HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

PATRICK JOHN COLEMAN APPELLANT

AND

BRENDAN JASON POWER & ORS RESPONDENTS

Coleman v Power
[2004] HCA 39
1 September 2004
B98/2002

ORDER

1. Appeal allowed.

2. So much of the order of the Court of Appeal of Queensland made on 30 November 2001 as deals with the order of Pack DCJ in the District Court of Queensland dated 26 February 2001 is varied by substituting the following:

> *The orders of Pack DCJ dated 26 February 2001 are set aside and in lieu thereof it is ordered that:*
>
> *(a) the appeals to the District Court are allowed in respect of the convictions recorded in respect of the charges laid under s 7(1)(d) and s 7A(1)(c) of the* Vagrants, Gaming and Other Offences Act *1931 (Q) and the convictions and sentences in respect of those charges are set aside;*
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> *(b) the appeals to the District Court are otherwise dismissed; and*

(c) the respondents pay the appellant one half of the appellant's costs of and incidental to the appeals, those costs to be assessed.

3. Respondents to pay the appellant's costs in this Court.

On appeal from Supreme Court of Queensland

Representation:

W P Lowe with A D R Gibbons for the appellant (instructed by Patricia White & Associates)

G J Gibson QC with P J Davis for the first and second respondents (instructed by Queensland Police Service Solicitor)

P A Keane QC, Solicitor-General of the State of Queensland, with G R Cooper for the third respondent (instructed by Crown Solicitor for the State of Queensland)

D M J Bennett QC, Solicitor-General of the Commonwealth, with R G McHugh and B D O'Donnell intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with M J Leeming intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for the State of New South Wales)

C J Kourakis QC, Solicitor-General for the State of South Australia, with C Jacobi intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor for the State of South Australia)

CATCHWORDS

Coleman v Power

Statutes – Acts of Parliament – Interpretation – Meaning of "threatening, abusive and insulting words" under *Vagrants, Gaming and Other Offences Act* 1931 (Q) ("*Vagrants Act*"), s 7(1)(d) – Where appellant arrested for using insulting words to a person in a public place contrary to s 7(1)(d) – Whether "insulting words" must be reasonably likely to provoke physical retaliation.

Statutes – Acts of Parliament – Interpretation – Whether, if *Vagrants Act* s 7(1)(d) invalid, appellant's arrest was lawfully authorised by the *Police Powers and Responsibilities Act* 1997 (Q) ("*Police Powers Act*"), s 35(1) – Whether convictions for obstructing and assaulting police are valid.

Statutes – Acts of Parliament – Construction and interpretation – Relevance of international obligations assumed by the Commonwealth after enactment of State statute – Whether State Acts to be interpreted to be consistent with international law of human rights and fundamental freedoms.

Constitutional law (Cth) – Implied freedom of communication about government or political matters – Whether *Vagrants Act*, s 7(1)(d) effectively burdened freedom of communication about government or political matters – Whether s 7(1)(d) 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 – Whether s 7(1)(d) invalid to the extent that it penalised persons using insulting words where those words had a political content or purpose and the penalty constituted a burden on the freedom of political communication.

Constitutional law (Cth) – Implied freedom of communication about government or political matters – Whether *Police Powers Act*, s 35(1) invalid to the extent that it seeks to make lawful the arrest of a person on a charge under *Vagrants Act*, s 7(1)(d) for uttering insulting words in the course of making statements concerning political and governmental matters.

Words and Phrases – "insult", "insulting", "threatening, abusive and insulting words", "to any person", "public place".

Acts Interpretation Act 1954 (Q), ss 9, 14B.
Criminal Code (Q), ss 23(2), 340(b).
Police Powers and Responsibilities Act 1997 (Q), ss 35(1), 38, 120.
Vagrants, Gaming and Other Offences Act 1931 (Q), ss 7(1)(d), 7A(1)(a), 7A(1)(c).

1 GLEESON CJ. The appellant was protesting in Townsville. He was distributing pamphlets which contained charges of corruption against several police officers, including the first respondent. The first respondent approached the appellant and asked to see a pamphlet. The appellant pushed the first respondent, and said loudly: "This is Constable Brendan Power, a corrupt police officer". The magistrate who dealt with the case said that the appellant was not protesting against any laws or government policies, but was conducting a "personal campaign related to particular officers of the Townsville Police". Although there was a dispute as to the precise sequence of events, the prosecution case against the appellant, which was substantially accepted by the magistrate, was that the pushing and the verbal insult were intended to provoke an arrest. They did so.

2 The appellant was convicted of the offence of using insulting words to the first respondent in a public place. The primary issue in the appeal is whether he was rightly convicted. The appellant contends that the legislation creating the offence is invalid, as an unconstitutional restriction on freedom of speech.

3 The first step is to construe the statutory language creating the offence of using insulting words to a person in a public place. In that respect, both the legislative context and the statutory history are important. The *Vagrants, Gaming and Other Offences Act* 1931 (Q) ("the Vagrants Act") created a number of what are sometimes called "public order offences"[1]. Legislation of this general kind is familiar in the United Kingdom, in all Australian jurisdictions, and in New Zealand. The immediate context of the expression "insulting words" is s 7 of the Vagrants Act, which provides[2]:

> "7 (1) Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear–
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> (a) sings any obscene song or ballad;

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1 For an account of the history of public order legislation in common law jurisdictions, see Brown, Farrier, Neal and Weisbrot, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales*, 3rd ed (2001), ch 8.

2 Section 7, which is the legislation applicable to the events the subject of the present appeal, was omitted from the Vagrants Act and replaced by a different provision after argument in this appeal. The amending legislation is contained in Act No 92 of 2003 (Q). It is convenient, however, to speak of s 7, in its application to this appeal, in the present tense.

(b) writes or draws any indecent or obscene word, figure, or representation;

(c) uses any profane, indecent, or obscene language;

(d) uses any threatening, abusive, or insulting words to any person;

(e) behaves in a riotous, violent, disorderly, indecent, offensive, threatening, or insulting manner;

shall be liable to a penalty of $100 or to imprisonment for 6 months ... ."

4 The words the subject of s 7(1)(d) must be used to, and not merely about, a person, and they must be used in a public place or in circumstances where they could be heard from a public place. Section 7 protects various aspects of public order, ranging from decency to security.

5 There is no reason to doubt that "insulting" has the same meaning in pars (d) and (e). Those two paragraphs deal separately with a subject that had previously been dealt with compendiously, that is to say, insulting words and behaviour. Section 7 of the Vagrants Act replaced s 6 of the *Vagrant Act* 1851 (Q). That section prohibited the using of threatening, abusive or insulting words or behaviour in any public street, thoroughfare or place with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned. The omission of the element relating to a breach of the peace, in the 1931 Act, was plainly deliberate. Furthermore, the 1931 Act, in s 7(1)(e), expanded the kinds of behaviour that were prohibited. It continued to include threatening or insulting behaviour, but it also included, for example, disorderly, indecent, or offensive behaviour, which might involve no threat of a breach of the peace but which was nevertheless regarded by Parliament as contrary to good order.

6 The legislative changes in Queensland in 1931 were similar to changes in New Zealand in 1927. In New Zealand, the *Police Offences Act* 1884 (NZ) made it an offence to use any threatening, abusive or insulting words or behaviour in any public place within the hearing or in the view of passers by, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned. By legislation in 1927, the provision was altered by omitting any reference to a breach of the peace, and by expanding the description of the prohibited conduct to cover behaving in a riotous, offensive, threatening, insulting or disorderly manner, or using threatening, abusive or insulting words, or striking or fighting with any other person.

7 The New Zealand courts, in considering the effect of the 1927 amendments, attached importance to the decision of the legislature to delete the

reference to breaches of the peace, and to expand the range of prohibited behaviour. In *Police v Christie*[3], Henry J held that, to support a charge of disorderly behaviour, it was not necessary to show that the conduct of the defendant was such as to provoke a breach of the peace or was calculated to do so. He gave two reasons for this. First, the legislature, when re-enacting the provision, excluded the previous reference to breaches of the peace. Secondly, it added to the proscribed conduct forms of behaviour which may not necessarily lead to a breach or a likely breach of the peace[4]. The decision of Henry J was approved by the New Zealand Court of Appeal in *Melser v Police*[5], another case about disorderly behaviour. The considerations which the New Zealand courts took into account in construing their 1927 legislation apply with equal force to the 1931 Queensland legislation.

8 The absence, or elimination, of a requirement concerning breach of the peace is a feature of other legislation on the same topic. Section 59 of the *Police Act* 1892 (WA) made it an offence to "use any threatening, abusive, or insulting words or behaviour in any public or private place, whether calculated to lead to a breach of the peace, or not". When the *Summary Offences Act* 1966 (Vic) was enacted, s 17 was expressed in terms substantially the same as s 7 of the Vagrants Act of Queensland. That section replaced ss 26 and 27 of the *Police Offences Act* 1958 (Vic). Section 26(b) prohibited threatening, abusive and insulting words "with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned". Section 27(b) prohibited threatening, abusive or insulting words without reference to a breach of the peace, but with a lesser penalty[6]. In some jurisdictions, legislation prohibiting insulting words and behaviour in public places includes as an element of the offence a requirement relating to a breach of the peace. In some jurisdictions, no such element is included. And in other jurisdictions, such as Queensland, there was once legislation that included such a requirement, but that legislation has been amended or replaced so that the requirement no longer applies.

9 It is open to Parliament to form the view that threatening, abusive or insulting speech and behaviour may in some circumstances constitute a serious interference with public order, even where there is no intention, and no realistic

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3 [1962] NZLR 1109.

4 [1962] NZLR 1109 at 1112.

5 [1967] NZLR 437.

6 cf *Inglis v Fish* [1961] VR 607; see also *Anderson v Kynaston* [1924] VLR 214 dealing with the earlier *Police Offences Act* 1915 (Vic), in which ss 24 and 25 were substantially the same as ss 26 and 27 of the 1958 Act.

possibility, that the person threatened, abused or insulted, or some third person, might respond in such a manner that a breach of the peace will occur. A group of thugs who intimidate or humiliate someone in a public place may possess such an obvious capacity to overpower their victim, or any third person who comes to the aid of the victim, that a forceful response to their conduct is neither intended nor likely. Yet the conduct may seriously disturb public order, and affront community standards of tolerable behaviour. It requires little imagination to think of situations in which, by reason of the characteristics of those who engage in threatening, abusive or insulting behaviour, or the characteristics of those towards whom their conduct is aimed, or the circumstances in which the conduct occurs, there is no possibility of forceful retaliation. A mother who takes her children to play in a park might encounter threats, abuse or insults from some rowdy group. She may be quite unlikely to respond, physically or at all. She may be more likely simply to leave the park. There may be any number of reasons why people who are threatened, abused or insulted do not respond physically. It may be (as with police officers) that they themselves are responsible for keeping the peace. It may be that they are self-disciplined. It may be simply that they are afraid. Depending upon the circumstances, intervention by a third party may also be unlikely.

10 Violence is not always a likely, or even possible, response to conduct of the kind falling within the terms of s 7(1)(d) of the Vagrants Act. It may be an even less likely response to conduct falling within other parts of s 7. And if violence should occur, it is not necessarily unlawful. Depending upon the circumstances, a forceful response to threatening or insulting words or behaviour may be legitimate on the grounds of self-defence or provocation[7]. Furthermore, at common law, in an appropriate case a citizen in whose presence a breach of the peace is about to be committed has a right to use reasonable force to restrain the breach[8]. I am unable to accept that, when it removed the element of intended or actual breach of the peace in 1931, the legislature nevertheless, by implication, confined the prohibition in s 7(1)(d) to cases where there was an intention to provoke, or a likelihood of provoking, unlawful physical retaliation. That seems to me to be inconsistent with the statutory language, the context, and the legislative history.

11 That having been said, the removal in 1931 of the requirement concerning a breach of the peace undoubtedly gave rise to a problem of confining the operation of the legislation within reasonable bounds. The New Zealand courts faced this problem in relation to the prohibition of "disorderly" conduct. Having

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7 The *Criminal Code* (Q) in s 269 provides a defence of provocation to a charge of assault. Such provocation could arise from insulting words or behaviour.

8 *Albert v Lavin* [1982] AC 546 at 565 per Lord Diplock.

decided that there was no justification for reading into their 1927 Act a requirement of intended or likely breach of the peace, they had to address the issue of the kind of disorder that would justify the imposition of a criminal sanction. In *Melser v Police*[9], the Court of Appeal declined to give the word "disorderly" its widest meaning. North P referred to a South Australian case[10] which held that "disorderly behaviour" referred to "any substantial breach of decorum which tends to disturb the peace or to interfere with the comfort of other people who may be in, or in the vicinity of, a street or public place". He went on to say that the words "are directed to conduct which at least is likely to cause a disturbance or annoyance to others"[11]. Turner J pointed out that the disorderly behaviour, like the insulting behaviour, prohibited by the section had to be such as would tend to annoy or insult people sufficiently deeply or seriously to warrant the interference of the criminal law. It was not sufficient that the conduct be indecorous, ill-mannered, or in bad taste. The question, he said, was a matter of degree[12]. McCarthy J pointed out that the law had to take due account of the rights, and freedoms, of citizens. He said that, to be characterised as disorderly, conduct had to be "likely to cause a disturbance or to annoy others considerably"[13].

12 Concepts of what is disorderly, or indecent, or offensive, vary with time and place, and may be affected by the circumstances in which the relevant conduct occurs. The same is true of insulting behaviour or speech. In the context of legislation imposing criminal sanctions for breaches of public order, which potentially impairs freedom of speech and expression, it would be wrong to attribute to Parliament an intention that any words or conduct that could wound a person's feelings should involve a criminal offence. At the same time, to return to an example given earlier, 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.

13 There is a similar problem in applying the concept of offensive behaviour, which often arises in relation to conduct undertaken in the exercise of political

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9 [1967] NZLR 437.

10 *Barrington v Austin* [1939] SASR 130.

11 [1967] NZLR 437 at 443.

12 [1967] NZLR 437 at 444.

13 [1967] NZLR 437 at 446.

expression and action. In *Ball v McIntyre*[14], Kerr J considered the conduct of a student who demonstrated against the Vietnam War by hanging a placard on a statue in Canberra. He decided that the behaviour was not offensive within the meaning of the *Police Offences Ordinance* 1930-1961 (ACT) even though some people may be offended by it. He said[15]:

> "The word 'offensive' in [the Ordinance] is to be found with the words 'threatening, abusive and insulting', all words which, in relation to behaviour, carry with them the idea of behaviour likely to arouse significant emotional reaction."

He said that what was involved had to be behaviour that would produce, in the reasonable person, an emotional reaction (such as anger, resentment, disgust or outrage) beyond a reaction that was no more than the consequence of a difference of opinion on a political issue.

14 Section 7(1)(d) covers insulting words intended or likely to provoke a forceful response, whether lawful or unlawful; but it is not limited to that. However, the language in question must be not merely derogatory of the person to whom it is addressed; it must be of such a nature that the use of the language, in the place where it is spoken, to a person of that kind, is 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.

15 It is impossible to state comprehensively and precisely the circumstances in which the use of defamatory 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 offence of using insulting words to a person. An intention, or likelihood, of provoking violence may be one such circumstance. The deliberate inflicting of serious and public offence or humiliation may be another. Intimidation and bullying may constitute forms of disorder just as serious as the provocation of physical violence. But where there is no threat to the peace, and no victimisation, then the use of personally offensive language in the course of a public statement of opinions on political and governmental issues would not of itself contravene the statute. However, the degree of personal affront involved in the language, and the circumstances, may be significant.

16 The fact that the person to whom the words in question were used is a police officer may also be relevant, although not necessarily decisive. It may

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14 (1966) 9 FLR 237.

15 (1966) 9 FLR 237 at 243.

eliminate, for practical purposes, any likelihood of a breach of the peace[16]. It may also negate a context of victimisation. As Glidewell LJ pointed out in *Director of Public Prosecutions v Orum*[17], it will often happen that "words and behaviour with which police officers will be wearily familiar will have little emotional impact on them save that of boredom". But police officers are not required to be completely impervious to insult. A public accusation of corruption made about a police officer to his face, even in the context of a political protest or demonstration, is a form of conduct that a magistrate is entitled to regard as a serious contravention of public order by contemporary standards of behaviour. There was no challenge in the Court of Appeal, or, as I followed the argument, in this Court, to that aspect of the magistrate's decision.

17 Before leaving the question of the meaning of s 7 of the Vagrants Act, I should comment upon the proposition that the provisions of international treaties to which Australia is a party, and in particular the International Covenant on Civil and Political Rights ("ICCPR")[18], support a construction which confines s 7(1)(d) to the use of words in circumstances where there is an intention to provoke, or a likelihood of provoking, unlawful physical violence.

18 First, this is not an argument that was put by, or to, counsel during the course of the appeal. We are concerned with the interpretation of a State Act, enacted in 1931. The possibility that its meaning is affected (perhaps changed) by an international obligation undertaken by the Australian Government many years later raises questions of general importance. The Attorney-General of Queensland was a party to the appeal, represented by the Solicitor-General. The Attorneys-General of the Commonwealth and for the States of New South Wales and South Australia intervened. No party or intervener dealt with the possibility in argument.

19 Secondly, the formulation of a general principle of statutory interpretation by reference to international obligations requires some care. In *Chu Kheng Lim v Minister for Immigration*, Brennan, Deane and Dawson JJ said[19]:

> "[C]ourts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty."

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16 *Marsh v Arscott* (1982) 75 Cr App R 211.

17 [1989] 1 WLR 88 at 93; [1988] 3 All ER 449 at 451-452.

18 Done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23.

19 (1992) 176 CLR 1 at 38.

The footnote supporting that proposition referred to what was said by Lord Diplock in *Garland v British Rail Engineering Ltd*[20]:

> "[I]t is a principle of construction of United Kingdom statutes ... that the words of a statute passed *after* the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it." (emphasis added)

In *Minister for Immigration and Ethnic Affairs v Teoh*, Mason CJ and Deane J said[21]:

> "Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, *at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law*." (emphasis added) (footnote deleted)

The qualification in that passage is consistent with what Mason CJ had earlier said in *Yager v The Queen*[22]:

> "There is no basis on which the provisions of an international convention can control or influence the meaning of words or expressions used in a statute, unless it appears that the statute was intended to give effect to the convention, in which event it is legitimate to resort to the convention to resolve an ambiguity in the statute."

It is also consistent with what was said later by Dawson J in *Kruger v The Commonwealth*[23] concerning the principle stated in *Teoh*:

> "Such a construction is not, however, required by the presumption where the obligations arise only under a treaty and the legislation in question was enacted before the treaty, as is the situation in the present case."

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20 [1983] 2 AC 751 at 771.

21 (1995) 183 CLR 273 at 287.

22 (1977) 139 CLR 28 at 43-44.

23 (1997) 190 CLR 1 at 71.

The ICCPR was made in 1966, signed by Australia in 1972, and ratified in 1980. The First Optional Protocol came into force in Australia in 1991. The proposition that the ICCPR can control or influence the meaning of an Act of the Queensland Parliament of 1931 is difficult to reconcile with the above statements. In particular, it is difficult to reconcile with the theory that the reason for construing a statute in the light of Australia's international obligations, as stated in *Teoh*, is that Parliament, prima facie, intends to give effect to Australia's obligations under international law. Of one thing we can be sure: the Queensland Parliament, in 1931, did not intend to give effect to Australia's obligations under the ICCPR.

20 Thirdly, we are not in this case concerned with the development of the common law of Australia, or the influence upon such development either of established principles of international law, or of Australia's treaty obligations[24]. This Court is not presently engaged in the task of developing the law of Queensland. Our responsibility is to interpret a Queensland statute. It is for the Parliament of Queensland to develop the statute law of that State.

21 Fourthly, s 14B of the *Acts Interpretation Act* 1954 (Q) provides that consideration may be given to extrinsic material to assist in the interpretation of a statute. Extrinsic material includes "a treaty or other international agreement that is mentioned in the Act"[25]. No relevant treaty or international argument is mentioned in the Vagrants Act.

22 Fifthly, unless s 7 of the Vagrants Act changed its meaning in 1966, or 1972, or 1980, or 1991, it is difficult to see how the ICCPR can advance the construction argument. If, prior to 1966 (or one of the later dates), s 7(1)(d) was limited to words intended to provoke, or likely to provoke, unlawful violence, then the ICCPR adds nothing. If it was not so limited earlier, the suggestion that it came later to be so limited, without any intervention by the Queensland Parliament, raises a topic of potentially wide constitutional significance.

23 Sixthly, let all the above difficulties be put to one side, and let it be assumed that the Vagrants Act is to be construed in the light of Art 19 of the ICCPR. What follows? How does the *particular* construction asserted, that is to say, limitation to words intended or likely to provoke unlawful violence, follow? As has already been explained, that is different from a limitation to words intended or likely to provoke violence. Queensland law permits physical

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24 cf *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42.

25 *Acts Interpretation Act* 1954 (Q), s 14B(3)(d).

retaliation to insulting provocation in certain cases. It is also different from the limitations that exist in some corresponding legislation in other jurisdictions. Furthermore, Art 19(3)(b) contemplates restrictions on freedom of speech for the protection of public order. For the reasons given above, public order is a concept that extends beyond absence of physical violence. If this point had been argued, counsel would have been given the opportunity to inform the Court about the number of countries in which a person, with impunity, may walk up to a policeman in a public place, push him, and inform passers-by that he is corrupt. As I have indicated, I would interpret s 7 as having built into it a requirement related to serious disturbance of public order or affront to standards of contemporary behaviour. This is not inconsistent with Art 19.

24 Finally, the consequences of the proposition, in its wider context, are noteworthy. The 1851 legislation prohibited the use of threatening, abusive or insulting words in a public street, but only if used with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned. The legislation of 1931, apparently deliberately, removed the requirement of intent to provoke, or occasioning, a breach of the peace. Australia ratified the ICCPR in 1980. This is said to result in a construction of the 1931 Act which limits the prohibition to the use of insulting words with intent to provoke, or the likelihood of provoking, unlawful violence. *Plus ça change, plus c'est la même chose*.

25 I turn to the issue that divided the Court of Appeal of Queensland, and that formed the basis of the appellant's case in this Court. The appellant contended that s 7(1)(d) of the Vagrants Act, in its application to the facts of the present case, was invalid for the reason that it was inconsistent with the freedom of political communication conferred by implication by the Commonwealth Constitution.

26 It was common ground in argument in this Court that the appellant's contention is to be considered by reference to the principles stated in *Lange v Australian Broadcasting Corporation*[26], and that a law of the Queensland Parliament will infringe the relevant constitutional freedom where it effectively burdens communication about governmental or political matters, and either the object of the law is incompatible with the maintenance of the constitutional system of representative and responsible government or the law is not reasonably appropriate and adapted to achieving its object.

27 It was accepted by the Attorney-General of Queensland that s 7(1)(d) is capable of having a practical operation that, in some circumstances, may burden communication about governmental or political matters, whatever the precise ambit of the concept of governmental or political matters may be. That is true in

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26 (1997) 189 CLR 520 at 561-562, 567.

the sense that threatening, abusive, or insulting words might be used in the course of communicating about any subject, including governmental or political matters. The same could be said about all, or most, of the other forms of conduct referred to in s 7. However, the object of the law is not the regulation of discussion of governmental or political matters; its effect on such discussion is incidental, and its practical operation in most cases will have nothing to do with such matters. The debate concentrated on the question whether the law, in its application to this case, is reasonably appropriate and adapted to achieving its object.

28 The facts of the case illustrate the vagueness of concepts such as "political debate", and words spoken "in the course of communication about governmental or political matters". The appellant was carrying on what the magistrate described as a personal campaign against some individual police officers, including the first respondent. Let it be accepted that his conduct was, in the broadest sense, "political". It was not party political, and it had nothing to do with any laws, or government policy. Because the constitutional freedom identified in *Lange* does not extend to speech generally, but is limited to speech of a certain kind, many cases will arise, of which the present is an example, where there may be a degree of artificiality involved in characterising conduct for the purpose of deciding whether a law, in its application to such conduct, imposes an impermissible burden upon the protected kind of communication. The conduct prohibited by the relevant law in its application to the present case involved what the magistrate was entitled to regard as a serious disturbance of public order with personal acrimony and physical confrontation of a kind that could well have caused alarm and distress to people in a public place. As was noted above, almost any conduct of the kind prohibited by s 7, including indecency, obscenity, profanity, threats, abuse, insults, and offensiveness, is capable of occurring in a "political" context, especially if that term is given its most expansive application. Reconciling freedom of political expression with the reasonable requirements of public order becomes increasingly difficult when one is operating at the margins of the term "political".

29 In *Levy v Victoria*[27], Brennan CJ, contrasting United States First Amendment jurisprudence, said:

> "Under our Constitution, the courts do not assume the power to determine that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose. The courts acknowledge the law-maker's power to determine the sufficiency of the means of achieving the legitimate purpose, reserving only a jurisdiction to determine whether

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27 (1997) 189 CLR 579 at 598.

> the means adopted could reasonably be considered to be appropriate and adapted to the fulfilment of the purpose."

30 In the same case, Gaudron J adopted a somewhat different approach. She said[28]:

> "If the direct purpose of the law is to restrict political communication, it is valid only if necessary for the attainment of some overriding public purpose. If, on the other hand, it has some other purpose, connected with a subject matter within power and only incidentally restricts political communication, it is valid if it is reasonably appropriate and adapted to that other purpose."

31 The law presently under consideration is within the second category, and it is unnecessary to pursue the issues that would be relevant to the validity of a law within the first category. In relation to a law in the second category, the standard of judicial review proposed by Gaudron J, with which I respectfully agree, is rather more strict than that proposed by Brennan CJ, but it involves the same proposition, that is to say, that the Court will not strike down a law restricting conduct which may incidentally burden freedom of political speech simply because it can be shown that some more limited restriction "could suffice to achieve a legitimate purpose". This is consistent with the respective roles of the legislature and the judiciary in a representative democracy.

32 Legislation creating public order offences provides a good example of the reason for this difference in functions. The object of such legislation is generally the same: 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. The right of one person to ventilate personal grievances may collide with the right of others to a peaceful enjoyment of public space. Earlier, I gave an example of a mother who takes her children to play in a public park. Suppose that she and her children are exposed to threats, abuse and insults. Suppose, further, that the mother is an immigrant, that the basis of such threats, abuse and insults includes, either centrally or at the margin, an objection to the Federal Government's immigration policy, and that the language used is an expression, albeit an ugly expression, of an opinion on that matter. Why should the family's right to the quiet enjoyment of a public place necessarily be regarded as subordinate to the abusers' right to free expression of what might generously be described as a political opinion? The answer necessarily involves striking a balance between competing interests, both of which may properly be described as rights or freedoms. As the Solicitor-General of Queensland pointed out in the

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28 (1997) 189 CLR 579 at 619.

course of argument, it is often the case that one person's freedom ends where another person's right begins. The forms of conduct covered by s 7 all constitute an interference with the right of citizens to the use and enjoyment of public places. As the survey of legislation made earlier in these reasons shows, the balance struck by the Queensland Parliament is not unusual, and I am unable to conclude that the legislation, in its application to this case, is not suitable to the end of maintaining public order in a manner consistent with an appropriate balance of all the various rights, freedoms, and interests, which require consideration.

33 As indicated above, this case does not raise an issue as to the method and standard of scrutiny to be applied in judicial review of a law "whose character is that of a law with respect to the prohibition or restriction of [political] communications"[29]. I note also that argument in this case proceeded upon the common assumption that *Lange v Australian Broadcasting Corporation*[30] was authoritative, and that, in this context, a test of "reasonably appropriate and adapted" was to be applied. It was not argued, for example, that, in this case, a test of "proportionality" would produce a different result.

34 In my view, the legislation is valid. That being so, the other issues do not arise. The appeal should be dismissed with costs.

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29 cf *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169 per Deane and Toohey JJ.

30 (1997) 189 CLR 520.

35 McHUGH J. The principal issue in this appeal is whether s 7(1)(d)[31] of the *Vagrants, Gaming and Other Offences Act* 1931 (Q) was invalid to the extent that it penalised persons using insulting words where those words had a political content or purpose and the penalty constituted a burden on the freedom of political communication. Because the parties agree that the penalty for uttering the words in issue in this case had the capacity to burden that freedom, the appeal raises the narrow issue whether s 7(1)(d) was reasonably appropriate and adapted to serve the end of public order in a manner that was compatible with the system of representative and responsible government prescribed by the Constitution. If s 7(1)(d) was not compatible with that system, further issues arise as to whether the appellant's conviction under that paragraph can be maintained and, if not, whether it follows that convictions for other offences arising out of his resisting arrest for using insulting words must be quashed.

