HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

Matter No S36/2014

SLEIMAN SIMON TAJJOUR — PLAINTIFF

AND

STATE OF NEW SOUTH WALES — DEFENDANT

Matter No S37/2014

JUSTIN HAWTHORNE — PLAINTIFF

AND

STATE OF NEW SOUTH WALES — DEFENDANT

Matter No S38/2014

CHARLIE MAXWELL FORSTER — PLAINTIFF

AND

STATE OF NEW SOUTH WALES — DEFENDANT

Tajjour v New South Wales
Hawthorne v New South Wales
Forster v New South Wales
[2014] HCA 35
8 October 2014
S36/2014, S37/2014 & S38/2014

ORDER

Matter No S36/2014

The questions asked in the Special Case dated 5 March 2014 be answered as follows:

1. *Is s 93X of the* Crimes Act *1900 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?*

   Answer: *Section 93X of the* Crimes Act *1900 (NSW) is not invalid.*

2. *Is there implied into the Commonwealth Constitution a freedom of association independent of the implied freedom of communication on governmental and political matters?*

   Answer: *No.*

3. *Does s 93X of the* Crimes Act *1900 (NSW) contravene any implied freedom of association referred to in question 2?*

   Answer: *Unnecessary to answer.*

4. *Is s 93X of the* Crimes Act *1900 (NSW) invalid because it is inconsistent with the International Covenant on Civil and Political Rights as ratified by the Commonwealth of Australia?*

   Answer: *No.*

5. *Who should pay the costs of the special case?*

   Answer: *The plaintiff.*

Matter No S37/2014

The questions asked in the Special Case dated 5 March 2014 be answered as follows:

1. *Is s 93X of the* Crimes Act *1900 (NSW) invalid because it impermissibly burdens the implied freedom of communication on*

governmental and political matters, contrary to the Commonwealth Constitution?

Answer: *Section 93X of the* Crimes Act *1900 (NSW) is not invalid.*

2. *Is there implied into the Commonwealth Constitution a freedom of association independent of the implied freedom of communication on governmental and political matters?*

Answer: *No.*

3. *Does s 93X of the* Crimes Act *1900 (NSW) contravene any implied freedom of association referred to in question 2?*

Answer: *Unnecessary to answer.*

4. *Is s 93X of the* Crimes Act *1900 (NSW) invalid because it is inconsistent with the International Covenant on Civil and Political Rights as ratified by the Commonwealth of Australia?*

Answer: *No.*

5. *Who should pay the costs of the special case?*

Answer: *The plaintiff.*

Matter No S38/2014

The questions asked in the Special Case dated 5 March 2014 be answered as follows:

1. *Is s 93X of the* Crimes Act *1900 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?*

Answer: *Section 93X of the* Crimes Act *1900 (NSW) is not invalid.*

2. *Who should pay the costs of the special case?*

Answer: *The plaintiff.*

Representation

G R James QC and P D Lange with E M M James and A Ahmad for the plaintiff in S36/2014 (instructed by Matouk Joyner Solicitors)

G O'L Reynolds SC with D P Hume for the plaintiff in S37/2014 (instructed by Matouk Joyner Solicitors)

W P Lowe with E M M James for the plaintiff in S38/2014 (instructed by McGowan Lawyers)

M G Sexton SC, Solicitor-General for the State of New South Wales and J G Renwick SC with K M Richardson for the defendant in each matter and for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

M G Hinton QC, Solicitor-General for the State of South Australia with N M Schwarz for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

S G E McLeish SC, Solicitor-General for the State of Victoria with P D Herzfeld for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

G R Donaldson QC, Solicitor-General for the State of Western Australia with M Georgiou for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

P J Dunning QC, Solicitor-General of the State of Queensland with G J D del Villar for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

B W Walker SC with A M Mitchelmore for the Australian Human Rights Commission, as amicus curiae (instructed by Australian Human Rights Commission)

CATCHWORDS

Tajjour v New South Wales
Hawthorne v New South Wales
Forster v New South Wales

Constitutional law – Implied freedom of political communication – Section 93X of *Crimes Act* 1900 (NSW) made it offence habitually to consort with convicted offenders after receiving official warning in relation to each convicted offender – Plaintiffs charged with offence against s 93X – Whether s 93X infringes implied freedom of political communication.

Constitutional law – Implied freedom of association – Whether Constitution contains an implied freedom of association independent of implied freedom of political communication.

Constitutional law – Powers of State Parliaments – Provisions of international convention ratified by Australia but not incorporated by statute in Australian domestic law – Whether capable of limiting power of State Parliaments to enact inconsistent legislation.

Words and phrases – "effectively burden", "habitually consort", "proportionality", "reasonably appropriate and adapted".

Crimes Act 1900 (NSW), ss 93W, 93X, 93Y.

FRENCH CJ.

Introduction

1 It is an offence in New South Wales for a person to habitually consort with two or more convicted offenders after being warned by a police officer that they are convicted offenders and that consorting with a convicted offender is an offence. Section 93X of the *Crimes Act* 1900 (NSW) ("the Crimes Act")[1], which makes it so, has its ancestry in vagrancy laws dating back to medieval England[2]. Its evident object is the prevention of crime by preventing the formation, maintenance or expansion of criminal networks. Although the verb "consort" has a pejorative flavour, it is capable of application to law-abiding persons[3] regularly associating for innocent purposes, including for the purposes of communication and advocacy about governmental or political matters. The primary practical constraint upon its application is the discretion afforded to police officers in deciding whether or not to issue an official warning to a person about consorting with a convicted offender.

2 The validity of s 93X has been challenged by three plaintiffs, Tajjour, Hawthorne and Forster, each of whom has been charged under it. Each charge alleged that between certain times and dates the relevant plaintiff did habitually consort with named convicted offenders after receiving a warning not to consort with those persons. The plaintiffs contend that s 93X impermissibly burdens the freedom of communication on governmental or political matters implied in the Constitution. Tajjour and Hawthorne also assert that there is implied in the Constitution a freedom of association, independent of the implied freedom of communication on governmental or political matters, and that the section contravenes that implied freedom. In addition, Tajjour and Hawthorne contend that the section is invalid because it is inconsistent with the freedom of

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1 Inserted by the *Crimes Amendment (Consorting and Organised Crime) Act* 2012 (NSW), Sched 1 [9].

2 McLeod, "On the Origins of Consorting Laws", (2013) 37 *Melbourne University Law Review* 103 at 106–108, 114.

3 Section 93W defines "convicted offender" as a person who has been convicted of an indictable offence and does not set any upper limit on the age of the conviction necessary to fall within that definition. A person may be a "convicted offender" in respect of an old conviction, yet may also be a law-abiding citizen. Some old convictions may be expunged under spent conviction provisions in Pts 2 and 3 of the *Criminal Records Act* 1991 (NSW), but those provisions do not cover, for example, sexual offences or convictions attracting a sentence of more than six months imprisonment (s 7(1)).

association guaranteed by Art 22 of the International Covenant on Civil and Political Rights ("the ICCPR"), to which Australia is a party.

3 Each of the three plaintiffs filed a summons in the Supreme Court of New South Wales seeking a declaration that s 93X is invalid. On 13 May 2013, Beech-Jones J made orders that the question whether s 93X was invalid be decided separately from all other questions in the proceedings and that the proceedings be removed into the Court of Appeal of the Supreme Court of New South Wales. On 14 February 2014, on the application of the Attorney-General for New South Wales, Kiefel and Bell JJ made orders removing the three proceedings into this Court. Directions were given for the serving of draft Special Cases and, on 5 March 2014, Kiefel J made orders referring each Special Case for hearing before the Full Court.

4 For the reasons that follow, s 93X impermissibly burdens the implied constitutional freedom of communication on governmental or political matters and is on that account invalid. There is, therefore, no occasion to consider the argument, advanced by Tajjour and Hawthorne, for a free-standing implied freedom of association. The argument that State legislative power is limited by the right to freedom of association guaranteed under the ICCPR is misconceived. The questions referred in the Special Cases should be answered accordingly.

The questions in the Special Cases

5 In the Special Cases relating to Tajjour and Hawthorne, the following questions are stated for the opinion of the Full Court:

1. Is s 93X of the *Crimes Act* 1900 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

2. Is there implied into the Commonwealth Constitution a freedom of association independent of the implied freedom of communication on governmental and political matters?

3. Does s 93X of the *Crimes Act* 1900 (NSW) contravene any implied freedom of association referred to in question 2?

4. Is s 93X of the *Crimes Act* 1900 (NSW) invalid because it is inconsistent with the International Covenant on Civil and Political Rights as ratified by the Commonwealth of Australia?

5. Who should pay the costs of the Special Case?

In the Special Case relating to Forster, only the first and the last questions are referred. It is a feature of the Special Cases that while the agreed facts disclose interference with the freedom of association of each of the plaintiffs, it is not

suggested that there was interference with any attempted or proposed communication about governmental or political matters.

6 The construction of s 93X is the first necessary step in determining its validity. Its construction is informed by the history of consorting laws in Australia and judicial decisions interpreting and applying them.

Some legislative history

7 Laws directed at inchoate criminality have a long history, dating back to England in the Middle Ages, which is traceable in large part through vagrancy laws. An early example was a statute enacted in 1562 which deemed a person found in the company of gypsies, over the course of a month, to be a felon[4].

8 A precursor of consorting laws in New South Wales was s 2 of the *Vagrancy Act* 1835 (NSW)[5], which listed categories of persons deemed "idle and disorderly". Among them it included "the holder of every house … frequented by reputed thieves or persons who have no visible lawful means of support and every person found in any such house in company with such reputed thieves or persons" without giving a good account of lawful means of support and of being in such a house on some lawful occasion. There was no equivalent category under English vagrancy laws. Plainly enough, the 1835 legislation was directed to the prevention of criminal combinations. As Professors Campbell and Whitmore wrote in 1973[6]:

> "New South Wales in 1835 was still a penal colony and one can understand why at that time it should have been thought necessary to prevent people getting together to hatch crimes."

9 The earliest Australian statutes expressly directed against "habitual consorting" were modelled on s 26(4) of the *Police Offences Act* 1884 (NZ), which was enacted in 1901[7]. The New Zealand provision included in the

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4 McLeod, "On the Origins of Consorting Laws", (2013) 37 *Melbourne University Law Review* 103 at 113 referring to 5 Eliz 1 c 20.

5 6 Will 4 No 6.

6 Campbell and Whitmore, *Freedom in Australia*, rev ed (1973) at 135. The offence created by the *Vagrancy Act* 1835 (NSW), unlike consorting, was constituted by a single incident, ie being "found in any such house" — see the discussion of the equivalent Victorian provision, s 6(1)(b) of the *Vagrancy Act* 1966 (Vic), in *Johanson v Dixon* (1979) 143 CLR 376 at 395–396 per Aickin J; [1979] HCA 23.

7 The sub-section was inserted into the *Police Offences Act* 1884 (NZ) by the *Police Offences Amendment Act* 1901 (NZ), s 4.

categories of persons "deemed … idle and disorderly" persons who "habitually consort[] with reputed thieves or prostitutes or persons who have no visible means of support." The insertion in the vagrancy laws of the Australian States of common form prohibitions of habitual consorting, modelled on the New Zealand provision, began in South Australia in 1928[8]. The purpose of its similarly worded successor[9] was described in *Dias v O'Sullivan* as[10]:

> "to prevent the regular meeting of congeries of individuals (persons generally regarded by those, who ought to know, as having vicious propensities), in circumstances where the meetings have the appearance of fraternising."

The provision was also described as "a legislative attempt to give legal sanction to St Paul's advice to the Corinthians (amongst whom were many reputed thieves) that 'Evil communications corrupt good manners.'"[11] The offence created by the South Australian Act[12] was that of being an "idle and disorderly" person. Similar offences were created in New South Wales, Victoria, Queensland and Western Australia[13]. Griffith CJ explained the operation of the common form vagrancy laws in *Lee Fan v Dempsey*[14], albeit before the inclusion in them of consorting provisions, as follows:

> "[Section 65 of the *Police Act* 1892 (WA)] creates only one substantive offence, that of being an idle and disorderly person, and the eight categories of persons are not, properly speaking, definitions of offences,

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8 In chronological order, consorting provisions were introduced by the *Police Act Amendment Act* 1928 (SA), s 5; *Vagrancy (Amendment) Act* 1929 (NSW), s 2(b); *Police Offences (Consorting) Act* 1931 (Vic), s 2; *Vagrants, Gaming, and Other Offences Act* 1931 (Q), s 4(1)(v); *Police Offences Act* 1935 (Tas), s 6; *Police Act Amendment Act* 1955 (WA), s 2.

9 *Police Act* 1936 (SA), s 85(1)(j).

10 [1949] SASR 195 at 199 per Mayo J.

11 *Reardon v O'Sullivan* [1950] SASR 77 at 82 per Abbott J.

12 *Police Act* 1916 (SA), s 66(g2).

13 *Vagrancy Act* 1902 (NSW), s 4(1)(j) read with s 3; *Police Offences (Consorting) Act* 1931 (Vic), s 2; *Vagrants, Gaming, and Other Offences Act* 1931 (Q), s 4(1)(v); *Police Act* 1892 (WA), s 65(9).

14 (1907) 5 CLR 310 at 313; [1907] HCA 54. See also at 317 per Barton J, 320 per Isaacs J.

> but of states of facts which, if proved, will establish that substantive offence."

Subsequently, in New South Wales, Victoria and South Australia, the common form prohibition of habitual consorting evolved to a stand-alone consorting offence, not mediated through the deemed status of being an "idle and disorderly" person[15]. It was a stand-alone offence in Tasmania from the outset[16].

10 Consorting laws in Australia had the practical effect of conferring significant powers on police officers. In New Zealand, the Minister of Justice, introducing the Bill for the inclusion of s 26(4) in the *Police Offences Act* 1884 (NZ), said it gave the police power with respect to people who were not without means, but consorted with thieves and prostitutes and were "well known to the police to be people of bad character"[17]. It answered Isaacs J's characterisation of vagrancy laws in *Lee Fan v Dempsey* as protective of the public by preventative rather than punitive means[18]. In a similar vein, Mayo J in *Dias v O'Sullivan* described the purpose of the South Australian consorting offence as "precautionary and preventative, rather than to administer punishment for dishonest planning, criminal transactions, or machinations whilst the group are together."[19]

11 The first consorting law in New South Wales, s 4(1)(j) of the *Vagrancy Act* 1902 (NSW), was enacted in 1929[20]. It provided that whosoever "habitually consorts with reputed criminals or known prostitutes or persons who have been convicted of having no visible lawful means of support" would be liable to imprisonment with hard labour for a term not exceeding six months. Its purpose, as stated in the Explanatory Note and the First and Second Reading Speeches to

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15 The first stand-alone offences were created by s 25 of the *Summary Offences Act* 1970 (NSW), s 6(1)(c) of the *Vagrancy Act* 1966 (Vic) and s 13 of the *Police Offences Act* 1953 (SA). See also s 33 of the *Criminal Law Amendment (Simple Offences) Act* 2004 (WA), introducing into the *Criminal Code* (WA) s 557J(2), concerning consorting by declared drug traffickers, and s 557K(4), concerning consorting by child sex offenders.

16 *Police Offences Act* 1935 (Tas), s 6.

17 New Zealand, House of Representatives, *Parliamentary Debates* (Hansard), 24 August 1900 at 237.

18 (1907) 5 CLR 310 at 321.

19 [1949] SASR 195 at 202.

20 Inserted by the *Vagrancy (Amendment) Act* 1929 (NSW), s 2(b).

the Bill, was to give greater powers to the police to deal with "the consorting of criminals"[21]. It was, at least in part, a response to a perceived problem of criminal gangs known as "razor gangs" in the 1920s[22].

12 The *Vagrancy Act* 1902 (NSW) was repealed in 1970[23]. Its replacement, the *Summary Offences Act* 1970 (NSW), created the stand-alone offence of habitually consorting, inter alia, with reputed criminals or persons who had been convicted of certain offences[24]. In 1979, that Act was repealed[25] and a new, more narrowly defined, consorting offence was created by s 546A of the Crimes Act[26]. Section 546A made it an offence for a person to habitually consort with persons who had been convicted of indictable offences, if he or she knew that they had been convicted of indictable offences. A principle underlying the redefinition, as explained in the Second Reading Speech by the Attorney-General and Minister of Justice, was that[27]:

> "Unless there are exceptional and compelling reasons for otherwise providing, the basis of criminal liability should be what a person does, or, in appropriate cases, omits to do, rather than the identity of the person".

