IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S172 of 2012

BETWEEN:

MAN HARON MONIS
Appellant

AND:

THE QUEEN
First Respondent

AND:

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

APPELLANT'S REPLY

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Part I: INTERNET PUBLICATION

1. These submissions are suitable for publication on the internet.

Part II: REPLY SUBMISSIONS

(1) Reply to Respondents

2. These submissions respond to the submissions filed by the Crown ("R") and the Attorney-General for NSW ("NSW").

3. At R[30] it is asserted that a construction of the word "offensive" which includes hurt or wounded feelings is unsupported by authority. This is not correct. At NSW [14], there is reference to a number of cases where "offensive" has been taken to include conduct which is "hurtful" or which is likely to "wound the feelings" of a person. To this list the following cases may be added: *Robbins v Harness Racing Board* [1984] VR 641 at 646 per O'Bryan J; *Jones v Scully* (2002) 120 FCR 243 at [102]-[107] per Hely J; *Jones v Toben* (2002) 71 ALD 629 at [90] per Branson J; *McGlade v Lightfoot* (2002) 73 ALD 385 at [51]-[52] per Carr J; *Eatock v Bolt* (2011) 197 FCR 261 at [262] per Bromberg J; *Lafitte v Samuels* [1972] 3 SASR 1 at 18 per Zelling J; *Spence v Loguch* (NSWSC, unreported, 12.11.91, BC9101434) at 6 per Sully J; *Wurramura v Haymon* (1987) 44 NTR 1 at 5 per Asche J; *Kennedy v Eldridge* [2006] NTMC 1 at [12] per Blockland SM; *Khan v Bazeley* (1986) 40 SASR 481 at 484 per O'Loughlin J; *Thommeny v Humphries* (NSWSC unreported 19.6.87 BC8701303) at [2] per Foster J; *Burns v Seagrave & Anor* [2007] NSWSC 77 at[15]-[16] and [18] per Simpson J; *Ross v Munns* (NTSC unreported 11.6.98 BC9802272) at 39-40 per Priestley J; *R v Burgmann* (NSWCA unreported 4.5.72) at 2 per Reynolds JA and at 3 per Hope JA; *Estate of Enjakovic (decd), Re* (2008) 100 SASR 486 at 493–494 per Gray J; *In the Estate of Brummitt (dec'd)* [2011] SASC 116 at [31] per Gray J. Importantly, in *Malvern v Bradbury* (1971) 17 FLR 345 (at 349.2 – see also 347.4), Henchman ChQS construed the meaning of "*grossly* offensive" in s.107(c) of *the Post and Telegraph Act 1901-1968* (a predecessor to s.471.12) as follows:

> "The test is how a reasonable man would regard the actual words in the postal article. Would he regard them as calculated to *wound the feelings*, arouse anger, resentment, disgust or outrage in his mind?" (emphasis added)

4. At NSW [13]-[14] reference is made to *CEPU v Australian Postal Corp* (1998) 85 FCR 526. However, in that case Wilcox J, in dealing with an award which used the word "offensive", said (at 535):

> (a) not all criticisms can properly be described as being offensive;
> (b) it is not easy to draw the line between criticism and offensiveness;
> (c) a statement that makes serious allegations of impropriety would probably be regarded as offensive by most people.

5. At R [19] the Crown asserts that s.471.12 is "a law imposing a significant criminal sanction" and that this supports a narrow construction of offensive. However, the maximum penalty of two years cannot be looked at in isolation. It must be considered in the light of the Commonwealth sentencing regime as a whole. Sections 16-22A of the *Crimes Act 1914* (Cth) establish that regime. Section 16A(1) provides that a Court must impose a sentence or make an order that "is of a severity appropriate in all the circumstances of the offence". Available sentencing options include the dismissal of charges without conviction (s.19B(1)(c)), conditional discharge without conviction (s.19B(1)(d)) and an order for recognisance (s.20). There are also additional sentencing alternatives including community-based orders (s.20AB). As in happens, the sentences imposed for offensive use of the post have often been very light. In *Nancarrow v DPP* (SASC unreported 7.2.97) at first instance there was an order for 240 hours community service and payment of court costs; on appeal the Court dismissed the charges. In *R v Chambers* the NSW District Court imposed a three year good behaviour bond, a fine of $250 and an 18 months supervision order: see *R v Chambers* (NSWCCA unreported 4.12.94). In *Fabriczy v DPP* (SASC unreported 13.2.98) the Court imposed a psychiatric assessment order, a 12 month good behaviour bond and a probation order. Further, the maximum penalty of two years is also the maximum penalty for menacing and harassing. These matters lend some support to the view that "offensive" covers a broad range of seriousness (including less serious matters).

