

SUPREME COURT OF QUEENSLAND

CITATION: *Coleman v P and Anor* [2001] QCA 539

PARTIES: **COLEMAN, Patrick John**
(appellant)
v
P
C
(respondents)
ATTORNEY GENERAL (Qld)
(intervenor)

FILE NO/S: CA No 69 of 2001
DC Nos 335, 336, 337, 338, 339 and 340 of 2000

DIVISION: Court of Appeal

PROCEEDING: Appeal against conviction

ORIGINATING COURT: District Court at Townsville

DELIVERED ON: 30 November 2001

DELIVERED AT: Brisbane

HEARING DATE: 18 October 2001

JUDGES: McMurdo P, Davies and Thomas JJA
Separate reasons for judgment of each member of the Court;
Davies and Thomas JJA concurring as to the orders made,
McMurdo P dissenting in part

ORDER: **1. The appeal is allowed.**
2. The respondents are ordered to pay the appellant's costs of the appeal.
3. The order of Pack DCJ dated 26 February 2001 is set aside and in lieu thereof it should be ordered that –
a) The appeal be allowed in respect of the conviction recorded in respect of s 7A(1)(c) of the *Vagrants, Gaming and Other Offences Act 1931* and that the conviction and sentence in respect of that matter be set aside;
b) The appeal be in all other respects dismissed;
c) That the respondents pay the appellant one half of the appellant's costs of and incidental to the appeal to be assessed.
4. It is declared that s 7A(1) of the *Vagrants, Gaming and Other Offences Act* is beyond the legislative power of the Queensland Parliament, and that s 7 A(1)(a) thereof should be read and construed as if the words and punctuation, "abusive, or insulting" were deleted therefrom.

CATCHWORDS: CONSTITUTIONAL LAW – INTERPRETATION – IMPLICATIONS FROM CONSTITUTION – SYSTEM OF REPRESENTATIVE AND RESPONSIBLE GOVERNMENT PRESCRIBED BY CONSTITUTION – IMPLIED FREEDOM OF COMMUNICATION CONCERNING GOVERNMENT AND POLITICAL MATTERS – WHETHER LAW INFRINGES IMPLIED FREEDOM – constitutional validity of s 7(1)(d) and s 7A of the *Vagrants, Gaming and Other Offences Act 1931* – where provisions directed to printing, publishing, distributing or possessing material containing “threatening, abusive or insulting” words – two part test in *Lange* test applied – whether the provisions serve a legitimate end of maintenance of proper governmental function and prevention of mischief and whether law reasonably appropriate and adapted to that end – where infringement of constitutional freedom by s 7(1)(d) slight – where s 7(1)(d) satisfies second limb of *Lange* – where under s 7A no defamation defences available – where prohibited conduct not limited to acts done in public – where impossible to read down meaning of “insulting” to cover only “contemptuous rudeness” – where s 7A stifles political comment and infringes the freedom – where s 7A invalid to the extent that it applies to “abusive or insulting words” but not “threatening words”

CRIMINAL LAW – PARTICULAR OFFENCES – MISCELLANEOUS OFFENCES AND MATTERS – where the appellant was convicted of using insulting words and publishing insulting words under s 7(1)(d) and s 7A(1)(c) of the *Vagrants, Gaming and Other Offences Act 1931* – reference to history of those provisions

STATUTES – INTERPRETATION ACTS AND CLAUSES – PARTICULAR ACTS AND ORDINANCES – QUEENSLAND – SAVING CLAUSES – application of s 9 *Acts Interpretation Act 1954* to s 7A – severance and reading down - consideration of the Court’s role in the application of such statutes – *Nationwide News* considered - where inappropriate to read down the meaning of ‘insulting’ to confine its operation – where more appropriate to construe section as if “insulting” and “abusive” were deleted

Acts Interpretation Act 1901 (Cth), s 15A
Acts Interpretation Act 1954 (Qld), s 9, s 14, s 14B
Commonwealth Constitution
Crimes Act 1900 (ACT), s 546A
Defamation Act 1889 (Qld), s 15, s 16
Judiciary Act 1903 (Cth), s 78B
Police Offences Act 1935 (Tas), s 12

Police Powers and Responsibilities Act 1997 (Qld), s 120
Racecourses Act and Other Acts Amendment Act 1936 (Qld)
Summary Offences Act 1988 (NSW), s 4
Summary Offences Act 1923 (NT), s 47, s 54
Vagrants, Gaming and Other Offences Act 1931 (Qld) s 7(1),
s 7(1)(d), ss 7A(a)-(d)

Annett v Brickell [1940] VLR 312, considered
Cunliffe v The Commonwealth (1993-1994) 182 CLR 272,
considered
Lange v Australian Broadcasting Corporation (1997) 189
CLR 520, applied
Levy v State of Victoria (1997) 189 CLR 579, considered
Nationwide News v Wills (1992) 177 CLR 1, applied
Pidoto v Victoria (1943) 68 CLR 87, considered
Rann v Olsen (2000) 159 FLR 132, considered
Sellars v Coleman [2001] 2 Qd R 565, considered
Re F, ex parte F (1986) 161 CLR 376, considered
Thurley v Hayes (1920) 27 CLR 548, considered
Voigt v Loveridge; Ex parte Loveridge [1938] St R Qd 303,
considered

COUNSEL: No appearance by the appellant; the appellant's submissions
were heard on the papers
M Copley for the respondents
P A Keane QC, with G R Cooper for the intervenor

SOLICITORS: The appellant was self represented
Director of Public Prosecutions (Qld) for the respondents
C W Lohe, Crown solicitor for the intervenor

- [1] **McMURDO P:** I have read the reasons for judgment of Thomas JA in which the relevant issues and facts are set out. I agree with Thomas JA that the appeal should be allowed in respect of the conviction recorded under sub-s 7A(1)(c) *Vagrants, Gaming & Other Offences Act 1931* (Qld) ("the Act") and that the conviction and sentence under that sub-section should be set aside.
- [2] I would also allow the appeal in respect of the conviction and sentence under sub-s 7(1)(d) of the Act and set aside that conviction and sentence.

The Implied Constitutional Freedom of Communication

- [3] The Constitution protects against laws which impinge upon the freedom of communication between Australian community members on political and government matters relevant to the system of responsible and representative government provided by the Constitution.¹ In *Lange v Australian Broadcasting*

¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow, Kirby JJ at 561-562; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1993-1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1993-1994) 182 CLR 211; *Cunliffe v The Commonwealth* (1993-1994) 182 CLR 272; *Levy v Victoria* (1997) 189 CLR 579.

Corporation,² the High Court stated the test for determining whether a law infringes this constitutional implication:

"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 If the first question is answered 'yes' and the second is answered 'no', the law is invalid."

- [4] The implied freedom of communication protects political discussion at all levels of government including State government and has application to State laws.³ A law which clearly purports to prohibit or control some or all communications relating to government or government instrumentalities will be much more difficult to justify as consistent with the implied freedom of communication than a law aimed at another subject which incidentally has that effect: *Nationwide News Pty Ltd v Wills*.⁴

- [5] In *Cunliffe v The Commonwealth* Gaudron J noted:
 "[I]f a law imposes a direct prohibition on political discussion in an area where none previously existed, it will ordinarily be concluded that it has the impermissible purpose of curtailing that discussion unless it can clearly be seen to be serving some overriding and important public interest. Even if there is a public interest of that kind, that conclusion may still be reached if the public interest can be served by less drastic measures.

The above considerations indicate that a law which curtails political discussion may be valid if the curtailment is no more than a limited and incidental by-product of a genuine regulatory scheme or if it operates in an area in which discussion has traditionally been curtailed in the public interest, as, for example, with the law of sedition. Beyond that, some pressing public interest would have to be shown for the law to be valid"⁵

The Issue

² Ibid, 567-568.

³ Ibid, 561 and *Levy v The State of Victoria* (1997) 189 CLR 579, Brennan CJ at 596; *R v Brisbane TV Limited ex p Criminal Justice Commission (No 2)* [1998] 2 QdR 483; *Sellars v Coleman* [2001] 2 Qd R 565.