13 Despite the redefinition and narrowing of the offence, s 546A, like its successor, s 93X, carried forward the concept of "habitual consorting" from the offences in the *Summary Offences Act* 1970 (NSW) and the *Vagrancy Act* 1902 (NSW) that preceded it. It is necessary to have regard to how that statutory term

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21 New South Wales, Legislative Assembly, Vagrancy (Amendment) Bill 1929, Explanatory Note; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 September 1929 at 325; New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 1929 at 682.

22 Steel, "Consorting in New South Wales: Substantive Offence or Police Power?", (2003) 26 *University of New South Wales Law Journal* 567 at 584–586. See also New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 October 1929 at 731.

23 *Summary Offences Act* 1970 (NSW), s 3(1) and Sched 1.

24 s 25.

25 *Summary Offences (Repeal) Act* 1979 (NSW), s 3.

26 Inserted by the *Crimes (Summary Offences) Amendment Act* 1979 (NSW), Sched 5, item 3.

27 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 April 1979 at 4924.

in the laws of New South Wales and the other States has been interpreted by the courts, in order for its construction in s 93X to be properly informed.

14 The term "habitually consorts", in the offence provisions of the various States, required, in practical terms, proof of more than one occasion of association between a defendant and reputed thieves or criminals. Consorting was construed as "frequent companionship"[28]. The adverb "habitually" required that it be more than occasional, "so constant as to have created a habit."[29] It was not necessary that the consorting be with the same person or persons[30]. Consorting for an innocent purpose was within the ambit of the offences. In *Gabriel v Lenthall*, Richards J said that[31]:

> "The offence is not being with thieves on occasions when it may be suspected that they are about their nefarious occupation, but simply habitually consorting with them; it is not companionship in thieving, but with thieves."

A similar approach was adopted in Queensland in *Clarke v Nelson; Ex parte Nelson*[32]. Macrossan SPJ, delivering the judgment of the Full Court, said that Parliament had not inadvertently omitted some justification or excuse for habitually consorting with reputed criminals[33]. That proposition was endorsed by

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28 *O'Connor v Hammond* (1902) 21 NZLR 573 at 576 per Stout CJ; *Reardon v O'Sullivan* [1950] SASR 77 at 87 per Paine AJ; *Benson v Rogers* [1966] Tas SR 97 at 101 per Burbury CJ.

29 *O'Connor v Hammond* (1902) 21 NZLR 573 at 576 per Stout CJ; *Reardon v O'Sullivan* [1950] SASR 77 at 87 per Paine AJ; *Benson v Rogers* [1966] Tas SR 97 at 101 per Burbury CJ.

30 *O'Connor v Hammond* (1902) 21 NZLR 573 at 576 per Stout CJ; *Gabriel v Lenthall* [1930] SASR 318 at 323 per Richards J; *Auld v Purdy* (1933) 50 WN (NSW) 218 at 219 per Street J. See generally *Brealy v Buckley* [1934] ALR 371 at 372 per Gavan Duffy J.

31 [1930] SASR 318 at 327.

32 [1936] QWN 17. See also *Beer v Toms; Ex parte Beer* [1952] St R Qd 116 at 126–127 per Townley J delivering the judgment of the Court.

33 [1936] QWN 17 at 19.

this Court in 1979 in *Johanson v Dixon*[34]. It was restated in 1983 by King CJ in *Jan v Fingleton*[35]:

> "Apart from the statute the conduct to be punished may be quite innocent",

which led his Honour to add[36]:

> "The wisdom and even the justice of such a law may be, and often has been, questioned."

15 The prosecution of persons for habitual consorting required police to have identified repeated occasions of association between the accused and reputed thieves or criminals. The reputation of any person with whom the accused had consorted could be established without proof of its correctness. A reputation known only to police could suffice[37]. Those characteristics of the consorting provisions conferred wide discretionary powers on police officers to observe, to warn and, if their warnings were ignored on a number of occasions, to charge[38]. The importance attached to the exercise of appropriate judgment by police officers in the application of the Queensland consorting law was evidenced by the observation of Henchman J in the course of argument in *Clarke v Nelson; Ex parte Nelson*[39]:

> "The police will not harass a man because he has been a criminal: they will only concern themselves with present criminals."

The consorting laws of the States did not in terms so confine police powers. Nor does s 93X.

16 Judgment of an evaluative kind was required of the courts. The question whether a person had been engaged in habitual consorting was a "question of

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34 (1979) 143 CLR 376, which concerned s 6(1)(c) of the *Vagrancy Act* 1966 (Vic) and is considered below.

35 (1983) 32 SASR 379 at 380.

36 (1983) 32 SASR 379 at 380.

37 *Dias v O'Sullivan* [1949] SASR 195 at 203 per Mayo J.

38 See generally Steel, "Consorting in New South Wales: Substantive Offence or Police Power?", (2003) 26 *University of New South Wales Law Journal* 567.

39 [1936] QWN 17 at 18.

degree"[40], involving consideration by the court of the number of times a person had been in company with reputed criminals and all the circumstances[41]. As was pointed out in *Dias v O'Sullivan*, each meeting by an accused with a reputed thief did not constitute a separate offence in South Australia. The consorting provision was "directed at the notional relationship (over the averred period), indicated by the series of incidents relied on, as explanatory of the aggregate of those incidents revealing a general practice considered for the purpose of s 85(1)(j) as a single offence."[42] Mayo J described the fundamental ingredient of consorting as "companionship", noting that it might be concurrent with innocent activity[43]:

> "The fact that people meet (*inter alia*) to carry on some trade or occupation is not inconsistent with a fraternising contemporary therewith amounting to consorting."

The requirement that consorting be habitual involved "a continuance and permanence of some tendency, something that has developed into a propensity, that is present from day to day."[44]

17 The decision of this Court in *Johanson v Dixon* concerned the Victorian consorting provision in s 6(1)(c) of the *Vagrancy Act* 1966 (Vic)[45]. It was delivered against the background of a generally consistent body of case law dealing with similar, but not identical, provisions in a number of the Australian States. The applicant, Johanson, who had sought special leave to appeal against a decision of the Full Court of the Supreme Court of Victoria[46], faced the difficulty that findings of fact adverse to him had been made by the primary

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40 *MacDonald v The King* (1935) 52 CLR 739 at 743 per Rich J; [1935] HCA 18.

41 *Clarke v Nelson*; *Ex parte Nelson* [1936] QWN 17 at 19 per Macrossan SPJ delivering the judgment of the Court; *Young v Bryan* [1962] Tas SR 323 at 327–328 per Burbury CJ; *Benson v Rogers* [1966] Tas SR 97 at 98 per Burbury CJ.

42 [1949] SASR 195 at 199 per Mayo J.

43 [1949] SASR 195 at 201.

44 [1949] SASR 195 at 200 per Mayo J.

45 One of its predecessors, s 69(1)(d) of the *Police Offences Act* 1957 (Vic), which mediated the consorting provision through the status offence of being an "idle and disorderly" person, was considered in *Byrne v Shearer* [1959] VR 606.

46 *Johanson v Dixon (No 3)* [1978] VR 377.

judge. Those findings required that special leave be refused[47]. The Victorian provision created the offence of habitually consorting with reputed thieves, but made it a defence if the person accused, on being so required by the court, gave to the satisfaction of the court a good account of his lawful means of support and also of his consorting. The primary judge had not accepted the truth of the applicant's account. Cadit quaestio. Nevertheless, Mason J, with whom Barwick CJ and Stephen J agreed, went on to consider and reject the applicant's contention that, on its proper interpretation, the statute excluded association for an innocent purpose. To say no more than that the association was innocent or not unlawful was not to give a good account[48]. It was not for the Crown to prove that the defendant had consorted for an unlawful or criminal purpose[49]. The words creating the offence made no mention of purpose[50]. Aickin J came to the same conclusion[51]. Mason J also explained the verb "consorts"[52]:

> "In its context 'consorts' means 'associates' or 'keeps company' and it denotes some seeking or acceptance of the association on the part of the defendant." (citation omitted)

18 While those observations were made in the context of the particular defence of "a good account" provided for in the Victorian provision, the meaning attributed to the term "consorts" followed that adopted in previous decisions of State courts. What was said in *Johanson v Dixon* informs the construction of the term "habitually consorts" used in s 93X. It is necessary, however, to consider the text of that section and its associated provisions. It differs in some material respects from the Victorian provision considered in *Johanson v Dixon*, precursor provisions in New South Wales and their equivalents in the other States.

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47 (1979) 143 CLR 376 at 382 per Mason J, Barwick CJ and Stephen J agreeing at 379, Aickin J agreeing at 395.

48 (1979) 143 CLR 376 at 384.

49 (1979) 143 CLR 376 at 383.

50 (1979) 143 CLR 376 at 383.

51 (1979) 143 CLR 376 at 396.

52 (1979) 143 CLR 376 at 383 citing *Brown v Bryan* [1963] Tas SR 1 at 2 per Crisp J. See also at 395 per Aickin J.

The statutory provisions

19 Section 93X and its companion provisions were introduced into the Crimes Act in 2012, replacing s 546A[53].

20 Section 93X of the Crimes Act provides:

> "(1) A person who:
>
> (a) habitually consorts with convicted offenders, and
>
> (b) consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offenders,
>
> is guilty of an offence.
>
> Maximum penalty: Imprisonment for 3 years, or a fine of 150 penalty units, or both.
>
> (2) A person does not ***habitually consort*** with convicted offenders unless:
>
> (a) the person consorts with at least 2 convicted offenders (whether on the same or separate occasions), and
>
> (b) the person consorts with each convicted offender on at least 2 occasions.
>
> (3) An ***official warning*** is a warning given by a police officer (orally or in writing) that:
>
> (a) a convicted offender is a convicted offender, and
>
> (b) consorting with a convicted offender is an offence."

21 Section 93W defines "convicted offender" as "a person who has been convicted of an indictable offence (disregarding any offence under section 93X)." The class of persons falling within that description is limited only by the range of offences which are "indictable offences". "Indictable offences" comprise any offences which may be dealt with on indictment[54]. Moreover, the class is not

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53 As to the background to the introduction of s 546A, see New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 April 1979 at 4924.

54 *Criminal Procedure Act* 1986 (NSW), ss 3(1) and 5.

temporally confined, in that there is no upper limit on the age of a conviction which would constitute the person convicted a "convicted offender" for the purposes of s 93W.

22 The term "consort" is defined in s 93W to mean:

> "consort in person or by any other means, including by electronic or other form of communication."

That definition assumes a received meaning for the verb "consort", which may be taken to have been based upon the pre-existing judicial interpretation[55]. Consorting was not defined in any of its prior judicial exegesis solely by reference to "communication". Communication is characterised in the definition not as a species, but as a "means", of consorting. The purpose of the definition, as explained in the Agreement in Principle Speech of the Attorney-General and Minister for Justice, was that "networks established via Facebook, Twitter and SMS will not be immune from these provisions."[56] Section 93W has the effect that consorting can be carried on by any form of communication. But it must be communication which constitutes "association" or "keeping company" and can therefore be characterised as "consorting". The Australian Human Rights Commission, in written submissions, contended that the conduct prohibited by s 93X extends to communication between identified persons, with no exception for political communication. For the reasons already given, the offence created by s 93X is not so wide ranging.

23 The constructional question, anterior to the constitutional question in this case, is whether and to what extent association or keeping company by means of, or for the purpose of, communication on governmental or political matters can fall within the offence created by s 93X.

24 As appears from the judicial exegesis of the consorting laws of the Australian States, innocent purpose was never a defence against a charge of habitual consorting[57]. Section 93Y, which sets out a number of specific

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55 *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106–107; [1994] HCA 34.

56 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 February 2012 at 8132.

57 Some of the observations of the Full Court of the Supreme Court of Victoria in *Byrne v Shearer* [1959] VR 606, which concerned an earlier provision, s 69(1)(d) of the *Police Offences Act* 1957 (Vic), might have supported a different view, but they were qualified into conformity by the Full Court in *Johanson v Dixon (No 3)* [1978] VR 377 at 383 per Young CJ, Menhennitt and Murray JJ, consistently with

(Footnote continues on next page)

"innocent purpose" defences to a charge under s 93X, therefore represents a significant shift in the law in New South Wales. That section provides:

> "The following forms of consorting are to be disregarded for the purposes of section 93X if the defendant satisfies the court that the consorting was reasonable in the circumstances:
>
> (a) consorting with family members,
>
> (b) consorting that occurs in the course of lawful employment or the lawful operation of a business,
>
> (c) consorting that occurs in the course of training or education,
>
> (d) consorting that occurs in the course of the provision of a health service,
>
> (e) consorting that occurs in the course of the provision of legal advice,
>
> (f) consorting that occurs in lawful custody or in the course of complying with a court order."

Those paragraphs provide defences on the evident premise that meeting in the course of any of the listed activities could constitute consorting. The prosecution, in a case based upon consorting with family members, would have to show that what occurred was consorting. That shown, the defence could seek to satisfy the court that it was a "form[] of consorting ... to be disregarded for the purposes of section 93X". The specific defences do not cover consorting that occurs in the course of, or for the purpose of, political discussion, communication or action. That omission weighs against any implication which would exclude consorting for that purpose.

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the construction adopted by this Court on the application for special leave to appeal against that decision.

25 The Attorney-General and Minister for Justice, in the Agreement in Principle Speech for the Amendment Bill[58], cited *Johanson v Dixon*[59] for the proposition that "consorting need not have a particular purpose but denotes some seeking or acceptance of the association on the part of the defendant"[60]. Referring to the new criteria for habitual consorting in s 93X(2), he identified a purpose of the provision when he said[61]:

> "The requirement that the person consorts with more than one offender recognises the fact that the goal of the offence is not to criminalise individual relationships but to deter people from associating with a criminal milieu."

26 A person does not commit the offence of habitual consorting with convicted offenders, contrary to s 93X, unless he or she consorts with them after being warned by a police officer, orally or in writing, that they are convicted offenders and that consorting with them is an offence. That requirement has no precedent in the precursor consorting laws in New South Wales, but is reflected in similar consorting provisions in Western Australia and the Northern Territory[62]. It appears to reflect what was always a necessary feature of police practice in the enforcement of consorting laws in New South Wales and the other States[63]. It has the practical effect that a person so warned would find it difficult to say that he or she did not know that the persons with whom he or she was thereafter consorting were convicted offenders. It also confers a discretion on police officers to determine who shall be at risk of prosecution and who shall not. Recognising the practical effect of the law in conferring discretionary powers on

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58 Crimes Amendment (Consorting and Organised Crime) Bill 2012 (NSW).

59 (1979) 143 CLR 376 at 383 per Mason J citing *Brown v Bryan* [1963] Tas SR 1 at 2 per Crisp J.

60 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 February 2012 at 8131–8132.

61 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 February 2012 at 8131.

62 *Criminal Code* (WA), ss 557J(2) and 557K(4); *Summary Offences Act* (NT), s 55A(1).

63 Steel, "Consorting in New South Wales: Substantive Offence or Police Power?", (2003) 26 *University of New South Wales Law Journal* 567 at 588–590, 592–593. See also Brunskill, "Consorting", (2003) 11(1) *Policing Issues & Practice Journal* 1 at 1–2; Victoria, Parliament, Scrutiny of Acts and Regulations Committee, *Review of the Vagrancy Act 1966: Final Report*, (2002) at 11–12.

police, the Attorney-General and Minister for Justice related those powers to the purpose of the provisions[64]:

> "This bill puts police in a position to do what they do best every day and make a judgement about whether observed behaviour reaches the level sought to be addressed by the bill, that is, behaviour which forms or reinforces criminal ties."

27 Section 93X and its associated provisions, read in the light of judicial exegesis of earlier consorting provisions in New South Wales and other States, extend to habitual consorting for innocent purposes. There is no express textual basis for excluding consorting for the purpose of communications on governmental or political matters. The next question is whether there is any alternative construction which would avoid that result. If there is, then the principle of legality, protective of the common law freedom of speech on public affairs, would favour that construction.

Application of the principle of legality regarding freedom of speech and freedom of association

28 Statutes should be construed, where constructional choices are open, so that they do not encroach, or encroach as little as possible, upon fundamental rights and freedoms at common law[65]. While the utility of the term "fundamental" in this context is questionable[66], freedom of speech has long

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64 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 February 2012 at 8132.

