IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S 172 of 2012
No S 179 of 2012

BETWEEN:

MAN HARON MONIS

AMIRAH DROUDIS

Appellants

10 and

THE QUEEN

First Respondent

and

THE ATTORNEY GENERAL FOR THE STATE OF NEW SOUTH WALES

Second Respondent

20 **SECOND RESPONDENT'S SUBMISSIONS**

PART I: PUBLICATION ON THE INTERNET

1. These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. The issue in the appeal is the application of the second limb of the test for constitutional validity – laid down by the Court in Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 at 567-568 and modified by the Court in Coleman v Power (2004) 220
30 CLR 1 at 50-51 [93]-[96] – to the facts of this case.

Date of document: 4 September 2012
Filed by:
I V Knight, Crown Solicitor
Level 5, 60-70 Elizabeth Street
SYDNEY NSW 2000
DX 19 Sydney

Telephone: (02) 9224-5247
Fax: (02) 9224-5255

Ref: Paolo Buchberger

3. In particular, the issue is whether s 471.12 of the Criminal Code 1995 (Cth) ("the Code") infringes the second limb of the Lange test. Section 471.12 of the Code provides that:

> 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.

10 4. The appellants contend that the members of the Court of Criminal Appeal (Bathurst CJ, Allsop P and McClellan CJ at CL) erred in the construction of s 471.12 of the Code, in particular of the word "offensive", which is not defined. Bathurst CJ (at [44], Joint Appeal Book ("AB") 83), with whom Allsop P agreed (at [91], AB111-112), concluded that "offensive" prohibited a use of a postal service which was "calculated or likely to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person in all the circumstances". Whilst Allsop P was "content to rest" with Bathurst CJ's construction, his Honour considered an alternative more restrictive construction involving "an additional requirement of causing real emotional or mental harm, distress or anguish" (at [89], AB 111).

20 5. The second respondent contends that the appellants have identified no relevant error in the approach of the Court of Criminal Appeal. Alternately, the Court would adopt the alternative more restrictive construction identified by Allsop P.

6. In any event, if there were to be a finding of invalidity, the provision should be read down in the way that McHugh J did in Coleman v Power (2004) 220 CLR 1 at [107]-[111] by confining its operation to instances of political (as opposed to non-political) communications.

PART III: SECTION 78B NOTICES

7. Both appellants have served notices under s 78B of the Judiciary Act 1903 (Cth) (AB 146-147; 153-156).

PART IV: STATEMENT OF FACTS

8. The second respondent does not point to any material facts set out in either appellant's narrative of facts or chronology that are in contention, other than to note that Droudis was charged with aiding and abetting Monis under ss 11.2 and 471.12 of the Code: see the indictment at AB 3-6. The 12 counts alleging use of a postal service in a way that a reasonable person would regard as being, in all the circumstances, offensive, related to the sending of letters to persons who were either relatives of members of the Australian Defence Force killed in combat in Afghanistan or, in one case, relatives of an Austrade official who had been killed in the bombing of the Marriott Hotel in Jakarta in 2009.

PART V: STATEMENT OF APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

9. The second respondent accepts both appellants' statement of applicable constitutional provisions, statutes and regulations.

PART VI: SECOND RESPONDENT'S ARGUMENT

Construction of s 471.2 and the word "offensive"

10. The Court of Criminal Appeal adopted an entirely orthodox approach in disposing of the appeals, first, addressing the proper construction of the impugned provision, and then embarking upon the issues of validity. The members of the Court, especially Bathurst CJ and Allsop P (at [25]-[45], AB 87-92 and [72]-[83], AB 102-108), applied conventional principles of statutory construction in concluding that in order to be "offensive" within the meaning of s 471.12, the use of a postal service 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", and that it would not sufficient if the use

"would only hurt or wound the feelings of the recipient, in the mind of a reasonable person".

11. The Attorney General for New South Wales refers in particular to the following matters which support a narrow construction of the provision.

12. First, as noted by Bathurst CJ (at [40], AB 92) and Allsop P (at [72], AB 102-103), s 471.12 creates a criminal offence punishable by imprisonment for up to two years, the prescribed maximum penalty tending to suggest that the conduct is directed to offences carrying a significant degree of criminality.

13. It would not be expected that a criminal offence carrying a maximum penalty of two years imprisonment would be created in relation to conduct that was trivial or minor in nature and which would, in the eyes of a reasonable person, merely hurt or wound the feelings of the recipient. See eg Higgins CJ in R v PM [2009] ACTSC 171 at [10] in relation to the comparable provision in s 474.17 of the Code; see also Wilcox J in Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Postal Corporation (1998) 85 FCR 526 at 533-535 and the cases there cited.

