Case Note

The Implied Freedom of Political Communication in *Monis v the Queen*: 'A Noble and Idealistic Enterprise which has Failed, is Failing, and Will Go on Failing?'

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I INTRODUCTION

Monis v the Queen[1] presented the High Court with the opportunity to clarify the second limb of the *Lange*[2] test in determining the scope and nature of the implied freedom of political communication. The Court delivered a decision split three to three,[3] along gender lines, leaving the law unclear. The three male justices, French CJ, Hayne and Heydon JJ decided that the constitutional implied freedom of political communication prevents the Commonwealth from criminalising the sending of highly offensive material through the post, whilst the three female justices decided it did not. Crennan, Kiefel and Bell JJ took at contextual approach and characterised the purpose of the impugned legislation as an individual's right to be free from 'seriously' offensive material intruding into the personal domain, a purpose compatible with the constitutionally-prescribed system of representative and responsible government. The dissenting judges, however, characterised the purpose of the law as preventing the use of postal services in an offensive manner. The even split resulted the decision of the New South Wales Court of Appeal being affirmed. [4] As a result, s 471.12 of the *Criminal Code 1995* (Cth) ('*Criminal Code*') was declared valid.

Whilst the decision has limited precedential value, it serves to highlight the continued divergence of judicial opinion on the application of the

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[1] *Monis v the Queen; Droudis v the Queen* (2013) 295 ALR 259 ('*Monis'*).

[2] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (*'Lange'*).

[3] Only six justices delivered judgments because the seventh, Justice William Gummow, retired in October 2012, before the case was fully heard.

[4] *Judiciary Act 1903* (Cth) s 23 provides that in the event of the High Court delivering a judgment that is evenly split; the decision of the preceding court will be affirmed.

Lange test. Despite the jurisprudential confusion, the decision of *Monis* will no doubt have a number of implications for future considerations of similar questions regarding the role and nature of the implied freedom of political communication.

II BACKGROUND TO THE APPEAL

A *Factual Matrix*

In 2011 Mr Man Haron Monis was charged with 12 counts under s 471.12 of the *Criminal Code*. Ms Amirah Droudis was charged with eight counts of aiding and abetting Mr Monis in the commission of those offences. Section 471.12 of the *Criminal Code* provides that it is an offence for a person to use postal or similar services 'in a way… that reasonable persons would regard as being, in all the circumstances… offensive.'

The charges concerned the sending of letters, and in one case a recording on a compact disc, by Mr Monis to the relatives of Australian soldiers who had been killed whilst on active service in Afghanistan. The letters contained expressions of sympathy to the families, but also contained criticisms of the deceased soldiers. These criticisms included assertions that they were murderers and inferior in moral merit to Adolf Hitler. In one case, the body of a deceased soldier was likened to the 'dirty body of a pig'. Copies of the letters were also sent to various politicians. Mr Monis and Ms Droudis argued that the letters constituted communications on political and governmental matters, which are the subject of an implied freedom of political communication. They alleged s 471.12 violated this implied constitutional freedom and was therefore invalid.

B *Procedural History*

During the appellants' joint trial in the District Court of New South Wales Tupman DCJ applied the *Lange* test and held that the impugned provision did not infringe the implied freedom[5]. Her Honour accepted that the provision burdened political communication, but that the law was reasonably appropriate and adapted for the legitimate purposes of 'protecting the integrity of the post', preventing breaches of the peace and preventing harm to recipients.[6]

[5] *R v Monis* (2011) 12 DCLR (NSW) 266, 278.
[6] *R v Monis* (2011) 12 DCLR (NSW) 266.

The decision was appealed to the New South Wales Court of Appeal, which unanimously affirmed Tupman DCJ's decision.[7] In June 2012 the appellants were granted special leave to appeal to the High Court.

III THE DECISION OF THE HIGH COURT

A *Common Ground*

In determining the validity of s 471.12 the Court applied the *Lange* test, again confirming its correctness in determining the extent of the ability of the legislature to make laws in contravention of the implied freedom.