65 *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; [1908] HCA 63; *Bropho v Western Australia* (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; [1990] HCA 24; *Coco v The Queen* (1994) 179 CLR 427 at 436–437 per Mason CJ, Brennan, Gaudron and McHugh JJ; [1994] HCA 15; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 562–563 [43] per McHugh J, 578 [93]–[94] per Kirby J, 592–593 [134] per Callinan J; [2002] HCA 49; *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 513 [45] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne and Heydon JJ; [2003] HCA 21; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 271 [58] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; [2010] HCA 23.

66 *Momcilovic v The Queen* (2011) 245 CLR 1 at 46 [43] per French CJ; [2011] HCA 34.

enjoyed special recognition at common law[67] and particularly so in relation to the criticism of public bodies[68]. As TRS Allan wrote in 1996[69]:

> "The traditional civil and political liberties, like liberty of the person and freedom of speech, have independent and intrinsic weight: their importance justifies an interpretation of both common law and statute which serves to protect them from unwise and ill-considered interference or restriction."

Even absent entrenchment by express or implied constitutional guarantee, freedom of speech on public affairs at common law is more than a particular application of the general principle that anybody is free to do anything which is not forbidden by law[70]. In order to displace it, the Parliament must have chosen clear language which permits no other outcome.

29 The common law freedom of speech in relation to public affairs informed the decision of this Court in *Davis v The Commonwealth*[71] to hold invalid a statute purportedly made in the exercise of the incidental power under s 51(xxxix) of the Constitution. The restrictions it imposed on the use of words

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67 *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 52 per Mason J; [1980] HCA 44; *Davis v The Commonwealth* (1988) 166 CLR 79 at 100 per Mason CJ, Deane and Gaudron JJ; [1988] HCA 63; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 31 per Mason CJ; [1992] HCA 46; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 31–32 [43] per French CJ, 67–68 [151]–[152] per Heydon J; [2013] HCA 3. See also Blackstone, *Commentaries on the Laws of England*, (1769), bk 4, c 11 at 151–152; *Bonnard v Perryman* [1891] 2 Ch 269 at 284 per Lord Coleridge CJ; *R v Commissioner of Police of the Metropolis; Ex parte Blackburn (No 2)* [1968] 2 QB 150 at 155 per Lord Denning MR; *Wheeler v Leicester City Council* [1985] AC 1054 at 1063, 1065 per Browne-Wilkinson LJ; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 203 per Dillon LJ.

68 *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 690–691 per Gleeson CJ; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 at 547–549 per Lord Keith of Kinkel.

69 Allan, "The Common Law as Constitution: Fundamental Rights and First Principles", in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia*, (1996) 146 at 148.

70 cf *Attorney-General v Observer Ltd* [1990] AC 109 at 283 per Lord Goff of Chieveley.

71 (1988) 166 CLR 79.

and expressions relevant to Australia's bicentennial celebrations were held to be "grossly disproportionate to the need to protect the commemoration"[72]. Its impact on freedom of expression was relevant to that assessment[73]:

> "This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power."

Davis, antedating by four years the Court's discernment of the implied freedom of political communication, suggests that a proportionality test, relevant to the constitutional validity of any purposive legislative power, including an incidental power, may involve consideration of the effect of the purported exercise of that power upon common law rights and freedoms.

30 The application of the principle of legality to the construction of s 93X is anterior to the determination of the validity of the section and to any "reading down", if that be possible and necessary, to bring the section within the bounds of the legislative competence of the New South Wales Parliament as required by s 31 of the *Interpretation Act* 1987 (NSW). Constructional choices precluding or limiting the application of s 93X to consorting by engaging in, or for the purpose of, communication on governmental or political matters would include a reading of "consort" as not extending to association for such a purpose. No such construction, which could engage with the principle of legality, was suggested by the parties. It was not in the interest of the plaintiffs' challenge to validity for them to do so. The State of New South Wales accepted that s 93X extended to consorting with convicted offenders for entirely innocent purposes. Its arguments focussed upon the effects of s 93X on the implied freedom of communication, which it contended are minimal and purely incidental.

31 Section 93X does not prohibit mere communication with convicted offenders. Even if such a construction were open, the principle of legality would operate against it. However, there is no textual or contextual basis for construing s 93X as inapplicable to "habitual consorting" by engaging in, or for the purpose of, communication on governmental or political matters. Such a reading would import a qualification or limitation upon the meaning of "consort" which is inconsistent with its longstanding judicial exegesis, including that in *Johanson v Dixon*. Nor, having regard to that conclusion, could the Court construe official warnings as lacking legal consequences in relation to consorting in the course of, or for the purposes of, communication on governmental or political matters. The Court should not give a strained meaning to statutes in order to avoid the possibility of constitutional invalidity. Parliament's choice of language must be

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72 (1988) 166 CLR 79 at 100 per Mason CJ, Deane and Gaudron JJ.

73 (1988) 166 CLR 79 at 100 per Mason CJ, Deane and Gaudron JJ.

respected, even if the unavoidable consequence of that choice is constitutional invalidity[74] which cannot be cured by statutorily mandated reading down[75]. The question which must now be considered is whether s 93X, as applied to consorting in the course of, or for the purposes of, communication on governmental or political matters, infringes the implied freedom of political communication.

The implied freedom of political communication

32 The implied freedom of communication on governmental or political matters defines a limit on the legislative power of the Commonwealth, State and Territory Parliaments and informs the common law of Australia. The questions to be asked in determining whether an impugned law exceeds that limit were settled in *Lange v Australian Broadcasting Corporation*[76], and modified in *Coleman v Power*[77]. They were recently restated in *Unions NSW v New South Wales*[78]. They are:

1. Does the impugned law effectively burden the freedom of political communication either in its terms, operation or effect[79]?

2. If the provision effectively burdens the freedom, is the provision reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government[80]?

33 In considering each question, it is necessary to bear in mind that the implied freedom operates as a limit upon legislative power, not as a source of

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74 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 349 [42] per French CJ; [2009] HCA 49.

75 *Interpretation Act* 1987 (NSW), s 31.

76 (1997) 189 CLR 520 at 567 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ; [1997] HCA 25.

77 (2004) 220 CLR 1 at 50 [92]–[93], 51 [95]–[96] per McHugh J, 77–78 [196] per Gummow and Hayne JJ; [2004] HCA 39.

78 (2013) 88 ALJR 227; 304 ALR 266; [2013] HCA 58.

79 (2013) 88 ALJR 227 at 236 [35] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; 304 ALR 266 at 276.

80 (2013) 88 ALJR 227 at 237 [44]; 304 ALR 266 at 278.

individual rights or freedoms[81]. As five Justices of this Court said in *Unions NSW*[82]:

> "The central question is: how does the impugned law affect the freedom?"

The question whether a law "effectively burdens" the freedom requires consideration of its legal and practical operation. As Hayne J pointed out in *Monis v The Queen*, it does not require an evaluation of the significance or weight to be attached to that effect[83]. The submission of New South Wales to the contrary should be rejected. Nor can a negative answer to the question be based on a finding that the law's restriction on the implied freedom will not affect the overall quantum of political discourse, having regard to ways of undertaking that discourse which are unaffected by the restriction[84]. Such considerations may be involved in the second question. On the other hand, an effective burden is unlikely to be inferred simply from the forensic construction of causal connections between the law and some unlikely hypothetical restriction on the implied freedom.

34 The language of "legitimate ends" and laws "reasonably and appropriately adapted" to them in the second question may be traced back to the judgment of the Supreme Court of the United States delivered by Marshall CJ in *McCulloch v Maryland*[85] in 1819. That judgment concerned the power conferred on the Congress by Art I, §8, cl 18 of the United States Constitution to make laws "necessary and proper" for the exercise of other powers conferred by the Constitution. It was cited by Barton and O'Connor JJ in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*[86] in connection with the analogous "incidental" power conferred by s 51(xxxix) of the Constitution. Their Honours quoted[87] the well-known passage from the judgment of Marshall CJ[88]:

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81 (2013) 88 ALJR 227 at 235 [31]; 304 ALR 266 at 275.

82 (2013) 88 ALJR 227 at 236 [36]; 304 ALR 266 at 277.

83 (2013) 249 CLR 92 at 145–146 [118]–[121]; [2013] HCA 4.

84 (2013) 249 CLR 92 at 146 [122] per Hayne J.

85 17 US 316 at 421 (1819).

86 (1908) 6 CLR 309 at 344 per Barton J, 358 per O'Connor J; [1908] HCA 95.

87 (1908) 6 CLR 309 at 344 per Barton J, 357 per O'Connor J.

88 *McCulloch v Maryland* 17 US 316 at 421 (1819).

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

35 The criterion of validity to which the second question gives rise first requires that the impugned law serve a "legitimate end". That is a purposive standard, which must be satisfied by any law which effectively burdens the freedom. Satisfaction of that standard attracts to consideration of the law's validity the criterion which has long been applied to laws purportedly made pursuant to grants of purposive law-making powers[89] and, as a subset of that category, express or implied grants of incidental law-making powers[90]. That criterion, that the law be "reasonably appropriate and adapted, or proportionate" to serve the legitimate end, is a species of the genus of proportionality tests. Such tests apply to constitutional grants of purposive powers and to statutory grants of power to make delegated legislation, but not to non-purposive powers[91]. They apply to what might broadly be called "public interest qualifications" on other constitutional guarantees, particularly s 92[92]. The term "proportionality" in this context is classificatory. It does not designate a doctrine. Some of the proportionality criteria apply a high threshold test for invalidity, asking whether the impugned law is "capable" or "reasonably capable" of being appropriate and adapted to the relevant purpose[93]. That kind of formulation has sometimes been

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89 As to the distinction between purposive and non-purposive powers see *Stenhouse v Coleman* (1944) 69 CLR 457 at 471 per Dixon J; [1944] HCA 36.

90 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 322 per Brennan J; [1994] HCA 44.

91 *Leask v The Commonwealth* (1996) 187 CLR 579 at 593–595 per Brennan CJ, 602–604 per Dawson J, 613–615 per Toohey J, 616–617 per McHugh J, 624 per Gummow J; [1996] HCA 29; *Theophanous v The Commonwealth* (2006) 225 CLR 101 at 128 [70] per Gummow, Kirby, Hayne, Heydon and Crennan JJ; [2006] HCA 18.

92 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 472–473 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ; [1990] HCA 1; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 476–477 [101]–[102] per Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ; [2008] HCA 11.

93 As to the use of high threshold and low threshold proportionality tests see *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 34–42 [48]–[62] per French CJ.

used in relation to the implied freedom of political communication[94]. A negative answer to the question, so framed, would be sufficient for invalidity. However, a positive answer is not sufficient for validity. The second question, as recently restated in *Unions NSW*, requires the low threshold proportionality test for invalidity to be applied in cases involving the implied freedom.

36 In the joint judgment in *Unions NSW* it was said that[95]:

> "The inquiry whether a statutory provision is proportionate in the means it employs to achieve its object may involve consideration of whether there are alternative, reasonably practicable and less restrictive means of doing so."

That passage referred back to the observation in the joint judgment of Crennan, Kiefel and Bell JJ in *Monis v The Queen*[96]:

> "Where there are other, less drastic, means of achieving a legitimate object, the relationship with the legislative purpose may not be said to be proportionate, at least where those means are equally practicable and available. Given the proper role of the courts in assessing legislation for validity, such a conclusion would only be reached where the alternative means were obvious and compelling, as was the Tasmanian legislation in *Betfair Pty Ltd v Western Australia*. In such circumstances the means could not be said to be reasonably necessary to achieve the end and are therefore not proportionate." (footnotes omitted)

The cautionary qualification that alternative means be "obvious and compelling" ensures that consideration of the alternatives remains a tool of analysis in applying the required proportionality criterion. Courts must not exceed their constitutional competence by substituting their own legislative judgments for those of parliaments.

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94 *Langer v The Commonwealth* (1996) 186 CLR 302 at 318 per Brennan CJ, 334 per Toohey and Gaudron JJ; [1996] HCA 43; *Levy v Victoria* (1997) 189 CLR 579 at 594–595 per Brennan CJ, 614–615 per Toohey and Gummow JJ; [1997] HCA 31.

95 (2013) 88 ALJR 227 at 237 [44] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; 304 ALR 266 at 278.

96 (2013) 249 CLR 92 at 214 [347].

Whether s 93X imposes a burden on the implied freedom of political communication

37 Laws which burden the implied freedom may fall into one or more of the following non-exhaustive list of classes[97]:

- a law which expressly restricts or prohibits communication on governmental or political matters[98];
- a law which restricts or prohibits communication by reference to characteristics of its content which may or may not involve governmental or political matters[99];
- a law which restricts or prohibits communications by reference to a mode of communication, without regard to the content of the communication; and
- a law which restricts or prohibits an activity, which is not defined by reference to communication on governmental or political matters, where the law may operate in some circumstances to restrict or prohibit such communication[100].

Those categories of laws do not attract different levels of scrutiny in the application of the criteria of validity. As Crennan, Kiefel and Bell JJ explain more generally in their Honours' reasons, the test in *Lange* does not import the range of different kinds of scrutiny, from minimal to strict, adopted in the Supreme Court of the United States. The identification of a legitimate end may be more difficult in the first category than in the fourth[101]. The question whether

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97 See generally *Hogan v Hinch* (2011) 243 CLR 506 at 555–556 [95]–[96] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; [2011] HCA 4; *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30] per French CJ, Gummow, Hayne, Crennan and Bell JJ; [2012] HCA 2.

98 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; [1992] HCA 45; *Langer v The Commonwealth* (1996) 186 CLR 302.

99 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Coleman v Power* (2004) 220 CLR 1; *Hogan v Hinch* (2011) 243 CLR 506; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1; *Monis v The Queen* (2013) 249 CLR 92.

100 *Levy v Victoria* (1997) 189 CLR 579; *Wotton v Queensland* (2012) 246 CLR 1.

101 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169 per Deane and Toohey JJ; *Hogan v Hinch* (2011) 243 CLR 506 at 555–556 [95] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

the law is reasonably appropriate and adapted to serve that legitimate end remains the same in each case. The question whether it does so in a manner compatible with the maintenance of the constitutionally prescribed system of representative government may be easier to answer in the affirmative in the fourth category than in the first.

38 Section 93X is in the fourth category. It prohibits an activity which is not simply communication but necessarily involves communication, albeit not necessarily communication on governmental or political matters. However, it does not require the construction of a fanciful hypothesis to conclude that, in its legal effect and practical operation, s 93X may directly or indirectly restrict the implied freedom. Persons could be convicted of habitual consorting even if their consorting was with ex-prisoners for the purposes of agitation for reform of the laws relating to consorting, sentencing, parole, prison conditions or the provision of post-prison rehabilitation services or half-way houses. The inferred burden on the implied freedom is not able to be displaced by any assumption that, as a matter of administrative practice, police officers would not issue official warnings in relation to consorting for such innocent purposes. As appears from s 93Y, habitual consorting for the innocent purpose of engaging in political activity, including communication on governmental or political matters, is not excluded from the offence-creating provision.

39 New South Wales submitted, correctly, that s 93X is not directed at political communication. Further, as it submitted, a person constrained by s 93X retains the freedom to engage in a variety of ways in the kinds of communications which are covered by the freedom. It also correctly submitted that s 93X would only prohibit such communication where it occurs as an incident of consorting with two or more persons convicted of indictable offences in relation to whom warnings have previously been given, and which does not fall within one of the exceptions in s 93Y. Those submissions, however, do not go to the point of the first question. They invite the Court to assess the significance or extent of the effect of s 93X on the implied freedom, including by reference to modes of communication that remain open for persons affected by its prohibitions. In this respect, New South Wales was supported by the Attorneys-General for Victoria and Queensland. For the reasons already given, that invitation should be rejected.

40 Section 93X imposes an effective burden upon the implied freedom of political communication. The next question is whether s 93X serves a legitimate end.

Whether the burden is imposed for a legitimate end

41 New South Wales submitted that the legitimate object or end of s 93X is to prevent or impede criminal conduct by deterring non-criminals from consorting in a criminal milieu and deterring criminals from establishing or

building up a criminal network. That submission should be accepted. That object is apparent from the text of s 93X and, as part of its context, the objects of precursor consorting laws in New South Wales and similar laws in other States, reflected in the judicial decisions discussed earlier in these reasons.