14. Where the word "offensive" is used in a provision imposing criminal liability, courts have consistently construed it to mean more than merely hurtful and have required a high "degree of objectionableness" (see Wilcox J in Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Postal Corporation at 535). In Ball v McIntyre (1966) 9 FLR 237 Kerr J considered (at 243) the word "offensive" in the relevant provision of the Police Offences Ordinance 1930-1961 (ACT) carried the idea of "behaviour likely to arouse significant emotional reaction" as did the words "threatening, abusive and insulting" with which it was to be found. Justice Kerr rejected the notion (at 241) that it was sufficient to constitute offensive behaviour if it could be said that conduct is "hurtful, blameworthy or improper, and thus may offend". His Honour adopted (at 242-243) the view of O'Bryan J in Worcester v Smith [1951] VLR 316 at 318 that for behaviour to be "offensive" within the meaning of the Police Offences Act 1928 (Vic) it must be such as is "calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a

reasonable person". See also Inglis v Fish [1961] VR 607 at 611 where Pape J also adopted the view of O'Bryan J in Worcester.

15. Second, the word "offensive" takes its meaning from its context, the use of the words "menacing" and "harassing" together with "offensive" indicating that they should be understood as informing the meaning of each other, and tending to suggest that the word is directed to conduct more serious than using the postal service to hurt or wound the feelings of a recipient.

16. As Allsop P observed (at [73], AB 103) "menacing" and "harassing" both have "an element of personal direction at the recipient of the post; both contain an element of calculated conduct, though objective in character; both have a serious quality of objectionability in civil society". To adopt the words of Kirby J in Coleman v Power at 86-87 [224], an examination of "the situation of the word in a concatenation of words that include" (in this case "menacing" and "harassing") "also suggest(s) the narrow interpretation"; see also Gummow and Hayne JJ at 73 [177].

17. For these reasons, it is not the case that the Court of Criminal Appeal "erred" in relying on authorities concerned with provisions creating public order offences which pre-dated Coleman v Power: cf Droudis submissions at [24(a)], [25]-[36]. Each of those cases, like Coleman v Power itself, concerned specific statutory provisions the construction of which, whilst not conclusive in the instant case, is capable of bearing upon (but not dictating) the interpretation of the specific statutory language of s 417.12. Likewise, whilst the antecedents to s 471.12 (see Droudis submissions at [41]-[50]) are capable of assisting in the task of construing s 471.12, they cannot displace or override the specific text enacted by Parliament. It is uncontroversial that prior statutory provisions must be used with caution: DC Pearce and RS Geddes, Statutory Interpretation in Australia, (7th ed, 2011) at [3.31]. It would have been an error for the Court to have failed to have regard to the context in which the word "offensive" currently appears in s 417.12.

18. Further, it is of significance that the appellant Droudis accepts that s 471.12 "can extend to conduct which gives rise to some negative emotional state in the mind of a hypothetical reasonable recipient": see Droudis submissions at [54]. It follows that having regard to the context of the word "offensive" together with the words "menacing" and "harassing" in s 471.12 that the Court of Criminal Appeal was correct in concluding that properly

construed "offensive" requires at least a "significant" negative emotional reaction by the hypothetical recipient or, in Allsop P's more restrictive construction, actual harm, distress or anguish: cf Droudis submissions at [60].

19. Third, it is not an occasion for criticism that the Court of Criminal Appeal declined to give "offensive" in s 471.12 its ordinary and natural meaning. In Coleman v Power at 40 [64] it was only McHugh J in dissent who construed the provision under challenge, and in particular the word "insulting", by giving it its ordinary meaning, and hence concluding that it failed the Lange test and was invalid.

20. Fourth, there exists the requirement in s 15A of the Acts Interpretation Act 1901 (Cth), that the provision be read subject to the Constitution and so as not to exceed the legislative power of the Commonwealth: see also Gypsy Jokers Motorcycle Club Inc v Commissioner of Police 234 CLR 532 at 553 [11] per Gummow, Hayne, Heydon and Kiefel JJ; New South Wales v Commonwealth (2006) 229 CLR 1 at 161 [355] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

21. Fifth, as noted by Bathurst CJ (at [41], AB 93), s 471.12 extends to private communications. It would be unlikely that the legislature intended a great deal of private correspondence which, in the eyes of a reasonable person, would tend to wound a recipient be caught by the section and visited with a potential sanction of two years imprisonment: cf Coleman v Power at 25 [12], 74 [183].

