme Court of New Zealand in *Morse v Police* [2012] 2 NZLR 1 at 19 [38] per Elias CJ, 33 [98] per McGrath J.

90 *Spence v Loguch* unreported, Supreme Court of New South Wales, 12 November 1991 at 11 per Sully J.

91 See for example, *Johnson v Johnson* (2000) 201 CLR 488 at 493 [12] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; [2000] HCA 48.

may be related to specific individual attitudes or sensitivities. That, however, is easier said than done.

45 The "reasonable persons" test in s 471.12 does not specify the assumptions upon which it is to be applied. One assumption might be that the reasonable persons referred to in the section have bare knowledge of the allegedly offending use of a postal or similar service and its attendant circumstances but that it is a use not directed to them and not otherwise affecting them. An alternative assumption is that the reasonable persons are affected by the allegedly offensive use. In the present case that would require the assumption that the reasonable persons are the parents of recently deceased servicemen or women in receipt of the letters the subject of the indictment. The reasons for judgment of Bathurst CJ and Allsop P in the Court of Criminal Appeal posited an emotional reaction by the hypothetical reasonable persons but did not explain its origin[92].

46 The assumed perspective of the reasonable persons referred to in s 471.12 was not explored in these appeals. The more conservative assumption may be that of a reasonable person who knows of the allegedly offensive use and its attendant circumstances rather than that of a person to whom the allegedly offensive use is directed. In the event, for reasons that follow, it makes no difference to the outcome of these appeals.

47 A further question about the application of the reasonable persons test as formulated in the Court of Criminal Appeal arises from the need to show that such persons would react to the allegedly offensive use with significant anger, resentment, outrage, disgust or hatred. Such reactions are not to be explained as the outcome of a process of reasoning. They would involve the assumption, by the tribunal of fact, of some deeply and widely held values or attitudes with emotional content by which the allegedly offensive conduct is to be judged and which are discerned by the tribunal of fact as those of reasonable persons. Whether or not located in the eye of a reasonable beholder and whether or not narrowly defined, offensiveness is a protean concept which is not readily contained unless limited by a clear statutory purpose and other criteria of liability.

48 It would be useful to be able to identify a purposive framework, beyond that provided by s 471.12 itself, in which to apply the criterion of liability which it creates. The Commonwealth's submission invoked numinous concepts of "unwanted and undesirable intrusions into private spaces" and the preservation of

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92 (2011) 256 FLR 28 at 39 [44] per Bathurst CJ, Allsop P agreeing at 45 [70]. The perspective from which conduct or language is to be regarded as "offensive" raises difficult issues discussed by the late Professor Joel Feinberg in relation to what he called "profound offense": Feinberg, *Offense to Others*, (1985), Ch 9.

"public confidence" in the use of postal and similar services. Those terms and the invocation of the "integrity of the postal service" have a rhetorical ring about them. The latter term was used in the Second Reading Speech. They do not, however, provide a basis for a workable constraint upon the application of the criterion of offensiveness in s 471.12. Nor, as appears below, do they define with sufficient concreteness a "legitimate end" of the prohibition relevant to the question whether any burden it imposes upon freedom of political communication is permissible under the Constitution.

49 Public order offences relating to disorderly, insulting or offensive behaviour or language have purposes related to the regulation of conduct in or near public places. However, it is unwise to generalise about them. In a statute creating such an offence there is a close relationship between its construction and its purpose. Depending upon whether a low threshold or high threshold construction of the criterion of liability is adopted the prohibition may be directed to maintaining "decorum" in public places[93], upholding community standards and reasonable expectations of the community[94] or preventing conduct productive or likely to be productive of public disorder[95].

50 Different constructions and correspondingly different formulations of the statutory purpose of s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act* 1931 (Q), in its application to insulting words in or near a public place, were apparent in the judgments in *Coleman v Power*[96]. Gleeson CJ held that "insulting words" extended to the use of language which in the circumstances was "contrary to contemporary standards of public good order, and goes beyond what, by those standards, is simply an exercise of freedom to express opinions on controversial issues."[97] That construction of the prohibition also defined its purpose, which the Chief Justice expressed broadly[98]:

> "the preservation of order in public places in the interests of the amenity and security of citizens, and so that they may exercise, without undue disturbance, the rights and freedoms involved in the use and enjoyment of such places."

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93 *Campbell v Samuels* (1980) 23 SASR 389 at 391 per Zelling J.

94 *Khan v Bazeley* (1986) 40 SASR 481 at 486 per O'Loughlin J.

95 *Morse v Police* [2012] 2 NZLR 1.

96 (2004) 220 CLR 1; [2004] HCA 39.

97 (2004) 220 CLR 1 at 26 [14].

98 (2004) 220 CLR 1 at 32 [32].

51 McHugh J construed the words according to their broad ordinary meaning. He did not separately identify a statutory purpose but ultimately rejected the propounded legitimate end of the prohibition, namely avoiding breaches of the peace and removing threats and insults from areas of public discussion, as a justification for the burden imposed by the prohibition on the freedom of political communication[99].

52 Gummow and Hayne JJ construed "insulting words" in context as words which, in the circumstances in which they were used, were provocative in the sense that they were intended or reasonably likely to provoke unlawful physical retaliation from the person to whom they were directed or some other person who heard the words uttered[100]. The provision was "not directed simply to regulating the way in which people speak in public"[101] but something more. Kirby J took a similar approach[102] and observed[103]:

> "It has always been a legitimate function of government to prevent and punish behaviour of such kind."

53 Callinan and Heydon JJ, like Gleeson CJ, took a broader view of the prohibition. Callinan J held that the legislation was intended to prohibit language that was "incompatible with civilised discourse and passage"[104]. Heydon J also held that the term "insulting words" should be given its natural and ordinary meaning, not limited to words intended to provoke an unlawful physical retaliation[105].

54 As appears from the preceding, and from the other cases mentioned, the identification of the purpose of a particular provision of a statute cannot always precede its construction. Against that background it is necessary to focus more closely upon the text of s 471.12.

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99 (2004) 220 CLR 1 at 54 [103].

100 (2004) 220 CLR 1 at 74 [183].

101 (2004) 220 CLR 1 at 76 [191].

102 (2004) 220 CLR 1 at 98 [254].

103 (2004) 220 CLR 1 at 99 [256].

104 (2004) 220 CLR 1 at 108 [287].

105 (2004) 220 CLR 1 at 117 [310].

The construction of s 471.12—text and context

55 Section 471.12 is concerned with the use of a "postal or similar service". The breadth of that term as defined in s 470.1 has already been pointed out. It is broader than "postal … and other like services" within the meaning of s 51(v) of the Constitution. The present appeals are concerned with the application of the section to the content of communications said to be made using a postal or similar service as defined.

56 The ordinary meaning of the word "offensive" unconstrained by epithets such as "grossly" is:

- Causing offence or displeasure;
- Irritating, highly annoying;
- Repugnant to the moral sense, good taste or the like, insulting[106].

The *New Shorter Oxford English Dictionary* also adds the terms "disgusting" and "nauseous"[107].

57 Within the bounds of its ordinary meaning the term "offensive" used objectively, as it is in s 471.12, covers a range of imputed reactions by one person to the conduct of another. It may describe conduct which would cause transient displeasure or irritation and also conduct which would engender much more intense responses. In the Court of Criminal Appeal Bathurst CJ and Allsop P, as discussed earlier in these reasons, construed it as confined to conduct at a threshold defined by the words "calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances."[108]

58 On the construction of "offensive" adopted by the Court of Criminal Appeal, conduct which a reasonable person would regard in all the circumstances as offensive within the ordinary meaning of that term would not necessarily be offensive for the purposes of s 471.12. There is no novelty in that approach. Kerr J in *Ball v McIntyre*[109] referred to conduct which was hurtful or blameworthy or improper but not "offensive" within the meaning of s 17(d) of

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106 *Macquarie Dictionary*, rev 3rd ed (2001) at 1329.

107 (1993), vol 2 at 1983.

108 (2011) 256 FLR 28 at 39 [44] per Bathurst CJ, 48 [81]–[83] per Allsop P.

109 (1966) 9 FLR 237 at 241.

the Police Offences Ordinance 1930–1961 (ACT)[110]. The construction adopted by Bathurst CJ and Allsop P in this case set a higher threshold even than that adopted in *Ball v McIntyre*, which had followed the formulation by O'Bryan J in *Worcester v Smith*[111]. In the latter case, which concerned the offence of behaving in an "offensive manner" in a public place contrary to s 25 of the *Police Offences Act* 1928 (Vic), O'Bryan J said[112]:

> "Behaviour, to be 'offensive' within the meaning of that section, must, in my opinion, be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person."

59 The approach of the Court of Criminal Appeal to the construction of s 471.12, in its application to offensive conduct, was orthodox. The level of offensiveness defined by the Court accorded with the principle of legality in its application to freedom of expression. It accorded with the need to construe a criterion of serious criminal liability relatively narrowly and clearly where the narrow construction was reasonably open[113]. It also accorded with the observations made in *Bradley* concerning the importance of postal and other services to freedom in the dissemination of information and opinion. In my respectful opinion however, the formulation of the purposes of the provision, expressed in largely metaphorical terms by reference to its application to postal and similar services, was not of assistance in the construction or application of s 471.12 nor in the resolution of the constitutional question. That question, which now falls for determination, is whether s 471.12, construed as the Court of Criminal Appeal construed it, in its application to offensive uses of postal or similar services, impermissibly burdens the freedom of political communication protected by the Constitution.

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110 The definition of offensive adopted by Kerr J was followed in subsequent cases including *Spence v Loguch* unreported, Supreme Court of New South Wales, 12 November 1991 per Sully J; *Conners v Craigie* unreported, Supreme Court of New South Wales, 5 July 1993 per McInerney J.

111 [1951] VLR 316.

112 [1951] VLR 316 at 318; in that case the defendant had deployed banners outside the United States Consulate in Melbourne protesting against the United States military involvement in Korea among other things. The conviction was set aside on the basis that disagreement with a political policy supported by a majority of the community was not offensive within the meaning of s 25.

113 See *Coleman v Power* (2004) 220 CLR 1 at 75 [185] per Gummow and Hayne JJ.

The validity of s 471.12

60 Freedom of speech is a common law freedom. It embraces freedom of communication concerning government and political matters. The common law has always attached a high value to the freedom and particularly in relation to the expression of concerns about government or political matters[114]. Lord Coleridge CJ in 1891 described what he called the right of free speech as "one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done"[115]. The common law and the freedoms it encompasses have a constitutional dimension. It has been referred to in this Court as "the ultimate constitutional foundation in Australia"[116]. TRS Allan wrote of the "traditional civil and political liberties, like liberty of the person and freedom of speech"[117] and said[118]:

> "The common law, then, has its own set of constitutional rights, even if these are not formally entrenched against legislative repeal."

61 The term "implied freedom of communication concerning government and political matters" has been well established in Australian constitutional discourse since the implication was first posited in *Nationwide News Pty Ltd v Wills*[119] and

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114 *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3 at [42]–[48] per French CJ.

115 *Bonnard v Perryman* [1891] 2 Ch 269 at 284.

116 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182 per Gummow J; [1996] HCA 40.

117 Allan, "The Common Law as Constitution: Fundamental Rights and First Principles", in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia*, (1996) 146 at 148.

118 Allan, "The Common Law as Constitution: Fundamental Rights and First Principles", in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia*, (1996) 146 at 148.

119 (1992) 177 CLR 1; [1992] HCA 46.

in *Australian Capital Television Pty Ltd v The Commonwealth*[120]. However, as Dawson J said in *Levy v Victoria*[121]:

> "the freedom of communication which is protected by the Constitution is that which everyone has in the absence of laws which curtail it and that freedom does not find its origins in the Constitution at all, either expressly or by implication."

That observation may be qualified to the extent that the constitutional implication also operates upon the common law[122]. Subject to that qualification, the Constitution imposes a restriction on the extent of legislative power to impose a burden on freedom of communication on matters of government or political concern. The now settled questions[123] to be asked when a law is said to have infringed the implied limitation are:

1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?

2. If the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment to the Constitution to the informed decision of the people?

62 In each case the enquiry about the impugned law is, as was submitted for the Commonwealth Attorney-General, systemic. It is not an enquiry into whether the law places a burden upon freedom to engage in the particular kind of communications in which the appellants are said to have engaged and if so whether that burden was justified. As Hayne J said in *APLA Ltd v Legal Services Commissioner (NSW)*[124]:

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120 (1992) 177 CLR 106; [1992] HCA 45.

121 (1997) 189 CLR 579 at 607; [1997] HCA 31; see also at 625–626 per McHugh J, quoted in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 246 [184] per Gummow and Hayne JJ; [2004] HCA 41; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

122 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

123 *Wotton v Queensland* (2012) 246 CLR 1 at 15 [25] per French CJ, Gummow, Hayne, Crennan and Bell JJ; [2012] HCA 2.

124 (2005) 224 CLR 322 at 451 [381]; [2005] HCA 44.

"in deciding whether the freedom has been infringed, the central question is what the impugned law does, not how an individual might want to construct a particular communication".

63 The first of the two constitutional questions is to be asked by reference to the legal effect and operation of s 471.12 in its application to "offensive" uses of postal and similar services. The prohibition it imposes is defined by reference, inter alia, to the content of a communication made using such services. It is therefore a restriction which can directly affect content. It places in the hands of the Court, mediated by the emotional reactions of imaginary reasonable persons, a judgment as to whether the content is within or outside the prohibition. It applies without distinction to communication of ideas about government and political matters and any other communication.

64 The first respondent submitted that s 471.12 has only an indirect effect upon political communications. The submission pointed to the distinction, recently reiterated in *Hogan v Hinch*[125], between laws with respect to the restriction of political communications and laws with respect to some other subject matter whose effect on political communications is unrelated to their political nature[126]. That distinction, however, is relevant to the second question going to validity rather than the question whether the law imposes an effective burden upon the implied freedom of political communication. The plurality in *Hogan v Hinch* referred to the distinction after having accepted that an affirmative answer should be given to the first question[127]. That is to say a law imposing a direct burden on political communication may be found more readily to fail the criterion of validity defined by the second question than a law whose effect on such communications is indirect. There is nothing in the legal operation or effect of s 471.12 on communications about government and political matters which would defeat its characterisation as an effective burden on the freedom to engage in such communications.

65 The kinds of communications, about government and political matters, caught by s 471.12 were said by the Commonwealth Attorney-General to be "outside the accepted boundaries of Australian political debate and at the outer fringes of political discussion." The potential reach of the section was said to be significantly limited by the circumstances to which it directed attention and the

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125 (2011) 243 CLR 506; [2011] HCA 4.

126 (2011) 243 CLR 506 at 555 [95] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, citing *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40] per Gleeson CJ, citing in turn *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169 per Deane and Toohey JJ.

127 (2011) 243 CLR 506 at 555 [95].

nature of the reasonable person test. The Attorney-General for Victoria submitted that:

- A reasonable person, for the purposes of s 471.12, would understand that the use of robust means of expression can be a legitimate part of political communication in Australia;
- As a result the statute only prohibits those uses of the postal services which the tribunal of fact considers, even after having regard to their political context, lie outside the boundaries of robust debate and are therefore "likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances".

The Attorney-General for Victoria also referred to the fault element attaching to the circumstance that a communication is "offensive" and the alternative means of political communication left open by s 471.12. Similar submissions were made by the Attorney-General of Queensland and the Attorney-General for South Australia.

66 It may be accepted that the "reasonable person" whose perspective is to be adopted in determining liability under s 471.12 would be aware of the nature of political debate inside and outside parliamentary circles in Australia. The reasonable person would also be endowed with the awareness that participants in political debate in Australia include people who are reasonable, people who are unreasonable and people who are reasonable about some things some of the time and unreasonable about other things at other times. The awareness of the reasonable person invoked under s 471.12 would also be expected to extend to the existence of participants who are civil and courteous in the expression of their views and others who are strident, insulting and offensive as well as those people who may express themselves in varying registers of civility and offensiveness according to the circumstances. These are social facts which would not escape the hypothetical reasonable person.

67 Based on a broad imputed awareness of the nature of Australian political debate and communications, reasonable persons would accept that unreasonable, strident, hurtful and highly offensive communications fall within the range of what occurs in what is sometimes euphemistically termed "robust" debate. That does not logically preclude the conclusion that a communication within that range is also one which is likely or calculated to induce significant anger, outrage, resentment, hatred or disgust. There may be deeply and widely held community attitudes on important questions which have a government or political dimension and which may lead reasonable members of the community to react intensely to a strident challenge to such attitudes. An example might be the circulation to households and offices of a pamphlet expressing opposition to Australia's involvement in a military conflict which has widespread community

support, denouncing the involvement as immoral and asserting that Australian servicemen or women who suffer injury or die in the conflict do so in an immoral and futile cause. If such a pamphlet were circulated at or about the time of the funeral of a deceased serviceman or woman its timing might be a circumstance which would intensify the anger of reasonable persons about it. Examples can be multiplied in respect of different issues of government or political concern. It cannot be said that the constraints imposed on freedom of expression by s 471.12 in its application to "offensive" communications are confined to what were described in the submissions made on behalf of the Commonwealth Attorney-General as "the outer fringes of political discussion." Further, the reaction elicited by an offensive communication may depend upon its source. If emanating from a marginal voice on the fringes of political discussion, it may not be taken seriously enough to induce an emotional reaction in any reasonable person. There are many communications, of which the internet provides more than ample evidence, from what might be described as the "lunar" elements of political discourse. Such communications may not be taken seriously enough by reasonable persons to upset anybody. Indeed it might be said that a communication, on its face offensive, is more likely to elicit significant anger, outrage, hatred or disgust if coming from a source which cannot be so readily dismissed.

68 The question whether s 471.12 imposes a burden on the implied freedom is answered not only by consideration of the content of the communications it affects but also by the range of mechanisms for making such communications to which it applies. They include:

- Delivery of letters, packets and parcels by Australia Post;
- Delivery of letters, packets and parcels by couriers or packet or parcel carrying services which are "postal … or other like services" within the meaning of s 51(v) of the Constitution;
- Delivery of letters, packets and parcels by couriers or packet or parcel carrying services which are not postal or other like services.

69 There is nothing on the face of s 471.12 to exclude from the scope of the services it covers courier or packet or parcel carrying services for the delivery of newspapers, magazines, pamphlets, brochures, books, DVDs, CDs or audiotapes to homes or offices or even to distributors of such material, particularly if the delivery service is provided by a constitutional corporation or provided in the course of interstate trade or commerce. The "postal or similar services" covered by s 471.12 extend well beyond services funded, provided or regulated by government and beyond the constitutional concept of "postal … or other like services". There are many communications, the content of which could be regarded by reasonable persons in all the circumstances as offensive, that are conveyed by postal, courier, or packet or parcel carrying services not only to

identified individuals but also to large groups of people. As earlier suggested, offensive material might be circulated by subscription or otherwise to recipients whose sympathies lie with the content of that material.

70 The Attorney-General for Victoria submitted that the "reasonable persons" test would take account of:

- The nature and timing of an impugned communication concerning government or political matters;
- Whether the communication was targeted to an individual or part of a general circulation or mailout;
- Whether the communication was made pursuant to a subscription;
- Whether the communication occurred in the context of a pending election or constitutional referendum.

The submission, with respect, tended to reinforce the conclusion that the prohibition has a potentially broad application. The "reasonable persons" criterion, which is linked to imputed emotional reactions to the content of the communication, does not narrow the scope of the prohibition in its legal operation or effect. At best, assuming the criterion can be applied as proposed by the Attorney-General for Victoria, it may affect the application of the prohibition to particular circumstances. That conclusion, however, does not support a broad judgment that the prohibition does not impose an effective burden on the implied freedom.

71 Given the scope of the criminal liability created by s 471.12 in its application to offensive uses of postal or similar services, the section must be taken to effectively burden freedom of communication about government or political matters in its operation or effect.

72 Section 471.12 having been found to impose an effective burden upon the implied freedom of political communication, the question arises what if any legitimate end it serves. The legitimate ends enunciated in the Court of Criminal Appeal and by the respondents and interveners were various. They included the protection of persons from being subjected to offensive material, the promotion and protection of postal and similar services that bring material into homes and offices, the regulation of postal services, the protection of the integrity of such services and the protection of those who participate in the constitutionally mandated system of government.

73 Having regard to the scope of the term "offensive" as properly construed and the range of the "postal or similar services" to which s 471.12 applies, it is not possible to define its purpose by reference to common characteristics of such services. In practical terms it is difficult, if not impossible, to distinguish the

purpose of s 471.12 from that of a law which makes it an offence to send or deliver offensive communications to anyone by any means. References to the promotion or protection of postal and similar services, the integrity of the post and public confidence in the post do not define in any meaningful way a legitimate end served by s 471.12. Its purpose is properly described as the prevention of the conduct which it prohibits. That is the prevention of uses of postal or similar services which reasonable persons would regard as being, in all the circumstances, offensive. That should not be regarded as a legitimate end not least because, as explained below, its very breadth is incompatible with its implementation in a way that is consistent with the maintenance of that freedom of communication which is a necessary incident of the system of representative government prescribed by the Constitution.

74 The second question going to the validity of s 471.12 has two limbs. The first is whether the section serves a legitimate end. The second is whether, if so, it serves that end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment to the Constitution to the informed decision of the people. In this case those two limbs collapse into one. The purpose of the prohibition imposed by s 471.12 is as broad as its application. On its proper construction it cannot be applied in such a way as to meet the compatibility requirement. As explained above, the reasonable persons test, even when applied to a high threshold definition of what is "offensive", does not prevent the application of the prohibition to communications on government or political matters in a range of circumstances the limits of which are not able to be defined with any precision and which cannot be limited to the outer fringes of political discussion. Section 471.12, in its application to the offensive content of communications made using postal or similar services, is invalid.

75 The remaining question is whether the impugned aspect of s 471.12 can be read down to exclude its application to offensive content in communications on matters of government or political concern. The Attorneys-General for Victoria and South Australia submitted that the provision, if otherwise invalid, should be read in that way.

76 Having regard to the nature of the allegations made in the indictment and the relief sought, there would seem to be little point in determining whether the provision can be construed as proposed. The communications complained of on their face involve matters of government or political concern. I agree with Hayne J that the substance of the orders sought by the appellants in this Court involves quashing the indictment so far as it related to the "offensive" use of a

postal service. In any event the proposed reading down would face the difficulty identified by Latham CJ in *Pidoto v Victoria*[128] that:

> "if a law can be reduced to validity by adopting any one or more of a number of several possible limitations, and no reason based upon the law itself can be stated for selecting one limitation rather than another, the law should be held to be invalid."

In this case there appears to be more than one possible limitation open. It is, however, not necessary to determine that question.

Conclusion

77 The appeals should be allowed. I agree with the orders proposed by Hayne J.

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128 (1943) 68 CLR 87 at 111; [1943] HCA 37. See also *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 485 per Brennan and Toohey JJ; [1991] HCA 29; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 61 per Brennan J; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 339 per Brennan J; [1995] HCA 16.

HAYNE J.

The facts

78 The appellant in the first appeal ("the first appellant") allegedly sent letters (and in one case a recorded message) to relatives of several soldiers killed in action in Afghanistan and the mother of an Austrade official killed in the bombing of a hotel in Indonesia. Each communication conveyed the author's views about a controversial political matter: the deployment of the Australian Defence Force in Afghanistan. In form, each communication offered condolences to the relatives of the deceased but, in intemperate and extravagant language, each also urged the rejection of the policies which see Australian forces engaged in Afghanistan. At least some of the communications directly insulted those who had died.

