

MONIS v THE QUEEN & ANOR (S172/2012)
DROUDIS v THE QUEEN & ANOR (S179/2012)

Court appealed from: New South Wales Court of Criminal Appeal
[2011] NSWCCA 231

Date of judgment: 6 December 2011

Special leave granted: 22 June 2012

Mr Man Haron Monis was charged with using a postal service in contravention of s 471.12 of the *Criminal Code* 1995 (Cth) (“the Code”). Ms Amirah Droudis was charged with aiding and abetting Mr Monis. Section 471.12 creates an offence (and prescribes a penalty of two years’ imprisonment) for using a postal service in a way that reasonable persons would regard as being menacing, harassing or offensive. The charges relate to the sending of letters to the wives and relatives of Australian military personnel killed while serving in Afghanistan. The letters were critical of Australia’s military involvement in Afghanistan. They also denigrated the deceased soldiers. Mr Monis and Ms Droudis each moved the District Court of New South Wales to quash the indictments against them. This was on the basis that s 471.12 of the Code was (at least partly) invalid because it infringed the implied constitutional freedom of political communication.

On 18 April 2011 Judge Tupman dismissed both motions. Her Honour found that s 471.12 did burden the freedom of communication about governmental or political matters. Judge Tupman held however that the section was reasonably appropriate and compatible with the system of government prescribed by the Constitution. It was therefore not invalid.

On 6 December 2011 the Court of Criminal Appeal (Bathurst CJ, Allsop P & McClellan CJ at CL) unanimously dismissed the Appellants’ appeals. Their Honours found that the restriction imposed by s 471.12 of the Code does potentially fetter political communications by post. They held however that the section’s validity must be assessed in light of the robust nature of political communication in Australia, and of Parliament’s desire to protect people from the misuse of postal services. The Court of Criminal Appeal found it legitimate for Parliament to enact s 471.12 of the Code to prohibit communications which reasonable persons would find offensive.

“Section 78B” notices have been filed in each matter by both of the Appellants and both of the First Respondents. The Attorneys-General for the Commonwealth, Victoria, Queensland, Western Australia and South Australia have all advised the Court that they will be intervening in these matters.

In matter number S172/2012 (Monis), the grounds of appeal include:

- The Court of Criminal Appeal erred in holding that s 471.12 of the Code did not infringe the implied freedom of political communication.

In matter number S179/2012 (Droudis), the grounds of appeal include:

- The Court of Criminal Appeal erred in concluding that for the use of a postal service to be offensive within the meaning of section 471.12 of the Code, 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, as opposed to only hurting or wounding the feelings of the recipient.

In both matters the First Respondent filed a notice of contention in identical terms, the ground of which is:

- The Court of Criminal Appeal erred in holding that s 471.12 of the Code effectively burdened the freedom of communication about government or political matters.

In matter number S179/2012 (Droudis) the Second Respondent also filed a notice of contention identical to that of the First Respondent.