6. At R[21] the Crown contrasts the law of defamation with s.471.12 (which refers to whether "reasonable persons would regard" the postal article as "offensive" "in all the circumstances"). However, there is a very close correlation between s.471.12 and the law of defamation. First, the definition of "defamatory" is very close to the meaning of "offensive": both involve civility of discourse, overlapping notions of disgust,

contempt, odium and anger and resultant hurt feelings. Secondly the concepts of "defamatory" and "offensive" are both determined by reference to the standard of an ordinary reasonable person. Thirdly, the mental element for s.471.12 (see the Cth submissions at [10]-[11]) is similar to defamation where a publisher will not be liable if the publication is made innocently, without recklessness and without knowledge of the defamatory nature of the material. Fourthly, just as "all the circumstances" are relevant to offensiveness in s. 471.12 the surrounding circumstances and context are relevant in defamation on the meaning conveyed, whether that meaning is defamatory and whether the publication is defamatory of the plaintiff. The only major point of contrast is that s.471.12 contains no defences of truth, fair comment, qualified privilege, etc whereas all such defences operate in relation to a defamatory publication.

7. At NSW [33] it is noted that Australia Post has "the exclusive right to carry letters within Australia". This is an important factor in Monis's favour in relation to the second limb.

8. At NSW [42] it is asserted that *Coleman v Power* does not support the proposition that offensive words are part and parcel of political debate in Australia. However, the following passages in *Coleman* support this view: [105], [195]-[197], [238], [239]. See *Sunol v Collier [No. 2]* (2012) 289 ALR 128 at [66].

9. At NSW [42] it is suggested that a majority in *Coleman v Power* were not of the view that a proscription on offensive or insulting words simpliciter offended the second limb of *Lange*. However, a majority were of this view: [102], [183]-[199], [223]-[260].

(2) Notice of Contention: first limb of *Lange*

10. The only point raised by way of notice of contention is that that the Crown asserts that s.471.12 does not infringe the first limb of the *Lange* test. NSW concedes that the first limb is infringed.

11. The first limb of the *Lange* test asks whether the law, in its terms, operation and effect effectively burdens freedom of communication about government or political matters.

12. The primary judge held that s.471.12 infringed the first limb: [40]. So did all of the judges of the CCA: [56]-[57], [84] and [108].

13. This reasoning is consistent with a substantial number of statements in this Court: *Wotton v Queensland* (2012) 86 ALJR 246, at [29] per French CJ, Gummow, Hayne, Crennan and Bell JJ, [80] per Kiefel J; *Hogan v Hinch* (2011) 243 CLR 506, at [50] per French J, [95] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, at [30] per Gleeson CJ, [274] per Kirby J; *Coleman v Power* (2004) 220 CLR 1, at [229]-[232] per Kirby J; *Roberts v Bass* (2002) 212 CLR 1, at [102] per Gaudron, McHugh and Gummow JJ; *Levy v Victoria* (1997) 189 CLR 579, at 609.3 per Dawson J, 614.3 per Toohey and Gummow JJ, 617.3 per Gaudron J, 625.8 per McHugh J, 647.6 per Kirby J; *Lange v ABC* (1997) 189 CLR 560, at 568.4.

14. The CCA's reasoning is also consistent with concessions noted in *Coleman v Power* (2004) 220 CLR 1, at [27] per Gleeson CJ; [78]-[80] ("concessions... properly made") per McHugh J, [197] per Gummow and Hayne JJ, [317]-[318], [321] per Heydon J.

15. The CCA's reasoning is also consistent with the approach adopted by various Full Courts on this question: *Sunol v Collier [No 2]* (2012) 289 ALR 128, at [42], [66], [68]; *John Fairfax v AG* (2000) 181 ALR 694 at [100]-[102], [157]; *Mulholland v AEC* (2003) 198 ALR 278 at [22]; *Rann v Olsen* (2000) 76 SASR 450 at [146]-[151], [283], [390].

16. It is submitted that the first limb is clearly infringed.

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