The prosecution of the appellants

79 The Commonwealth Director of Public Prosecutions filed an indictment in the District Court of New South Wales charging the first appellant with 12 counts of using a postal service in a way that reasonable persons would regard as being, in all the circumstances, offensive, contrary to s 471.12 of the *Criminal Code* (Cth) ("the Code"). The indictment further charged the first appellant with one count of using a postal service in a way that reasonable persons would regard as being, in all the circumstances, harassing, again contrary to s 471.12 of the Code. The indictment charged the appellant in the second appeal ("the second appellant") with eight counts of aiding and abetting the first appellant in using a postal service in a way that reasonable persons would regard as being, in all the circumstances, offensive, contrary to ss 11.2(1) and 471.12 of the Code.

80 Section 471.12 of the Code provides:

"**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."

The course of proceedings

81 The appellants moved to quash the indictment. They alleged that s 471.12 of the Code is invalid. At first instance, Tupman DCJ dismissed[129] the motion to quash.

82 The appellants appealed to the Court of Criminal Appeal of the Supreme Court of New South Wales. In the course of the appeals, the first appellant abandoned his challenge to the validity of so much of s 471.12 as makes it an offence to use a postal service in a way that reasonable persons would regard as being harassing. Thus the only question for the Court of Criminal Appeal was whether s 471.12 is valid when it makes it a crime to use a postal service in a way that reasonable persons would regard as being offensive. The Court of Criminal Appeal (Bathurst CJ, Allsop P and McClellan CJ at CL) held that s 471.12 is valid and dismissed[130] the appeals.

83 By special leave, each appellant appealed to this Court.

The issue and its resolution

84 The issue in these appeals can be stated briefly. The Parliament of the Commonwealth has no power to make a law inconsistent with that freedom of communication on matters of government and politics which is an indispensable incident of the constitutionally prescribed system of representative and responsible government. Is a law which makes it a crime to use a postal or similar service to make a communication about government or political matters in a way that reasonable persons would regard as being, in all the circumstances, offensive beyond legislative power? For the reasons that follow, that question must be answered: "Yes".

85 History, not only recent history, teaches that abuse and invective are an inevitable part of political discourse. Abuse and invective are designed to drive a point home by inflicting the pain of humiliation and insult. And the greater the humiliation, the greater the insult, the more effective the attack may be. The giving of really serious offence is neither incidental nor accidental. The communication is designed and intended to cause the greatest possible offence to its target no matter whether that target is a person, a group, a government or an opposition, or a particular political policy or proposal and those who propound it. And any reasonable person would conclude that not only is that the purpose of what was said, its purpose has been achieved.

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129 *R v Monis* (2011) 12 DCLR (NSW) 266.

130 *Monis v The Queen* (2011) 256 FLR 28.

86 If examples are sought, and recent Australian political history is thought too controversial, consider O'Connell's attack on Disraeli in 1835, with its references to the impenitent thief and what now are rightly seen as racial or religious slurs. Or look to Lloyd George's speech in the House of Commons about Sir John Simon acting "as if [he] has been a total abstainer all his life and has suddenly taken to drink ... and landed amidst the Tory drunkards". The examples can be multiplied.

87 Particular attacks may be admired, others condemned. But admiration or condemnation depends not upon whether offence is given but upon the content of the views that are advanced or attacked and the identity of those associated with those views. Great care must be taken in this matter lest condemnation of the particular views said to have been advanced by the appellants, or the manner of their expression, distort the debate by obscuring the centrality and importance of the freedom of political communication, including political communications that are intended to and do cause very great offence. If s 471.12 is valid, communications of that kind cannot be reduced to writing and sent by use of a postal or similar service. To do so would be a crime because reasonable persons would consider the communication to be, in all the circumstances, seriously offensive. Yet being seriously offensive was the plain political purpose of the communication.

88 The conclusion that s 471.12 does not validly make it a crime to use a postal or similar service to make a communication about government or political matters in a way that reasonable persons would regard as offensive is required by earlier decisions of this Court, in particular *Lange v Australian Broadcasting Corporation*[131] and *Coleman v Power*[132]. No party or intervener sought to reopen those decisions or to submit that they should not be followed and applied. Both the principles stated in those cases and the actual decisions reached in them require the conclusion that s 471.12 is too broad in its operation with respect to offensive use of a postal or similar service. That aspect of the section is directed generally to preventing serious offence, not to some other object or end the pursuit of which would be compatible with the maintenance of the constitutionally prescribed system of government and the freedom of political communication which is its indispensable incident. More particularly, s 471.12 makes it a crime to send by a postal or similar service an offensive communication about a political matter even if what is said is true. It makes it a crime to send by a postal or similar service an offensive communication about a political matter that is not only offensive but defamatory, even when, applying

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131 (1997) 189 CLR 520; [1997] HCA 25.

132 (2004) 220 CLR 1; [2004] HCA 39.

Lange, the publisher would have a defence of qualified privilege to a claim for defamation.

The arguments

89 On the hearing of the appeals, arguments were advanced on behalf of each appellant, the Commonwealth Director of Public Prosecutions on behalf of the first respondent and the Attorney-General for the State of New South Wales as second respondent. In addition, separate arguments were advanced on behalf of the Attorneys-General for the Commonwealth and the States of Queensland, South Australia, Victoria and Western Australia intervening in support of the respondents pursuant to s 78A of the *Judiciary Act* 1903 (Cth). The arguments for invalidity of s 471.12 (in its application to "offensive" uses) advanced by the appellants were not identical and the arguments of the respondents and interveners in support of validity also differed, as between themselves, in a number of respects. It is neither necessary nor desirable to attempt to trace these differences precisely. It is, however, useful to identify immediately five principal strands in the arguments.

The construction of s 471.12

90 The respondents and interveners generally accepted that what amounts to an "offensive" use of a postal or similar service for the purposes of s 471.12 should be understood in the manner described[133] by Bathurst CJ in the Court of Criminal Appeal: the use must be calculated or likely to arouse "significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances". For the purposes of argument, the appellants were content to adopt the same construction but they also submitted that the better view is that "offensive", when used in s 471.12, encompasses any affront to feelings.

91 These reasons conclude that the appellants' submissions about construction should not be accepted. It is convenient to adopt the description used by Bathurst CJ as a general description of the kind and intensity of reaction that must be evoked by the relevant conduct.

A burden on the freedom of political communication?

92 All parties and interveners accepted that s 471.12 prohibits the making of some communications about government or political matters. But the first respondent and several interveners submitted that s 471.12 does not "effectively burden" the freedom of political communication because its effect could be described as de minimis, insubstantial, slight or unrealistic. They submitted that

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133 (2011) 256 FLR 28 at 39 [44].

this was a sufficient basis for concluding that s 471.12 is consistent with the freedom of political communication.

93 These reasons conclude that s 471.12 does effectively burden the freedom of political communication. And even if it were right to describe the burden which this law imposes as only a little burden, a law imposing a little burden will only be consistent with the freedom of political communication if it is (a) directed to an object or end compatible with the maintenance of the constitutionally prescribed system of government and its necessary incident the freedom of political communication and (b) reasonably appropriate and adapted to achieving that legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of government and with the freedom of political communication.

The object or end of the "offensive" limb of s 471.12?

94 The parties and interveners suggested a number of possible objects or ends to which s 471.12 is directed in its operation with respect to "offensive" uses of a postal or similar service. Candidates included promoting the civility of discourse, preserving the integrity of the post, protecting mail recipients from offence, and preserving an ordered society by preventing violence.

95 These reasons conclude that the object or end to which s 471.12 is directed must be determined by the ordinary processes of statutory construction. It follows that the object or end to which the "offensive" limb of the section is directed is preventing the use of a postal or similar service in a way that would give offence.

Is the object or end legitimate?

96 However the object or end of s 471.12 is described, the respondents and interveners submitted that the object or end was legitimate because the section does one or more of three different things: it preserves the integrity of the post, it keeps the peace by avoiding violent responses by those who are offended, and it protects mail recipients (and others) from offence.

97 These reasons conclude that, in its legal and practical operation, the relevant part of the section protects mail recipients and others from offence. This is not a legitimate object or end. It is not compatible with the maintenance of the constitutionally prescribed system of government and its necessary incident the freedom of political communication. The section goes no further than maintaining the civility of discourse carried on by means of a postal or similar service. Section 471.12 does not protect the "integrity of the post". It makes no real or substantial contribution to keeping the peace. And it was not shown to be directed to achieving any further social good other than penalising, and so protecting against, conduct that is offensive.

Reasonably appropriate and adapted to a legitimate object or end?

98 In these appeals, the critical question is whether the object or end of s 471.12 is legitimate. These reasons conclude that it is not. Questions about the proportionality of the legislative means chosen for achieving a legitimate object or end thus do not arise.

99 But if, as the respondents and interveners submitted and these reasons deny, s 471.12 is directed to a legitimate object or end, the respondents and interveners submitted that the section is reasonably appropriate and adapted to achieving that end in a manner that is compatible with the maintenance of the constitutionally prescribed system of government. The general thrust of the submissions was that s 471.12 is a narrowly defined offence which leaves unregulated many other ways for people to communicate about government or political matters.

100 If a law is narrowly tailored to a legitimate object or end, the conclusion that the law is reasonably appropriate and adapted to that object or end readily follows. But these reasons conclude that, by making all seriously offensive uses of a postal or similar service an offence, including those uses where the user would have a defence of truth or of qualified privilege to a claim for defamation founded on that use, the relevant part of s 471.12 goes too far and is invalid.

101 In order to identify the relevant content of the arguments and conclusions just described, it is necessary to state some established and unchallenged principles.

Applicable principles

102 The Constitution provides for a system of representative and responsible government. Sections 7 and 24 of the Constitution provide that the two Houses of the Parliament must be "directly chosen by the people". Section 64 requires that no Minister of State hold office "for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives". Those who are elected as members of the Parliament and those who are appointed as Ministers of State are necessarily accountable to "the people" referred to in ss 7 and 24. Additionally, s 128 provides that the Constitution shall not be altered except in the manner provided in that section; in particular, only "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". As the whole Court said in *Lange*[134], it follows from these and other provisions that "[f]reedom of communication on matters of government and politics is an

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134 (1997) 189 CLR 520 at 559; see also at 557-559.

indispensable incident of that system of representative government which the Constitution creates".

103 Because freedom of communication on matters of government and politics is an indispensable incident of the constitutionally prescribed system of government, that freedom cannot be curtailed by the exercise of legislative or executive power[135] and the common law cannot be inconsistent with it. But the freedom is not absolute and it follows that the limit on legislative power is also not absolute.

104 To observe that the freedom is not absolute is not to say that it must yield to accommodate the regulation of conduct which a majority of members of the Australian community may consider to be repugnant. Nor does the observation that the freedom is rooted in implication rather than in the express text of the Constitution make it brittle or otherwise infirm, or make it some lesser or secondary form of principle. Rather, accepting that the freedom is not absolute recognises that it has boundaries. But within those boundaries the freedom limits legislative power.

105 The accepted doctrine of the Court is that where a law has the legal or practical effect of burdening political communication, the boundaries of the freedom are marked by two conditions. In *Lange*, the conditions were identified[136] as being first, whether the object of the impugned law "is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes" and second, whether the impugned law "is reasonably appropriate and adapted to achieving that legitimate object or end". It was said[137] that the "legitimate object or end" of the impugned law must be one "the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people".

106 Subsequently, in *Coleman v Power*[138] a majority of the Court reformulated the second question slightly to ask whether the impugned law achieves its

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135 *Lange* (1997) 189 CLR 520 at 560.

136 (1997) 189 CLR 520 at 561-562.

137 (1997) 189 CLR 520 at 567 (footnote omitted).

138 (2004) 220 CLR 1 at 50-51 [92]-[96] per McHugh J, 77-78 [196] per Gummow and Hayne JJ, 82 [211] per Kirby J.

legitimate object or end *in a manner* which is compatible with the maintenance of the system of representative and responsible government for which the Constitution provides. But, as the plurality in *Wotton v Queensland* recently observed[139], the terms of the *Lange* questions are settled. No party or intervener suggested to the contrary.

107 It is necessary to say something further about particular aspects of these accepted principles. That examination is organised under the following headings:

"Effectively burden"? [108]-[112]

A "slight" or "little" burden? [113]-[124]

The submissions [113]-[116]

The flaws [117]-[122]

Reasonably appropriate and adapted? [123]-[124]

Object or end [125]

"Legitimate" object or end [126]-[143]

Not every object or end within power [132]-[141]

An ordered society and the public interest? [142]-[143]

Reasonably appropriate and adapted [144]-[147]

"Effectively burden"?

108 In *Lange*, the Court said[140] that a law will not be inconsistent with the freedom unless it is first found to "effectively burden freedom of communication about government or political matters either in its terms, operation or effect". If it does, attention must turn to the law's object or end and the manner in which it achieves that object or end. The use of the adverb "effectively" in the expression "effectively burden" invites attention to both the legal effect of the law in question and its practical effect. The expression "effectively burden" means nothing more complicated than that the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications.

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139 (2012) 246 CLR 1 at 15 [25]; [2012] HCA 2.

140 (1997) 189 CLR 520 at 567.

109 The decided cases demonstrate that this is how "effectively burden" is to be understood. No doubt, as has been pointed out[141], in many of the decided cases the parties have conceded or assumed that the law in question effectively burdens political communication. But the actual decisions in the cases can be explained only on the footing that "effectively burden" is to be understood in the way that has been described. Two examples suffice to illustrate the point.

110 In *Lange*, the common law of defamation was held[142] to burden the freedom of political communication. The Court identified[143] the burden as holding the maker of a communication about government or political matters liable in damages or to injunctive relief. Both the question asked and its answer were straightforward: the common law of defamation effectively burdened political communication because it had the effect of limiting the making or the content of political communications by exposing the maker to civil liability.

111 Likewise, the regulations considered in *Levy v Victoria*[144] were found to effectively burden political communication. The regulations prevented protesters from making communications of that character. The particular regulation in issue prohibited people who did not have a valid game licence from entering permitted hunting areas between specified hours on two particular days. The burden was identified[145] as precluding the plaintiff from making his political protest within those areas at those times. At this stage of the analysis, it was not to the point that communications of the same kind and content could be made in other ways.

112 Although the principles to be applied are, in this respect, simple and straightforward, their application was central to the argument of these appeals. How and why this was so requires further explanation and consideration.

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141 *Wotton* (2012) 246 CLR 1 at 19 [41] per Heydon J.

142 (1997) 189 CLR 520 at 568, 575.

143 (1997) 189 CLR 520 at 568.

144 (1997) 189 CLR 579; [1997] HCA 31.

145 (1997) 189 CLR 579 at 597 per Brennan CJ, 609 per Dawson J, 613-614 per Toohey and Gummow JJ, 617 per Gaudron J, 625 per McHugh J, 629, 647 per Kirby J.

A "slight" or "little" burden?

The submissions

113 The first respondent and four interveners (the Commonwealth, Queensland, South Australia and Victoria) submitted that there are some burdens on political communication which are not sufficient to support a conclusion that the law in question "effectively burdens" political communication. The submissions used different terms to describe such burdens: "de minimis", "insubstantial", "slight" and "unrealistic". Nothing was said to turn on the choice of adjective. Each label was intended to capture, in its own way, the conclusion that the impugned law regulated so narrow or so unimportant a category of political communication that the law could not be inconsistent with the implied freedom.

114 According to these submissions, a law which imposed a burden on political communication that warranted one of these descriptions would be consistent with the implied freedom solely on the basis that it did not "effectively burden" political communication. And because the impugned law was valid on this basis alone, no consideration need be given to either the object or end to which the law was directed or the means by which the law sought to achieve that object or end.

115 Although the submissions which the first respondent and the interveners made differed in some respects, a common thread ran through them all. That thread had three cumulative elements. First, it was recognised that the freedom of political communication exists because it is necessary for the operation of the constitutionally prescribed system of government. Second, it was submitted that the freedom extends only so far as necessary for the operation (or perhaps preservation) of that system of government. And third, a "little" burden does not impede the effective operation or imperil the continued existence of that system. Therefore, so the argument concluded, laws imposing only a "little" burden are consistent with the implied freedom. That conclusion was embellished by assertions that there would remain a free "flow of information" and opinion; that the impugned law did not pose any "realistic threat" to the constitutionally prescribed system and the implied freedom; and that the institutions of government established by the Constitution are "strong enough not to require protection"[146] from such burdens.

116 These submissions must be rejected. They are fundamentally flawed.

146 *Wotton* (2012) 246 CLR 1 at 24 [54].

The flaws

117 First, the submissions proceed from a false premise. The premise for the submissions is that the operation of the freedom is to be assessed, and its boundaries determined, by reference to whether the constitutional system of government will remain intact and still function. The submissions thus assume that the Constitution's prescription of the system of government is sufficiently detailed to allow a court to assess whether that system remains intact and functioning despite the burden on political communication. That assumption is not right. The Constitution goes no further than prescribing a system of government that has the "representative" and "responsible" characteristics fixed by its provisions, chiefly ss 7 and 24 and ss 61-67 and 69-70 respectively[147]. The inquiry is at best unhelpful, at worst positively misleading.

118 The infirmity of the identified premise is further demonstrated, and the way in which its adoption may ultimately mislead is revealed, by considering the case where a burden is found not to be "little". Presumably in such a case the burden is not "little" but "significant" because it *does* represent a threat to the constitutional system of government. But when the bar is set so high, it is difficult to imagine, contrary to Queensland's submissions, that a burden so understood could ever be found to be reasonably appropriate and adapted to the pursuit of a legitimate object or end. Framing the first *Lange* question as asking whether the burden is a "little" one dictates the answer to the second *Lange* question and thus radically distorts the inquiry.

119 The relevant premise is that there is a freedom of political communication, not any more general concept of the constitutional system of government, let alone some conception of how that system could or should work, or work "effectively". It is of the very first importance to recognise that the constitutional prescription of a system of representative and responsible government entails that there must be freedom of political communication. The freedom is an indispensable incident of that system of government. Whether a law burdens that freedom is not to be determined by some attempted survey of whether there is *sufficient* communication on government or political matters either to make the constitutional system of government work, or to make it work satisfactorily. That is too large and diffuse an inquiry. The more confined and manageable inquiry, which the cases require, is to look to the effect of the impugned law on the freedom of political communication.

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147 See generally *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 57-58 per Stephen J; [1975] HCA 53; *Lange* (1997) 189 CLR 520 at 566-567; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 188 [6] per Gleeson CJ; [2004] HCA 41.

120 Second, and no less fundamentally, the submissions about "little" burdens are contrary to and seek to discard the established and unchallenged doctrine of the Court. They do so by seeking to reformulate the accepted boundaries of the freedom, within which the freedom is absolute. Those boundaries are passed only when the impugned law is found to be reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the constitutionally prescribed system of government and the freedom of political communication which is its indispensable incident. By these submissions the first respondent and the interveners sought to reset the boundaries to some quantitative measure. By this means the constitutional freedom would be subordinated to small and creeping legislative intrusions until some point where it could be said that there are so few avenues of communication left that the last and incremental burden is no longer to be called a "little" burden. This is not and cannot be right.

121 The question which lies beneath the Court's doctrine in this area can be expressed as: in what circumstances can the Parliament override the freedom which "the people" must have to communicate on government or political matters? What is a "good reason" for limiting that freedom? One answer must be: when the communication is not about a government or political matter. And that is the answer the majority of the Court gave in *APLA Ltd v Legal Services Commissioner (NSW)*[148]. But is another answer to be: so long as the Parliament restricts the making or the content of political communications only a little bit? Surely not. But that is the answer proffered by the first respondent and the interveners.

122 Third, to suggest that a law which limits political communication is valid only because there can or will be "as much" or "equivalent" political discourse (because, for example, there are other ways to make the same political point) makes one or both of two assumptions. It assumes that it is right to hold the impugned law to be within power or it consigns some restrictions on political communication to a netherworld of unimportance. Assuming the answer to the constitutional question is as wrong as it is to ignore the answer that is given to the question. The very purpose of the freedom is to permit the expression of unpopular or minority points of view. Adoption of some quantitative test inevitably leads to reference to the "mainstream" of political discourse. This in turn rapidly merges into, and becomes indistinguishable from, the identification of what is an "orthodox" view held by the "right-thinking" members of society. And if the quantity or even permitted nature of political discourse is identified by reference to what most, or most "right-thinking", members of society would consider appropriate, the voice of the minority will soon be stilled. This is not and cannot be right.

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148 (2005) 224 CLR 322; [2005] HCA 44.

Reasonably appropriate and adapted?

123 Those who advanced the "little" burden submissions asserted that if, contrary to their principal submissions, it was nonetheless necessary or appropriate to consider the application of the two *Lange* conditions to a law imposing only a "little" burden on political communication, a law of that kind would easily meet those conditions. They submitted that s 471.12 did so.

124 It is trite to say that the more extensive the burden on political communication the more difficult it will be to justify the impugned law[149]. And where a law which effectively burdens political communication is valid because it meets the two *Lange* conditions, it may very well be right to describe the law as imposing only a small burden on political communication. But it by no means follows that consideration of the validity of an impugned law can take a shortcut to the conclusion by use of the label "little" (or some equivalent) as a description of the burden. That sort of approach is evident in many of the submissions made in this Court. For example, South Australia submitted that the "effectiveness" of any burden "involves an evaluative exercise requiring consideration of all relevant factors". To approach the matter in this way, and to conclude that the burden is "little", may seek to replicate but serves only to mask (if not wholly ignore) all of the analytical work that is to be done in answering the second *Lange* question. Yet the strength of the principles established in *Lange*, and of proportionality reasoning more generally, is the transparency that they bring to decision-making. That transparency must not be obscured by resort to labels.

<u>Object or end</u>

125 Whether a statutory provision which effectively burdens political communication is consistent with the implied constitutional limitation on legislative power depends upon (a) whether the object or end which the provision pursues is legitimate and (b) whether the provision is reasonably appropriate and adapted to achieving that object or end in a manner compatible with the constitutionally prescribed system of representative and responsible government and the freedom of political communication which is its indispensable incident. Whether an impugned law serves a "legitimate object or end" first requires identification of the end or ends which the law seeks to serve. That is not a search for some subjective purpose or intention of the Parliament in enacting the impugned law. As Gummow and Bell JJ observed in *Rowe v Electoral Commissioner*[150], whether a law infringes the constraints imposed by ss 7 and

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149 See, for example, *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143; [1992] HCA 45; *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]-[96]; [2011] HCA 4; *Wotton* (2012) 246 CLR 1 at 16 [30].

150 (2010) 243 CLR 1 at 61 [166]; [2010] HCA 46.

24 of the Constitution "cannot depend upon the purpose attributed to the Parliament in enacting that measure. ... [It] cannot be answered simply by what may appear to have been legislative purpose." The end or ends that the impugned law seeks to achieve must be identified by the ordinary processes of statutory construction. In this respect, as in so many others concerned with the construction and application of statutes, "[t]he language which has actually been employed in the text of legislation is the surest guide to legislative intention"[151].

"Legitimate" object or end

126 It is necessary, but not sufficient, to identify by the ordinary principles of statutory construction what end or ends the impugned law seeks to serve. It is not sufficient to do so because not every object or end pursued by a law will justify burdening the freedom of political communication. The object or end must be "legitimate". The word "legitimate" requires explanation.