36 In my opinion, the appeal must be allowed in respect of all charges. Section 7(1)(d) made it an offence to utter insulting words in or near a public place. Nothing in the *Vagrants, Gaming and Other Offences Act* 1931 (Q) ("the Vagrants Act"), or any other relevant Queensland law, provided any defence to a charge under s 7(1)(d). Once such words were uttered in or near a public place, the offence was committed. Under the Constitution, a law that, without qualification, makes it an offence to utter insulting words in or near a public place cannot validly apply to insulting words that are uttered in the course of making statements concerning political or governmental matters. The appellant's conviction for uttering such words must be quashed. Furthermore, a law that seeks to make lawful the arrest of a person on such a charge is as offensive to the Constitution as the law that makes it an offence to utter insulting words in the course of making statements concerning political or governmental matters. Consequently, the appellant's convictions for obstructing and resisting arrest must also be quashed.

Statement of the case

37 The appeal is brought against an order of the Court of Appeal of the Supreme Court of Queensland, the effect of which was to uphold all but one of the convictions recorded against the appellant in the Townsville Magistrates Court. The Magistrates Court had convicted the appellant of the following charges:

> (1) using insulting words: "This is Const Brendan Power a corrupt police officer" contrary to s 7(1)(d) of the Vagrants Act;

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31 Some of the provisions the subject of this appeal have been repealed: Act No 92 of 2003 (Q).

(2) obstructing "a police officer namely Adam CARNES in the performance of the officer's duties" contrary to s 120 of the *Police Powers and Responsibilities Act* 1997 (Q);

(3) assaulting "Adam CARNES a Police Officer whilst Adam CARNES was acting in the execution of his duty" contrary to s 340(b) of the *Criminal Code* (Q);

(4) assaulting "Brendan POWER a Police Officer whilst Brendan POWER was acting in the execution of his duty" contrary to s 340(b) of the *Criminal Code* (Q);

(5) obstructing "a police officer namely Brendan POWER in the performance of the officer's duties" contrary to s 120 of the *Police Powers and Responsibilities Act* 1997 (Q); and

(6) distributing printed matter containing insulting words contrary to s 7A(1)(c) of the Vagrants Act.

38 The learned magistrate rejected the appellant's claim that he was not guilty of the charges concerning insulting words because his statements were part of a communication on political or government matters and were within the immunity from legislative action formulated by this Court in *Lange v Australian Broadcasting Corporation*[32]. The learned magistrate said that the appellant was "not ... protesting against the laws and policies of this government". She said that his campaign was "a personal campaign related to particular officers of the Townsville Police whom he perceives have been involved in corrupt and criminal conduct".

39 The appellant appealed to the District Court of Queensland. Pack DCJ dismissed his appeal.

40 Subsequently, the appellant appealed to the Court of Appeal of the Supreme Court of Queensland (McMurdo P, Davies and Thomas JJA)[33]. The Court unanimously held that s 7A(1)(c) was invalid, in so far as it penalised the appellant for publishing a pamphlet containing insulting words (Charge (6))[34]. It quashed the conviction under that section of the Vagrants Act. However, the majority (Davies and Thomas JJA) held that s 7(1)(d) of the Vagrants Act was valid even though it burdened the implied freedom of communication on political

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32 (1997) 189 CLR 520 at 567-568.

33 *Power v Coleman* [2002] 2 Qd R 620.

34 *Power v Coleman* [2002] 2 Qd R 620 at 633, 635, 645.

and government matters protected by the Constitution. Davies JA said that the paragraph[35]:

> "imposes only a slight burden on the freedom of communication about government or political matters and one which is reasonably appropriate and adapted to serve the legitimate end of preventing such public acrimony and violence, an end the fulfilment of which is compatible with the maintenance of the system of representative and responsible government".

Thomas JA said[36]:

> "its burden upon freedom of communication about government or political matters is not very great in its terms of operation or effect. And, the law seems proportionate, appropriate and adapted to serve the legitimate ends that have been mentioned."

41 Accordingly, the majority upheld the conviction under s 7(1)(d) of the Vagrants Act. The Court unanimously dismissed the appeal against the remaining convictions[37].

The material facts

42 In March 2000, the appellant, Patrick John Coleman, was handing out pamphlets in a mall in Townsville. The mall was a public place. One of the headings in the pamphlet was in capital letters and in bold type stated: "GET TO KNOW YOUR LOCAL CORRUPT TYPE COPS". Behind the appellant was a placard upon which were written the words: "Get to know your local corrupt type coppers; please take one". The second and third lines in the body of the pamphlet declared that the appellant was "going to name corrupt cops". One of the police officers named in the pamphlet was the first respondent, Brendan Jason Power. The second page of the pamphlet contained the following statement:

> "Ah ha! Constable Brendan Power and his mates, this one was a beauty – sitting outside the mall police beat in protest at an unlawful arrest – with simple placards saying TOWNSVILLE COPS – A GOOD ARGUMENT FOR A BILL OF RIGHTS – AND DEAR MAYOR – BITE ME – AND TOWNSVILLE CITY COUNCIL THE ENEMY OF FREE SPEECH –

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35 *Power v Coleman* [2002] 2 Qd R 620 at 635.

36 *Power v Coleman* [2002] 2 Qd R 620 at 645.

37 *Power v Coleman* [2002] 2 Qd R 620 at 634, 648.

> the person was saying nothing just sitting there talking to an old lady then BAMMM arrested dragged inside and detained. Of course not happy with the kill, the cops – in eloquent prose having sung in unison in their statements that the person was running through the mall like a madman belting people over the head with a flag pole before the dirty hippie bastard assaulted and [sic] old lady and tried to trip her up with the flag while ... while ... he was having a conversation with her before the cops scared her off ... boys boys boys, I got witnesses so KISS MY ARSE YOU SLIMY LYING BASTARDS."

43 The contents of this pamphlet formed the basis of Charge (6) which, as I have said, was laid under s 7A(1)(c) of the Vagrants Act and which the Court of Appeal unanimously held could not validly apply to the handing out of the pamphlet. The validity of Charge (6) is no longer an issue between the parties. However, the contents and handing out of the pamphlet are relevant matters in assessing whether the appellant was engaged in communicating political or governmental matters when he uttered the words that form the basis of Charge (1).

44 During the day, the appellant gave one of the pamphlets to Constable Carnes who told Constable Power about the contents of the pamphlet. As a result, Constable Power in the company of another constable approached the appellant and asked for a pamphlet. The appellant refused to give him one, saying, "No, you know what's in it". What happened thereafter was the subject of dispute between the police officers and the appellant as to whether he pushed Constable Power before or after his arrest.

45 In the District Court, Pack DCJ said the magistrate had "resolved the conflict in evidence in [Constable Power's] favour". I think that this conclusion is correct. Although the magistrate did not expressly say that she preferred the evidence of Constable Power to that of the appellant, her judgment shows that she thought the appellant's admissions in evidence and the evidence contained in a videotape proved the charges against him. Because the videotape evidence supported Constable Power's version of events, I think that she must have preferred his evidence to the appellant's evidence.

46 According to Constable Power's evidence, when the appellant refused to give him a copy of the pamphlet he took out a "notice to appear" to give to the appellant, and told him to stop handing out the pamphlets or he would be arrested. The appellant then pushed him and yelled out: "This is Constable Brendan Power, a corrupt police officer". Constable Power then told the appellant he was under arrest. A bystander then asked why the appellant was being arrested and Constable Power answered: "Insulting language". The statement that Constable Power was a corrupt police officer formed the basis of Charge (1).

47 The magistrate found that on the appellant's admissions he was guilty of "the charges of obstructing Senior Constables Carnes and Power following his lawful arrest". The obstruction consisted in the appellant "hanging onto the pole, having to be carried to the police car, refusing to get into the vehicle and then, when it was indicated that he should get out of the vehicle, refusing to exit the vehicle and thereafter holding onto Senior Constable Carnes' legs and then a further post before he was ultimately placed in the police van, kicking out at police." These facts were the basis of Charges (2) and (5).

48 The basis of Charge (4) was that the appellant attempted to bite Constable Power. The basis of Charge (3) – assaulting Constable Carnes – was:

> "that the [appellant] kicked him as he was being put into the police van; that the kicking on the part of the [appellant] was deliberate in terms of his view that the arrest was unlawful and that he was going to do whatever he could to make it as difficult as he could".

The scope of s 7 of the Vagrants Act

49 Section 7(1) of the Vagrants Act provided:

> **"Obscene, abusive language etc.**
>
> Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear –
>
> (a) sings any obscene song or ballad;
>
> (b) writes or draws any indecent or obscene word, figure, or representation;
>
> (c) uses any profane, indecent, or obscene language;
>
> (d) uses any threatening, abusive, or insulting words to any person;
>
> (e) behaves in a riotous, violent, disorderly, indecent, offensive, threatening, or insulting manner;
>
> shall be liable to a penalty of $100 or to imprisonment for 6 months …"

50 The scope of this provision was broad. Paragraph 7(1)(d) applied to the uttering of any insulting words that could be heard in or near a public place including a communication concerning a government or political matter.

51 The Vagrants Act contains an inclusive definition of "public place". Section 2 declares:

> "'**public place**' includes every road and also every place of public resort open to or used by the public as of right, and also includes –
>
> (a) any vessel, vehicle, building, room, licensed premises, field, ground, park, reserve, garden, wharf, pier, jetty, platform, market, passage, or other place for the time being used for a public purpose or open to access by the public, whether on payment or otherwise, or open to access by the public by the express or tacit consent or sufferance of the owner, and whether the same is or is not at all times so open; and
>
> (b) a place declared, by regulation, to be a public place".

52 Hence, for the purposes of the Vagrants Act, public places include places not normally open to the public, but to which the public may have access at particular times upon paying a fee. They also include places accessible to the public with the tacit consent of the owner. And for the purposes of s 7, an offence might be committed in any private place that is within sight or hearing of a public place.

53 The term "insulting" was wide enough to catch a very broad range of words used by persons in a public place. The *Shorter Oxford English Dictionary* defines "insult" as[38]:

> "To manifest arrogant or scornful delight by speech or behaviour; to exult proudly or contemptuously; to vaunt, glory, triumph ... To assail with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage."

54 The *Macquarie Dictionary* defines it as[39]:

> "To treat insolently or with contemptuous rudeness; affront."

55 Over a long period, superior courts – including this Court on one occasion – have decided many cases involving statutory offences concerned with using insulting words. Those cases show that insulting words include:

- "language calculated to hurt the personal feelings of individuals"[40],

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38 3rd ed (1944) at 1020.

39 3rd ed (rev) (2001) at 983.

- "scornful abuse of a person or the offering of any personal indignity or affront"[41],

- "something provocative, something that would be offensive to some person to whose hearing the words would come"[42].

56 In *Thurley v Hayes*[43], this Court restored a conviction for using insulting words calculated to provoke a breach of the peace where the defendant had said to a returned soldier, "You are sponging on the Government and you waste public money and I will report you". Rich J, giving the judgment of the Court, said[44]:

> "'Insulting' is a very large term, and in a statement of this kind is generally understood to be a word not cramped within narrow limits."

57 His Honour thought that the words used were within the then *Oxford Dictionary* definition of the term "insult", a definition that does not greatly differ from the present edition.

58 However, words are not insulting merely because they provoke anger or annoyance or show disrespect or contempt for the rights of other persons[45]. Thus, in *Cozens v Brutus*[46], the House of Lords held that it was open to magistrates to find that the defendant was not guilty of insulting behaviour although he angered spectators at a tennis match at Wimbledon. The defendant and nine other persons interrupted the match by running onto the court with banners and placards and blowing whistles and throwing leaflets around. Lord Reid said that, if he had to decide the question of fact, he would have agreed with the magistrates even though the spectators "may have been very angry and justly so"[47].

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40 *Ex parte Breen* (1918) 18 SR (NSW) 1 at 6 per Cullen CJ. See also *Wragge v Pritchard* (1930) 30 SR (NSW) 279 at 280 per Street CJ.

41 *Annett v Brickell* [1940] VLR 312 at 315.

42 *Lendrum v Campbell* (1932) 32 SR (NSW) 499 at 503.

43 (1920) 27 CLR 548.

44 (1920) 27 CLR 548 at 550.

45 *Cozens v Brutus* [1973] AC 854 at 862C, 864B, 865D 867D.

46 [1973] AC 854.

47 [1973] AC 854 at 863A.

59 In *Cozens v Brutus*, all the Law Lords agreed that the term "insulting" in the statute under consideration was an ordinary English word whose meaning was a question of fact[48]. In some cases, however, the context of the term may indicate that the word "insulting" should be read as broadly as possible or restrictively to give effect to the purpose of the enactment. If the statutory provision requires additional elements to be proved before the offence is created, such as, "with intent to provoke a breach of the peace", the term may be read as broadly as possible, as in *Thurley*.

60 However, even where the offence requires proof of an element in addition to the use of insulting words or behaviour, the courts have not always taken the view that those terms should be read broadly. The New South Wales courts, for example, have generally given the term "insulting" a restricted meaning whatever the context. They have interpreted it so that the words must have had an effect on the feelings of the person or persons who hear them. In *Ex parte Breen*, Cullen CJ said of a provision very similar to the present, but containing an additional element that a breach of the peace be intended or occasioned by the insulting words[49]:

> "The word [insulting] is often used in a very wide sense. One speaks of an insult to a man's intelligence, an insult to his loyal and patriotic sentiments, or an insult to his religious convictions. The collocation in which the word 'insulting' is used in this enactment seems to have a much narrower scope than that. I do not mean to say that offensive disrespect, either towards a man's national sentiments or his religion, may not sometimes assume the aspect of a personal insult to himself. What I mean is that the word 'insulting' as used in the enactment seems to have regard to the more personal feelings of individuals to whose hearing the words may come."

61 On that basis his Honour held that words disrespectful of British officers and British women at war were not within the statute because they were not uttered in the presence of those persons or others closely connected with them.

62 Unsurprisingly in view of *Ex parte Breen*[50], where the use of insulting words in a public place is by itself sufficient to create the offence, New South Wales courts have read the term "insulting" as meaning having a personal effect

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48 [1973] AC 854 at 861D-F, 863D, 865G, 867B.

49 (1918) 18 SR (NSW) 1 at 5.

50 (1918) 18 SR (NSW) 1 at 4-6.

on the person who hears them. In *Lendrum v Campbell*[51], the Full Court of the Supreme Court applied the reasoning in *Ex parte Breen* to a statutory provision that made it an offence to use threatening, abusive or insulting words in or near certain public places "within the view or hearing of any person present therein"[52]. Unlike the statute in *Ex parte Breen*, the provision in *Lendrum* did not require proof that a breach of the peace be intended or occasioned by the insulting words. No doubt for that reason the Full Court felt compelled to read the statute restrictively.

63 The terms of s 7(1)(d) were similar to those considered by the Full Court in *Lendrum*. However, the New South Wales statute considered in that case did not contain the qualifying words "to him". The presence of this phrase in s 7(1)(d) provides a strong reason for giving s 7(1)(d) the construction that the Full Court gave to the New South Wales statute. That is to say, the term "insulting" requires proof by direct evidence or by inference that the words used had a personal effect on the person or persons who heard them.

64 However, I can see no reason for otherwise limiting the natural and ordinary meaning of "insulting". The provision imposed its own limitations: the insulting words had to be directed to a person and they had to be used in or near a public place. Accordingly, if the words were used in or near a public place and were calculated to hurt the personal feelings of a person and did affect the feelings of that person, they were "insulting words" for the purpose of s 7(1)(d).

65 Seizing on the words "to him", the respondents contend that to come within s 7(1)(d), the relevant words had to be *said to the person at whom* the insult is directed. This proposition has the curious result that words insulting to a person would not be an offence if *said* in his or her presence, as long as they were not directed to that person. Form would triumph over substance. In the present case, for example, it might mean that the appellant committed no offence by saying to bystanders: "This is Constable Power – a corrupt police officer". But the appellant would commit an offence by saying to Constable Power, "You are a corrupt police officer". However, to completely deny the respondents' proposition requires reading words such as "concerning any person" into the paragraph. The paragraph would then have read "uses any ... insulting words concerning any person to any person". This is an interpretation that the Supreme Court of New South Wales denied to the New South Wales provision considered in *Ex parte Breen*[53]. And I think it should be denied to s 7(1)(d). Except by

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51 (1932) 32 SR (NSW) 499.

52 *Lendrum v Campbell* (1932) 32 SR (NSW) 499 at 501.

53 See *Ex parte Breen* (1918) 18 SR (NSW) 1 at 6. See also *Lendrum v Campbell* (1932) 32 SR (NSW) 499 at 503.

necessary implication, courts should not extend the natural and ordinary meaning of words that create an offence, especially when the statute is regulating such a fundamental right as that of free speech. However, it does not follow that the words in question had to be said directly to the person insulted. It is sufficient that the person of whom they are said could reasonably, and did, regard their content as directed at him or her.

66 Accordingly, if a person used words in or near a public place that were insulting in their natural and ordinary meaning, that person committed an offence against par (d) of s 7(1) if the words were used, expressly or impliedly, to the person who was the subject of the insult. "Public places" and "insult to the person" were the only limitations that the paragraph imposed. Otherwise, the words of the paragraph should be given their ordinary and natural meaning. It is true that s 7(1)(d) used the terms "threatening" and "abusive". But I cannot see anything in those terms that suggests that the natural and ordinary meaning of "insulting" in s 7(1)(d) did not apply.

67 Nor can I see any reason for reading into s 7(1)(d) the limitation that the insulting words should be likely to occasion a breach of the peace. Not only did the Vagrants Act not expressly contain such a limitation but, in enacting the present Act, the Queensland Parliament removed that very limitation from a previous version of the offence[54]. Moreover, s 7 was premised on the basis that offences under s 7(1) pars (a), (b), (c) and part of par (e) might occur even though there was no person other than the offender present. Section 7(1) made it an offence to do the matters described in those paragraphs if they were done "in any public place or so near to any public place that any person who might be therein, *and whether any person is therein or not*, could view or hear" those matters (emphasis added). Thus, s 7(1)(e) made it an offence to behave in an insulting manner whether or not any person was present. How an offence might be proved if no one was present, except by an admission, is another matter. What is important is that s 7(1) did not require a person to be present in every situation where an offence under the sub-section might occur. This points strongly to proof of a breach or potential breach of the peace not being an element of offences under the sub-section. Furthermore, even when persons were present, a breach of the peace was an unlikely result in many cases of offences created by the sub-section. While almost any breach of the law may lead to a further breach of the peace, in most cases the occurrence of the offences created in pars (a), (b) and (c) of s 7(1) seems unlikely to lead to breaches of the peace.

68 It is true that it is not easy to see how an offence, described in par (d) of s 7(1), could occur without another person being present in or near the public place. This is the consequence of the phrase "to any person" in s 7(1)(d), and it

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54 *Vagrant Act* (1851) (15 Vict No 4), s 6.

suggests that the words "whether any person is therein or not" did not apply to s 7(1)(d). So far as that paragraph is concerned, therefore, there is nothing in its terms that indicated a breach of the peace requirement. Thus, in view of the deletion of the element of breach of the peace in the earlier version of the offence, the opening words of s 7(1) and the context of s 7(1)(d), I can see no justification for reading this limitation into the section. It may be that at least part of s 7(1) was enacted to prevent breaches of the peace from occurring. But that does not mean that a breach or potential breach of the peace was an element of the offence under s 7(1)(d).

Defences to the use of insulting words

69 Section 7(1)(d) of the Vagrants Act contained no defence to charges under that paragraph. Nor did the Act contain any defence to the uttering of insulting words similar to the defences available to the publication of defamatory words at common law or under various statutes[55], defences such as public interest, qualified privilege, truth or fair comment[56]. In Queensland, it is also a defence to defamation that the defamation was oral and not likely to have caused injury to the defamed person[57]. But a person charged under s 7(1)(d) had no equivalent defence.

70 Section 52 of the Vagrants Act requires the Act be read with the *Criminal Code* of Queensland[58]. Chapter 5 of the *Criminal Code* deals with "Criminal Responsibility". The matters therein described would apply to any offence under the Vagrants Act by virtue of s 52 of that Act. The defences may be summarised as:

- No knowledge of a statutory instrument that had not been published or made reasonably available (s 22);
- Absence of mens rea (s 23);
- Honest and reasonable mistake of fact (s 24);
- Acting in extraordinary emergencies (s 25);

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55 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 570-571; *Roberts v Bass* (2002) 212 CLR 1 at 28 [69].

56 cf *Defamation Act* 1889 (Q), ss 13, 14, 15, 16(1)(g).

57 *Defamation Act* 1889 (Q), s 20.

58 The *Criminal Code* is found in the *Criminal Code Act* 1899 (Q), Sch 1.

- Insanity (s 27), including by involuntary intoxication (s 28);
- Being of immature age (s 29);
- Lawful justification or excuse – self-defence, rescue and duress (s 31).

71 With the exceptions of the defences of insanity and immaturity, it is hard to see how any of these defences could be available to a charge under s 7(1)(d). In all but exceptional cases, therefore, Queensland law provided no defence to a charge of using insulting words to a person in or near a public place. The possibility that other Queensland statutes might have provided defences to s 7(1)(d) does not appear to have been argued before the Court of Appeal. None of the written submissions for the respondents to this appeal claimed that any such defences were available. In oral argument, I put to the Solicitor-General of Queensland that there were no defences to the charge. He agreed that this was so and gave, as the reason, that the paragraph was intended to prevent breaches of the peace.

Subject to the Constitution, the words used by the appellant constituted an offence under s 7(1)(d) of the Vagrants Act

72 The words used by the appellant were uttered in a public place. They were calculated to hurt the personal feelings of Constable Power and the conclusion that they did so is inevitable. Accordingly, they were "insulting words" for the purpose of s 7(1)(d). It is no answer to the charge that the appellant uttered the words to bystanders and not solely to Constable Power. The words: "This is Constable Brendan Power, a corrupt police officer" were said in his presence and referred to him in the most pointed way. By necessary implication, they told Constable Power to his face that he was a corrupt police officer.

73 Unless the implied freedom of communication on political and government matters in the Constitution protects the use of the words on this occasion and in this context, the appellant was guilty of an offence against s 7(1)(d) of the Vagrants Act. To the constitutional issue, I now turn.

Issues not requiring resolution in this appeal

74 All parties to the appeal accepted that the validity of s 7(1)(d) had to be determined by reference to the tests laid down by this Court in *Lange*[59]:

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59 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567-568.

> "When a law of a State or federal Parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by ss 7, 24, 64 or 128 of the Constitution, two questions must be answered before the validity of the law can be determined. 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 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 (hereafter collectively 'the system of government prescribed by the Constitution'). If the first question is answered 'yes' and the second is answered 'no', the law is invalid." (footnotes omitted)

75 In the Queensland Court of Appeal and in this Court, the respondents conceded that the impugned provision was capable of burdening political communication in the manner described by the first limb of the *Lange* test. Two important matters are involved in this concession.

76 First, it concedes that the Constitution may invalidate a State law that restricts, without justification, a political communication concerning the functioning of representative and responsible government at federal level. That element of the concession was properly made[60]. In *Levy v Victoria*, I pointed out that "no Commonwealth or State law can validly impair the freedom of communication that the Constitution protects"[61].

77 Second, it concedes that the words used by the appellant concerned matters within the freedom of communication that the Constitution protects even though it concerns State police officers. In *Lange*, the Court acknowledged the interrelated character of political and governmental discussion at the various levels of government when considering the scope of qualified privilege[62]:

> "[D]iscussion of government or politics at State or Territory level and even at local government level is amenable to protection by the extended category of qualified privilege, whether or not it bears on matters at the federal level. Of course, the discussion of matters at State, Territory or local level might bear on the choice that the people have to make in

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

61 (1997) 189 CLR 579 at 622.

62 (1997) 189 CLR 520 at 571-572.

> federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable."

78 Furthermore, in written and oral submissions in this Court, the respondents and interveners conceded that s 7(1)(d) could burden political communication. The Attorney-General of the Commonwealth submitted that the particular communication at issue in this case, concerning corruption and the propriety of the police force, had the requisite connection with federal matters, bearing in mind the integrated character of law enforcement. In oral submissions, the Solicitor-General of Queensland made it clear that the respondents' argument was focused on the "second limb" of *Lange*, namely, the appropriate and adapted test.

79 In my view – in constitutional and public law cases as well as private law cases – parties can concede issues even though the issue is a legal issue. The only power with which this Court is invested is judicial power together with such power as is necessary or incidental to the exercise of judicial power in a particular case. The essence of judicial power is the determination of disputes between parties. If parties do not wish to dispute a particular issue, that is their business. This Court has no business in determining issues upon which the parties agree. It is no answer to that proposition to say that this Court has a duty to lay down the law for Australia. Cases are only authorities for what they decide. If a point is not in dispute in a case, the decision lays down no legal rule concerning that issue. If the conceded issue is a necessary element of the decision, it creates an issue estoppel that forever binds the parties. But that is all. The case can have no wider *ratio decidendi* than what was in issue in the case. Its precedent effect is limited to the issues. Because of the concession, the present case, for example, can be an authority only for a limited rule of constitutional law. It is limited to a rule that, if insulting words have a political content or purpose and burden the freedom of political communication protected by the Constitution, s 7(1)(d) of the Vagrants Act was (or was not) invalid to the extent that it penalised persons using such words.

80 However, in my view the concessions made by the respondents were properly made. For the purposes of ss 7, 24, 64 and 128 of the Constitution – the sections that give rise to the constitutional implication – the relevant subjects of political and governmental communication include the activities of the executive arm of government. For that purpose, the Executive includes Ministers, public servants and "statutory authorities and public utilities which are obliged to report

to the legislature or to a Minister who is responsible to the legislature"[63]. The conduct of State police officers is relevant to the system of representative and responsible government set up by the Constitution. State police officers are involved in the administration and enforcement of federal as well as State criminal law. Members of the police forces of the States and Territories are included in the definitions of "constable" and "law enforcement officer" in the *Crimes Act* 1914 (Cth)[64]. That Act empowers State police officers to execute search warrants and to make searches and arrests without warrant[65]. Similarly, State and Territory police officers are included in the definition of "investigating official"[66] for the purposes of investigation of Commonwealth offences, including detention for questioning[67]. Moreover, persons convicted of offences – State or federal – punishable by imprisonment for a year or more are disqualified from sitting in the federal Parliament by s 44(ii) of the Constitution. Public evaluation of the performance of Federal Ministers, such as the Attorney-General, the Minister for Justice and the Minister for Customs, may be influenced, therefore, by the manner in which State police officers enforce federal law and investigate federal offences. Allegations that members of the Queensland police force are corrupt may reflect on federal Ministers as well as the responsible State Ministers. Such allegations may undermine public confidence in the administration of the federal, as well as the State, criminal justice system.

81 The concession that the words used by the appellant were a communication on political or government matters was also correctly made. It is beside the point that those words were insulting to Constable Power. Insults are as much a part of communications concerning political and government matters as is irony, humour or acerbic criticism. Many of the most biting and offensive political insults are as witty as they are insulting. When Lloyd George said[68] that Sir John Simon had sat for so long on the fence that the iron had entered his soul, the statement was as insulting as it was witty, for it insinuated that Sir John was a political coward who failed to take sides on controversial issues.

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

64 Section 3.

65 Part IAA, Divs 2-4.

66 Section 23B.

67 Part IC.

68 Rathbone and Stephenson, *Pocket Companion Guide to Political Quotations*, (1985) at 43.

82 Furthermore, because s 7(1)(d) penalised insulting words used in statements concerning political and governmental matters, it burdened those statements in much the same way as the law of defamation burdens those statements.

Criticism of the reasonably appropriate and adapted test

83 The real issue between the parties is whether the burden imposed on communications by s 7(1)(d) was reasonably appropriate and adapted to achieving an end, the fulfilment of which is compatible with the system of representative and responsible government prescribed by the Constitution[69]. That test has been the subject of criticism. Some commentators contend that inferior courts face considerable difficulty when called upon to apply the "reasonably appropriate and adapted" or "proportionality" tests[70]. The leading critic is Dr Adrienne Stone who forcefully contends that both these tests involve an "ad hoc balancing" process without criteria or rules for measuring the value of the means (the burden of the provision) against the value of the end (the legitimate purpose).

84 One of Dr Stone's articles[71] contains a detailed analysis of the tests for determining what laws infringe the freedom of political communication. She argues that the problems concerned with the reasonably appropriate and adapted test stem from the "High Court's assertion that the freedom of political communication is governed solely by textually based interpretation" and leaves the Court "without much guidance as to the selection of a standard of review."[72] Dr Stone contends that the High Court's approach to constitutional interpretation is anti-theoretical and "says only that some freedom of political communication is necessary to protect certain institutions: free voting in elections and referenda,

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

70 Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 and Arcioni, "Politics, Police and Proportionality – An Opportunity to Explore the *Lange* Test: *Coleman v Power*", (2003) 25 *Sydney Law Review* 379.

71 Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668.

