IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S36 of 2014

BETWEEN:

SLEIMAN SIMON TAJJOUR
Plaintiff

STATE OF NEW SOUTH WALES
Defendant

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No. S37 of 2014

BETWEEN:

JUSTIN HAWTHORNE
Plaintiff

STATE OF NEW SOUTH WALES
Defendant

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No. S38 of 2014

BETWEEN:

CHARLIE MAXWELL FORSTER
Plaintiff

STATE OF NEW SOUTH WALES
Defendant

30 **ANNOTATED SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)**

I. CERTIFICATION

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

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Date of document: 29 April 2014
Filed on behalf of: Attorney-General for the State of Queensland

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II. BASIS OF INTERVENTION

2. The Attorney-General for the State of Queensland intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

IV. APPLICABLE LEGISLATION

4. The applicable legislation is identified in the Defendant's submissions.

5. The Attorney-General for the State of Queensland also refers to section 61 of the Commonwealth Constitution.

V. ARGUMENT

Implied freedom of political communication

6. The Attorney-General for the State of Queensland adopts the submissions of the Defendant, the State of New South Wales, regarding the application of the implied freedom of political communication to s 93X of the *Crimes Act 1900* (NSW). Specifically, the Attorney-General joins in the submission that s 93X does not "effectively burden"[1] the implied freedom of political communication.[2]

7. On the assumption, however, that s 93X of the *Crimes Act 1900* (NSW) burdens the implied freedom, the Attorney-General submits that it satisfies the second limb of the test in *Lange,*[3] for the reasons below.

8. First, s 93X of the *Crimes Act 1900* (NSW) does not, on its face, restrict communication on political or governmental matters. As was noted by Gleeson CJ in *Coleman v Power,* "the constitutional freedom identified in *Lange* does not extend to speech generally, but is limited to speech of a certain kind".[4] Section 93 X has nothing to say about political communication, being only designed to restrict

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1 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Attorney- General (SA) v Corporation of the City of Adelaide* (2013) 87 ALRJ 289 at [131] (Hayne J).

2 Note particularly Heydon J's observation in *Wotton* v *Queensland* that the freedom of political communication exists to "protect the institutions of representative and responsible government created by the Constitution. Those institutions are strong enough not to require protection from insubstantial burdens or unrealistic threats." (2012) 246 CLR 1 at [54], The enactment of laws such as s 93X of the *Crimes Act 1900* (NSW) could not constitute anything more than an ephemeral threat to the institutions of representative and responsible government.

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

4 *Coleman* v *Power* (2004) 220 CLR 1 at [30].

association and hence communication between members of the public and certain convicted offenders about whom formal warnings have been given.

9. Secondly, and relatedly, any burden imposed on freedom of political communication by s 93X of the *Crimes Act 1900* (NSW) is no more than incidental. In *Coleman* v *Power*[5], Gleeson CJ distinguished between laws the purpose of which was to prohibit or restrict political communication and other laws. His Honour reasoned[6]:

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> [T]he Court will not strike down a law restricting conduct which may incidentally burden freedom of political speech simply because it can be shown that some more limited restriction 'could suffice to achieve a legitimate purpose'. This is consistent with the respective roles of the legislature and the judiciary in a representative democracy.

10. More recently, in *Wotton* v *Queensland,* French CJ, Gummow, Hayne, Crennan and Bell JJ held:[7]

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> In answering the second *Lange* question, there is a distinction, recently affirmed in *Hogan* v *Hinch,* between laws which, as they arise in the present case, *incidentally restrict political communication,* and laws which prohibit or regulate communications which are *inherently political* or a necessary ingredient of political communication. The burden upon communication is more readily seen to satisfy the second *Lange* question if the law is of the former rather than the latter description.

11. Section 93X is not targeted at political communication. The main purpose of the provision is the prevention of association and communication between persons which may lead to building up criminal networks, planning criminal acts or similar
30 activities,[8] not the prevention of communication about governmental or political matters. Any communication which s 93X prohibits is not "inherently political or a necessary ingredient of political communication".

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5 (2004) 220 CLR 1.

6 (2004)220 CLR 1 at [31].

40 7 *Wotton* v *Queensland* (2012) 246 CLR 1 at [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ) (emphasis added).