42 Tajjour and Hawthorne argued that s 93X casts so wide a net that it could not be said to be reasonably adapted to serve a legitimate end. That aspect of their written submissions tended to conflate the question whether the section serves a legitimate end with the proportionality question. While the net cast by s 93X is wide enough to pick up a large range of entirely innocent activity, it clearly does apply to conduct which is properly regarded as likely to result in the formation, maintenance and extension of criminal networks. It evidently relies upon the exercise of police discretion for an appropriately narrow focus in its actual application[102]. Wide as its net may be, the proposition that s 93X serves a legitimate end must be accepted.

Reasonably appropriate and adapted

43 The proportionality question is whether s 93X is reasonably appropriate and adapted to serve its legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government.

44 New South Wales submitted that s 93X is not directed to restricting communication on governmental or political matters. It argued that the effect of the section on such communication is incidental. On its proper construction, s 93X applies to habitual consorting for the sole purpose of communication on governmental or political matters. Its actual application may be limited by the sensible exercise of the police discretion to issue an official warning. While in practical terms that may mean that it is not likely to be applied to consorting for the purpose of political communication, the law does not so constrain the discretion or the application of the section. Where it applies to such activity, its burden on the implied freedom cannot be discounted as merely incidental.

45 It may be that, in some cases, the application of s 93X to consorting with convicted offenders for the purpose of communicating on governmental or political matters will have a double effect — it will prevent or impede the formation, maintenance or expansion of a criminal network and also burden the implied freedom. The first effect serves a legitimate end. The difficulty is that the section, in imposing the burden on the implied freedom, does not

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102 The submission of the Attorney-General for Western Australia, however, went too far in contending that the warning feature "excludes the innocent associate and clarifies the object of s 93X."

discriminate between cases in which the purpose of impeding criminal networks may be served, and cases in which patently it is not. That there are such cases appears from s 93Y, which makes it clear that it is not the purpose of s 93X to prohibit habitual consorting whatever the circumstances in which it occurs. A range of innocent consorting activities is excluded, albeit the onus is on the defendant to satisfy the court that the consorting was reasonable in the circumstances. The existence of those defences reinforces the conclusion that the burden of s 93X on the implied freedom, measured by the breadth of its application to entirely innocent habitual consorting, is not appropriate and adapted reasonably, or otherwise, to serve the purpose of the section.

46 That conclusion does not require further support by the identification of less restrictive alternatives to s 93X in its present form. Nor does it depend upon the proposition that there is an implied freedom of association, free-standing or incidental to the implied freedom of political communication. The burden on freedom of association imposed by s 93X results in a burden on the implied freedom of political communication. It is not necessary to consider whether there is a free-standing implied freedom of association. In any event, the Court has recently rejected such a concept[103].

47 Section 93X, in its application to the implied freedom, is not reasonably appropriate and adapted to serve its legitimate end. A fortiori, it is not reasonably appropriate and adapted to serve its legitimate end in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative government.

48 It was submitted for Tajjour and Hawthorne that the legislative powers of the Parliament of New South Wales are limited by obligations which Australia, through the Executive Government of the Commonwealth, has assumed at international law under treaties to which it is a party. In particular, it was submitted that the Parliament of New South Wales could not enact a law infringing upon the "right to freedom of association with others" set out in Art 22 of the ICCPR, to which Australia is a party. There is no authority which would support such a proposition. It is incompatible with the long accepted dualism of

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103 *Wainohu v New South Wales* (2011) 243 CLR 181 at 230 [112] per Gummow, Hayne, Crennan and Bell JJ, French CJ and Kiefel J agreeing at 220 [72], 251 [186] per Heydon J; [2011] HCA 24; cf divergent views in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 225–226 [114]–[115] per McHugh J, 234 [148] per Gummow and Hayne JJ, 277–278 [284]–[286] per Kirby J, 306 [364] per Heydon J; [2004] HCA 41 and *Kruger v The Commonwealth* (1997) 190 CLR 1 at 91 per Toohey J, 116 per Gaudron J, 142 per McHugh J, 157 per Gummow J; [1997] HCA 27.

international law and Australian domestic law[104]. If given effect by a Commonwealth statute, the freedom of association set out in Art 22 of the ICCPR could be said to enliven the operation of s 109 to invalidate inconsistent State laws. Absent such incorporation, the existence of the Convention obligation is relevant to the interpretation of State laws, analogously to the principle of legality[105]. The submission would treat as invalid any law of a State inconsistent with, or in contravention of, an obligation assumed by the Executive Government of the Commonwealth. There is no constitutional basis for that submission, which should be rejected.

Reading down

49 New South Wales submitted, as a "fall back" position, that if s 93X were found to impose an impermissible burden on the implied freedom, it could be read down pursuant to s 31 of the *Interpretation Act* 1987 (NSW) so as not to apply to communications protected by the implied freedom.

50 Section 31 of the *Interpretation Act* 1987 (NSW), reflecting in part s 15A of the *Acts Interpretation Act* 1901 (Cth), relevantly provides:

> "(1) An Act or instrument shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of Parliament.
>
> (2) If any provision of an Act or instrument, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, be construed as being in excess of the legislative power of Parliament:
>
> (a) it shall be a valid provision to the extent to which it is not in excess of that power, and
>
> (b) the remainder of the Act or instrument, and the application of the provision to other persons, subject-matters or circumstances, shall not be affected."

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104 *Brown v Lizars* (1905) 2 CLR 837 at 860–861 per Barton J; [1905] HCA 24; *Chow Hung Ching v The King* (1948) 77 CLR 449 at 477–478 per Dixon J; [1948] HCA 37; *Kioa v West* (1985) 159 CLR 550 at 570–571 per Gibbs CJ; [1985] HCA 81; *Dietrich v The Queen* (1992) 177 CLR 292 at 305–306 per Mason CJ and McHugh J, 321 per Brennan J, 348–349 per Dawson J, 359–361 per Toohey J; [1992] HCA 57. See also *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 303–305 per Gummow J.

105 *Polites v The Commonwealth* (1945) 70 CLR 60 at 77 per Dixon J; [1945] HCA 3.

51 It is a necessary condition of the application of s 31 that the court can identify an application of the relevant provision to a larger class of "persons, subject-matters or circumstances" than the power of the Parliament allows[106]. By way of example, in *R v Hughes*[107] the words "functions and powers" in s 47(1) of the *Corporations Act* 1989 (Cth) were treated as limited to functions and powers in respect of matters within the legislative powers of the Parliament of the Commonwealth[108]. Section 93X does not apply to a class of things like the "functions and powers" in *Hughes* or the "associations" read down by O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*[109] to associations party to a dispute within the meaning of s 51(xxxv) of the Constitution.

52 The general words of s 93X present a variety of ways in which the excess of power might be removed. Section 93X and its associated provisions might be reframed so as not to impose a burden on the implied freedom at all, or so as to impose a lesser or conditional burden which would satisfy the proportionality criterion. There is no unique construction which would bring the section within the legislative power of the Parliament. As Latham CJ said in *Pidoto v Victoria*[110]:

> "if a law can be reduced to validity by adopting any one or more of a number of several possible limitations, and no reason based upon the law itself can be stated for selecting one limitation rather than another, the law should be held to be invalid."

That passage was referred to in *Victoria v The Commonwealth* (*Industrial Relations Act Case*)[111]. Further, a construction of s 93X to confine its operation by reference to the implied freedom would involve a reading of its text and that of s 93Y, which sets out six express innocent purpose defences, in a way that would be inconsistent with the statutory text and context. It would be

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106 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 93 [250] per Gummow, Crennan and Bell JJ; [2009] HCA 23.

107 (2000) 202 CLR 535; [2000] HCA 22.

108 (2000) 202 CLR 535 at 557 [43] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

109 (1908) 6 CLR 309 at 364.

110 (1943) 68 CLR 87 at 111; [1943] HCA 37.

111 (1996) 187 CLR 416 at 502 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; [1996] HCA 56.

inconsistent with the scope of the term "consorting", which the Parliament has chosen to use according to its received meaning, and inconsistent with the qualifications on that received meaning reflected in s 93Y. Section 31 does not apply in this case to save s 93X from invalidity.

Conclusion

53 The questions in the Special Cases relating to Tajjour and Hawthorne should be answered as follows:

Q1. Is s 93X of the *Crimes Act* 1900 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

A1. Yes.

Q2. Is there implied into the Commonwealth Constitution a freedom of association independent of the implied freedom of communication on governmental and political matters?

A2. Not necessary to answer.

Q3. Does s 93X of the *Crimes Act* 1900 (NSW) contravene any implied freedom of association referred to in question 2?

A3. Not necessary to answer.

Q4. Is s 93X of the *Crimes Act* 1900 (NSW) invalid because it is inconsistent with the International Covenant on Civil and Political Rights as ratified by the Commonwealth of Australia?

A4. No.

Q5. Who should pay the costs of the Special Case?

A5. The defendant.

54 In the Special Case relating to Forster, only the first and last questions were referred. The answer to the first question should be "Yes" and the answer to the last question should be "The defendant".

55 HAYNE J. Neither the Parliament of the Commonwealth nor the Parliament of any State has power to make a law inconsistent with that freedom of communication on matters of government and politics which is an indispensable incident of the constitutionally prescribed system of representative and responsible government of the Commonwealth. Section 93X of the *Crimes Act* 1900 (NSW) makes it an offence, punishable by imprisonment, fine, or both imprisonment and fine, habitually to consort with convicted offenders after having been given an "official warning"[112] in relation to each of those offenders. Is that law beyond the legislative power of the Parliament of New South Wales?

The facts and proceedings

56 The plaintiff in each of these proceedings stands charged with an offence against s 93X. Each has brought proceedings in the Supreme Court of New South Wales seeking a declaration that s 93X is invalid. On the application of the Attorney-General for New South Wales, the whole of each proceeding has been removed[113] into this Court. The parties in each proceeding have agreed in stating questions of law in the form of a special case for the opinion of the Full Court.

57 None of the special cases records any agreed fact about what is said to constitute the alleged habitual consorting beyond the names of the persons with whom it is alleged the plaintiff was consorting and the fact that each was a convicted offender. None of the special cases says anything to suggest that any of the alleged occasions of consorting was for a purpose of, or attended by, any communication about any government or political matter.

58 Each plaintiff alleges that s 93X is invalid because it impermissibly burdens the implied freedom of communication concerning government and political matters. Mr Tajjour and Mr Hawthorne further allege that s 93X is invalid because it infringes a freedom of association which they assert should be found to be implied in the Constitution and because s 93X is inconsistent with the International Covenant on Civil and Political Rights[114] ("the ICCPR"). The questions stated in the form of special cases ask, in effect, whether the allegations the plaintiffs make should be accepted. They should not.

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112 Defined by s 93X(3) as a warning given by a police officer (orally or in writing) that a convicted offender is a convicted offender and that consorting with a convicted offender is an offence.

113 *Judiciary Act* 1903 (Cth), s 40(1).

114 Done at New York on 16 December 1966; [1980] ATS 23.

Freedom of political communication – principles

59 Because freedom of communication on matters of government and politics is an indispensable incident of that system of representative and responsible government which the Constitution creates and requires, that freedom cannot be curtailed[115] by the exercise of legislative or executive power and the common law cannot be inconsistent with it. But the freedom is not absolute and it follows that the limit on legislative power is not absolute.

60 The principles governing this limitation on power are well-established. Subject to one qualification, they were not disputed in argument in these cases. Where a law has the legal or practical effect of burdening political communication, it is necessary to decide "whether the provision is reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government"[116].

61 The qualification which must be noted, however, is that, contrary to the submissions of New South Wales and some interveners, the first question posed by *Lange*[117] – whether the impugned law "effectively burdens the freedom of political communication either in its terms, operation or effect"[118] – neither permits nor requires consideration of the extent of that burden. As five members of the Court have recently held[119], "[t]he identification of the extent of the burden imposed on the freedom is not relevant to this first inquiry". The submissions by New South Wales, and some of the interveners, to the effect that consorting laws would have only a slight or insubstantial effect on political discourse, and that *for that reason alone* s 93X should be found not to be a law which effectively burdens freedom of communication about government or political matters, are unsound and must be rejected. Rather, application of the established principles must proceed in accordance with the two steps identified in *Lange*. Does the law have the legal or practical effect of burdening political communication? If it does, is the law proportionate to serve a legitimate end in a manner which is

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115 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; [1997] HCA 25; *Monis v The Queen* (2013) 249 CLR 92 at 141 [103]; [2013] HCA 4; *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 235 [31]; 304 ALR 266 at 275; [2013] HCA 58.

116 *Unions NSW* (2013) 88 ALJR 227 at 237 [44]; 304 ALR 266 at 278.

117 (1997) 189 CLR 520 at 567.

118 *Unions NSW* (2013) 88 ALJR 227 at 236 [35]; 304 ALR 266 at 276.

119 *Unions NSW* (2013) 88 ALJR 227 at 236 [40]; 304 ALR 266 at 277.

compatible with the maintenance of the prescribed system of representative government?

62 Answering both of the *Lange* questions depends upon a proper understanding of the application of the impugned provision. It is necessary, therefore, to say something about what is meant by "consort" and "consorting" in those provisions.

Consorting

63 Section 93W provides that, in the relevant provisions, "***consort*** means consort in person or by any other means, including by electronic or other form of communication". Section 93Y provides that certain forms of consorting are to be disregarded "if the defendant satisfies the court that the consorting was reasonable in the circumstances". Both s 93W and s 93Y depend upon giving meaning to the idea of "consort". Neither of those sections sheds much light upon that meaning.

64 New South Wales submitted that "consort" should be given the meaning described by Mason J in *Johanson v Dixon*[120]. That meaning has two relevant elements. First, there is an element of associating or keeping company. Second, there must be "some seeking or acceptance of the association on the part of the defendant"[121]. The plaintiffs did not put forward any alternative meaning. Rather, they submitted that s 93X would have a very wide application, not least because of s 93W and its provision for consorting "by any other means". Implicitly, the plaintiffs seemed thus to accept that "consort" should be given the meaning which has been described. Be this as it may, no reason was given for departing from the meaning given to "consort" by Mason J in *Johanson* and it should be adopted.

65 It remains necessary to make four further points about s 93X and its associated provisions.

66 First, s 93X, in creating the offence, says nothing at all about the purpose for the consorting. To adopt and adapt what Mason J said[122] in *Johanson* (about differently expressed consorting provisions), this feature of s 93X entails not only that the prosecution need not prove that the consorting was for an unlawful or criminal purpose but also that "consort" and its cognates do not imply that the association is one which has or needs to have any *particular* purpose.

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120 (1979) 143 CLR 376 at 383; [1979] HCA 23.

121 (1979) 143 CLR 376 at 383.

122 (1979) 143 CLR 376 at 383.

67 Second, s 93X provides that any person who "*habitually* consorts with convicted offenders", after having been given an official warning in relation to each of the relevant offenders, is guilty of an offence (emphasis added). Again adopting and adapting what Mason J said[123] in *Johanson*, "the gist of the offence ... is habitual association with persons who fall into the designated [class]". For s 93X, the class is constituted by convicted persons in relation to each of whom the accused person has received an official warning.

68 Third, the definition of "consort" given in s 93W refers to consorting "in person or by any other means, including by electronic or other form of communication". The reference in s 93W to modes of consorting does not modify the elements of consorting itself. It follows that consorting, no matter how it is effected, has those elements identified[124] by Mason J in *Johanson*. That is, there must be a sought or accepted (and habitual) association or keeping of (real or virtual) company with persons of the designated class.

69 Fourth, demonstrating those matters in any particular case may not be easy. What would suffice to demonstrate consorting, not in person, but by electronic or other form of communication, will have to be worked out as the need arises. But the difficulties that may arise are problems of proof. They do not bear upon the proper construction of the provisions.

70 This being the way in which s 93X should be construed, how do the relevant principles apply?

The first *Lange* question

71 It may readily be accepted that s 93X is not directed to restricting communication about government or political matters. But by prohibiting habitually consorting with convicted offenders with respect to whom an official warning has been issued, s 93X operates to prohibit occasions on which there could be political communications. By prohibiting the persons to whom the section is directed from habitually seeking out or accepting association with persons of the designated class, s 93X prohibits those persons making political communications between themselves and prohibits them from joining together to make some concerted communication to others about government or political matters. Like the regulations in issue in *Levy v Victoria*[125], which prohibited all but certain persons from entering certain areas of a State Game Reserve during

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123 (1979) 143 CLR 376 at 384.

124 (1979) 143 CLR 376 at 383.

125 (1997) 189 CLR 579; [1997] HCA 31.

the first two days of the duck hunting season, s 93X exemplifies[126] "a law which has the effect, if not the purpose, of curtailing to some degree the constitutional freedom". Because s 93X has this legal and practical effect, it is a law which "effectively burdens" the constitutional freedom.