72 Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 at 698.

and responsible government"[73]. She asserts that the Court's approach does not answer "how much and what kind of protection of political communication does this entail"[74]. She argues that the more ad hoc the assessment required by the applicable test, the less certainty the test provides, and uncertainty is a result to be avoided. That is because uncertainty produces a "chilling" effect on political speech. Furthermore, she contends that uncertainty invites greater regulation and "burdening" of political communication. She argues that the tests accept that a range of restrictions are compatible with the constitutional freedom and that they do not demand that the regulating law be the least restrictive measure consistent with the freedom[75]. Dr Stone also contends that the present tests increase the likelihood of a value-laden process[76] being disguised in value-neutral language because the means/ends approach requires a judgment involving comparative evaluations of the freedom of political communication and some other end to be achieved by the impugned provision.

85 Dr Stone says that if "the Court is going to create a rule that gives freedom of political communication special weight in particular circumstances, it needs some conception of the freedom of political communication against which to do this"[77]. She argues that to express "a judgment about the relative importance of free political communication and competing values inevitably involves the kind of reasoning against an overarching or underlying principle or set of values"[78].

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73 Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 at 699.

74 Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 at 699.

75 Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 at 696-697.

76 Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 at 702.

77 Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 at 700.

78 Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 at 700.

And she claims that by concentrating on text and structure in *Lange*, the Court distanced itself from this kind of reasoning. Fundamental to her criticism is that reasoning about freedom of communication involves reference to values that are outside the Constitution[79].

86 Another critic asserts that expressions such as "extreme" measures or "extraordinary intrusions", used by High Court Justices in past cases to invalidate provisions that infringe freedom of communication, have a low predictive value[80].

87 The Attorneys-General of the Commonwealth and New South Wales also criticised the reasonably appropriate and adapted test. They urged the Court to adopt a test that is more deferential to the judgment of the legislature than the reasonably appropriate and adapted test. They contended that the appropriate test was whether the impugned legislation was "reasonably capable of being seen as appropriate and adapted". Although Justices of this Court have used that formulation on previous occasions, a majority of the Court has not accepted it in any case concerned with the constitutional protection of political communication.

Compatibility with freedom of communication under the Constitution

88 The above criticisms overlook two matters concerning the "reasonably appropriate and adapted" test formulated in *Lange*. Those matters show that freedom of communication under the Commonwealth Constitution is different from freedom of speech provisions in other Constitutions and that ideas relating to or arising out of other Constitutions have little relevance to the freedom of communication under the Commonwealth Constitution. Those matters also show that no question of ad hoc balancing is involved in the two-pronged test formulated in *Lange* and that the text and structure of the Constitution enable the Court to determine whether the freedom has been infringed without resort to political or other theories external to the Constitution.

89 First, freedom of political communication under the Constitution arises only by necessary implication from the system of representative and responsible government set up by the Constitution. It is not the product of an express grant. It arises because the system of representative and responsible government cannot operate without the people and their representatives communicating with each

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79 Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 at 704.

80 Arcioni, "Politics, Police and Proportionality – An Opportunity to Explore the *Lange* Test: *Coleman v Power*", (2003) 25 *Sydney Law Review* 379 at 386.

other about government and political matters. As the Court pointed out in *Lange*, "[f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates by directing that the members of the House of Representatives and the Senate shall be 'directly chosen by the people' of the Commonwealth and the States, respectively"[81]. If the system is to operate effectively, however, of necessity it must be free from laws whose burdens interfere or have a tendency to interfere with its effectiveness. Thus, it is a necessary implication of the system that no legislature or government within the federation can act in a way that interferes with the effective operation of that system. But since the implication arises by necessity, it has effect only to the extent that it is necessary to effectively maintain the system of representative and responsible government that gives rise to it. "It is", said the Court in *Lange*[82], "limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution."

90 Second, the legislative powers conferred on the Commonwealth by ss 51 and 52 of the Constitution are conferred "subject to this Constitution". So is the continuance of the Constitution of each State under s 106. And the powers of a State continued under s 107 do not extend to those "withdrawn from the Parliament of the State". Those withdrawn from the State include not only those powers expressly withdrawn from the States such as those referred to in ss 51 and 90 but those powers which would entrench on the zone of immunity conferred by s 92 and the implied freedom of communication on political and governmental matters. Consequently, the powers of the Commonwealth, the States and Territories must be read subject to the Constitution's implication of freedom of communication on matters of government and politics. The constitutional immunity is the leading provision; the sections conferring powers on the federal, State and Territory legislatures are subordinate provisions that must give way to the constitutional immunity. To the extent that the exercise of legislative or executive powers, conferred or saved by the Constitution, interferes with the effective operation of the freedom, the exercise of those powers is invalid.

91 In determining whether a law is invalid because it is inconsistent with freedom of political communication, it is not a question of giving special weight in particular circumstances to that freedom[83]. Nor is it a question of balancing a

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81 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559.

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

83 cf Stone, "The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication", (1999) 23 *Melbourne University Law Review* 668 at 700.

legislative or executive end or purpose against that freedom. Freedom of communication always trumps federal, State and Territorial powers when they conflict with the freedom. The question is not one of weight or balance but whether the federal, State or Territorial power is so framed that it impairs or tends to impair the effective operation of the constitutional system of representative and responsible government by impermissibly burdening communications on political or governmental matters. In all but exceptional cases, a law will not burden such communications unless, by its operation or practical effect, it directly and not remotely restricts or limits the content of those communications or the time, place, manner or conditions of their occurrence. And a law will not impermissibly burden those communications unless its object and the manner of achieving it is incompatible with the maintenance of the system of representative and responsible government established by the Constitution.

92 In the two-limb test formulated in *Lange*, the adjectival phrase "compatible with the maintenance of the constitutionally prescribed system of representative and responsible government"[84] does not merely qualify the expression "legitimate end". It qualifies the compound conception of the fulfilment of such an end, and the emphasis of the qualification is on the term "fulfilment" rather than "end". That is to say, *it is the manner of achieving* the end as much as the end itself that must be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. Of course, the end itself may be incompatible with the system of representative and responsible government. It will be incompatible, for example, if it is designed to undermine that system.

93 No doubt the Court would have made the meaning of the second limb in *Lange* clearer if it had used the phrase "in a manner" instead of the phrase "the fulfilment of" in that limb. The second limb would then have read "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?". However, it is clear that the Court did intend the second limb to be read in a way that requires that both the end and the manner of its achievement be compatible with the system of representative and responsible government. This is clear from the example that the Court gave immediately after formulating the two-limb test. The Court said[85]:

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

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

> "In *ACTV*[86], for example, a majority of this Court held that a law seriously impeding discussion during the course of a federal election was invalid *because there were other less drastic means by which the objectives of the law could be achieved.* And the common law rules, as they have traditionally been understood, must be examined by reference to the same considerations. If it is necessary, they must be developed to ensure that the protection given to personal reputation does not unnecessarily or unreasonably impair the freedom of communication about government and political matters which the Constitution requires." (emphasis added)

94 The example of *ACTV* shows that in *Lange* the Court intended the adjectival phrase "compatible with the maintenance of the constitutionally prescribed system" to govern the means by which the impugned law achieved its end. The Parliament had enacted the relevant legislation in *ACTV* "to safeguard the integrity of the political system by reducing, if not eliminating, pressure on political parties and candidates to raise substantial sums of money in order to engage in political campaigning on television and radio, a pressure which renders them vulnerable to corruption and to undue influence by those who donate to political campaign funds"[87]. Despite the object of the legislation – an object that enhanced representative government – Parliament adopted means that were not compatible with the implied freedom. The *ACTV* example demonstrates the point that it is the content of the law – the manner in which it seeks to achieve the end – as well as the end which must be compatible with the prescribed system.

95 The true test was clearly expressed by Kirby J in his judgment in *Levy v Victoria*[88]. After discussing a number of tests that have been used to determine whether a law is consistent with the freedom, his Honour said:

> "A universally accepted criterion is elusive. In Australia, without the express conferral of rights which individuals may enforce, it is necessary to come back to the rather more restricted question. This is: does the law which is impugned have the effect of preventing or controlling communication upon political and governmental matters *in a manner which is inconsistent* with the system of representative government for which the Constitution provides?" (emphasis added)

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86 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.

87 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 129 per Mason CJ.

88 (1997) 189 CLR 579 at 646.

96 In my view, this formulation accurately states the second limb of the *Lange* test. It emphasises that a law that burdens communications on political or governmental matters in the sense I have explained will be invalid unless it seeks to achieve an end in a manner that is consistent with the system of representative government enshrined in the Constitution.

97 When, then, is a law not reasonably appropriate and adapted to achieving an end in a manner that is compatible with the system of representative government enshrined in the Constitution? In my opinion, it will not be reasonably appropriate and adapted to achieving an end in such a manner whenever the burden is such that communication on political or governmental matters is no longer "free". Freedom of communication under the Constitution does not mean free of all restrictions. The freedom is not absolute or equivalent to licence. The zone of freedom conferred by the constitutional immunity is not, as Higgins J said[89], in discussing s 52 of the Constitution, an "Alsatia for Jack Sheppards", where law does not run. Communications on political and governmental matters are part of the system of representative and responsible government, and they may be regulated in ways that enhance or protect the communication of those matters. Regulations that have that effect do not detract from the freedom. On the contrary, they enhance it.

98 Hence, a law that imposes a burden on the communication of political and governmental matter may yet leave the communication free in the relevant sense. Thus, laws which promote or protect the communications or which protect those who participate in the prescribed system, for example, will often impose burdens on communication yet leave the communications free. On the other hand, laws that burden such a communication by seeking to achieve a social objective unrelated to the system of representative and responsible government will be invalid, *pro tanto*, unless the objective of the law can be restrictively interpreted in a way that is compatible with the constitutional freedom. Thus, a law that sought to ban all political communications in the interest of national security would be invalid unless it could be demonstrated that at the time such a prohibition was the only way that the system of representative government could be protected. In such a case, the issue would not be whether the needs of national security require the prohibition of communication on political and governmental matters. It would be whether, at that time, the system of representative government is so threatened by an external or internal threat that prohibiting all communication on political and governmental matters is a reasonably appropriate

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89 *The Commonwealth v New South Wales* (1923) 33 CLR 1 at 59. Alsatia was part of the Whitefriars district of London and was a place of sanctuary for lawbreakers. Jack Sheppard was a notorious highwayman of the early 18th century. See Cowen, "Alsatias for Jack Sheppards?: The Law in Federal Enclaves in Australia", *Sir John Latham and other papers*, (1965) at 172.

and adapted means of maintaining the system. A total prohibition would not be reasonable unless there was no other way in which the system of representative government could be protected. Ordinarily, the complete prohibition on, or serious interference with, political communication would itself point to the inconsistency of the objective of the law with the system of representative government.

99 It follows then that not all laws burdening communications on political and governmental matters are impermissible laws. They will be permissible as long as they do no more than promote or protect such communications and those who participate in representative and responsible government from practices and activities which are incompatible with that system of government. Thus, although defamation law burdens communications on political and government matters, the law of defamation, as developed in *Lange*, is now a reasonably appropriate and adapted means of protecting the reputation of those participating in political and governmental matters.

100 As the reasoning in *Lange* shows, the reasonably appropriate and adapted test gives legislatures within the federation a margin of choice as to how a legitimate end may be achieved at all events in cases where there is not a total ban on such communications[90]. The constitutional test does not call for nice judgments as to whether one course is slightly preferable to another. But the Constitution's tolerance of the legislative judgment ends once it is apparent that the selected course unreasonably burdens the communication given the availability of other alternatives. The communication will not remain free in the relevant sense if the burden is unreasonably greater than is achievable by other means. Whether the burden leaves the communication free is, of course, a matter of judgment. But there is nothing novel about Courts making judgments when they are asked *to apply* a principle or rule of law. Much of the daily work of courts requires them to make judgments as to whether a particular set of facts or circumstances is or is not within a rule or principle of law.

The end served by s 7(1)(d)

101 In this case, the Solicitor-General of Queensland proffered two purposes to justify the enactment of s 7(1)(d) in so far as it burdened the communication of political and governmental matters. The first was that the object of the paragraph was to avoid breaches of the peace. The second was that the paragraph protected free political communication by removing threats, abuses and insults from the arena of public discussion, so that persons would not be intimidated into silence.

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90 *Levy v Victoria* (1997) 189 CLR 579 at 598; *Rann v Olsen* (2000) 76 SASR 450 at 483.

Breach of the peace

102 Regulating political statements for the purpose of preventing breaches of the peace by those provoked by the statements is an end that is compatible with the system of representative government established by the Constitution. However in the case of insulting words, great care has to be taken in designing the means of achieving that end if infringement of the constitutional freedom is to be avoided. In so far as insulting words are used in the course of political discussion, an unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom. An unqualified prohibition goes beyond anything that could be regarded as reasonably appropriate and adapted for preventing breaches of the peace in a manner compatible with the prescribed system. Without seeking to state exhaustively the qualifications needed to prevent an infringement of the freedom of communication, the law would have to make proof of a breach of the peace and the intention to commit the breach elements of the offence. It may well be the case that, in the context of political communications, further qualifications would be required before a law making it an offence to utter insulting words would be valid. In the present case, it is enough to say that s 7(1)(d) infringed the constitutional freedom by simply making it an offence to utter insulting words in or near a public place whether or not a person hears those words even when they were used in the discussion of political and governmental matters.

103 The first justification for upholding the conviction of the appellant under s 7(1)(d) must be rejected.

Intimidating participants in the discussion

104 Regulating political statements for the purpose of preventing the intimidation of participants in debates on political and governmental matters is an end that is compatible with the system of representative government laid down by the Constitution. However, as in the case of preventing breaches of the peace, great care has to be taken in designing the means of achieving that end if infringement of the constitutional freedom is to be avoided.

105 The use of insulting words is a common enough technique in political discussion and debates. No doubt speakers and writers sometimes use them as weapons of intimidation. And whether insulting words are or are not used for the purpose of intimidation, fear of insult may have a chilling effect on political debate. However, as I have indicated, insults are a legitimate part of the political discussion protected by the Constitution. An unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom. Such a prohibition goes beyond anything that could be regarded as reasonably appropriate and adapted to maintaining the system of representative government.

106 The second justification for upholding the conviction of the appellant under s 7(1)(d) must also be rejected.

Consequences of invalidity

Severance

107 Where an enactment is beyond the legislative power of the State of Queensland, the *Acts Interpretation Act* 1954 (Q), s 9 declares:

> "**Act to be interpreted not to exceed Parliament's legislative power**
>
> (1) An Act is to be interpreted as operating –
>
> (a) to the full extent of, but not to exceed, Parliament's legislative power; and
>
> (b) distributively.
>
> (2) Without limiting subsection (1), if a provision of an Act would, apart from this section, be interpreted as exceeding power –
>
> (a) the provision is valid to the extent to which it does not exceed power; and
>
> (b) the remainder of the Act is not affected.
>
> (3) Without limiting subsection (1), if the application of a provision of an Act to a person, matter or circumstance would, apart from this section, be interpreted as exceeding power, the provision's application to other persons, matters or circumstances is not affected."

108 In the *Industrial Relations Act Case*[91], this Court summarised the principles applicable in determining whether to sever the partially invalid provisions of an enactment from the rest of the enactment. In a joint judgment, the Court said:

> "Section 15A of the Interpretation Act [1901 (Cth), relevantly similar to the Queensland provision] may fall for application in two distinct situations. It may fall for application in relation to 'particular clauses, provisos and qualifications, separately expressed, which are beyond legislative power'. It may also fall for application in relation to

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91 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 502-503 (per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

> general words or expressions. It is well settled that s 15A cannot be applied to effect a partial validation of a provision which extends beyond power unless 'the operation of the remaining parts of the law remains unchanged'. Nor can it be applied to a law expressed in general terms if it appears that 'the law was intended to operate fully and completely according to its terms, or not at all'.
>
> Where a law is expressed in general terms, it may be more difficult to determine whether Parliament intended that it should, nonetheless, have a partial operation. And there is an additional difficulty if it 'can be reduced to validity by adopting any one or more of a number of several possible limitations'. It has been said that if, in a case of that kind, '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'.
>
> The limitation by reference to which a law is to be read down may appear from the terms of the law or from its subject matter. Thus, a law which is 'clearly made with the intention of exercising the power to make laws with respect to trade and commerce' can be read down 'so as to limit its application to inter-State and foreign trade and commerce'. Similarly, where a law is intended to operate in an area where Parliament's legislative power is subject to a clear limitation, it can be read as subject to that limitation." (footnotes omitted)

109 In the present case, the appellant urged the Court to sever so much of s 7(1)(d) as was invalid, namely the words "or insulting" from the section. The respondents and the Commonwealth and South Australian Solicitors-General contended that it would be possible to read an exception into the provision to exclude communication connected with political matters necessary for the system of government prescribed by the Constitution.

110 Accordingly, the issue is whether that part of s 7(1)(d) which concerned insulting words should be severed from the paragraph or read down. In my opinion, the clear intention of s 9 of the Queensland *Acts Interpretation Act* is 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 par (d) of s 7(1) was within the power of the Queensland legislature except to the extent that it penalised insulting words uttered in discussing or raising matters concerning politics and government in or near public places. It should be read down accordingly.

The arrest offences

111 The appellant contends that, if his conviction under s 7(1)(d) of the Vagrants Act is set aside – because that paragraph cannot constitutionally apply to his conduct – his arrest was unlawful and that the convictions relating to

resisting or obstructing the respondents after he was arrested must also be quashed.

Resisting unlawful arrest

112 As I have indicated, the appellant was convicted of two counts of serious assault under s 340(b) of the Queensland *Criminal Code*. He was also convicted of two counts of obstructing a police officer in the performance of the officer's duties under s 120 of the *Police Powers and Responsibilities Act* 1997 (Q) ("Police Powers Act").

113 Section 340(b) of the *Criminal Code* provides:

"Any person who –

…

(b) assaults, resists, or wilfully obstructs, a police officer while acting in the execution of the officer's duty, or any person acting in aid of a police officer while so acting

...

is guilty of a crime, and is liable to imprisonment for 7 years."

114 Carter's Criminal Law of Queensland[92] identifies the elements of this offence as:

"The accused:

(1) assaulted, resisted or wilfully obstructed;

(2) a police officer or any person acting in aid of a police officer;

(3) while the police officer was acting in the execution of his or her duty." (the underlined portions indicate the elements relied on by the Crown in the present case)

115 Section 120(1) of the Police Powers Act provided[93]:

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92 Shanahan, *Carter's Criminal Law of Queensland*, 14th ed (2004) at 591.

93 The Police Powers Act was repealed by the *Police Powers and Responsibilities Act* 2000 (Q) ("the 2000 Act"), s 572 (now s 460). The provision was re-enacted, in the same terms, as s 356 (now s 444) of the 2000 Act.

> "A person must not assault or obstruct a police officer in the performance of the officer's duties."

116 Sub-section (2) provided that "assault" had the meaning given by the Queensland *Criminal Code*.

117 Each of the sub-sections under which the appellant was charged is predicated on the lawfulness of the action being resisted or obstructed. It is not part of an officer's duty to engage in unlawful conduct. If the officer acts outside his or her duty, an element of the offence is missing. In *Re K*, after reviewing the authorities on the scope of an officer's duty, the Full Court of the Federal Court said[94]:

> "The effect of all those cases is that a police officer acts in the execution of his duty from the moment he embarks upon a lawful task connected with his functions as a police officer, and continues to act in the execution of that duty for as long as he is engaged in pursuing the task and until it is completed, provided that he does not in the course of the task do anything outside the ambit of his duty so as to cease to be acting therein."

118 An officer who unlawfully arrests a person is not acting in the execution of his or her duty. In *Nguyen v Elliott*[95], the Supreme Court of Victoria set aside convictions for assaulting and resisting an officer in the execution of his duty when the arrest was unlawful and therefore not made in the execution of the officer's duty. The accused was approached by two constables who believed that he might have been involved in drug dealing. The accused attempted to walk away but was detained by the first officer who wished to search him. The accused became aggressive and kicked the first officer. The second officer crossed the street to assist the first officer to control the accused. The accused was forced into the police vehicle and continued to protest. He was then taken out and handcuffed during which the accused bit the second officer on the hand. Before the magistrate, the first officer acknowledged that he did not reasonably suspect that the accused was in possession of drugs but was merely curious about whether the accused possessed drugs. The charges relating to the first officer were dismissed. The prosecution claimed the second officer's position was different because he had good reason to believe he was lawfully assisting his partner to effect an arrest for what the second officer assumed was an assault on the first officer. Hedigan J held that the conviction for resisting arrest could not stand. His Honour said:

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94 (1993) 46 FCR 336 at 340-341 per Gallop, Spender and Burchett JJ.

95 Unreported, 6 February 1995.

> "… it cannot be said that a police officer is acting in the execution of his duty to facilitate an unlawful search and arrest. The right of citizens to resist unlawful search and arrest is as old as their inclination to do so. The role of the courts in balancing the exercise of police powers conferred by the State and the rights of citizens to be free from unlawful search and seizure may be traced through centuries of cases."

119 In setting aside the conviction, Hedigan J applied the decision of the Full Court of the Supreme Court of Victoria in *McLiney v Minster* where Madden CJ said[96]:

> "… it is an important principle of law that no man has the right to deprive another of his liberty except according to law, and if he does so the person so unlawfully deprived has a perfect right to use reasonable efforts to beat him off and get out of his custody."

120 Hedigan J held that, although the second officer acted in good faith, his conduct was also unlawful and he was not acting in the execution of his duty when assisting the first officer to effect an unlawful arrest.

121 Although a charge of assaulting a police officer in the execution of his or her duty will fail when the officer has engaged in unlawful conduct such as an unlawful arrest, the accused may be convicted of common assault if his or her response is excessive. The author of a Comment on *Nguyen* refers to the availability of this course being open to the prosecution[97]. The author referred to *Kerr v DPP*[98] where the Queen's Bench Division refused to uphold a conviction for assaulting a constable in the execution of his duty where the constable, believing his partner had already arrested a woman, took hold of her arm to detain her. The woman retaliated by punching the constable. Because no arrest had taken place, the officer's conduct was outside his duty. However, the Court referred to the possibility of an alternative charge of common assault.

122 In *Bentley v Brudzinski*[99], Donaldson LJ also suggested that common assault was a course open to the prosecution where the arrest was unlawful. In *Bentley*, the English Court of Appeal dismissed an appeal against an acquittal on a charge of assaulting a police officer in the execution of his duty. The officer

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96 [1911] VLR 347 at 351.

97 Groves, "Case and Comment: Assault (*Nguyen v Elliott*)", (1995) 19 *Criminal Law Journal* 342 at 345.

98 (1995) *Criminal Law Review* 394.

99 (1982) 75 Cr App R 217 at 226.

was punched when, at the request of his partner, he attempted to restrain a person for questioning. Donaldson LJ suggested that, where a technical defence may be available to the "execution of duty" element of the charge, common assault should be charged in the alternative in order to support police in their attempts, albeit mistaken, to enforce the law. His Lordship clearly thought that the conduct of the accused in that case was an unreasonable response to the touching on the shoulder.

123 The ratio of *Bentley v Brudzinski* was applied by the Queen's Bench Division in *Collins v Wilcock*[100] where a woman, suspected of being a prostitute, scratched a female constable who had unlawfully restrained her for the purpose of issuing a caution. The conviction for assault on the officer was quashed.

124 These authorities show that once the conduct of an officer is unlawful, the level of physical response offered by an accused is irrelevant to a charge involving the "execution of duty" or "performance of duty". If the appellant had been charged in the alternative with assault contrary to s 246 of the Queensland *Criminal Code*, the reasonableness of the force that he used would have been an issue. Section 246(1) provides:

> "An assault is unlawful and constitutes an offence unless it is authorised or justified or excused by law."

125 One justification is provided by s 31(1)(c) of the *Criminal Code*:

> "A person is not criminally responsible for an act or omission, if the person does or omits to do the act under any of the following circumstances ...
>
> (c) when the act is reasonably necessary in order to resist actual and unlawful violence threatened to the person ...".

126 This defence is applicable where the defendant has been unlawfully arrested. The conduct of the accused would be measured according to the requirements of reasonable necessity.

127 None of those considerations apply in this appeal because assault was not charged independently of the element of an officer executing or performing his or her duty. If the arrest is not made while executing or performing the duty, the authorities establish that the "assault" on the officer is irrelevant because the prosecution has failed to prove an essential element of the offence – that the officer was acting in the execution or performance of his or her duty when or after the "arrest" was made.

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100 [1984] 1 WLR 1172 at 1179; [1984] 3 All ER 374 at 379-380.

The appellant's arrest was unlawful

128 The question then arises as to whether the arrest of the appellant was lawful despite the invalidity of the law under which he was arrested. If not, his convictions in respect of his conduct after his arrest must be quashed. Two Queensland legislative provisions empower a constable to arrest a person who utters insulting words in or near a public place. But in my opinion neither of these provisions made the arrest of the appellant lawful.

129 The first provision was in the Vagrants Act itself. Section 38 of that Act provided[101]:

> "**Where offender may be arrested**
>
> (1) Subject to this Act any person *found offending* against … [s 7] … may be arrested, anything contained in the Justices Act or any other Act to the contrary notwithstanding." (emphasis added)

130 However, the power of arrest under s 38 could be exercised only when a person was found committing an offence under s 7. Because the appellant committed no offence against that section, s 38 did not make his arrest lawful. Under s 38, there was no room for reasonable error or suspicion on the part of the arresting officer; the person arrested must have been committing an offence before the power under s 38 could be lawfully exercised.

131 The second provision – s 35(1) of the Police Powers Act – went further. It provided[102]:

> "It is lawful for a police officer, without warrant, to arrest a person the police officer *reasonably suspects has committed or is committing* an offence … if it is reasonably necessary for 1 or more of the following reasons –
>
> (a) to prevent the continuation or repetition of an offence or the commission of another offence;
>
> …

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101 Section 38 was repealed by the 2000 Act, after the events in this appeal.

102 The provision is in relevantly the same terms in the 2000 Act as s 198(1)(a) and (d).

(e) to obtain or preserve evidence relating to the offence …". (emphasis added)

132 In this case, the respondents were entitled to rely on par (a) and possibly par (e) of this sub-section. The appellant was handing out multiple leaflets and engaging in repetitive articulation of his views about the corruption of Constable Power. If s 7(1)(d) or s 7A could validly apply to the words used by the appellant, these paragraphs would have authorised the arrest of the appellant on the ground that the respondents reasonably suspected that he was continuing to commit offences under these provisions.

133 But was an arrest under s 35 of the Police Powers Act lawful because the arresting officer "reasonably suspected" that an offence had been committed even though the law "creating" the offence was constitutionally invalid? An invalid law is void *ab initio*. Nevertheless, the respondents submit that the invalidity of the law is irrelevant. It is sufficient that the officers reasonably suspected that the appellant had committed offences under s 7(1)(d) or s 7A of the Vagrants Act. The respondents rely on *Veivers v Roberts, Ex parte Veivers*[103], a decision of the Full Court of the Supreme Court of Queensland. In *Veivers*, the Court held that, where an arresting officer makes a reasonable mistake of law concerning an offence, the accused is not entitled to be acquitted on a further charge of resisting arrest for that offence.

134 Dicta in an English case also supports the proposition that no action for damages will lie against a constable who arrests a person under a by-law that is subsequently held to be invalid. In *Percy v Hall*[104], the English Court of Appeal rejected the plaintiffs' claim that certain by-laws were void for uncertainty. But the Court went on to consider whether the plaintiffs, who had been arrested on numerous occasions and imprisoned for breach of by-laws, would have had an action for damages against the arresting officers if the by-law was invalid. The Court held that the plaintiffs could not have obtained damages against the arresting officers for trespass to the person, except perhaps in a case of patent invalidity.

135 Simon Brown LJ said[105]:

"It seems to me one thing to accept, as readily I do, that a subsequent declaration as to their invalidity operates retrospectively to entitle a person convicted of their breach to have that conviction set aside; quite another to

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103 [1980] Qd R 226.

104 [1997] QB 924.

105 [1997] QB 924 at 947-948.

> hold that it transforms what, judged at the time, was to be regarded as the lawful discharge of the constables' duty into what must later be found actionably tortious conduct."

136 Peter Gibson LJ agreed with this statement[106]. Schiemann LJ also agreed with Simon Brown LJ but added[107]:

> "It has been commonplace in our jurisprudence, as Simon Brown LJ points out, to speak of a basic principle that an ultra vires enactment is void ab initio and of no effect. This beguilingly simple formulation, as is widely acknowledged, conceals more than it reveals. Manifestly in daily life the enactment will have had an effect in the sense that people will have regulated their conduct in the light of it. Even in the law courts it will often be found to have had an effect because the courts will have given a remedy to a person disadvantaged by the application of the ultra vires enactment to him or because a decision, binding on the parties thereto, has been rendered on the basis of the apparent law or because some period of limitation has expired making it too late now to raise any point on illegality.
>
> The policy questions which the law must address in this type of case is whether any and if so what remedy should be given to whom against whom in cases where persons have acted in reliance on what appears to be valid legislation. To approach these questions by rigidly applying to all circumstances a doctrine that the enactment which has been declared invalid was 'incapable of ever having had any legal effect upon the rights or duties of the parties' seems to me, with all respect to the strong stream of authority in our law to that effect, needlessly to restrict the possible answers which policy might require."