22. Sixth, s 471.12 requires the use of the service to be such "that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive". The provision is not unqualified in its operation, as was recognised by Bathurst CJ (at [65], AB 100), Allsop P (at [76], AB 104) and McClellan CJ at CL (at [99], AB 113). As Tupman DCJ held (at [51], AB 65-66), it is such as to "allow the tribunal of fact [here, the jury] to determine the context in which the postal service was used by an accused person". This question of reasonableness in the circumstances is a classic question for a jury. State parliaments have recognised as much in provisions making plain that where an alleged offence involves "objective community standards", specifically including an issue of reasonableness, it may be preferable, "in the interests of justice", that there should be trial by jury: see eg Criminal Procedure Act 1986 (NSW) s 132(5); Criminal Procedure Act 2004 (WA) s 118(6), Criminal Code 1899 (Qld) s 615(5). As to other factual questions

requiring the application of objective community standards, see AK v Western Australia (2008) 232 CLR 438 at 472-473 [95] per Heydon J.

23. The qualification in s 471.12 is also in contrast to the apparently "unqualified prohibition" on the use of insulting words in s 7(1)(d) of the Vagrants, Gaming and Other Offences Act 1931 (Qld) considered in Coleman v Power: see McHugh J at 53-54 [102] to [105].

24. Finally, to the extent that the appellant Monis seeks to erect a divergence in the approach of the members of the Court of Appeal to the purpose of s 471.12 (see Monis submissions at [33]-[37], there is no material difference which bears upon the proper construction of the provision. The criticism of the approach of Allsop P, and the "difficulty" that only "a very small portion" of material would offend such purpose, overlooks the situation of the word "offensive" in a concatenation of the words "menacing" and "harassing", and the principle *noscitur a sociis*. The proscription in s 471.12 on material which is relevantly "offensive" is not a quantitative one.

Validity of s 471.12

25. There was no error in application by the Court of Criminal Appeal of the two limb test for constitutional validity laid down by this Court in Lange at 567-568 and modified in Coleman v Power at 50-51 [93]-[96].

The first limb in Lange

26. The appellants appear to raise no issue in relation to the first limb of Lange. Nor does the Attorney General for New South Wales contend that the Court of Criminal Appeal erred in holding that s 471.12 of the Code effectively burdens the freedom of communication about government or political matters.

27. The Attorney General submits that this is a case - perhaps a rare one - where it can be assumed that there is some political content to the letters in question, and the law at least incidentally burdens the implied freedom of political communication.

28. In deciding whether the freedom has been infringed, the central question is what the law does, not how a particular individual might want to construct a particular communication: APLA Ltd v Legal Services Commissioner (NSW) (2005) 224 CLR 322 at [381] per Hayne J; Hogan v Hinch (2011) 243 CLR 506 at 544 [50] per French CJ (applied by Bathurst CJ at [47], AB 94). The range of matters that may be characterised as

governmental and political for the purpose of the constitutional freedom is broad, but does not extend to discussions that cannot illuminate the choice for electors at federal elections, in amending the Constitution or in throwing light on the administration of the federal government: Lange at 571. The freedom is implied principally from ss 7, 24, 64 and 128 of the Constitution so that the implication can only be based on, and is therefore limited by, those provisions: Lange at 567.

The second limb in Lange

29. In relation to the second limb of Lange, each of the members of the Court correctly identified and applied the test, namely whether the law is reasonably and appropriately adapted to serve a legitimate end in a manner compatible with the maintenance of a constitutionally prescribed system of representative and responsible government: Coleman v Power per McHugh J at 50-51 [93]-[96], Gummow and Hayne JJ at 77-78 [196] and Kirby J at 82 [211]; APLA per Gleeson CJ and Heydon J at 350-351 [26]-[29], McHugh J at 358 [56]ff, Gummow J at 402 [213]ff, Hayne J at 449 [376]ff, and Callinan J at 477 [446]ff; Hogan v Hinch per Gummow, Hayne, Hayden, Crennan, Kiefel and Bell JJ at 556 [97].

30. Whilst Coleman v Power was plainly distinguishable on the facts, as the Court of Criminal Appeal clearly appreciated (for example, Bathurst CJ at [64]-[65], AB:100-101), nothing in their Honours' reasoning in this regard was other than consistent with the reasoning of Gleeson CJ, Gummow and Hayne JJ and Kirby J in Coleman v Power.

31. It is important to distinguish between laws that have as their purpose the restriction of communications on government or political matters, and those that merely affect political communications incidentally (as here): Mulholland(2004) 220 CLR 181 at 200 [40] per Gleeson CJ; Hogan v Hinch at 555-556 [95] per Gummow, Hayne, Hayden, Crennan, Kiefel and Bell JJ; Wotton v Queensland (2012) 86 ALJR 246 at 254 [30] per French CJ, Gummow, Hayne, Crennan and Bell JJ. If the provisions cannot be characterised as laws having a purpose of the former kind, and if the burdening effect is incidental and unrelated to their nature as political communications, then that makes an affirmative answer to the second Lange question likely.