72 It becomes necessary, therefore, to consider the second *Lange* question (as that question is now to be understood and applied in the light of later decisions[127] of the Court). Before doing so, however, it is as well to deal directly with the absence of any fact in any of the special cases which would suggest that any of the several acts or occasions of consorting alleged against the plaintiffs had anything to do with any communication about government or political matters.

Is the second *Lange* question reached?

73 Each plaintiff alleged that s 93X is wholly invalid because it has the effect of curtailing the constitutional freedom, does not satisfy the second *Lange* question and cannot be read down pursuant to s 31 of the *Interpretation Act* 1987 (NSW)[128]. If the plaintiffs are right to allege that s 93X does not satisfy the

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126 *Levy* (1997) 189 CLR 579 at 614 per Toohey and Gummow JJ.

127 *Coleman v Power* (2004) 220 CLR 1 at 50-51 [92]-[96] per McHugh J, 77-78 [196] per Gummow and Hayne JJ, 82 [211] per Kirby J; [2004] HCA 39; *Levy* (1997) 189 CLR 579 at 645-646 per Kirby J. See also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; [2005] HCA 44; *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4; *Wotton v Queensland* (2012) 246 CLR 1; [2012] HCA 2; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1; [2013] HCA 3; *Monis* (2013) 249 CLR 92; *Unions NSW* (2013) 88 ALJR 227; 304 ALR 266.

128 Section 31 provides, so far as presently relevant:

> "(1) An Act or instrument shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of Parliament.
>
> (2) If any provision of an Act or instrument, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, be construed as being in excess of the legislative power of Parliament:
>
> (a) it shall be a valid provision to the extent to which it is not in excess of that power, and
>
> (b) the remainder of the Act or instrument, and the application of the provision to other persons, subject-matters or circumstances, shall not be affected."

second *Lange* question, but are wrong in their argument that s 93X could not be read down, there is nothing in any of the special cases to suggest that, so read down, s 93X would not fall for consideration and application to these cases. That is, as has been already noted, there is nothing in any of the special cases which suggests that any of the alleged occasions of consorting was for a purpose of, or attended by, any communication about any government or political matter.

74 But whether or how s 93X could be read down cannot be decided without knowing the nature and extent of the excess of legislative power. Section 31 of the *Interpretation Act* applies only if, but for its application, a provision would exceed legislative power. That is, s 31 "applies only when the law, *construed according to its terms*, is beyond power"[129] (emphasis added). If s 31 does apply, the relevant provision is then to be "construed as operating *to the full extent* of, but so as not to exceed, the legislative power of Parliament" (emphasis added). As decisions like *Pidoto v Victoria*[130] and *Victoria v The Commonwealth* (*Industrial Relations Act Case*)[131] show, applying a provision like s 31 to a law expressed in general terms may present some difficulties. It cannot be assumed that those difficulties can always be resolved in such a way that the generally expressed provisions of the impugned law can have a partial operation.

75 It is, therefore, necessary to decide whether s 93X is beyond legislative power.

The second *Lange* question

76 Is s 93X "reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government"[132]?

77 The purpose or object of s 93X can be described generally as the prevention of crime. The prevention of crime is a legislative end or object compatible[133] with the maintenance of representative and responsible government

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129 *Pidoto v Victoria* (1943) 68 CLR 87 at 108 per Latham CJ; [1943] HCA 37.

130 (1943) 68 CLR 87 at 108-109 per Latham CJ.

131 (1996) 187 CLR 416 at 502-503 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; [1996] HCA 56.

132 *Unions NSW* (2013) 88 ALJR 227 at 237 [44] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; 304 ALR 266 at 278.

133 *Wotton* (2012) 246 CLR 1 at 16 [31]-[32] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

and the freedom of communication which is its indispensable incident. The legislative end s 93X seeks to pursue is legitimate.

78 Section 93X pursues this end by prohibiting habitual association with persons of the designated class. The premise for the prohibition is that stopping association with the designated class will prevent those who are forbidden to consort from using the occasion of their association to consider or explore the possibility of one or more of them (or others) engaging in some criminal act and will thereby prevent crime. In so far as the plaintiffs challenged the validity of this premise, the challenge must fail. Unlike one of the laws[134] in issue in *Unions NSW*[135], there is a rational connection between the provisions made by s 93X and the end to which it is directed: preventing crime. Section 93X is rationally connected to a legitimate end[136].

79 The plaintiffs submitted that s 93X goes beyond what is necessary to achieve its end, and thus unnecessarily burdens the implied freedom, because the end to which s 93X is directed could be achieved[137] by other, less drastic, but equally practicable and available means.

80 These submissions proceeded, at least in part, by comparing the operation of s 93X with one or more of three alternative hypotheses: first, the complete absence of any prohibition on consorting with convicted offenders; second, a prohibition on consorting with convicted offenders which either excluded from the offence, or excused, consorting "for political purposes"; and third, either "tethering criminal liability to a criminal design" by requiring proof of criminal purpose, or providing for a prohibition on consorting with convicted offenders which either excluded from the offence, or excused, consorting "with reasonable excuse".

81 The first alternative (the complete absence of any prohibition on consorting) may be dealt with briefly. To accept that the law is rationally connected to a legitimate end is to accept that the means adopted by the law are capable of realising that end. Once that is accepted, it follows that it is not possible to conclude that absence of the law would realise that end to the same extent. To conclude otherwise would be to deny the validity of the statutory

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134 *Election Funding, Expenditure and Disclosures Act* 1981 (NSW), s 96D.

135 (2013) 88 ALJR 227 at 238-239 [51]-[56]; 304 ALR 266 at 279-280.

136 cf *Monis* (2013) 249 CLR 92 at 153-154 [145]-[146]; *Unions NSW* (2013) 88 ALJR 227 at 239 [60] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; 304 ALR 266 at 281.

137 cf *Unions NSW* (2013) 88 ALJR 227 at 237 [44]; 304 ALR 266 at 278.

premise, that is, to deny that the realisation of the law's means could contribute to the realisation of the law's end.

82 The plaintiffs' arguments invited attention, at least implicitly, to whether consorting offences do prevent crime that would otherwise occur. Those arguments reveal error. It is neither possible nor relevant to examine whether, without s 93X, the incidence of crime would change. It is not relevant to do so because the efficacy of the impugned law is irrelevant to the ultimate question, which is one of legislative power. In deciding that question, this Court cannot, and will not, assess whether the relevant law has in fact achieved, or will in fact achieve, its intended end or object. The relevant inquiry is about how the law relates to the identified end or object and about the nature and extent of the burden the law imposes on political communication.

83 The second alternative (excluding consorting for political purposes) invites the observation that it will usually (perhaps always) be possible to reframe a law which does not directly regulate, but does effectively burden, political communication by providing that the law is not to apply in a way which would burden communication about government and political matters. But two points must be made about that observation. First, observing no more than that a law could be redrafted to avoid intersection with the implied freedom cannot conclude the second *Lange* question. To hold otherwise would be to strip all content from the second *Lange* question. Second, while it would be possible to reframe s 93X by carving out an exception from its operation for some (even all) political communication, it by no means follows that a provision reframed in this way would be a less drastic means of achieving, to the same extent as the present law, the end to which s 93X is directed or that the provision would be as practicable and available as the present law. The first point need not be developed further. It will be necessary, however, to say something further about the second point in the course of examining the third alternative.

84 The third alternative embraced alternative forms of law: one limiting the offence to consorting for criminal purposes, the other providing a defence of reasonable excuse. For the purposes of the present inquiry, both forms of law present similar questions. But the differences between the operation of s 93X and a law requiring proof of criminal purpose are greater than the differences between s 93X and a law providing for a general defence of reasonable excuse. It is convenient, therefore, to focus upon the second form of suggested law: a law providing for a general defence of reasonable excuse.

85 This branch of the argument directed attention to other forms of consorting law which have been enacted in Australia and which have provided

for a defence of "reasonable excuse"[138] or "good and sufficient reasons for consorting"[139]. These other forms of consorting law were said to be an equally practicable and available means of achieving the end to which s 93X is directed and a means of achieving that end which was less intrusive on the freedom of political communication.

86 The argument by reference to provisions allowing for proof of a reasonable excuse for consorting assumed that demonstrating that the consorting was for the purpose of (or perhaps attended by) the making or receiving of communications about government or political matters would constitute a "reasonable excuse" or "good and sufficient reasons" for the consorting. That construction of the expressions would be available and, absent some compelling contextual reason to reject it, would very probably be adopted.

87 Yet the argument failed to confront the proposition that occasions of political communication would not exhaust the operation of a generally expressed "reasonable excuse" provision. The operation of such a provision would turn on the availability of a justification or explanation for the consorting. That is, the operation of the provision would depend on the availability of a sufficient reason for the consorting, including a reason founded in what was said or done (or intended to be said or done) in the course of the consorting.

88 To understand the extent to which such a provision would differ from s 93X (as qualified by s 93Y), it is necessary to observe two features of the present provisions. First, the engagement of s 93X does not depend on the reason or purpose for the consorting. The section is directed to association, regardless of the purpose or reason for the association, and regardless of what the participants may say or do in the course of their association. Second, the forms of consorting which "are to be disregarded"[140] for the purposes of s 93X are not identified by reference to what is or may be communicated in the course of the consorting. Section 93Y excludes reasonable consorting with a specified class of persons (family members[141]) and reasonable consorting that occurs "*in the course of*" any of the specified activities[142] (emphasis added). The activities form a closed class of occasions on which consorting may be disregarded.

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138 *Summary Offences Act* 1966 (Vic), s 49F; *Summary Offences Act* 1953 (SA), s 13; *Summary Offences Act* (NT), s 55A.

139 *Police Offences Act* 1935 (Tas), s 6.

140 s 93Y.

141 s 93Y(a).

142 s 93Y(b)-(f).

89 It follows that a consorting law which provided for a general "reasonable excuse" defence, or for an exception for political communication (by qualifying the content of the offence or providing a defence), would differ radically from s 93X (as qualified by s 93Y). It would shift the focus of the present law from the fact of association in proscribed circumstances to what is said or done during the act of association or to the purpose or reason for the act of association. Neither the sufficiency of the purpose or reason for, nor the relevance of what was said or done in the course of, association with persons of the designated class, would depend upon the acts that constitute the consorting falling within any of the circumstances described in s 93Y. Investigation, prosecution and enforcement of such a law would differ markedly from the equivalent steps taken in relation to s 93X. And the same observations apply, with greater force, to a law which required proof of criminal purposes.

90 It is not possible to say that a law of the kind posited by the plaintiffs would achieve, to the same extent as the present law, the end to which s 93X is directed or that such alternative means would be as practicable as those adopted by s 93X (as qualified by s 93Y). The premise for s 93X is that crime is prevented by prohibiting consorting with designated persons, regardless of what is or may be said or done in the course of the association and (subject to the closed class of occasions identified in s 93Y) regardless of the purpose or reason for the association. It is not possible to say that a law which proceeded from a different premise (that the occasion of consorting can be excused according to what was said or done or to why it was said or done) could further the prevention of crime to the same extent as the present law or that the means adopted by such a law would be as practicable as those adopted by s 93X.

91 It is, then, necessary to consider what is the burden which s 93X imposes on political communication. Section 93X does not impose an undue burden on political communication. In particular, s 93X does not prohibit the expression or dissemination of any political view or any information relevant to the formation of or debate about any political opinion or matter. Rather, the section prohibits some kinds of association between certain persons. It therefore limits the *occasions* on which political views and information can be formed, expressed or disseminated by or between those persons.

92 Finally, it may be observed that consorting provisions, of a kind not radically different from those made by s 93X, have a long Australasian history[143]. It was not suggested in argument that any of these earlier forms of consorting provisions had had any discernible, let alone detrimental, effect on the maintenance of the constitutionally prescribed system of government. And while

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143 *Johanson* (1979) 143 CLR 376 at 382-383 per Mason J. See also McLeod, "On the Origins of Consorting Laws", (2013) 37 *Melbourne University Law Review* 103.

absence of demonstration of harm cannot conclude the second *Lange* question, its absence, despite the long history of provisions of the relevant kind, is relevant to determining whether the means adopted by s 93X of achieving the end to which it is directed is compatible with the maintenance of that system of government.

93 Section 93X does not go beyond the limit on legislative power fixed by the *Lange* principle.

94 The other two grounds of attack on validity advanced by Mr Tajjour and Mr Hawthorne, but not Mr Forster, may be dealt with briefly.

An implied freedom of association?

95 This Court has held, more than once[144], that no "free-standing" right of association is to be implied from the Constitution. That is, "[a]ny 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"[145]. These conclusions should not be revisited. For the reasons which have been given, this challenge fails.

The ICCPR?

96 The provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into Australian municipal law[146]. No party or intervener submitted that the provisions of the ICCPR have been so incorporated. As was explained by McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural*

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144 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 [148] per Gummow and Hayne JJ, 306 [364] per Heydon J; [2004] HCA 41; *Wainohu v New South Wales* (2011) 243 CLR 181 at 220 [72] per French CJ and Kiefel J, 230 [112] per Gummow, Hayne, Crennan and Bell JJ, 251 [186] per Heydon J; [2011] HCA 24.

145 *Wainohu* (2011) 243 CLR 181 at 230 [112] per Gummow, Hayne, Crennan and Bell JJ (footnote omitted).

146 See, for example, *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478; [1948] HCA 37; *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582; [1973] HCA 34; *Simsek v Macphee* (1982) 148 CLR 636 at 641-642; [1982] HCA 7; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 211-212, 224-225; [1982] HCA 27; *Kioa v West* (1985) 159 CLR 550 at 570-571; [1985] HCA 81; *Dietrich v The Queen* (1992) 177 CLR 292 at 305; [1992] HCA 57; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287; [1995] HCA 20.

and Indigenous Affairs; Ex parte Lam[147], there are several ways in which an unincorporated treaty may affect the resolution of justiciable disputes. But the proposition which Mr Tajjour and Mr Hawthorne advanced was radically different from the uses of unincorporated international treaties referred to in *Lam*.

97 Mr Tajjour and Mr Hawthorne submitted that the ICCPR "operates as a constraint upon the power of the State to enact contrary legislation, much like the implied freedom of communication on governmental and political matters".

98 The submission must be rejected. The limitation on State legislative power asserted by Mr Tajjour and Mr Hawthorne is not analogous in any way to the implied freedom of political communication. The implied freedom of political communication is derived from the Constitution itself. The asserted limitation on legislative power by reference to unincorporated treaties cannot be derived from the Constitution. Contrary to the submissions of Mr Tajjour and Mr Hawthorne, for a State to legislate in a manner inconsistent with an unincorporated treaty does not intersect with, let alone interfere with, any aspect of the executive power of the Commonwealth.

Conclusion and orders

99 For these reasons, the plaintiffs' challenges to the validity of s 93X should be rejected. The first question in each of the three special cases should be answered: "Section 93X of the *Crimes Act* 1900 (NSW) is not invalid". Questions 2 and 4 in the special cases in both Mr Tajjour's matter and Mr Hawthorne's matter should each be answered: "No". Question 3 in those special cases should be answered: "Unnecessary to answer". Question 5 in each of those special cases, and question 2 in the special case in Mr Forster's matter, should each be answered: "The plaintiff".

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147 (2003) 214 CLR 1 at 32-34 [99]-[102]; [2003] HCA 6.

100 CRENNAN, KIEFEL AND BELL JJ. Section 93X of the *Crimes Act* 1900 (NSW) provides that it is an offence for a person habitually to consort with convicted offenders after having been given a warning by a police officer that each of those persons has been convicted of an indictable offence[148] and that consorting with a convicted offender is an offence. For a person to be said to "habitually consort" with convicted offenders, that person must consort with at least two convicted offenders and consort with each of them on at least two occasions[149]. "Consort" is widely defined[150] to mean any form of communication.

101 At the time s 93X was introduced[151], the term "habitually consort" had a received meaning. The fundamental ingredient of association of this kind is companionship, or seeking out the company of the other person[152]. It follows that not every meeting with a convicted offender would qualify as habitually consorting. The fact that the legislation prescribes a minimum level of association necessary for the offence under s 93X does not exclude recourse to the received meaning of "habitually consort" in order to identify what further may be required.