137 These dicta suggest that, where a person is arrested under an enactment, later found to be invalid, that person has no cause of action against the arresting officer if at the time the officer could reasonably regard the enactment as valid.

138 In response to the respondents' argument, the appellant pointed out that, where an "offence" arises out of conduct falling within an invalid enactment, as a matter of law no offence exists or has existed. He argues that no reasonable suspicion concerning an offence can exist if the law "creating" the offence does not exist. In my opinion, this submission is correct. It is one thing for a police officer to mistakenly believe that particular facts constitute an offence because the officer has misconstrued the statute creating the offence. But the position is

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106 [1997] QB 924 at 950.

107 [1997] QB 924 at 951.

different where, although the arresting officer believes that an offence against a statute has occurred, the relevant provision of the statute does not exist. In *Hazelton v Potter*[108], Griffith CJ said:

> "The reasonableness of the defendant's belief, if he honestly entertained it, is not to be inquired into, except as an element in determining the honesty ... Nor is a mistake in the construction of the Statute fatal to the defendant ... But there must be some Statute in force under which the act complained of could under some circumstances have been lawful. A mistake by the defendant as to the existence of a law cannot be brought within these principles."

139 *Hazelton* concerned an enactment declaring that no proceeding could be commenced "for anything done or omitted in pursuance or execution or intended execution of [the Order in Council] ... unless notice in writing is given by the ... plaintiff ... to the ... defendant one clear month before the commencement of the ... proceeding."[109] This Court held that the enactment could not be relied on where the defendant acted in the belief that he was executing an Order in Council that did not exist.

140 Section 35(1) of the Police Powers Act was not identical with the enactment considered in *Hazelton*. But in my opinion the principle on which that case was decided applies to the present case. *Hazelton* holds that a person cannot intend to execute a statutory instrument if the instrument does not exist. *A fortiori,* a person cannot have a *reasonable* suspicion that an offence has been committed under an enactment that does not exist. It is not reasonable to believe or suspect that a law exists when it does not. Ignorance of the law is ordinarily not an excuse for what is otherwise unlawful conduct. Fictional though it may be, everyone is presumed to know the law.

141 Accordingly, s 35(1) of the Police Powers Act did not make the arrest of the appellant lawful.

142 Moreover, where a law is invalid because it infringes a constitutional prohibition or immunity, there is an unanswerable reason for holding that the arrest of a person is unlawful if the arrest was made in reliance on the law that is constitutionally invalid. The constitutional prohibition or immunity extends to invalidating not only a law directly infringing the prohibition or immunity but also any consequential law that seeks to validate conduct that occurred under the

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108 (1907) 5 CLR 445 at 460.

109 (1907) 5 CLR 445 at 454.

first law. In *Commissioner for Motor Transport v Antill Ranger & Co Pty Ltd*[110], the Judicial Committee held invalid the provisions of an Act which purported to extinguish causes of action and to bar claims in respect of monies paid under legislation that was invalid under s 92 of the Constitution. Viscount Simonds, giving the Advice of the Judicial Committee, said[111]:

> "Neither prospectively nor retrospectively (to use the words of Fullagar J[112]) can a State law make lawful that which the Constitution says is unlawful. A simple test thus appears to be afforded. For if a statute enacted that charges in respect of inter-State trade should be imposed and that, if they were held to be illegally imposed and collected, they should nevertheless be retained, such an enactment could not be challenged if the illegality of the charge rested only on the then existing State law ... But it is otherwise if the illegality arises out of a provision of the Constitution itself. Then the question is whether the statutory immunity accorded to illegal acts is not as offensive to the Constitution as the illegal acts themselves ...".

143 To seek to validate an arrest made in respect of an offence that is invalid under the Constitution is as offensive to the Constitution, as the law that purported to create the offence. The holding of Dixon J in *James v The Commonwealth*[113] is probably distinguishable. In *James*, his Honour held that no liability arises in tort in respect of acts done in purported execution of a duty under a statute later held to be valid. To hold that no liability in tort arises is not the same as holding that the act is lawful. It is merely an illustration of a phenomenon of which the common law provides many examples that not all wrongful acts are actionable. If what Dixon J held is inconsistent with the holding in *Antill Ranger*, however, his holding should no longer be followed.

144 Section 35(1) of the Police Powers Act did not make lawful the arrest of the appellant for uttering insulting words. Accordingly, in arresting him the respondents were not acting in the execution or performance of their duty. The charges of obstructing and assaulting the officers in the performance and execution of their duty must be quashed.

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110 (1956) 94 CLR 177; [1956] AC 527.

111 (1956) 94 CLR 177 at 179-180; [1956] AC 527 at 536-537.

112 (1955) 93 CLR 83 at 108.

113 (1939) 62 CLR 339 at 373.

Conclusion

145 The appeal should be allowed with costs. The orders of the Court of Appeal of the Supreme Court of Queensland should be set aside in so far as they uphold the convictions of the appellant. In their place should be substituted an order that the appeal to that Court should be allowed and the convictions of the appellant quashed.

GUMMOW AND HAYNE JJ.

The issues

146 In a public place in Townsville, Queensland, the appellant said that the first respondent, a police officer, was corrupt. Charged with using insulting words to a person (the respondent), in a public place, contrary to s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act* 1931 (Q) ("the Vagrants Act")[114], the appellant contended that the statute was invalid in its application to his conduct. He submitted that to apply the statute to his conduct would be contrary to that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors[115]. He alleged that it followed that his arrest for using insulting words was unlawful, and that two charges of assaulting a police officer in the execution of his duty and two charges of obstructing a police officer in the performance of the officer's duties should therefore have been dismissed.

147 The respondents conceded, in this Court, that the practical operation and effect of s 7(1)(d) of the Vagrants Act may, at least in some cases, burden the freedom of communication about government or political matters. They submitted that s 7(1)(d), nevertheless, was valid because it was appropriate and adapted to the end of maintaining public order[116]. Whether that submission can be established depends first upon construing the Vagrants Act.

148 The respondents further submitted that the appellant's arrest was lawfully authorised by the *Police Powers and Responsibilities Act* 1997 (Q) ("the Police Powers Act"), even if s 7(1)(d) of the Vagrants Act is invalid and the appellant therefore committed no offence. The respondents submitted that police could nonetheless "reasonably suspect" that the appellant had committed or was committing an offence. This contention, which depends upon construing the Police Powers Act, must be considered only if s 7(1)(d) of the Vagrants Act is held to be invalid.

149 One other aspect of the proceedings brought against the appellant must be noted, even though it directly gives rise to no issue in this Court. The appellant was also charged with, and convicted of, an offence under s 7A(1)(c) of the

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114 As other members of the Court point out, these and other related provisions have since been repealed.

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

116 *Lange* (1997) 189 CLR 520 at 567.

Vagrants Act. That provision makes it an offence to distribute printed matter containing words described in that section. Section 7A(1)(a) identifies the words which are the subject of proscription as:

> "threatening, abusive, or insulting words of or concerning any person by which the reputation of that person is likely to be injured, or by which the person is likely to be injured in the person's profession or trade, or by which other persons are likely to be induced to shun, or avoid, or ridicule, or despise the person".

His conviction and sentence for this offence was set aside in the Court of Appeal and there is no challenge in this Court to that order.

Sections 7 and 7A of the Vagrants Act

150 It is desirable to set out the relevant parts of the two provisions of the Vagrants Act under which the appellant was charged:

> "**Obscene, abusive language etc**
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> **7.(1)** Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear—
>
> (a) sings any obscene song or ballad;
>
> (b) writes or draws any indecent or obscene word, figure, or representation;
>
> (c) uses any profane, indecent, or obscene language;
>
> (d) uses any threatening, abusive, or insulting words to any person;
>
> (e) behaves in a riotous, violent, disorderly, indecent, offensive, threatening, or insulting manner;
>
> shall be liable to a penalty of $100 or to imprisonment for 6 months, and may, in addition thereto or in substitution therefor, be required by the court to enter into a recognisance, with or without sureties, to be of good behaviour for any period not exceeding 12 months, and, in default of entering into such recognisance forthwith, may be imprisoned for any period not exceeding 6 months, unless such recognisance is sooner entered into.
>
> ...

Printing or publishing threatening, abusive, or insulting words etc

7A.(1) Any person—

(a) who by words capable of being read either by sight or touch prints any threatening, abusive, or insulting words of or concerning any person by which the reputation of that person is likely to be injured, or by which the person is likely to be injured in the person's profession or trade, or by which other persons are likely to be induced to shun, or avoid, or ridicule, or despise the person; or

(b) who publishes any such words of or concerning any person by exhibiting such words or by causing such words to be read or seen, or by showing or causing to be shown such words with a view to such words being read or seen by any person; or

(c) who delivers or distributes in any manner whatsoever printed matter containing any such words; or

(d) who has in the person's possession printed matter containing any such words—

shall be liable to a penalty of $100 or to imprisonment for 6 months."

The facts

151 On 26 March 2000, the appellant was distributing pamphlets in the Flinders Street Mall, Townsville. He had with him a placard which said, "Get to know your local corrupt type coppers; please take one." The second respondent, a police officer, took one of the appellant's pamphlets. The pamphlet had, as one of its headings, "Get to know your local corrupt type cops." It named four police officers, one of whom was the first respondent, and accused each of some form of misconduct. The details of the accusations made in the pamphlet need not be examined.

152 The second respondent told the first respondent of the pamphlet's content. The first respondent and another police officer, Constable Dunstone, then went to the Mall and approached the appellant. The first respondent asked the appellant for a copy of the pamphlet. The appellant refused. What happened then was revealed by a video tape of the events. The first respondent was about to give the appellant a notice to appear in court. The appellant pushed him and said, "This is Constable Brendan Power, a corrupt police officer". The first respondent then tried to arrest the appellant, telling a bystander (who asked) that the appellant was being arrested for "insulting language". The first respondent, and other police

(including the second respondent) who had arrived, tried to put the appellant in a police van. As the appellant said in evidence, he tried to make this as difficult as possible. There was a struggle. The appellant hit and pushed at the first respondent; he kicked the second respondent. The appellant announced that he would bite the first respondent, saying: "I'll force you to take me before a judge and jury", and he later did not dispute in court that he had tried to bite the first respondent.

153 In the Magistrates Court the appellant was convicted on two counts of obstructing a police officer (one count alleged obstruction of the first respondent; the second alleged obstruction of the second respondent). He was convicted on two counts of assaulting a police officer in the execution of his duty (again, one count in respect of each of the first and second respondents). He was convicted of the charge of using insulting words to a person in a public place, and the charge of distributing printed matter containing insulting words.

154 He appealed to the District Court against conviction and sentence on each charge. That appeal failed. He then sought, and was granted, leave to appeal to the Court of Appeal of Queensland.

The Court of Appeal

155 The Court of Appeal (McMurdo P, Davies and Thomas JJA) unanimously concluded[117] that the appellant's conviction for distributing printed matter contrary to s 7A(1)(c) of the Vagrants Act should be set aside. The Court declared that s 7A(1) of the Vagrants Act was "beyond the legislative power of the Queensland Parliament, and that s 7A(1)(a) thereof should be read and construed as if the words and punctuation, 'abusive, or insulting' were deleted therefrom".

156 By majority (Davies and Thomas JJA, McMurdo P dissenting), the Court concluded that s 7(1)(d) was not invalid. Davies JA said[118] that the provision "imposes only a slight burden on the freedom of communication about government or political matters and one which is reasonably appropriate and adapted to serve the legitimate end of preventing ... public acrimony and violence". Thomas JA directed chief attention to the validity of s 7A(1) but concluded[119] that the impact of s 7(1)(d) on discussion of government or political

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117 *Power v Coleman* [2002] 2 Qd R 620 at 631-633 [23]-[28] per McMurdo P, 635 [35] per Davies JA, 645 [70] per Thomas JA.

118 [2002] 2 Qd R 620 at 635 [37].

119 [2002] 2 Qd R 620 at 645 [71]-[72].

matters "might be considered to be slight" and that the law seemed "proportionate, appropriate and adapted to serve the legitimate ends" of regulating the conduct of, and promotion of, good behaviour by persons in or near public places in the interest of others in those places and "to nip in the bud any breaches of the peace".

157 McMurdo P, dissenting, described[120] s 7(1)(d) as "a by-product of a genuine regulatory scheme to stop breaches of the peace and ensure basic standards of conduct in public", but concluded that "its curtailment of political discussion is more than limited and incidental and goes beyond what is proportional and reasonable in an ordered society". In her Honour's view[121]:

> "the pressing public interest in the prevention of breaches of the peace can be appropriately achieved, as in some other jurisdictions, by the other sub-sections in s 7(1) of the Act which do not appear to infringe the constitutional implied freedom."

158 As this abbreviated description of the reasons of the Court of Appeal reveals, the question of the validity of s 7(1)(d) of the Vagrants Act was approached by examining what had been held by this Court in *Lange v Australian Broadcasting Corporation*[122] and seeking to apply the principles derived from *Lange* to the words of the Vagrants Act. Little direct attention was given to first construing the relevant provisions. Yet that is where the inquiry must begin. And it must do so recognising that the provisions under consideration have a very long legislative pedigree.

The Vagrants Act

159 As originally enacted, Pt 2 (ss 4-18) of the Vagrants Act, entitled "Vagrants and Disorderly Persons", contained a wide variety of prohibitions. Identifying any thread which draws together the various provisions contained within the Part is not easy: the provisions cover such a diverse group of subjects.

160 Section 4 gave 21 different bases on which a person might be deemed to be a vagrant. They ranged from the Dickensian, or perhaps Gilbertian, concept of being "found by night ... having in his possession any dark lantern ... or ... silent matches" with intent to commit any indictable offence (s 4(1)(ix)(b))[123], to

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120 [2002] 2 Qd R 620 at 630 [21].

121 [2002] 2 Qd R 620 at 630-631 [21].

122 (1997) 189 CLR 520.

123 See now s 4(1)(h)(ii).

pretending or professing to tell fortunes for gain or payment of any kind (s 4(1)(xvi))[124]. Sections 5 and 8 to 11 dealt with prostitution. Sections 4(2) and 6 provided for forfeiture of certain items upon conviction of an offender, and seizure and disposal of goods found in a vagrant's possession. Sections 12 to 17 dealt with indecent and obscene publications. And s 18 dealt with the altogether different subject of protection to the spouses of habitual drunkards.

161 It was in this setting of provisions dealing with such a wide variety of conduct that s 7 (and later s 7A) dealt with "[o]bscene, abusive language etc" and "[p]rinting or publishing threatening, abusive, or insulting words etc".

162 Part 2 of the Vagrants Act, as originally enacted, was derived from the *Vagrant Act* 1851 (Q) ("the 1851 Queensland Act"). The 1851 Queensland Act, in turn, evidently drew on the *Vagrancy Act* 1824 (UK) (5 Geo IV c 83) ("the English Vagrancy Act"), an Act from which several of the Australian colonies drew in framing their early legislation about what came to be known as "police offences"[125].

163 Notably absent from the English Vagrancy Act, but present in the 1851 Queensland Act, was a provision dealing with threatening, abusive or insulting language in a public place. Section 6 of the 1851 Queensland Act provided that "any person who shall use any threatening abusive or insulting words or behavior in any public street thoroughfare or place with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned" was liable to punishment. Three features of that section must be noted. First, it dealt with words and behaviour. Secondly, it forbade certain conduct in any public street, thoroughfare, or place. Thirdly, it required that either there be an intent to provoke a breach of the peace, or that a breach of the peace "may be occasioned".

164 Section 6 of the 1851 Queensland Act was modelled on s 54(13) of the *Metropolitan Police Act* 1839 (UK). The three elements of s 6 which we have identified were also present in s 54(13). But what that section of the *Metropolitan Police Act* also did was proscribe a large number of other offences constituted by conduct in a thoroughfare or public place. Those offences ranged from feeding animals to the annoyance of inhabitants (s 54(1)), through riding or driving furiously or to the common danger of passengers in a thoroughfare (s 54(5)), to loitering for the purpose of prostitution (s 54(11)). All of the provisions of s 54 of the *Metropolitan Police Act* were directed to allowing free

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124 See now s 4(1)(o).

125 See, for example, *The Vagrancy Act* 1835 (NSW) (6 Wm IV No 6), *The Police Offences Statute* 1865 (Vic) (28 Vict No 265).

and orderly use of thoroughfares and public places. Section 6 of the 1851 Queensland Act took the proscription of threatening, abusive or insulting words out of that context and put it within the context of a miscellany of provisions dealing with "idle and disorderly" persons, "rogues and vagabonds" and "incorrigible rogues".

165 The *Metropolitan Police Act* had been enacted against a background where the regulation of speech, by the criminal law, was not unknown. There was the offence of sedition. But, in addition, there were at least two common law offences which could be understood as concerned with use of insulting language. First, there was the common law misdemeanour committed by publishing words intended to provoke a duel[126]. This offence was evidently concerned with keeping the peace. Secondly, it was also a common law misdemeanour to publish, maliciously, any defamatory libel knowing it to be false[127]. (The subsequent enactment of *The Libel Act* 1843 (UK) (6 & 7 Vict c 96) providing the maximum punishment to be imposed for the offence of criminal libel was held merely to enact the punishment, not define the offence[128].) By the later part of the 19th century it was clear that the offence of criminal libel also depended upon demonstration of a tendency to disturb the public peace[129]. These common law misdemeanours took their place alongside other offences concerned with public order like riot, rout, and affray.

166 The importance of the references to breach of the peace in s 6 of the 1851 Queensland Act was emphasised by Griffith CJ (when Chief Justice of Queensland) in *R v The Justices of Clifton; Ex parte McGovern*[130]. The question in that case concerned the construction of the words "whereby a breach of the peace may be occasioned". The Court held[131] that an offence was committed if the defendant *intended* to provoke a breach of the peace or if, without that intention, the defendant's words led to such a breach. It rejected a construction that would result in a person being convicted for using threatening, abusive, or insulting language (in a public place) which might possibly, under some

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126 *R v Philipps* (1805) 6 East 464 [102 ER 1365].

127 *R v Munslow* [1895] 1 QB 758.

128 *Munslow* [1895] 1 QB 758.

129 *R v Labouchere* (1884) 12 QBD 320 at 322-323.

130 (1903) St R Qd 177.

131 Following *Clarson v Blair* (1872) 3 VR(L) 202. See also *Vidler v Newport* (1905) 5 SR (NSW) 686.

circumstances, occasion a breach of the peace. Of that latter construction Griffith CJ said[132]:

> "That, in effect, would mean that any person making use of oral defamation to another in a public place would be guilty of an offence, and would practically make it an offence punishable on summary conviction, to defame a man to his face in the street, even though a breach of the peace was not intended and none, in fact, occurred; and the duty would be cast upon the Bench of deciding whether the particular words might have occasioned a breach of the peace. That would be a very serious responsibility to place upon the magistrates, and we ought not lightly to hold that the Legislature has imposed it in the absence of clear or unambiguous words, apart from the creation of a new form of criminal responsibility."

167 Section 7 of the Vagrants Act departed from the model provided by the 1851 Queensland Act and the *Metropolitan Police Act*. First, it made no reference to breach of the peace. Secondly, it dealt with the use of threatening, abusive or insulting *words* separately from *behaving* in a riotous, violent, disorderly, indecent, offensive, threatening, or insulting manner. Thirdly, it required that the words be used to "any person". Finally, although the section itself made no separate mention of thoroughfares or public streets, "public place" was defined by s 2 of the Vagrants Act to include "every road and also every place of public resort open to or used by the public as of right".

168 What is to be made of the omission of reference to breach of the peace? Did that omission mean, as one commentator was later to write[133], "that any person making use of oral defamation to another in a public place is guilty of an offence"?

Construing s 7(1)(d)

169 Reading s 7(1)(d) as prohibiting use of oral defamation to another in a public place depends upon giving "insulting words" a very wide meaning. In particular, it depends upon confining attention to the effect (or perhaps the intended effect) of the words upon the self-esteem of the person to whom they were directed. It asks only whether the words conveyed (or again, perhaps were intended to convey) scorn or disrespect to *that* person. Confining the offence to the use of words to a person appears to entail that it is the self-esteem of the

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132 (1903) St R Qd 177 at 181-182.

133 Allen, *Police Offences of Queensland*, 2nd ed (1951) at 85.

person to whom the words are used, not the esteem of others, that would be relevant.

170 Support for that understanding of the provision may be found in dictionary definitions of "insult". *The Oxford English Dictionary* gives[134] as a principal meaning of the verb "insult":

> "To assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage."

Some support may also be had from what was said by this Court in *Thurley v Hayes*[135]. In a short ex tempore judgment, Rich J, giving the reasons of the Court, said[136] that "'[i]nsulting' is a very large term, and in a statement of [a provision like s 7] is generally understood to be a word not cramped within narrow limits". But it is important to observe that in that case there was no dispute that the words had been uttered either with the intent to provoke a breach of the peace, or had been calculated to provoke such a breach.

171 Similar care must be exercised in considering what was said by the House of Lords in *Cozens v Brutus*[137], another decision which might be understood as suggesting that no narrow meaning should be given to the word "insulting". There, Lord Reid said[138] of "insulting", used in the collocation "insulting words or behaviour" in s 5 of the *Public Order Act* 1936 (UK), that "Parliament has given no indication that the word is to be given any unusual meaning. Insulting means insulting and nothing else". His Lordship emphasised[139] that the meaning of an ordinary English word is a question of fact, not law.

172 Again, however, it is necessary to notice the context in which these statements were made. Lord Reid was dealing with an argument that "insulting" should be given an unusually wide or extended meaning, not with an argument

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134 2nd ed (1989), vol 7 at 1057.

135 (1920) 27 CLR 548.

136 (1920) 27 CLR 548 at 550.

137 [1973] AC 854.

138 [1973] AC 854 at 863.

139 [1973] AC 854 at 861.

that its content and application must be determined by the context in which the word is used.

173 The precise point at issue in *Cozens* was whether it was open to Magistrates to conclude that the appellant's behaviour (in interrupting a tennis match at Wimbledon as an anti-apartheid demonstration) was *not* insulting behaviour offered to or directed at spectators. The House of Lords decided that the conclusion which the Magistrates reached had been open to them. Lord Reid went on to say[140]:

> "If I had to decide, which I do not, whether the appellant's conduct insulted the spectators in this case, I would agree with the magistrates. The spectators may have been very angry and justly so. The appellant's conduct was deplorable. Probably it ought to be punishable. But I cannot see how it insulted the spectators."

174 What does emerge from *Cozens*, therefore, is that a provision, like s 7(1) of the Vagrants Act, which prohibits, among other things, the use of insulting words, is not to be construed by taking the language of the section and divorcing individual elements (like the word "insulting") from the context in which they appear.

175 That is further illustrated by the decision of the Full Court of the Supreme Court of New South Wales in *Ex parte Breen*[141]. That Court considered the application of s 6 of the *Police Offences (Amendment) Act* 1908 (NSW), a provision cast in terms essentially identical to s 7 of the Vagrants Act. Noting that the 1908 New South Wales legislation had omitted references to breach of the peace that had been present in earlier provisions of the *Vagrancy Act* 1902 (NSW), the Court resolved the particular issue presented by holding that "insulting" must be confined to[142]:

> "language calculated to hurt the personal feelings of individuals, whether the words are addressed directly to themselves, or used in their hearing, and whether regarding their own character or that of persons closely associated with them".

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140 [1973] AC 854 at 863.

141 (1918) 18 SR (NSW) 1. Special leave to appeal to this Court was refused: *Gumley v Breen* (1918) 24 CLR 453.

142 (1918) 18 SR (NSW) 1 at 6.

Because the words being considered by the Court in *Ex parte Breen* did not meet that description, it was held that the evidence did not disclose an offence and prohibition issued. "Insulting", even without the addition of the requirement in s 7 of the Vagrants Act that the words be used *to* a person, was understood as requiring that the words be directed to hurting the hearer. (Although some doubts about this construction of the New South Wales provision were expressed in *Wragge v Pritchard*[143], *Ex parte Breen* was affirmed in *Lendrum v Campbell*[144].)

176 Like this Court's decision in *Thurley*, neither the decision in *Ex parte Breen* nor the subsequent cases in which *Ex parte Breen* was considered is to be understood as an exhaustive examination of all aspects of the provision in question. In particular, none of these cases (*Thurley*, *Ex parte Breen*, *Wragge* or *Lendrum*) should be understood as exhausting discussion of what is meant by using insulting words to a person in a public place, or as providing any definitive guidance to the construction of the section now in issue.

177 In construing s 7(1) it is necessary to notice first, and most obviously, that it creates criminal offences. Secondly, and no less obviously, it is necessary to read "insulting" in the contexts in which it is used in the section. The kinds of words proscribed by s 7(1)(d) are "threatening, abusive, or insulting words". Such words may not be used "to any person". The behaviour proscribed by s 7(1)(e) is "riotous, violent, disorderly, indecent, offensive, threatening, or insulting". These kinds of words, and these forms of behaviour, are proscribed "in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear" the relevant words or behaviour. And the section proscribes other words, and other behaviour, in such places: singing any obscene song or ballad (s 7(1)(a)), writing or drawing any indecent or obscene word, figure, or representation (s 7(1)(b)), and using any profane, indecent, or obscene language (s 7(1)(c)).

178 The harm that such words and behaviour is thought to do is reflected, presumably, not only in making the conduct criminal, but also in the penalties which may be imposed. The maximum fine that may be imposed is small: $100. But an offender can be imprisoned for up to six months and can be required to enter a recognisance to be of good behaviour for up to 12 months.

179 Evidently, then, the section is intended to serve public, not private purposes. Why else would the conduct be made criminal? Why else would it

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143 (1930) 30 SR (NSW) 279 at 281.

144 (1932) 32 SR (NSW) 499.

merit, in some cases, the severe punishment of imprisonment? Why else would it be confined to what is done in, or in sight or hearing of, public places?

180 Some of the conduct which is proscribed by s 7 is violent. Behaving in a riotous or violent manner is plainly of that kind but, so too, threatening behaviour and threatening words will often (perhaps usually) create in those who observe the behaviour, or hear the words, the apprehension that violence is intended or may be about to occur. It must be recognised, however, that violence is not the sole subject to which s 7 is directed. The references to obscenity, profanity and indecency show that to be so.

181 In the context provided by the section as a whole, is "insulting" to be read as encompassing any and every disrespectful or harmful word or gesture? Is it a criminal offence (of *behaving* in an insulting manner) for someone in a public place to deliberately turn his or her back on a public figure or even an acquaintance? To do so may be an insult, but is it to behave in an insulting manner? Is the uttering of an unmannerly jibe at another to be a criminal offence (of using insulting *words*) if, for example, one calls the other "ugly", or "stupid", or uses some other term of disapprobation? Again, to do so may be to offer insult, but is it to use insulting words to a person? Are the niceties of the civil law of defamation to be introduced to the determination of whether words used in a public place are insulting words? There is no obvious basis upon which any of the defences to the tort of defamation might be adopted and applied. If that is so, why should the criminal offence be given a reach which, because none of the civil law defences would be available, would be much larger than the tort?

The preferred construction

182 Even without regard to the constitutional considerations discussed in *Lange*, there are powerful reasons to conclude that s 7 does not go so far as to reach the examples given. To do so would extend the law well beyond its public purposes. The combination of four factors requires that the section is to be given a confined operation.

183 Those four factors are first, that the section creates an offence; secondly, the description of the words as "insulting"; thirdly, the requirement that the words are used to a person; and fourthly, the requirement that the words are used in, or within the hearing of, a public place. Those factors, standing alone, suggest that the "insulting" words that are proscribed are those which are directed to hurting an identified person and are words which, in the circumstances in which they are used, are provocative[145], in the sense that either they are intended

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145 cf *Lendrum v Campbell* (1932) 32 SR (NSW) 499 at 503.

to provoke unlawful physical retaliation, or they are reasonably likely to provoke unlawful physical retaliation from either the person to whom they are directed or some other who hears the words uttered. That is, the removal of the references to breach of the peace found in the 1851 Queensland Act took the law substantially to the point which Griffith CJ considered but rejected in *Ex parte McGovern*. Whether words are insulting would turn on the assessment of whether, in the circumstances in which they were used, they were either intended to provoke unlawful physical retaliation, or were reasonably likely to do so.