The *Lange* test, as modified by *Coleman v Power*,[8] is comprised of two limbs:

1. Does the law effectively burden freedom of communication about government or political matters?
2. If so:
    a. Does the law have an object that is compatible with the maintenance of the constitutionally-prescribed system of representative and responsible government; and
    b. Is the law reasonably and appropriately adapted to achieving that legitimate object or end?

The court reiterated that the implied freedom of political communication does not operate as an individual right. It is no more or less than an implied constraint on the ability of the parliament and executive to legislate.[9] All members of the court agreed that the provision burdened the implied freedom, holding that the first limb of the *Lange* test was satisfied. This was because even if the provision were construed narrowly, inevitably some political communications would fall within its ambit.[10]

Similarly, all members of the court construed the word 'offensive' in s 471.12 narrowly.[11] The purpose and operation of the section is only to

[7] *Monis v The Queen* (2011) 256 FLR 28.
[8] (2004) 220 CLR 1. In *Coleman v Power* a majority of the High Court reformulated the second limb of the *Lange* test to ask whether the impugned law achieves its legitimate object *in a manner, which* is compatible with the maintenance of the system of representative and responsible government for which the Constitution provides.
[9] *Monis* [2] (French CJ, with whom Heydon J agreed), [103] (Hayne J), [266] (Crennan, Kiefel and Bell JJ).
[10] *Monis* [73] (French CJ, with whom Heydon J agreed at [236]), [171] (Hayne J), [255] (Crennan, Kiefel and Bell JJ).
[11] *Monis* [43] (French CJ, with whom Heydon J agreed), [191] (Hayne J), [309] – [316] (Crennan, Kiefel and Bell JJ).

make it illegal to use postal services in a way that is 'seriously'[12] offensive. Where the judgments diverge is in relation to the application of the second limb of the *Lange* test. Differing views emerged on whether the section serves a legitimate purpose, whether it is appropriate and adapted to do so, and if otherwise invalid whether it can be read down to be limited to certain types of communications.

B *The Judgments of French CJ and Hayne J*

The judgments of French CJ and Hayne J, although written separately, contain a number of commonalities. Their Honours were overtly concerned with the implications of restricting freedom of speech based on what is deemed 'offensive' in particular contexts. Both appeared to consider the restrictions on political communications greater than Crennan, Kiefel and Bell JJ did and both attached a greater degree of weight to the role that offensive communications inevitably play in democratic political discourse.

1 *Application of the Second Limb of the Lange Test*

Their Honours construed the purpose of the provision narrowly, holding its object simply to be the prevention of the use of the postal service in an offensive way. According to their Honours, this is not a legitimate purpose under the *Lange* test.

French CJ held that such a purpose is not a legitimate end because at the very least, the sheer breadth of the provision is incompatible with the maintenance of the freedom of communication, which is a necessary incident of the system of representative government prescribed by the Constitution.[13] His Honour argued that 'great care must be taken in this matter lest condemnation of the particular views said to be have been advanced by the appellants, or the manner of their expression, distort the debate by obscuring the centrality and importance of the freedom of political communication.'[14] His Honour expressed concern at the difficulties of attempting to separate a political purpose from an offensive purpose, concluding that that abuse and invective are an inevitable part of political discourse.

Hayne J also concluded that the purpose of s 471.12 was to penalise and thereby discourage the use of the postal service in an offensive manner. Therefore, the section did nothing more than regulate the civility of discourse, and following *Coleman v Power*, this is not a 'legitimate end'.

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[12] *Monis* [336] (Crennan, Kiefel and Bell JJ).
[13] Ibid [73].
[14] Ibid [87].

C *The Judgment of Heydon J*

Whilst Heydon J ultimately agreed with French CJ, his Honour made a number of critical observations regarding this area of the law. Heydon J characterised the implied freedom of political communication as a 'noble and idealistic enterprise which has failed, is failing, and will go on failing.'[15] His Honour used the bulk of his judgment to seriously question the existence of the implied freedom, echoing concerns expressed in *Wotton.*[16]

Heydon J's judgment initially appeared to conform to the approach of the joint judgment in considering the adverse implications of holding s 471.12 to be invalid. However, his Honour ultimately considered himself to be bound by the sheer weight of precedent affirming the existence of the implied freedom. He concluded, begrudgingly, that the implied freedom must be again affirmed on the current facts, despite the uncomfortable result of doing so.