127 In *Lange*[152], the Court said that the object or end to which the impugned law is directed must be "compatible with the maintenance of the constitutionally prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people". It follows that to be a "legitimate" object or end, that object or end must be compatible with the constitutional system of representative and responsible government. But what it means to be "legitimate" in this context can and should be identified more precisely[153]. Because freedom of political communication is an indispensable incident of the constitutionally prescribed system of government, an object or end can be compatible with the system only if it is compatible with the freedom. And that is why, in *Lange*[154], the Court said that the purpose of the law of defamation was not "incompatible with the requirement of freedom of communication imposed by the Constitution".

128 The object or end pursued by the impugned law need not itself be the maintenance or enhancement of the system of representative and responsible government or of the freedom of political communication. But it must be compatible with them. The Constitution provides only limited guidance on the

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151 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 47 [47]; [2009] HCA 41 (footnote omitted).

152 (1997) 189 CLR 520 at 562; see also at 567.

153 See generally *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 139 [454], 145 [477], 146 [482].

154 (1997) 189 CLR 520 at 568 (footnote omitted). See also *Levy v Victoria* (1997) 189 CLR 579 at 626-627 per McHugh J.

requirements of the system of government which it establishes. Legitimate ends are not expressly listed in the Constitution as they sometimes are in other jurisdictions[155]. In many cases it will be profitable to examine how the general law operates and has developed over time, not because the general law in any way limits or restrains the exercise of legislative power but because the implied freedom of political communication must be understood and applied having regard to what may be learned from consideration of the general law[156]. In most cases it will be much less useful[157] to examine what is considered legitimate in other jurisdictions with their own constitutional contexts, especially where those legitimate ends are expressly identified.

129 The decided cases show that the protection of reputation[158], the prevention of physical injury[159], the prevention of violence in public places[160], the maintenance of a system for the continuing supervision of some sexual offenders who have served their sentences[161], "community safety and crime prevention through humane containment, supervision and rehabilitation of offenders"[162], and "the imposition of conditions [a parole board] considers reasonably necessary to ensure good conduct and to stop [a] parolee committing an offence"[163] are legitimate objects or ends compatible with the maintenance of the constitutionally prescribed system of government. These are no more than

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155 See, for example, European Convention on Human Rights (1950), Art 10(2), which lists national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence and maintaining the authority and impartiality of the judiciary.

156 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 44-45 per Brennan J, 95 per Gaudron J; [1992] HCA 46; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 216-217 per Gaudron J.

157 See *Momcilovic v The Queen* (2011) 245 CLR 1 at 84 [146(iii)], 87-90 [148]-[160] per Gummow J; [2011] HCA 34.

158 *Lange* (1997) 189 CLR 520.

159 *Levy v Victoria* (1997) 189 CLR 579.

160 *Coleman v Power* (2004) 220 CLR 1.

161 *Hogan v Hinch* (2011) 243 CLR 506.

162 *Wotton* (2012) 246 CLR 1 at 16 [31].

163 *Wotton* (2012) 246 CLR 1 at 16 [32].

examples of legitimate objects or ends that have so far been identified in the cases. The list is not closed.

130 These examples must not be taken as suggesting that any end conducive to the public interest will do. For example, to observe that the protection of personal reputation was a legitimate end in *Lange* and to observe that personal reputation might be thought to be a general good does not adequately support a proposition, by analogical reasoning or otherwise, that the protection of any other general good is a legitimate end. That chain of reasoning, premised as it is upon the summary statement that the legitimate end in *Lange* was the protection of personal reputation, overlooks the need to explain how protecting personal reputation has a connection and is compatible with the constitutionally prescribed system of government and with the freedom of political communication which is its necessary incident. Dawson J explained the connection between personal reputation and the constitutionally prescribed system of government in *Theophanous v Herald & Weekly Times Ltd*[164]:

> "It is hardly surprising that representative government has been thought to co-exist with defamation laws for over ninety years, even though those laws curtail freedom of speech. Indeed, the protection of reputations, even the reputations of politicians or would-be politicians, may be thought to be in the interests of representative government, because the number and quality of candidates for membership of Parliament is likely to be appreciably diminished in the absence of such protection." (footnote omitted)

131 It is neither appropriate nor possible to identify exhaustively what are legitimate objects or ends. But it is important to identify and consider two possible views of what might qualify as a "legitimate" legislative object or end. Both views are particular manifestations of the more general proposition that any object or end that is in the public interest is a "legitimate" object or end for the purposes of applying the Court's doctrine on the implied freedom of political communication.

Not every object or end within power

132 The first respondent submitted that a legislative object or end is "legitimate" if it is an end within a legislative head of power. Queensland and South Australia each made submissions to generally similar effect. Reference was made to statements[165] said to support the proposition advanced in these

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164 (1994) 182 CLR 104 at 192; [1994] HCA 46.

165 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 95. See also *Wotton* (2012) 246 CLR 1 at 32 [83].

submissions, but the proposition has not been endorsed by a majority of the Court. It should not be adopted.

133 In order to explain why it should not be adopted, it is useful to consider what would follow if it were.

134 If any and every object or end that falls within any of the heads of legislative power is "legitimate", the second *Lange* question becomes whether the law in question is reasonably appropriate and adapted to serve the identified object or end *in a manner* that is compatible with the maintenance of the constitutionally prescribed system of government. Presumably the law fails this test if its detrimental impact on political communication is somehow judged to be greater than the benefit following from pursuit of the end that has been held to fall within a head of legislative power. How that comparison is to be made was not explained.

135 On the view propounded by the first respondent, Queensland and South Australia, the only consideration that is to be given to the implied freedom is at the point of assessing the compatibility with the freedom of the legislative *means* that have been chosen for achieving the object or end that is within legislative power. Yet the authorities make plain that both the end and the means must be compatible with the constitutionally prescribed system and with the freedom of political communication and that compatibility means more than that the law is within a head of legislative power.

136 As McHugh J explained in *Coleman v Power*[166], the second *Lange* question involves a "compound conception". That compound conception requires consideration of both legislative means and legislative ends. It was for this reason that the majority of the Court in *Coleman v Power* reformulated[167] the second *Lange* question. As originally framed, the second question could be read as suggesting that only the legislative end, and not the means of achieving that end, had to be compatible with the constitutionally prescribed system of government and with the freedom of political communication.

137 The view urged in these appeals was that an assessment of the compatibility of the legislative object or end is concluded by finding only that the object or end falls within a head of legislative power. These submissions ignore that part of the compound conception which it has never been doubted must be considered: is the object or end to which the law is directed compatible with the maintenance of the system of representative and responsible government and the

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166 (2004) 220 CLR 1 at 50 [92].

167 (2004) 220 CLR 1 at 50-51 [92]-[96] per McHugh J, 77-78 [196] per Gummow and Hayne JJ, 82 [211] per Kirby J.

freedom of political communication? This is not and cannot be right unless it be assumed that any end within power is, for that reason alone, compatible in the relevant sense. But as is explained below, that assumption is not and cannot be right.

138 The failure to explain how a comparison could or should be made between the implied freedom and the pursuit of a legislative end which is within power (but which otherwise bears no connection with the implied freedom) is significant. On the face of it, the comparison appears to require a court to balance incommensurables: the pursuit of some object or end that is within power and the maintenance of the constitutionally prescribed system of government and the freedom that the system requires. By contrast, if the legitimacy of an object or end is understood (as it should be) as referring to the compatibility of that object or end with that system and the freedom, the second *Lange* question can sensibly be applied. What is then being compared is, on the one hand, the means of pursuing a legislative object or end that has been determined to be compatible with the implied freedom and, on the other, the burden on the freedom itself. There is a common point of reference.

139 Another and no less fundamental point should be made about these submissions. The expression "reasonably appropriate and adapted", and proportionality reasoning more generally, direct attention to the relationship between one thing and another[168]. On the view propounded by the first respondent, Queensland and South Australia, the only relationship under consideration is the relationship between the end within power and the legislative means chosen to effect that end. Since that end may have nothing whatever to do with political communication, the law's effect on political communication may have no relevance to the relationship at all. Instead, political communication is introduced into the inquiry by a side-wind: is the means compatible with the maintenance of the constitutionally prescribed system of government and the implied freedom?

140 If the effect on political communication is to be introduced into the inquiry in this way, a significant problem that then emerges is that the "compatibility" that is sought is not further explained. But it is clear that the inquiry is not directed to whether the law is reasonably appropriate and adapted to an end which is necessarily itself compatible with the freedom. There is, therefore, no longer any direct comparison being made between the effect of the law on one interest (an interest compatible with the constitutionally prescribed system) and another (the interest in political communication). Instead, the inquiry asks whether the law imposes "too great" a burden on the freedom, which is answered by looking only to the effects the law has on the freedom. That

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168 *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 131 [425] per Kiefel J.

becomes no more than a restatement of the "little" burden submissions examined and rejected earlier in these reasons.

141 As already noted, the submission that any end within legislative power is a "legitimate" end might be associated with an even broader proposition. The submission may proceed from the premise that any object or end within a head of power can be assumed to be in the public interest and that any end conducive to the public interest is necessarily legitimate. This second and broader proposition requires separate consideration.

An ordered society and the public interest?

142 It may be thought that any legislative object or end is "legitimate" if it is directed to achieving an "ordered" society and not merely the curtailment of political communication. For example, reference is to be found in some of the decisions of this Court to an end being "legitimate" if it is "for the preservation of an ordered society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a society"[169]. And it is common to find reference in statutory and constitutional human rights instruments to such limitations on human rights as are justifiable in a "free and democratic society"[170].

143 In general terms, it may readily be accepted that preservation of an ordered society is compatible with the constitutionally prescribed system of representative and responsible government and the freedom of political communication that is its indispensable incident. But references to an "ordered" society will mislead if they are intended to suggest that any and every end conducive to the "public interest" is compatible in the relevant sense. Like the view that any and every end within power is a "legitimate" end, this view would require the courts to balance incommensurable considerations. Even more fundamentally, the determination of what ends are "legitimate" must be made recognising that a constitutional principle is at stake. To subordinate the freedom to a law which pursues an end wholly unrelated to the freedom, even one said to be in the "public interest", would fail to recognise that the freedom is an *indispensable* incident of the constitutionally prescribed system of government.

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169 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 77 per Deane and Toohey JJ; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169 per Deane and Toohey JJ; *Theophanous* (1994) 182 CLR 104 at 179, 182 per Deane J.

170 See, for example, *Charter of Human Rights and Responsibilities Act* 2006 (Vic), s 7(2); *Canadian Charter of Rights and Freedoms*, s 1.

Reasonably appropriate and adapted

144 If a law which effectively burdens political communication pursues a legitimate end, the second *Lange* question asks whether the means chosen to achieve that end are reasonably appropriate and adapted to achieving it in a manner compatible with the system of representative and responsible government. This question requires the Court to make a judgment[171]. The judgment may be assisted by adopting the distinctive tripartite analysis that has found favour in other legal systems. On this analysis, separate consideration is given to questions of suitability, necessity and strict proportionality.

145 But whatever structure is used for the analysis, it is necessary to consider the legal and practical effect of the impugned law. It is necessary to identify how the law curtails or burdens political communication on the one hand and how it relates to what has been identified as the law's legitimate end on the other. In undertaking that comparison it is essential to recognise that the legitimacy of the object or end of the impugned law is identified by considering the compatibility of that object or end with the system of representative and responsible government and the freedom of political communication which is its indispensable incident.

146 It bears repeating that, because "legitimate" must be understood in this way, the comparison that is to be made between the effect of the impugned law upon the freedom to communicate on government and political matters and the law's connection with an identified end proceeds from a common point of reference: the constitutionally prescribed system of government and the freedom of political communication which is its indispensable incident. The comparison to be made does not call for the balancing of incommensurables or comparing of the incomparable, as would be the case if the comparison was between the law's effect on freedom of political communication and the law's effect on some public interest or purpose wholly unconnected with the implied freedom.

147 Those are the principles that are to be applied in these appeals. But, as this Court has said[172] many times, it is necessary to construe a law that is impugned before attention can turn to its validity.

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171 See generally *Coleman v Power* (2004) 220 CLR 1 at 53 [100] per McHugh J; *Thomas v Mowbray* (2007) 233 CLR 307 at 330-333 [19]-[27] per Gleeson CJ; [2007] HCA 33.

172 See, for example, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]; [2008] HCA 4.

Construing s 471.12

148 The text of s 471.12 is set out earlier in these reasons. It will be recalled that it prohibits the use of a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. The meaning of "offensive" lay at the centre of the debate about construction in this Court. It is convenient to enter that debate first by noticing the different ways in which that word is used in statute law generally and second by describing the statutory context in which s 471.12 sits. Attention will then turn directly to the text of the section itself.

"Offensive" in other statutory contexts

149 Many statutes which create offences have used the word "offensive" as an element of the relevant offence. So, for example, many police and summary offences Acts have made it a crime to use offensive words or to engage in offensive conduct[173] in or near a public place. Possession of an "offensive weapon" is a common form of statutory offence[174] and may be a circumstance relevant to the commission of aggravated forms of other offences[175]. Some statutes have used the word "offensive" in contexts which require consideration of notions of pornography and "moral offence"[176].

150 In some statutes, most notably those dealing with offensive weapons, the central idea conveyed by "offensive" is of being made or adapted for the purposes of causing injury[177]. In others, the central idea which "offensive" conveys is of being displeasing, annoying, insulting, or causing painful or

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173 See, for example, *Summary Offences Act* 1988 (NSW), ss 4 and 4A; *Summary Offences Act* 1966 (Vic), s 17(1)(d); *Summary Offences Act* 1953 (SA), s 7; *Summary Offences Act* 2005 (Q), s 6; *The Criminal Code* (WA), s 74A; *Police Offences Act* 1935 (Tas), ss 12 and 13; *Summary Offences Act* (NT), s 47; *Crimes Act* 1900 (ACT), s 392.

174 See, for example, *Summary Offences Act* 1988 (NSW), s 27D; *Summary Offences Act* 1953 (SA), s 15; *The Criminal Code* (WA), ss 68B and 68C; *Crimes Act* 1900 (ACT), ss 380 and 381.

175 See, for example, *Crimes Act* 1900 (NSW), s 97(1); *Crimes Act* 1958 (Vic), s 60A(1); *Criminal Law Consolidation Act* 1935 (SA), s 5AA(1)(b); *The Criminal Code* (WA), s 318(1)(l)(i); *Criminal Code* (Tas), s 240(3); *Criminal Code* (NT), s 174G(a); *Crimes Act* 1900 (ACT), s 35(1)(a)(ii).

176 See, for example, *Summary Offences Act* 1953 (SA), Pt 7.

177 See, for example, *Crimes Act* 1958 (Vic), s 77(1A).

unpleasant sensations or reactions. In general use, the word can be used to describe the evoking of a form of *sensory* reaction (of sight, smell or touch)[178].

151 The point to be made is obvious but important. No single definition of "offensive" was or is apt for every different form of crime. Much turns on the context in which the word "offensive" is used.

Context of s 471.12

152 Section 471.12 is one of several offences in what is now subdiv A (General postal offences) of Div 471 (Postal offences) of the Code. Other "General postal offences" include offences of theft of, or receiving stolen, mail-receptacles, articles or postal messages (ss 471.1 and 471.2), taking or concealing those items (s 471.3) and damaging or destroying those items (s 471.6). The subdivision provides for offences of dishonesty, including dishonestly removing postage stamps or postmarks (s 471.4), and dishonestly using previously used, defaced or obliterated stamps (s 471.5). It also provides for offences which concern the transmission of dangerous things: causing a dangerous article to be carried by a postal or similar service (s 471.13) or causing an explosive, or a dangerous or harmful substance, to be carried by post (s 471.15).

153 Three provisions deal directly with the content of the articles that are carried by a postal or similar service. One is s 471.10, which makes it an offence to cause an article to be carried by a postal or similar service with the intention of inducing a false belief either that the article consists of, encloses or contains an explosive or a dangerous or harmful substance or thing, or that an explosive or a dangerous or harmful substance or thing has been or will be left in any place. Another is s 471.11, which makes it an offence to use a postal or similar service to make a threat to kill or to cause serious harm, where the person making the threat intends that the person threatened should fear that the threat will be carried out. The third is s 471.12.

154 These appeals do not directly concern the offences in s 471.12 of using a postal or similar service in a way that reasonable persons would consider either menacing or harassing. It may be assumed, however, that "menacing" connotes

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178 See *The Oxford English Dictionary*, 2nd ed (1989), vol X at 726, "offensive", meaning 4.

uttering or holding out threats[179] and that "harassing" connotes troubling or vexing by repeated attacks[180].

155 Although the appellants are charged with offences relating to the use of the postal service provided by the Australian Postal Corporation ("Australia Post"), it is to be noted that s 471.12 is directed more broadly to a person who uses "a postal *or similar* service" (emphasis added). The expression "postal or similar service" is defined expansively in s 470.1 of the Code. It means not only "a postal service (within the meaning of paragraph 51(v) of the Constitution)" but also courier and packet or parcel carrying services and any other service that is a postal or other like service within the meaning of the constitutional provision. In addition, it includes courier and packet or parcel carrying services provided by a constitutional corporation, and courier and packet or parcel carrying services that are provided in the course of or in relation to trade or commerce between Australia and a place outside Australia, among the States or between a State and a Territory or between two Territories.

156 It follows that the reach of s 471.12 goes well beyond the use of those postal services which, for most of the 20th century, were provided by the executive government but which are now provided by a government business enterprise (Australia Post). Section 471.12 encompasses the use of postal and analogous services provided by commercial enterprises not owned by the government. And, of course, the section extends well beyond the use of a postal or similar service to send an article to a person at his or her home. It includes communications to or from businesses, arms of government and others. All of these services can generally be described as forming part of the "national infrastructure". Indeed, Div 471 (in which s 471.12 appears) is one of several divisions of Pt 10.5 of the Code, and Pt 10.5 is one of several Parts forming Ch 10, which is entitled "National infrastructure".

"Offensive" in s 471.12

157 Two preliminary observations should be made. First, the text of s 471.12 shows that an objective test must be applied in deciding whether the use alleged meets the description "offensive". The section requires that the accused be shown to have used a postal or similar service "in a way ... that *reasonable persons* would regard as being, in all the circumstances, ... offensive" (emphasis added). Second, as the first respondent and some interveners correctly pointed

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179 See *The Oxford English Dictionary*, 2nd ed (1989), vol IX at 599, "menace" and "menacing".

180 See *The Oxford English Dictionary*, 2nd ed (1989), vol VI at 1100, "harass", meanings 3 and 4.

out, the offence created by s 471.12 consists[181] of physical elements and fault elements. The fault element of "intention" applies[182] to the physical element of "use" of a postal or similar service; the fault element of "recklessness" applies[183] to the "circumstance" that the use would be regarded as "offensive". The fault element of recklessness may also be satisfied[184] by proof of intention or knowledge. It follows that to establish commission of the offence the prosecution must prove two things. The first is that the accused intentionally used the relevant postal or similar service. The second is that, in so using that service, the accused intended or knew that the use was offensive or was aware of a substantial risk that the use was offensive and, having regard to all the circumstances known to the accused, it was unjustifiable to take that risk.

158 Accepting that the offence in s 471.12 depends upon an objective standard and that it has the elements identified, what content is to be given to the word "offensive"?

159 What is "offensive" for the purposes of s 471.12 must be identified by reference to the reaction that the conduct in question would evoke in the hypothesised reasonable person exposed to the conduct. No party or intervener submitted that what is "offensive" for the purposes of s 471.12 was to be identified in some other way and there appeared to be little if any dispute that the relevant kind of reaction could be described by any or all of the several words used[185] by the Court of Criminal Appeal: anger, resentment, outrage, disgust or hatred. There was, however, a debate about how intense the reaction must be to constitute the offence.

160 At least a majority of the Court of Criminal Appeal proceeded[186] on the basis that the preferable construction of the section required a strong reaction from the hypothetical reasonable person to the conduct in question before that conduct would merit the description "offensive". Bathurst CJ used[187] intensifying epithets to describe the reaction that the conduct in question was calculated or

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181 Code, s 3.1(1).

182 Code, ss 4.1(1)(a), 4.1(2) and 5.6(1).

183 Code, ss 4.1(1)(c) and 5.6(2).

184 Code, s 5.4(4).

185 (2011) 256 FLR 28 at 39 [44] per Bathurst CJ, 48 [83], 50 [91] per Allsop P.

186 (2011) 256 FLR 28 at 39 [44] per Bathurst CJ, 48 [83], 50 [91] per Allsop P.

187 (2011) 256 FLR 28 at 39 [44].

likely to arouse: "*significant* anger, *significant* resentment, outrage, disgust, or hatred" (emphasis added). Presumably, then, the reaction of the hypothetical reasonable person intended by these descriptions must be a reaction that is clearly experienced and deeply felt.

161 Contrary to the submissions of the appellants, s 471.12 does not make it a crime to use a postal or similar service in a way that would merely "hurt or wound the feelings of the recipient" of a postal article. Understood in that way, the section would deal with forms of offensive conduct properly described as trifling. The word "offensive" must be given a narrower meaning than that. It is used in conjunction with "menacing" and "harassing" and all three forms of use are treated, without distinction between them, as meriting the same punishment of up to two years' imprisonment. The Court of Criminal Appeal was right to conclude that the provision is to be construed as requiring a strong reaction.

162 It is sufficient to proceed, as the parties did for much of the argument in this Court, on the footing that the section bears the meaning adopted by at least a majority of the Court of Criminal Appeal and advanced by those supporting the section's validity. Even on that assumption, the section's prohibition of offensive use of a postal or similar service is invalid, at least in its application to the use of such a service for making political communications. But before considering the constitutional question, it is important to say something about two matters considered by Allsop P.

163 First, Allsop P observed[188] that in considering a charge brought under s 471.12, a jury would have to take account of the fact that reasonable persons would know of "the existence and importance of the freedom of expression". The respondents and most interveners picked up and supported this observation. The first respondent submitted that the section's reference to use in a way that "reasonable persons would regard as being, in all the circumstances, ... offensive" "leave[s] room for" the operation of the implied freedom. The first respondent further submitted that the jury at the trial of a charge brought under s 471.12 were "ideally positioned" to determine whether the impugned use was "offensive" and that they could be directed to consider the "robust" nature of political debate in Australia. The second respondent and most interveners made submissions to the same effect.

164 It may be accepted that the political subject or context of a communication is a circumstance to be taken into account in determining whether a communication is "offensive". But what follows from that trite observation?

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188 (2011) 256 FLR 28 at 50 [88].

165 It was not said by any party or intervener that the section's reference to "reasonable persons" and "in all the circumstances" would have the result that the maker of a political communication could never be found guilty of an offence against s 471.12. Had that submission been made, it would have assumed critical importance to the disposition of these appeals because there would be no restriction on political communication at all. Instead, the assumption which underpinned all of these submissions was that the political subject or context of a communication would reduce (but not eliminate) the uses of a postal or similar service to communicate a political message which would be found to be "offensive". That assumption would lead to the conclusion that the section restricts a narrow class of political communication. And that conclusion would properly be taken into account in determining whether s 471.12 is reasonably appropriate and adapted to achieving a legitimate object or end in a manner compatible with the constitutionally prescribed system of government and the freedom of political communication. But is the assumption correct?