⁴ (1992) 177 CLR 1, Deane and Toohey JJ at 76-77; *Cunliffe v The Commonwealth* (1993-1994) 182 CLR 272, Deane J at 337.

⁵ *Cunliffe v The Commonwealth* (1993-1994) 182 CLR 272, 388-389.

- [6] The Solicitor-General, Mr Keane QC, on behalf of the Attorney fairly conceded that sub-ss 7(1)(d) and 7A(1)(c) of the Act can have application to matters of government or political interest and in some cases could burden the freedom of communication about government or political matters. Mr Keane also accepted that both the appellant's oral statement "This is Constable ('P') a corrupt police officer", and the pamphlets the appellant distributed headed "Get to know your local corrupt type coppers" concerning Constable P, which resulted in the two charges under the Act, were communications about government or political matters. Mr Keane also conceded that this is not changed by the existence of a complaints procedure about police conduct to the Criminal Justice Commission.⁶
- [7] The issue to be determined then is whether each sub-section satisfies the second limb of the *Lange* test; if not, it is invalid.

Sub-section 7(1)(d) of the Act

- [8] Section 7(1) of the Act provides a penalty of \$100 or imprisonment for six months and/or the entering into a recognisance to be of good behaviour for up to 12 months for:

"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;"

(The relevant sub-section is emphasised.)

- [9] "Public place" is defined as including
 "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;"⁷

- [10] The width of the definition of "public place" is immediately apparent. Potentially, any place, even a private home, could become by regulation a public place. Conceivably, any place where members of the Australian community could possibly wish to discuss political or government matters could, by regulation, be a public place under the Act.

⁶ See *Coleman v Power* [2001] QDC 027, Appeal Nos 335-340 of 2000, p 11, para [28].

⁷ Section 2 of the Act.

- [11] The words "threatening", "abusive" and "insulting" are not defined in the Act. They should then be given their ordinary meaning having regard to their context in the Act.⁸ To "threaten" means "1. to utter a threat against; menace. 2. to be a menace or source of danger to. 3. to offer (a punishment, injury, etc.) by way of a threat. 4. to give an ominous indication of: *the clouds threaten rain.* –v.i. 5. to utter or use threats. 6. to indicate impending evil or mischief."⁹

To "insult" is "1. to treat insolently or with contemptuous rudeness; affront."¹⁰

To "abuse" is "1. to use wrongly or improperly; misuse: *to abuse authority, to abuse a confidence.* 2 to do wrong to; act injuriously towards; *to abuse one's wife.* 3. to revile; malign. 4. *Archaic.* to deceive."¹¹

- [12] Sub-section 7(1)(d) of the Act does have significant potential to impinge upon the constitutional freedom of communication discussed in *Lange*. Whilst threatening words are often associated with serious breaches of the criminal law,¹² relatively unobjectionable words can also be threatening. A person could use threatening words by saying: "I will not vote for you unless you change your policies" or "You will lose the election unless you fund this worthy cause" or "You will rot in hell for your callous treatment of XYZ". Words said when interjecting or heckling a political candidate's address, vociferously arguing a matter of government policy with a politician or government representative or in a heated discussion with door-knocking or street-walking political candidates or their supporters could be abusive or insulting and offend sub-s 7(1)(d). For example, the term "scab" was found to be "insulting" under the Act: *Voight v Loveridge; ex parte Loveridge*.¹³ Even truthful legitimate complaints could constitute threatening, abusive or insulting words under the Act.
- [13] In a perfect world, no-one would threaten, abuse or insult another, even when discussing political and governmental matters and for generations many mothers have advised their progeny never to discuss politics in polite society. But Queensland is not yet Utopia and the world of politics is often far from polite society. The reality is that political and governmental matters are often discussed vigorously in public, sometimes in language which can be described as threatening, abusive or insulting, at least by those who disagree with the oral views expressed. The wide definition of "public place" has the potential to impinge upon such discussions anywhere in the State, even, by regulation, in private homes.
- [14] I turn now to the central question: is the sub-section reasonably appropriate and adapted to serve a legitimate end which is compatible with the Constitution?
- [15] It is true that there has long been a regulatory regime aimed at controlling behaviour in public to avoid breaches of the peace but such schemes have not always included

⁸ *Acts Interpretation Act* 1954 (Qld), s. 14B.

⁹ Macquarie Dictionary, Second Revised Edition, Macquarie Library, 1991.

¹⁰ Ibid.

¹¹ Ibid.

¹² See, eg, *Criminal Code*, ss 409, 412, 414, 415, 416, 417, 417A. In *Beutal v Turner* (1910) QWN 35 the Full Court found that the use of offensive language, offering to fight the complainant and taking an aggressive stance was capable of amounting to threatening language with intent to provoke a breach of the peace.

¹³ [1938] StR Qd 303.

provisions akin to sub-s 7(1)(d). The Act is described in its heading as "An Act to make better provision for the prevention and punishment of offences by vagrants and disorderly persons, for the suppression of unlawful gaming and other offences, and for other purposes".¹⁴

- [16] Kennedy Allen in "Police Offences of Queensland"¹⁵ notes that:
 "Clause [7](d) creates a new form of criminal responsibility. It involves this, that any person making use of oral defamation to another in a public place is guilty of an offence. It is 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 occurs. See *The King v Clifton Justices, Ex parte McGovern*, 1903 StRQd 177 per Griffith CJ at p 181."
- [17] It is noteworthy that the use of threatening, abusive or insulting words does not necessarily constitute offensive,¹⁶ threatening or insulting *behaviour*, which is prohibited by sub-s 7(1)(e) of the Act; such behaviour is a concept which turns on the *conduct* of the offenders, rather than their *words*. The legislature is able to control *conduct* which might breach the peace without offending the implied freedom.
- [18] Although other States and Territories have schemes to regulate behaviour in public places to avoid breaches of the peace, many of those schemes do not contain provisions such as sub-s 7(1)(d) but rather contain provisions generally comparable with sub-s 7(1)(a)-(c) and (e) of the Act, emphasising the *conduct* or the indecent, obscene or offensive nature of the language. See *Summary Offences Act 1988* (NSW), s 4;¹⁷ *Crimes Act 1900* (ACT), s 546A¹⁸ and *Summary Offences Act 1923*

¹⁴ *Acts Interpretation Act 1954* (Qld), s 14, s 14B.

¹⁵ Law Book Co, 1936, p 60.

¹⁶ Kennedy Allen in "Police Offences of Queensland" (Law Book Co, 1936, p 63) notes:
 "The epithet '**offensive**' as applied to behaviour, has for the purposes of this section a restricted meaning. Since this and the associated sections are concerned with the preservation of order and decorum in streets and other public places and with the punishment of police offences committed therein, the word connotes conduct that is offensive when judged by the ordinary standards in criminal cases, namely the external standard – that is to say, conduct in the external relations of life. It does not embrace all conduct that may in a general sense be considered blameworthy and therefore improper, nor all conduct that may ultimately prove to be in a broad sense hurtful to a person's future disposition or character. *Anderson v Kynaston* [1924] VLR 214."
 In *Worcester v Smith* [1951] VLR 316, O'Bryan J found that behaviour to be "offensive" must be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person. The mere expression of political views, even when made in the proximity of the offices of those whose opinions or views are being attacked, does not ... amount to offensive behaviour..." (at 318)

¹⁷ **Section 4 Offensive Conduct**

(1) A person must not conduct himself or herself in an offensive manner in or near, or within view or hearing from, a public place or a school.

Maximum penalty: 6 penalty units or imprisonment for 3 months.

(2) A person does not conduct himself or herself in an offensive manner as referred to in subsection (1) merely by using offensive language.

(3) It is a sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the manner alleged in the information for the offence.