102 Each of the plaintiffs was charged with an offence under s 93X after receiving a warning. The Special Cases do not suggest that, on the occasions alleged to constitute consorting, the plaintiffs were engaged in communicating about government or political matters. Nevertheless the plaintiffs contend that the effect of s 93X is to restrict the ability of persons to communicate on such matters, that the constitutionally guaranteed implied freedom of communication on those matters ("the freedom") is therefore burdened and that s 93X, in consequence, is invalid.

103 The test in *Lange v Australian Broadcasting Corporation*[153], as to whether a legislative provision impinges on the freedom, contains two limbs. The first

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148 See *Crimes Act* 1900 (NSW), s 93W.

149 *Crimes Act* 1900, s 93X(2).

150 *Crimes Act* 1900, s 93W.

151 By the *Crimes Amendment (Consorting and Organised Crime) Act* 2012 (NSW).

152 *Dias v O'Sullivan* [1949] SASR 195 at 201; *Johanson v Dixon* (1979) 143 CLR 376 at 383, 391, 395; [1979] HCA 23.

153 (1997) 189 CLR 520 at 567; [1997] HCA 25, as modified by *Coleman v Power* (2004) 220 CLR 1 at 50-51 [93]-[96], 78 [196], 82 [211]; [2004] HCA 39.

enquires whether the freedom is burdened by the legislative provision in its terms, operation or effect; the second contains certain conditions which, if met, permit a conclusion that the provision is valid, despite burdening the freedom.

104 The freedom effects a restriction on legislative power[154]. It was explained in *Unions NSW v New South Wales*[155] that, in addressing the first limb of the test in *Lange*, it is important to bear in mind that what the Constitution protects is not a personal right[156]. It follows that the correct approach to the question whether a legislative provision impermissibly burdens the freedom is to consider how the provision affects the freedom generally, rather than a particular person.

105 Submissions in the matters presently under consideration suggest some misunderstanding about the first limb and about what is necessary to satisfy the requirement that the freedom is "effectively burdened" by the terms, operation or effect of s 93X. Both New South Wales and Victoria referred to the following statement from the joint reasons in *Monis v The Queen*[157]:

> "It may be accepted that an effect upon political communication *which is so slight as to be inconsequential* may not require an affirmative answer to the first limb inquiry". (emphasis added)

It was put by New South Wales that, if s 93X did not restrict the freedom very often, then a negative answer might be given to the enquiry in the first limb of the *Lange* test. If that were the case, it would not be necessary to consider whether the conditions in the second limb were satisfied.

106 The submission proceeds upon a misreading of the statement in *Monis*. Read with what follows in the same passage, it is plain that the joint reasons were saying that it was only an effect which would not be regarded as a real effect that would not qualify as a burden. It was not suggested that a qualitative assessment of the degree of the restriction effected by a legislative provision was appropriate

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154 *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 236 [36]; 304 ALR 266 at 277; [2013] HCA 58.

155 (2013) 88 ALJR 227 at 236 [36]; 304 ALR 266 at 276-277.

156 See also *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 73-74 [166]; [2013] HCA 3; *Monis v The Queen* (2013) 249 CLR 92 at 189 [266]; [2013] HCA 4.

157 (2013) 249 CLR 92 at 212 [343].

at the stage of the first limb. Immediately after the statement referred to above, the joint reasons in *Monis* continued[158]:

> "[B]ut it cannot be suggested that s 471.12 falls within this category, even if its likely effect is hard to quantify. *Once a real effect* upon the content of political communication *is seen as likely, attention must be directed to the second limb of the test.* That is because the evident purpose of *Lange* is to require a justification for a burden placed upon the freedom. This is not to say that *the level of the restriction or burden* which is imposed is not relevant. *Lange* itself shows that it is; but it *is a question to be addressed in connection with consideration of the second limb of the Lange test.*" (emphasis added; footnote omitted)

107 This accords with what was said by five members of this Court in *Unions NSW*[159]. It was noted that it could be simply resolved whether the provision under consideration in that case limited the freedom, because the provision restricted the source of funds available to meet the costs of political communication. It was then said[160]:

> "It follows that the freedom is effectively burdened. The concession made by the defendant, that there is an indirect burden which is more than inconsequential, is inevitable."

Shortly thereafter, it was explained[161]:

> "The identification of the extent of the burden imposed on the freedom is not relevant to this first inquiry ... Questions as to the extent of the burden and whether it is proportionate to the legitimate purpose of a statutory provision arise later in connection with the second limb inquiries. The question at this point is simply whether the freedom is in fact burdened." (footnote omitted)

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158 *Monis v The Queen* (2013) 249 CLR 92 at 212-213 [343].

159 (2013) 88 ALJR 227 at 236 [38]-[40]; 304 ALR 266 at 277.

160 *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 236 [38]; 304 ALR 266 at 277.

161 *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 236 [40]; 304 ALR 266 at 277.

108 The term "habitually consort" is not to be understood to apply as widely as the plaintiffs contend. There is no real prospect of a person committing an offence because they meet with convicted offenders on some occasions. Nevertheless, s 93X proscribes all forms of communication with convicted offenders in the course of habitual consorting. Its operation therefore extends to include communications of the kind protected by the freedom. The first limb must be answered in the affirmative. Section 93X effectively burdens the freedom.

109 It is the second limb of the *Lange* test which is the real area for debate in the present matters.

110 The proportionality analysis which is central to the second limb of the *Lange* test first requires the identification of the legislative purpose of s 93X and the means by which it is sought to be achieved. *Unions NSW* confirms that it is necessary that there be shown to be a rational connection between the two[162]. In some jurisdictions, this first stage of the proportionality analysis is referred to as one of "suitability"[163].

111 It may be inferred, from the terms of s 93X, that the provision is targeted, albeit indirectly, to the prevention of crime. Convicted offenders who are not able to associate amongst themselves and with others on a regular basis may find it more difficult to organise criminal activities and enlist others to participate in such activities.

112 The desirability of consorting provisions such as this is not relevant to the task before the Court. It is sufficient for the purposes of the initial enquiry under the second limb of the *Lange* test to observe that the purpose of s 93X is legitimate and the means employed are capable of advancing that purpose. The two are therefore rationally connected. Neither the purpose of s 93X nor the means by which it is sought to be achieved can be said to be incompatible with the maintenance of representative and responsible government[164].

113 The question that follows is whether the means chosen by the legislature are proportionate to the purpose pursued. The relevant enquiry identified in

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162 See *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 238 [50], 239 [60]; 304 ALR 266 at 279, 281.

163 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 303.

164 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Monis v The Queen* (2013) 249 CLR 92 at 193 [277].

Unions NSW[165] is whether there are alternative, reasonably practicable means which are capable of achieving that purpose and which are less restrictive in their effect upon the freedom. This second enquiry under the second limb of the *Lange* test may be described, in a shorthand way, as the test of "reasonable necessity". The "necessity" for the means employed by the legislative provision is made out where no other (hypothetical) alternative exists which would be less harmful to the freedom while equally advancing the legislative purpose[166].

114 To qualify as a true alternative for the purposes of the comparison between the impugned legislative provision and a hypothetical provision, the latter must be as practicable as the impugned provision[167]. That is, the hypothetical measure must be as effective in achieving the legislative purpose. It must be as capable of fulfilling that purpose as the means employed by the impugned provision, "quantitatively, qualitatively, and probability-wise"[168].

115 Consequently, not every hypothetical legislative measure which is identified as capable of advancing the same legislative purpose and lessening the restrictive effect on the freedom will qualify as a reasonably practicable alternative. The enquiry proceeds upon the basis of what the legislature could have done to achieve its purpose whilst at the same time limiting the effects upon the freedom as much as reasonably possible. It does not proceed upon the premise that the legislature would adopt a measure which was not as effective in achieving its purpose. To approach the matter otherwise would involve the Court impermissibly substituting the legislative provision under consideration for something else.

116 If no other means can be identified that are as practicable in achieving the purpose but less restrictive to the freedom, it may be concluded that the legislative provision goes no further than is reasonably necessary in achieving its purpose. Attention is then directed to a third enquiry, as to the extent of the burden effected by the legislative provision on the freedom. However, if other means are shown to be available and equally practicable, the impugned

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165 (2013) 88 ALJR 227 at 237 [44]; 304 ALR 266 at 278; see also *Monis v The Queen* (2013) 249 CLR 92 at 214-215 [347]-[348].

166 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 317.

167 *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 306; [1980] HCA 40; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 134-135 [438]-[439]; [2010] HCA 46.

168 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 324.

legislation has gone further than is reasonably necessary. It would follow that the legislature has exceeded the limits of its power to make laws which burden the freedom and no further enquiry is necessary.

117 The plaintiffs Hawthorne and Forster, and the Australian Human Rights Commission as amicus curiae, argue that the legislature could have provided further defences to the offence in s 93X.

118 Section 93Y of the *Crimes Act* lists only six forms of consorting which are to be disregarded for the purposes of s 93X if the court considers that the consorting was reasonable in the circumstances. They are: consorting with family members; consorting that occurs in the course of lawful employment or the lawful operation of a business; consorting that occurs in the course of training or education; consorting that occurs in the course of the provision of a health service; consorting that occurs in the course of the provision of legal advice; and consorting that occurs in lawful custody or in the course of complying with a court order. Consorting for the purpose of communication on government or political matters is not listed as an exception in s 93Y.

119 It was argued that a more general defence of a reasonable excuse could have been provided, and is provided in other jurisdictions. However, the test of reasonable necessity is not concerned with whether a provision could have been enacted which limits the operation of s 93X generally; it is concerned only with whether there could be a provision which is as practicable as s 93X but has a lesser effect on the freedom. The only defence which might have this effect is one that excepted, from the operation of s 93X, consorting taking place on occasions where communications on government or political matters occurred or where communication on those matters was the purpose of the consorting.

120 Such a defence would achieve a result similar to reading down s 93X – a process which the plaintiff Hawthorne denied was open, on the basis that s 93Y indicates a contrary legislative intention to limit the forms of consorting which might qualify as defences. That submission may be put to one side. The relevant enquiry for present purposes is not whether s 93X can be construed so as to except from its operation communications which are the subject of the freedom. It is whether s 93X, operating with the hypothetical defence, would be as practicable in achieving its legislative object as it is without the defence. If it is, it qualifies as an alternative measure which could have been taken.

121 A defence which would except from the definition of consorting occasions where there is communication on government or political matters is far removed from the defences provided by s 93Y. Putting aside difficulties in drafting a defence of that kind, such a defence would be easily claimed but difficult to investigate, test or challenge, both factually and legally. This would be

especially so if the prosecution were required to negative the claim once raised. In reality, the defence would create a gap which is readily capable of exploitation. In these circumstances, it cannot be said that s 93X would operate as effectively with the hypothetical defence.

122 Another of the alternative measures proposed by the plaintiff Hawthorne also fails the requirement that it be equally practicable. It was suggested that s 93X could be confined to consorting which occurred only between convicted offenders. However, this would not be effective to prevent recruitment of non-criminals by convicted offenders.

123 Other hypothetical measures were suggested, such as a law which provides a clearer link with criminal activity or requires the police to form the view that it was reasonably necessary to give a warning in order to prevent future crime. These measures would add another requirement to proof of the offence.

124 Other proposed alternatives were laws that limit the persons who might qualify as convicted offenders, by reference to the nature of or penalty for the offences of which they were convicted, whether the offences were recent, whether there had been multiple offences, as well as other factors. These alternatives may have the effect of reducing the scope of the offence, but it cannot be said with respect to any of them that it would effect a lesser restriction on the freedom than s 93X.

125 No reasonable and equally practicable alternatives having a lesser effect on the freedom have been identified. A conclusion that s 93X goes no further than is reasonably necessary in order to achieve its objective is therefore open.

126 To this point the extent of the effect of s 93X on the freedom has not been considered. In *Unions NSW*, it was said that the second limb of the *Lange* test involves questions "as to the extent of the burden [which the legislative provision places on the freedom] and whether it is proportionate to the legitimate purpose" of the provision[169]. It was not necessary in *Unions NSW* to address those questions further or to discuss what was involved in them because the legislation there in question did not meet the initial requirement that its measures be rationally connected to its legitimate purpose.

127 The question central to the *Lange* test is: how does the impugned law affect the freedom? This was identified in *Unions NSW* in discussing the first

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169 *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 236 [40]; 304 ALR 266 at 277; see also *Monis v The Queen* (2013) 249 CLR 92 at 213 [343], 215 [350].

limb enquiry[170]. That the second limb requires consideration of the *extent* to which the legislative provision burdens the freedom is confirmed by the conclusion stated in *Lange*, namely that the burden was not "undue"[171].

128 The submissions for Western Australia direct attention to whether consideration of the importance of the legislative purpose is involved in the second limb. Those submissions proceed upon the basis that there has been some level of acceptance by this Court of a test of strict proportionality as relevant to the *Lange* test. The test of strict proportionality, as applied in other jurisdictions that employ proportionality analysis, has recently been described as involving the ultimate question whether the severity of the effect on a right outweighs the importance of the legislative objective[172].

129 The tests of proportionality have been well worked out in some legal systems. They may be thought to have the advantage of providing judges with more objective methods of assessment, thus reducing the prospect of mere statements of conclusion, based upon individual notions of whether legislation has gone too far. At the same time, they allow the legislature to understand how the limits of its power will be tested. However, as Professor Barak has said, the way in which one legal system understands proportionality may inspire another legal system, but no more[173].

130 The question whether a test of strict proportionality is useful and appropriate in the Australian constitutional context has not been debated in a matter before this Court since *Lange*. Its determination is likely to involve a number of considerations, not the least of which concerns the role of this Court with respect to the freedom. That role does not involve assessing the loss of a fundamental right or freedom enjoyed by individuals. It involves protecting the freedom in order to preserve the system of representative government.

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170 *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 236 [36]; 304 ALR 266 at 277.

171 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 575.

172 *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at 791 [74] per Lord Reed JSC, cited in *R (Nicklinson) v Ministry of Justice* [2014] 3 WLR 200 at 343 [168]; [2014] 3 All ER 843 at 893. See also Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 340.

173 See Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 240-241.

131 The tests of proportionality to which reference has been made above are not to be confused with the categories of scrutiny which have been employed by the Supreme Court of the United States of America[174], and which range from minimal scrutiny, requiring only a rational connection between the legislation and a legitimate object, to strict scrutiny, which is applied to fundamental rights and which requires there to be a compelling state interest[175]. Whilst an aspect of strict scrutiny – that there be no other means available which would be less restrictive of the right – may bear some resemblance to the test of reasonable necessity employed in proportionality analysis, it has been doubted that a true comparison can be drawn between strict scrutiny and proportionality analysis[176].

132 The test in *Lange* does not involve differing levels of scrutiny. In attempting to resolve differences of view expressed in preceding cases about the appropriate method of testing legislation which burdened the freedom, the Court in *Lange* adopted aspects of proportionality analysis. American jurisprudence, respecting strict scrutiny, has not been accepted by this Court as relevant to the *Lange* test.

133 There may be questions still to be addressed, in an appropriate case, concerning the role, if any, of the test of strict proportionality in the *Lange* test. They do not arise for consideration in these matters. Enquiry as to whether a burden is undue or as to the importance of a legislative purpose is necessitated only when the burden effected by the legislation is substantial. The legislation now under consideration is unlikely to have that effect. Section 93X is not directed to the freedom and its effect upon the freedom is incidental. Any limitation on the freedom would only occur in the course of what would qualify as habitual consorting.

134 We would answer the questions in the Special Cases in the terms proposed by Hayne J.

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174 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 284, 509-512.

175 Canada employs a similar requirement, of strict scrutiny, but its application is said to be different: Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 516-517.

176 Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 516. As to the enquiry involved in strict scrutiny, see Fallon, "Strict Judicial Scrutiny", (2007) 54 *UCLA Law Review* 1267.

GAGELER J.

Introduction

135 Section 93X of the *Crimes Act* 1900 (NSW), making guilty of an offence a person who "habitually consorts" with convicted offenders and who again "consorts" with those convicted offenders after having been given an official warning in relation to each of them, adopts language which has been the subject of authoritative judicial exposition. The section adopts that language designedly[177]. To "consort", in this context, means no more than to "associate" or to "keep company"; denoting "some seeking or acceptance of the association", but not implying "that the association is one which has or needs to have a particular purpose"[178].

136 The argument of Mr Tajjour and Mr Hawthorne that the section is invalid as infringing Art 22 of the International Covenant on Civil and Political Rights founders at the threshold; the argument is based on the flawed premise that international law operates of its own force to limit State legislative power. Their argument that the section is invalid as infringing an implied constitutional freedom of association which is independent of the implied constitutional freedom of communication on governmental or political matter similarly founders at the threshold; there is no foothold in the Constitution for such an implication.