166 In many if not most cases, neither words nor conduct become any less "offensive" because they are uttered or occur in a particular political context or in connection with a political subject. Some contributions to political debate are deliberately designed to be insulting and belittling. They are *intended* to sting as much as possible and, in doing so, to be such as would inevitably evoke in the reasonable person significant anger, significant resentment, outrage, disgust or hatred.

167 The gist of the offence is to be found in the reaction that reasonable persons would have to the communication. The political nature of a communication or occasion will rarely lessen the offence and it is artificial to expect that a jury direction in terms that political debate is typically "robust" in Australia would lead a jury to find a use not to be offensive when otherwise they would have found it to be offensive. If anything, the outrage caused by a communication will be worse when it arises out of, or relates to, matters of wider importance than relations between two individuals.

168 To the extent to which the submission, as it was developed in oral argument by the first respondent, appeared to be one which would seek to leave to the decision of the tribunal of fact at trial whether and to what extent the freedom is affected by the section, it is a submission without foundation. Questions of constitutional validity are not questions of fact to be decided by a jury.

169 Secondly, Allsop P considered, but did not adopt[189], a construction of s 471.12 which would make it necessary to demonstrate that the relevant use of

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189 (2011) 256 FLR 28 at 50 [89].

the postal or similar service was "objectively calculated or likely ... to cause real emotional or mental harm, distress or anguish". The words of the provision give no foundation for such a reading. In its operation with respect to the use of a postal or similar service in a way that reasonable persons would regard as offensive, the section makes no reference at all to any *harm* to any person.

170 Given this construction of the offensive aspect of s 471.12, is that aspect of the section valid in its application to political communications? As has been explained, that depends upon the answers given to the two *Lange* questions (as modified by the majority in *Coleman v Power*).

Section 471.12 effectively burdens political communication

171 Section 471.12 prohibits using a postal or similar service to make communications that are "offensive" in the sense that has been described. The section applies generally. It therefore prohibits some political communications (those where the communications are made through the use of a postal or similar service and are objectively offensive in the sense described). No party or intervener contended to the contrary. It follows that the section effectively burdens the freedom of political communication.

172 It will be recalled that, notwithstanding their concession, rightly made, that s 471.12 can operate to prohibit some political communications, the first respondent, and most of the interveners, sought to resist the conclusion that the first *Lange* question must be answered "Yes" by resort to the assertion that the section does not "effectively burden" political communication because it is only a "little" burden.

173 It may be accepted that s 471.12 has a narrow operation. It deals only with use of a postal or similar service, the use must be objectively offensive in the sense described, and the mental elements of the offence must be proved. But to observe that the section has this "narrow" operation is to state the minor premise of the argument. And that statement of the minor premise does no more than describe how the section operates. It may be that this operation of s 471.12 can be described as a "little" burden on political communication. But assuming that this is right, the assumption reveals why the major premise of the argument – that a "little" burden does not "effectively burden" political communication – cannot be right. These reasons have already explained why that is so. It is sufficient to repeat that to move from some quantitative assessment of the effect of s 471.12 on political communication to the qualitative assessment that it is only a "little" burden is to assume that the form of communication eradicated from political debate is unimportant. On this view, it does not merit constitutional protection.

174 The argument has the same functional effect as an argument that says that the form of communication in issue is not political communication. But only the

first respondent was bold enough to submit that the communications in issue in these appeals were not communications about a matter of federal political controversy. (The correctness of that submission is examined below.) If that argument is to be made, it should be put squarely, as the first respondent did. The result is not to be achieved by applying the label "little" to the burden that is identified.

The object or end pursued by s 471.12

175 Because s 471.12 effectively burdens political communication, it is necessary to consider whether it is reasonably appropriate and adapted to serve a legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of government and the freedom of political communication which is its indispensable incident. As has been explained, this requires identification of the object or end which the section pursues. And, as has also been explained, that task is to be carried out by applying the ordinary processes of statutory construction. Before doing that, it is useful to describe the arguments of the parties and interveners on this issue.

176 In this Court, the parties and interveners made extensive submissions about the possible object or end (or the possible objects or ends) pursued by s 471.12. The submissions did not always clearly separate the objects or ends and the submissions sometimes slid between one or more of the objects or ends that were identified. One way or another, four candidates emerged. They can be described as "civility of discourse", "integrity of the post", "prevention of violence" and "welfare of the recipients of postal articles".

177 The second appellant submitted that s 471.12 seeks only to regulate the civility of discourse and that this end is not legitimate. The respondents and interveners referred to the three other candidates in support of their arguments for validity. These three candidates were deployed in argument in two different ways. Sometimes it was said that the object or end to which s 471.12 is directed is one or other of them (integrity of the post, prevention of violence or welfare of recipients). Sometimes it was said that the object or end of s 471.12 is limited to preventing the sending of offensive materials by a postal or similar service and that this object or end is legitimate because it is conducive to one or more of the three candidates that have been identified. In practical terms there may be little separating the two forms of argument in these appeals. Each form of argument depends upon the content that is given to each of the candidate ideas. But the distinction between the two forms of argument is not unimportant.

178 In these appeals, it is the second form of argument that provides the appropriate frame of reference. The object or end of s 471.12 must be framed in limited terms. Both legally and practically, the offensive limb of s 471.12 has only one object or end: to penalise, and thereby prevent, giving offence to recipients of, and those handling, articles put into a postal or similar service.

Apart from the (perhaps rare) case where offensive images or words appear on the envelope or packet, the chief practical operation of the section is to prevent offence (in the sense described) to recipients of articles delivered by a postal or similar service.

179 That is not to say, however, that the submissions that were made about such matters as "integrity of the post" are irrelevant. Those submissions are to be understood as directed to whether the object or end of preventing offensive uses of a postal or similar service is an object or end that is compatible with the maintenance of the constitutionally prescribed system of government and the freedom of political communication which is its indispensable incident. But it is as well to explain why, contrary to the submissions of the respondents and interveners, the object or end to which s 471.12 is directed cannot be identified as any of the three candidates they urged: "integrity of the post", "prevention of violence" and "welfare of the recipients of postal articles". Attention can then turn to whether the narrow object or end of preventing offence to mail recipients and handlers is conducive to any or all of those candidates and whether, for that reason, s 471.12 serves a "legitimate" end.

180 First, the object or end to which the section is directed cannot be identified as protecting from harm the recipients of, or those who handle, postal articles. Because the section applies an objective test of what is "offensive", the section does not require proof that any person has actually suffered the reactions of significant anger or the like that have been described. And as earlier explained, a person accused of contravention of s 471.12 need not be shown to have intended to cause offence. It is enough to show that the accused was reckless to the possibility that such a reaction would be evoked.

181 Nor can the object or end of the section be identified as protecting recipients of, or those who handle, postal articles from *legally cognisable* harm. None of the reactions described – significant anger, significant resentment, outrage, disgust or hatred – constitutes a form of legally cognisable harm. Anger, resentment, outrage, disgust and hatred, however intense, are transient emotional responses which may, and more often than not will, leave no mark upon the individual who experiences them. More than that, the emotional responses described are universal human responses which are among the "ordinary and inevitable incidents of life"[190]. They can be provoked for any of a myriad of reasons, in well-nigh any circumstances. Experiencing responses of these kinds does not set the person concerned apart from any save the most sheltered or placid of human beings.

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190 *Tame v New South Wales* (2002) 211 CLR 317 at 382 [193] per Gummow and Kirby JJ; [2002] HCA 35, quoting *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 416.

182 Second, it is not possible to say that the object or end of the section is the prevention of violent retaliation. The section says nothing of the sort and the likelihood of violence is neither a necessary nor a sufficient element of the offence.

183 Third, the object or end of s 471.12 cannot be identified more broadly as maintaining the "integrity of the post". In this regard, the Commonwealth pointed to the second reading speech made in support of the Bill[191] for the insertion of s 471.12 and related sections into the Code. It was there said[192] that:

> "Protecting the safety, security and integrity of Australia's information infrastructure, including postal and courier services, is a priority for this Government.
>
> The measures contained in this bill will ensure that these important communication services are not compromised by irresponsible, malicious or destructive behaviour."

184 In the light of these statements, it may readily be accepted that the political motives for inserting s 471.12 and other provisions into the Code included protecting the "integrity of the post". But it does not follow that the expression is an apt description of the object or end to which s 471.12 is directed. Nothing in the statutory text supports such a broad view. In its operation with respect to offensive use of a postal or similar service, s 471.12 regulates the content of what may be communicated by post. It thus limits the kinds of communication that can be committed to a postal or similar service. It does not deal at all with, and is not directed to, the safety, efficiency or reliability of those services or any of them. To adopt and adapt what Dixon J said[193] in a different context, what was said in the second reading speech may reveal the "external motive or purpose" for the amendments that were then made to the Code, but the "only ostensible purpose" evident from the statutory text is the prevention of offence to recipients of, and others handling, articles committed to a postal or similar service.

<u>Is that object or end "legitimate"?</u>

185 To penalise, and thereby seek to prevent, the giving of offence to recipients of, and those handling, articles put into a postal or similar service regulates the civility of discourse, including political discourse, conducted by the

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191 Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002 (Cth).

192 Australia, Senate, *Parliamentary Debates* (Hansard), 11 March 2002 at 441.

193 *Moore v The Commonwealth* (1951) 82 CLR 547 at 568; [1951] HCA 10.

use of those services. Unless some reason can be shown why that object or end is legitimate, this Court's decision in *Coleman v Power* dictates the conclusion that the object or end of s 471.12 is not compatible with the constitutionally prescribed system of government and the freedom of political communication which is its indispensable incident. Queensland's submissions that *Coleman v Power* does not require this conclusion must be rejected. The submissions made about "integrity of the post", "prevention of violence" and "welfare of the recipients of postal articles" were all directed to explaining why regulating the civility of this form of discourse by penalising offensive uses of a postal or similar service is a legitimate object or end. Each is considered in turn.

Integrity of the post?

186 The expression "integrity of the post" has a large and satisfying ring to it. It sounds important and valuable. It is convenient to accept that, despite the very large changes that have occurred in the last years of the 20th century and the first 12 years of this, the existence of an efficient postal service remains important and valuable. But it by no means follows that preventing users sending material that will cause others offence, even really serious offence, bears upon whether the postal service continues to exist or continues to operate efficiently.

187 The point which these submissions made may have been expressed more accurately by Lord Bingham of Cornhill when he described[194] legislation which made[195] it an offence to send "grossly offensive" material by means of a "public electronic communications network" as prohibiting "the use of a service provided and funded by the public for the benefit of the public for the transmission of communications which contravene the basic standards of our society". Two separate elements of this proposition must be noticed. The first, expressed crudely, is that society can regulate what society provides. The second is wrapped up in the reference to "the basic standards of our society". Unpacking the proposition to identify both of these elements shows that despite its rhetorical power, the proposition does no more than restate the question for determination.

188 The question for decision in these appeals is whether there is legislative power to prohibit offensive political communications which are conveyed by a postal or similar service. Observing that the form of service that was used was provided by a government business enterprise (and in that sense provided by society) does not advance the analysis. And likewise, approving gestures to the importance or unique quality of the postal service do not advance the debate. What remains to be considered, and what these approving statements ignore, is

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194 *Director of Public Prosecutions v Collins* [2006] 1 WLR 2223 at 2227 [7]; [2006] 4 All ER 602 at 607.

195 *Communications Act* 2003 (UK), s 127(1).

how offensive communications detrimentally affect a postal (or similar) service at all. If it is said that s 471.12 maintains (or tends to maintain) the "integrity of the post", content must be given to that expression. But despite the pressure of argument, no party or intervener gave the expression a meaning that could support the validity of the section.

189 When it is said to be important to maintain the "integrity of the post", the central idea that is conveyed is that it is important to ensure that postal articles are carried safely (perhaps safely *and* efficiently) to their intended recipients. That this is what the expression should be understood to mean is revealed by consideration of those statutory provisions which provide for the postal service which the appellants are alleged to have used. The *Australian Postal Corporation Act* 1989 (Cth) continued in existence Australia Post as a body corporate the principal function of which is to supply postal services within Australia and between Australia and places outside Australia[196]. The Act obliges Australia Post to supply a letter service[197], to ensure that the service is reasonably accessible to all people in Australia and to ensure that the performance standards for the letter service "reasonably meet the social, industrial and commercial needs of the Australian community"[198].

190 Against this background, it is perfectly apposite to say that measures taken to ensure that letters and other postal articles committed to Australia Post are not stolen or diverted, or destroyed or damaged in transit, are directed to the maintenance or preservation of the "integrity of the post". Such measures are directed to that end because they ensure that whatever is committed to the postal system arrives, and arrives undamaged by other articles that are being carried.

191 It may be harder to describe in the same way a measure that deals not only with postal services but "similar services" supplied by commercial courier and packet or parcel carrying services[199]. At the least, there would have to be some expansion of the notion of "the post", and perhaps some account taken of the fact that the services the "integrity" of which is to be protected are provided not by the executive government or any government business enterprise, but by a diverse group of commercial enterprises whose terms and conditions of carriage are not directly regulated. It is, however, not necessary to consider whether this second set of steps could be taken.

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196 ss 12-14.

197 s 27(1).

198 s 27(4).

199 Code, s 470.1, definition of "postal or similar service".

192 Concern for the "integrity of the post" must focus upon its safety and reliability as a means of carriage for postal articles. The nature or content of the articles a postal service carries has a connection with that concern only if a postal article (or its contents) might damage or destroy another article or delay its delivery. But apart from the case where something written on the outside of a postal article might cause a delay in delivery of that or other articles – as might be the case if a package was said to contain a dangerous substance – what is written in or on any postal article can have no effect on the reliability or safety of the postal system.

193 If some extended meaning were to be given to the "integrity of the post" which would direct attention to the *content* of the articles carried, the use of the expression "integrity of the post" would depend upon a premise that the post *should* be used for only some kinds of messages or communications. That is, the "integrity of the post" would be defined in a way that directs attention to the nature or content of what is communicated by post and requires that those communications meet some standard (whether described as a standard of decency, politeness, integrity or otherwise). If the "integrity of the post" is defined in this way, circular reasoning beckons. The end to which the legislation under consideration is directed is defined in a way which assumes without examination that the fixing of standards which the *content* of communications carried by post must meet is important to the effective operation of the postal service. There is no foundation for that proposition. It is bare assertion.

194 The first respondent and several interveners sought to link "integrity of the post" with regulation of the content of what is carried by reference to a notion of "confidence" in the post. It was said that the integrity of the post would be affected adversely if both the senders and the recipients of postal articles did not have "confidence" in the post. On the face of it, the argument appears to be no more than a restatement of the proposition that those who use the postal service should be able to be sure that articles committed to the service will be delivered safely to their intended recipients. But as developed in oral argument it became apparent that "confidence" was being used in a sense which again depended upon bare assertion and again invited circular reasoning by defining the object or end to which the law is directed in a question-begging manner.

195 The assertion was that, if really offensive communications can be made by post, recipients would be "fearful" (presumably fearful of receiving a communication that would offend them). Some submissions went no further than that. If the assertion is right (and there is no basis for deciding that it is) it is an observation that leads to no relevant legal conclusion. Perhaps it is for that reason that the Commonwealth took a further step in its argument and asserted that there could and would be consequences for the postal service flowing from this postulated fear. The Commonwealth identified these consequences as persons being "discouraged from willing receipt of mail" with a consequent "adverse effect upon the willingness of senders ... to use postal services as a

means of communication". No basis for this assertion was provided. It is not an assertion that is self-evidently likely to be true. On the contrary, the notion that a person who has received an offensive communication in the mail (even one that is really offensive) will thereafter not take any mail at all is inherently improbable. If that were ever to happen its occurrence would be very rare indeed and it would have not the slightest effect on the general operation of the postal service. The fears expressed by the Commonwealth should be dismissed as spectral.

Prevention of violence?

196 The first respondent submitted that penalising, and so preventing, offensive uses of a postal or similar service was legitimate because doing so prevented violent responses and thus prevented breaches of the peace. The proposition appeared to be founded on some extrapolation from what was decided in *Coleman v Power* and was endorsed[200] by Bathurst CJ in the Court of Criminal Appeal.

197 The proposition should be rejected. It can be answered shortly. Section 471.12 is in no way directed to or concerned with preventing violence or keeping the peace. The prospects that were conjured up in argument of retaliation for offence done by use of a postal or similar service were no more than speculative imaginings of premeditated and vengeful lawlessness which should be dismissed from consideration. They have no foundation and no attempt was made to provide any, whether by evidence or argument. Having regard, however, to the emphasis given in argument to notions of violent reprisal, and to the significance it was given in the Court of Criminal Appeal, something more should be said about *Coleman v Power*. It will be seen that the decision in that case provides no support for, indeed runs directly contrary to, the submission made by the first respondent.

198 It will be recalled that the legislation[201] in issue in *Coleman v Power* made it a crime for a person "in any public place or so near to any public place that any person who might be therein ... could ... hear" to use "any threatening, abusive, or insulting words to any person". It was said that the provision did not infringe the implied freedom of political communication, and was valid, if the references to "abusive" and "insulting" words were "understood as those words which, in the circumstances in which they are used, are so hurtful as either they are intended to, or they are reasonably likely to provoke unlawful physical retaliation"[202].

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200 (2011) 256 FLR 28 at 43 [64], 44 [67].

201 *Vagrants, Gaming and Other Offences Act* 1931 (Q), s 7(1)(d).

202 *Coleman v Power* (2004) 220 CLR 1 at 77 [193].

That construction of the provision was available because the offence in question was one that could not be committed unless the words were uttered in or within the hearing of a public place.

199 It is of the first importance to recognise that this construction of the legislation was a step that was both necessary and sufficient to support the conclusion of validity. Confining the reach of the provision to cases in which the words used are so hurtful as to be either intended, or reasonably likely, to provoke unlawful physical retaliation was *sufficient* for validity because, so understood, the law was reasonably appropriate and adapted to keeping public places free from violence[203]. But confining the reach of the provision in this way was also *necessary* to validity. If read as making it a crime to utter any words to a person in, or within the hearing of, a public place that are calculated to hurt the personal feelings of that person, the end served by the law would "necessarily be described in terms of ensuring the civility of discourse. ... [A]n end identified in that way *could not* satisfy the second of the tests articulated in *Lange*."[204] (emphasis added) Reading the provision as confined to words connected by intention or effect with violent retaliation both permitted and required identifying the end to which the impugned law was directed as "keeping public places free from violence"[205]. That end is compatible with the constitutionally prescribed system of government and with that freedom of communication which is its indispensable incident. Ensuring civility of discourse in public is not. And ensuring civility of *private* discourse is even further removed from a legitimate object or end.

200 There are important, if obvious, distinctions between the legislation at issue in *Coleman v Power* and s 471.12. First, s 471.12 has no connection with any conduct in a public place, no matter whose conduct is considered: the sender of the communication, the carrier of the relevant postal article, or the recipient of what is communicated. All of the facts and circumstances surrounding a contravention of s 471.12 can, and commonly will, occur in private. The user of the service frames his or her offensive communication in private, the user typically encloses it in an envelope in private, and the recipient opens the communication in private and experiences offence. Second, the meaning of the word "offensive" in s 471.12 focuses upon the reaction that the use of the postal or similar service would evoke in reasonable persons. As already explained, that reaction can be identified as "significant anger, significant resentment, outrage, disgust, or hatred". The recipient may have no such reaction. There may be circumstances in which a recipient who experiences reactions described in those

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203 (2004) 220 CLR 1 at 78 [198].

204 (2004) 220 CLR 1 at 79 [199].

205 (2004) 220 CLR 1 at 78 [198].

terms might contemplate resorting to violence. But they are surely the exception rather than the rule.

201 Even if it is right to take account of the exceptional case in which a person who experiences significant anger, significant resentment, outrage, disgust or hatred may be provoked to contemplation of violence, how would that surge of anger be translated into action? As *Coleman v Power* shows, questions about maintaining the peace require consideration of the circumstances in which the relevant conduct is experienced by the person to whom it is directed or who observes its occurrence. In particular, the critical point in *Coleman v Power* was that the conduct in question (the use of abusive or insulting words to a person) had three relevant characteristics: it took place in, or within the hearing of, a public place; it had to be intended or reasonably likely to provoke physical retaliation; and of necessity it occurred in circumstances where the exaction of revenge or retaliation for the insult could occur at once.

202 By contrast, neither an intention to provoke violence nor a likelihood of violent response forms any part of the offence created by s 471.12. Typically, if offence is felt, it will be experienced in private. And seldom if ever will the user of the postal or similar service whose conduct is offensive be close at hand when a person who is offended experiences the feelings described. Indeed, it may well be that the person who experiences those feelings does not know and cannot readily find the person who used the postal or similar service.

Protecting mail recipients?

203 As has already been explained, "offensive" in s 471.12 cannot be read as limited to uses of a postal or similar service that are "objectively calculated or likely ... to cause real emotional or mental harm, distress or anguish"[206]. Yet it was said that penalising, and so preventing, offensive uses of a postal or similar service was legitimate because it protected mail recipients from harm. That harm was described in several different ways. Victoria described offensive uses of a postal or similar service as "offensive intrusions" into the lives of the recipients. Queensland referred to "a person's security of domain". The Commonwealth also referred to "security of domain" but it further referred to the threat to a person's "legitimate sense of safety". These harms were said to be caused, or made worse, by the fact that mail is commonly addressed to a named recipient and that, adopting an expression drawn from a decision of the Supreme Court of the United States, mail recipients are a "captive"[207] audience for whatever is sent to them by post.

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206 (2011) 256 FLR 28 at 50 [89] per Allsop P.

207 *Frisby v Schultz* 487 US 474 at 487 (1988).

204 Each of these descriptions, shorn of their rhetorical flourishes, sought to combine the intensity of reaction required for conduct to be classed as "really" or "seriously" offensive with an appeal to notions of integrity of the person or private property. Notions of integrity of the person or of property accord with the ordinary legal usage of the word "protection". It connotes protection from legally cognisable harm in the form of damage to person, pocket, property or reputation. And cases like *Levy* and *Lange* show that protection of bodily integrity and protection of reputation are objects or ends which are compatible with the constitutional system of government and the freedom of political communication. Each concerns a form of legally cognisable harm: injury to the person in one case and injury to reputation in the other.

205 Each of the forms of "harm" identified in the submissions falls short of any form of legally cognisable harm and the second respondent correctly conceded this to be so. No less importantly, s 471.12 directs no attention to any such form of harm. The allusions made in the submissions to notions of intrusion upon, or injury to, the integrity of a person or a person's property find no foundation in the text of the section. Intrusion or injury of that kind, whether legally cognisable or not, is neither an element of the offence nor a necessary consequence of its commission. Rather, the section's sole concern is the prevention of "serious" offence. It pursues no wider object or end.

206 It may be that the references to "security of domain" and "intrusions" were intended to appeal, inferentially, to notions of privacy. But if that was their intention, the appeal is misplaced. Delivery of mail, whether at home or at work, or by leaving an article in a post office box, is no intrusion upon the privacy of the recipient. It is an unremarkable feature of everyday life tolerated, if not always welcomed, by all. What was described as an "offensive" intrusion was the disturbance to the equanimity of the recipient that might be caused by the offensive character of what was received. But that disturbance (which might occur anywhere) is in no sense any intrusion upon the recipient's privacy. Section 471.12 is not directed to an object or end of preserving privacy.

