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

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S179 of 2012**

BETWEEN: **AMIRAH DROUDIS**
Appellant

AND:

THE QUEEN
First Respondent

AND:

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

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA (INTERVENING)

Filed on 11 September 2012 by:
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Part I: Form of Submissions

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

Part II: Basis of Intervention

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes under s78A of the *Judiciary Act 1903* (Cth) in support of the First Respondent.

Part III: Legislative Provisions

3. South Australia adopts the First and Second Respondents' statement of legislative provisions. South Australia would include the additional constitutional and legislative provisions annexed to the submissions of the Attorney-General for the Commonwealth (intervening).

Part iV: Issues Presented by the Appeals and South Australia's submission in summary

4. The Appellant Monis sent letters to members of the families of soldiers who were killed in action in Afghanistan. The letters convey, amongst other things, the Appellant Monis' opinion as to the moral and legal justification for Australian soldiers being deployed to Afghanistan and Australia's foreign policy concerning terrorism. The Appellant Droudis assisted the Appellant Monis by sending other letters and, in one instance, a DVD containing the same or similar content to members of the families of soldiers who were killed in action in Afghanistan and, in one case, to family of a person killed in a terrorist attack. The Commonwealth Director of Public Prosecutions has charged the Appellants with offences under s471.12 of the *Criminal Code 1995* (Cth) alleging that in sending the letters and the DVD they used a postal service in a way that reasonable persons would regard as being, in all the circumstances, offensive. The Appellants contend that the offence created by s471.12 is beyond the power of the Commonwealth Parliament as it captures conduct protected by the implied freedom of political communication. The New South Wales Court of Appeal considered that the offensive conduct caught by s471.12 was of a type such that the offence could be characterised as a law reasonably and appropriately adapted to a purpose compatible with the implied freedom. In the circumstances, does s471.12 and what amounts to the offensive use of a postal service effectively burden the implied freedom of political communication? If it does, is s471.12 a law that is reasonably and appropriately adapted to a legitimate purpose compatible with the implied freedom?

5. South Australia contends that:

   5.1. the construction of s471.12 adopted by the Court of Criminal Appeal was correct; and

   5.2. as construed, s471.12 does not effectively burden the implied freedom of political communication, and, hence, does not satisfy the first limb of the *Lange* test.

   5.3. in the alternative, applying the second limb of the *Lange* test, s471.12 imposes only an incidental burden upon the implied freedom, and is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government. Section 471.12 is not, therefore, invalid.

Construction of 'offensive' within s471.12

6. South Australia respectfully adopts the construction of 'offensive' adopted by Bathurst CJ,[1] with whom Allsop P agreed,[2] in the Court of Criminal Appeal, for the reasons set out in their respective judgments. This construction is consistent with the provision's legislative context and statutory history, contrary to the submissions of the Appellant Droudis. The historical predecessors of s471.12 applied, and sought to apply, to conduct beyond 'incivility' or that which is likely to merely 'hurt feelings'.

7. Further, the reasoning employed by Bathurst CJ and Allsop P in the Court of Criminal Appeal is consistent with that adopted by a majority of this Court in *Coleman v Power*[3] in construing the meaning of 'insulting' in s7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld). In that case, four members of this Court construed 'insulting' in the context of that provision as having a narrower scope than its ordinary meaning, for reasons which included the fact that the legislature had sought to prohibit such conduct on threat of criminal penalty.[4]

The Lange test

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1 *Monis v R; Droudis v R* [2011] NSWCCA 231; (2011) 256 FLR 28, 39-40 [44]-[45].

2 *Monis v R; Droudis v R* [2011] NSWCCA 231; (2011) 256 FLR 28, 44-45, 50 [70], [91].

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

4 In *Coleman v Power*, Gleeson CJ found that the section applied to language "contrary to contemporary standards of public good order" (at 26 [14], per Gleeson CJ). Gummow, Hayne and Kirby JJ adopted an even narrower construction, that of language reasonably likely to provoke unlawful physical retaliation (at 74 [183], per Gummow and Hayne JJ, and at 87 [226], per Kirby J).