Section 4A Offensive Language

(NT), ss 47 and 53.¹⁹ No other jurisdiction has such a potentially unlimited definition of "public place"²⁰ nor a provision comparable to s 7A of the Act.²¹

- [19] Section 12 *Police Offences Act 1935* (Tas) does contain a similar provision to sub-s 7(1)(d) of the Act. The Tasmanian provision does not require that the threatening, abusive or insulting words be made "to any person" and, unlike the Queensland Act, requires that the words be spoken "with intent or calculated to provoke a breach of the peace or whereby a breach of the peace may be occasioned". The Tasmanian

(1) A person must not use offensive language in or near, or within hearing from, a public place or a school.

Maximum penalty: 6 penalty units.

(2) It is sufficient defence to a prosecution for an offence under this section if the defendant satisfies the court that the defendant had a reasonable excuse for conducting himself or herself in the matter alleged in the information for the offence.

(3) Instead of imposing a fine on a person, the court:

- (a) may make an order under section 8(1) of the *Crimes (Sentencing Procedure) Act 1999* directing the person to perform community services work, or
- (b) may make an order under section 5(1) of the *Children (Community Service Orders) Act 1987* requiring the person to perform community service work, as the case may be.

(4), (5) (repealed).

(6) However, the maximum number of hours of community service work that a person may be required to perform under an order in respect of an offence under this section is 100 hours.

¹⁸ **Section 546A** A person shall not in, near, or within the view or hearing of a person in, a public place behave in a riotous, indecent, offensive or insulting manner. Penalty: \$1000.

This was inserted by the *Crimes (Amendment) Ordinance* (No 3) No 55 of 1983, s 20.

¹⁹ **Section 47, Offensive & c., Conduct**

Every person who is guilty –

- (a) of any riotous, offensive, disorderly or indecent behaviour, or of fighting, or using obscene language, in or within the hearing or view of any person in any road, street, thoroughfare or public place;
- (b) of disturbing the public peace;
- (c) of any riotous, offensive, disorderly or indecent behaviour in any police station;
- (d) of offensive behaviour in or about a dwelling house, dressing-room, training-shed or clubhouse;
- (e) of unreasonably causing substantial annoyance to another person; or
- (f) of unreasonably disrupting the privacy of another person,

shall be guilty of an offence.

Penalty: \$2000 or imprisonment for 6 months, or both.

Section 53, Obscenity

(1) Any person who –

- (a) in a public place, or within the view or hearing of any person passing therein –
 - (i) sings any obscene song or ballad, or writes or draws any indecent or obscene word, figure or representation, or uses any profane, indecent or obscene language,

shall be guilty of an offence.

...

(9) The penalty for an offence against this section is a fine not exceeding \$2000 or imprisonment for a term not exceeding 6 months, or both.

(10) The Court hearing a complaint for an offence against this section shall not award costs against the complainant unless the court considers that the complaint was unreasonably made.

²⁰ *Police Offences Act 1935* (Tas), s 3; *Crimes Act 1900* (ACT), s 8; *Summary Offences Act 1923* (NT), s 5; *Summary Offences Act 1988* (NSW), s 3; *Summary Offences Act 1996* (Vic), Sectional Definitions and cf s 2 of the *Vagrants, Gaming & Other Offences Act 1931* (Qld).

²¹ However, in Victoria (*Summary Offences Act 1996*, but see the *Summary Offences Act 1996* Discussion Paper, May 2001, prepared by the Scrutiny of Acts and Regulations Committee, Victoria, which recommends the repeal and replacement of s 17); South Australia (*Summary Offences Act 1953*, s 7) and Western Australia (*Police Act 1892*, s 59) the regulatory schemes to prevent breaches of the peace include provisions akin to sub-s 7A(1)(d) of the Act.

provision directly focuses on the purpose of the regulatory scheme (the prevention of breaches of the peace) rather than merely on the *words* and reflects the position in Queensland prior to the Act.

- [20] I appreciate that it is not for the courts to substitute their judgment for that of parliament as to the best or most appropriate means of achieving a desired legitimate result: *Rann v Olsen*.²² The legislative regimes to prevent breaches of the peace in New South Wales, the Australian Capital Territory and the Northern Territory, however, demonstrate that it is possible to lawfully control obscene or offensive conduct which could result in a breach of the peace without burdening the freedom of communication amongst community members on political and government matters.
- [21] Whilst sub-s 7(1)(d) of the Act is a by-product of a genuine regulatory scheme to stop breaches of the peace and ensure basic standards of conduct in public, its curtailment of political discussion is more than limited and incidental and goes beyond what is proportional and reasonable in an ordered society. The definition of "public place" demonstrates the potential width of the application of sub-s 7(1)(d) of the Act. This section is significantly different in the potential width of its application from the by-laws which infringed the implied constitutional freedom in *Sellars v Coleman*;²³ the by-laws in that case were found to be reasonably appropriate and adapted to serve the legitimate end of controlling the orderly use of pedestrian malls and were limited in operation to a small area of the City of Townsville. Nor is there any fair comparison between the wide-ranging potential effect of sub-s 7(1)(d) and the regulation which infringed the implied constitutional freedom in *Levy v Victoria*;²⁴ that regulation required a game licence to be obtained by those entering a permitted hunting area and was deemed reasonably appropriate and adapted to the protection of individual or public safety. Here, 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. There is no pressing public interest requiring it to be held valid.
- [22] It follows that I would answer "no" to the second question in the *Lange* test and declare sub-s 7(1)(d) of the Act invalid.

Section 7A of the Act

- [23] Section 7A is set out in full in Thomas JA's reasons. The case for declaring it invalid is compelling. I agree with the analysis of Thomas JA that the words "abusive" and "insulting" in that section infringe the constitutional freedom. For the reasons I have given when discussing sub-s 7(1)(d),²⁵ the prohibition of the use of "threatening" defamation-like words, as well as the prohibition of the use of "abusive" or "insulting" defamation-like words, is capable of burdening the constitutional freedom of communication between members of the Australian community on political and government matters.

²² (2000) 159 FLR 132, 166.

²³ [2001] 2 QdR 565.

²⁴ (1997) 189 CLR 579.

²⁵ These reasons at [11]-[13].

[24] As I have noted, the section has no equivalent in other Australian jurisdictions. The comments of the then Premier in the Second Reading Speech²⁶ suggest it may have been enacted²⁷ to prohibit political discussion in an area where no such prohibition previously existed:

"We have acted on the lines indicated in the Bill, because it is a sound principle that if a police court can deal summarily with a case of assault on a man physically, the same court should have power to deal with assaults on a man's reputation or moral character. That is the principle of the section in the Bill. A physical assault is not nearly so cowardly as an assault on a man's character. If a man attempts to assault another man physically, then the man assaulted sometimes has the opportunity of retaliating in kind – an opportunity of immediately defending himself – but the assault of the whisperer and defamer may go on for a considerable time before it is even known to the object of it. Where it is known too, it is frequently found that it is done by men of straw who are not worth invoking the aid of the Supreme Court. The position under this Bill will be that in future the publisher of the defamatory libel will be subject to the summary jurisdiction of the police magistrate. ...

The intention is to deal with publications that come from very obscure sources defaming people. For example, I have one of them here that refers to the manager of a company registered in Queensland, and deals with an accident that took place in the course of operations by that firm.²⁸ This is a letter of the class that is sometimes printed. One could go on quoting them for a considerable period, and in the Committee stages, I may feel called upon to read more samples. These things are issued and disseminated amongst the people; all for the purpose of undermining the reputation of men charged with the conduct of industry or of public affairs. It is useless suing those men under the existing law; they could not satisfy any judgments. The thing is not being enough to engage the attention of the Supreme Court; but I hold it is a proper thing that they should be dealt with summarily by a police court on the principle that I have mentioned before; namely that a man should be protected against character assault, just as he is protected under the law from physical assault.

²⁶ *Acts Interpretation Act 1954 (Qld)*, s 14B(3)(g).

²⁷ *Racecourses Acts & Other Acts Amendment Act 1936 (Qld)*, s 24.