137 The argument of Mr Tajjour, Mr Hawthorne and Mr Forster that the section is invalid as infringing the implied constitutional freedom of communication on governmental or political matter is not wholly without merit, but does not avail them of the consequences they seek.

138 For the reasons which follow, I consider that the section does infringe the implied constitutional freedom, albeit only in its application to association for a purpose of engaging in communication on governmental or political matter. The section is to that extent invalid, but severable. The section is otherwise valid.

Analytical framework

139 The implied constitutional freedom of communication on governmental or political matter was recognised in *Australian Capital Television Pty Ltd v The Commonwealth*[179] and in *Nationwide News Pty Ltd v*

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177 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 February 2012 at 8131-8132.

178 *Johanson v Dixon* (1979) 143 CLR 376 at 383; [1979] HCA 23.

179 (1992) 177 CLR 106; [1992] HCA 45.

Wills[180]. It was confirmed in *Lange v Australian Broadcasting Corporation*[181], where it was held to be rooted in ss 7 and 24 and related sections, which establish representative and responsible government under the Constitution, together with s 128, which provides for its amendment by referendum.

140 The implication of the constitutional freedom as explained in *Lange* proceeds on the understanding that the Constitution has as its purpose "to enlarge the powers of self-government of the people of Australia"[182], "is for the advancement of representative government"[183], and establishes the electoral processes for which it provides as the principal mechanism both for facilitating and for constraining the exercise of Commonwealth legislative and executive power[184]. The implication is of a judicially enforceable constitutional limitation on Commonwealth and State legislative and executive power which derives from, and is limited to, "what is necessary for the effective operation of that system"[185].

141 What is it that is necessary for the effective operation of the system of representative and responsible government established by the Constitution? In terms adopted in *Lange*, it is "that the elections to it must be free, with all that this implies in the way of freedom of speech and political organisation"[186]. The constitutionally protected freedom is to receive and to disseminate information which might ultimately bear on electoral choice[187]. Within the scope of that freedom is not simply communication on governmental or political matter *to*

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180 (1992) 177 CLR 1; [1992] HCA 46.

181 (1997) 189 CLR 520; [1997] HCA 25.

182 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557 quoting *Official Report of the National Australasian Convention Debates* (Adelaide), 23 March 1897 at 17.

183 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557 quoting *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 178; [1926] HCA 58.

184 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 134.

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

186 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560 quoting Birch, *Representative and Responsible Government*, (1964) at 17.

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

electors (allowing for each individually to make an informed electoral choice) but communication on governmental or political matter *between* electors (allowing for those electors collectively to communicate with other electors and with government).

142 Very soon after *Lange*, Gaudron J observed[188]:

> "[J]ust as communication would be impossible if 'each person was an island', so too it is substantially impeded if citizens are held in enclaves, no matter how large the enclave or congenial its composition. Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others."

143 Statements in subsequent cases, to the effect that any freedom of association implied by the Constitution would exist only as a corollary of the freedom of communication formulated in *Lange*[189], should be read in light of that observed reality. They should not be read as suggesting that the constitutional protection of freedom of association for governmental or political purposes is in doubt. They should not be read as suggesting that it is secondary or derivative. Association for the purpose of engaging in communication on governmental or political matter is part and parcel of the protected freedom.

144 Part of the legacy of *Lange* is that the ultimate question of whether or not a law infringes the implied constitutional freedom falls to be determined within a standardised analytical framework. The two steps in that precedent-mandated analysis are together a functional reflection of the nature of the protected freedom.

145 The first step in the analysis is to ask whether the law, in its legal or practical operation, effectively burdens communication on governmental or political matter. The inquiry is into the character of the law assessed and expressed by reference to its tendency to burden communication of that kind. The test of effective burden is qualitative not quantitative. That is the import of the recent statement that "[t]he identification of the extent of the burden imposed … is not relevant to this first inquiry"[190]. To confine constitutional protection to

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188 *Kruger v The Commonwealth* (1997) 190 CLR 1 at 115; [1997] HCA 27 (footnotes omitted). See also at 88-92, 142.

189 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 234 [148]; [2004] HCA 41; *Wainohu v New South Wales* (2011) 243 CLR 181 at 230 [112]; [2011] HCA 24.

190 *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 236 [40]; 304 ALR 266 at 277; [2013] HCA 58.

a law which operates to place some "general" constraint on communication on governmental or political matter – in the apparently volumetric sense in which New South Wales and some of the interveners would employ that term – would be inimical to the nature of the freedom to be protected, which exists to ensure that even the smallest minority is not, without justification, denied by law an ability to be heard in the political process. That minority, as the cases illustrate, might be as small as those who seek to engage in non-verbal protests in a hunting area during restricted hours in a hunting season[191], or those who seek to express political views to named individuals by means of offensive communications sent through the post[192].

146 The function served by the first step in the analysis is twofold. First, it recognises that most laws on most topics will in some circumstances have some effect on some forms of communication. By limiting the protection to laws which effectively burden communication on governmental or political matter, the first step reflects the high purpose and substantive nature of the protected freedom. "In all but exceptional cases", a law does not effectively burden such communication "unless, by its operation or practical effect, it directly and not remotely restricts or limits the content of those communications or the time, place, manner or conditions of their occurrence"[193]. The first step in this way recognises as beyond the scope of constitutional protection those laws the effect of which on communication on governmental or political matter is insubstantial or adventitious[194]. In so doing, it forestalls the need for further analysis. To answer that a law does not effectively burden communication on governmental or political matter is to end the inquiry.

147 The other aspect of the function served by the first step in the analysis is no less important. By requiring identification of an effective burden on communication on governmental or political matter at the outset, the first step serves to focus and to calibrate the inquiry mandated by the second step in the analysis.

148 The second step in the analysis, as reformulated in *Coleman v Power*[195], is to ask whether the law is reasonably appropriate and adapted to serve a legitimate

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191 *Levy v Victoria* (1997) 189 CLR 579; [1997] HCA 31.

192 *Monis v The Queen* (2013) 249 CLR 92; [2013] HCA 4.

193 *Coleman v Power* (2004) 220 CLR 1 at 49 [91]; [2004] HCA 39.

194 Cf *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [28]; [2005] HCA 44.

195 (2004) 220 CLR 1.

end in a manner which is compatible with the system of representative and responsible government established by the Constitution. That second step itself proceeds in two stages[196]. It requires initially the identification of the object or end which the law is designed to achieve. That identification necessarily occurs by reference to the text and context of the law. The end is not legitimate unless the end is itself compatible with the system of representative and responsible government established by the Constitution. The end of quelling a political controversy or of handicapping political opposition would not answer that description.

149 Where a legitimate end is identified, what is then required by the second step in the analysis is examination of whether, and if so to what extent, the law in its legal and practical operation is tailored to achieve that end. The degree of fit between means and end sufficient to justify a law as reasonably appropriate and adapted to serve that end can be alternatively described as one of "proportionality"[197] or of "reasonable necessity"[198]. Whatever description is used, the examination is in every case directed to the sufficiency of the justification for the burden on communication on governmental or political matter which the law has been identified to have at the first step in the analysis. The constitutional protection is not against every effective burden on communication on governmental or political matter. The protection is against an effective burden that is "undue"[199], meaning "unjustified".

150 This Court has not to date adopted a generic proportionality analysis of the kind used in Canada to determine whether a law burdening an activity within an area of constitutionally protected freedom is "reasonable" and "can be demonstrably justified in a free and democratic society"[200]. Nor has it overtly adopted a categorical approach of the kind used in the United States to determine

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196 *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 61-62 [131]; [2013] HCA 3.

197 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562; *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 237 [44]; 304 ALR 266 at 278.

198 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199-200 [39]-[40].

199 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568-569, 575.

200 Section 1 of the *Canadian Charter of Rights and Freedoms*. See *R v Oakes* [1986] 1 SCR 103 at 138-140.

whether a law shown to burden communication answers the First Amendment's description of one "abridging the freedom of speech"[201].

151 This Court has, however, recognised it to be in the nature of the requirement for a law which effectively burdens communication on governmental or political matter to be justified in terms of pursuing a legitimate end by means compatible with the system of representative and responsible government established by the Constitution, that the sufficiency of the justification will be calibrated to the nature and intensity of the burden which those means impose on communication on governmental or political matter. So, it has repeatedly been accepted that "a law whose character is that of a law with respect to the prohibition or restriction of [political] communications ... will be much more difficult to justify ... than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications"[202]. At one end of the spectrum, establishment of a sufficient justification may require "close scrutiny, congruent with a search for 'compelling justification'", constituted by establishing that the law pursues an end identified in terms of the protection of a public interest which is itself so pressing and substantial as properly to be labelled compelling and that the law does so by means which restrict communication on governmental or political matter no more than is reasonably necessary to achieve that protection[203]. At the other end of the spectrum, establishment of a sufficient justification may require nothing more than demonstration that the means adopted by the law are rationally related to the pursuit of the end of the law, which has already been identified as legitimate.

152 Alternative means of achieving the end which are less burdensome on communication on governmental or political matter have long been recognised as relevant to the inquiry[204]. But their presence or absence will not necessarily be decisive. The weight they will be accorded will vary with the nature and intensity of the burden to be justified. Relevant to the validity of a particular law

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201 Eg *United States v Alvarez* 183 L Ed 2d 574 at 595-596 (2012).

202 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 169; *Levy v Victoria* (1997) 189 CLR 579 at 618-619; *Hogan v Hinch* (2011) 243 CLR 506 at 555-556 [95]; [2011] HCA 4; *Wotton v Queensland* (2012) 246 CLR 1 at 16 [30]; [2012] HCA 2.

203 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 200 [40] citing *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 143.

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

may also be any inequality of impact on the communication of divergent political views[205].

Step 1: Effective burden?

153 The first question in the present case is whether, and if so how, s 93X of the *Crimes Act* imposes an effective burden on communication on governmental or political matter. Answering that question begins with the observation that the section imposes a criminal prohibition on association. The prohibition is on habitual association with two or more persons within s 93W's definition of convicted person. There are in fact nearly 200,000 persons in New South Wales within that definition[206]. Most are no longer under sentence or subject to be sentenced. Most are therefore not ineligible to be elected to the Commonwealth Parliament on account of their conviction[207]. But the analysis would proceed in the same way irrespective of the number of persons within the definition and irrespective of their eligibility to be elected to the Commonwealth Parliament.

154 Answering the question proceeds by observing that the section imposes a criminal prohibition on association with two or more convicted persons irrespective of the purpose of association. That leads to an obvious point, which no party or intervener had an interest in making. The point is that the section will impact differentially on communication on governmental or political matter depending on the purpose of association. Its impact on those who associate to lobby for prison reform will be different from its impact on those who associate to play cards.

155 In its application to an association formed other than for a purpose of engaging in communication on governmental or political matter, the prohibition imposed by the section will have the practical effect of preventing such communication on governmental or political matter as might otherwise occur in the course of that association. Persons who cannot associate to play cards cannot discuss politics between hands. That is an effect on communication on governmental or political matter. But it is an effect which is properly characterised as adventitious, even if it might not in every conceivable circumstance be trivial. It does not amount to an effective burden.

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205 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 146; *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 251 [147]-[148]; 304 ALR 266 at 297-298.

206 New South Wales Ombudsman, *Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force*, November 2013 at 21.

207 Section 44(ii) of the Constitution.

156 In its application to an association formed for a purpose of engaging in communication on governmental or political matter, however, the prohibition imposed by the section will have the practical effect of preventing or impeding that purpose being realised. That effect on communication on governmental or political matter is qualitatively different. It does amount to an effective burden.

157 New South Wales and some interveners argue that any burden would be negated by the requirement for an official warning as an element of the offence which the section creates. They point out that the giving of that official warning would be subject to collateral review in any prosecution. They point out that an official warning given out of a desire to prohibit or impede political communication would not be for a purpose which the section would be construed to permit even leaving the application of the implied constitutional freedom entirely to one side. That may be so. Yet the official warning could still be given to a person whose association was for a purpose of engaging in political communication without any desire on the part of the police officer giving it to prohibit or impede political communication. The implied statutory constraint on the giving of an official warning provides no assurance that the prohibition on association imposed by the section cannot apply to an association formed for a purpose of engaging in communication on governmental or political matter.

158 The requisite analysis looks to the burden on communication imposed by a law itself in its legal operation or in its practical operation[208]. The burden here lies in the legal operation of the section in so far as that legal operation extends to an association formed for a purpose of engaging in communication on governmental or political matter. That burden is not removed by the fact, if it be the fact, that the law might be administered to have a practical operation which is narrower than its legal operation[209].

159 The section effectively burdens communication on governmental or political matter. Further analysis is therefore required to determine whether that burden is justified. What is important for that further analysis is that the effective burden on communication on governmental or political matter is confined to the application of the section to an association for a purpose of engaging in communication on governmental or political matter.

Step 2: Justification?

160 Section 93X is a contemporary version of a consorting law, the policy of which historically has been "to inhibit a person from habitually associating with persons ... because the association *might* expose that individual to temptation or

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208 *Wotton v Queensland* (2012) 246 CLR 1 at 19 [42].

209 Cf *Ackroyd v McKechnie* (1986) 161 CLR 60 at 70; [1986] HCA 43.

lead to his involvement in criminal activity"[210]. The object of the section is to prevent or impede criminal conduct. Preventing or impeding criminal conduct is compatible with the system of representative and responsible government established by the Constitution. The section has a legitimate end.

161 The question is then whether there is sufficient justification for the burden which the section imposes on communication on governmental or political matter in pursuit of that legitimate end. That question can be focussed more precisely. The section pursues its end by prohibiting association. New South Wales, in its written submissions, explained it this way:

> "Section 93X serves the legitimate objective of preventing or impeding criminal conduct by preventing and disrupting association that might expose that individual to temptation or lead to his involvement in criminal activity. It is the 'association' that is sought to be prevented – prior to the stage at which a 'criminal design' is actually formed."

162 Is s 93X's prohibition on association, prior to the stage at which "criminal design" is actually formed (or perhaps even suspected), justified in its application to association for a purpose of engaging in communication on governmental or political matter? Is application of the prohibition to association for a purpose of engaging in communication on governmental or political matter proportionate to, or reasonably necessary for, preventing or impeding criminal conduct?

163 The question is not – as New South Wales and some interveners seek to frame it – whether the burden which the section imposes on communication on governmental or political matter is proportionate to, or reasonably necessary for, preventing or impeding criminal conduct to the same extent as might potentially be achieved by adopting the section's prophylactic prohibition on association. To frame the question in those or similar terms is to pay insufficient regard to the *Coleman v Power* reformulation of the second *Lange* question. It is to lose sight of why the analysis is being undertaken. The implied constitutional freedom is a constraint on legislative design. It limits legislative options. The consequence of the implied constitutional freedom is that there are some legitimate ends which cannot be pursued by some means, the result of which in some circumstances is that some ends will not be able to be pursued to the same extent as they might have been pursued absent the implied constitutional freedom. Means which come at too great a cost to the system of representative and responsible government established by the Constitution must be abandoned or refined. Means which are overbroad may need to be narrowed. This consequence of the implied freedom cannot be avoided by an analysis which seeks to circumvent its

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210 *Johanson v Dixon* (1979) 143 CLR 376 at 385 (emphasis added).

application by characterising means adopted by the law which burden communication on governmental or political matter as the end the law pursues.

164 An effective burden on communication on governmental or political matter which takes the form of the application of a prohibition on association for a purpose of engaging in communication on governmental or political matter, in my view, warrants close scrutiny, congruent with a search for compelling justification. Not much turns, however, on the precise calibration of the test of proportionality, or reasonable necessity, warranted by the burden which s 93X imposes.

165 To prevent or impede criminal conduct, s 93X prohibits association. The prohibition is not absolute. Some forms of association are excluded by the availability of the defence in s 93Y. Why is association for a purpose of engaging in communication on governmental or political matter not similarly excluded?

166 The only answer proffered by New South Wales or by any intervener in its support is that exclusion of association for a purpose of engaging in communication on governmental or political matter would be impracticable. The impracticability is argued to arise: first because what is included within communication on governmental or political matter is difficult to define, and second because "[t]hat consorting was for such purposes is an assertion easily made, and most difficult to disprove". Neither basis for the suggested impracticability is attractive, much less compelling. As to the first, any difficulty of defining communication on governmental or political matter provides no justification for ignoring communication on governmental or political matter entirely. As to the second, our system of criminal justice has other means of mitigating the possibility that witnesses might tell lies, and, if they do, imposes no requirement on juries to believe them.