8. In *Wotton v Queensland*[5] the two step approach to determining whether a law infringes the implied freedom of political communication was confirmed in the following terms:

> The first question asks whether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If this is answered affirmatively, the second question asks whether the law nevertheless is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government.[6]

9. The test articulated in *Wotton* is not materially different to that accepted in *Lange v Australian Broadcasting Corporation*,[7] as modified in *Coleman v Power*[8] (**the *Lange* test**).

10. The limitation on legislative power resulting from the application of the *Lange* test is derived from the system of representative government mandated by the *Commonwealth Constitution*, and in particular ss7 and 24 which require that the senators for each State and the members of the House of Representatives be directly chosen by the people of the State and the people of the Commonwealth respectively. Implicitly the process must permit the choice to be made freely, and to the extent necessary for a free choice, allow electors access to information.[9] The necessary ability to communicate to that extent is not limited to election periods.[10]

11. However, to the extent that the requirement of freedom of such communication is an implication drawn from ss7, 24 and related sections of the *Commonwealth Constitution*, the implication can validly only extend so far as is necessary to give effect to those sections.[11] In addition, the *Commonwealth Constitution* operates within and upon contemporary conditions, not in a political vacuum.[12] An implication drawn from the *Commonwealth Constitution*, which has the potential to invalidate a law, applies in the context of the contemporary and relevant political conditions in which the impugned law operates.[13]

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5 *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246.

6 [2012] HCA 2; (2012) 86 ALJR 246, 253 [25] (French CJ, Gummow, Hayne, Crennan & Bell JJ), 255 [40] (Heydon J), 262 [77] (Kiefel J); *Hogan v Hinch* (2011) 243 CLR 506, 542 [47] (French CJ), 555-556 [94]-[97] (Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ).

7 (1997) 189 CLR 520, 567-568 (the Court).

8 (2004) 220 CLR 1, 50-51 [94]-[96] (McHugh J), 77-78 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J): the words "the fulfillment of" were replaced by "in a manner".

9 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 187 (Dawson J).

10 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561 (the Court).

11 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (the Court).

12 *Mulholland v AEC* (2004) 220 CLR 181, 189–191 [9] – [10], [14] (Gleeson CJ).

13 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 158 (Brennan J). Similarly, the *Commonwealth Constitution* mandates a system of government whereby the Parliament is

Related to this is the fact that the *Commonwealth Constitution* does not mandate any particular electoral system, leaving the choice as to the features of that system to the Commonwealth Parliament.[14]

12. These limitations on the scope of the implied freedom inform the application of both steps of the *Lange* test. They suggest that application of the *Lange* test is likely to result in invalidity only in extreme cases, where electors are likely to be denied the ability to make a genuine electoral choice as contemplated by ss 7, 24, 64 and 128 of the *Commonwealth Constitution*.[15]

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13. The implied freedom does not protect all forms of communication. It only protects those communications that are necessary to preserve the system of government prescribed by the *Commonwealth Constitution*. In this regard the nature and extent of the freedom is governed by the necessity which it serves.[16] The first limb of the *Lange* test would have little or no work to do if it were amenable to an answer in terms of possibilities. The use of the adverb 'effectively' introduces a qualitative threshold.[17] It only captures laws which effectively burden political communications.[18] A law that effectively burdens conduct is one that imposes a real burden upon that conduct. Thus the first limb requires a consideration as to how the impugned law, here s471.12, may affect the freedom.[19]

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14. It is important then to identify fully what the freedom protects. It is access to, and the communication of, information relevant to the exercise of an informed choice by the people

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accountable to the people for political choices that are taken. The *Lange* test should not develop in a manner as to deny to the legislative branch the responsibility of identifying legitimate ends and the means by which those ends, in good faith, are pursued.

14 *McGinty v Western Australia* (1996) 186 CLR 140, 184 (Dawson J), 220 (Gaudron J), 284 (Gummow J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 188 [6] (Gleeson CJ), 207 [64] (McHugh J), 236-237 [154] (Gummow and Hayne JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1,49-50 [125] (Gummow and Bell JJ), 69-70 [198]-[200] (Hayne J), 106 [325] (Crennan J), 121 [386] (Kiefel J).

15 *Nationwide News* (1992) 177 CLR 1, 52 (Brennan J).