32. The ends of s 471.12 involve protecting users of a postal service from objective menace, harassment or offence. This is a legitimate end, reflecting a recognition of the unique features of postal service in a system of representative and responsible government.

33. The postal service provided by the Australian Postal Corporation ("Australia Post") is operated by a government business enterprise continued in existence by statute (the Australian Postal Corporation Act 1989 (Cth) ("APC Act")). Australia Post has the exclusive right to carry letters within Australia, subject to the reservations in the APC Act: see ss 29 and 30. Parliament regards the letter service as sufficiently essential as to impose an obligation on Australia Post to "ensure ... that, in view of the social importance of the letter service, the service is reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business" (APC Act, s 27(4)(a)) and further, to prescribe a performance standard obliging Australia Post to deliver postal articles to 99.7 per cent of all delivery points at least twice weekly: APC Act, s 28C and Australian Postal Corporation (Performance Standards) Regulations 1998, cl 5. On the other hand, Australia Post and its employees are not generally permitted to open a postal article or to examine its contents (APC Act, s 90N), and its employees' power to destroy "physically offensive" articles in s 90ZA of the APC Act specifically excludes any words, pictures or graphics from rendering an article offensive.

34. Thus at least one public postal service is required to regularly deliver letters – which its employees for the most part cannot open and the content of which generally cannot be examined – directly into individuals' homes and offices, in a manner which has been legislatively recognised as essential to the "social, industrial and commercial needs of the Australian community": APC Act, s 27(4)(b). Despite the Electronic Transactions Act 1999 (Cth), postal communication remains essential to many transactions between citizens and government. For example, the Commonwealth Electoral Roll is generally required to set out the "place of living of each elector" (Commonwealth Electoral Act 1918, s 83) and, while this may not correspond to an elector's postal address, the obligations imposed on the Electoral Commission to give copies of the Roll to members of the House of Representatives and Senate (Commonwealth Electoral Act 1918, s 90B) mean that posting articles to the addresses provided on the Roll may provide parliamentarians with their only means of contacting constituents. As Bathurst J put it (at [59], AB 98-99), material sent by post is "often unable to be avoided in the ordinary course of things".

35. An end that involves preventing the use of services of this character as a means of objective menace, harassment or offence, or as a tool for harm of this kind, is not only concerned with the emotional consequences of a particular communication for a private recipient. It is thus not merely a derivative of Droudis' postulated illegitimate end of suppressing uncivilised discourse, nor is it directed to restricting political communication.

36. Droudis properly acknowledges that United States First Amendment jurisprudence is based on an individual right to free speech, rather than a limitation on legislative power: see Droudis submissions at [80]. Nevertheless, it might be noted that in Rowan v United States Post Office 379 US 728 (1970), where the relevant legislation allowed an order – if requested by the addressee – prohibiting the mailing of advertisements by the sender to an address, Burger CJ, delivering the opinion of the court that upheld the validity of the legislation, said (at 738):

> If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient. That we are often "captives" outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere ... The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.

Differing constitutional considerations mean that individual privacy interests are not protected in the same way in the US as in Australia. That said, Australian law protects the quiet enjoyment of occupiers of property and the privacy of various forms of communication that may be conducted in the home by both common law and statutory means.

37. As Bathurst CJ recognised (at [61], AB 99), the question is not whether some choice other than that made by the Parliament was preferable or desirable, but whether the parliamentary choice was reasonable in light of the burden placed on the constitutional freedom of communication: Levy v Victoria (1997) 189 CLR 579 at 598 per Brennan CJ, 608 per Dawson J, 614-615 per Toohey and Gummow JJ, 618-620 per Gaudron J, 627-628 per McHugh J, 647-648 per Kirby J; Coleman v Power at 31 [31] per Gleeson CJ, 52-53 [100] per McHugh J, 110 [292] per Callinan J, 123-124 [328] per Heydon J; Mulholland at 197 [32]-[33] per Gleeson CJ, 266-267 [248]-[249] per Kirby J and 305 [356]-[357] per Heydon J.

38. It is of significance that an offence under s 471.12 will be found to have been committed only where "reasonable persons" would regard the use of the service as being (menacing, harassing or) offensive. Whilst this imports an objective analysis, the use of the service has to be offensive in the eyes of a reasonable person "in all the circumstances", thereby qualifying the offence and allowing for analysis of any subjective factors affecting the assessment.