8 See Second Reading Speech, the Hon. David Clarke, *Hansard,* Legislative Council, 7 March 2012, p 9093. Compare *Johanson v Dixon* (1979) 143 CLR 376 at 385 (Mason J) (describing the legislative policy of the consorting provision in question as 'designed to inhibit a person from habitually associating with persons of the three designated classes, because the association might expose that individual to temptation or lead to his involvement in criminal activity').

12. Thirdly, the extent of any burden imposed is relatively small.[9] Section 93X of the *Crimes Act 1900* (NSW) will only apply to communications which amount to "habitual consorting" with two or more persons convicted of indictable offences, and only after warnings have been issued and only where no defence is applicable.[10] The concept of consorting, as Mason J pointed out in *Johanson* v *Dixon,*[11] denotes "some seeking or acceptance of the association". It would have little or no application to communications made by a convicted offender to the community at large by, for example, writing letters to newspapers, ringing talkback radio stations or posting material publically on the Internet. Section 93X therefore leaves multiple channels of communication between electors and between electors and their representatives open.

13. Fourthly, there is no obvious and compelling alternative[12] for achieving the legitimate aims of s 93X of the *Crimes Act 1900* (NSW) that would have a less restrictive effect on the implied freedom. The section does not pursue the same ends as the bail conditions, apprehended violence orders or laws directed to establishing that particular organisations are criminal organisations. In addition, the mere possibility that some different means of achieving the same aim is not sufficient to invalidate the provision.

14. Finally, the concerns expressed by the Plaintiffs Tajjour and Hawthorne about the breadth of s 93X of the *Crimes Act 1900* (NSW) are, respectfully, exaggerated. The Plaintiffs expressed concern that an official warning "may be issued by any police officer, without the prior sanction of a more senior officer", and even before any consorting had occurred.[13]

15. Any concerns about the manner or context in which a warning is issued can be raised with a senior police officer and review of the decision sought through police channels. A warning is not irrevocable.[14]

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9 *Monis* v *The Queen* (2013) 87 ALJR 340 at [343], [352] (Crennan, Kiefel and Bell JJ); *Unions NSWv New South Wales* (2013) 88 ALJR 227 at [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

10 In addition, the provision does not apply to spent convictions, or to offences where a judge does not record a conviction. Section 12(c)(i) of the *Criminal Records Act 199}* (NSW) states that references in any legislation to convictions only apply to convictions which are not "spent". A conviction becomes spent 10 years after the person's conviction or release from imprisonment, whichever is the later, if the person has committed no further offences within that 10 year period: sections 8 and 9 of the *Criminal Records Act 1991* (NSW). Accordingly, police cannot give a warning to a person not to associate with another person if that other person's conviction or convictions have been spent.

11 (1979) 143 CLR 376 at 383. See also at 395 (Aickin J).

12 *Monis* v *The Queen* (2013) 87 ALJR 340 at [347]-[348] (Crennan, Kiefel and Bell JJ).

13 Plaintiffs' submissions, para [5.20].

14 A warning is revocable consistently with the principle of legality, whereby courts construe legislation so as to minimize its impact on fundamental rights and freedoms. See *Momcilovic* v *The Queen* (2011) 245 CLR 1 at [43] (French CJ); *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [86]-[87] (Hayne and Bell JJ), [158] (Kiefel J).

16. Accordingly, s 93X of the *Crimes Act 1900* (NSW) satisfies the second limb of the test in *Lange.*

Implied freedom of association

17. The Plaintiffs' submission that there is a stand-alone right to freedom of association implied in the Constitution is contrary to authority and principle. In *Wainohu,* all members of the Court who dealt with freedom of association stated that said there is no freestanding implied constitutional freedom of association. Gummow, Hayne, Crennan and Bell JJ (with whom French CJ and Kiefel agreed) stated:[15]

> Any freedom of association implied by the Constitution would exist only as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply.

18. That statement confirmed the earlier remarks of Gummow and Hayne JJ in *Mulholland,* with which Heydon J agreed.[16]

19. As a matter of principle, moreover, there being overlap between association and communication,[17] that militates against a separate freedom of political association. Such a freedom is not necessary in order to give effect to ss 7, 24 and 128 of the Constitution.[18]

20. Nothing in the text or structure of the Constitution supports any broader freedom of association unrelated to political communication, and the Plaintiffs in their submissions admit as much.[19] A freedom to associate for familial, social, sporting or other purposes (as claimed by the Plaintiffs)[20] is not required to facilitate the system of representative and responsible government established by the Constitution. To the extent that the Plaintiffs rely on the views of Murphy J and

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15 *Wainohu* v *State of New South Wales* (2011) 243 CLR 181 at [112]. French CJ and Kiefel J concurred with the reasons of the majority on this point: (2011) 243 CLR 181 at [72].