207 Lying behind many of the submissions advanced in these appeals was a proposition that should be brought to the foreground. It was that s 471.12 carves out an area for its operation that lies between "mere" civility of discourse and the infliction of physical or psychiatric injury. The area in question was said to be occupied by the "really" or "seriously" offensive. Prevention of *that* kind of conduct was said to be compatible with the constitutionally prescribed system of representative and responsible government and with the implied freedom of political communication.

208 Consideration of this proposition must begin with the observation made by McHugh J in *Coleman v Power*[208] that "[i]nsults are as much a part of communications concerning political and government matters as is irony, humour or acerbic criticism". Insult, irony and criticism may all give offence. Sometimes, insult, irony or criticism may give such serious offence that a reasonable person would be moved to "significant anger, significant resentment, outrage", even "disgust, or hatred".

209 Some forms of political communication are deliberately designed to offend. They may be designed and intended to offend because their content is shocking and the maker, having made reasonable inquiries to verify their content, wishes to disseminate the information widely. Yet if the statement communicated is such as reasonable persons, in all the circumstances, would regard as evoking the reaction described, s 471.12 would forbid its communication by post, on pain of up to two years' imprisonment, regardless of whether it is true or false and regardless of whether its maker took all reasonable steps to verify the truth of what is communicated.

210 If a statement is defamatory it may very well move reasonable persons to significant anger, significant resentment, outrage, disgust or hatred. Indeed that may be the strength of reaction which the person making such a communication in relation to government or political matters wants and intends to cause. And if the sender of the communication acted reasonably, *Lange* may provide the sender with a defence to an action for defamation. But s 471.12 would make the sender's conduct a crime.

211 This point about defamatory statements requires further elaboration. What comparison can or should be made between s 471.12 and the law of defamation was much debated in this Court. The Commonwealth rightly pointed out that the legislation considered in *Coleman v Power* provided none of the defences available to a claim for defamation, yet the law was held valid. This being so, why does it matter, so the argument continued, if an offence against s 471.12 can be committed by using a postal or similar service to publish defamatory material even though the publisher would have a defence to a civil action for defamation?

212 The answer to this question is found by recognising that, absent physical or psychiatric injury, the extent of the individual's interest in preventing or recovering for the consequences of a communication of this kind is measured and can only be vindicated by action for defamation. If s 471.12 were to be understood as directed to an object or end of preventing harm to or intrusion upon the individual, it does so in a way that is not coherent with the rights of the individual whose interest it is said that the section protects. And if the section is

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208 (2004) 220 CLR 1 at 45 [81].

directed to vindicating some wider or societal interest, as the applicable legislation was in *Coleman v Power*, the object or end to which s 471.12 is directed cannot then be identified as preventing intrusion upon the safety or security of the individual's domain.

213 To hold that a person publishing defamatory matter could be guilty of an offence under s 471.12 but have a defence to an action for defamation is not and cannot be right. The resulting incoherence in the law demonstrates either that the object or end pursued by s 471.12 is not legitimate, or that the section is not reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government and the freedom of communication that is its indispensable incident. The incoherence is not removed, and its consequences cannot be avoided, by leaving a jury to decide whether reasonable persons would regard the use, in all the circumstances, as offensive. In the case postulated, the user of the service both *knows* that the communication is, and *intends* that the communication be, offensive. And there is no basis for the proposition (advanced by the second respondent and Queensland) that a jury would not find an accused guilty of an offence against s 471.12 in circumstances of the kind now under consideration because of the section's reference to "reasonable persons ... in all the circumstances". Statements that are political in nature and reasonable for a defendant to make can and often will still bite in the sense relevant to s 471.12. A statement can still be offensive even if it is true[209].

214 The better view is that the object or end pursued by s 471.12 is not a legitimate object or end. Preventing use of a postal or similar service in a way that is offensive does no more than regulate the civility of discourse carried on by using such a service. *Coleman v Power* established that promoting civility of discourse is not a legitimate object or end.

215 If, contrary to the view that has just been expressed, it were to be decided that the object or end to which s 471.12 is directed is legitimate, the observation that has been made about the lack of intersection between the *Lange* defence to a claim for defamation and the operation of s 471.12 would demonstrate that the section is not reasonably appropriate and adapted to serve that object or end in a manner that is compatible with the constitutionally prescribed system of government and with the freedom of political communication which is its indispensable incident. The resulting incoherence in the law requires that conclusion. In *Lange*[210], this Court held that it was necessary to develop the common law of defamation in order to preserve the compatibility of that law with

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209 cf *Patrick v Cobain* [1993] 1 VR 290 at 294.

210 (1997) 189 CLR 520 at 571, 575.

the implied freedom, and so the Constitution. To uphold the validity of the offensive aspect of s 471.12 would cut across the development made in *Lange* by subjecting to criminal liability conduct that could not, for constitutional reasons, be subject to civil liability. If the object or end of the "offensive" limb of s 471.12 is legitimate, the answer to the second *Lange* question must be "No".

216 It is necessary to say something more about the legitimacy of the object or end to which s 471.12 is directed.

217 The ground marked out as "really" or "seriously" offensive conduct is identified by the strength of reaction that, judged objectively, would be evoked by the conduct. But all forms of giving "offence" are identified by reference to the expected or actual reaction evoked by particular conduct. The only distinction between the "really" or "seriously" offensive and any other form of offensive conduct is the intensity of the reaction that is or would be evoked. Thus, the prohibition or regulation of the "really" or "seriously" offensive is the prohibition or regulation of some instances of a larger class.

218 Applying this observation to s 471.12, the section relevantly prohibits some, but not all, instances of a particular kind of interaction (or discourse) between people (communication by use of a postal or similar service) where the class of instances prohibited is fixed by the intensity of the reaction evoked and not by notions of harm to a person or intended or likely violent reaction. The form of regulation adopted in s 471.12 does not seek to preclude *all* offensive conduct. It prohibits only a smaller class of that conduct. But it remains a form of regulation which seeks to exclude from one form of discourse between people (communication by use of a postal or similar service) a specified class of communications.

219 What is the significance of seeking to mark out this middle ground for the question whether s 471.12 serves a legitimate object or end? For the purposes of that inquiry, the prohibition or regulation of "really" or "seriously" offensive conduct is no more than the regulation of some but not all aspects of conduct the regulation of which would serve to promote the civility of discourse. That is, the form of regulation does not sit in any middle ground that can be seen as lying between the "mere" civility of discourse and infliction of injury. The supposed middle ground is no more than one part of a wider field.

220 It follows from *Lange* and *Coleman v Power* that s 471.12 is not directed to a legitimate object or end. The elimination of communications giving offence, even serious offence, *without more* is not a legitimate object or end. Political debate and discourse is not, and cannot be, free from passion. It is not, and cannot be, free from appeals to the emotions as well as to reason. It is not, and cannot be, free from insult and invective. Giving and taking offence are inevitable consequences of political debate and discourse. Neither the giving nor the consequent taking of offence can be eliminated without radically altering the

way in which political debate and discourse is and must be continued if "the people" referred to in ss 7 and 24 of the Constitution are to play their proper part in the constitutionally prescribed system of government.

221 On its own, regulating the giving of offence is not a legitimate object or end. And for the reasons that have been given, s 471.12 pursues no other object or end. Beyond the matters already mentioned ("integrity of the post", "prevention of violence" and "protection of mail recipients") no party or intervener sought to demonstrate that there was any other advantage gained or sought to be gained by marking out this supposed middle ground of "really" or "seriously" offensive conduct and making it an offence to use a postal or similar service in that way. All that was said was that s 471.12 prevents conduct of this kind and that mail recipients were, therefore, less likely to be exposed to communications that are "really" or "seriously" offensive. But, as has already been explained, identifying the section's legal and practical operation does not identify any legitimate object or end.

222 The conclusion that eliminating the giving of offence, even serious offence, is not a legitimate object or end is supported by reference to the way in which the general law operates and has developed over time. The general law both operates and has developed recognising that human behaviour does not accommodate the regulation, let alone the prohibition, of conduct giving offence. Almost any human interaction carries with it the opportunity for and the risk of giving offence, sometimes serious offence, to another. Sometimes giving offence is deliberate. Often it is thoughtless. Sometimes it is wholly unintended. Any general attempt to preclude one person giving *any* offence to another would be doomed to fail and, by failing, bring the law into disrepute. Because giving and taking offence can happen in so many different ways and in so many different circumstances, it is not evident that any social advantage is gained by attempting to prevent the giving of offence by one person to another unless some other societal value, such as prevention of violence, is implicated.

223 The common law has never recognised any general right or interest not to be offended. The common law developed a much more refined web of doctrines and remedies to control the interactions between members of society than one based on any general proposition that one member of society should not give offence to another. Apart from, and in addition to, the development of the criminal law concerning offences against the person, the common law developed civil actions and remedies available when one member of society *injured* another's person or property, including what was long regarded as the separate tort in *Wilkinson v Downton*[211] for deliberate infliction of "nervous shock". (Whether or to what extent such a separate tort is still to be recognised need not

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211 [1897] 2 QB 57.

be examined.) And the common law developed the law of defamation to compensate for injury to reputation worked by the publication of oral or written words. But the common law did not provide a cause of action for the person who was offended by the words or conduct of another that did not cause injury to person, property or reputation.

224 From time to time, and in various ways, legislatures in common law jurisdictions, including Australia, have created crimes which hinge on words or conduct being "offensive". Most notably, legislatures have sought to regulate the possession, sale or distribution of written or other articles offensive to some generalised standard of moral sensibility. One method of regulation commonly employed has been to regulate what can be sent by post and, in particular, to make it an offence to send indecent or obscene material by post.

225 The earliest form of federal legislative regulation of the sending of certain kinds of offensive matter by post went beyond prohibiting the sending of indecent or obscene material. Section 107(c) of the *Post and Telegraph Act* 1901 (Cth), which commenced operation on 1 December 1901, made it an offence to knowingly send, or attempt to send, by post any postal article which "has thereon *or therein* or on the envelope or cover thereof any words marks or designs of an indecent obscene *blasphemous libellous or grossly offensive* character" (emphasis added). The reference to "grossly offensive character" in s 107(c) was not confined to the indecent or the obscene. That follows from first, the collocation of words used in s 107(c) and second, from a comparison with s 107(b), which made it an offence to knowingly send, or attempt to send, by post any postal article which "encloses an indecent or obscene print painting photograph lithograph engraving book card or article".

226 It is evident, then, that the prohibition in s 107(c) would have encompassed some, perhaps much, of the conduct with which s 471.12 of the Code deals. In doing this, s 107(c) departed sharply from the colonial Act on which the legislative sidenote indicates the section was based: s 98 of *The Post and Telegraph Act* 1891 (Q). Section 98(3) of the Queensland Act (like a then current equivalent English provision[212]) was directed only to the transmission of materials of "an indecent, obscene, or grossly offensive, character". Although the Queensland Act (unlike the English Act) dealt with both the envelope or cover of the postal article and what was "therein", both the Queensland Act and the English Act used the word "offensive" in a manner that directed attention only to an offence to moral sensibilities worked by indecent material. Unlike the later federal provision, neither the Queensland Act nor its English equivalent dealt with libellous matter or with matter that was offensive in some sense wider than "morally" offensive.

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212 *Post Office (Protection) Act* 1884 (UK), s 4(1)(c).

227 Observing that s 107(c) of the *Post and Telegraph Act* 1901 had this broad reach does not dictate the outcome of the present debate about the validity of s 471.12 of the Code. In particular, the observation does no more than provoke the same questions about s 107(c) of the 1901 Act as are presented about the prohibition in s 471.12 of offensive uses of a postal or similar service.

Political communication

228 The first respondent contended that the Court of Criminal Appeal should have held that the communications in issue in this matter were not communications concerning a government or political matter. The submission was not developed at any length. The central point made in the first respondent's written submissions was that:

> "These prosecutions concern communications which are offensive, not in respect of any political or government content properly the subject of the implied freedom, but offensive because of other content such as the personal attacks that are made upon the deceased *in the circumstances* of having been sent to the homes of the wives and families." (emphasis in original)

The point was embellished by the proposition that a "communication must be directed at promoting political discussion" to come within the scope of the implied freedom.

229 The distinction upon which these submissions depended – between communications "in respect of any political or government content *properly* the subject of the implied freedom" (emphasis added) and other aspects of the communication described as "the personal attacks that are made upon the deceased", which were said not to be in respect of any political or government content – is not validly drawn. The whole of each of the communications, including the attacks made on the deceased, was, both in form and in substance, a single communication about whether Australian forces should be engaged in Afghanistan. That subject was and is a matter of political controversy. The insults directed to the deceased were as much a part of the political nature of the communications as anything else that was said in them.

230 The first respondent's contention should be rejected.

Relief

231 The first respondent submitted that if the appeals to this Court were to be allowed, this Court should not itself make such order as the Court of Criminal Appeal should have made but instead remit the matter to the District Court for further argument about whether "any statements in the [communications] are not protected by the implied freedom and available to support a charge". There is no sound reason shown for this Court not to dispose of the matter finally.

232 It is neither necessary nor appropriate, however, to decide whether s 471.12, in its operation to an "offensive" use of a postal or similar service, can or should be read down or any parts of that section severed. The parties and many of the interveners referred to the possibility of reading down s 471.12 by reference to s 15A of the *Acts Interpretation Act* 1901 (Cth) and the approach of some of the members of the Court in *Coleman v Power*. But the substance of the orders which each appellant sought in this Court was only to quash the indictment in so much as it charged them regarding "offensive" uses of a postal service. And, although the first appellant sought a declaration of invalidity in his notice of appeal to the Court of Criminal Appeal, it is important to recall that these appeals arise out of motions to quash an indictment. In these circumstances, it is sufficient and appropriate only to quash the relevant parts of the indictment[213].

233 Accordingly there should be orders that each appeal to this Court is allowed. The orders of the Court of Criminal Appeal should be set aside and in their place there should be orders that (a) each appeal to that Court is allowed and (b) the orders of the District Court of New South Wales are set aside and in their place there is an order that the whole of the indictment preferred against Man Haron Monis and Amirah Droudis, except for the charge numbered 3 charging Man Haron Monis with using a postal service in a way that reasonable persons would regard as being, in all the circumstances, harassing, is quashed.

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213 Compare, for example, the orders made in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; [1996] HCA 24.

234 HEYDON J. The circumstances are fully set out in other judgments.

235 The appellants submit that s 471.12 of the *Criminal Code* (Cth) ("the Code") infringes the implied constitutional limitation on the extent of legislative power to burden freedom of communication about government and political matters. The submission raises three questions.

236 The first question is: does s 471.12 effectively burden the freedom of communication about government or political matters? The second question is: is the offence reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment to the Constitution to the informed decision of the people? And the third question is: should s 471.12 of the Code be read down so as to make it valid? In approaching those questions, it is necessary to proceed on the fundamental assumption that the implied freedom of communication about government or political matters is correctly identified and elucidated in the authorities of this Court[214]. Below that will be called "the fundamental assumption". The answer to the first question is "Yes" broadly for the reasons given by French CJ[215]. The answer to the second question is "No" broadly for the reasons given by French CJ[216]. As to the third question, s 471.12 should not be read down so as to make it valid[217]. It follows from these conclusions that it is beyond the legislative power of the Commonwealth to prohibit and punish conduct of the type underlying the charges in this case. The orders proposed by Hayne J and concurred in by French CJ should be made.

237 That is an outcome so extraordinary as to cast doubt, and perhaps more than doubt, on the fundamental assumption and the chain of reasoning which led to it.

238 There are various ways of describing the communications which found the alleged offences in this case. To say that they are letters addressed to the parents and relatives of deceased soldiers killed in active service in Afghanistan that reflect on the service of those deceased soldiers in that conflict is one way of

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214 Running from *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; [1992] HCA 45 to *Wotton v Queensland* (2012) 246 CLR 1; [2012] HCA 2.

215 Reasons of French CJ at [63]-[71].

216 Reasons of French CJ at [72]-[74].

217 Reasons of French CJ at [75]-[76], and of Hayne J at [232].

putting the matter. Another approach is to concentrate on the actual language of the communications, unmediated by bland summary. That approach is not inimical to the rights and interests of the appellants in their criminal trials. One of the communications, for example, is couched in unctuous expressions of regret for the "difficult time" through which the parents are passing, "condolences for the loss of your son" and statements like "May God grant you patience and guide us all to the right path." But it calls the son a murderer of civilians. It expresses sympathy to his parents, but not to him. It compares the son to a pig and to a dirty animal. It calls the son's body "contaminated". It refers to it as "the dirty body of a pig". It describes Hitler as not inferior to the son in moral merit.

239 For most children, the death of a parent is a sad event. For most parents, the death of a child is worse. That is because many parents die when elderly, or at a great age when death comes as a blessed release. Parents of that kind have lived a full lifespan. But it is different when children die in their parents' lifetime. The natural order of events is reversed. The children have not fought their fight to finality. They have not run their full race.

240 Yet when a child dies in battle, a parent's sadness is often assuaged by the feeling that the child's death was a necessary and meritorious sacrifice. Thus on 27 September 1915, in the course of the Battle of Loos, an 18 year old subaltern in the Irish Guards, who had experienced considerable difficulty in joining up because of bad eyesight, was shot through the head as his unit advanced. After a German counterattack, he was left behind. In due course he was posted missing, presumed dead. These events ruined the remaining years of his father, who wrote the following poem:

> "*My Boy Jack*
>
> 1914-18
>
> 'Have you news of my boy Jack?'
>
> *Not this tide.*
>
> 'When d'you think that he'll come back?'
>
> *Not with this wind blowing, and this tide.*
>
> 'Has any one else had word of him?'
>
> *Not this tide.*
>
> *For what is sunk will hardly swim,*
>
> *Not with this wind blowing, and this tide.*

'Oh, dear, what comfort can I find!'

None this tide,

Nor any tide,

Except he did not shame his kind –

Not even with that wind blowing, and that tide.

Then hold your head up all the more,

This tide,

And every tide;

Because he was the son you bore,

And gave to that wind blowing and that tide!"

241 The parents and other relatives of those killed in war are likely to experience a similar mingling of sadness and pride. That feeling is liable to be disturbed when the parents or relatives receive communications of the kind on which the appellants' prosecutions are based. Perhaps not all parents or relatives would consider the communications underlying the charges with which these appeals are concerned offensive. The recipients may throw the communications away without a thought. They may find the communications to be de minimis when compared to the misery being experienced. Some recipients may have almost saintly capacities for forbearance and forgiveness. But many would not fall into these categories. Many would regard the communications as sadistic, wantonly cruel and deeply wounding blows during the most painful days of their lives.

242 Legislators, the members of the Executive who are responsible to the legislators, and the people who elect the legislators, can claim a legitimate interest in procuring legislation which seeks to punish and prevent conduct of that kind. The offensiveness of remarks to and about political opponents, or politicians, may be a price to be paid for or an incidental side-effect of free speech. But offensive remarks of the kind alleged here are not within those categories. It was said that the primary objects of the appellants' alleged conduct were not the recipients of the letters, but the politicians who support Australian participation in the war as being in the national interest. Yet the offensive conduct is likely to be much more hurtful to the innocent relatives of the deceased soldiers than to the primary objects of attack. The result of the fundamental assumption on which these appeals were argued is to prevent the enactment of both federal legislation and State legislation to deal with the conduct. The law protects those within the Queen's peace from intentionally

caused bodily harm. It protects them from emotional harm which is intentionally caused by a prank where the "act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant"[218]. Why cannot the law protect them from harm which is intentionally caused, not by a prank, but by a deadly serious allegation used as a political weapon calculated to produce emotional harm? It is true that the control of offensive conduct may be seen as an imprudent step for a legislature to take. But whether controlling offensive conduct is prudent is an entirely different question from whether it is right that the legislature should be impotent to take that step at all.

243 There are many reasons for doubting the correctness of the fundamental assumption. A good many of those reasons were trenchantly developed in the powerful dissenting judgments of Dawson J in *Australian Capital Television Pty Ltd v The Commonwealth*[219] and of Callinan J in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[220]. They have also been developed by academic lawyers[221]. What follows is a miscellany of additional or overlapping points calling for inquiry if a challenge were ever to be made to the relevant authorities supporting the fundamental assumption.

244 The implied freedom of political communication has never been clear. If there were a federal bill of rights, the implied freedom of communication about government and political matters would be listed. "Bills of rights are not moral or even political philosophies. They are, at best, bullet points from such philosophies."[222] Like other philosophical bullet points, the unclarity of the implied freedom gives the courts virtually untrammelled power to make of it what each judge wills.

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218 *Wilkinson v Downton* [1897] 2 QB 57 at 59 per Wright J.

219 (1992) 177 CLR 106 at 177-191.

220 (2001) 208 CLR 199 at 298-309 [251]-[277] and 330-339 [337]-[348]; [2001] HCA 63.

221 For example, Goldsworthy, "Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue", (1997) 23 *Monash University Law Review* 362; Stone, "Freedom of Political Communication, the Constitution and the Common Law", (1998) 26 *Federal Law Review* 219; Stone, "The Australian Free Speech Experiment and Scepticism about the UK Human Rights Act", in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights*, (2001) 391.

222 Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review*, (2010) at 32.

245 Nor has the existence of the implied freedom enjoyed unanimous support. Its progenitor was in a minority of one until after his death. From this point of view the provenance of the implied freedom has been viewed as unsatisfactory[223]. It is notorious that there was marked division of opinion in the early cases. The statement of the implied freedom has varied in each case in which it has been considered – right up to the most recent case[224].

246 The "reasonably appropriate and adapted test" is mysterious. The words "appropriate" and "adapted" mean the same thing. Something is "appropriate" if it is "[s]pecially fitted or suitable"[225]. Something is "adapted" if it is "[f]itted; fit, suitable."[226] If an enactment is reasonably appropriate, why is it not reasonably adapted? If it is reasonably adapted, why is it not reasonably appropriate? What is the force of "reasonably"? It appears to point to a distinction between what is "*un*reasonably appropriate and adapted" and what is "reasonably appropriate and adapted" – but to call something unreasonably appropriate and adapted is to speak in self-contradictory terms. How does the application of so amorphous a test avoid the dangers of judicial legislation? Is the "reasonably appropriate and adapted" test an adequate explanation for all the exceptions to the implied constitutional limitation – the crime of perjury, the tort of deceit, the crimes of inciting or threatening violence, the crime of sedition and the tort of defamation?

247 The former President of the Supreme Court of Israel, Aharon Barak, said[227]: "Most central of all human rights is the right to dignity. It is the source from which all other human rights are derived. Dignity unites the other human rights into a whole." Those observations have force. If so, why should a constitutional right be invented which is capable of injuring the right to dignity? An aspect of the right to dignity must be the right to be free from abuse after the loss of a loved one. The former President also said[228]: "Human dignity regards a human being as an end, not as a means to achieve the ends of others." Why should a freedom of political communication be implied into the Constitution when it permits persons like the appellants to disregard the relatives of soldiers as ends, and treat the infliction of pain on them only as a means of achieving their own ends?

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223 *Wotton v Queensland* (2012) 246 CLR 1 at 18 [39].

224 *Wotton v Queensland* (2012) 246 CLR 1 at 19 [41].

225 *The Oxford English Dictionary*, 2nd ed (1989), vol I at 586 meaning 5.

226 *The Oxford English Dictionary*, 2nd ed (1989), vol I at 139 meaning 1.

227 *The Judge in a Democracy*, (2006) at 85 (footnotes omitted).

228 *The Judge in a Democracy*, (2006) at 86.