16 *APLA Ltd v Legal Services Cmmr (NSW)* (2005) 224 CLR 322, 350 [27] (Gleeson CJ and Heydon J).

17 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (the Court); *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246, 253 [25] (French CJ, Gummow, Hayne, Crennan & Bell JJ), 255 [40] (Heydon J), 262 [77] (Kiefel J); *Hogan v Hinch* (2011) 243 CLR 506, 542 [47] (French CJ), 555-556 [94]-[97] (Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ).

18 In *Coleman v Power* (2004) 220 CLR 1, 49 [91], McHugh J expressed the concept as requiring the impugned law to "directly and not remotely" restrict or limit communications on political or governmental matters (subsequently referred to by Heydon J in *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246, 256 [42]).

19 *Owen v Menzies & Ors; Bruce v Owen; Menzies v Owen* [2012] QCA 170, [71] (McMurdo P); *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246, 263 [80] (Kiefel J).

of the States and the people of the Commonwealth in electing representatives to the Senate and House of Representative respectively in periodic elections held in accordance with Commonwealth electoral laws. Characterising the freedom in this way is necessary for two reasons; first, the implied freedom is an implication drawn from the *Commonwealth Constitution*. As such it can extend only so far as is necessary to give effect to that expressed which it supports. Second, and following from the first, it reflects the fact that the implied freedom has no operation beyond serving the purposes of ss 7, 24, 64 and 128 of the *Commonwealth Constitution*.

10 15. But further to this, the notion of an effective burden requires consideration of practical effect.

15.1. Determining whether a law 'effectively burdens' protected communication in its practical effect is an evaluative exercise. It requires consideration of the likely practical effect of the law on the ability of a voter to access information relevant to the exercise of an informed choice in federal elections periodically held in accordance with the electoral laws of the Commonwealth.

15.2. Relevant factors are likely to include:

20 i. the kinds of communication the law is likely to inhibit: if it is not 'content neutral', is the kind of content at which it is aimed always, or often, likely to include information relevant to voter choice? If not, the burden potentially imposed on political or governmental communication may be so light as to be ineffective;

ii. the scope of the limitation prescribed by the law, in terms of whether other, perhaps more effective, means of communicating or accessing the information concerning political or governmental matters remain readily available. If so, the law is unlikely to pose a "realistic threat"[20] to the ability of a voter to access information relevant to electoral choice.

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16. The second limb of the *Lange* test arises from the Court's unanimous holding that the implied freedom is not absolute.[21] The following principles apply to the second limb:

16.1. The *Lange* test draws a distinction between laws that serve a legitimate end, on the one hand, and laws that serve the purpose of targeting and restricting free political

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20 *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246, 259 [55], [58] (Heydon J).

21 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561, and the references cited in fn 251; *Levy v Victoria* (1997) 189 CLR 579, 617 (Gaudron J); *Coleman v Power* (2004) 220 CLR 1, 51-52 [97] (McHugh J).

communication, on the other hand.[22] Where a law sets out to impede the implied freedom it will ordinarily be invalid. Such a law will not serve a legitimate end.

16.2. A law that serves a legitimate end, conversely, is a law that serves any purpose (otherwise within power) other than one that is aimed at the destruction, subversion or frustration of the constitutionally prescribed system of government. Where a law serves a legitimate end, and only incidentally burdens the freedom of political communication, it will only be held to be invalid where it is not reasonably appropriate and adapted to that legitimate end.

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16.3. An impugned law is not invalid simply because it can be shown that it was not the least restrictive measure available to achieve the legitimate end served by the law.[23] The measure need not be "essential" or "unavoidable".[24] The role of the Court is supervisory, in terms of determining whether the means chosen by the legislature is within a reasonable range, given the nature of the burden imposed by the impugned provision.[25]

Application of the Lange test to s471.12 of the Criminal Code 1995 (Cth)

20 17. Applying the first step of the *Lange* test, the nature of communications potentially burdened by s471.12 meet the following description:

17.1. they must be sent by a 'postal or similar service';[26]

17.2. they must be conveyed in a way, or include content, or both, that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

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22 *Hogan v Hinch* (2011) 243 CLR 506, 555-556 [95]-[99] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246, 254 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

23 *Coleman v Power* (2004) 220 CLR 1, 31 [31] (Gleeson CJ), 53 [100] (McHugh J) ("The constitutional test does not call for nice judgments as to whether one course is slightly preferable to another."), 123-124 [328] (Heydon J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 305 [360] (Callinan J); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 22 [29] (French CJ); *Levy v Victoria* (1997) 189 CLR 579, 598 (Brennan CJ); *Rann v Olsen* (2000) 76 SASR 450, 483 [185] (Doyle CJ).