²⁸ The Premier then read out an open letter addressed to the manager, part of which reads: 'Did you take into account the number of shifts lost by Mick Ojala, whom you murdered at the age of 29 through deliberately breaking the Mining Regulations, or do you cast such "incidents" aside as of no further importance? ... Your ghoulish mind can think only of profit, which you regard with cynical indifference the stream of killed, maimed, poisoned, plundered workers, turned out by the human slaughterhouse that you call a mine.' The Premier noted that in this case referred, there was a full inquiry under the *Mining Act* and the finding was that the death was accidental and that no blame was attached to the company.

... There is scarcely an hon member of this House who has not been pilloried in that defamatory fashion by an individual of that type. Some of the most ghastly suggestions that I have ever heard against men have been published in similar documents, and it is time that that sort of thing was dealt with. Liberty of expression and opinion is entirely different from the prostitution of that liberty, from the acts of people who assume that they have a license to injure and defame. That is the basis of that clause of the bill, which will, in my opinion, commend itself to all decent citizens in the community. There is no interference with the existing law relating to defamation, but in certain cases it enables police proceedings to be taken and empowers a magistrate to hear and determine a case of assault on character, summarily, as he can in any other form of assault.²⁹

[25] The Premier's comments suggest that s 7A was intended to curtail the constitutional right of freedom of communication on political and government matters by providing for summary conviction for the use of defamation-like words which were also threatening, abusive or insulting (as many apparently defamatory statements are).

[26] It is not entirely clear whether it was intended in enacting s 7A to exclude the protections and qualified protection available in defamation actions. In *Voigt v Loveridge; ex parte Loveridge*,³⁰ McGill KC argued on behalf of the appellant that the ordinary defences to defamation were open under this section and this seemed to have been accepted by Macrossan for the respondent. In affirming the conviction, Webb J with whom Hart AJ and Graham AJ agreed, did not decide the point. Section 52 of the Act then, as now, provided: "This Act shall be read and construed with and as an amendment of and in addition to the Criminal Code" When s 7A was enacted the Criminal Code contained provisions relating to defamation in Ch 35 ss 365-389. In 1995³¹ those provisions were removed from the Criminal Code and re-enacted by amendment, in largely similar form, in the *Defamation Act 1889* (Qld) which now contains the protection of truth and public benefit³² and qualified protections.³³ Significantly, some defamations remain criminal offences under the Criminal Code: see ss 105(d),³⁴ 543(1)(b) and (d),³⁵ 599³⁶ and 699.³⁷ Although s 7A sets out the proscribed words in terms similar to

²⁹ Second Reading Speech, 1838-1839.

³⁰ [1938] StRQd 303, 307.

³¹ Act No 37 of 1995, s 459 and Sch 3 operational 16 June 1995.

³² *Defamation Act 1889* (Qld), s 15, formerly s 376 *Criminal Code*.

³³ *Ibid*, s 16, formerly s 377 *Criminal Code*.

³⁴ "Any person who-

...

(d) before or during an election, and for the purpose of effecting the return of a candidate at the election, knowingly publishes a false statement of fact respecting the personal character or conduct of the candidate;"

³⁵ "Any person who conspires with another to effect –

...

(b) to cause any injury to the person or reputation of any person ...

...

(d) to injure any person in the person's trade or profession;"

³⁶ Defence of truth of defamatory matter to be specially pleaded.

³⁷ Staying prosecution for publication of defamatory matter contained in a paper published by the authority of the Legislative Assembly.

the definition of "defamatory matter" under the *Defamation Act* 1989,³⁸ it does not use the term "defamation" or any like term. It seems to me that the protection and qualified protection available to defamations was not intended to apply to s 7A of the Act. The comments of the Premier in the Second Reading Speech also support this conclusion.

- [27] Section 7A effectively imposes a prohibition on political discussion where none previously existed and it has the impermissible purpose of curtailing political discussion without any legitimate over-riding important public interest; the curtailment is not merely a limited and incidental by-product of an established regulatory scheme; there are no pressing public interests which require that the section be held to be valid.
- [28] It follows that I would answer the second question in the *Lange* test "no" and I would declare s 7A of the Act invalid.

Severance

- [29] Section 9 *Acts Interpretation Act* 1954 (Qld) requires the reading down or severance of those portions of legislation found invalid, if the remainder of the Act does not exceed power and is not affected by the invalidity. The severing of the words "threatening, abusive or insulting" would make sub-s 7(1)(d) and s 7A meaningless and can be excluded as an option. In *R v Brisbane TV Limited ex parte Criminal Justice Commission (No 2)*³⁹ this Court was able to read down the general prohibition in s 106(e) *Criminal Justice Act* 1989 (Qld) so that it is inapplicable to words otherwise caught by the provision but which are protected by a constitutional right to freedom of political discourse. But the courts cannot routinely take this approach and each case needs to be considered in its own legal and factual matrix. To take that approach here would only cause confusion for those police officers and magistrates left with the difficult task of the enforcement of sub-s 7(1)(d) and s 7A of the Act. In this case, the approach taken in *Nationwide News Pty Ltd v Wills*⁴⁰ is apposite. The Act does not provide any criterion for limiting its operation and it is not for the courts to remould legislative provisions which offend the Constitution. Sub-section 7(1)(d) and s 7A of the Act can be discreetly severed, leaving in place an effective regime to regulate public behaviour by prohibiting indecent or obscene language, songs, writings or drawings and *behaviour* which is obscene, profane, indecent, riotous, violent, disorderly, offensive, threatening or insulting. Additionally, of course, the protection of the *Criminal Code*⁴¹ as to criminal defamation and the protection of the civil law of defamation remain. Sub-section 7(1)(d) and s 7A should be severed from the Act.

The Effect of the Findings of Invalidity

- [30] It follows that I would overturn the appellant's convictions in respect of both sub-ss 7(1)(d) and 7A(1)(c) of the Act.
- [31] The next question is the effect, if any, this has on the appellant's remaining convictions. The police officers could not have known that the long-standing

³⁸ Ibid, s 4.

³⁹ [1998] 2 QdR 483.

⁴⁰ (1991-1992) 177 CLR 1, Brennan J (as he then was) at 61, Deane and Toohey JJ at 80; Dawson J at 91.

⁴¹ ss 105(d), 543(1)(b) and (d), 599 and 699.

provision under which they acted in arresting the appellant were unconstitutional. In arresting the appellant they were enforcing a law which they honestly and reasonably believed was the law of Queensland and they acted in the execution of their duty. The appellant admitted to obstructing police by making it as difficult as possible for them to place him in the police vehicle. During his struggle with the police officers, which was video-taped, he attempted to bite one officer and damaged the rubber seal of the police vehicle door. He hit one police officer in the right shoulder area and pushed him on a number of occasions after the appellant was told he was under arrest. The appellant kicked one police officer as he was put into the police van. The learned magistrate described the appellant's video-taped struggle as "extreme". The acquittal of the appellant on the charges under the Act in these circumstances does not have the result of overturning his convictions for the two offences of serious assault and the two offences of obstructing police: *Veivers v Roberts ex p Veivers*.⁴²

- [32] The final matter for consideration is whether the sentence on the remaining offences should be disturbed because of the quashing of the appellant's convictions under the Act. The appellant had prior convictions for assault and obstructing police officers in the performance of their duty in 1997, 1998, 1999 and most recently in 2000 when he was convicted and fined \$500 in default 12 days imprisonment. The learned magistrate noted that despite the imposition of increasing penalties the appellant continued to offend and concluded that a fully suspended period of imprisonment was the appropriate sentence. The magistrate imposed a sentence of two months imprisonment fully suspended for 12 months on each count. The appellant's extensive prior convictions, his determined obstruction and the force with which he resisted the police officers acting reasonably in the execution of their duties have the result that the sentence imposed was within a sound exercise of discretion. I would not interfere with the sentences imposed.