Heydon J concluded his judgment with the following:

> On the existing law, there is no alternative but to make the orders proposed by Hayne J – a result which, some may think, demonstrates how flawed that law is.[17]

However, Heydon J's reasoning that there was no other option in the circumstances than conceding to a 'flawed' outcome is partially undermined by the alternative proposed by the joint judgment of Crennan, Kiefel and Bell JJ. Their Honours acknowledged the existence and importance of the implied freedom, but limited it to certain types of offensive conduct, to which Mr Monis' and Ms Droudis' communications did not belong.

D *Joint Judgment: Crennan, Kiefel and Bell JJ:*

The joint judgment of Crennan, Kiefel and Bell JJ began in a similar fashion to those of French CJ and Hayne J in confirming the correctness of the *Lange* test. However, in determining the purpose of s 471.12, their Honours differed from their male colleagues in holding the purpose of the provision is to protect people from intrusion of offensive material into their personal domain,[18] rather than to prevent offensive uses of the post. In applying the second limb of *Lange*, their Honours focused on proportionality as the appropriate test.

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[15] Ibid [251].
[16] *Wotton v Queensland* (2012) 246 CLR 1. His Honour noted statements of the implied freedom have varied in each case in which it has been considered, including the present one: *Monis* [245].
[17] *Monis* [251].
[18] Ibid [320].

1 *Application of the Second Limb of the Lange Test*

Their Honours concluded that the second limb of the *Lange* test involves a series of different enquiries. First, the relationship between a valid legislative object and the means adopted for its attainment must be determined.[19] In order to answer this, their Honours held that the latter must be 'proportionate' to that object.[20] Consequently, if there are other 'less drastic' means by which the purposes of the law could be achieved, invalidity may result.[21]

Second, even if the ends and means of the impugned legislation are proportionate, the second limb of the *Lange* test also requires that they each be tested for compatibility with the constitutional imperative of the maintenance of the system of representative government.[22]

2 *The Importance of Context*

In applying both limbs of the *Lange* test, the joint judgment placed an emphasis on the importance of context. In determining the correct construction of s 471.12, their Honours argued that the appellants' submission that the term 'offensive' should be construed broadly 'denies the relevance of context.'[23] Their Honours argued that the modern approach to interpretation, particularly in the case of general words, requires that the context be considered in the first instance and not merely later when some ambiguity is said to arise.[24]

Accordingly, their Honours found that the purpose of s 471.12 is more than merely ensuring civility of discourse between users of the postal service. Crennan, Kiefel and Bell JJ considered the concept of the 'home as the castle' as being an important consideration in the case before them[25]. Their Honours held this concept conferred a special benefit of privacy that all citizens are entitled to enjoy within the confines of their own home. The State may legitimately legislate to protect this privacy, which their Honours ultimately characterised as 'an ability to avoid intrusions'.[26] This purpose was legitimate because it is compatible with the maintenance of the constitutionally prescribed system of government, and s 471.12 is reasonably appropriate and adapted to do so. Section 471.12 may seek to protect people from intrusion of seriously offensive material into their personal domain in accordance with *Lange*, provided

[19] Ibid [282].
[20] Ibid [283].
[21] Ibid [280].
[22] Ibid [281].
[23] Ibid [309].
[24] Ibid [309].
[25] Ibid [321].
[26] Ibid [321].

'it does not go too far.'[27] Their Honours held that the effect of s 471.12 on political communication is incidental, and therefore proportionate to the purpose of the section. As communications prohibited by the section are only those of a very serious nature, the section cannot be said to impinge extensively on the implied freedom.

IV COMMENT

Whilst *Monis* has limited precedential value beyond its own facts, a number of observations can be made regarding the implications for the law in this area and regarding certain aspects of interest within the judgment itself.