248 It is sometimes suggested that even if the implied freedom did not originally exist – which it did not – it was necessary to invent it in order to ensure that representative democracy operated properly. It is hard to agree in view of the more than satisfactory operation of representative and responsible democracy in Australia for 50 years before Federation, and then for the period, more than 90 years long, between Federation and the invention of the implied freedom. Indeed, it is questionable whether the implied freedom does foster representative democracy. For Campbell and Crilly say[229]:

> "To date, the clear casualty of the matter has been the Australian democratic system. In particular, there is the ongoing failure to come to grips with the inequities and distortions of campaign finances, a realm in which there are vast political expenditures provided by individuals, corporations, unions and taxpayers, on a scale which, proportionate to the population's size, is amongst the highest in the world. This not only disregards the ideal of political equality central to democratic values, but also encourages methods of campaigning and propagandising which are rightly seen by their subjects as insultingly uninformative and non-argumentative, a type of political communication which is neither free nor inviting."

A further line of questions would concern why a limited free speech protection should be implied into a Constitution the framers of which, after carefully examining the United States Constitution, deliberately decided not to transpose its First Amendment, either in whole or in part.

249 Finally, doubt must attend *Lange v Australian Broadcasting Corporation*. The celebrated compromise achieved in that case underlies the modern law. But the detection of an opportunity to reach the compromise was unconvincing. Mr Lange was not an Australian politician but a New Zealander. What did discussion of him have to do with Australia? The Court said[230]:

> "By reason of matters of geography, history, and constitutional and trading arrangements, however, the discussion of matters concerning New Zealand may often affect or throw light on government or political matters in Australia."

This may have been true in the very early 1890s, when New Zealand was a candidate for joining the Australian colonies in a federation and it was not clear

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229 "The Implied Freedom of Political Communication, Twenty Years On", (2011) 30 *University of Queensland Law Journal* 59 at 78.

230 (1997) 189 CLR 520 at 576 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ; [1997] HCA 25.

what final form Australian unification would take. It is hard to see how it was true in the 1990s. For the most part, Australians know nothing of New Zealand affairs. The information which the Australian public does possess of New Zealand affairs is more likely to generate great public boredom, not interest. And what light can matters in a non-federal unicameral country throw on matters in a federal union of polities many of which are bicameral?

250 Those who drafted the Constitution, those who secured legislative approval of it by each colonial legislature, and the people who approved it by their ballots would each say, if they could examine the authorities on the implied freedom of communication: "*Non haec in foedera veni*". Yet in compacts other than constitutions, clearness and obviousness are common conditions precedent to the implication of terms.

251 Close examination of the implied freedom of political communication would involve analysis of these issues. That examination may reveal that it is a noble and idealistic enterprise which has failed, is failing, and will go on failing. That close examination cannot usefully take place until some litigant whose interests are damaged by the implied freedom argues in this Court, with leave if necessary, that the relevant authorities should be overruled. No endeavour of that kind was made in these appeals. Hence these appeals offered no occasion for close examination of the relevant questions. On the existing law, there is no alternative but to make the orders proposed by Hayne J – a result which, some may think, demonstrates how flawed that law is.

252 CRENNAN, KIEFEL AND BELL JJ. The appellants were charged in a joint indictment with offences against s 471.12 of the *Criminal Code* (Cth) ("the *Code*"), which provides:

> "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."

253 The appellant Man Haron Monis was charged with 12 counts of using a postal service in a way that reasonable persons would regard as being, in all the circumstances, offensive. The appellant Amirah Droudis was charged with eight counts of aiding and abetting the commission by Monis of those offences. Monis was further charged with using a postal service in a way which would be regarded as harassing.

254 The charges against the appellants generally concern the sending of letters or a compact disc by Monis to the fathers, the wives or other relatives of Australian soldiers who had been killed whilst on active service in Afghanistan[231]. The letters contained statements which were critical of the Australian government's role in maintaining troops in Afghanistan. Copies of some of the letters were sent to politicians. The appellants maintain that the letters constitute communications on political and governmental matters which are the subject of the implied freedom of communication on those matters, a freedom which *Lange v Australian Broadcasting Corporation*[232] ("*Lange*") holds to be an indispensable incident of the system of representative government created by the Constitution.

255 The appellants' letters have another dimension. Whilst they open with expressions of sympathy for the grieving family member or members to whom they are addressed, if the recipients read on, they are confronted with accusations that the dead soldier was a murderer of innocent civilians and children and, in some cases, was to be likened to Hitler. The question whether reasonable persons would regard the content of these communications as being, in all the

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231 Two of the charges arose out of a letter sent to the mother of an Austrade official killed in the bombing of the J W Marriott Hotel in Indonesia in July 2009.

232 (1997) 189 CLR 520 at 559; [1997] HCA 25.

circumstances, offensive, within the meaning of that term in s 471.12, is not a matter which falls to be determined upon these appeals. That may be a matter to be determined by a jury, depending upon the outcome of these appeals. The question raised for the Court by these appeals concerns the constitutional validity of s 471.12, given that its operation is likely to inhibit some communication on political or governmental matters (hereafter referred to as "political communication") which is the subject of the implied freedom of communication.

256 By notices of motion filed in the District Court of New South Wales, the appellants sought to have the indictments quashed on the basis that s 471.12 is invalid. Tupman DCJ found that the letters were capable of being characterised as political communication[233]. Whether that is a correct characterisation of the letters is not an issue on these appeals. For the purposes of these appeals it may be accepted that s 471.12 may have the effect of inhibiting some offensive communications of a political character.

257 Tupman DCJ, however, dismissed the motions[234]. The Court of Criminal Appeal of the Supreme Court of New South Wales (Bathurst CJ, Allsop P and McClellan CJ at CL) dismissed the appellants' appeals from those orders[235]. The appeal by Monis with respect to the charge of using a postal service in a harassing way was abandoned.

Section 471.12

258 An offence of the kind in question is not new. The *Post and Telegraph Act* 1901 (Cth) prohibited 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"[236]. That Act was repealed in 1975. Regulation 53 of the regulations made under the *Postal Services Act* 1975 (Cth) proscribed the sending, by post or courier service, of an article consisting of matter which advised, notified or advertised the existence or availability of matter "of an indecent, obscene or offensive nature". It may be observed that the words "libellous" and "blasphemous" were omitted and "grossly" was no longer maintained as a description of the requisite degree of

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233 *R v Monis* (2011) 12 DCLR (NSW) 266 at 270 [14].

234 *R v Monis* (2011) 12 DCLR (NSW) 266 at 278 [53].

235 *Monis v The Queen* (2011) 256 FLR 28 at 44 [69], 50 [92], 55 [120].

236 *Post and Telegraph Act* 1901 (Cth), s 107 (punctuation added).

offensiveness. The regulation also required, for the offence to be made out, that the matter not have been solicited by the person to whom it was sent.

259 Section 85S was introduced into the *Crimes Act* 1914 (Cth) in 1989[237]. It created an offence of knowingly or recklessly using a postal or carriage service supplied by Australia Post:

> (a) "to menace or harass another person"; or
>
> (b) "in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive."

260 In 2002, the *Criminal Code Amendment (Anti-hoax and Other Measures) Act* 2002 (Cth) repealed s 85S and enacted s 471.12, which appears in Ch 10 (entitled "National infrastructure"), Pt 10.5 ("Postal services"), Div 471 ("Postal offences"), Subdiv A ("General postal offences") of the *Code*. Section 471.12 as enacted was in substantially the same terms as the current provision, except for the words which now appear in parentheses, "(whether by the method of use or the content of a communication, or both)", which were added in 2005[238]. Section 471.12 applies to the use of a "postal or similar service", which is defined[239] to include courier services and packet or parcel carrying services. Australia Post has the exclusive right to carry letters by post in Australia[240].

261 The 2002 amendments create offences of using a postal or similar service in a way that is "menacing", "harassing" or "offensive". The focus in these appeals is upon an offensive use of a postal service but, as will be explained, in the context of s 471.12 this involves more than the mere causing of offence to a recipient. This is evident from the text which precedes the word "offensive", and from the history and purposes of these types of provisions as explained below. Further, whilst an offensive use may arise from the content of a communication, this should not detract attention from the method of the use as relevant under s 471.12. In either case, the standard to be applied to the use under s 471.12 is

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237 By the *Telecommunications and Postal Services (Transitional Provisions and Consequential Amendments) Act* 1989 (Cth), s 5.

238 *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2)* 2004 (Cth), Sched 1, item 7.

239 *Criminal Code* (Cth), s 470.1.

240 *Australian Postal Corporation Act* 1989 (Cth), s 29.

the view of a reasonable person taking into account all the relevant circumstances.

262 The penalty provided for the abovementioned offences has varied over the years. When s 471.12 was enacted, the maximum fine was increased to $13,200 for an offence committed by a person and $66,000 for a corporation[241]. The maximum term of imprisonment which could be applied was increased from one to two years. Earlier predecessors to s 471.12 also provided for imprisonment as a possible penalty.

263 An offence in terms similar to s 471.12 is contained in s 474.17. It appears in Ch 10 of the *Code*, Pt 10.6 ("Telecommunications Services"), Div 474 ("Telecommunications offences"), Subdiv C ("General offences relating to use of telecommunications"). It creates an offence of using a carriage service[242] in a way "that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive." A point of difference between s 471.12 and s 474.17 is in the application of s 473.4, which lists certain matters to be taken into account in determining whether reasonable persons would regard particular material, or a particular use of a carriage service, as being, in all the circumstances, offensive. Those matters include "the general character of the material", and "the standards of morality, decency and propriety generally accepted by reasonable adults"[243]. However, s 473.4 is expressed to apply for the purposes of Pt 10.6 of the *Code*. It is not said to apply to Pt 10.5. Section 474.17 was enacted two years after s 471.12[244], at the same time that s 473.4 was

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241 *Crimes Act* 1914 (Cth), ss 4AA, 4B as at 1 January 2004 (Reprint No 9) incorporating amendments pursuant to the *Criminal Code Amendment (Anti-hoax and Other Measures) Act* 2002 (Cth).

242 "Carriage service" is defined in the Dictionary of the *Code* by reference to the *Telecommunications Act* 1997 (Cth), s 7 of which defines the term as a service for carrying communications by means of guided or unguided electromagnetic energy. "Internet carriage service" is separately defined in the *Telecommunications Act* 1997, s 7.

243 It was explained, upon the introduction of s 473.4, that the factors listed are some of the matters which are required to be considered by the Classification Board under the *Classification (Publications, Films and Computer Games) Act* 1995 (Cth): Australia, House of Representatives, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004, Explanatory Memorandum at 14.

244 *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2)* 2004.

inserted into the *Code*. No issue arises in these proceedings concerning the matters contained in s 473.4, nor as to the operation of s 474.17. It may be observed that many of the matters raised for consideration by s 473.4 would be taken into account in the application of the reasonable person standard in s 471.12.

264 Laws prohibiting communications containing offensive and other like matter by use of the postal service have been in existence for some time in other countries. The offence created by the *Post and Telegraph Act* 1901 was in terms similar to that in the *Post Office (Protection) Act* 1884 (UK)[245]. This and subsequent legislation[246] made it an offence to send a postal packet which contained an indecent or obscene article. Section 1(1) of the *Malicious Communications Act* 1988 (UK) prohibits the sending of a letter, electronic communication or article which is "indecent or grossly offensive" if the sender's purpose is to cause distress and anxiety to the recipient or any other person to whom it is intended its contents should be communicated[247]. The enactment of the offence followed the recommendation of the Law Commission in its report on poison-pen letters[248]. Among the Law Commission's reasons for recommending a new statutory offence was the recognition that poison-pen letters may not be defamatory[249] and may not contain threats of a kind that would expose the writer to criminal sanction[250]. The Law Commission instanced the sending of a letter to a married woman falsely stating that her husband, abroad on a business trip, had been killed[251].

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245 Section 4(1)(b), (c).

246 *Post Office Act* 1953 (UK), s 11(1)(b); *Postal Services Act* 2000 (UK), s 85(3).

247 In addition, the *Communications Act* 2003 (UK) prohibits the use of a public electronic communications network to send matter which is of a grossly offensive, indecent, obscene or menacing character: s 127(1).

248 The Law Commission, *Criminal Law: Report on Poison-Pen Letters*, Law Com No 147, (1985) at 32 [5.1]-[5.5].

249 The Law Commission, *Criminal Law: Report on Poison-Pen Letters*, Law Com No 147, (1985) at 4 [2.5].

250 The Law Commission, *Criminal Law: Report on Poison-Pen Letters*, Law Com No 147, (1985) at 5-6 [2.11].

251 The Law Commission, *Criminal Law: Report on Poison-Pen Letters*, Law Com No 147, (1985) at 9 [3.1].

265 Section 85 of the *Postal Services Act* 2000 (UK) creates the offences of, inter alia, posting a packet exhibiting or containing any indecent or obscene material or article. Under s 22 of the *Postal Services Act* 1998 (NZ), a person who posts an indecent article with the intention of offending the recipient is guilty of an offence. The use of a telephone device to make a profane, indecent or obscene communication, where it is intended to offend the recipient[252], is an offence under s 112(1) of the *Telecommunications Act* 2001 (NZ). In the United States, laws prohibit the use of communication services to distribute obscene or indecent material[253].

266 The provision of some form of legislative protection to citizens against the receipt of material through the post which is grossly offensive, offensive, obscene or indecent has a long history in Australia and in other representative democracies. In each of the other jurisdictions mentioned, laws are tested for their validity against entrenched personal rights of freedom of speech[254]. The freedom implied by the Australian Constitution does not provide such a right; rather, it operates as a constraint upon legislative power[255]. The question is whether, given its object and the means by which it is sought to be achieved, s 471.12 can be said to be a valid exercise of Commonwealth legislative power.

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252 As to the fault element of recklessness, knowledge or intention with respect to s 471.12 see [341] of these reasons.

253 18 USC §§1461-1464, 1468.

254 In the United Kingdom by reference to Art 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950); in New Zealand by s 14 of the *New Zealand Bill of Rights Act* 1990; and in the United States by the First Amendment to the Constitution.

255 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 150, 168; [1992] HCA 45; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 125, 149, 162, 166; [1994] HCA 46; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 326; [1994] HCA 44; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *Hogan v Hinch* (2011) 243 CLR 506 at 554 [92]; [2011] HCA 4. Similarly in relation to the s 92 freedom, see *James v The Commonwealth* (1939) 62 CLR 339 at 361-362; [1939] HCA 9; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 56, 59, 76; [1992] HCA 46.

The implied freedom – the test in *Lange*

267 The implied freedom was recognised in *Australian Capital Television Pty Ltd v The Commonwealth*[256] ("*ACTV*") and in *Nationwide News Pty Ltd v Wills*[257] ("*Nationwide News*"). In *ACTV*, the freedom was identified as essential to the maintenance of representative government for which the Constitution makes provision[258]. Neither those decisions, nor *Cunliffe v The Commonwealth*[259] and *Leask v The Commonwealth*[260], which followed, explained how it might be determined whether a law which denied or restricted the implied freedom was invalid. The question necessarily arose because it was accepted that the implied freedom was not absolute[261]. The same observation had been made concerning the freedom which finds expression in s 92 of the Constitution[262]. A law is not invalid merely because its operation effects some restriction upon political communication the subject of the implied freedom or upon the freedom of interstate trade and commerce with which s 92 is concerned.

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256 (1992) 177 CLR 106.

257 (1992) 177 CLR 1.

258 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 140 per Mason CJ, 174 per Deane and Toohey JJ.

259 (1994) 182 CLR 272.

260 (1996) 187 CLR 579; [1996] HCA 29.

261 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 76-77, 94-95; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142-144, 159, 169, 217-218; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 299, 336-337, 363, 387.

262 *W & A McArthur Ltd v State of Queensland* (1920) 28 CLR 530 at 567-568 per Gavan Duffy J; [1920] HCA 77 (referred to with approval in *Cole v Whitfield* (1988) 165 CLR 360 at 395-396; [1988] HCA 18); *The Commonwealth v Bank of NSW* (1949) 79 CLR 497 at 639; [1950] AC 235 at 309-310; *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 581 per Barwick CJ, 607-608, 614-615 per Mason J, 620-621 per Jacobs J; [1975] HCA 45; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 281-282 per Barwick CJ; [1980] HCA 40; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 472 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ; [1990] HCA 1; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 54, 56 per Brennan J.

268 Judgments in *ACTV* and in *Nationwide News* spoke in the language of proportionality. To an extent, such an analysis had been utilised in cases involving s 92 of the Constitution[263]. In *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW*[264], Mason J said that the regulation there in question was not shown to be necessary to the legislative object of the protection of public health and was, therefore, not a reasonable regulation of interstate trade in pasteurised milk[265]. The test of "reasonable necessity" was later adopted as a doctrine of the Court in *Betfair Pty Ltd v Western Australia*[266]. It was said to be consistent with the acceptance in *Cole v Whitfield*[267] that the total prohibition in Tasmanian legislation on the sale of undersized crayfish was necessary for the protective purpose there concerned.

269 The legislation at issue in *Nationwide News* made it an offence to use words, in writing or in speech, which were calculated to bring a member of the Industrial Relations Commission into disrepute. Freedom of communication about government institutions was thereby restricted. The judgments spoke of the lack of need for, or reasonableness of, the level of protection provided by the legislation. Mason CJ held the legislation to be unnecessary and disproportionate[268]; McHugh J referred to a law that was "grossly disproportionate to [its] need" and an "extraordinary intrusion" upon the implied freedom[269]. Deane and Toohey JJ considered that the legislation went far beyond what was reasonably necessary[270] and Brennan J identified a lesser restriction that could have been effected[271].

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263 *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 303-307; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 472, 473-474.

264 (1975) 134 CLR 559.

265 *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 608.

266 (2008) 234 CLR 418 at 477 [102]-[103]; [2008] HCA 11.

267 (1988) 165 CLR 360 at 409-410.

268 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 34.

269 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 101.

270 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 78.

271 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 53.

270 *ACTV* concerned prohibitions and restrictions affecting broadcasting of political advertisements in election periods. Views were expressed in the judgments that the prohibitions went beyond what was reasonably necessary to achieving the aim of preventing corruption[272], and that they could not be regarded as reasonable and appropriate[273].

271 Other considerations, relevant to whether a law impermissibly restricts the implied freedom, are evident from some of the judgments. In *ACTV*, Mason CJ was inclined to analyse the kinds of restrictions effected on communications[274], and the nature of the interests sought to be protected by the freedom. Both Mason CJ and McHugh J spoke of the different levels of justification required for different kinds of restrictions[275].

272 It may be said that in the cases which followed *Nationwide News* and *ACTV*, the use of proportionality analysis appears to have been somewhat more restricted[276]. It is not necessary to survey those cases. In *Lange*, the Court articulated a test to be applied to determine whether a law infringes the implied freedom[277] and in that process it drew upon aspects of *ACTV*. Some statements of the test in *Lange* may be thought to require further explication. These appeals necessitate particular attention to the requirements of the test as expressed in *Lange*.

273 In *Lange* it was explained that the system of representative government which is provided for by the Constitution requires that members of the Houses of Parliament be "directly chosen by the people". Because there is a choice to be exercised, legislative power cannot support an absolute denial to the people of access to information relevant to that choice. Sections 7 and 24 of the

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272 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 174 per Deane and Toohey JJ.

273 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 221 per Gaudron J; see also at 146-147 per Mason CJ.

274 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143 per Mason CJ, 234-235 per McHugh J.

275 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143 per Mason CJ, 235 per McHugh J.

276 See Zines, *The High Court and the Constitution*, 5th ed (2008) at 61-62.

277 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

Constitution do not, however, confer personal rights on individuals; rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power[278].

274 *Lange* repeated what had earlier been said, namely that the implied freedom is not absolute, and said that it is limited to what is necessary for the effective operation of that system of representative government provided for by the Constitution[279]. Whilst recognising that the implied freedom operates as a restriction on legislative power, *Lange* held that a law will not be invalid if it is enacted to meet some other legislative end, so long as it satisfies two conditions[280]. The first condition was stated to be:

> "that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government".

The second condition was that:

> "the law is reasonably appropriate and adapted to achieving that legitimate object or end."

275 Reference was also made at this point in the reasons to how a test for infringement of the implied freedom might be expressed. It might be said to be "whether the law is reasonably appropriate and adapted to the fulfilment of a legitimate purpose", or it could be described as a test of proportionality. There was not considered to be a relevant distinction between these formulations.

276 The Court stated the test[281] to be applied in determining whether a statute infringes the freedom later in its reasons. "The *Lange* test", as subsequently modified[282], is in these terms:

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278 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560.

279 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561.

280 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562.

281 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

282 *Coleman v Power* (2004) 220 CLR 1 at 50 [93], 51 [95]-[96] per McHugh J, 78 [196] per Gummow and Hayne JJ agreeing; [2004] HCA 39; *Hogan v Hinch* (2011) 243 CLR 506 at 542 [47]; see also *Wotton v Queensland* (2012) 246 CLR 1 at 15 [25], 30 [77], 31-32 [82]; [2012] HCA 2.

> First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

277 Some observations are necessary respecting the *Lange* test as stated. It will be observed that there are *two objects* spoken of. In the reference to the conditions for validity, which were earlier stated, the first object or the "legitimate end" is the maintenance of the constitutionally prescribed system of government. In the reference which followed to a possible test for infringement and in the *Lange* test itself, it is said to be necessary that a law be reasonably appropriate and adapted to serve "a legitimate purpose" or "a legitimate end". Here reference is made to the second object, the impugned law's own object. That end, and the means by which it is sought to be achieved, must be compatible with the aforementioned constitutional imperative of the maintenance of the prescribed system of representative government.

278 It may then be observed that *two tests* are involved: one of compatibility with the constitutional imperative of the maintenance of representative government, or the freedom which supports it; and one of proportionality (or whether the law is "reasonably appropriate and adapted"). And it is necessary to bear in mind, by reference to the conclusion reached in *Lange*, that an enquiry into whether the burden imposed by the law upon the implied freedom is too great or "undue"[283] is necessarily addressed.

279 The relative succinctness with which the test is stated in *Lange* should not mislead. What has been referred to as the second limb of the *Lange* test, read with other statements in *Lange*, may be seen to involve a series of different enquiries.

280 The first enquiry concerns the relationship between a valid legislative object and the means adopted for its attainment. The latter must be "reasonably appropriate and adapted", or proportionate, to that object. The reference in *Lange*[284] to the example of *ACTV* confirms the applicability of such a test. As was observed in *Lange*, the law was held to be invalid in *ACTV* because there were clearly other, less drastic, means by which the objectives of the law could

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283 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568-569, 575.

284 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568.

have been achieved. Thus if the means employed go further than is reasonably necessary to achieve the legislative object, and are disproportionate to it, invalidity may result. This brings to mind the test of reasonable necessity stated in *Betfair Pty Ltd v Western Australia*[285]. In such a case it would follow that the burden imposed upon the freedom could not be justified, even if it were not great.

281 Even if the ends and means of the impugned legislation are in proportion, the second limb of the *Lange* test requires that they each be tested for compatibility with the constitutional imperative of the maintenance of the system of representative government. It will be a rare case where a conclusion of outright incompatibility will be reached and, where it is, it will be by reference to the object of the legislation. In most cases, the question of incompatibility will involve examining the extent of the effect of the legislative restrictions upon the communications the subject of the implied freedom which supports the maintenance of that system of government.