Orders

- [33] I propose the following orders:
1. The appeal is allowed with costs of the appeal and the application for leave to appeal to be assessed.
 2. The order of the District Court judge dated 26 February 2001 is set aside and instead it is ordered that
 - (a) the appeal is allowed only insofar as the convictions and sentences recorded in respect of sub-s 7(1)(d) and s 7A(1)(c) *Vagrants Gaming & Other Offences Act 1931 (Qld)*, which are set aside.
 - (b) the appeal in all other respects is dismissed.
 - (c) the respondents pay the appellant one-half of the appellant's costs of and incidental to the appeal to be assessed.
 3. It is declared that sub-s 7(1)(d) and s 7A *Vagrants, Gaming & Other Offences Act 1931 (Qld)* are beyond the legislative power of the Queensland Parliament and that Act should be read and construed as if sub-s 7(1)(d) and s 7A were deleted from it.

⁴² [1980] Qd R 226.

- [34] **DAVIES JA:** I have had the advantage of reading the reasons for judgment of Thomas JA. I agree with the orders he proposes.
- [35] With one minor and, as it turns out, irrelevant reservation I agree with his Honour's reasons for holding that s 7A of the *Vagrants Gaming & Other Offences Act 1931*, to the extent that it applies to abusive or insulting words, is invalid. That reservation concerns his Honour's statement that even drafting a letter or article might amount to an offence under s 7A, presumably because it would be the printing (writing) of threatening, abusive or insulting words. But I would question whether, in the context of s 7A, words can be threatening, abusive or insulting if they are not communicated to anyone. However my reservation on that question does not diminish my agreement with what his Honour has otherwise said about s 7A and the possible application to it of s 9 of the *Acts Interpretation Act 1954*.
- [36] I also agree with but would like to add to his Honour's reasons for concluding that, on the other hand, s 7(1)(d) is not invalid as argued by the appellant. That provision contains two limitations not specifically contained in s 7A. The first is that the threatening, abusive or insulting words must be used *to* a person. And the second is that they must be used in or in the near vicinity of a public place. These limitations together confine the operation of this provision to a situation in which the user of the threatening, abusive or insulting words and a person or persons who, to put it generally, are likely to be offended by the use of those words are in close proximity to one another and to a public place. In such a situation there is the potentiality for acrimony escalating to violence or, in more archaic language, a breach of the peace.
- [37] For this reason, in my opinion 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 such public acrimony and violence, an end the fulfilment of which is compatible with the maintenance of the system of representative and responsible government.
- [38] **THOMAS JA:** The issue in this appeal is whether s 7(1)(d) and/or 7A(1)(c) of the *Vagrants, Gaming and Other Offences Act 1931* are invalid because of inconsistency with the implied constitutional protection of freedom of communication between the people concerning political or government matters.

Background circumstances and procedure

- [39] The matter comes before the court in this way. On 26 March 2000 the appellant saw fit to distribute pamphlets in the Townsville Mall. A police constable obtained one and saw that it contained insulting passages including the allegation that a fellow police officer (Constable P) was corrupt, and that the local police were “slimy, lying bastards.” A little time later some police officers, including Constable P, approached the appellant. The appellant refused to provide him with a copy, and berated the officer stating, “This is Constable P – a corrupt police officer.” After making further statements the appellant sat down, wrapped his arms around a pole and resisted police attempts to effect an arrest. Subsequent episodes ensued of his resisting arrest and assaulting police officers. In due course he was brought before a magistrate and, after a hearing, convicted of the following offences –

- (a) using insulting words pursuant to s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931*;
- (b) publishing insulting words under s 7A(1)(c) of the *Vagrants, Gaming and Other Offences Act 1931*;
- (c) two offences of serious assault;
- (d) two offences of obstructing police under s 120 of the *Police Powers and Responsibilities Act 1997*.

[40] His defence raised numerous grounds including the implied constitutional protection mentioned above. He brought an appeal against those convictions which was dismissed by Pack DCJ. Application was then made to the Court of Appeal for leave to appeal against the decision of Pack DCJ. This court granted such leave, limited to the grounds raised in paras (f), (h) and (i) of the appellant's application, which in effect limited the appeal to the constitutional point which impacts upon the charges mentioned in (a) and (b) above.

[41] Notices were then given to the Attorneys-General under s 78B of the *Judiciary Act 1903* (Cth). The Attorney-General of Queensland gave notice of intervention and appeared by Mr Keane QC to defend the validity of the legislation. The appellant, who is self represented, made written submissions. Oral submissions were received on behalf of the respondents and the Attorney-General.

The legislation

[42] It will be necessary to set out only a short extract from s 7. Section 7A will be set out in full –

“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 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.”

[43] Section 7A creates numerous offences. It is immediately apparent that its prohibitions are absolute, and that in proceedings under that section there are no defences such as, for example, truth, public interest or any of the familiar defences that are available against a charge of defamation. Significantly, the prohibited conduct is not limited to acts done in public. The section catches anything that a person prints in his or her own home if it happens to be threatening, abusive or insulting, and injurious to someone else's reputation. To illustrate the breadth of the measure, under subpara (a), a journalist, editor or executive officer of a newspaper would commit an offence upon procuring the printing of any article which was likely to injure a politician's reputation and which was abusive or insulting, even if the politician merited the abuse or insult, and even if it was in the public interest that the politician be called to task over his or her conduct. Under subpara (b) anyone responsible for publishing such an article would commit an offence. Under subpara (c) the local newsagent would become criminally liable for effecting distribution. Under subpara (d) every citizen who obtained such a newspaper would likewise commit an offence for as long as the newspaper was kept in his or her possession.

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

The constitutional protection

[45] *Lange v Australian Broadcasting Corporation*⁴³ holds that the Commonwealth Constitution impliedly provides an important protection. It may be concisely stated as protection of freedom of communication between the people concerning political or government matters which enables the people to exercise a free and

⁴³ (1997) 189 CLR 520.

informed choice as electors.⁴⁴ Such protection however does not invalidate a law whose object is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, so long as the law is reasonably appropriate and adapted to achieving that legitimate object. This two part test was more fully stated in the following passage from a judgment in which every member of the High Court agreed –

“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.”⁴⁵

- [46] The issue here is not whether the appellant engaged in political or governmental discussion; it is whether the law under which he was prosecuted is constitutionally valid. The written submissions filed on behalf of the Attorney-General concede that in the event that the relevant part of one or other of these sections is invalid, any characterisation of his conduct or language becomes unnecessary because the convictions recorded against him could not stand. Assuming that such a measure infringes the freedom impliedly guaranteed by the Constitution, the invalidity of the State legislation flows, not from the operation of s 109 of the Constitution, but because the power of the State parliament to pass such a measure has been withdrawn by the Commonwealth Constitution. As the legislative power of a State is conferred by its Constitution, and that Constitution is subject to the Commonwealth Constitution, legislative power to enact such a provision would be lacking.⁴⁶

Coverage of s 7A

- [47] Although argument has primarily been directed towards s 7A (1)(c), it is necessary to consider the operation of the section as a whole. In particular it is necessary to focus upon subpara (a) which is the reference point for the “words” of which subpara (c) prohibits distribution. Further, in the context of considering the broad issue of impact upon freedom of political and governmental discussion, the

⁴⁴ The implied freedom is also recognised in *Levy v The State of Victoria* (1997) 189 CLR 579, and is the culmination of implied freedoms earlier recognised in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v The Herald and Weekly Times Limited* (1994) 182 CLR 104, and *Cunliffe v Commonwealth* (1994) 182 CLR 272.

⁴⁵ *Ibid* at 567-568.