16 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [148] (Gummow and Hayne JJ), [364] (Heydon J). See also *Kruger* v *Commonwealth* (1997) 190 CLR I at 68-69 (Dawson J), 157 (Gummow J).

17 As illustrated by this law, which defines "consort" to include consorting by electronic or other forms of communication: s 93 W.

18 The implied freedom of political communication is implied only to the extent necessary to give effect to such constitutional provisions: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560-561,

19 Plaintiffs' submission at [5.50].

20 Plaintiffs' submission at [5.49].

other judges regarding the democratic nature of Australian society,[21] those views must be taken to have been rejected.[22]

21. Further, insofar as the Plaintiffs suggest that freedom of association is a right so "deeply rooted in our democratic system of government and the common law"[23] that legislatures cannot impair it, such a view is contrary to the long history of vagrancy laws in Australasia[24] and authorities such as *Wainohu* that have considered a purported implied freedom of association. It is also difficult to reconcile with authorities on binding over orders[25] and control orders[26] and the scope of the defence power in wartime.

22. All such matters point to there being neither the existence of, nor a rationale justifying, a free standing conception of freedom of association in the plenary terms posited by the Plaintiffs. Indeed, such a conception would be fraught with both difficulty and danger.

Treaty-making power of the Commonwealth

23. Finally, the Attorney-General submits that a treaty ratified by the Commonwealth Executive cannot operate as a constraint on State legislative power unless it has been enacted in Commonwealth legislation.

24. The Plaintiffs' submissions regarding section 61 of the Constitution and entry into treaties are inconsistent with settled authority[27] holding that if the Commonwealth Parliament does not enact or give effect to a treaty, the treaty creates no rights and imposes no obligations on any person in Australia. That necessarily includes the States as bodies politic in the Australian federation.

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21 McGraw-Hinds (Aust.) Pty Ltd v Smith (1979) 144 CLR 633 at 670; Miller v TCN Channel Nine Pty Ltd (1986) 161 CLR 556 at 581.

22 In addition, the Plaintiffs' reliance on authorities from the United States, Canada and the European Union sheds no light on the implications to be derived from Australia's constitutional structure. Those authorities deal with particular constitutional guarantees or human rights treaties. Neither forms the basis of the implied freedom of political communication or any freedom of association.

23 *Union Steamship Co of Australia Pty Ltd* v *King* (198 8) 166 CLR 1 at 10.

24 As to which, see A McLeod, "On the Origins of Consorting Law" (2013) *Melbourne University Law Review* 103.

25 *R v County of London Quartersessions Appeals Committee: Ex parte Metropolitan Police Commissioner* [1948] 1 KB 670 at 675 (Lord Goddard CJ).

26 See, for example, *Thomas v Mowbray* (2007) 233 CLR 307; *South Australia* v *Totani* (2010) 242 CLR 1; *Wainohu* v *State of New South Wales* (2011) 243 CLR 181.

27 *Minister for Immigration and Ethnic Affairs* v *Teoh* (1995) 183 CLR 273 at 286-287 (Mason CJ and Deane J). See also *Simsek* v *Macphee* (1982) 148 CLR 636 at 641-642 (Gibbs CJ); *Dietrich* v *The Queen* (1992) 177 CLR 292 at 305-306 (Mason CJ and McHugh J),

25. The Plaintiffs can point to no provision of the Constitution or any authority in this Court suggesting that the Commonwealth, and individuals in the community, would be free to contravene a treaty which the Executive has ratified but Parliament has not enacted, but a State legislature would somehow be prevented from doing so.

Conclusion

26. Questions 1 to 4 in the special case in the Tajjour and Hawthorne matters[28] should be answered "No".

27. Question 1 in the special case in the 27. Forster matter[29] should be answered "No".

VI. ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

28. The Attorney-General estimates that 20 minutes should be sufficient to present his oral argument.

Dated: 28 April 2014

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28 Joint Special Case Book ('JSCB') pp 6 and 32 respectively.
29 JSCB, p 52.