24 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 199 [85] (Gummow, Kirby & Crennan JJ), referring to *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 199-200 [39]-[40] (Gleeson CJ); *Hogan v Hinch* (2011) 243 CLR 506, 549 [72] (Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ).

25 *Nationwide News* (1992) 177 CLR 1, 50, 52 (Brennan J); *Levy v Victoria* (1997) 189 CLR 579, 598 (Brennan CJ), 627 (McHugh J).

26 The relevant definition in s470.1 of the *Criminal Code 1995* (Cth) extends the scope of the prohibition in s471.12 beyond the use of the letter service provided by Australia Post.

18. To the extent that s471.12 seeks to prohibit menacing or harassing communications, it is common ground that the implied freedom has no application. However, to the extent that the provision deters or prevents the sending of 'offensive' communications, the Court of Criminal Appeal found that political and governmental communications protected by the implied freedom would be burdened.[27]

19. Given the construction accorded to 'offensive' in the context of s471.12, and as accepted by Bathurst CJ in the Court of Criminal Appeal,[28] political and governmental communications would only be criminalised when they 'cross a boundary' such that they are likely to arouse
10 significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person in all the circumstances. Such extreme communications are likely, at most, to form only a very small portion of communications as to political or governmental matters necessary to give effect to the free and informed choice of voters as contemplated by ss 7, 24, 64 and 128 of the *Commonwealth Constitution*. Such communications fall outside the limits of legitimate political debate requiring the protection of the implied freedom.[29]

20. Further, such communications are only prohibited to the extent that they are made or sent via use of a postal or similar service. Section 471.12 imposes no burden on the uttering of such communications in public or private, or the dissemination of documents containing such
20 information via other means or mediums. To the extent that s471.12 may incidentally limit or restrict communication as to political or governmental matters, it does not amount to an effective burden upon such communications.[30]

21. This is not inconsistent with the views of a majority of this Court in *Coleman v Power* to the effect that insults are a legitimate part of the political discussion protected by the

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27 *Monis v R; Droudis v R* [2011] NSWCCA 231; (2011) 256 FLR 28, 42 [56] (Bathurst CJ), 48-49 [84] (Allsop P), 53 [108] (McClellan CJ at CL, although His Honour considered the contrary argument to have merit).

28 *Monis v R; Droudis v R* [2011] NSWCCA 231; (2011) 256 FLR 28, 44 [65]. See also 46-47 [79] (Allsop P).

29 *Monis v R; Droudis v R* [2011] NSWCCA 231; (2011) 256 FLR 28, 53 [107] (McClellan CJ at CL). See also *Sunol v Collier (No 2)* [2012] NSWCA 44; (2012) 289 ALR 128, 147 [89] (Basten JA); *Owen v Menzies & Ors; Bruce v Owen; Menzies v Owen* [2012] QCA 170, [2] (de Jersey CJ): "... it is arguable that [the impugned provision's] proscription of extreme forms of objectionable acts (such as inciting hatred or serious contempt or severe ridicule) nevertheless leave citizens sufficiently free to engage in communications about governmental and political matters ... so that the first question posed by [the *Lange* test] should be answered "no": the law does not effectively burden the relevant constitutional freedom"; and in the same case McMurdo P at [71] – [74].

30 *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246, 258-259 [53]–[55], [58] (Heydon J); see also *Coleman v Power* (2004) 220 CLR 1, 112 [298] (Callinan J).

Commonwealth Constitution.[31] The impugned provision in that case relevantly prohibited the use of insulting words to any person in a public place. That such a provision could limit political or governmental communication was readily apparent to the majority, considering the 'biting and offensive political insults' traded between political opponents and reported in the media, the 'insult and invective' employed in political communication, and 'the broadcasts that bring debates of the Federal Parliament to the living rooms of the nation.' Insulting language, uttered by political proponents in the course of heated public debate, is so commonplace as to go largely unnoticed – a law which operated to prohibit such communications would clearly amount to an effective burden upon them. The principle difference for present purposes lies in the kind of communication captured by the impugned law.