⁴⁶ *McGinty v Western Australia* (1995-1996) 186 CLR 140 at 171 per Brennan CJ.

structure of the entire section (printing, publishing, distributing and possession respectively) is illuminating

- [48] On an ordinary reading of s 7A, it is difficult to resist a provisional conclusion that a by no means insignificant part of contemporary political comment in this country would run the risk of infringing it. I do not imply that current political discussion in parliament, in the media, in the streets or in households is more fervent or vitriolic than it has been in the past. Indeed, my reading suggests that there have been periods when the style of pamphlets and other means of dissemination of political messages was considerably more fulminatory and abusive than is now the case. But politics remains an area where people have and are entitled to have strong opinions and to be condemnatory of those in whom public power is reposed, especially when such persons abuse their power or let down those who depend upon them.
- [49] Section 7A is directed against the printed or written word. It immediately raises questions concerning the freedom of the press, and particularly the extent to which s 7A impairs the freedom of the print media to engage in reporting and discussing of political and governmental matters.
- [50] An extraordinarily wide net has been cast by this section. On my reckoning (leaving aside the extended definition of “print”) there are 162 combinations of conduct available to be charged as an offence under the section. If my provisional view of the coverage of s 7A is correct it is disconcerting to contemplate the number of offences that must be daily committed in a great number of households, let alone in public. The thought that we might rely upon the grace of the executive not to prosecute such offences affords cold comfort.
- “I dislike extremely legislation which is felt to be so unfair if universally applied that it can only be justified by saying that in particular cases it will not be enforced. I think that that is as bad a ground for defending legislation as one could well have.”⁴⁷

Outline of Attorney-General’s submissions

- [51] Mr Keane submitted that although s 7A is apt to burden speech, including discussion concerning representative or responsible government, it is not directed to that end and that its impact is therefore incidental. Section 7A (1)(c) serves, he submitted, a legitimate end that is compatible with the maintenance of proper governmental function, namely regulation of the conduct of persons, the promotion of good behaviour and the prevention of breaches of the peace. He further submitted that as the range of operation of s 7A(1)(c) is confined to the delivery or distribution of printed matter containing threatening, abusive or insulting words of the prescribed character, it is compatible with legitimate prevention of mischief, and that accordingly, a significant opportunity remains for discussion of political or governmental matters.

“Insulting words”

⁴⁷ Per Wills J in *Stiles v Galinski* [1904] 1 KB 615; cf *Kwiksnax Mobile Industrial & General Caterers Pty Ltd v Logan City Council* [1994] 1 Qd R 291 at 307-308.

[52] I shall at this stage confine discussion to an offence of which “insulting words” is an element. Mr Keane’s key submission is that s 7A(1)(a) should be read in a very limited way, so that it catches only a quite restricted range of conduct by the insulter. Considerable reliance was placed upon the primary definition of “insult” given in the Macquarie Dictionary namely, “to treat insolently with or contemptuous rudeness; affront”. Mr Keane submitted that if “insult” is confined to contemptuous rudeness, the term has only a relatively narrow application, so that such conduct could properly be prohibited without imposing an unacceptable burden upon free political speech. However I do not think the term “insult” can be properly confined to the first part of the Macquarie definition, and note that it also includes “affront” which is not a meaning that aids the submission. It is interesting to note that the example of usage given in the same entry is - “The crowd piled up at the windows and added insult to injury by laughing at them.”⁴⁸ Laughter of course can be a very hurtful insult, and cartoons with emphatic captions are a well-established form of political comment.

[53] In *Thurley v Hayes*⁴⁹ Rich J delivering the judgment of the court stated –
 “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. In the *Oxford Dictionary* under the word “insult”, we find it means in a transitive sense “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.” We find in the same dictionary: “Hence ‘insulted,’ treated with contemptuous abuse, outrage.” There is, therefore, in this case no warrant for saying that the words complained of and found to have been used were not legally capable of being regarded as insulting words.”

The words there in question were “You are sponging on the government and you waste public money and I will report you”, spoken to a returned soldier. Similarly, in the Victorian case of *Annett v Brickell*⁵⁰ the expression “insulting words” was held to be not limited to words disparaging a person’s moral character. They were held to include scornful abuse of a person or the offering of any personal indignity or affront. Similarly, in the United Kingdom under analogous legislation it has been considered that the word should be given its ordinary or popular meaning, and it is interpreted neither more widely nor more narrowly than such a meaning requires⁵¹.

[54] In Queensland, in *Voigt v Loveridge; Ex parte Loveridge*⁵², the Full Court upheld a conviction under s 7A(1)(c) of a political candidate for distributing circulars alleging that his opponent had offered himself as a Free Labourer (scab) in 1911 “when unionists were fighting for their existence”, and that his opponent had “worked for the ‘boss’ to crush his fellow unionists in Mackay district”. It

⁴⁸ Attributed to Xavier Herbert in 1938.

⁴⁹ (1920) 27 CLR 548 at 550.

⁵⁰ [1940] VLR 312.

⁵¹ *Cozens v Brutus* [1973] AC 854 at 863, 867 – per Lord Reid “Parliament has given no indication that the word is to be given any unusual meaning. Insulting means insulting and nothing else”; a very broad interpretation of the terms coverage was upheld in *Masterson v Holden* [1986] 1 WLR 1017; [1986] 3 All ER 39, 44.

⁵² [1938] St R Qd 303.

continued, “trade unionists, please remember this: you know what its effect is and you know it is an action which cannot be forgotten or forgiven”. The court held the magistrate entitled to find the circular insulting. The word “insulting” plainly cannot be successfully insulated from a political and governmental context.

- [55] I do not think that the term can be properly limited to the narrow meaning suggested by Mr Keane. A person who printed or distributed a statement that a member of parliament lacked integrity or had been selfish and lazy, or had let down his electorate and deserved to be sacked could not in my view defeat a charge brought under s 7A(1) even if the words were true. As earlier mentioned there is no available defence of truth or any other defence that could be made such as those that would be available in a charge of defamation. At least a significant minority of political cartoons might likewise offend the prohibition both of abusive and insulting words, and might in any event satisfy counsel’s preferred connotation of “contemptuously rude”.

Legislative History of ss 7 and 7A

- [56] The legislative history of *Vagrants, Gaming and Other Offences Act* which came into effect in 1931 is relevant and instructive. It was the product of the government’s reaction to the great depression and the social problems that it produced. Whether it was then an over-reaction does not need to be considered. The question is whether on its proper construction these measures prohibit what we now regard as a well-established right of freedom of communication with respect to government and political matters.⁵³

- [57] The second reading speech of the Home Secretary (Hon JC Peterson) who introduced the Bill in 1931 suggests that the Bill was founded on similar lines to the consorting Act of New South Wales. Victoria had at the time taken similar steps. He said –

“Drastic remedies are essential to deal with drastic situations. It is no pleasure for a government or a minister to introduce a measure containing principles which take away any liberty of the subject. When we discussed the term “liberty” we must take into consideration the greatest good for the greatest number; and in those cases where liberty becomes license, it is necessary in the interests of society to protect society from encroachments.”

Having noted difficulties that had arisen at railway platforms, wharves and other places where people tended to congregate, he continued –

“[P]olice should have power to arrest and bring before a magistrate in the usual manner any person or persons frequenting wharves or railway station platforms and accosting travellers in order to work a swindle on them. Parliament should recognise that the police require some additional powers in this direction in order to protect the travelling public. It may be said that, if a person is taken down in this manner, it is his business; but we must remember that laws are made to protect the weak as well as the people as a whole....Any

⁵³ See *Lange* above; *Nationwide News* above; *Australian Capital Television* above; *Theophanous* above; *Cunliffe* above; and *Levy* above

person who comes within the ambit of this Part (referring to Part II) may be arrested, despite anything contained in any other Act. No honest man need be afraid of the provisions of this Bill. In fact, no honest man need be afraid of the police.”

(Part II includes the sections that are here in question).

- [58] Section 7A did not emerge until 1936 when it was introduced under the unlikely banner of the *Racecourses Acts and Other Acts Amendment Act* (1936). It was initiated with the comments –

“A further provision in the Bill.. is that no threatening, abusive or insulting words are to be allowed to be used in any connection – either in writing, printing, posting up, placarded, or painted up in any way.”⁵⁴

At the second reading speech, in response to questions – “What has it got to do with a Racing Bill?” and “why did you not bring in a Special Bill?” the following unenlightening reply was offered - “These things all merge in racing, gambling and allied things, and for that reason the measure has been made comprehensive so that we may deal with the subject comprehensively and afford hon members an opportunity of visualising the whole”.⁵⁵

- [59] Some ensuing comments in debate included a suggestion that the measures were actually designed to control unpopular political groups. They are of sufficient interest to warrant inclusion in a footnote.⁵⁶ For almost the rest of the 20th century s 7A contained additional provisions authorising the searching for and seizure of printing presses, roneos and other machines used for typing and for the seizure of unlawful printed matter. Those particular provisions have only very recently been deleted⁵⁷; but the broad net of s 7A(1) remains, and contemplated reviews of the Act have come to nothing.⁵⁸

Application of second test in *Lange*

⁵⁴ Initiation of Bill, p 1764 Queensland Parliamentary Debates, Vol CLXX, 1936, p 1764, 26 November 1936.