39. It is submitted that s 471.12 is appropriate and adapted to a legitimate end, in a manner compatible with the maintenance of a constitutionally prescribed system of representative and responsible government. It might well be imagined, for example, that bereaved parents of soldiers receiving the letters written by Mr Monis (AB 7-52) might be moved to retaliatory violence (so breaching the peace); have a depressive illness triggered or accentuated; or be motivated to harm themselves. Such persons are properly entitled to assume that postal articles will not contain material which is menacing, harassing or offensive in the manner found by the Court of Criminal Appeal.

The Court's decision in Wotton

40. It is true that the Court of Criminal Appeal's decision predates that of this Court in Wotton.

41. However, nothing in the approach of the Court of Criminal Appeal to the second limb of the Lange test is inconsistent with the observations of this Court in Wotton at 252 [20], 253 [25], and 254 [30], or those in Aid/Watch Incorporated v Federal Commissioner of Taxation (2010) 241 CLR 539 at 555-556 [44]. As the plurality, French CJ, Gummow, Hayne, Crennan and Bell JJ, commented in Wotton at 253 [25], the terms of the two Lange questions are settled.

Second portion of second limb in Lange

42. None of the matters set out in the submissions of Monis at [41]-[66] in relation to the "second portion of second limb" expose any relevant error in the approach of the Court of Criminal Appeal in adopting a narrow constructive of "offensive" in s 417.12 of the Code, or in considering whether s 471.12 operates in a manner compatible with the maintenance of the constitutionally prescribed system of government. In particular, the Court's decision in Coleman v Power is not authority for any generalised proposition that "offensive words are part and parcel of political debate, particularly in this country". The submission

concerning the availability of defences of truth, fair report etc to defamation apparently overlooks the significance of the qualifying words in s 417.12 "reasonable persons ... in all the circumstances". Again, the suggestion that a majority in Coleman v Power "was of the view that a proscription on insulting or offensive words simpliciter offended the second limb of Lange" is not supported by a consideration of the cited passages (49-50 [91], 52-54 [100]-[102] per McHugh J, 75 [185], 76-77 [191]-[193], 78-79 [199] per Gummow and Hayne JJ, 87-98[227]-[253], 99-100 [260] per Kirby J).

43. Each member of the Court contemplated the making of a direction to the jury in determining whether the communications were "offensive" to "a reasonable person ... in all the circumstances". It is not to the point whether any of the judges envisages a direction being given which would allow for a defence of truth, fair comment etc.

The alternative more restrictive construction identified by Allsop P

44. Whilst the appellants have identified no relevant error in the approach of the Court of Criminal Appeal, it is submitted that it would be open to the Court to adopt the more restrictive construction identified by Allsop P, as enabling an affirmative answer to the second question in Lange. His Honour, whilst "content to rest" with Bathurst CJ's construction, referred to an alternative more restrictive construction involving "an additional requirement of causing real emotional or mental harm, distress or anguish": at [89], AB 111.

Reading down of s 471.2

45. The Court of Criminal Appeal, having found s 471.12 to be valid, did not need to consider whether the provision should be read down to conform with the implied freedom of political communication.

46. It is submitted that if this Court concludes that s 471.12 is invalid, the provision should be read down in accordance with s 15A of the Acts Interpretation Act 1901 (Cth) by confining its operation to instances of political discussion: Coleman v Power at 54-56 [107]-[111] per McHugh J in relation to s 9 of the Acts Interpretation Act 1954 (Qld).

47. As his Honour there concluded, the clear intention of s 9 of the Queensland Acts Interpretation Act was that, where possible, an invalid law should be saved to the extent that it is within the power of the Queensland legislature. In the present case, the relevant

part of s 471.12 was within the power of the Commonwealth Parliament except – should the Court accept the appellants' submissions – to the extent that it penalised offensive words uttered in discussing or raising matters concerning politics and government. If necessary it can be read down accordingly.

48. The appellants have identified no compelling reason why a comparable exercise in reading down is not possible in this case.

PART VII: SECOND RESPONDENT'S NOTICE OF CONTENTION

49. The Attorney General no longer presses his notice of contention.

10

PART VIII: ORAL ARGUMENT

50. It is estimated that the second respondent's oral argument will take less than one hour.

Dated: 4 September 2012

Counsel for the Second Respondent

S E Pritchard
Tel: 02 9223 8594
Fax: 02 9232 7626
s.pritchard@selbornechambers.com.au

M.G. Sexton SC SG
Ph: (02) 9231 9440
Fax: (02) 9231 9444
Michael_Sexton@agd.nsw.gov.au