184 As will later be explained, the constitutional considerations debated in argument in this matter reinforce the conclusion that the provision should be construed in that way. It is as well, however, to stay to explain the other considerations which lead to that construction.

185 First and foremost is the fact that s 7(1)(d) creates a criminal offence. The offence which it creates restricts freedom of speech. That freedom is not, and never has been, absolute. But in confining the limits of the freedom, a legislature must mark the boundary it sets with clarity. Fundamental common law rights are not to be eroded or curtailed save by clear words[146].

186 Support for the construction we have given can be had from considering what has been said in the Supreme Court of the United States about the application of the First Amendment's requirement that "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

187 In *Chaplinsky v New Hampshire*, Murphy J, delivering the unanimous opinion of the Court, said[147]:

> "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, *and the*

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146 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Plenty v Dillon* (1991) 171 CLR 635 at 654; *Coco v The Queen* (1994) 179 CLR 427 at 435-438; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

147 315 US 568 at 571-572 (1942).

> *insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace*. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (emphasis added; footnotes omitted)

This principle had found earlier exposition in *Cantwell v Connecticut*[148] and has since been adopted and applied in a number of cases[149]. It has been said that "fighting words remain a category of speech unprotected by the First Amendment [but] in the more than half century since *Chaplinsky*, the [Supreme] Court has never again upheld a fighting words conviction"[150]. However, neither the details of the limitations that have been set in the United States to the application of the principle[151] nor the difficulties that have been encountered there in connection with "symbolic or expressive *conduct*"[152] need now be examined. The point to be drawn from the United States experience is important but limited. It is that there are certain kinds of speech which fall outside concepts of freedom of speech. In the United States it has been emphasised that those classes of speech are "narrowly limited"[153].

188 The Australian constitutional and legal context is different from that of the United States. The United States decisions about so-called "fighting words" find no direct application here. But the United States references to "narrowly limited" definitions of speech which can be proscribed find echoes in the application of well-established principles of statutory construction to the Vagrants Act. Once it is recognised that fundamental rights are not to be cut down save by clear words,

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148 310 US 296 (1940).

149 See, for example, *Terminiello v Chicago* 337 US 1 (1949); *Cohen v California* 403 US 15 (1971); *Gooding, Warden v Wilson* 405 US 518 (1972); *Lewis v City of New Orleans* 415 US 130 (1974); *RAV v City of St Paul, Minnesota* 505 US 377 (1992); *Virginia v Black* 155 L Ed 2d 535 (2003).

150 Chemerinsky, *Constitutional Law – Principles and Policies*, 2nd ed (2002), §11.3.3.2.

151 *Terminiello* 337 US 1 (1949); *Lewis* 415 US 130 (1974).

152 *Virginia v Black* 155 L Ed 2d 535 at 551 (2003) (emphasis added). See also *RAV* 505 US 377 at 382 (1992).

153 *Chaplinsky* 315 US 568 at 571 (1942).

it follows that the curtailment of free speech by legislation directed to proscribing particular kinds of utterances in public will often be read as "narrowly limited".

189 There is then a further, and separate, point which follows from the fact that s 7(1)(d) of the Vagrants Act creates a criminal offence. That point can be identified by posing the question: what is it which would make the public, as distinct from private, utterance of insulting words to a person a matter for criminal punishment? The answer to the question must be found in the particular characteristics which the "insult" must have.

190 The proscription of profane, indecent or obscene language marks a limit on the kind of language which may be employed in or within the hearing of public places. Enforcement of that limit ensures that a minimum standard of what, in other times, might have been called decorum or seemly discourse in public places is maintained.

191 By contrast, the requirement that "threatening, abusive, or insulting words" be used *to* a person demonstrates that s 7(1)(d) is not directed simply to regulating the way in which people speak in public. No crime would be committed by uttering threats to, or abuse or insults about, some person who is not there to hear what is said (unless, of course, the speaker's behaviour could be held to fall within s 7(1)(c)). That being so, the proscription of the use of insulting words to another, and for that matter the proscription of engaging in insulting behaviour, must find support in more than the creation and enforcement of particular standards of discourse and behaviour in public. Making criminal the use of certain kinds of words *to* another can be explained only by reference to the effect on, or the reaction of, the person to whom the words are directed. It can be explained only by the provocation offered. As Street CJ said in *Lendrum*[154], "what the Legislature had in mind, in speaking of insulting words, was something provocative". It is that kind of offence to the hearer which the section is directed to enjoining.

192 That this is so gains some support from the use of "insulting" in a collocation of three words – "threatening, abusive, or insulting". As pointed out earlier, "threatening" is a word which conveys the possibility of violence. As *The Oxford English Dictionary* puts it[155], to threaten is "to declare (usually conditionally) one's intention of inflicting injury upon" someone. Thus, the effect which the use of threatening words may provoke in the hearer is fear: fear that the threat of violence will be carried into effect. Ordinarily, the person uttering the words intends that this be the effect of what is said.

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154 (1932) 32 SR (NSW) 499 at 503.

155 2nd ed (1989), vol 17 at 998.

193 Again, as indicated earlier, "abusive" and "insulting" words can be understood as anything that is intended to hurt the hearer. But in the context of this provision "abusive" and "insulting" should be 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. Only if "abusive" and "insulting" are read in this way is there a public purpose to the regulation of what is said to a person in public.

194 These conclusions are reinforced by considering the principles established in *Lange*.

Lange v Australian Broadcasting Corporation

195 In *Lange*, the Court unanimously held[156] that "[f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates". That freedom is not absolute; "[i]t is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution"[157]. It operates upon the common law and also, in the manner identified by McHugh J in his reasons in this case, as a restriction on the legislative powers of the Commonwealth, the States and the Territories.

196 The Court identified[158] the test for determining whether a law infringes the requirement of freedom of communication imposed by the Constitution as presenting two questions:

> "First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect[159]? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure

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156 (1997) 189 CLR 520 at 559.

157 (1997) 189 CLR 520 at 561.

158 (1997) 189 CLR 520 at 567.

159 cf *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 337.

prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people[160]".

If the first is answered "Yes", and the second "No", the law is invalid. We agree, for the reasons given by McHugh J, that in the above statement of the second question the phrase "the fulfilment of" should be replaced by "in a manner". We would reject the submission by two of the intervening Attorneys-General (of the Commonwealth and New South Wales) that the force of the second question should be weakened by requiring only that the law in question be "reasonably capable of being seen as appropriate and adapted".

197 Although, as noted earlier, argument in this appeal focused largely upon the second question posed in *Lange*, it is as well to state explicitly that these reasons assume, they do not decide, that the first question presented in *Lange* should be answered, "Yes". That is, it is assumed, not decided, that s 7(1)(d) of the Vagrants Act may, in some cases, burden a communication about government or political matters, and also that what the appellant said was such a communication. Insult and invective have been employed in political communication at least since the time of Demosthenes. Given the extent to which law enforcement and policing in Australia depends both practically, and structurally (through bodies like the Australian Crime Commission) upon close co-operation of federal, State and Territory police forces, there is evident strength in the proposition that an allegation that a State police officer is corrupt might concern a government or political matter that affects the people of Australia[161]. It is, however, not necessary to decide the point.

198 Construed in the fashion we have earlier indicated, s 7(1)(d) is reasonably appropriate and adapted to serve the legitimate public end of keeping public places free from violence. That is an end the fulfilment of which is entirely 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.

199 If s 7(1)(d) is not construed in the way we have indicated, but is construed as prohibiting the use of any words to a person that are calculated to hurt the personal feelings of that person, it is evident that discourse in a public place on

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160 *Cunliffe* (1994) 182 CLR 272 at 300, 324, 339, 387-388. In this context, there is little difference between the test of "reasonably appropriate and adapted" and the test of proportionality: see at 377, 396.

161 *Lange* (1997) 189 CLR 520 at 571.

any subject (private or political) is more narrowly constrained by the requirements of the Vagrants Act. And the end served by the Vagrants Act (on that wider construction of its application) would necessarily be described in terms of ensuring the civility of discourse. The very basis of the decision in *Lange* would require the conclusion that an end identified in that way could not satisfy the second of the tests articulated in *Lange*. What *Lange* decided was that the common law defence of qualified privilege to an action for defamation must be extended to accommodate constitutional imperatives. That *extension* would not have been necessary if the civil law of defamation (which requires in one of its primary operations that a speaker not defame another) was itself, without the extension of the defence of qualified privilege, compatible with the maintenance of the constitutionally prescribed system of government.

Section 7(1)(d), Vagrants Act – Conclusions

200 Section 7(1)(d) is not invalid. It does, however, have a more limited operation than it was understood to have in the courts below. In particular, it does not suffice for the person to whom the words were used to assert that he or she was insulted by what was said. And it does not suffice to show that the words used were calculated to hurt the self-esteem of the hearer. Where, as here, the words were used to a police officer, then unless more is shown, it can be expected that the police officer will not physically retaliate. It follows that unless there is something in the surrounding circumstances (as, for example, the presence of other civilians who are affected by what is said) the bare use of words to a police officer which the user intends should hurt that officer will not constitute an offence. By their training and temperament police officers must be expected to resist the sting of insults directed to them. The use of such words would constitute no offence unless others who hear what is said are reasonably likely to be provoked to physical retaliation.

201 The appellant's conviction should therefore be set aside. There was no evidence before the Magistrate which would show that the words used by the appellant were intended or were reasonably likely to provoke physical retaliation. It follows that the Magistrate (and, on appeal to the District Court under Pt 9 of the *Justices Act* 1886 (Q)[162]) should have dismissed the charge.

202 What of the offences of obstructing police and assaulting police? Those offences require reference to the Police Powers Act.

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162 Section 223 of the *Justices Act* 1886 (Q) provided for an appeal "by way of rehearing on the evidence ... given in the proceeding" before the Magistrate.

The Police Powers Act

203 At the time of the appellant's arrest, s 35(1) of the Police Powers Act provided that it was lawful for a police officer, without warrant, to arrest a person the officer "reasonably suspects has committed or is committing an offence", if to do so was reasonably necessary for one or more of the reasons specified in the section. One of those reasons was "to prevent the continuation or repetition of an offence or the commission of another offence" (s 35(1)(a)).

204 Section 7(1)(d) of the Vagrants Act being a valid enactment (albeit one which bears a construction narrower than that given to it by the Court of Appeal) the question about the lawfulness of the appellant's arrest for an offence against that section falls away. The appellant's contentions in this regard were predicated on this Court holding that s 7(1)(d) was invalid, and for the reasons given earlier that is not the conclusion to which we come. The appellant did not contend that in the circumstances of this case, if s 7(1)(d) were valid, the arresting officers could not reasonably have suspected that he was then committing an offence under s 7(1)(d) of the Act and that his arrest was necessary to prevent repetition of the offence.

205 It is, therefore, not necessary to consider whether the steps which the appellant took to prevent his arrest would have been reasonable if the arrest had been unlawful. The challenge to the lawfulness of his arrest fails. It follows that the orders of the District Court and the Court of Appeal, in so far as those orders dismissed the appeals against the appellant's convictions for offences of obstructing police and assaulting police, were correct.

Order

206 The appeal to this Court should be allowed with costs. (Orders for costs were made in the courts below and the respondents did not submit that there should not be an order for costs in this Court if the appeal were allowed.) So much of the order of the Court of Appeal made on 30 November 2001 as deals with the order of Pack DCJ dated 26 February 2001 should be varied by substituting the following:

> The orders of Pack DCJ dated 26 February 2001 are set aside and in lieu thereof it is ordered that:
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> (a) the appeals to the District Court are allowed in respect of the convictions recorded in respect of the charges laid under s 7(1)(d) and s 7A(1)(c) of the *Vagrants, Gaming and Other Offences Act* 1931 (Q) and the convictions and sentences in respect of those charges are set aside;

(b) the appeals to the District Court are otherwise dismissed; and

(c) the respondents pay the appellant one half of the appellant's costs of and incidental to the appeal, those costs to be assessed.

207 KIRBY J. This appeal concerns the implied freedom of communication under the Australian Constitution. However, it is necessary, in considering that issue, first to clarify the meaning and effect of s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act* 1931 (Q) ("the Act") as applicable at the time of the proceeding[163]. Depending on the interpretation given to that provision, the implied freedom will, or will not, be engaged.

The implied freedom of communication

208 Unlike the basic laws of most nations, the Australian Constitution does not contain an express guarantee of freedom of expression, such as that included in the *Constitution of the United States*[164] and now in the *Canadian Charter of Rights and Freedoms*[165]. Nor has legislation providing such a guarantee been enacted at a federal or State level in Australia[166], as it has in New Zealand[167] and more recently in the United Kingdom[168]. In this respect, Australia's constitutional arrangements are peculiar and now virtually unique[169].

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163 This section has since been repealed and replaced by a new s 7. See *Police Powers and Responsibilities and Other Legislation Amendment Act* 2003 (Q), s 50.

164 *Constitution of the United States* 1787, Amendment I (1791): "Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

165 *Constitution Act* 1982, Pt 1, s 2(b): "Everyone has the … freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

166 In the Australian Capital Territory, the *Human Rights Act* 2004 (ACT) has been enacted. It includes reference to freedom of expression: s 16(2).

167 *New Zealand Bill of Rights Act* 1990 (NZ), s 14. See Burrows, "Freedom of the Press Under the New Zealand Bill of Rights Act 1990" in Joseph (ed), *Essays on the Constitution*, (1995) at 286.

168 *Human Rights Act* 1998 (UK), ss 1, 12, Sched 1, Pt 1, Art 10.

169 See, for example, *The Constitution of Japan* 1946, Art 21; *The Constitution of the Italian Republic* 1947, Art 21; *Constitution of the Federative Republic of Brazil* 1988, Art 5; *Constitution of the Republic of Lithuania* 1992, Art 25; *Constitution of the Republic of South Africa* 1996, s 16; *Constitution of the Federal Republic of Nigeria* 1999, s 39; *Constitution of the Democratic Republic of East Timor* 2002, s 40.

209 Following a series of earlier divided decisions of this Court in which an implication of the Australian Constitution protecting freedom of communication was upheld[170], against a standard held necessary to maintain the system of representative and responsible government prescribed by the Constitution[171], this Court in *Lange v Australian Broadcasting Corporation*[172], unanimously expressed a constitutional principle defensive of freedom of communication concerning governmental or political subjects. As a matter of authority, the rule in that unanimous decision should be upheld and applied. As a matter of constitutional principle and policy, it should not be watered down.

210 *Lange* establishes that two questions must be answered when deciding the validity of a law alleged to infringe the implied constitutional freedom of communication: (1) Does the law effectively burden freedom of communication about governmental or political matters, either in its terms, operation or effect? (2) If so, is the law reasonably appropriate and adapted (or, as I prefer to express it, proportional) so as to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the system of government prescribed by the Constitution[173]?

211 In his reasons in this appeal, McHugh J[174] has proposed a slight rewording of the second limb of the *Lange* test by reference, in part, to the way I expressed it in *Levy v Victoria*[175]. In their reasons, Gummow and Hayne JJ (the "joint reasons") have expressed their assent to McHugh J's reformulation[176]. So do I.

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170 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72-77; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 140-142, 168-169, 217; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 120-125, 146-152, 164-166, 192-193, 205-206; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 232, 257; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 298-300, 326-328, 335-338, 360-363, 378-380, 387-389, 395.

171 This extended to the procedure established by s 128 of the Constitution requiring that proposals to amend the Constitution be submitted to an informed decision of the electors of the Commonwealth. See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

172 (1997) 189 CLR 520 at 561-562, 567-568. See also *Levy v Victoria* (1997) 189 CLR 579 at 598, 608, 614, 617-620, 627, 647-648.

173 *Lange* (1997) 189 CLR 520 at 567 and fn 272.

174 Reasons of McHugh J at [95]-[96].

175 (1997) 189 CLR 579 at 645-646.

176 Joint reasons at [196].

212 I also agree with McHugh J and the joint reasons[177] that the submission by the Attorneys-General of the Commonwealth and of New South Wales should be rejected, namely that, to be valid, the law need only be "reasonably capable of being seen as appropriate and adapted". The latter formulation has never attracted a majority of this Court. It would involve a surrender to the legislature of part of the judicial power that belongs under the Constitution to this Court.

213 It follows that, once it is established that a law in the Australian Commonwealth purports to impose an effective burden upon freedom of communication about governmental or political matters, such a law will be invalid unless it seeks to achieve its ends in a manner that is consistent with the system of representative government that the Constitution creates. In the case of dispute, it is ultimately this Court that decides the matter. It does so by the measure of the Constitution, not by what the Parliament or anyone else might reasonably be capable of thinking.

214 Since it was propounded, the principle expressed in *Lange* has been accepted by this Court, and repeatedly applied. It was given effect by members of the Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[178] and in *Roberts v Bass*[179]. No party in those earlier proceedings, or in this, questioned the correctness, and application, of the rule in *Lange*. This Court should not cut back the constitutional freedom whilst pretending to apply it. That freedom is defensive of the core institutions established by our basic law. Representative democracy would be neutered in Australia if we had the buildings that house our Parliaments and went through the forms of regular elections but restricted the robust free debates amongst citizens that are essential to breathe life into the accountability of parliamentary government in Australia to the people who are sovereign.

215 This appeal[180] is the latest attempt to invoke the constitutional implication. The ultimate issue is therefore whether the implication applies and, if so, with

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177 Reasons of McHugh J at [87]; joint reasons at [196].

178 (2001) 208 CLR 199 at 280-282 [193]-[199], but compare reasons of Callinan J at 298-299 [252]-[253], 330-333 [337]-[340].

179 (2002) 212 CLR 1 at 26-30 [64]-[74], 58-60 [159]-[162], 76-79 [221]-[230], but compare reasons of Callinan J at 101-102 [285].

180 From the Court of Appeal of the Supreme Court of Queensland: *Power v Coleman* [2002] 2 Qd R 620. For earlier proceedings see *Sellars v Coleman* [2001] 2 Qd R 565 (special leave refused, High Court, 26 June 2002).

what consequences for the State law that was in contest in these proceedings, namely s 7(1)(d) of the Act.

216 In the manner explained in the joint reasons[181], the Queensland Court of Appeal declared that another section of the Act, s 7A(1)(a), was beyond the legislative power of the Queensland Parliament. That paragraph of the Act was therefore to be read and construed as if the words and punctuation, "abusive, or insulting" were deleted from the provision[182]. This Court was not asked to review the correctness of that determination. Our attention has been confined to the meaning and validity of s 7(1)(d) of the Act, measured against the *Lange* standard. However, the decision in relation to s 7A(1)(a) of the Act shows what may happen when a court considers that the constitutional freedom is impaired. In some cases, that decision will result in invalidation of the provision in question. In other cases, where the offending section can be read down or severed, the validity of the law will be saved but its ambit and application will be reduced.

The facts, legislation and decisional authority

217 The facts of this case are set out in the other reasons in terms that I accept[183]. Also set out there are the relevant provisions of the Act[184] and of the statutory predecessors to the Act. Such predecessors were originally enacted in England[185] and later in the Australian colonies and States. Such legislation had been enacted before and after 1931 when the provision of the Act in question in this appeal became law[186]. I will not repeat any of this material.

218 Other reasons also explain the decisional history of these proceedings. They resulted in a divided decision of the Queensland Court of Appeal[187].

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181 Joint reasons at [155].

182 *Power v Coleman* [2002] 2 Qd R 620 at 631-633 [23]-[28] per McMurdo P, 635 [35] per Davies JA, 645 [70] per Thomas JA.

183 Reasons of McHugh J at [37]-[48]; joint reasons at [146]-[154]; reasons of Callinan J at [269]-[270].

184 Joint reasons at [150]; reasons of Callinan J at [272].

185 Esp *Vagrancy Act* 1824 (UK); 5 Geo IV c 83. See joint reasons at [162].

186 Joint reasons at [159]-[167]; reasons of Callinan J at [275]-[278].

187 *Power v Coleman* [2002] 2 Qd R 620 at 635 [36] per Davies JA, 645 [72] per Thomas JA; cf at 630-631 [21]-[22] per McMurdo P (diss). See joint reasons at [155]-[158].

However, by the time the matter reached this Court, the issues for decision had been narrowed.

The proper approach

219 Before examining those issues, there is a preliminary question concerning the proper approach to be adopted in determining the validity of a law said to be inconsistent with the requirements of the Constitution. I agree with the approach of the other members of this Court[188]. The first step is to construe the law itself.

220 This is so, whether the law in question is a federal, State or Territory law. It is so, whether the constitutional rule is one expressly stated or implied from the language and structure of the Constitution. Adopting this approach conforms to the longstanding instruction of this Court in cases of suggested constitutional invalidity[189]. It is an approach regularly taken where there is any possibility of doubt concerning the meaning and operation of the impugned law[190]. In *R v Hughes*[191] I explained why this approach is taken:

> "In considering the validity or otherwise of the legislation … said to be invalid, it is necessary, at the threshold, to elucidate the meaning and operation of the provisions in question. This is an elementary point. However it is important in the present case. If particular provisions claimed to be unconstitutional have no operation in the circumstances of the matter before the Court, it is irrelevant, and therefore unnecessary, to determine their validity. Constitutionality is not normally decided on a hypothesis inapplicable to the resolution of a particular dispute. If, upon a true construction of the legislation, it operates in a way that does no offence to the language and structure of the Constitution, it is irrelevant that, had it been construed in a different way, it might have done so. This Court will not answer constitutional questions on the basis of assumptions that have no practical or legal consequence for the case in hand."

221 The foregoing observations apply, word for word, to the present case. However, in saying this I do not embrace a naïve belief that interpretation of a

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188 Reasons of Gleeson CJ at [3]; reasons of McHugh J at [49]-[68]; joint reasons at [158]; reasons of Callinan J at [272]-[287]; reasons of Heydon J at [306].

189 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ.

190 The approach has been taken in several recent cases: *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 662 [81]; *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36 at [106].

191 (2000) 202 CLR 535 at 565-566 [66] (footnotes omitted).

contested provision can be wholly disjoined in a case such as this from constitutional questions that have been raised[192]. Or that statutory interpretation is a simple matter of taking out a dictionary and using it to find the meaning of the contested words, read in isolation. History, context, legislative purposes, considerations of human rights law and basic common law assumptions – as well as constitutional principle – can all play a part in elucidating the meaning of disputed legislative provisions.

The issues

222 Five issues arise for decision:

(1) *The interpretation issue*: Whether, as stated in the joint reasons, the impugned words must be intended, or reasonably likely, to provoke unlawful physical retaliation to come within the scope of "insulting" in s 7(1)(d) of the Act[193]. Or whether, as stated in the several reasons of Gleeson CJ, McHugh, Callinan and Heydon JJ, "insulting" is not so confined[194]. Is it sufficient that the impugned words are potentially provocative or incompatible with civilised discourse[195], liable to hurt the personal feelings of individuals[196] or contrary to contemporary standards of public good order[197]? Or does "insulting" have some other meaning? To the extent that there is uncertainty in the meaning of the word, viewed in its context, should a meaning be adopted that ensures that it conforms to the *Lange* freedom, in preference to a meaning that would potentially expose the Act to invalidity, according to the constitutional standard?

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192 See *Behrooz* [2004] HCA 36 at [106]-[124]; *Al-Kateb v Godwin* [2004] HCA 37 at [144]; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38 at [26].

193 Joint reasons at [193].

194 Reasons of Gleeson CJ at [9]-[10], [14]; reasons of McHugh J at [67]; reasons of Callinan J at [287]; reasons of Heydon J at [310]. In his reasons Callinan J presents a slight variation on the alternative theme. His Honour accepts that to be "insulting" words must be such that they might arouse the subject to respond: [286]-[287].

195 Reasons of Callinan J at [287].

196 Reasons of Heydon J at [314].

197 Reasons of Gleeson CJ at [14].

(2) *The State law burden issue*: Whether so interpreted, the Act, in the words in question, burdens communication about government or political matters within Australia, contrary to the first step in the reasoning in *Lange*[198].

(3) *The State law proportionality issue*: Whether, in accordance with the second step in the reasoning in *Lange*, as now reformulated, s 7(1)(d) of the Act is reasonably proportionate (or, as it is commonly stated, "reasonably appropriate and adapted") to serve a legitimate end of State law-making. Does the provision seek to achieve its ends in a manner that is consistent with the maintenance of the system of representative and responsible government prescribed in the Australian Constitution[199]?

(4) *The validity of the State law issue*: In the light of the resolution of the foregoing issues, is s 7(1)(d) of the Act valid or invalid when measured against the *Lange* standard? If the provision does impose an effective burden upon freedom of communication about governmental or political matters it will be constitutionally invalid unless the manner chosen to achieve its ends is consistent with the system of representative government provided by the Constitution.

(5) *The police powers issue*: In the light of the resolution of all of the foregoing issues, and the consequence of the resulting conclusion for the lawfulness of the arrest of the appellant for an offence against s 7(1)(d) of the Act, were the police officers concerned in that arrest entitled to the protection of s 35 of the *Police Powers and Responsibilities Act* 1997 (Q) ("the Police Powers Act")?

Interpretive principles and the meaning of the State law

223 *The competing meanings of "insulting"*: The interpretation of s 7(1)(d) of the Act entails consideration, principally, of the meaning of the word "insulting" in that section. What meaning should that word be given, if regard is had to textual, purposive, historical and contextual considerations? Do these ordinary modes of interpreting the contested statutory expression provide a clear meaning for "insulting"? In my opinion, they do not. Such sources afford support both for a wide or narrow construction of the word "insulting" in this context. This conclusion is borne out by comparing the factors emphasised in the joint reasons,

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198 *Lange* (1997) 189 CLR 520 at 567-568, see also at 561. See above at [210].

199 And the procedure prescribed by s 128 of the Constitution. See *Lange* (1997) 189 CLR 520 at 567-568. The text is set out in the joint reasons at [195]-[196] and in the reasons of Callinan J at [288].

with those collected in the several reasons of Gleeson CJ, McHugh, Heydon and Callinan JJ. I will not repeat all of the competing considerations.

224 Obviously, if "insulting" is given its dictionary meaning, it would extend to a wide ambit, such as "to offer indignity to"[200], or "to treat insolently"[201]. An analysis of the history of the section may also be invoked to support a wide interpretation[202]. The absence of express words requiring a likelihood or intention of violence (or breach of the peace) may suggest that there is no such requirement[203]. So might a construction relying on the deletion by the Queensland legislature in 1931 of the express reference to breaches of the peace that formerly appeared[204]. However, the fact that the section imposes a criminal sanction, together with the public purposes of the section, suggest a need to adopt a more restrictive reading[205]. Further, the situation of the word "insulting" in a concatenation of words that include "abusive" and "threatening" together with the use of the preposition "to", also suggest the narrow interpretation[206].

225 *Ambiguity and the preferable meaning*: In the light of my conclusion that the above factors are not ultimately determinative, so as to yield an incontestable meaning for the word "insulting" in the disputed provision of the Act, I turn to three norms of statutory construction (or interpretative principles) that aid in deciding the scope of s 7(1)(d) of the Act, applicable to this case. First, in the event of ambiguity, a construction of legislation should be preferred which avoids incompatibility with the Constitution. Secondly, a construction that would arguably diminish fundamental human rights (including as such rights are expressed in international law) should not normally be preferred if an alternative construction is equally available that involves no such diminution. Thirdly, courts should not impute to the legislature a purpose of limiting fundamental rights at common law. At least, they should not do so unless clear language is used. Such a purpose must be express and unambiguous. I will discuss each of these interpretive principles in turn.

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200 See joint reasons at [170].

201 See reasons of Heydon J at [307].

202 See reasons of Gleeson CJ at [3]-[8]; reasons of Heydon J at [312].

203 See reasons of Gleeson CJ at [10]; reasons of Callinan J at [287]; reasons of Heydon J at [310]-[312].

204 See reasons of Gleeson CJ at [5]-[8], [11]; reasons of Heydon J at [312].

205 See joint reasons at [179]-[181], [183]-[185], [189].

206 See joint reasons at [192].

226 Together, the principles convince me that "insulting" should not be given its widest meaning in the context of s 7(1)(d) of the Act. Specifically, the word should be read so that it does not infringe the implied constitutional freedom of political communication. Thus, words are not "insulting" within s 7(1)(d) of the Act if they appear in, or form part of, a communication about government or political matters. It follows that the construction explained in the joint reasons should be preferred. Thus, "insulting" means words which are intended to provoke unlawful physical retaliation, or are reasonably likely to provoke unlawful physical retaliation[207].

227 *Interpretation: constitutional conformity*: To justify this conclusion, I start with the interpretive principle of constitutional conformity. As the precise meaning of the word "insulting" is unclear in the context of the disputed provision of the Act, the word should be construed in a manner that avoids a consequence, otherwise arising, that s 7(1)(d) would be incompatible with the Constitution[208]. Statutory provisions[209], and the maxim *ut res magis valeat quam pereat*[210], apply so that s 7(1)(d) of the Act may be given effect, rather than held invalid[211]. If s 7(1)(d) of the Act may be construed so that it conforms to the Lange freedom, and does not infringe the constitutional implication, it should be so construed.