282 What is not clearly expressed in the second limb of the test is what appeared in the earlier statement relating to the two conditions for validity, namely that the law must also be proportionate, or reasonably appropriate and adapted, to the first object of maintaining representative government. This enquiry involves the relationship between that object and the means employed by the legislation. It is tested by assessing the extent of the restriction imposed upon political communication, the subject of the freedom. This enquiry is evident in the conclusion reached in *Lange* that the law of defamation did not impose an "undue burden" on the freedom[286]. It reflects what was said by Brennan J in *Nationwide News*[287] in connection with s 92, namely that s 92 invalidates a law in so far as it imposes an impermissible burden on a protected interstate transaction. That the enquiry is as to the effect of the impugned law on a constitutionally protected freedom is confirmed by *Cole v Whitfield*[288], where the question was stated as being whether the burden so disadvantaged interstate trade as to raise a protective barrier around Tasmanian trade in crayfish.

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285 (2008) 234 CLR 418 at 479 [110]; and see *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 135-136 [443] per Kiefel J; [2010] HCA 46.

286 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568-569, 575.

287 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 56.

288 (1988) 165 CLR 360 at 409.

283 These tests or enquiries involve proportionality analysis. It was said on more than one occasion in *Lange* that there was no difference between the concept reflected in the words "reasonably appropriate and adapted" and the test of proportionality[289]. So much had earlier been suggested in *Cunliffe v The Commonwealth*[290]. In *Roach v Electoral Commissioner* it was said[291] that what upon close scrutiny is disproportionate or arbitrary may not answer the description "reasonably appropriate and adapted". This raises the question whether the use of this more cumbersome and inexact phrase should be continued. That question will be discussed later in these reasons.

284 *Lange* itself was concerned, not with statute law, but with the common law rules of defamation in New South Wales, which were required to conform to constitutional requirements[292]. The purpose of the law, of protecting reputation, was not regarded as incompatible with the implied freedom or the system of representative government it serves. It was said that the constitutionally prescribed system of government did not require that there be an unqualified freedom to publish defamatory matter[293].

285 The problem with the common law as developed prior to *Lange* was that it operated to restrict publication of political communication without providing a defence of qualified privilege in the circumstance of a wide publication. The Court extended that defence. Once the law was developed in this way, the Court was able to conclude that, having regard to the need to protect reputation, the law of defamation went no further than was reasonably appropriate and adapted to achieve that object. Whilst it placed something of a burden on the implied freedom, it did not create an "undue burden"[294].

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289 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562, 567 fn 272.

290 (1994) 182 CLR 272 at 296-297, 300, 324, 339-340, 377.

291 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85] per Gummow, Kirby and Crennan JJ; [2007] HCA 43.

292 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 556.

293 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568.

294 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568-569, 575.

286 Arguments in these appeals focus largely upon the approaches taken in the later case of *Coleman v Power*[295]. The problem with the statutory provision there in question, so far as concerned the *Lange* test, was that on one view of its language and purpose, it would operate too widely in its restriction upon statements made in a public place and therefore upon political communication. In some of the judgments the provision was construed so as to restrict its sphere of operation, with the result that it met the *Lange* test. That approach has particular relevance to these appeals.

The wide view of s 471.12 and the *Lange* test

287 The word "offensive" in s 471.12 relevantly characterises the contents of a communication which is made using a postal service. It is a relative term, capable of referring to material ranging in degree of offensiveness. The section applies an objective standard, namely that of a reasonable person, and enquires whether that person would regard the use of the postal service in all the circumstances as offensive.

288 The inclusion of an objective standard is not unimportant to the question whether the section goes further than is reasonably necessary, in the sense discussed in *Lange*. An objective standard operates to limit communications which may fall within s 471.12. The enquiry under s 471.12 is not merely whether the recipient is offended, but whether the content of the communication or the method of sending it is offensive, judged by that objective standard. That standard does not elucidate what is to be taken as offensive for the purposes of the section and, in particular, what degree of offensiveness is required; however, the technique of applying an objective standard to answer a question is familiar in the law.

289 The legislative history, context and purpose of s 471.12 may assist in determining this question of construction. So too may other relevant principles of construction, which may require that the provision be read down. For present purposes it may be accepted that, at the lower end of the range, an offensive communication might refer to a communication which might cause upset to a person. A communication may be said to be offensive if it is capable of causing mere insult or hurt to a person's feelings.

290 The judgments in the Court of Criminal Appeal implicitly accept that if the meaning of "offensive" in s 471.12 extends to communications of this nature, at the lower end of the spectrum of offensiveness, then s 471.12 cannot pass the

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295 (2004) 220 CLR 1.

second limb of the *Lange* test. Stated in terms of the conclusion reached in *Lange*, it would have too far-reaching an effect on communications of the kind protected by the implied freedom and would therefore unduly burden it.

291 The primary judge and all members of the Court of Criminal Appeal adopted a restricted meaning of the term "offensive" in s 471.12 with the result that the section would apply to a smaller number of cases, where the degree of offensiveness might be said to be at the higher end of the spectrum[296]. The appellants submit that that meaning is not open and that any construction of s 471.12 must be consistent with the ordinary meaning of the word "offensive". By "ordinary", the appellants may be taken to refer to the widest meaning of the word, extending to the lowest degree of offensiveness.

292 The appellant Droudis' submission proceeds by reference to *Coleman v Power*[297]. It is submitted that a majority there held that a law prohibiting the use of "insulting" words in a public place will only be valid in conformity with the test in *Lange* if the offence it creates refers to the use of insulting words which are intended, or likely, to cause a breach of the peace by provoking some unlawful physical retaliation from the person to whom the words are directed or some other person who hears them. It is submitted that, in that process, that same majority rejected a meaning of "insulting" which comprehends mere injury to a person's feelings. So wide a construction would be consistent with a legislative purpose of ensuring the civility of discourse in public. A law operating so widely upon political communication could not meet the *Lange* test[298].

293 The appellants seek to apply such reasoning to the words "offensive communications". On their argument, the term "offensive" cannot, on its ordinary meaning, be read other than as affecting a person's feelings. By analogy, *Coleman v Power* concludes the *Lange* test against the validity of s 471.12.

Coleman v Power

294 Section 7(1)(d) of the *Vagrants, Gaming and Other Offences Act* 1931 (Q) made it an offence to use "threatening, abusive, or insulting words" in a public

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296 *Monis v The Queen* (2011) 256 FLR 28 at 39 [44], 48 [83], 54-55 [116]-[118]; *R v Monis* (2011) 12 DCLR (NSW) 266 at 272 [24].

297 (2004) 220 CLR 1.

298 *Coleman v Power* (2004) 220 CLR 1 at 78-79 [199].

place. The appellant in *Coleman v Power* was convicted of, inter alia, using insulting words contrary to that Act. The words were to be found in a statement made by the appellant to a police officer, whom the appellant publicly accused of being corrupt. A majority of the Court (McHugh, Gummow, Kirby and Hayne JJ; Gleeson CJ, Callinan and Heydon JJ dissenting) held that the conviction should be set aside. The submission for the appellant Droudis relies upon an argument that the same majority held that a word as far-reaching in operation as "insulting" can never pass the *Lange* test unless it is capable of being read down.

295 The word "insulting" shares the same problem as the word "offensive" with respect to its intended operation in a statute creating an offence, in that they both describe statements which range in the severity of their effect. In *Coleman v Power*, Gleeson CJ drew a direct analogy between the two words[299]. Gummow and Hayne JJ held that if one construed the words "abusive or insulting" to encompass insults which are merely calculated to hurt the feelings of a person, the impugned provision could not satisfy the test in *Lange*[300]. Kirby J considered that an unqualified offence of expressing insulting language in a public place would be intolerably over-wide and difficult to characterise as a law meeting the *Lange* test[301].

296 Gummow and Hayne JJ considered it to be of some significance to the limit to be applied in interpreting the word "insulting" that, although the maximum fine by way of penalty for the offence was relatively small, a person could be imprisoned for six months[302]. Their Honours posed the question as to what it was that rendered the public utterance of insulting words a matter for criminal punishment and said that the answer must lie in the characteristics the insult must have[303]. Their Honours held that, in the context of the provision, the words "abusive" and "insulting" should be understood as words which, in the circumstances in which they are used, are so hurtful as to either be intended to, or be reasonably likely to, provoke unlawful physical retaliation[304]. Kirby J agreed

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299 *Coleman v Power* (2004) 220 CLR 1 at 25 [13].

300 *Coleman v Power* (2004) 220 CLR 1 at 78-79 [199].

301 *Coleman v Power* (2004) 220 CLR 1 at 91 [237], [239].

302 *Coleman v Power* (2004) 220 CLR 1 at 73 [177]-[178].

303 *Coleman v Power* (2004) 220 CLR 1 at 76 [189].

304 *Coleman v Power* (2004) 220 CLR 1 at 77 [193].

with that interpretation, dealing as it did with extreme conduct[305]. Construed in this way, Gummow and Hayne JJ held, s 7(1)(d) was reasonably appropriate and adapted to serve the legitimate end of keeping public places free from violence[306].

297 McHugh J did not read the offence as narrowly so as to be directed to preventing a breach of the peace. His Honour gave consideration to that purpose, because it was one of the justifications put forward in argument in favour of the validity of the statutory provision. He accepted that such a purpose would be compatible with a system of representative government[307]. However, his Honour's concern was that the prohibition was unqualified so that, even if it were addressed to that purpose, it went beyond what was reasonably appropriate and adapted to prevent breaches of the peace[308]. In the result, his Honour was prepared to excise that part of the provision which proscribed the use of insulting words in discussing political and governmental matters in or near a public place[309], but his Honour did not adopt the constructional approach of the other three majority Justices.

298 Gleeson CJ paid close attention to the meaning to be given to "abusive" and "insulting words" within the provision. However, his Honour did so by reference to the meaning to be given to the words in the context, and given the evident purpose, of the legislation. His Honour does not appear to have considered that an offence postulated on the likelihood of retaliation was comprehended by the provision. His Honour observed that "a group of thugs who, in a public place, threaten, abuse or insult a weak and vulnerable person may be unlikely to provoke any retaliation, but their conduct, nevertheless, may be of a kind that Parliament intended to prohibit."[310] In his Honour's view, s 7(1)(d) extended to insulting words intended or likely to provoke a forceful response, but it was not limited to that circumstance. To come within the provision the language must not merely be derogatory; it must be such that its use, in the place where it is spoken and in the context of to whom it is spoken, is

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305 *Coleman v Power* (2004) 220 CLR 1 at 98 [254], 98-99 [256].

306 *Coleman v Power* (2004) 220 CLR 1 at 78 [198].

307 *Coleman v Power* (2004) 220 CLR 1 at 53 [102].

308 *Coleman v Power* (2004) 220 CLR 1 at 53-54 [102].

309 *Coleman v Power* (2004) 220 CLR 1 at 56 [110].

310 *Coleman v Power* (2004) 220 CLR 1 at 25 [12].

contrary to contemporary standards of good public order and goes beyond what, by those standards, is simply an exercise of the freedom to express opinions[311]. No comprehensive statement of the circumstances in which the use of language in a public place will involve such a disturbance of public order, or such an affront to contemporary standards of behaviour, as to constitute the contemplated offence, was possible[312].

299 In reasoning to this conclusion, Gleeson CJ referred[313], it would seem with approval, to what was said in *Ball v McIntyre*[314], where the word "offensive" appeared together with the words "threatening", "abusive" and "insulting" in a statutory provision creating an offence. The word "offensive" was held to convey the idea of behaviour likely to arouse significant emotional reaction. It was said in that case that what must be involved is an emotional reaction, such as anger, resentment, disgust or outrage[315].

300 It is therefore not correct to say, as the appellant Droudis does, that a majority in *Coleman v Power* held that the validity of the provision in question depended upon the offence being restricted in its operation to refer to the likelihood that insulting words might provoke violence. Nevertheless it may be accepted that a majority of the Court considered it necessary that the words "abusive" and "insulting" be given a restricted meaning, if the operation of the provision in question was not to be too wide in its effect upon political communication and thus fail to meet the test in *Lange*. Gummow and Hayne JJ considered that, on the wider construction of the provision, the relevant legislative purpose of prohibiting abusive or insulting language could only be to ensure civility of discourse[316]. It may be observed that Gleeson CJ did not consider the legislative purpose to be so limited and indicated that it extended to the maintenance of public order[317]. It may be inferred from his Honour's reference to *Ball v McIntyre* that his Honour considered that "abusive" and

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311 *Coleman v Power* (2004) 220 CLR 1 at 26 [14].

312 *Coleman v Power* (2004) 220 CLR 1 at 26 [15].

313 *Coleman v Power* (2004) 220 CLR 1 at 25-26 [13].

314 (1966) 9 FLR 237.

315 *Ball v McIntyre* (1966) 9 FLR 237 at 243.

316 *Coleman v Power* (2004) 220 CLR 1 at 78-79 [199].

317 *Coleman v Power* (2004) 220 CLR 1 at 26 [14], 32 [32].

"insulting" words were to be interpreted as those capable of creating a stronger emotional reaction than mere hurt feelings. The Court of Criminal Appeal in these matters took a similar approach to the construction of s 471.12.

301 In any event, the true relevance of *Coleman v Power* to these appeals is not what might be gleaned from that case as to the meaning to be given to the word "insulting", which, like the word "offensive", may be problematic in statements of what constitutes a criminal offence on any view. It is what principles of construction were there engaged, and how they might be applied here to s 471.12. The central issue in the process of construction is whether the offence in s 471.12 can be read as restricted in its operation to refer only to communications of a higher degree of offensiveness, so that it can satisfy the *Lange* test.

The construction of s 471.12

The reasons of the Court of Criminal Appeal

302 Attention was directed to the meaning of the word "offensive" in earlier decisions of courts in Australia, including *Ball v McIntyre*. As Bathurst CJ observed, although those cases were decided before the implied freedom was recognised by this Court, the courts were astute to interpret provisions restricting or prohibiting offensive language or communications so that they did not unduly restrict political debate[318].

303 *Ball v McIntyre*[319] involved the political behaviour of a person who, in protesting against the Vietnam War, had sat and stood on parts of a memorial statue to King George V and hung a placard upon it. Kerr J observed that while certain improper conduct might be hurtful and cause people to be offended, it may not be "offensive" within the meaning of the statute. The purpose of a charge of offensive behaviour is not to punish those who differ from the majority[320]. To be offensive, behaviour would normally "be calculated to wound the feelings, arouse anger, resentment, disgust or outrage in the mind of a

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318 *Monis v The Queen* (2011) 256 FLR 28 at 38 [35]; and see in this regard *R v Burgmann* unreported, New South Wales Court of Criminal Appeal, 4 May 1973 per Reynolds JA.

319 (1966) 9 FLR 237.

320 *Ball v McIntyre* (1966) 9 FLR 237 at 241; see also *Worcester v Smith* [1951] VLR 316 at 317.

reasonable man."[321] The words "threatening, abusive and insulting" were all words, in his Honour's view, which "carry with them the idea of behaviour likely to arouse significant emotional reaction"[322].

304 Bathurst CJ concluded that for the use of a postal service to be offensive within the meaning of s 471.12, "it is necessary that the use be calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances. However, it is not sufficient if the use would only hurt or wound the feelings of the recipient, in the mind of a reasonable person."[323] Allsop P, whilst accepting the definition proposed by Bathurst CJ[324], suggested a further restriction, namely that to be offensive, the communication must be capable of causing "real emotional or mental harm, distress or anguish to the addressee."[325]

305 In reaching his conclusion, Bathurst CJ took into account a number of factors. In the first place, a possible penalty of imprisonment for two years is significant and suggests that the conduct to which the offence is directed carries a greater degree of criminality than conduct dealt with in legislation concerning some summary offences[326]. The word "offensive" is used in conjunction with "menacing" and "harassing" in s 471.12. This suggested to his Honour that the word "offensive" is directed to conduct more serious than using the postal service to hurt or wound the feelings of a recipient[327]. It was also necessary, in his Honour's view, to take into account the fact that s 471.12 involved communications occurring in private. It would be unlikely that the legislature intended that the sanction should attach to a great deal of private correspondence[328]. His Honour did not consider that the test of a reasonable

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321 *Ball v McIntyre* (1966) 9 FLR 237 at 243, referring to *Worcester v Smith* [1951] VLR 316 at 318.

322 *Ball v McIntyre* (1966) 9 FLR 237 at 243.

323 *Monis v The Queen* (2011) 256 FLR 28 at 39 [44].

324 *Monis v The Queen* (2011) 256 FLR 28 at 50 [91].

325 *Monis v The Queen* (2011) 256 FLR 28 at 50 [89].

326 *Monis v The Queen* (2011) 256 FLR 28 at 39 [39]-[40].

327 *Monis v The Queen* (2011) 256 FLR 28 at 39 [42].

328 *Monis v The Queen* (2011) 256 FLR 28 at 39 [41].

person was relevant to the meaning of the word "offensive", but considered it relevant to the *Lange* test[329].

306 In construing s 471.12, Allsop P had regard to the implied freedom. His Honour acknowledged that the section should be read so as not to offend the freedom and that such an approach would necessarily affect the content of "offensive", in light of the purpose of the section[330].

307 Bathurst CJ said that the purpose of s 471.12 is to protect persons from being menaced and harassed and subjected to material that is offensive. It could be inferred that the legislature considered such protection to be necessary, having regard to the features unique to a postal service, namely that it is used to send communications to a person's home or business address. It is a personalised service in that sense. It is usual for a person to open mail addressed to them and the effect of a communication is therefore difficult to avoid. A recipient in that sense is a captive audience[331].

308 Allsop P likewise saw the section as directed to a service that brings communications into people's homes or places of work, generally in packages that will be opened. Thus the seriousness of the use of the service is that it allows a communication that is menacing, harassing or offensive to be brought into and invade the personal domain of the addressee[332]. Such an intrusion is capable of undermining a sense of civil peace and a sense of the security of one's domain without warning and without consent. In that sense, it could affect public confidence in postal services[333].

A wider meaning?

309 The appellants' approach to the meaning of the word "offensive" in s 471.12 denies the relevance of context. The modern approach to interpretation, particularly in the case of general words, requires that the context be considered

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329 *Monis v The Queen* (2011) 256 FLR 28 at 39 [43].

330 *Monis v The Queen* (2011) 256 FLR 28 at 45-46 [76].

331 *Monis v The Queen* (2011) 256 FLR 28 at 42-43 [59].

332 *Monis v The Queen* (2011) 256 FLR 28 at 45 [75].

333 *Monis v The Queen* (2011) 256 FLR 28 at 46 [78].

in the first instance and not merely later when some ambiguity is said to arise[334]. Such an approach was confirmed as correct in *Project Blue Sky Inc v Australian Broadcasting Authority*[335]. Whilst the process of construction concerns language, it is not assisted by a focus upon the clarity of expression of a word to the exclusion of its context.

310 The word "offensive" is used in s 471.12 in conjunction with "menacing" or "harassing". The appellant Droudis submits that nothing could be gained from those other words, because what is sought to be derived from them is not a similarity of kind[336], but of degree. It is true that a communication which has the quality of being menacing or harassing can be seen to be personally directed and deliberately so. An offensive communication may have those qualities; it may not. In many cases though, the purpose of sending an offensive communication through the post will be to target the addressee. Importantly, the grouping of the three words and their subjection to the same objective standard of assessment for the purposes of the offences in s 471.12 suggests that what is offensive will have a quality at least as serious in effect upon a person as the other words convey. The words "menacing" and "harassing" imply a serious potential effect upon an addressee, one which causes apprehension, if not a fear, for that person's safety[337]. For consistency, to be "offensive", a communication must be likely to have a serious effect upon the emotional well-being of an addressee.

311 The penalty for each of the offences under s 471.12 is the same. The maximum penalty is significant: two years' imprisonment. The appellant Droudis seeks to diminish the importance of penalty as part of the context of the offence involving offensive communications because it might be the subject of an exercise of discretion in a particular case. But it has long been accepted that penalty is an indication of the seriousness with which the legislature views an offence. The severity of penalty was regarded as a matter of no small importance in *Coleman v Power*[338], and there the maximum penalty was much less: six months' imprisonment.

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334 *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315 per Mason J; [1985] HCA 48.

335 (1998) 194 CLR 355 at 381 [69]; [1998] HCA 28.

336 As with the principle of noscitur a sociis.

337 Australia, House of Representatives, Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002, Explanatory Memorandum at 7.

338 (2004) 220 CLR 1 at 73 [177]-[178].

312 The appellant Droudis submits that the legislative history of provisions relating to the use of postal services suggests an intention to widen the scope of material which might be considered offensive, rather than to narrow it. Reliance is placed, in this regard, upon the removal of the words "obscene" and "indecent". Those words were removed when s 85S of the *Crimes Act* was enacted, when the standard of a reasonable person was introduced as the test for whether communications are offensive. Both "indecent" and "obscene" are words which convey one idea, that of offending against recognised standards of propriety – indecent being at the lower end of the scale and obscene at the upper end[339]. The word "offensive" is apt to describe the content of communications which range from being indecent to obscene. It has been observed that criminal law provisions concerned with obscenity fall into a category of laws which must necessarily keep pace with prevailing views of society and changing circumstances. It is for that reason that concepts such as "obscenity" and "offensiveness" are inevitably couched in vague terms[340]. The application of a societal standard may be seen in the use, in s 471.12, of the objective standard of the reasonable person.

313 The appellant Droudis places even greater weight on the omission of the word "grossly", which had qualified the word "offensive" in legislation which preceded the *Postal Services Act* 1975 and its attendant regulations. This is said to support an inference that the nature of the offence was regarded as less serious than it had been before.

314 The reference was changed from "grossly offensive" to "offensive" in character at the same time as the words "blasphemous" and "libellous" were removed. These changes do not necessarily suggest that some lesser seriousness was then thought to attach to the offence. The words "libellous" and "blasphemous" may have been removed because they were considered outmoded and no longer a reflection of what might be regarded, in 1975, as sufficiently serious to warrant criminal liability. In any event, the submission overlooks the fact that s 85S later grouped the offences relating to menacing or harassing communications with that relating to offensive communications. Those firstmentioned offences now provide part of the context for what is comprehended by the offence relating to offensive communications. The submission also ignores the fact that when s 471.12 was enacted, the maximum

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339 *R v Stanley* [1965] 2 QB 327 at 333 per Lord Parker CJ.

340 *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 210 [55] per Simon Brown LJ; *Müller v Switzerland* (1988) 13 EHRR 212 at 226 [29].

term of imprisonment was raised from one to two years, in recognition of the seriousness of the offence[341].

315 It may also be observed that s 471.12 is preceded in the *Code* by other offences relating to postal services which may be regarded as of a serious nature. Section 471.10(1) makes it an offence to cause an article to be carried by a postal service with the intention of inducing a false belief that it contains an explosive or a dangerous or harmful substance. Section 471.11 refers to using a postal or similar service to make a threat to kill or a threat to cause serious harm. These sections refer to conduct which may create fear or apprehension.

316 The word "grossly" may have been thought an unnecessary gloss to the word "offensive", given that it had for some time been understood to refer to language or conduct at the higher end of the spectrum of offensiveness. For the purposes of the offence against s 1(1) of the *Malicious Communications Act* 1988 (UK), a communication has to be "grossly offensive". That standard has been said to require more than statements of opinion which may be distasteful or even painful to those subjected to them[342]. This does not seem so far from what was said in *Ball v McIntyre* and what was accepted as the meaning of "offensive" in s 471.12 by the Court of Criminal Appeal.