The even split along gender lines is an immediately noticeable feature of *Monis*, and will no doubt provide thought-provoking material for further debate around the role and nature of Australian feminist jurisprudence. This is particularly so given the joint judgment's focus on context and experience rather over a strict interpretation of the law appears to bear out some of the literature in this area.[28]

Although the decision is one of a number of recent cases considering the implied freedom of political communication,[29] much remains unresolved. What must be taken into account in determining the second limb of *Lange*, remains unclear, as does whether such considerations are best described as 'proportionality tests', whether the word 'effective' in 'effective burden' is important, and finally, what the 'maintenance of the system of representative and responsible government' necessitates. More fundamentally, Heydon J's judgment calls into question the role and functionality of the implied freedom, inviting comment on whether the doctrine has indeed 'failed' in its aims.

A *The Purpose of the Implied Freedom of Political Communication*

The implied freedom of political communication emerged in the early 1990s, before undergoing a reformation in the *Lange* decision later in the decade. In *Lange*, the court unanimously held that the source of the

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[27] Ibid [325].

[28] See, eg, Ann C Scales, 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95(7) *Yale Law Review* 1373. There is a school of feminist jurisprudence, based on the work of development psychologist Carol Gilligan, that female judicial reasoning typically 'expands the available universe of facts, rules and relationships in order to find a unique solution to each unique problem:' see Carol Gilligan, *In a Different Voice* (Harvard University Press 1982). In relation to *Monis*, see Helen Irving, *Constitutional Interpretation: A Woman's Voice?* (20 March 2013) A Woman's Constitution <http://blogs.usyd.edu.au/womansconstitution/2013/03/constitutional_interpretation_1.html>.

[29] See, eg, *Wootton v Queensland* (2012) 285 ALR 1; *Hogan v Hinch* (2011) CLR 506.

implied freedom was the text of the Constitution itself, particularly ss 7 and 24,[30] which provide that representatives of both federal houses of Parliament be elected directly by the people. Inherent in this interpretation of the freedom is the concept that in order for the people to freely perform this task, they must be able to communicate with one another on political or governmental matters.[31]

As Mason CJ stated in *Australian Capital Television Pty Ltd v The Commonwealth ('ACTV')*:[32]

> ... Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken and in this way influence the elected representatives...[33]

Accordingly, if this is the source of the freedom, it follows that the purpose may be stated loosely as 'safeguarding free and fair elections'.[34] Whilst there is no doubt, in the words of Heydon J, that this is a 'noble and idealistic enterprise', it is unclear whether recent decisions of the High Court, including *Monis*, adequately serve this intended function. As Heydon J argues, *Monis* sits within a long line of unclear jurisprudence on what types of communication will be protected. A history of differing of judicial opinion has plagued the operation of the doctrine since its inception; *Lange* was a unique moment of clarity and agreement. This lack of clarity may partially explain why Heydon J argues the doctrine has failed in its purpose.

It has been suggested that a key flaw within the doctrine is the failure of the High Court to adequately explain what constitutes 'political' communication.[35] In *Monis*, the High Court again avoided an enunciation of a definition as it was not strictly at issue on the facts. In Lange, the court held that 'political communications' were all those communications falling within the ambit of the Constitutional requirement that citizens 'be able to communicate with each other with respect to matters that could

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[30] The *Australian Constitution* s 7 provides the Senate 'shall be composed of senators for each State, directly chosen by the people of the State', whilst s 24 provides that the House of Representatives 'shall be composed of members directly chosen by the people of the Commonwealth'.

[31] This approach was confirmed in *Monis* [273] (Crennan, Kiefel and Bell JJ).

[32] (1992) 177 CLR 106.

[33] *ACTV* 138.

[34] Tom Campbell and Stephen Crilly, 'The Implied Freedom of Political Communication, Twenty Years On' (2011) 30 (1) *University of Queensland Law Journal* 59, 67.

[35] See, eg, Dan Meagher, 'What is Political Communication? The Rationale and Scope of the Implied Freedom of Political Communication' *Melbourne University Law Review* 28, 438; Tom Campbell and Stephen Crilly, 'The Implied Freedom of Political Communication, Twenty Years On' (2011) 30 (1) *University of Queensland Law Journal* 59, 67.

affect their choice in federal elections or constitutional referenda…'[36] Since its genesis in the *ACTV Case*,[37] The High Court has always insisted that the implied freedom is limited. Yet it is also clear that the freedom is not limited to the context of election campaigns, as decisions relating to voting choice are continually being informed.[38] However, as Campbell and Crilly argue, if almost anything capable of forming a decision of who to vote for can be the subject of the freedom, the limitation begins to appear purely academic and renders the doctrine unpredictable in its application. Yet at the same time, the fact that very few laws[39] have been subject to the doctrine's operation since the foundational cases[40] is also suggestive of a failure of the doctrine's original purpose; the protection of some forms of speech.[41] A determination of what is 'political' may resolve some of this confusion, and serve to mitigate the type of 'flawed' results lamented by Heydon J.