228 In accordance with *Lange*[212], the entitlement to communicate "about government or political matters" is not free-standing. It extends "only so far as is

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207 See joint reasons at [183].

208 See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268; *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1 at 161-167. See also *Jumbunna Coal Mine, NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 364; *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 267; *Behrooz* [2004] HCA 36 at [109].

209 See *Acts Interpretation Act* 1954 (Q), s 9. Also see *Acts Interpretation Act* 1901 (Cth), s 15A.

210 "It is better for a thing to have effect than to be made void": *Jowitt's Dictionary of English Law*, 2nd ed (1977), vol 2 at 1845. "In constitutional law, the doctrine that it is preferable to give effect or operation to an Act as far as possible than for it to be held invalid": Nygh and Butt (eds), *Butterworths Australian Legal Dictionary*, (1997) at 1235.

211 See *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93.

212 (1997) 189 CLR 520 at 560-561, 571.

necessary to give effect to" those provisions of the Constitution (principally ss 7, 24, 64 and 128) that prescribe the federal system of responsible government[213]. The subject matters of communication to which the implied freedom extends are not narrowly confined solely to federal concerns. In *Lange*[214], this Court made it clear that:

> "[T]he discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable."

229 Upon this basis, even communications that principally, or substantially, concern State governmental or political issues (such as the alleged corruption of State police) may constitute communications about government or political matters for the purposes of the federal Constitution and the *Lange* test. The increasingly integrated nature of law enforcement in Australia and the national, indeed international[215], concern about official (specifically police) corruption and proper governmental responses to these concerns, mean that a provision such as s 7(1)(d) of the Act, in its reference to using "abusive, or insulting words", unless confined, would have a very large potential to burden communication about governmental or political matters. It could do so to an effective degree, contrary to the implied constitutional freedom explained in *Lange*.

230 The Attorney-General of the Commonwealth correctly so submitted. The Attorney-General of Queensland correctly accepted that "the practical operation and effect of s 7(1)(d) of the Act may, at least in some cases, burden the freedom of communication about government or political matters"[216]. The appellant so

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213 *Lange* (1997) 189 CLR 520 at 567.

214 (1997) 189 CLR 520 at 571-572.

215 See United Nations Convention against Corruption (not yet in force, opened for signature on 9 December 2003, Australia signed 9 December 2003), adopted by General Assembly Resolution 58/4 of 31 October 2003; Murphy (ed), "Adoption of UN Convention against Corruption", (2004) 98 *American Journal of International Law* 182; Landmeier et al, "Anti-Corruption International Legal Developments", (2002) 36 *The International Lawyer* 589.

216 Arcioni, "Politics, Police and Proportionality – An Opportunity to Explore the *Lange* Test: *Coleman v Power*", (2003) 25 *Sydney Law Review* 379 at 383.

contended. At least potentially, therefore, this issue should be resolved in favour of the appellant. I see no reason to withhold such a conclusion.

231 I do not agree with McHugh J[217] that parties can control this Court's application of the Constitution and foreclose constitutional decision-making merely by their private arrangements or assertions in court. In my opinion, this is completely inconsistent with this Court's duty to the Constitution when a matter is before the Court for decision[218]. In effect, McHugh J's views on this issue would allow parties to control the exercise of a portion of the judicial power. Such a possibility has only to be stated to be seen as incompatible with constitutional principle.

232 However, in the present case, this difference matters not because of the concession by the Attorney-General of Queensland. The position of the parties was legally correct. As a matter of potentiality, the contested provision of the Act does have the practical effect of burdening the protected freedom of communication. This conclusion leaves the respondents with their substantial argument on the application of the second step of the *Lange* test.

233 The second step in *Lange*, even as reworded in this appeal, is expressed by reference to the language that has become conventional in this Court when issues are presented concerning the compliance of a law with the requirements of the Constitution. Specifically, it asks whether the impugned law effectively burdens the constitutional freedom and, if so, whether it is a law "reasonably appropriate and adapted" to achieve its ends in a manner that is compatible with "the maintenance of … representative and responsible government"[219].

234 I will never cease to protest at this ungainly phrase "appropriate and adapted". Just imagine what non-lawyers must make of it? It involves a ritual incantation, devoid of clear meaning. It appears to have originated nearly two hundred years ago in the opinion of Marshall CJ in *McCulloch v Maryland*[220]:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

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217 Reasons of McHugh J at [79].

218 See *Roberts v Bass* (2002) 212 CLR 1 at 54-55 [143]-[144].

219 *Lange* (1997) 189 CLR 520 at 567.

220 17 US 159 at 206 (1819). See *Leask v The Commonwealth* (1996) 187 CLR 579 at 599 per Dawson J.

Despite the respect properly due to that great judge and to such repeated usage, this is an instance where Homer nodded.

235 In the present appeal, Callinan J is rightly critical of "appropriate and adapted"[221]. It is an unhelpful formula for distinguishing permissible from impermissible or inadequate constitutional connection[222]. Indeed, it is misleading in so far as it suggests that a court is concerned with the "appropriateness" of legislation. That is entirely a matter for the legislature, so long as the law is within power[223]. It is for this reason that I prefer the alternative formula of connection – of "proportionality"[224]. It has sometimes been used by this Court[225]. It is regularly used by other constitutional courts[226].

236 This is not the occasion to resolve that debate. Any phrase used will only convey imperfectly the idea of valid constitutional connection to the source of law-making power. The reasons in *Lange*[227] acknowledge that, in the context of the second question posed there, "there is little difference between the test of 'reasonably appropriate and adapted' and the test of proportionality". I am content to approach the reformulated *Lange* test upon that footing.

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221 See reasons of Callinan J at [292].

222 *Leask* (1996) 187 CLR 579 at 634-635.

223 *Burton v Honan* (1952) 86 CLR 169 at 179; *Director of Public Prosecutions v Toro-Martinez* (1993) 33 NSWLR 82 at 88.

224 The concept is entering the discourse of common law countries from civil law jurisdictions, particularly the German law notion of *Verhältnismässigkeit*. See *State of NSW v Macquarie Bank Ltd* (1992) 30 NSWLR 307 at 321-324; *South Australia v Tanner* (1989) 166 CLR 161 at 168 per Wilson, Dawson, Toohey and Gaudron JJ.

225 *Cunliffe* (1994) 182 CLR 272 at 322, 356-357; *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270 at 286; *Leask* (1996) 187 CLR 579 at 634-635.

226 See *Figueroa v Canada (Attorney-General)* (2002) 227 DLR (4th) 1 at 37-38 [73], 43-44 [88]-[89]. See also, for example, the Constitutional Court of the Czech Republic (Pl ÚS 4/94), cited and explained by Holländer, in Přibáň et al (eds), *Systems of Justice in Transition: Central European Experiences Since 1989*, (2003) 77 at 89-90.

227 (1997) 189 CLR 520 at 567, fn 272.

237 If "insulting" were given the interpretation most clearly favoured in this appeal by Gleeson CJ and Heydon J, the potential operation on political discourse of an unqualified offence of expressing insulting language in any public place would be intolerably over-wide. It would be difficult or impossible to characterise such a law as one achieving its ends in a manner that is consistent with the system of representative government envisioned by the Constitution.

238 Reading the description of civilised interchange about governmental and political matters in the reasons of Heydon J[228], I had difficulty in recognising the Australian political system as I know it. His Honour's chronicle appears more like a description of an intellectual salon where civility always (or usually) prevails. It is not, with respect, an accurate description of the Australian governmental and political system in action.

239 One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion[229]. They are part and parcel of the struggle of ideas. Anyone in doubt should listen for an hour or two to the broadcasts that bring debates of the Federal Parliament to the living rooms of the nation. This is the way present and potential elected representatives have long campaigned in Australia for the votes of constituents and the support of their policies. It is unlikely to change. By protecting from legislative burdens governmental and political communications in Australia, the Constitution addresses the nation's representative government as it is practised. It does not protect only the whispered civilities of intellectual discourse. "Insulting" therefore requires a more limited interpretation in order for s 7(1)(d) to be read so as not to infringe the constitutional freedom defined in *Lange*.

240 *Interpretation: international law*: A restrictive reading of s 7(1)(d) is also supported by the principle of statutory construction that where words of a statute are susceptible to an interpretation that is consistent with international law, that construction should prevail over one that is not[230]. International law provides for

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228 Reasons of Heydon J at [324]-[326].

229 Pearl, *Wild Men of Sydney*, 3rd ed (1970); Pearl, *Brilliant Dan Deniehy: A Forgotten Genius* (1972); Bate, *Lucky City: The First Generation at Ballarat 1851-1901*, (1978) at 139.

230 *Jumbunna Coal Mine* (1908) 6 CLR 309 at 363; *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69 per Latham CJ, 77 per Dixon J, 81 per Williams J; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183

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a freedom of expression, subject to stated exceptions[231]. Relevantly, Art 19 of the International Covenant on Civil and Political Rights ("ICCPR") states:

> "19.2 Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 19.3 The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For the respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*) or of public health or morals."

241 Australia is a party to the ICCPR. Moreover, it is a party to the First Optional Protocol that permits communications to be made to the United Nations Human Rights Committee where it is alleged that Australian law does not conform to the requirements of the ICCPR[232]. This Court has accepted that these

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CLR 273 at 287 per Mason CJ and Deane J; *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105 at 135-138 [172]-[186]; 202 ALR 233 at 274-279. See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [29]; *Behrooz* [2004] HCA 36 at [125]-[129]; *Al-Kateb* [2004] HCA 37 at [150]; *Al Khafaji* [2004] HCA 38 at [27]-[28].

231 International Covenant on Civil and Political Rights, done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23, Art 19. Also see Universal Declaration of Human Rights, General Assembly Resolution 217(III)(A) of 10 December 1948, Art 19; African [Banjul] Charter on Human and Peoples' Rights, adopted 26 June 1981, (1982) 21 *International Legal Materials* 59, Art 9(2); American Convention on Human Rights, done at San José on 22 November 1969, [1979] 1144 *United Nations Treaty Series* 123, Art 13; Charter of Fundamental Rights of the European Union, done at Nice on 7 December 2000, (2000) *Official Journal of the European Communities* 364/01.

232 First Optional Protocol to the International Covenant on Civil and Political Rights, done at New York on 19 December 1966, [1991] *Australian Treaty Series* No 39.

considerations inevitably bring to bear on the expression of Australian law the influence of the ICCPR and the principles there stated[233].

242 Expression characterised as political expression is clearly protected by Art 19 of the ICCPR[234]. The widest possible meaning of "insulting", postulated for the operation of s 7(1)(d) of the Act, would travel far beyond the permissible exceptions to the freedom of expression set out in Art 19.3 of the ICCPR. Those exceptions are to be construed strictly and narrowly[235]. The interpretation of "insulting" supported by the joint reasons would fall within the permitted exception contemplated by Art 19.3(b) of the ICCPR as one arguably necessary "for the protection … of public order". While the precise scope of public order is unclear at international law, it is evident that public order includes the following: "prescription for peace and good order"[236], public "safety"[237] and "prevention of disorder and crime"[238]. It is also clear that permissible limitations on Art 19 rights include "prohibitions on speech which may incite crime [or] violence"[239].

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233 *Mabo* (1992) 175 CLR 1 at 42.

234 See, for example, *Kivenmaa v Finland*, Human Rights Committee Communication No 412/1990 (1994) at [9.3]: "The right for an individual to express … political opinions … forms part of the freedom of expression guaranteed by article 19 of the Covenant." Also see *Aduayom et al v Togo*, Human Rights Committee Communication Nos 422/1990, 423/1990 and 424/1990 (1996) at [7.4]; Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 2nd ed (2004) at 519-540; Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, (2002) at 689-695.

235 See *Faurisson v France*, Human Rights Committee Communication No 550/1993 (1996) at [8]; Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, (2002) at 701, 709-711.

236 Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, (2002) at 196.

237 See also *Omar Sharif Baban v Australia*, Human Rights Committee Communication No 1014/2001 (2003) at [6.7]; *Gauthier v Canada*, Human Rights Committee Communication No 633/1995 (1999) at [13.6].

238 Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (1993) at 356-357.

239 Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd ed (2004) at 530. This is also evident in the debates leading to the formulation of Art 19.3: Bossuyt, *Guide to the*

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These considerations reinforce the conclusion to which the construction of the language of the Act would lead me.

243 *Criticism of interpretive principle*: There is, with respect, no substance in the criticism of the use of the foregoing principles of international human rights law to assist in the interpretation of contemporary Australian statutory provisions[240]. My own use of these principles (where they are relevant) is frequent, consistent and of long standing[241]. It preceded my service on this Court[242]. It extends beyond the elaboration of the written law to the expression of the common law. It is well known, and if parties do not address the interpretive point in argument (many do), that is their choice. It is not the judicial obligation to put specifically to parties, least of all well-resourced governmental parties, every rule of statutory construction relevant to the performance of the judicial task. Subject to considerations of procedural fairness, this Court may adopt a construction of legislation that has not been argued by the parties, and a fortiori it is not restricted to the interpretive principles argued by their representatives. As Lord Wilberforce said in *Saif Ali v Sydney Mitchell & Co*[243]:

> "Judges are more than mere selectors between rival views – they are entitled to and do think for themselves."

244 In time, the present resistance to the interpretive principle that I favour will pass. The principles of human rights and fundamental freedoms, expressed

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"Travaux Préparatoires" *of the International Covenant on Civil and Political Rights*, (1987) at 387.

240 See reasons of Gleeson CJ at [17]-[24].

241 See, for example, *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 417-419 [166]-[167]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 151-152 [69]; *Marquet* (2003) 78 ALJR 105 at 135-138 [172]-[186]; 202 ALR 233 at 274-279.

242 See, for example, *Jago v District Court of NSW* (1988) 12 NSWLR 558 at 569-570; *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414 at 422; Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes", (1993) 16 *University of NSW Law Journal* 363.

243 [1980] AC 198 at 212. Affirmed in Australia in: *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 317 per Dawson J; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 366 [13] per Brennan CJ; *Accident Towing and Advisory Committee v Combined Motor Industries Pty Ltd* [1987] VR 529 at 547-548 per McGarvie J.

in the ICCPR, preceded their expression in that treaty. They long preceded Australia's adherence to it and to the First Optional Protocol[244]. The words of Lord Diplock in *Garland v British Rail Engineering Ltd*[245] are *obiter dicta*. They are unnecessary to the decision in that case. I regard them as unduly narrow. In any event, they are concerned with a treaty obligation of a different and more limited kind, namely a specific treaty adjusting the powers of states to European institutions (the European Economic Community Treaty) and a Council Directive. Even if the same approach to such a question would be taken by United Kingdom courts today (a matter that is debatable), it says nothing about the use of an international treaty stating comprehensive human rights and fundamental freedoms. These considerations derive from inherent human dignity. They do not derive, ultimately, from inter-governmental negotiations as to national rights *inter se*, where different and additional considerations apply. This is not to say that treaty provisions such as those expressed in the ICCPR are directly binding. They are not. They have not been enacted as part of Australian municipal law[246]. But that does not prevent courts using the statement of human rights and fundamental freedoms set forth in the ICCPR in the way that I favour[247].

245 The notion that Acts of Parliament in Australia are read in accordance with the subjective intentions of the legislators who voted on them is increasingly seen as doubtful. It involves an approach to statutory construction encapsulated in the maxim: *contemporanea expositio est optima et fortissima in lege*[248]. The essential flaw in that maxim derives from the fact that laws, once enacted, operate thenceforth, as from time to time applicable. The words of a statute should normally be interpreted "in accordance with their ordinary and *current*

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244 See, for example, Charter of the United Nations, signed at San Francisco on 26 June 1945, Arts 1(3), 55, 56; Universal Declaration of Human Rights, General Assembly Resolution 217(III)(A) of 10 December 1948. See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 204-206.

245 [1983] 2 AC 751 at 771. See reasons of Gleeson CJ at [19]. See also *Kruger v The Commonwealth* (1997) 190 CLR 1 at 71 per Dawson J.

246 See *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 78 ALJR 737 at 768 [171]; 206 ALR 130 at 173.

247 See *B and B: Family Law Reform Act 1995* (1997) FLC ¶92-755 at 84,226-84,227.

248 *Broom's Legal Maxims*, 10th ed (1939) at 463. (The best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up). See *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 322-323 per Brennan J.

meaning"[249]. Statutes must be read, understood, obeyed and applied by people who are subject to their requirements. The *contemporanea* maxim is not normally the way the courts of the United Kingdom now approach problems of statutory interpretation[250]. Neither should we[251]. The suggestion that the meaning of the Act in question here is forever governed by the "intention" of the legislators who sat in the Queensland Parliament in 1931[252] is not one that I would accept. Nor do I believe that it constitutes the approach of other courts with functions similar to our own[253]. It does not represent the purposive approach to legislation now followed by this Court. The purpose postulated in that meaning is an objective one, derived from the living language of the law as read today. It is not derived from the subjective intentions of parliamentarians held decades earlier, assuming that such intentions could ever be accurately ascertained.

246 In interpreting in 1978 a statute that was enacted in 1944, Scarman LJ stated in *Ahmad v Inner London Education Authority*[254]:

> "Today, therefore, we have to construe and apply section 30 [of the *Education Act* 1944 (UK)] not against the background of the law and society of 1944 but in a … society which has accepted international obligations".

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249 *Joyce v Grimshaw* (2001) 105 FCR 232 at 244 [66] (emphasis added); *Australian Competition and Consumer Commission v The Daniels Corporation International Pty Ltd* (2001) 108 FCR 123 at 143-144 [76]; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 570-571 [71].

250 See, for example, *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27. See also *Ghaidan v Godin-Mendoza* [2004] 3 WLR 113; Bennion, *Statutory Interpretation: A Code*, 4th ed (2002) at 779.

251 In Pearce and Geddes, *Statutory Interpretation in Australia*, 5th ed (2001) at 94 [4.7], the authors say that the operation of the *contemporanea* rule has largely been abandoned. A possible exception is where a statute expressly provides that the law is that existing at a specified date: *Giannarelli v Wraith* (1988) 165 CLR 543 at 560-561.

252 See reasons of Gleeson CJ at [18]-[19].

253 See *Fitzpatrick* [2001] 1 AC 27; *Baker v Canada (Minister for Citizenship and Immigration)* [1999] 2 SCR 817 at 860-862 [69]-[71].

254 [1978] QB 36 at 48.

This is the approach that I favour, certainly in the case of an Act such as the present[255].

247 It is true that, subject to the Constitution, the duty of this Court is to give effect to the Queensland law in question according to its true meaning and to achieve its ascertained purpose. However, that is not a mechanical task. It is a task that involves reading the law with today's eyes, with the interpretive tools available to the contemporary judiciary. That means analysing the Act with more than a pre-1931 dictionary and the 1931 Hansard debates on the Bill at hand. Interpretive principles are part of the common law. They inform the way judges give meaning to contested statutory language.

248 Section 14B[256] of the *Acts Interpretation Act* 1954 (Q) is facilitative, not restrictive. Article 19(3)(b) of the ICCPR allows for exceptions. However, they are to be understood and upheld in the context of the great importance which the ICCPR assigns to free speech in the attainment of human rights and fundamental freedoms. It does not afford a *carte blanche* for derogation, any more than does the Australian Constitution under the *Lange* principle.

249 The use of the interpretive principle that I have explained will become more common in the future than it has been in the past. The search for contemporary legal obligations expressed in presently binding statutory law, by primary reference to the history of nineteenth century predecessors to that statute, will increasingly be viewed as unhelpful. Reading contemporary law by reference to a presumed compliance with the principles of human rights and fundamental freedoms, stated in international law binding upon Australia, will be viewed as orthodox. In statutory construction, as in much else in the law, orthodoxies are constantly being altered. This Court must keep pace with such changes in doctrine, not rest on its legal laurels. *Plus ça change* indeed.

250 *Interpretation: civil rights*: In order to be effective, a statutory provision diminishing ordinary civil rights to free expression, otherwise recognised by the common law, must be stated clearly[257]. Statutes are to be interpreted, as far as possible, to respect such rights[258]. General words in an Act of Parliament will not

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255 Different considerations may apply to constitutional texts and to the elaboration of very old statutory language. See Pearce and Geddes, *Statutory Interpretation in Australia*, 5th ed (2001) at 94-95 [4.7]-[4.8].

256 Set out in the reasons of Gleeson CJ at [21].

257 See joint reasons at [185] and the cases in fn 146, to which I would add *Marquet* (2003) 78 ALJR 105 at 133 [160]; 202 ALR 233 at 271.

258 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523.

normally suffice to diminish such rights. As O'Connor J said in Potter v Minahan[259]:

> "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness … and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."

251 Similarly, in *Ex parte Walsh and Johnson; In re Yates*[260], Isaacs J pointed out that "the full literal intention will not ordinarily be ascribed to general words where that would conflict with recognized principles that Parliament would be prima facie expected to respect. Something unequivocal must be found … to overcome the presumption"[261]. Of course, the language of an Act, the statutory context or the purposes of a legislature acting within its powers may show that the contested provision was indeed intended to override a principle of the common law. However, cases old and new demonstrate that where the statute is ambiguous, where it has not expressly reduced or abolished basic common law rights, and where an alternative, narrower, construction is available, this Court will prefer the interpretation that avoids such a consequence to one that diminishes such rights parenthetically, accidentally or without revealing a clear purpose to do so[262]. Even more clearly will this approach govern the interpretation where the common law right in question is protected by an implied constitutional freedom, such as that expressed in *Lange*.

252 The meaning of "uses any … insulting words to a person" is not unequivocal and clear in s 7(1)(d) of the Act. The ambiguity of the adjective "insulting" in the context invites the conclusion that it should be given a more limited interpretation rather than the broadest one, chosen by merely selecting the widest possible dictionary meaning.

253 Because of the common law rule that "everybody is free to do anything, subject only to the provisions of the law", there is a general freedom of speech

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259 *Potter v Minahan* (1908) 7 CLR 277 at 304.

260 (1925) 37 CLR 36.

261 *In re Yates* (1925) 37 CLR 36 at 93.

262 See eg *Daniels Corporation* (2002) 213 CLR 543 at 559-560 [32]-[35], 562-563 [43], 581-583 [105]-[108], 592-594 [134]-[135].

under the common law in so far as it has not been lawfully restricted[263]. The widest interpretation of "insulting" in s 7(1)(d) would give the Act an effect far beyond the restriction on free speech evident in the tort of defamation. It would potentially impose criminal sanctions upon an extremely large number of communications in or near public places. It would do so without defences or qualifications appropriate to allow the legitimate and quite common use of insult and strong language in many forms of communication. Significantly, for the present purpose, these could include communications about governmental and political matters. A more restricted interpretation, as outlined above, would effect no such violence upon the ordinary civil rights of free expression. It is an interpretation available within the language chosen by the Queensland Parliament in s 7(1)(d) of the Act. It is therefore the interpretation to be preferred.

The State law burden and proportionality issues do not arise

254 It follows that s 7(1)(d) can, and should be, construed so that it conforms to the *Lange* test as reformulated in this appeal. As so construed, "insulting" words in the context of the Act are those that go beyond words merely causing affront or hurt to personal feelings. They refer to words of an aggravated quality apt to a statute of the present type, to a requirement that the insulting words be expressed "to" the person insulted, and to a legislative setting concerned with public order. They are words intended, or reasonably likely, to provoke unlawful physical retaliation[264]. They are words prone to arouse a physical response, or a risk thereof[265]. They are not words uttered in the course of communication about governmental or political matters, however emotional, upsetting or affronting those words might be when used in such a context.

255 In such communication, unless the words rise to the level of provoking or arousing physical retaliation or the risk of such (and then invite the application of the second limb of the *Lange* test) a measure of robust, ardent language and "insult" must be tolerated by the recipient. In Australia, it must be borne for the greater good of free political communication in the representative democracy established by the Constitution.

256 If s 7(1)(d) is confined to the use in or near a public place of threatening, abusive or insulting words that go beyond hurting personal feelings and involve

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263 *Cunliffe* (1994) 182 CLR 272 at 363; *Lange* (1997) 189 CLR 520 at 564; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283.

264 See joint reasons at [193].

265 See reasons of Callinan J at [286]-[287].

words that are reasonably likely to provoke unlawful physical retaliation[266], the proportionality of the contested provision and the legitimate ends of State government in the context of the fulfilment of those ends and of the system of representative and responsible government provided in the federal Constitution becomes clear. The Act, so interpreted, is confined to preventing and sanctioning public violence and provocation to such conduct. As such, it deals with extreme conduct or "fighting" words[267]. It has always been a legitimate function of government to prevent and punish behaviour of such kind. Doing so in State law does not diminish, disproportionately, the federal system of representative and responsible government. On the contrary, it protects the social environment in which debate and civil discourse, however vigorous, emotional and insulting, can take place without threats of actual physical violence.

So construed the State law is valid

257 It follows from the foregoing analysis that s 7(1)(d) of the Act, properly understood, does not offend the implied constitutional freedom of expression in Australia. I reach the same conclusion as stated in the joint reasons. However, my reasoning is somewhat different. For me, the history of the legislation in England and Australia is less important than the inherent ambiguity of the statutory phrase, the language, character and purpose of the Act and the three interpretative principles that I have mentioned. But in the end, I arrive at the same destination as the joint reasons. Respectfully, I regard the contrary view as over-influenced by dictionary meanings.

258 It also follows that the paragraph has been misinterpreted by the courts below. It has therefore been misapplied in the appellant's case. There was no prospect that the respondent police officers would be provoked to unlawful physical violence by the words used. At least the law would not impute that possibility to police officers who, like other public officials, are expected to be thick skinned and broad shouldered in the performance of their duties. Nor would others nearby be so provoked to unlawful violence or the risk thereof against the appellant by words of the kind that he uttered.

259 Some, who heard the appellant's words would dismiss them, and his conduct, as crazy and offensive. Others, in today's age, might suspect that there could be a grain of truth in them. But, all would just pass on. Arguably, if there is an element of *insult* in this case, it lies in the use of police powers by and for the very subject of the appellant's allegations. The powers under the Act were

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266 As explained in the joint reasons at [193].

267 See *Chaplinsky v New Hampshire* 315 US 568 at 571-572 (1942). See joint reasons at [187].

entrusted to police officers by the Parliament of Queensland for the protection of the people of the State. They were not given to police officers to sanction, or suppress, the public expression of opinions about themselves or their colleagues or governmental and political issues of corruption of public officials.

260 History, and not only in other societies, teaches that attempts to suppress such opinions, even when wrong-headed and insulting, are usually counter-productive and often oppressive and ultimately unjustified. In Australia, we tolerate robust public expression of opinions because it is part of our freedom and inherent in the constitutional system of representative democracy. That system requires freedom of communication. It belongs as much to the obsessive, the emotional and the inarticulate as it does to the logical, the cerebral and the restrained. The Act should be read in this light. It requires that, to be "insulting", words addressed to a person must be such as are likely to provoke a physical response, that is, "fighting" words. That interpretation fits comfortably with the context, purpose and language of the Act as then applicable. It is therefore the interpretation that should be adopted.

261 This conclusion requires that the appellant's conviction of an offence against s 7(1)(d) of the Act be set aside. Nevertheless, s 7(1)(d) of the Act, so interpreted, is a valid law serving a legitimate end. When confined to its true ambit as explained, it is fully compatible with the freedom of communication within the federal system of representative and responsible government protected by the Constitution. It is also compatible with international human rights law and basic common law rights.

The police powers exemption applies

262 The only remaining question is whether, notwithstanding the misapprehension of the arresting police officers concerning the ambit and application of s 7(1)(d) of the Act, the appellant's arrest was lawful in terms of s 35(1) of the Police Powers Act. That section provides, relevantly:

> "35(1) It is lawful for a police officer, without warrant, to arrest a person the police officer reasonably suspects has committed or is committing an offence … if it is reasonably necessary for 1 or more of the following reasons –
>
> (a) to prevent the continuation or repetition of an offence or the commission of another offence".

263 In *Veivers v Roberts; Ex parte Veivers*[268] the Full Court of the Supreme Court of Queensland construed s 546 of the Queensland *Criminal Code Act* 1899.

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268 [1980] Qd R 226.

Relevantly, it is stated in terms similar to s 35(1) of the Police Powers Act. The Full Court pointed to the fact that the condition for the lawfulness of the arresting conduct of the police officer was not the commission *in fact* of an offence but the *reasonable suspicion* of the police officer in the identified cases that such was so. Although such a construction clothes a police officer with lawful protection where it subsequently transpires that, in law, the arrest was unsustainable, the justification for the protection was accepted by the Full Court in *Veivers* as inherent in the statute.