⁵⁵ Ibid at 1823-1824.

⁵⁶ “In my opinion this clause is directed against certain small political coteries in this State that have issued ‘roneoed’ circulars from time to time containing abusive reference to certain public men and to communistic literature generally. It seems to me that a Racing Bill is being used to pursue a small vendetta that exists between hon members of the Government Party and the left wing of their political organisation. Why should a Racing Bill be used for the purpose of inserting in the laws a provision of this kind that is neither relevant to nor concerned with racing?” (Per Mr Maher, ibid at 1825).

“...we find a new clause under the Vagrants Gaming and Other Offences Act to deal with people who issue insulting words about each other or print or advertise that people are not of the character they might be, or use threatening, or abusive or insulting words. It is a godsend to members that Hansard does not come under the definition of these abuses and threatening words. I do not see what it has to do with the Racecourses Acts. It seems to me the sections already in the statutes are sufficient. However, I am not objecting to that. If the Minister desires to put somebody in gaol who is found in possession of printed matter containing abusive words, I do not think it matters much to us”. (Per Mr Moore, ibid at 1836).

⁵⁷ *Police Powers and Responsibilities Act* (2000), Sch 2.

⁵⁸ Queensland Parliamentary Debates, Vol 326, Nov 1992 to Dec 1993, p 4929.

- [60] The real issue to be determined in these proceedings is whether s 7(1)(d) and/or 7A(1)(c) satisfy the second limb of the *Lange* test. As Doyle CJ observed in *Rann v Olsen*⁵⁹

“The question for the court is not a question of whether there are other and better ways of achieving the legitimate end. It involves considering whether the impediment to freedom of speech generally is as a result of a measure that is reasonably appropriate and adapted to achieving a legitimate end.”

The end that these sections seek to achieve is presumably the maintenance of law and order. But law and order are not well served by overkill.

- [61] Mr Keane’s submission continued that the legitimate end served by s 7A(1)(c) is the regulation of the conduct of persons, the promotion of good behaviour, and the prevention of breaches of the peace. He submitted that any prejudicial impact that it may have on the implied constitutional freedom is commensurate with reasonable regulation in the interests of an ordered society.⁶⁰

- [62] The words “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” closely resemble the definition of “defamatory matter” in the *Defamation Act 1889*.⁶¹ That requirement in my view is cumulative with whichever preceding component of “threatening...words”, “abusive...words” or “insulting words,” as the case may be, happens to be the base for the particular charge.

- [63] Although exceptions are conceivable,⁶² for ease of discussion I shall use “defamatory” to encapsulate the words in s 7A(1)(a) that follow “of or concerning any person.” Using that abbreviation, in order to constitute an offence under s 7A(1)(a) the words used need to be threatening and defamatory or abusive and defamatory, or insulting and defamatory, as the case may be.

- [64] There is no doubt that in the context of a measure dealing with defamation, a general abolition of the known defences would infringe the implied freedom of communication. Indeed, anything more than minor erosion of the traditionally understood offences would seem likely to infringe it.⁶³ The present question is whether the total abolition of such defences, in the context of a charge of printing defamatory material which is additionally “insulting” or “abusive” or “threatening”, infringes the freedom.

- [65] Each of these combinations needs separate consideration. I shall, again for ease of discussion, refer to the matter which s 7A(1)(a) says must not be printed as “threatening defamatory words”, “abusive defamatory words” and “insulting defamatory words” respectively.

⁵⁹ (2000) 159 FLR 132, 166.

⁶⁰ See *Levy* above at 608.

⁶¹ The statutory law of defamation in Queensland was transferred from the Criminal Code to that Act by Act No 37 of 1995.

⁶² See for example *Munday v Askin* [1982] 2 NSWLR 369; *Hubergin v Koppers* (1874) 2 NZLR 597, 601.

⁶³ See *Lange* above at 566.

- [66] In my opinion a law which renders all persons, including the print media, guilty of an offence punishable by imprisonment for printing insulting defamatory words, and which at the same time abolishes the defences that would be available upon a charge of defamation, infringes the guaranteed freedom. It is plainly calculated to stifle robust political comment, investigative journalism, and accountability of persons in government. In an ideal world one might think that facts can be reported without acrimony or insult and that the nation's needs could be met by polite reporting and intelligent analysis. Unfortunately the way of the world is not thus. I have little doubt that on the proper construction of s 7A(1)(a), the prohibition of insulting defamatory words infringes the guaranteed constitutional freedom.
- [67] I have reached a similar conclusion in relation to the prohibition against printing abusive defamatory words. "Abusive" (like "insulting") is a large term. Its subject matter ranges from the trivial to the serious. The concept of "vulgar abuse", at common law, was such that it was excepted from actionable defamatory matter, and could be pleaded as a defence to such a charge⁶⁴. The Macquarie Dictionary gives as the primary meaning for "abusive" – "Using harsh words or ill treatment" and gives the example of "an abusive author". The second meaning is "characterised by or containing abuse", and the example given is "an abusive satire". The present context is of course the writing or printing of abusive words. There is no reason why it should not be given its ordinary or popular meaning in this context and there is equally no good reason why it should be confined to words towards the upper end of the scale. In common usage it is capable of encompassing fairly trivial and low level, albeit direct, expressions of disapproval. Whilst abuse is to be generally discouraged, just as insult is, this section prohibits it even when it might be justified, and at the same time denies any defence. To deny political discussion the weapon of abuse is in my view unreal and unduly restrictive. This provision is similarly invalid.
- [68] The same cannot necessarily be said of threatening words. Adequate political and governmental discussion can take place without resort to threats. Prima facie it would be lawful for legislation to be passed prohibiting the printing of threatening defamatory words even in a non-public place, and denying traditional defamatory defences. Threatening conduct is more easily regarded as criminal conduct than mere abusive or insulting conduct because it introduces a considerably greater element of danger to person or property. I have considered the possibility that s 7A(1) might prevent the media from reporting threatening words that had been used against a particular person, although such a report might itself be sympathetic to the threatened person. It is sufficiently unlikely that such printing publication or distribution would be one by which the reputation of the person against whom the threat had been made was likely to be injured, and I do not think that this scenario would raise any insufferable obstacle for a committed reporter of political and governmental affairs. Although there would be some such risk, the section is confined to threatening defamatory words, and may be seen as reasonably appropriate to and adapted towards achieving the legitimate end of law and order.
- [69] Lest the use of the abbreviated term "defamatory" in the above discussion may be thought to be too imprecise a substitute for the words in s 7A(1)(a) that follow "of

⁶⁴ *Thorley v Lord Kerry* (1812) 4 Taunt 355, 365; 128 ER 367, 371; Gatley, J CC, *Libel and Slander* London: Sweet & Maxwell, 1981, 8th Edn, paras 162, 109.

or concerning any person”, I may say that the same conclusion is reached if, in the discussion in paras [26] to [31] above, one replaces “defamatory” with “statement by which the reputation of that person is likely to be injured”, or with any of the ensuing alternatives in s 7A(1)(a).

- [70] Subject to later discussion on the question of severance and possible application of s 15A of the *Acts Interpretation Act* 1901 (Cwth) I would hold that the inclusion of the words “abusive, or insulting” in s 7A(1)(a) of the *Vagrants, Gaming and Other Offences Act* 1931 was beyond the legislative power of the Queensland Parliament and that the section should be read and construed as if such words were omitted.