The circumstances and divergence of opinion in *Monis* exemplify such criticisms of the doctrine. If the approach of French CJ, Hayne and Heydon JJ is taken and the law is applied with a view to protect freedom of political communication, the unpalatable outcome of allowing behavior such as Mr Monis' to occur ensues. Furthermore, to the average citizen the link between the type of communications sent by Mr Monis to the families of deceased soldiers and aiding citizens to make informed electoral choice might seem tenuous. Any political flavour to the conduct in *Monis* is surely overshadowed by the personal implications intended for the recipients.[42] Whilst the approach favoured by the joint judgment is ostensibly able to find the middle ground by applying the law with regard

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[36] *Lange*, 571.
[37] (1992) 177 CLR 106.
[38] For example, the implied freedom has been applied to issues such as, inter alia, Victorian duck shooting regulations (*Levy v Victoria* (1997) 189 CLR 520), legal advertising (*APLA v Legal Services Commissioner* (NSW) (2005) 224 CLR 322) and a protestor alleging a particular police officer was corrupt (*Coleman v Power* (2004) 220 CLR 1).
[39] Only one federal law, one state law and one aspect of the common law have been affected by the implied freedom since 1992.
[40] *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
[41] Adrienne Stone suggests the implied freedom is 'weak across two axes: it covers only a narrow category of expression and provides relatively weak protection for that expression': 'Insult and Emotion, Calumny and Invective': Twenty Years of Freedom of Political Communication' (2011) 30(1) *University of Queensland Law Journal* 79, 79-80.
[42] To illustrate this point, see a number of media reports on the issue which focus on the latter: The Herald Sun 'Family Blasts Accused Sheik Man Haron Monis' November 11 2009 <http://www.heraldsun.com.au/news/family-blasts-accused-sheik-man-haron-monis/story-e6frf7jo-1225796243955>; WA Today (Online) 'Bid for Right to Offend Bereaved' August 12 2012 <http://www.watoday.com.au/national/bid-for-right-to-offend-bereaved-20120811-24168.html>; The Sydney Morning Herald, 'High Court Dismisses Appeal in 'Offensive Letters' Case' February 27 2013 <http://www.smh.com.au/opinion/political-news/high-court-dismisses-appeal-in-offensive-letters-case-20130227-2f53i.html>.

to the context of the communication, it does not provide clear principles capable of application or prediction by the community, nor does it inspire confidence from a civil rights perspective. Without a clear enunciation of what is 'political communication' and what is not, the application of the doctrine is likely to continue to be problematic.

Until these issues are resolved, the application of the implied doctrine will remain uncertain and unpredictable. To this end, the doctrine may indeed be failing in its original purpose in two key ways: it is arguably not working to protect freedom of political communication, evidenced by the decisions of the post-Mason High Court such as *Monis*, and yet simultaneously many judges would apply the freedom to communications such as those of Mr Monis, despite the tenuous connection to the freedom's original purpose. This is a paradoxical situation and elucidates Heydon J's characterization of the freedom as a 'failure' and the law it results in as 'flawed'.

V CONCLUSION

Whilst not all will agree with Heydon J's assertion that the implied freedom of political communication is a doctrine that has 'failed, is failing, and will go on failing,' there is little doubt that this area of the law remains in a state of confusion and it appears that decisions, at least for now, will occur on a case-by-case basis. Whether the reformulated bench[43] will take up Heydon J's throwing down of a gauntlet to reconsider the existence of the freedom appears unlikely, but ultimately remains to be seen. In the interim, the judgment will no doubt fuel debate in regards to the need for a bill of rights in the absence of clearly articulated judicial principles.

[43] Heydon J retired in March 2013 and was succeeded by Keane J. Gageler J succeeds Gummow J.