22. Section 471.12 is relevantly different in its scope of operation. It does not apply to communications made in the heat of public debate – it applies to material that has been prepared with the consideration required to record words or images on paper or electronically, and arrange for their transmission via a postal or similar service. Properly construed, it does not apply to material which merely insults or hurts the feelings of the recipient – it applies to communications likely to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person in all the circumstances. The content and purpose of the communication (including whether it addressed governmental or political issues), the relationship between sender and recipient, whether the communication was solicited or not, and whether the communication was directed to a private residence, are all relevant circumstances that a reasonable person would consider in determining whether a particular communication was 'offensive' pursuant to s471.12. The limited scope of operation of s471.12 distinguishes it from the offence considered in *Coleman v Power* and underpins its likely minimal impact (if any) on the types of communication protected by the implied freedom.

23. Further, it is not without significance that a postal service provides the receiver with no obvious means to avoid offensive material, nor the carrier the means to avoid carrying it. There is then a degree of imposition upon the receiver and the carrier that is absent in circumstances where communications are truly public in nature. A person's letterbox cannot

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[31] *Coleman v Power* (2004) 220 CLR 1, 45-46 [81], 54 [105] (McHugh J), 78 [197] (Gummow and Hayne JJ), 91 [239] (Kirby J).

be equated with a public forum. The context in which the implied freedom operates includes acknowledgement of the personal right to choose whether or not to receive the communication. In a sense, a law such as s471.12 does not prohibit the free trade in ideas it merely protects the receiver from offensiveness where the receiver is otherwise restricted in their capacity to choose to receive the communication.

24. In the alternative, and to the extent that the impact of s471.12 on communication as to political or governmental matters is considered to amount to an effective burden for the purposes of the first limb of the *Lange* test, the second limb of the *Lange* test is satisfied. Section 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 government.

25. The legitimate ends served by s471.12 are those identified by the Court of Criminal Appeal.[32] South Australia adopts the submissions of the First Respondent in this respect.[33] To the extent necessary to do so, South Australia also adopts the submissions of the Attorney-General for the Commonwealth (intervening) to the extent that s471.12 also serves the purpose of protecting the safety, security and integrity of Australia's information infrastructure, including postal and courier services, an aspect of which includes the preservation of public confidence in the use of such services.[34]

26. The ends served by s471.12 are legitimate, in that they are compatible with the system of government prescribed by the *Commonwealth Constitution*, and are otherwise within power. Section 51 of the *Commonwealth Constitution* allows the Federal Parliament to make laws for the "peace, order and good government of the Commonwealth" with respect to, relevantly, postal, telegraphic, telephonic, and other like services. Power to legislate for the peace and order of the Commonwealth is not limited to legislation which does no more than attempt to protect citizens from the use of a postal service to issue threats of physical violence. On the contrary, such legislative power extends to the prohibition of various types of anti-social behaviour in the use of a postal service judged to be sufficiently serious

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32 *Monis v R; Droudis v R* [2011] NSWCCA 231; (2011) 256 FLR 28, 42-43 [59] (Bathurst CJ), 46 [78] (Allsop P), 53 [109] (McClellan CJ at CL).

33 First Respondent's Submissions, filed 4 September 2012, [15] – [17].

34 Submissions of the Attorney-General for the Commonwealth (intervening), filed 4 September 2012, [22], [60].

according to contemporary standards so as to warrant criminal sanction. Section 471.12 is such a law.[35]

27. Such laws are not incompatible with the maintenance of the system of representative and responsible government required by the *Commonwealth Constitution*, or with the requirements of the particular clauses of the *Commonwealth Constitution* upon which this system is based.[36] Such laws arguably contribute to the enhancement of public debate on political and governmental issues by preventing intimidation.[37]

10 28. Section 471.12 cannot be characterised as a law with respect to the prohibition or restriction or political communications, and its effect on such communications is only indirect or incidental. It will therefore only be invalid where it cannot be characterised as reasonably appropriate and adapted to its legitimate end. The limited scope of operation of the provision serves to support its reasonable proportionality for the purposes of the second step of the *Lange* test.[38] It does not "go beyond what is reasonably necessary for the preservation of an ordered and democratic society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity within such a society."[39]