Validity of s 7(1)(d)

- [71] I turn to s 7(1)(d). This section is concerned with activity in a public place or so near to it that a person who was there could view or hear the prohibited conduct. It derives from a provision in an act that was usually called *The Vagrant Act* of 1851⁶⁵. That Act contained a requirement that the words be used “with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned.” Those words were deleted when the present Act was passed. Even so, the prohibition of the use of threatening, abusive or insulting words in a public place is well adapted to preventing breaches of the peace from occurring. The legitimate end which it was submitted is served by this provision is the regulation of the conduct of, and the promotion of good behaviour by persons who are in or near public places, in the interests of other persons in those places, and (importantly in my view) to nip in the bud any breaches of the peace. It was fairly conceded by the Attorney-General in written argument that this section could, at least in some cases, burden the freedom of communication about government or political matters. However the section deals essentially with the conduct of an individual person in a public place and the impact upon discussion of such matters might be considered to be slight.⁶⁶
- [72] In my opinion s 7(1)(d) satisfies the second limb of the *Lange* test. In the first place 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.

Severance

- [73] Section 9 of the *Acts Interpretation Act* 1954 includes the following –
- “9.(1)** An Act is to be interpreted as operating –
- (a) to the full extent of, but not 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 –

⁶⁵ Section 6 of the Statute 15 Vic No 4; cf *The King v The Justices of Clifton; Ex Parte McCauley McGovern* [1903] St R Qd 177, 180

⁶⁶ Cf *Coleman v Sellars* (2000) 181 ALR 120.

- (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."

[74] This is broadly comparable with s 15A of the *Acts Interpretation Act* 1901 (Cth), although more explicit in its direction to interpret distributively. Section 15A has been considered by the High Court in the context of many statutes which have been held to be constitutionally invalid where resort is made to it to be "saved" or "read down" the offending provisions in order to preserve a more limited operation.

[75] I do not propose to revisit general principles underlying the application of such statutory provisions, which were set out by Gibbs CJ in *Re F, ex parte F*⁶⁷. The judgment which has been described as the locus classicus in the application of s 15A is that of Latham CJ in *Pidoto v Victoria*⁶⁸. It is now well recognised that the section does not require the court to perform a task which is in essence legislative and not judicial, or in other words to re-write statutes so that their effect will be of a different kind from that originally contemplated. In particular it is not the court's function to produce a new enactment "with a fresh policy and operation" or "to divert legislation from one purpose to another".⁶⁹

[76] In the event that s 7A was held to be invalid, Mr Keane submitted in favour two and possibly three forms of severance. His preferred submission, as I understand it, would seek to read down the word "insulting" to an artificial level so that it would only cover cases of contemptuous rudeness. That, I think, is a form of rewriting or variation that the authorities suggest should not be done. It is not for the court to itemise the applications of a general term used in the statute.⁷⁰

[77] Perhaps the clearest illustration of this point is to be found in *Nationwide News Pty Ltd v Wills*. The legislation in question created offences including the use of words by writing or speech "calculated to bring a member of Industrial Relations Commission...into disrepute". The special defences normally available in respect of contempt of court and defamation were not available upon such prosecutions. Clearly all members of the court considered that the measure went too far. Deane and Toohey JJ held that the forbidding of making of well-founded and relevant criticism of the Commission was obnoxious to the Constitution's implication of freedom of communication. Three members of the court considered the question of severance, Brennan J (as he was then) noted that the section applies indiscriminately whether or not an attack on the Commission was warranted. His

⁶⁷ (1986) 161 CLR 376, 384-385.

⁶⁸ (1943) 68 CLR 87, 98, 109; cf Lane, P H *Commentary on the Australian Constitution* Sydney LBC, 1997, 2nd ed, at 921.

⁶⁹ *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 386; *Re F ex parte F* above at 385.

⁷⁰ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 354, 375; cf *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468, 503; *Nationwide News* above.

Honour observed that had the provision been drawn so as to apply only to unwarranted attacks (the definition being a matter for Parliament), it would have had a valid operation. His Honour continued –

“Although the purpose of s 15A of the *Acts Interpretation Act* is to reverse the presumption that a statute is to operate as a whole and to permit the general terms of an Act to be given a distributive operation and to sever its application to cases beyond power from its application to cases with power, the court cannot be left to select for itself the area in which the statute should be left to operate. The court’s function is to construe the statute in the light of s 15A, not to assume the role of legislator and to re-enact a law within power.

...

To apply s 15A to read down s 299(1)(d)(ii) so that it operated within power would require the court to remould the provision according to its own notion of the desirable criteria by which to describe unwarranted attacks falling within the prohibition. That is a function for the Parliament to perform. Unless and until s 299(1)(d)(ii) is redrafted, it must be construed as purporting to apply indiscriminately to all speech or writing which is calculated to bring the Commission or its members into disrepute.”⁷¹

[78] Deane and Toohey JJ stated –

“The question arises whether par. (d)(ii) can be read down or confined in a way which will bring it within the scope of Commonwealth legislative power. Such a reading down or confinement of the clause would require the court to determine, in the abstract, what qualification or qualifications or combination of qualifications would suffice to bring par (d)(ii)’s prohibition within legislative competence and then to undertake the task of determining which qualification or qualifications should be introduced. Thus, for example, par (d)(ii) would arguably be within legislative competence if its prohibition was confined to the malicious use of words which were false to the knowledge of the user or if a proviso were introduced to the effect that, analogously with the offence of contempt of court, an offence against the clause would not be committed unless what was written or said was unwarranted and calculated seriously to obstruct or interfere with the performance by the Commission of its function of conciliation and arbitration under the Act. Clearly, such a reframing of par (d)(ii) to produce a new and different provision falls outside the scope of any process of severing or reading down as a matter of construction of the type authorised by s 15A of the *Acts Interpretation Act* 1901 (Cth).”⁷²

[79] I do not consider that this court should give an artificial and limited meaning to the word “insulting” or any other relevant words in order to confine its operation, under the guise of severance.

⁷¹ *Nationwide News* above at 61.

⁷² *Nationwide News* above at 80.

- [80] Mr Keane further submitted that s 9 would permit the striking out of the word “insulting”. I accept that submission, and consider that it equally permits the striking out of “abusive” in the event that that prohibition is found to be beyond power. The structure of s 7A(1)(a) is to create three prohibited categories of conduct. One of them is within power and the other two are not. There is no good reason why a distributive reading should not be made, thereby permitting it to have its separate and discreet effect. That effect of the surviving category will not be intrinsically different by reason of the excision of the others.
- [81] Finally, mention should be made of the third alternative submission advanced by Mr Keane, namely that s 7A be read as not applying to communications concerning political or government matters of the kind protected by the implied constitutional freedom. Apart from the extreme difficulty of identifying the borderlines of such a construction, it would clearly infringe the principles applicable to severance that have been stated above, especially those mentioned in *Nationwide News*. I therefore consider that the appropriate declaration of invalidity is that suggested in paragraph above, and that s 7A(1)(a) should be construed as if the words “abusive” and “insulting” had been deleted.
- [82] This means that the appellant’s conviction on publishing insulting words under s 7A(1)(c) of the Act must be set aside. In the Magistrates Court concurrent sentences of two months imprisonment, wholly suspended for a period of 12 months, were imposed on all matters. The sentence in respect of the conviction under s 7A(1)(c) will of course be set aside, but there is no good reason why any variation should be made in respect of the remaining sentences. However as the appeal to the District Court should have been successful in part, a variation should be made to the costs order.

Orders

1. The appeal is allowed.
2. The respondents are ordered to pay the appellant’s costs of the appeal.
3. The order of Pack DCJ dated 26 February 2001 is set aside and in lieu thereof it should be ordered that –
 - (a) the appeal be allowed in respect of the conviction recorded in respect of s 7A(1)(c) of the *Vagrants, Gaming and Other Offences Act*, and that the conviction and sentence in respect of that matter be set aside;
 - (b) the appeal be in all other respects dismissed;
 - (c) that the respondents pay the appellant one half of the appellant’s costs of and incidental to the appeal to be assessed.
4. It is declared that s 7A(1) of the *Vagrants, Gaming and Other Offences Act* is 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.