264 In the nature of their ordinary functions, police officers cannot wait for action until courts, months, or perhaps years later, have passed upon the legality of their conduct, often performed in fraught and urgent circumstances[269]. They do not enjoy absolute immunity. Under the Police Powers Act they must demonstrate having "*reasonable* grounds for believing that an offence has been committed"[270]. But if this is shown, the fact that it ultimately proves that the police officer is under a misapprehension as to the law[271], or has based the arrest "on an erroneous view of the law"[272], do not deprive that officer of the protection afforded by a provision such as s 35(1) of the Police Powers Act.

265 The provision was applied by McMurdo P in the Court of Appeal, notwithstanding her Honour's conclusion that s 7(1)(d) of the Act was constitutionally invalid[273]. In his reasons[274], McHugh J has powerfully explained why, at least in a case of constitutional invalidity, that may not be the correct conclusion[275]. At least it may not be correct when stated as a general rule[276]. In

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269 Arcioni, "Politics, Police and Proportionality – An Opportunity to Explore the *Lange* Test: *Coleman v Power*", (2003) 25 *Sydney Law Review* 379 at 385.

270 *Veivers v Roberts; Ex parte Veivers* [1980] Qd R 226 at 228 per D M Campbell J.

271 *Veivers* [1980] Qd R 226 at 228.

272 *Veivers* [1980] Qd R 226 at 229 per W B Campbell J.

273 *Power v Coleman* [2002] 2 Qd R 620 at 634 [31].

274 Reasons of McHugh J at [138]-[141].

275 See *Ruddock v Taylor* (2003) 58 NSWLR 269 at 281-282 per Meagher JA to contrary effect, applying the *Migration Act* 1958 (Cth), s 189. But contrast *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327 at 341; *R v Eid* (1999) 46 NSWLR 116 at 121-123 [12]-[14], applying *Peters v Attorney-General for NSW* (1988) 16 NSWLR 24 at 38 per McHugh JA.

276 See *Spalvins* (2000) 202 CLR 629 at 653-655 [58]-[64]; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 185 [51]-[52].

such a case, the suspected "offence" does not exist at all. It is, legally speaking, a nullity and always was so. The courts would seem obliged by the Constitution to give no credence to the "offence". As McHugh J has explained[277], a constitutional prohibition or immunity would ordinarily extend to laws that seek, indirectly, to validate conduct or the effect of conduct that is invalid on constitutional grounds[278]. However, in light of the conclusion that I reach that the provisions of s 7(1)(d), read as I would favour, are constitutionally valid, it is unnecessary for me to reach a final opinion on the consequences of constitutional invalidation. But I acknowledge the force of what McHugh J has written based on the premises that he propounds.

266 What of the case where (as here in my view) the law in question is not constitutionally invalid (a view that the majority of this Court, for different reasons, holds)? In such a case, the Police Powers Act should take effect according to its terms. Such an approach to the Police Powers Act tends to diminish unreasonable risks that would otherwise be faced by police officers. It leaves it to courts of law to rule on the legality of a contested arrest. The approach in *Veivers* is consonant with that taken on analogous legislation in other Australian jurisdictions[279]. Although it involves reasoning that is somewhat different from that applied in another context to invalid administrative acts[280], it is one based on the terms of specific legislation enacted for a particular and limited purpose. *Veivers* is therefore the approach that I would adopt for the resolution of the police powers issue. No constitutional barrier stands in the way. No argument was advanced by the appellant to the effect that the respondent police officers did not "reasonably suspect" that he had committed the offence.

267 The consequence is that, although the appellant was not guilty of the offence against s 7(1)(d) of the Act, as I would construe that paragraph, and although he ought therefore not to have been arrested for that offence, the offence existed in law. It was simply a narrower one than the arresting police believed it to be. It did not apply to the appellant's case. It therefore attracted s 35(1) of the Police Powers Act. It not being suggested that the "reasonable suspicion" mentioned in that Act did not arise, the appellant was not entitled to resist arrest

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277 Reasons of McHugh J at [138]-[142].

278 See *Commissioner for Motor Transport v Antill Ranger & Co Pty Ltd* (1956) 94 CLR 177 at 179, cited by McHugh J at [142].

279 eg *Lippl v Haines* (1989) 18 NSWLR 620; *Lunt v Bramley* [1959] VR 313 at 319-320; *Perkins v County Court of Victoria* (2000) 2 VR 246 at 248 [1], 267 [42], 268 [46]-[49].

280 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

as he would have been had the offence provided in s 7(1)(d) of the Act been invalid and unknown to the law because unconstitutional by the *Lange* standard.

Orders

268 I agree in the orders proposed by the joint reasons of Gummow and Hayne JJ.

CALLINAN J.

Facts and earlier proceedings

269 On 26 March 2000 the appellant was distributing pamphlets in the Flinders Street Mall in Townsville, Queensland. A police constable obtained and read one of them. In it the appellant alleged that Constable Power was corrupt, and that police officers in Townsville were "slimy, lying bastards". Subsequently, other police officers, including Constable Power, approached the appellant and demanded a copy of the pamphlet. The appellant refused and said, "This is Constable Power, a corrupt police officer." He sat down, wrapped his arms around a pole and violently resisted the officers' attempts to arrest him. They prevailed. He was in due course brought before a magistrate, tried and convicted of the following offences:

(a) Using insulting words contrary to s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act* 1931 (Q).

(b) Publishing insulting words contrary to s 7A(1)(c) of the *Vagrants, Gaming and Other Offences Act* 1931 (Q).

(c) Two offences of serious assault on a police officer contrary to s 340(b) of the *Criminal Code* (Q).

(d) Two offences of obstructing police contrary to s 120 of the *Police Powers and Responsibilities Act* 1997 (Q).

270 The appellant unsuccessfully appealed to the District Court of Queensland (Pack DCJ). He then made application to the Court of Appeal of Queensland for leave to appeal to that Court[281]. Leave was granted but limited to the constitutional point to which I refer below, relating to the charges mentioned in (a) and (b) above. The reasoning of the judges of that Court is summarized in the judgment of Gummow and Hayne JJ.

The appeal to this Court

271 The questions which the appeal to this Court are said to raise are whether the majority in the Court of Appeal (Davies and Thomas JJA) were correct in upholding the validity of s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act* 1931 (Q) ("the Act") and whether the convictions and sentences imposed on the appellant on the two counts of serious assault on a police officer pursuant to s 340(b) of the *Criminal Code* (Q) and two counts of obstructing police pursuant to s 120 of the *Police Powers and Responsibilities Act* 1997 (Q) should have

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281 *Power v Coleman* [2002] 2 Qd R 620.

been set aside. In respect of the latter questions, the appellant contends that s 7(1)(d) of the Act was invalid and that his arrest was accordingly unlawful: he had justifiably acted in self-defence in resisting it. These issues only need be resolved if the appellant succeeds on his first argument that s 7(1)(d) of the Act is invalid.

272 It is convenient at this point to set out the relevant parts of s 7(1) and s 7A(1) of the Act[282]:

"**Obscene, abusive language, etc**

7(1) Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear –

...

(d) uses any threatening, abusive, or insulting words to any person;

...

shall be liable to a penalty of $100 or to imprisonment for 6 months.

...

Printing or publishing threatening, abusive, or insulting words etc

7A(1) Any person –

(a) who by words capable of being read either by sight or touch prints any threatening, abusive, or insulting words of or concerning any person by which the reputation of that person is likely to be injured, or by which the person is likely to be injured in the person's profession or trade, or by which other persons are likely to be induced to shun, or avoid, or ridicule, or despise the person; or

(b) who publishes any such words of or concerning any person by exhibiting such words or by causing such words to be read or seen, or by showing or causing to be shown such

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282 Section 7 of the Act was repealed by s 50 of the *Police Powers and Responsibilities and Other Legislation Amendment Act* 2003 (Q) effective 1 April 2004. It is however convenient to refer to s 7 of the Act in the present tense for the purpose of this case.

words with a view to such words being read or seen by any person; or

(c) who delivers or distributes in any manner whatsoever printed matter containing any such words; or

(d) who has in the person's possession printed matter containing any such words –

shall be liable to a penalty of $100 or to imprisonment for 6 months.

...

(5) If the words hereinbefore referred to and the publication thereof shall constitute the offence of defamation as defined in the Criminal Code, proceedings in respect of such publication may be taken either under this section or as heretofore under the said Criminal Code.

(6) For the purposes of this section –

'**print',** in relation to words, shall include write, print, type, or otherwise delineate or cause to be delineated any words in such a manner that they are capable of being read."

273 Thomas JA in the Court of Appeal in his reasons expressed concern at the breadth and potential reach of these provisions[283]:

> "Quite apart from matters of political discussion, the potential operation of the measure [s 7A] is breathtaking. Even drafting a letter or article might amount to an offence."

274 His Honour also referred to the history of the sections. He thought that they owed their origin largely to fears of public disorder during the great depression of the 1930s[284]. They and earlier variations of them have however a much longer history than that, which, as will appear, has a bearing upon the meaning to be attributed to them. It is sufficient to say at this point that despite his Honour's expression of concern about the potential reach of the provisions, modern history does not show that they have operated oppressively, or in any way as an instrument of repression, to diminish lively discourse, political and otherwise, in the community.

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283 *Power v Coleman* [2002] 2 Qd R 620 at 637.

284 [2002] 2 Qd R 620 at 641-642.

275 History does however show that the courts have tended to construe similar provisions narrowly. An early Act aimed at the prevention of public disorder was the *Vagrancy Act* 1824 (UK) (5 Geo IV c 83). Section 4 proscribed the wilful exposure in any public place of any obscene picture, and the exposure lewdly of a person in any public place with intent to insult any female. It made no reference to insulting words or to the likelihood of the occurrence of any breach of the peace.

276 In 1835 there was enacted Ordinance 6 Wm IV No 6 (NSW). Save for the omission of any reference to an intention to insult any female, s 3 of that enactment was to similar effect to s 4 of the UK *Vagrancy Act*.

277 Section 6 of 15 Vict No 4 1851 (NSW) did however use the words "threatening abusive or insulting"[285]. It should be set out:

> "6. And be it enacted that any person who shall use any threatening abusive or insulting words or behaviour in any public street thoroughfare or place with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned shall forfeit and pay on conviction in a summary way by any justice of the peace any sum not exceeding five pounds and in default of immediate payment shall be committed to the common gaol or house of correction for any period not exceeding three calendar months."

278 Section 6 of 15 Vict No 4 1851 (NSW) applied in Queensland as the *Vagrant Act of* 1851 (Q). A prosecution brought under it was considered by the Full Court of Queensland in 1903[286]. The language in question there was capable of being regarded as both threatening and insulting. Griffith CJ (Cooper and Real JJ agreeing) said this of the section[287]:

> "On the one view of the section now under consideration it means this: That any person using threatening, abusive, or insulting words in a public place – which is prima facie a wrong thing to do – and doing so with the intention of provoking a breach of the peace, or doing it without that intention if it leads to such a breach, is guilty of an offence. That is a clear and intelligible construction, and there would be no difficulty in applying it. The other construction is that any person using in a public place threatening, abusive, or insulting language which might possibly, under

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285 cf s 54(13) of the *Metropolitan Police Act* 1839 (UK).

286 *R v The Justices of Clifton, Ex parte McGovern* [1903] St R Qd 177.

287 *R v The Justices of Clifton, Ex parte McGovern* [1903] St R Qd 177 at 181-182.

some circumstances, occasion a breach of the peace, is guilty of an offence. That, in effect, would mean that any person making use of oral defamation to another in a public place would be guilty of an offence, and would practically make it an offence punishable on summary conviction, to defame a man to his face in the street, even though a breach of the peace was not intended and none, in fact, occurred; and the duty would be cast upon the Bench of deciding whether the particular words might have occasioned a breach of the peace. That would be a very serious responsibility to place upon the magistrates, and we ought not lightly to hold that the Legislature has imposed it in the absence of clear or unambiguous words, apart from the creation of a new form of criminal responsibility."

279 It is correct to say that s 7(1)(d) does enact a form of criminal responsibility for defamation of a person to his or her face even though a breach of the peace may not have been intended and none in fact may occur[288]. The Attorney-General of Queensland suggested that this was in substance a new form of criminal responsibility. That is not a complete or wholly correct statement of the position. There are historical parallels. In *Gatley on Libel and Slander* this summary of the historical position appears[289]:

"**12. Publication a misdemeanour.** The publication of written defamatory words is not only an actionable wrong but also a crime punishable on indictment, or in rare cases on criminal information, with fine or imprisonment. But the publication of *spoken* words, however scurrilous or malicious, is not a crime unless the words are blasphemous, seditious, or obscene, or unless they amount to an incitement to commit a crime, or to a contempt of court, or are uttered as a challenge to fight a duel, or with the intention of provoking another to send a challenge, or are defamatory words published in the course of performance of a play.

13. Reason for distinction. The reason for this distinction is perhaps to be found in the fact that as written words are apt to have a more diffused and permanent influence than spoken words, the mischief they do is far greater, and a criminal remedy is therefore necessary in the interest of the person defamed and in the interest of the public as a whole. The tendency of written defamation to provoke a breach of the peace, though sometimes given as a reason, is not sufficient, for oral defamation, especially when spoken in the presence of the person defamed, is often more likely to lead to the same result."

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288 See *Vagrants, Gaming, and Other Offences Act* 1931-1971 (Q), s 7 contained in Queensland Statutes (1962 reprint), vol 19 at 699.

289 7th ed (1974) at 8-9 (footnotes omitted).

280 In this case the insulting words were both set out in a document and stated orally although it is only with the latter that this Court is concerned. The distribution of the former might therefore well have constituted what would once have been the indictable offence of criminal libel in the United Kingdom.

281 It is also sometimes overlooked that until comparatively recently defamation *per se* could constitute a criminal offence in Queensland. The defamation provisions in Ch 35 (ss 365 to 389) of the *Criminal Code* were repealed in 1995[290], and with some exceptions, relocated[291] in the *Defamation Act* 1889 (Q). Section 366 of the *Criminal Code* defined defamatory matter in terms easily wide enough to include insults and abuse, and defamation was defined in s 368 to mean defamatory matter published by words spoken or audible sounds, signals, signs, or gestures and words, intended to be read and actually published. Section 369 of the *Criminal Code* provided that all that was required for publication in the case of spoken words was that they be spoken in the presence and hearing of any person other than the person defamed. That did not mean of course that there was no publication if the defamed person also was present. Section 370 made it unlawful to publish defamatory matter unless publication was protected, justified or excused by law, and s 380 provided that the unlawful publication of defamatory matter was a misdemeanour punishable by a term of imprisonment. Knowledge of falsity was a circumstance of aggravation rendering an offender liable to a longer term of imprisonment.

282 It would follow that in some circumstances what might have constituted an offence under s 7(1) of the Act could well have been an offence of defamation under the *Criminal Code* also.

283 Some reference should be made to *Hopgood v Burns; Ex parte Burns*[292]. It was held there that in order for the offence to be established it was necessary that the insulting words be actually used to some person. The Attorney-General of Queensland accepts, as the sub-section states in terms, that this is an element of the offence.

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290 Criminal sanction for defamation still exists in the *Criminal Code*, but in a much narrower sense, for example, knowingly publishing a false statement regarding the personal character or conduct of a candidate before or during an election (s 105), or conspiring to injure the reputation of any person, a prosecution of which requires the consent of the Attorney-General before it is instituted (s 543).

291 Pursuant to s 459(1) and (2) of the *Criminal Code Act* 1899 (Act No 37 of 1995).

292 [1944] QWN 49.

284 In New South Wales in the period 1902-1908 there was a requirement of an intention to provoke a breach of the peace, or the possibility of it[293]. From 1908 this requirement was abandoned.[294] Section 24 of the *Police Offences Act* 1928 (Vic) contained a requirement similar to that in force in New South Wales in the period 1902-1908, as did s 137 of the *Police Act* 1905 (Tas). Because the language used in the United Kingdom in relation to offences of public disorder and public utterances is quite different from the Queensland formulation, and because of the influence of the *Human Rights Act* 1998 (UK), reference to the case law of that country is unlikely to be of assistance in this jurisdiction.

285 As I have already indicated, behaviour which could attract the operation of s 7(1)(d) of the Act might also, despite suggestions to the contrary, have invited the imposition of criminal sanctions under other legislation. There was perhaps less novelty therefore in the enactment of an offence of the kind for which s 7(1)(d) provides than might at first sight have been thought.

286 I do not doubt that the section, with respect certainly to the nature and character of the words that might attract its operation, was intended to, and does have an extensive reach, and could include offensive disrespect to a person's national sentiments, religion, private and personal conduct, or an insult to a person's family or friends[295]. It is unnecessary however to express any opinion as to what in any particular situation could amount to a verbal insult because there is no doubt that the words spoken here were both insulting and abusive, a matter to which I will shortly return. What is particularly important to keep in mind in this case is the express requirement of the section that the words used must be used, *to a person*. In my opinion it is also right to construe the section, consistently with its history and the history of similar provisions, as requiring that the person to whom the words are used, be the person whom the words insult, or some other person who could be insulted or aroused to respond by them, because of that person's association or relationship with the person the subject of the insult, or any particular position and role of the insulted person. Otherwise, even though hearers might think the use of the words regrettable or distasteful, they are unlikely to be "insulting" to hearers other than the insulted person.

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293 Section 8 of the *Vagrancy Act* 1902 (NSW).

294 Section 8A of the *Vagrancy Act* 1902 (NSW), inserted by s 6 of the *Police Offences (Amendment) Act* 1908 (NSW). See *Lendrum v Campbell* (1932) 32 SR(NSW) 499.

295 cf *Ex parte Breen* (1918) 18 SR(NSW) 1; *Wragge v Pritchard* (1930) 30 SR(NSW) 279; *Lendrum v Campbell* (1932) 32 SR(NSW) 499.

287 I do not consider that the sub-section should relevantly be construed or confined to, insulting words which are likely or intended to provoke, in all of the circumstances, a breach of the peace. That they may have done so may well provide powerful evidence of their insulting nature. But whether they are to be adjudged insulting or otherwise, is not to be determined merely by the likelihood of their provoking a breach of the peace. The legislature has not so enacted. Instead, it has taken the view, by abstaining from making this a necessary element, that insults to the person or his or her associates or others of the kind to whom I have referred, are, having regard to the huge variation in human sensitivities, a matter to which I will refer again, either unnecessarily potentially provocative, or so incompatible with civilized discourse and passage, that they should be proscribed. A risk, sometimes very slight, at others very great, will always be present. It is not with fine assessments of the likelihood of its realization that the sub-section is concerned. It is at the *risk* of provocation that it is aimed. It is upon the basis of that construction that the issues here should be resolved.

288 The first issue may, it was put, be stated in this way: does s 7(1)(d) of the Act satisfy the second limb of the test propounded by this Court in *Lange v Australian Broadcasting Corporation*[296]:

> 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 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 (hereafter collectively 'the system of government prescribed by the Constitution'). If the first question is answered 'yes' and the second is answered 'no', the law is invalid." (footnotes omitted)

289 No party or intervener sought to argue that *Lange* should be reconsidered. That may not relieve me of the necessity, if I am conscientiously of the view that it, as a decision of this Court, no matter that it be recent and unanimous, is incompatible with the Constitution, of deciding whether I am bound not to follow it, rather than obliged to apply it. I will proceed for present purposes however upon the basis that *Lange* accords with the Constitution and that I am obliged to apply it.

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296 (1997) 189 CLR 520 at 567-568.

290 The appellant in *Lange* was a resident and former Prime Minister of New Zealand. He sued the respondent in defamation in New South Wales for imputing to him unfitness for office and abuse of public office in New Zealand, matters which at first, and indeed even with the advantage of second and subsequent sight, seem far removed from any Australian affairs of state or politics. But the Court was of the opinion that this was not necessarily so. Their Honours said[297]:

> "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."

291 The word "may" and the following words should be noted. They mean that to attract the application of the implication it is necessary that the spoken or written communication be capable of throwing light on government or political matters. This is an important qualification but it is not the only qualification or limit upon the reach of the constitutional implication. It is also essential not to overlook the language of limitation used by the Court in this significant passage[298]:

> "However, the freedom of communication which the Constitution protects is not absolute. It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution. The freedom of communication required by ss 7 and 24 and reinforced by the sections concerning responsible government and the amendment of the Constitution operates as a restriction on legislative power. However, the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the 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. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end." (footnote omitted)

292 The following principles can be distilled from those words. The "freedom" is itself a limited one. It relates only to what is necessary for the *effective* operation of government in accordance with the Constitution. The implication will not invalidate a law enacted for a legitimate end if it is

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297 (1997) 189 CLR 520 at 576.

298 (1997) 189 CLR 520 at 561-562.

compatible with the *maintenance* of government or the conduct of a referendum. The last condition, is, with all due respect, somewhat inscrutable. The appreciation of what is reasonably appropriate and adapted to achieving a legitimate end may very much be a matter of opinion. Another formula, using more traditional language, "is the law a reasonable implementation of a legitimate object" may well have been preferable.

293 The Act here is itself the creature of a responsible and representative parliament. It purports in no way to operate beyond the boundaries of Queensland. It bears upon its face not the slightest intention to operate upon, or in relation to Federal institutions, elections or referenda, or to interfere with the operation of the Constitution. It is well within the power of the Queensland Parliament to enact it.

294 It would be necessary, for the purposes of the application of the constitutional implication, to see whether in its operation it *necessarily* satisfies the tests with all of their qualifications propounded above. It is important that in undertaking that task close attention be paid to the reasons in *Lange* and the principles emerging from them. The absence of a sure and guiding text such as the written words of the Constitution itself requires this. This is so even though the Constitution is an instrument under which other laws are made and is in parts expressed in general language. There is still a clear and binding text. By contrast, it is in the reasons for judgment in *Lange* that the implication is spelled out. Reasons for judgment can only state principles[299], and not express rules as instruments and enactments do.

295 At what conduct is s 7(1)(d) aimed and what are its ends? Why is the sub-section couched in the language that it is? The decision in *Lange*[300], as I pointed out in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[301], was based to a large extent upon the Court's perception of circumstances prevailing today. If it is legitimate to have regard to those in construing the Constitution to discover an implication in it, it is equally so in construing, to discover its intent, an enactment of the Queensland Parliament. One notorious circumstance prevailing today is that civil proceedings in defamation may be, for an ordinary person, too expensive to pursue, or, having regard to the impecuniosity of a proposed defendant, likely to be futile, or, having regard to the power and wealth of a defendant, likely to be prolonged, and emotionally, as well as financially, debilitating. Other circumstances, prevailing not only today, but also since

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299 cf *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1085 per Lord Reid.

300 (1997) 189 CLR 520 at 570.

301 (2001) 208 CLR 199 at 298-299 [252]-[253].

human beings began to communicate with one another, are that abusive or insulting words used in or near a public place will on occasions undoubtedly cause, and always invite the risk of, offence, distress and anxiety to some who hear them. They are the antithesis of civilized behaviour.

296 Many people use and resort to public places. These include people of both tender and advanced years, inarticulate people unable to make an effective response, and people of greater and lesser sensitivities. The fact that some may be robust and sufficiently restrained to ignore, or to respond but not in kind, or turn the other cheek to offensive statements, is not a reason for risking the peace, the avoidance of which is the legitimate end of the section. The Courts should not be called upon to weigh up those sensitivities, to make assumptions, for example, about the relative vulnerability of soldiers, or police officers, or tradespeople, or clergy, or mothers, or husbands, or otherwise. Who such persons are, and what they do, may be relevant to the question whether the words are insulting in fact, but have nothing to say about the construction of the section otherwise, particularly whether the notion of a need for the likelihood of the realization of a risk should be read into it. It is on the risk, and not on whether it may in fact be realized that emphasis is to be placed. Legislation aimed at risk rather than likely consequence, or consequence in fact, is not unique. Much legislation in relation to traffic offences is directed to that end. Exceeding speed limits is a classic example. The Queensland legislature has taken the view that the risk to the peace from insulting words is simply not worth running. That is a view peculiarly for a legislature and not a court to form.

297 What the section seeks to further therefore is peaceable, civilized passage through, and assembly and discourse in public places free from threat, abuse or insult to persons there. In that sense, the section seeks itself to advance a valuable freedom. Free speech as this Court said in *Lange* has never been an absolute right. Various constraints upon it have always been essential for the existence of a peaceable, civilized, democratic community.

298 In my opinion, s 7(1)(d), understood in the sense contended for by the Attorney-General of Queensland, of an insult in a public place delivered to the person the subject of it, or to some person associated with that person, or a person who, having regard to the role or any particular position of the person insulted, might be aroused to respond, offers no realistic threat to any freedom of communication about Federal political, or governmental affairs. It is no burden upon it. I would hold this to be so regardless of the guarded concession made by the respondents[302] and which I would reject in any event. I do so because the

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302 The respondents accepted that s 7(1)(d) of the Act may apply whether or not the prohibited language relates to matters of governmental or political interest so that its practical operation and effect may, in some circumstances, burden communication about government or political matters.

Court is bound to give effect to the proper meaning of the Constitution, and an enactment, particularly in a case between a citizen and a public official acting under it[303]. What Barwick CJ said in *Queensland v The Commonwealth*[304] in relation to the construction of an express provision of the Constitution must apply with at least equal force to an implication said to be derivable from it[305]:

> "As to the first of these submissions, it is fundamental to the work of this Court and to its function of determining, so far as it rests on judicial decision, the law of Australia appropriate to the times, that it should not be bound in point of precedent but only in point of conviction by its prior decisions. In the case of the Constitution, it is the duty, in my opinion, of each Justice, paying due regard to the opinions of other Justices past and present, to decide what in truth the Constitution provides. The area of constitutional law is pre-eminently an area where the paramount consideration is the maintenance of the Constitution itself. Of course, the fact that a particular construction has long been accepted is a potent factor for consideration: but it has not hitherto been accepted as effective to prevent the members of the Court from departing from an earlier interpretation if convinced that it does not truly represent the Constitution. There is no need to refer to the instances in which the Court has departed from earlier decisions upon the Constitution, some of long standing. The Constitution may be rigid but that does not imply or require rigidity on the part of the Court in adherence to prior decisions. No doubt to depart from them is a grave matter and a heavy responsibility. But convinced of their error, the duty to express what is the proper construction is paramount. It is worthwhile, I think, to recall what Sir Isaac Isaacs said in *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia*[306]:
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> > 'The oath of a Justice of this Court is "to do right to all manner of people *according to law*". Our sworn loyalty is to the law itself, and to the organic law of the Constitution first of all. If, then, we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I

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303 cf *Gerhardy v Brown* (1985) 159 CLR 70 at 141-142 per Brennan J:

> "The validity and scope of a law cannot be made to depend on the course of private litigation. The legislative will is not surrendered into the hands of the litigants."

304 (1977) 139 CLR 585.

305 (1977) 139 CLR 585 at 593-594. See also at 599 per Gibbs J.

306 (1913) 17 CLR 261 at 278.

> conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right.' (original emphasis)
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> What I have written relates to longstanding decisions. Reluctance to depart from them when thought to be wrong springs from the length of time they have stood and apparently been accepted. *But that reluctance can have no place, in my opinion, in relation to a recent decision*. To refuse to decide in a constitutional case what one is convinced is right because there is a recent decision of the Court is, to my mind, to deny the claims of the Constitution itself and to substitute for it a decision of the Court. If both old and new decisions construing the Constitution, of whose error the Court is convinced, must none the less be followed, then, to use Sir Isaac Isaacs' expression, perpetuation of error rather than the maintenance of the Constitution becomes the paramount duty. I find no validity in the submission that the recency of the Court's former decision gives it a quality which precludes critical examination of it or, indeed, departure from it." (emphasis added)

299 The provisions of the Act are in any event, well adapted to the preservation of the peace in public places in Queensland. They are reasonable ones: they provide what would be, for many, the only practicable remedy for defamatory or offensive statements to and about them. That they may be uttered, either orally or otherwise, in a public place means that an unnecessary and undesirable *risk* of public disorder has been created. I would regard the notion that they burden the freedom of communication on political matters in any way as far fetched. Insulting or abusive words will no doubt generate heat, but it is equally unlikely that they will, to adapt the language of the judgment in *Lange* "throw *light* on [anything, let alone] government or political matters"[307]. In short it is *not at all necessary* for the effective operation of the system of representative and responsible government in accordance with the Constitution that people go about insulting or abusing one another in or about public places in Queensland.

300 The reasoning and decision in *Lange* arose out of a pleading point taken in a defamation action, matters not entirely easily and readily translatable to an offence against public order. Nevertheless, to ensure coherence in the law[308], if the implication falls to be considered here, the conditions to be satisfied for a successful defence to a defamation action should also be required to be satisfied for a defence to an offence of public disorder. On this matter in particular *Lange* is clear: that the defendant must have acted reasonably in publishing as he or she

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307 (1997) 189 CLR 520 at 576 (emphasis added).