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35 As noted by Bathurst CJ in the Court of Criminal Appeal: "It can be inferred that the legislature considered such protection necessary having regard to the features unique to a postal service including first the fact that the post is generally sent to a person's home or business address and therefore personalized, and second that material sent by post is often unable to be avoided in the ordinary course of things ... A recipient of material sent by post essentially is a captive audience." *Monis v R; Droudis v R* [2011] NSWCCA 231; (2011) 256 FLR 28, 42-43 [59].

36 "Thus, in general terms, the laws which have developed to regulate speech, including the laws with respect to defamation, sedition, blasphemy, obscenity and offensive language, will indicate the kind of regulation that is consistent with the freedom of political discourse" *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 217 (Gaudron J); see also *Levy v Victoria* (1997) 189 CLR 579, 608 (Dawson J); *Sunol v Collier (No 2)* [2012] NSWCA 44; (2012) 289 ALR 128, 139-140 [52] (Bathurst CJ). If such laws were incompatible, such incompatibility has passed unnoticed for most of the time since Federation, as for restrictions on the marketing of legal services considered in *APLA Ltd v Legal Services Cmmr (NSW)* (2005) 224 CLR 322, 351 [29] (Gleeson CJ and Heydon J).

37 *Sunol v Collier (No 2)* [2012] NSWCA 44; (2012) 289 ALR 128, 146-147 [86] (Basten JA); *Owen v Menzies & Ors; Bruce v Owen; Menzies v Owen* [2012] QCA 170, [72] (McMurdo P): "... the terms of [the impugned provision] set parameters to enhance communications about government and political matters in a civilised, diverse democracy which values all its members ...".

38 As noted by Allsop P in the Court below: "It is to be noted ... that the operation of the provision of itself caters, to a degree, for the Constitutional principle. The offending conduct must be such that reasonable persons would regard, in all the circumstances, the use as offensive. Such circumstances would be taken to include the recognition by reasonable persons of the existence and importance to Australian democracy and representative government of the freedom and thus of a possibly legitimate purpose for the use of the post, even if the use, through the communication, may offend the recipient of the communication." *Monis v R; Droudis v R* [2011] NSWCCA 231; (2011) 256 FLR 28, 45-46 [76].

39 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 174 (Deane and Toohey JJ).

29. Fundamentally, s417.12 cannot be characterised as likely to operate so as to deny electors the ability to make a genuine electoral choice, as required by ss7, 24 and related sections of the *Commonwealth Constitution*. The Appellant Monis has attempted to extend the implied freedom so as to have application as an absolute guarantee of protection for any communication between and amongst government and electors, or any communication which agitates for legislative and political change. The Appellant Droudis has attempted to extend the implied freedom so as to operate as a guaranteed protection for 'uncivilised' communications. In doing so, both Appellants seek to extend the application of the implied freedom beyond what the implication necessarily serves.

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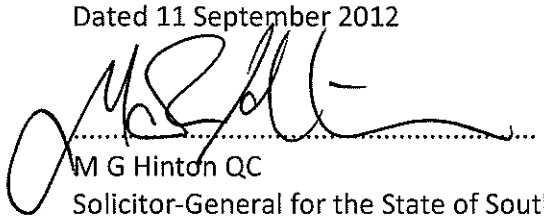
Reading down of s471.12

30. If this Court concludes that s471.12 is invalid to the extent that it fails the *Lange* test, it should be read down in accordance with s15A of the *Acts Interpretation Act 1901* (Cth) so as not to apply to the use of a postal or similar service for the purpose of engaging in political or governmental communications requiring the protection of the implied freedom.[40]

Part V: Estimated Hours

20 31. South Australia estimates it will require 20 minutes for presentation of its oral argument.

Dated 11 September 2012



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[40] *Coleman v Power* (2004) 220 CLR 1, 54 [107]–[110] (McHugh J); *Sunol v Collier (No 2)* [2012] NSWCA 44; (2012) 289 ALR 128, 141 [63] (Allsop P).