Freedom from intrusion

317 No conclusion can be reached regarding the construction of that part of s 471.12 which concerns offensive communications without identifying its purpose. The identification of that purpose is essential for the application of the *Lange* test. In the context of offence provisions, the question of purpose is rarely answered by reference only to the words of the provision, which commonly provide the elements of the offence and no more. It may be necessary to consider the context of the provision including other provisions in the statute and the historical background to the provision. Further, in the case of many crimes, the social objective of the legislation can be self-evident, and, in these appeals, may readily be inferred in respect of s 471.12.

318 The purpose of s 471.12, contrary to the appellant Droudis' contention, is not merely to ensure civility of discourse between users of the postal service. In this regard, it may immediately be observed that offensive, menacing or harassing communications will almost certainly be unsolicited. The section is,

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341 Australia, House of Representatives, Criminal Code Amendment (Anti-hoax and Other Measures) Bill 2002, Explanatory Memorandum at 7.

342 *Chambers v Director of Public Prosecutions* [2013] 1 All ER 149 at 156 [28].

therefore, not concerned with mutual discourse. The section does not qualify an offensive communication as unsolicited, but the circumstance that it was sent unsolicited will be a circumstance relevant to the method of use to which the section refers.

319 The appellant Droudis accepts that s 471.12 might be said to protect the "integrity of the post" and to maintain "public confidence in the postal service" and accepts that those purposes are rationally connected to preserving a sense of security or safety on the part of recipients of mail.

320 The risk of physical harm presented by physical objects and substances sent through the post is addressed in Pt 10.5 of the *Code*, as earlier mentioned. So too is the risk of the creation of fear or apprehension in an addressee who receives a communication in the nature of a hoax or threat. Section 471.12 seeks to deter a particular use of a postal service. It may be taken to recognise a citizen's desire to be free, if not the expectation that they will be free, from the intrusion into their personal domain of unsolicited material which is seriously offensive.

321 In the 18th century, postal services were made a sovereign function in many nations, because they were considered a necessity. It was not possible to have government without communication[343]. This underscores the importance of the implied freedom in the context of the regulation of postal services. Yet around the same time, an English judge made the social observation that "[e]very man's house is his castle"[344] when discussing the conditions for the execution of search warrants. That a warrant to search premises might not identify the object of the search was described as "totally subversive of the liberty of the subject"[345]. Such a requirement is commonplace in Australian statutes today[346].

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343 *United States Postal Service v Council of Greenburgh Civic Associations* 453 US 114 at 121 (1981); see also *Lamont v Postmaster General* 381 US 301 at 305 (1965).

344 *Bostock v Saunders* (1773) 2 Wm Bl 912 at 914 per De Grey CJ [96 ER 539 at 540].

345 *Wilkes v Wood* (1763) Lofft 1 at 18 [98 ER 489 at 498]; see also *Entick v Carrington* (1765) 2 Wils KB 275 [95 ER 807].

346 *New South Wales v Corbett* (2007) 230 CLR 606 at 629-630 [95]; [2007] HCA 32.

322 In *Rowan v United States Post Office Department*[347], Burger CJ referred to the continuing "vitality" of the concept of the home as castle when considering whether there was a "right to communicate offensively with another". In that case, it was observed that people are often "captives" outside the sanctuary of the home, but that this does not mean that they must be captives everywhere[348]. It has been said that "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions."[349]

323 More recently, in *R (ProLife Alliance) v British Broadcasting Corporation*[350] it was said, in connection with a possible television broadcast of images of aborted foetuses, that members of the public may be outraged to be confronted, in the privacy of their homes, with gratuitously offensive material. A citizen "has a right not to be shocked or affronted by inappropriate material transmitted into the privacy of his home"[351]. In *Connolly v Director of Public Prosecutions*[352], which concerned an offence under the *Malicious Communications Act*[353], it was held that just as people have the right to be protected in their homes from grossly offensive and indecent letters, so too, in general terms, do people in the workplace.

324 The Australian Constitution does not afford a person a right of protection against unwarranted intrusions of a seriously offensive kind. Nor does it provide a personal right of freedom to communicate regarding matters relating to politics and government. It implies a freedom of political communication which operates to restrict the exercise of legislative power in a manner that is incompatible with, or is likely to unduly restrict, that freedom. But the freedom is not absolute. The *Code*, by s 471.12, seeks to protect people from the intrusion of offensive material into their personal domain. It does not create a right but may serve to

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347 397 US 728 at 737 (1970).

348 *Rowan v United States Post Office Department* 397 US 728 at 738 (1970).

349 *Frisby v Schultz* 487 US 474 at 484-485 (1988).

350 [2004] 1 AC 185 at 243 [91].

351 *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 252 [123].

352 [2008] 1 WLR 276 at 285 [28]; [2007] 2 All ER 1012 at 1021.

353 Referred to at [264] above.

deter persons from such misconduct. It may do so according to *Lange*, and relevantly, so long as it does not go too far.

325 The appellants point to the recent decision of the United States Supreme Court in *Snyder v Phelps*[354], where the First Amendment to the Constitution was applied in circumstances not dissimilar to those present in this case. The right of freedom of speech was held to protect a group of persons picketing at the funerals of servicemen from liability in tort, although it was observed by the dissentient[355] that the protected speech made no contribution to public debate.

326 There is little to be gained by recourse to jurisprudence concerning the First Amendment, although it may be observed that, despite the wide protection it affords freedom of speech, which is regarded as almost absolute, it has been considered necessary to except obscene or indecent material from that constitutional protection[356]. That jurisprudence may be contrasted with that in Europe, where freedom of political speech is protected under Art 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Freedom of communication is there described as one of the essential foundations of a democratic society[357], but it is not said to be absolute. By Art 10(2) it may be subjected to such conditions, restrictions and penalties as are "necessary in a democratic society". In language reminiscent of that in *Lange*, it has been held that a law may be justified if the restriction it imposes is proportionate to a legitimate aim[358]. In *Handyside v United Kingdom*, the *Obscene Publications Act* 1959 (UK), as amended by the *Obscene Publications*

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354 179 L Ed 2d 172 (2011).

355 *Snyder v Phelps* 179 L Ed 2d 172 at 193 (2011) per Alito J.

356 *Hamling v United States* 418 US 87 (1974) (concerning postal communications); *Federal Communications Commission v Pacifica Foundation* 438 US 726 (1978) (concerning radio communications); compare *Reno v American Civil Liberties Union* 521 US 844 (1997) (concerning internet transmissions).

357 *The Observer and the Guardian v United Kingdom* (1991) 14 EHRR 153 at 191 [59]; *Jersild v Denmark* (1994) 19 EHRR 1 at 14 [30]; *Vogt v Germany* (1996) 21 EHRR 205 at 234-235 [52].

358 *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754 [49] (putting to one side references to a margin of appreciation); see also *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 202 [29].

Act 1964 (UK), was held to have such an aim in the protection of morals in a democratic society[359].

Further principles of construction

327 There are stronger reasons than context for reading the word "offensive" in s 471.12 as confined to more seriously offensive communications. It was recognised in early case law concerning the Constitution that it was a sound rule of construction that legislation should, if possible, be interpreted so as not to make it inconsistent with the Constitution[360]. There is a presumption that Parliament does not intend to pass beyond constitutional bounds[361]. This principle has been reaffirmed on many occasions. More recently, in *New South Wales v The Commonwealth* (*Work Choices Case*)[362], it was said that where different constructions are available, that construction which would avoid, rather than lead to, a conclusion of constitutional invalidity is to be selected[363].

328 The opening words of s 15A of the *Acts Interpretation Act* 1901 (Cth), "[e]very Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth", are consistent with this principle. Section 15A is concerned principally with preserving so much of a statute as may be valid. The principle expressed in its opening words is to be applied in that process. Latham CJ said in *Australian National Airways Pty Ltd v The Commonwealth*[364] that he regarded s 15A "as a direction to the Court to treat all statutes as being valid as far as possible, and to assume, as the general intention of Parliament, that as much of an Act shall operate as can operate, even if other parts may fail."

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359 *Handyside v United Kingdom* (1976) 1 EHRR 737 at 752-753 [46].

360 *Davies and Jones v The State of Western Australia* (1904) 2 CLR 29 at 43 per Griffith CJ; [1904] HCA 46.

361 *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 180 per Isaacs J; [1926] HCA 58.

362 (2006) 229 CLR 1 at 161-162 [355]; [2006] HCA 52, cited in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11] per Gummow, Hayne, Heydon and Kiefel JJ; [2008] HCA 4.

363 See also *Western Australia v The Commonwealth* (*Native Title Act Case*) (1995) 183 CLR 373 at 469; [1995] HCA 47.

364 (1945) 71 CLR 29 at 65; [1945] HCA 41.

329 Of course, this principle of construction is subject to the language and purposes of the Act in question. It permits legislation to be read in a way which would result in validity, but only so far as the language permits and only if there is no clear contrary intention that the statute is to operate in a way which must inevitably lead to invalidity[365].

330 General words and expressions may sometimes give rise to difficulties in the application of the principle. Such words may be capable of applying a provision to cases where it is within power as well as to cases where it is beyond power[366]. The solution, where the Court is faced with general words, which may be applied so as to maintain legislation within the limitation on legislative power effected by the implied freedom, may be found in the intention of the statute[367].

331 The question of legislative intention directs attention to another principle of construction which is to be applied here. Like the firstmentioned principle, arising from the presumption of constitutional validity, the principle of legality is based upon a presumption which may be sourced in rule of law concepts. The principle of legality is known to both the Parliament and the courts as a basis for the interpretation of statutory language[368]. It presumes that the legislature would not infringe rights without expressing such an intention with "irresistible clearness"[369]. The same approach may be applied to constitutionally protected freedoms. In such a circumstance it may not be necessary to find a positive warrant for preferring a restricted meaning[370], save where an intention to restrict political communication is plain (which may result in invalidity). A meaning

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365 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 267; [1945] HCA 30.

366 *Pidoto v Victoria* (1943) 68 CLR 87 at 110-111 per Latham CJ; [1943] HCA 37; see also *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652 per Dixon J; [1939] HCA 19.

367 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652 per Dixon J.

368 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21]; [2004] HCA 40.

369 *Potter v Minahan* (1908) 7 CLR 277 at 304; [1908] HCA 63; see also *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15]; [2010] HCA 23.

370 As to which see *Pidoto v Victoria* (1943) 68 CLR 87.

which will limit the effect of the statute on those communications is to be preferred.

332 These principles of construction were engaged in *Coleman v Power*. Kirby J applied the firstmentioned principle, which his Honour described as a principle of "constitutional conformity"[371]. His Honour said that the word "insulting" should not be given its widest meaning in the context of s 7(1)(d), but should be read narrowly, so that it would not infringe the implied constitutional freedom[372]. Gummow and Hayne JJ said that once it is recognised that fundamental rights are not to be cut down save by clear words, it follows that the curtailment of free speech by legislation proscribing particular kinds of utterances in public will often be read as "narrowly limited"[373].

Section 471.12 read down

333 It follows from the earlier discussion, concerning a contextual construction of s 471.12, that there is no barrier presented to reading it down to apply to a narrower category of offensive communications than would be the case if attention were directed only to the wider meaning of the word "offensive". Contextual considerations and legislative history of the offence are consistent with such an approach. It is unlikely that Parliament intended to prohibit all communications which happen to contain matter which may cause some offence. As Gleeson CJ observed in *Coleman v Power*[374], legislation concerned with the regulation of communications usually attempts to strike a balance between competing interests. Section 471.12 may be taken to do so by prohibiting communications which are offensive to a higher degree.

334 The process of construction, by reading down, is undertaken with an eye to the requirements of the second limb of *Lange*, but it is nevertheless a process of construction which is limited by the language and purposes of the statute. The principles of construction referred to above require that s 471.12 be read down so that it goes no further than is necessary in order to achieve its protective purpose, consistent with its terms, without unduly burdening political communication.

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371 *Coleman v Power* (2004) 220 CLR 1 at 87-88 [227].

372 *Coleman v Power* (2004) 220 CLR 1 at 87 [226].

373 *Coleman v Power* (2004) 220 CLR 1 at 76 [188].

374 (2004) 220 CLR 1 at 32 [32].

335 It might be thought a simple matter to excise political communication from the purview of s 471.12. Such an approach may underestimate the difficulty in determining when a communication is said to qualify as "political". This points to the need for statutory context and direction and here s 471.12 provides none. That is because the section is intended to apply to communications which are offensive to the requisite degree, regardless of subject matter. The legislative history and framework support a construction which applies a degree of offensiveness to the quality of the communication which is intended to be prohibited; they do not support the creation of an exception by reference to its subject matter.

336 The cases concerned with statutory prohibition or regulation of offensive conduct or communications make plain, and the judgments in the Court of Criminal Appeal confirm, that it is well understood that the protection intended to be provided by provisions such as s 471.12 relates to a degree of offensiveness at the higher end of the spectrum, although not necessarily the most extreme. Words such as "very", "seriously" or "significantly" offensive are apt to convey this. It is difficult to accept that this would be insufficient for the purposes of the application of the objective standard of the reasonable person, who may be taken to reflect contemporary societal standards, including those relating to robust political debate.

337 For the purposes of the construction of s 471.12 and the application of the *Lange* test, it would not seem necessary to go further by attempting to describe what level of emotional reaction or psychological response might be thought likely to be generated by a seriously offensive communication. It might be necessary to do so when directing a jury charged with finding whether the offence is made out.

338 Juries, and trial judges, often grapple with concepts that are difficult to define with precision. Proof beyond reasonable doubt comes immediately to mind, as does the perception of a reasonable person. Such concepts, although attended by a degree of difficulty in application, are not usually regarded by the courts as incapable of application. Rather it is recognised that juries will require assistance by the directions given by a trial judge. It would be possible to provide sufficient guidance in this way about the limits of the offence comprehended by s 471.12. The examples given in the Court of Criminal Appeal of the type of reaction which an offensive communication might engender[375] are useful to show the level of seriousness of the offence. One would expect such a communication to be likely to cause a significant emotional reaction or

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375 Discussed at [304] above.

psychological response. The former may range from shock through to anger, hate, disgust, resentment or outrage, and the latter may include provocation, anxiety, fearfulness and insecurity. As indicated earlier[376], a range of circumstances may be relevant to the method of use to which the postal service is put. An exhaustive list is not possible. Communications with such serious effects may be contrasted with those which cause mere hurt feelings.

339 The comparison drawn by the appellants with the standard set in some of the judgments in *Coleman v Power* is not useful. The offence there concerned statements made in a public place and therefore raised questions of public order, including the possibility that insulting and abusive statements might provoke violence. Section 471.12 operates in a different sphere and for different purposes. Its purposes are not confined to ensuring the civility of discourse in society. Its protective purposes, and the means by which they are achieved, are to be determined not by reference to *Coleman v Power*, but by the application of the *Lange* test.

The *Lange* test applied

340 Thus far, the field of operation of the offence contained in s 471.12 has been identified by reference to the quality of the communications subject to it and the degree of offensiveness necessary. The restriction of the offence to higher levels of offensiveness will limit the number of political communications which are caught by it.

341 There is a further restriction on the operation of the section which arises from proof of the fault element of the offence. As was pointed out in argument, the scope of s 471.12 is further confined when regard is had to this element. The fault element that applies to a use of the postal service that reasonable persons would regard, in all the circumstances, as offensive, is recklessness[377]. A person will be reckless if he or she is at least aware of a "substantial risk" that reasonable persons would so regard the use, where it is unjustifiable to take the risk[378]. Intention or knowledge will also satisfy the fault element of recklessness[379]. The requirement of proof of fault therefore excludes from the scope of the offence those cases where the conduct could not be said to be intentional or reckless.

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376 At [261], [288], [318].

377 See *Criminal Code*, s 5.6(2).

378 *Criminal Code*, s 5.4(1).

379 *Criminal Code*, s 5.4(4).

342 It may also be observed that s 471.12 is not directed to political communication. It only incidentally burdens them in its operation. A distinction has been drawn between laws of this kind and laws which prohibit or restrict communications that are inherently political[380]. The distinction is most relevant in applying the second limb of the *Lange* test. As was observed in *Wotton v Queensland*[381], a law which only incidentally restricts political communication is more likely to satisfy that aspect of the test.

343 Nevertheless, s 471.12 "effectively burdens" such communications for the purpose of the first limb of the test. Political communication which is offensive within the meaning of the section will be penalised, and may be deterred for that reason. It may be accepted that an effect upon political communication which is so slight as to be inconsequential may not require an affirmative answer to the first limb enquiry, but it cannot be suggested that s 471.12 falls within this category, even if its likely effect is hard to quantify. Once a real effect upon the content of political communication is seen as likely, attention must be directed to the second limb of the test. That is because the evident purpose of *Lange* is to require a justification for a burden placed upon the freedom[382]. This is not to say that the level of the restriction or burden which is imposed is not relevant. *Lange* itself shows that it is; but it is a question to be addressed in connection with consideration of the second limb of the *Lange* test.

344 The second limb of the *Lange* test asks whether s 471.12 is "reasonably appropriate and adapted" to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of representative government. In *Lange* it was said that there was no need to distinguish between the concept to which the phrase "reasonably appropriate and adapted" might give expression and proportionality[383]. Given that *Lange* most clearly involves proportionality analysis, the question arises whether the use of the term

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380 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40]; [2004] HCA 41; *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]; *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30], 30 [78].

381 (2012) 246 CLR 1 at 16 [30].

382 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at 199 [85] (referring to a "substantial" reason); *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 478 [105], quoting *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 477.

383 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562, 567 fn 272.

"reasonably appropriate and adapted" should be continued in connection with the *Lange* test, or in other areas where proportionality analysis is employed such as s 92 of the Constitution.

345 It has been observed[384] that the phrase "reasonably appropriate and adapted" was imported into Australian constitutional proportionality case law from a judgment of Marshall CJ given in 1819[385]. It is cumbersome and lacks clarity of meaning and application as a test. The only real affinity the phrase bears to a test involving proportionality analysis is the employment of the word "reasonably", but even then it does not describe how, and by reference to what factors, it is intended to operate. The phrase provides no guidance as to its intended application and tends to obscure the process undertaken by the court. Its use may encourage statements of conclusion absent reasoning[386]. It cannot be denied that *Lange* involves a level of proportionality analysis, albeit one which is to be applied in the setting of the Australian Constitution. So much was said in *Lange*.

346 In the setting of the Australian Constitution, a system of representative government is the constitutional imperative upon which the implied freedom is founded. The proportionality analysis in *Lange* is directed to determining whether the freedom is illegitimately burdened. The analysis is both informed and constrained by that purpose. The use of proportionality analysis is a rational response to the enquiry as to how the effect upon a freedom which is not absolute may be tested. The term proportionality used in this setting does not imply, without more, a proportionality analysis identical to that employed in other constitutional settings, although it may be possible to draw comparisons which are valid. Nevertheless it is an analysis based in reasonable proportionality and it would be preferable, to avoid confusion and for clarity, to identify the process by its name and explain how it is applied.

347 The second limb of *Lange* looks, in the first place, to whether the law is proportionate to the end it seeks to serve. In *Lange*, it will be recalled, once the common law of defamation was adapted it was regarded as going no further than was necessary having regard to the legitimate purpose of protection of

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384 *Coleman v Power* (2004) 220 CLR 1 at 90 [234] per Kirby J; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 133-134 [431]-[435] per Kiefel J.

385 *McCulloch v Maryland* 17 US 316 at 421 (1819).

386 In *Coleman v Power* (2004) 220 CLR 1 at 90 [234], Kirby J described it as involving "a ritual incantation".

reputation[387]. Where there are other, less drastic, means of achieving a legitimate object, the relationship with the legislative purpose may not be said to be proportionate[388], at least where those means are equally practicable and available[389]. Given the proper role of the courts in assessing legislation for validity, such a conclusion would only be reached where the alternative means were obvious and compelling, as was the Tasmanian legislation in *Betfair Pty Ltd v Western Australia*[390]. In such circumstances the means could not be said to be reasonably necessary to achieve the end and are therefore not proportionate[391].

348 The protective purpose of s 471.12 is directed to the misuse of postal services to effect an intrusion of seriously offensive material into a person's home or workplace. It is not possible to further read down the degree of offensiveness of a communication which is to be the subject of the offence and retain a field of operation for the section consistent with its purpose. It follows that the section, so construed, goes no further than is reasonably necessary to achieve its protective purpose.

349 A purpose of protecting citizens from such intrusion is not incompatible with the maintenance of the constitutionally prescribed system of government or the implied freedom which supports it. Section 471.12 is not directed to the freedom. By way of analogy, it will be recalled that in *Lange* the protection of reputation was not considered to be incompatible.

350 That leaves the question of whether the section imposes too great a burden upon the implied freedom by the means it employs. This assessment reflects an acceptance that some burden may be lawful. In *Coleman v Power*, McHugh J

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387 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 572-573, 575.

388 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568, where the Court referred to the example of *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

389 *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 616; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 306; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 134 [438].

390 (2008) 234 CLR 418 at 479 [110]; see also *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 608.

391 *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 616; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 477 [102].

said that a law could validly impose some burden but nevertheless leave political communication "free". It would be free if the burden was not unreasonable[392]. A test of proportionality is again invoked.

351 The appellant Monis submits that s 471.12 constitutes a "very substantial fetter" on discussion of political matters absent provision for defences of the kind that are available to a defendant in an action for defamation, such as the statutory defence of qualified privilege[393], which applies a test of reasonableness to the defendant's conduct. An allied submission refers to what had been said in *Lange* in that regard. These submissions draw in part on McHugh J's criticism of the provision considered in *Coleman v Power*, which provided no defence to the charge of using insulting words in, or within the hearing of, a public place[394]. However, that provision was very different from s 471.12. Having regard to the elements of the offence in s 471.12, considerable ingenuity would be required to conceive the field of operation of a defence that the accused's use of the postal service was a reasonable communication for the discussion of political matters. The appellant Monis' submissions overlook the circumstance that before any consideration of a defence could arise, the jury must have determined both that the postal service was used in a way that a reasonable person, taking into account all the circumstances, would regard as offensive, and that the accused was aware of the substantial risk that the use would be so regarded by a reasonable person and unjustifiably took that risk. And as to common law defences to defamation, such as qualified privilege, where the issue of malice may arise, the requirement of proof for an offence under s 471.12, that the defendant's conduct be intentional or reckless, may leave little room for their operation.

352 It has earlier been observed that the effect of s 471.12 upon political communication is incidental. Further, communications of the kind which are prohibited by s 471.12 are limited to those which are of a seriously offensive nature. This does not suggest an effect upon the freedom which could be regarded as extensive. It does not prevent communications of a political nature which do not convey such offensive matter. The observations of Brennan J in *Nationwide News*[395] are apposite. His Honour said with respect to the implied freedom that the Constitution may be taken to prohibit legislative or executive infringement of the freedom to discuss political matters, except to the extent

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392 *Coleman v Power* (2004) 220 CLR 1 at 53 [100].

393 *Defamation Act* 2005 (NSW), s 30.

394 *Coleman v Power* (2004) 220 CLR 1 at 33 [36], 41-42 [69]-[71].

395 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50-51.

necessary to protect other legitimate interests. It prohibits a restriction which substantially impairs the opportunity for the Australian people to form the necessary political judgments.

353 Section 471.12 does not impermissibly burden the implied freedom. The *Lange* test is satisfied. Section 471.12 is valid.

Conclusion and orders

354 The appeals should be dismissed. There should be no order for costs. None was made by the Court of Criminal Appeal, no doubt because of the nature of the matter.