308 See *Sullivan v Moody* (2001) 207 CLR 562 at 581 [55].

did[309]. This reinforces that it is only reasonable conduct that the implication protects. Threatening, insulting, or abusive language to a person in a public place is unreasonable conduct. The implication should not extend to protect that.

301 The section is valid. It offends no principle for which *Lange* may stand. It is therefore unnecessary for me to decide whether I should follow the path that Deane J, echoing Barwick CJ in *Queensland v The Commonwealth*[310], said should be followed in *Stevens v Head*[311]. His Honour said this[312]:

> "I am fully conscious of the weight of the considerations which support the view that a decision of the Court which still enjoys majority support should be treated by an individual member of the Court as being as binding upon him or her as it is on the members of every other Australian court. There are, however, weighty statements of authority[313] which support the proposition that, in matters of fundamental constitutional importance, the members of this Court are obliged to adhere to what they see as the requirements of the Constitution of which the Court is both a creature and the custodian."

302 I have no doubt therefore that the conviction under s 7(1)(d) was duly entered. That the police officer concerned may not in fact have been provoked does not avail the appellant. Nor does it avail the appellant that because Constable Power was a police officer, he may have been unlikely to retaliate or be otherwise provoked. The words used inevitably produced a risk of that. That was not however the only risk. It is easy to see that there was a further risk that other people present, or in the vicinity, might take exception to, and be moved to take matters into their own hands, because a constable was being insulted.

303 The other issues raised in the appeal needed only to be decided if I concluded that s 7(1)(d) was constitutionally invalid.

304 I would dismiss the appeal with costs.

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309 (1997) 189 CLR 520 at 573-574.

310 (1977) 139 CLR 585 at 593-594.

311 (1993) 176 CLR 433.

312 (1993) 176 CLR 433 at 461-462.

313 See *Queensland v The Commonwealth* (1977) 139 CLR 585 at 593, 600-601 and 610.

305 HEYDON J. The primary charge relevant to this appeal is that, on 26 March 2000, the appellant "in a public place namely Flinders St, Townsville used insulting words namely 'This is Const Brenden [sic] Power a corrupt police officer' to a person namely Brenden [sic] POWER." The appellant, a student in law and politics at James Cook University, conducted his case on his own behalf before the magistrate, the District Court and the Queensland Court of Appeal. Neither he nor any legal representative attended the oral hearing at which special leave was granted. He has contended before the magistrate, the District Court, the Court of Appeal[314], and this Court that the Commonwealth Constitution contains an implication that it is, and since 1901 has been, beyond the capacity of the Parliament of the State of Queensland (or of any other State) to pass legislation preventing a citizen from using insulting words in a public place, and, in particular, preventing a citizen publicly calling police officers corrupt to their faces[315]. The circumstances of these proceedings are otherwise sufficiently set out in the judgments of other members of the Court.

Were the words "insulting words"?

306 *Relevance of the question.* I agree that the other members of the Court correctly approach the appeal on the basis that the first question in the present case ought to be whether the conduct of the appellant fell within the meaning of the expression "insulting words" in s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act* 1931 (Q) ("the 1931 Act"), construed in the light of its context[316]. That is the correct approach because if that first question is answered "No", the next question, whether s 7(1)(d) effectively burdens the freedom of communication on government and political matters, does not arise; but if that first question is answered "Yes", the construction of s 7(1)(d) as a whole, independently of as well as in its particular application to the appellant, must be embarked on in order to determine whether s 7(1)(d) burdens the freedom of communication and other questions. The parties did not in fact rigorously approach the appeal that way, and in so far as they did adopt that approach, they were in agreement at least that the first question should be answered "Yes".

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314 *Power v Coleman* [2002] 2 Qd R 620: the written submissions are at 622-623, and they are rejected at 635 [36]-[37] per Davies JA, 645 [71]-[72] per Thomas JA.

315 The appellant's interest in the implied constitutional freedom of political communication has expressed itself in other litigation in the recent past: *Coleman v Sellars* (2000) 181 ALR 120.

316 After the conclusion of argument in this case, s 7(1)(d) was repealed by the *Police Powers and Responsibilities and Other Legislation Amendment Act* 2003 (Q), with effect from 1 April 2004. In these reasons, s 7(1)(d) is referred to in the present tense, and all references are to the legislation as it existed on 26 March 2000.

However, it is convenient to place that circumstance on one side for a moment in order to consider the first question.

307 *Ordinary meaning.* *The Macquarie Dictionary* (1981) defines the verb "insult" as:

> "1. to treat insolently or with contemptuous rudeness; affront."

It defines the noun "insult" as:

> "2. an insolent or contemptuously rude action or speech; affront. 3. something having the effect of an affront."

It defines the noun "affront" as:

> "1. a personally offensive act or word; an intentional slight; an open manifestation of disrespect; an insult to the face … 2. an offence to one's dignity or self-respect."

308 *The Oxford English Dictionary*, 2nd ed (1989), relevantly defines "insulting" as: "That insults (see the verb)." The first two meanings given of "insult" as a verb are:

> "1. *intr*. To manifest arrogant or scornful delight by speech or behaviour; to exult proudly or contemptuously; to boast, brag, vaunt, glory, triumph, esp in an insolent or scornful way ….
>
> 2. *trans*. To assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage."

That second meaning, published in an earlier edition of *The Oxford English Dictionary*, was quoted without disapproval by Knox CJ, Gavan Duffy and Rich JJ in *Thurley v Hayes*[317].

309 The conduct of the appellant was thus well within the ordinary meaning of the word "insult". To say in the presence of a particular named police officer that he is corrupt is personally offensive; it is an intentional slight; it is an open manifestation of disrespect; it is an offence to the officer's dignity or self-respect; it is insolent or contemptuously rude speech; it is offensively dishonouring speech; it is scornfully abusive and offensively disrespectful. The requirements of s 7(1)(d) that the words be used to a person, and in public, were also satisfied.

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317 (1920) 27 CLR 548 at 550.

310 *Contextual issues.* Does the context of s 7(1)(d) require a conclusion that the ordinary meaning of the expression "insulting words", as suggested by the dictionary definitions, is not its true construction, and that a more limited one is? No. In particular, although s 7 is directed against the risk of violence, among other things, that context does not limit the express words of s 7(1)(d) to conduct which is intended to provoke unlawful physical retaliation, or which is reasonably likely to provoke unlawful physical retaliation, from either the person to whom they are directed or some other person who hears the words uttered.

311 One difficulty with the first element of this suggested limited construction is posed by s 23(2) of the *Criminal Code* (Q), to which the appellant drew attention. It provides:

> "Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial."

312 Another difficulty with the limited construction is that the legislation which s 7(1)(d) replaced in 1931, namely s 6 of the *Vagrant Act of* 1851 (Q), prohibited the use of "insulting words" only if used "with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned." The dropping of this formula when s 7(1)(d) was enacted brought Queensland into line with the position under the *Vagrancy Act* 1902 (NSW): amendments to that Act in 1908 repealed s 8, which had since 1902 contained the formula, and introduced s 8A, which did not. That formula, however, continued to exist in similar form in legislation in force in 1931 in other States: see *Police Offences Act* 1928 (Vic), s 24 and *Police Act* 1905 (Tas), s 137. This history goes against the view that s 7(1)(d) is to be construed as if a similar formula appeared in it, and intensifies the problem flowing from the process of effectively inserting words into the legislation, on which the limited construction depends.

313 It may be accepted that the common law liberty of free speech is not to be cut down except by clear words. But the expression "insulting", though it requires analysis, is not unclear. It may also be accepted that the reference to "insulting words" in s 7(1)(d) is directed to "something provocative"[318]. But the appellant's words were "provocative". Thus in the primary meaning given by *The Oxford English Dictionary*, they were "apt or tending to excite or enrage; stimulating, irritating." It is true that there is nothing in the magistrate's findings to indicate that the appellant's words, considered by themselves, caused the police officer to become excited, enraged, stimulated or irritated. But words can

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318 *Lendrum v Campbell* (1932) 32 SR (NSW) 499 at 503 per Street CJ, James and Davidson JJ concurring.

be provoking even though the speaker does not intend to provoke unlawful physical retaliation, and even though the words are not reasonably likely to do so (because, in circumstances of the present type, it is to be expected that the object of the words will resist their sting, it being contrary to the training of a police officer to engage in, and it being the duty of a police officer to refrain from, unlawful physical retaliation). Insults are apt, or have a tendency, to excite and enrage their objects (and other persons who hear them), even though the objects of the insult (and other hearers) have a peaceful disposition and take the line of least resistance, or have considerable self-control, or have professional training or duties not to respond with violence. The test is an objective one.

314 Subject to any refinement which analysis of particular factual circumstances may call for in future, it may be said as a general matter that s 7(1)(d) prohibits the use of language to a person in or near a public place, being language which is insulting in the ordinary meaning of the word and so is liable "to hurt the personal feelings of individuals, whether the words are addressed directly to themselves, or used in their hearing, and whether regarding their own character or that of persons closely associated with them"[319]. Hence the conclusion of the magistrate was sound. In particular, she was correct in concluding: "There is no doubt that to suggest to a police officer whose duty it is to uphold the law that he or she has engaged in criminal or corrupt activity is to insult." The conclusion of the District Court to the same effect was also sound.

315 However, nothing in the careful reasons for judgment of the learned magistrate suggests that the appellant contended that s 7(1)(d) was limited to conduct intended or reasonably likely to provoke unlawful physical retaliation. Nor does anything in the transcript of proceedings before her, though it recorded only the evidence and not the addresses, and though the record of the appellant's egregious behaviour at the trial is difficult to follow. Nor do the Notice of Appeal to the District Court, the District Court's reasons for judgment, or the Notice of Application for leave to appeal to the Court of Appeal. The Court of Appeal necessarily assumed that the appellant had contravened s 7(1)(d), since it only granted leave to appeal in relation to constitutional questions[320]. The same assumption was made in the appellant's Amended Notice of Appeal to this Court, the notices issued under s 78B of the *Judiciary Act* 1903 (Cth) and the appellant's written and oral argument in this Court: indeed the latter made it explicit[321]. The

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319 *Ex parte Breen* (1918) 18 SR (NSW) 1 at 6 per Cullen CJ, Sly and Ferguson JJ concurring; approved in *Lendrum v Campbell* (1932) 32 SR (NSW) 499 at 501-503.

320 *Power v Coleman* [2001] 2 Qd R 620 at 636 [40].

321 The appellant submitted that if s 7(1)(d) contained the formula which the precursor to s 7(1)(d) contained – that the insulting words be used "with intent to provoke a

(Footnote continues on next page)

respondents were given no opportunity by the appellant's submissions to address a construction of s 7(1)(d) under which an intention to provoke, or reasonable likelihood of provoking, unlawful physical retaliation is a necessary element. It is true that questions were raised in argument which, if answered one way, would support that construction, that the Attorney-General of Queensland and the other respondents were given leave to file notes concerning the history and meaning of s 7(1)(d) and that the appellant was given leave to respond to them. However, in their notes the respondents did not deal with, and in his response the appellant did not advance, the proposition that s 7(1)(d) was limited to conduct which was intended or reasonably likely to provoke unlawful physical retaliation. Indeed, the appellant's response submitted, on the question why s 7(1)(d) of the 1931 Act did not include language referring to an intention to provoke a breach of the peace even though that language had appeared in the legislation in force up until the 1931 Act, that the "most satisfactory explanation … would appear to be the evidentiary difficulties arising in proof of issues connected with breaches of the peace." Thus the appellant appears to have had a conscious preference for a wide construction of s 7(1)(d), because the wider its construction, the more likely it was to fall foul of all the requirements of the constitutional test. The appellant eschewed a submission that s 7(1)(d) was, on its true construction, so narrow that he had not contravened it.

316 In short, the respondents, though they had ample occasion to advance their submissions on the true construction of s 7(1)(d), have not had an opportunity in any of the four courts which have dealt with these proceedings to controvert the specific elements of any formulation by the appellant of the competing construction. This is but one of the aspects in which this Court's approach to the issues raised by the appeal is hampered by the want of a satisfactory procedural background. Another is the absence of proper assistance to the courts below due to the appellant's lack of legal representation. Yet another is a concession made by the Attorney-General of Queensland in the Court of Appeal and in this Court, to which it is now necessary to turn.

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breach of the peace or whereby a breach of the peace may be occasioned" – it would not have breached the test of invalidity stated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. That is why the appellant never adopted a limited construction which would have placed his conduct outside s 7(1)(d). Further, the appellant supported the dissenting judgment of McMurdo P, and her Honour adopted the meaning of the verb "insult" given in *The Macquarie Dictionary* (1981), which is the same as that set out above at [307]: *Power v Coleman* [2002] 2 Qd R 620 at 627 [11].

Did s 7(1)(d) effectively burden freedom of communication about government or political matters?

317 The majority of the Queensland Court of Appeal answered this question affirmatively, though Davies JA said the burden was "only … slight"[322] and Thomas JA said it was "not very great"[323]. These statements are very much obiter dicta, because the Attorney-General of Queensland conceded in argument in the Court of Appeal that, in some cases, s 7(1)(d) could burden the freedom[324]. In this Court, the Attorney-General repeated the concession. He said that s 7(1)(d) "can apply whether or not the prohibited language relates to matters of governmental or political interest so that … its practical operation and effect may, in some cases, burden communication about government or political matters"[325].

318 It would be necessary to examine this concession if the outcome of the appeal turned on its correctness. However, it does not. The concession may be assumed to be correct for the purposes of the next question, but that assumption implies no decision as to its actual correctness.

319 It is, however, unsatisfactory that the case is to be decided on an assumption that s 7(1)(d) fails the test enunciated in the question. To some extent that is because analysis of the present problem should address the problem in its entirety, rather than examining only part of it. It is also because, in dealing with the next question whether s 7(1)(d) is reasonably appropriate and adapted to serve a legitimate end, it is necessary to assess whether the burden it places on freedom of communication is heavy or light. The task which consideration of the first limb would require to be carried out, though superficially obviated by the concession, in this case returns in another guise in considering the second limb.

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322 *Power v Coleman* [2002] 2 Qd R 620 at 635 [37].

323 *Power v Coleman* [2002] 2 Qd R 620 at 645 [72].

324 *Power v Coleman* [2002] 2 Qd R 620 at 645 [71]. The concession conceals numerous assumptions, including an assumption that the constitutional protection of federal elections can be relevant to a State law like s 7(1)(d). This and other assumptions were only briefly debated in argument.

325 This concession was one which the first and second respondents and the Attorney-General of the Commonwealth also made; the Attorney-General for New South Wales disputed it, but "operated on the basis" of it.

Is s 7(1)(d) reasonably appropriate and adapted to serve a legitimate end?

320 *The background of the test.* The test which is crucial to this appeal has been held to arise from the following constitutional doctrines. The Commonwealth Constitution created a system of government which is representative (ss 1, 7, 8, 13, 24, 25, 28 and 30), in which the executive is responsible to Parliament (ss 6, 49, 62, 64 and 83), and which is unalterable save by democratic means (s 128)[326]. An indispensable incident of that system of representative and responsible government is freedom of communication on government or political matters between the electors and the elected, between the electors and the candidates for election, and between the electors themselves, so that the people may exercise a free and informed choice as electors[327]. That freedom is not confined to the election period itself[328]. But the freedom is not absolute: "It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution"[329]. The freedom operates as a restriction on legislative power, but it does not invalidate a law unless the law:

(a) effectively burdens the freedom; and

(b) (i) lacks a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government only amendable pursuant to s 128; and

(ii) is not reasonably appropriate and adapted to serve that end[330].

321 Since the analysis must proceed on the assumption that s 7(1)(d) has effectively burdened the freedom, the question is whether invalidation of s 7(1)(d) is necessary for the effective operation of the constitutional system of democratic government. More particularly, does it have

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326 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-559.

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

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

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

330 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562 and 567-568.

a legitimate end of the type described? And, if it does, is it reasonably appropriate and adapted to serve that end?

322 *Is there a legitimate end?* Section 7(1)(d) is not a law which punishes insults in the abstract or insults communicated in private. It is directed against the use of insulting words to persons in or near public places. Hence those words may be experienced by the wide range of people who move about in or near public places. This includes people of all ages, most levels of intelligence, all degrees of fortitude, most amounts of worldly experience, all shades of sensitivity, all ranges of temperament, all powers of self-control and all capacities for eloquence.

323 In seeking to prevent provocative statements of an insolent, scornful, contemptuous or abusive character, s 7(1)(d) does seek to serve legitimate ends. Insulting statements give rise to a risk of acrimony leading to breaches of the peace, disorder and violence, and the first legitimate end of s 7(1)(d) is to diminish that risk. A second legitimate end is to forestall the wounding effect on the person publicly insulted. A third legitimate end is to prevent other persons who hear the insults from feeling intimidated or otherwise upset: they have an interest in public peace and an interest in feeling secure, and one specific consequence of those interests being invaded is that they may withdraw from public debate or desist from contributing to it. Insulting words are a form of uncivilised violence and intimidation. It is true that the violence is verbal, not physical, but it is violence which, in its outrage to self-respect, desire for security and like human feelings, may be as damaging and unpredictable in its consequences as other forms of violence. And while the harm that insulting words cause may not be intended, what matters in all instances is the possible effect – the victim of the insult driven to a breach of the peace, the victim of the insult wounded in feelings, other hearers of the insult upset.

324 The goals of s 7(1)(d) are directed to "the preservation of an ordered and democratic society" and "the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity within such a society"[331]. Insulting words are inconsistent with that society and those claims because they are inconsistent with civilised standards. A legislative attempt to increase the standards of civilisation to which citizens must conform in public is legitimate. In promoting civilised standards, s 7(1)(d) not only improves the quality of communication on government and political matters by those who might otherwise descend to insults, but it also increases the chance that those who might otherwise have been insulted, and those who might otherwise have heard

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331 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169 per Deane and Toohey JJ; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 339 per Deane J.

the insults, will respond to the communications they have heard in a like manner and thereby enhance the quantity and quality of debate. It is correct that the constitutional implication protects not only true, rational and detached communications, but also false, unreasoned and emotional ones[332]. But there is no reason to assume that it automatically protects insulting words by characterising the goal of proscribing them as an illegitimate one.

325 *Are the legitimate ends compatible with the maintenance of constitutional government?* The legitimate ends described are "compatible with the maintenance" of the system of government prescribed by the Commonwealth Constitution. Indeed, those ends would tend to enhance that system to the extent that they foster conduct in Queensland in relation to political communication, both during federal election campaigns and at all other times, which is free of insulting behaviour. If the inquiry is shifted from the ends of s 7(1)(d) considered by themselves to the extent of their practical success, the system of government prescribed by the Constitution has worked extremely effectively in Queensland since 1931, notwithstanding the existence of s 7(1)(d), and it has worked extremely effectively in other places from earlier times, notwithstanding the existence of provisions like s 7(1)(d).

326 *Is s 7(1)(d) reasonably appropriate and adapted to serve its legitimate ends?*[333] Section 7(1)(d) in its relevant operation is limited in three respects. It is limited geographically to conduct in or near public places. It is limited in its application only to "insulting words". And it is limited in its requirement that the words be addressed to a person. Hence it leaves a very wide field for the discussion of government and political matters by non-insulting words, and it leaves a wide field for the use of insulting words (in private, or to persons other than those insulted or persons associated with them). In short, it leaves citizens free to use insults in private, and to debate in public any subject they choose so long as they abstain from insults. Even if s 7(1)(d) does create an effective burden on communication on government and political matters, that is not its purpose; it is not directed at political speech as such. Its purpose is to control the various harms which flow from that kind of contemptuous speech which is

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332 *Levy v Victoria* (1997) 189 CLR 579 at 623 per McHugh J.

333 The Attorney-General of the Commonwealth submitted that the relevant question was whether an assessment by the legislature that a particular legislative measure was appropriate and adapted to achieve a legitimate end was one which could reasonably be made. It is not necessary in this case to decide whether that submission, and related submissions about allowing the legislature a "margin of appreciation", are correct.

"insulting". Its impact on communications about government and political matters is therefore incidental only[334]:

> "[A] law whose character is that of a law with respect to the prohibition or restriction of communications about government or governmental instrumentalities or institutions ('political communications') will be much more difficult to justify as consistent with the implication than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications."

Section 7(1)(d) falls into the latter category. Similarly, a law that incidentally restricts or burdens the constitutional freedom as a consequence of regulating another subject matter is easier to justify as being consistent with the constitutional freedom than a law that directly restricts or burdens a characteristic of the constitutional freedom[335]. Section 7(1)(d) is a law of the former kind.

327 Further, a law curtailing political discussion may be valid if it operates in an area in which discussion has traditionally been curtailed in the public interest[336], or as part of the general law[337]. Insulting words are within a field of verbal communication which has traditionally, since well before federation, been curtailed in the public interest as part of the general law.

328 The inquiry into whether a law is reasonably appropriate and adapted to achieving a legitimate end does not call for a judicial conclusion that the law is the sole or best means of achieving that end. Apart from the fact that that would be an almost impossible task for which the judiciary is not equipped, this Court has not said anything of the kind either in *Lange v Australian Broadcasting Corporation*[338] or in any other case. This Court has only called for an inquiry

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334 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169 per Deane and Toohey JJ. See also Mason CJ at 143 and McHugh J at 234-235. See further *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 298-299 per Mason CJ, 337-338 per Deane J, 388-389 per Gaudron J.

335 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 396 per McHugh J.

336 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 389 per Gaudron J, instancing sedition.

337 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 218 per Gaudron J.

338 (1997) 189 CLR 520. In *Levy v Victoria* (1997) 189 CLR 579 at 598 Brennan CJ said: "Under our Constitution, the courts do not assume the power to determine

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into whether the law was reasonably appropriate and adapted to serve a legitimate end. This implies that, in a given instance, there may be several ways of achieving that end. It also implies that reasonable minds may differ about which is the most satisfactory. In particular, differences amongst reasonable minds can readily arise where several distinct factors – here, the preservation of the peace, the protection of feelings, the avoidance of upset, the liberty to communicate – have to be borne in mind. Other arms of government – here, the executive which introduced the Bill containing s 7(1)(d) and the legislature which enacted it – are better placed than the judiciary to assess the difficulties and merits of particular solutions to the problems at which the provision is aimed. "In weighing the respective interests involved and in assessing the necessity for the restriction imposed, the Court will give weight to the legislative judgment on these issues."[339] "[I]t is not for the Court to substitute its judgment for that of Parliament as to the best or most appropriate means of achieving the legitimate end".[340] The question is not "Is this provision the best?", but "Is this provision a reasonably adequate attempt at solving the problem?"

329 Normally the onus of demonstrating constitutional invalidity rests on the party propounding invalidity. Nothing in the authorities suggests that that position is different where invalidity on freedom of political communication grounds is at issue. Hence the party propounding invalidity must show that the law is of so unsatisfactory a character that it must be excluded from the class of possible laws which are reasonably appropriate and adapted to serve a legitimate end.

330 It does not follow from the fact that some communications on government and political matters are insulting that those communications form a significant part of the whole field. It is possible, and indeed quite easy, to communicate the substance of what is habitually communicated about government and political matters without recourse to insulting words. The fact that in the past some communications about government and political matters have been couched in insulting words does not establish that that element is a necessary characteristic of those communications. Nor is it a beneficial one. Insulting words do very little to further the benefits which political debate brings. Indeed, by stimulating anger or embarrassment or fear, they create obstacles to the exchange of useful

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that some more limited restriction than that imposed by an impugned law could suffice to achieve a legitimate purpose."

339 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 144 per Mason CJ.

340 *Rann v Olsen* (2000) 76 SASR 450 at 483 [184] per Doyle CJ. See also *Levy v State of Victoria* (1997) 189 CLR 579 at 598 per Brennan CJ.

communications. It is difficult speedily to overcome their effect by reasoned persuasion: commonly the method resorted to is an equally irrational counter-insult. The range of non-insulting human communication is vast and the range of non-insulting political communication is also very wide. There are almost infinite methods of conveying ideas, information and arguments on government and political matters which are not insulting. Section 7(1)(d) imposes no restrictions on subject matter, no time limitations and no area limitations on government and political communications. It does not prevent full, compelling, trenchant, robust, passionate, indecorous, acrimonious and even rancorous debate, so long as the words used are not insulting. If it can be said to burden the relevant freedom at all, that burden is very slight.

331 The authorities make it plain that the constitutional freedom exists not just for its own sake, but because it serves various specific purposes. One purpose is that the people be enabled to exercise a "free and informed choice as electors"[341]. It must be a "true choice with 'an opportunity to gain an appreciation of the available alternatives'"[342]. The material the communication of which is protected comprises "matters necessary to enable 'the people' to make an informed choice"[343]. Another purpose is to enable "access by the people to relevant information about the functioning of government … and … the policies of political parties and candidates for election"[344]. The content of the freedom to discuss government and political matters depends on the common convenience and welfare of society[345], and that is advanced by "discussion – the giving and receiving of information"[346]. Underlying the freedom is the interest of each member of the community in disseminating and receiving "information, opinions and arguments concerning government and political matters"[347]. The exercise of

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341 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; see also 561.

342 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560, quoting *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 187 per Dawson J.

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

344 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; see also 561, 570-571, 574.

345 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 565; see also 568 ("impeding discussion") and 571.

346 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571.

347 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571.

the freedom must involve at least the possibility that it will "throw light on government or political matters"[348].

332 These passages suggest that the use of insulting words to persons in or near a public place are outside the constitutional freedom. Insulting words, considered as a class, are generally so unreasonable, so irrational, so much an abuse of the occasion on which they are employed, and so reckless, that they do not assist the electors to an "informed" or "true" choice. Insulting words damage, rather than enhance, any process which might lead to voter appreciation of the available alternatives. Insulting words cannot be characterised as "information", and so are not capable of being an element in "discussion" (ie "the giving and receiving of information"). Not only are insulting words not "information", but they are not "opinions and arguments" either. Insulting words are therefore not "matters" which are "necessary" to enable the people to make an informed choice. The terms of insulting words are usually so offensive and violent that they do not carry any reasonable possibility of throwing "light on government or political matters". Insulting words do not advance, but rather retard, the "common convenience and welfare of society". To address insulting words to persons in a public place is conduct sufficiently alien to the virtues of free and informed debate on which the constitutional freedom rests that it falls outside it.

333 The appellant submitted that the strength of the implied freedom of political communication could be gauged from the fact that it reflects "the importance that our society places on open discussion and the search for truth, the need for diversified opinions to be known and for the strengths and weaknesses of those opinions to be identified, the right to criticize, the value of tolerance of the opinions of others, and the social commitment to the value of individual autonomy, all being vital to the health of any democratic system of open government"[349]. Let that be admitted. The fact is that insulting words are not truly part of "open discussion" or "the search for truth". They do not really express "opinions" or enable the strengths and weaknesses of what genuinely are opinions to be identified. They form no part of criticism which rises above abuse. They reflect the vices of intolerance rather than the virtues of tolerance. They can crush individual autonomy rather than vindicating it.

334 The appellant also offered some specific arguments for the view that s 7(1)(d) was not reasonably appropriate and adapted to serve a legitimate end. One was that it was not qualified by any defence: but the general defences in Ch 5 of the *Criminal Code* do exist; even if they did not exist, the absence of other defences is not fatal; and the principal authority relied on by the appellant

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348 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 576.

349 Relying on *Watson v Trenerry* (1998) 100 A Crim R 408 at 413; 122 NTR 1 at 6.

was a very different case[350]. Another ground was that the limits placed on "insulting speech" by s 7(1)(d) depended on the "whim of a public official": that is not so, since any decision by a police officer adverse to the interests of the speaker is liable to review by a court, not on the basis of a whim, but on the application of s 7(1)(d) to the facts. Finally, it was said that the legislature had not attempted to balance the aims of s 7(1)(d) with the implied freedom; for the reasons set out above, that criticism is without foundation.

335 *Conclusion.* Section 7(1)(d) does not cut so far into the freedom of political communication as to detract from what is necessary for the effective operation of the system of government prescribed by the Constitution. "[T]he freedom of communication which the Constitution protects against laws which would inhibit it is a freedom which is commensurate with reasonable regulation in the interests of an ordered society."[351] The proscription by s 7(1)(d) of the uttering of insulting words to a person in or near a public place is reasonable regulation in the interests of an ordered society.

336 It is reasonably appropriate and adapted to the legitimate ends it serves.

Other issues

337 It follows that the question whether, if s 7(1)(d) as enacted were invalid, it should be read down, does not arise. The same is true of the question whether, even if s 7(1)(d) were invalid and were not read down, the assault and obstructing police convictions could stand.

338 I agree with the orders proposed by Callinan J.

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350 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 25-26, 31-34 per Mason CJ, 38, 45-46 per Brennan J, 92 per Gaudron J, 98-105 per McHugh J.

351 *Levy v Victoria* (1997) 189 CLR 579 at 608 per Dawson J.

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