167 The burden imposed by the application of the section to an association for a purpose of engaging in communication on governmental or political matter is not justified. It follows that, in its application to an association for a purpose of engaging in communication on governmental or political matter but not otherwise, the section infringes the implied constitutional freedom.

Severance

168 Section 31 of the *Interpretation Act* 1987 (NSW) is applied by s 5 of that Act to every New South Wales Act "except in so far as the contrary intention appears". Section 31(1) provides that an Act "shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of Parliament". Section 31(2) provides that, if the application of a provision of an Act "to any person, subject-matter or circumstance, would, but for this section, be construed as being in excess of the legislative power of Parliament", "it shall be a valid

provision to the extent to which it is not in excess of that power" and "the application of the provision to other persons, subject-matters or circumstances, shall not be affected".

169 Like other severance clauses, of which s 15A of the *Acts Interpretation Act* 1901 (Cth) has been the most litigated Australian example, s 31 of the *Interpretation Act* as qualified by s 5 of the *Interpretation Act* creates a statutory presumption the effect of which is that "the intention of the legislature is to be taken prima facie to be that the enactment should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail"[211]. A "contrary intention" for the purpose of s 31 is not a legislative aspiration that the enactment is to operate fully in the terms in which it is expressed, but "a positive indication [which] appears in the enactment that the legislature intended it to have either a full and complete operation or none at all"[212]. For the purpose of s 31(2), in particular, such a contrary intention is a positive indication that the legislature did not intend the provision in question to have a distributive application to persons, subject-matters or circumstances to which the provision is expressed to apply but instead intended "all to go free unless all were bound"[213].

170 Where not excluded by the appearance of a contrary intention, a severance clause such as s 31 – s 31(2) no less than s 31(1) – operates as "a rule of construction and not [as] a rule of law"[214]. As a rule of construction, the severance clause does not authorise a court, "by adopting a standard criterion or test merely selected by itself, to redraft a [provision] so as to bring it within power and so preserve its validity"[215]. The court "cannot separate the woof from the warp and manufacture a new web"[216]. That is to say, the court cannot

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211 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 371; [1948] HCA 7.

212 *Cam & Sons Pty Ltd v The Chief Secretary of New South Wales* (1951) 84 CLR 442 at 454; [1951] HCA 59.

213 *R v Poole; Ex parte Henry [No 2]* (1939) 61 CLR 634 at 652; [1939] HCA 19.

214 *Pidoto v Victoria* (1943) 68 CLR 87 at 110; [1943] HCA 37.

215 *Pidoto v Victoria* (1943) 68 CLR 87 at 111.

216 *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 386; [1930] HCA 52.

because the court could not take on "the legislative task of making a new law from the constitutionally unobjectionable parts of the old"[217].

171 That a severance clause operates only as a rule of construction, however, is no impediment to its application to read down a provision expressed in general words so as to have no application within an area in which legislative power is subject to a clear constitutional limitation[218]. Such reading down can occur even if the constitutional limitation is incapable of precise definition[219], and even if an inquiry of fact is required to determine whether the constitutional limitation would or would not be engaged in so far as the law would apply to particular persons in particular circumstances[220]. Where reading down can occur, the constructional imperative of a severance clause is that reading down must occur.

172 It is instructive in this respect to recall that severance clauses were routinely applied by this Court during the period between the *Bank Nationalisation Case*[221] and *Cole v Whitfield*[222], when the guarantee in s 92 of the Constitution that "trade, commerce, and intercourse among the States ... shall be absolutely free" was understood to be infringed by a law which "burdened" trade, commerce or intercourse among the States in a manner which was not justified as "reasonable regulation". Absent a severance clause, a provision of a law which had a distributive application to a range of persons, subject-matters or circumstances was invalid in its entirety if the law imposed an unjustifiable burden on trade, commerce or intercourse among the States in any of those applications[223]. The presence of a severance clause produced a markedly different result: such a provision was invalid only "in so far" as it "would apply" to burden conduct or transactions found to be the subject of trade, commerce or

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217 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 372.

218 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 502-503; [1996] HCA 56.

219 Eg *Victoria v The Commonwealth* (1996) 187 CLR 416 at 503; *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 at 307 [66], 317-318; [2009] HCA 33.

220 Eg *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 291-292; [1990] HCA 29; *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 487-488; [1991] HCA 29.

221 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1.

222 (1988) 165 CLR 360; [1988] HCA 18.

223 *Wilcox Mofflin Ltd v New South Wales* (1952) 85 CLR 488 at 523; [1952] HCA 17.

intercourse among the States within the meaning of s 92 of the Constitution[224]. The imperative to read down the provision in the event of invalidity had the additional salutary consequence of removing the need for a court to consider hypothetical or speculative applications of the provision in order to determine the rights of the parties. Barwick CJ explained that consequence as follows[225]:

> "Where [a severance clause] is available, and the statute can be given a distributive operation, its commands or prohibitions will then be held inapplicable to the person whose inter-State trade would thus be impeded or burdened. Of course, the question of validity or applicability will only be dealt with at the instance of a person with a sufficient interest in the matter; and, in my opinion, in general, need only be dealt with to the extent necessary to dispose of the matter as far as the law affects that person."

In a case where the particular conduct or transaction which the provision burdened was found not itself to be the subject of trade, commerce or intercourse among the States within the meaning of s 92 of the Constitution, the availability of severance meant that no further analysis was required in order to dismiss a challenge to the validity of the provision[226].

173 "It is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties"[227]. The s 92 cases were examples of that practice. Another example can be found in the reasons for judgment of Dixon J in *British Medical Association v The Commonwealth*, treating as "abstract or hypothetical", and therefore as "outside the scope of the suit", challenges to the validity of specific legislative provisions which were not alleged to affect any immediate right, duty

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224 Eg *Carter v The Potato Marketing Board* (1951) 84 CLR 460 at 481, 486; [1951] HCA 60; *Williams v Metropolitan and Export Abattoirs Board* (1953) 89 CLR 66 at 76; [1953] HCA 93; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 71, 75-76, 82; [1955] HCA 6; *Nominal Defendant v Dunstan* (1963) 109 CLR 143 at 151-152; [1963] HCA 5; *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board* (1985) 157 CLR 605 at 669-670; [1985] HCA 38; *Ackroyd v McKechnie* (1986) 161 CLR 60 at 73-74; *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 637; [1986] HCA 60.

225 *Harper v Victoria* (1966) 114 CLR 361 at 371; [1966] HCA 26.

226 Eg *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 82; *Nominal Defendant v Dunstan* (1963) 109 CLR 143 at 151-152.

227 *Lambert v Weichelt* (1954) 28 ALJ 282 at 283.

or liability of any party and which would have been severable if invalid[228]. Another example was the dismissal without consideration of the merits in *Commonwealth v Queensland* of an action for a declaration that a State law was invalid under s 109 of the Constitution to the extent that it was inconsistent with Commonwealth law, where no facts were alleged and where it was conceded that the State Act would "have some valid operation by reason of the presence in that Act of a reading down provision"[229]. Another example, much closer to the present case, can be found in the reasons for judgment of McHugh J in *Coleman v Power*, reading down a statutory prohibition against using "insulting" words in or near a public place so as to have valid operation "except to the extent that it penalised insulting words uttered in discussing or raising matters concerning politics and government"[230].

174 A presumption of severance has been identified in the United States as underpinning long-standing and frequently reiterated judicial reticence to consider "facial" challenges to the constitutional validity of legislation[231]. Prudential considerations often identified as supporting that reticence include avoiding the risk of premature interpretation of statutes on the basis of inadequate appreciation of their practical operation as well as avoiding the formulation of a rule of constitutional law broader than required by the precise facts to which it is to be applied[232].

175 The present case illustrates some of the problems of constitutional adjudication in a factual vacuum. The three special cases before the Court recorded no agreement or allegation of any communication on any governmental or political matter. As already noted, no party or intervener had any interest in grappling with the differential impact of the section on communication on governmental or political matter depending on the purpose of the association which might be alleged in a particular case to constitute consorting. Each party chose to present a highly abstracted all-or-nothing argument for or against invalidity. The competing arguments for the most part failed to engage because

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228 *British Medical Association v The Commonwealth* (1949) 79 CLR 201 at 258; [1949] HCA 44.

229 *Commonwealth v Queensland* (1987) 62 ALJR 1 at 1-2.

230 *Coleman v Power* (2004) 220 CLR 1 at 56 [110].

231 Fallon et al, *Hart and Wechsler's The Federal Courts and The Federal System*, 6th ed (2009) at 162-163; Stern, "Separability and Separability Clauses in the Supreme Court", (1937) 51 *Harvard Law Review* 76.

232 Eg *Washington State Grange v Washington State Republican Party* 552 US 442 at 450 (2008).

they were based on differing assumptions about how s 93X might operate in practice. Severance was relied on by New South Wales only as a fall-back.

176 It may be appropriate in a future case to consider severance as a threshold question. Where it is apparent that an impugned provision would be severable if and to the extent the provision might burden communication on political or governmental matter in a manner which infringes the implied constitutional freedom, there is a real question as to whether arguments about whether or not such a burden is justified are appropriate to be entertained absent demonstration that some right, duty or liability in issue turns on the validity of the provision in its application to burden a particular communication or category of communications on governmental or political matter.

177 The absence from s 93Y of a defence applicable in circumstances of an association for the purpose of engaging in communication on governmental or political matter is not a positive indication that the New South Wales Parliament intended s 93X to have either a full and complete operation or none at all. There is no other indication of an intention contrary to the application of s 31 of the *Interpretation Act.*

178 Section 93X is severable, and s 31 of the *Interpretation Act* therefore requires that it be severed. The requirement of s 31 is that s 93X be read down so as not to apply in circumstances where it would infringe the constitutional freedom by placing an undue burden on communication on governmental or political matter. That is achieved by reading the section as having no application in so far as the section would apply to consorting which is or forms part of an association for a purpose of engaging in communication on governmental or political matter.

Answers to questions

179 Mr Tajjour, Mr Hawthorne and Mr Forster make no claim that the conduct alleged against them to constitute consorting was or formed part of an association for a purpose of engaging in communication on governmental or political matter. Their argument is that s 93X is invalid in its entirety. Question 1 in each special case should therefore be interpreted to ask whether s 93X is invalid in its entirety. The question as so interpreted should be answered: "No".

180 Questions 2 and 3 in each of Mr Tajjour's and Mr Hawthorne's special cases should each be answered respectively: "No" and "Does not arise". Question 4 in each of those special cases should be answered: "No". Question 5 in each of those special cases, and Question 2 in Mr Forster's special case, should each be answered: "The plaintiff".

181 KEANE J. Each of the plaintiffs currently stands charged in proceedings pending in New South Wales with habitual consorting with convicted offenders in contravention of s 93X of the *Crimes Act* 1900 (NSW) ("the Act"). In the proceedings in New South Wales, each of the plaintiffs raised the contention that s 93X is invalid under the Constitution of the Commonwealth. Each of the plaintiffs' challenges to the validity of s 93X of the Act came to this Court on a special case pursuant to r 27.08 of the High Court Rules 2004 (Cth).

182 In this Court, the plaintiffs argued that s 93X is invalid on the ground that it is inconsistent with the freedom of communication on political and governmental matters implied by ss 7, 24, 64 and 128 of the Constitution.

183 Two of the plaintiffs, Mr Tajjour and Mr Hawthorne, argued, in addition, that s 93X is offensive to an implied freedom of association guaranteed by the Constitution. They also argued that s 93X is invalid because it is inconsistent with the International Covenant on Civil and Political Rights (1966) ("the ICCPR") as ratified by the Commonwealth. These additional arguments may be disposed of shortly, after the plaintiffs' argument based on the implied freedom of communication has been dealt with.

184 In none of the special cases was it suggested that the factual basis of the charge against the plaintiff involved a communication by or to the plaintiff of a political or governmental matter, whether as part of the social interaction said to be the consorting which gave rise to the charge or as a circumstance denying the possibility of criminal responsibility for a contravention of s 93X. Rather, the plaintiffs argued that s 93X is invalid because its legal effect is to burden communication on political or governmental matters by proscribing the opportunity for such communication.

185 For the reasons which follow, the plaintiffs' challenges to the validity of s 93X fail. Section 93X, properly construed, does not proscribe communication by or between any persons on political or governmental matters. That is because the making of a communication about political or governmental matters does not, of itself, amount to consorting as that term is properly understood.

186 In many cases a communication on political or governmental matters will be made or received without either party knowing that the other is a person convicted of an indictable offence. But even in those cases where one person is aware that the other has been convicted of an indictable offence, mere acquaintance does not make people consorts; and a person's discharge of his or her civic responsibilities is not an occasion of consorting because it lacks the personal intimacy characteristic of consorts.

187 To the extent that a political communication might occur in the course of a social interaction which otherwise answers the description of habitual consorting, s 93X would be engaged by the facts which establish that the interaction in

question is properly characterised as consorting. That a political communication might occur in the course of consorting does not excuse the consorting. However, it is not the communication on political or governmental matters that attracts the operation of s 93X, but the facts which establish the consorting.

188 The conclusion that s 93X does not burden communication on political or governmental matters is not reached by a process of reading down of the kind mandated by s 31 of the *Interpretation Act* 1987 (NSW) in order to avoid the conclusion that it is invalid. Rather, that conclusion is to be drawn from consideration of the text, history and purpose of s 93X. These indicate that s 93X does not extend to proscribe communication by or with any person convicted of an indictable offence on political or governmental matters.

The Act

189 Section 93X was introduced into the Act on 9 April 2012 by the *Crimes Amendment (Consorting and Organised Crime) Act* 2012 (NSW). It provides:

> "(1) A person who:
>
> (a) habitually consorts with convicted offenders, and
>
> (b) consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offenders,
>
> is guilty of an offence.
>
> Maximum penalty: Imprisonment for 3 years, or a fine of 150 penalty units, or both.
>
> (2) A person does not ***habitually consort*** with convicted offenders unless:
>
> (a) the person consorts with at least 2 convicted offenders (whether on the same or separate occasions), and
>
> (b) the person consorts with each convicted offender on at least 2 occasions.
>
> (3) An ***official warning*** is a warning given by a police officer (orally or in writing) that:
>
> (a) a convicted offender is a convicted offender, and
>
> (b) consorting with a convicted offender is an offence."

190 Consorting is defined by s 93W of the Act as to "consort in person or by any other means, including by electronic or other form of communication." Further, s 93W defines convicted offender as "a person who has been convicted of an indictable offence (disregarding any offence under section 93X)."

191 Section 93Y provides:

> "The following forms of consorting are to be disregarded for the purposes of section 93X if the defendant satisfies the court that the consorting was reasonable in the circumstances:
>
> (a) consorting with family members,
>
> (b) consorting that occurs in the course of lawful employment or the lawful operation of a business,
>
> (c) consorting that occurs in the course of training or education,
>
> (d) consorting that occurs in the course of the provision of a health service,
>
> (e) consorting that occurs in the course of the provision of legal advice,
>
> (f) consorting that occurs in lawful custody or in the course of complying with a court order."

Section 93X and the implied freedom of political communication

The plaintiffs' contentions

192 The plaintiffs contended that s 93X burdens the freedom of political communication because it is apt to "capture any form of communication, whether of a political nature or not". Section 93X was said to have the potential to restrict innocent or accidental meetings and discussions with, or between, individuals who have been convicted of an indictable offence. It was said that, because s 93X has the effect of prohibiting all communication, it necessarily has the effect of prohibiting communications on political or governmental matters contrary to the implied freedom.

193 It was further submitted that, because s 93X is broad enough in its reach to apply to entirely innocent communications of a political nature, it is neither reasonably appropriate nor adapted to serving a legitimate end. This submission was said to be supported by the unqualified language of s 93X, the narrow scope of the defences available under s 93Y of the Act, which do not include consorting for the purposes of the discussion of political or governmental matters, and the availability of "less drastic measures" to address the mischief at which s 93X is directed.

194 It is convenient to make some general observations about the implied freedom of political communication before turning to discuss the plaintiffs' submissions in relation to the operation of s 93X.

The nature of the implied freedom

195 The implied freedom of political communication is a limitation upon legislative and executive power, arising from ss 7, 24, 64 and 128 of the Constitution, which is necessary to ensure that those provisions operate effectively[233]. It is important to keep these provisions steadily in view. Section 7 provides, in relation to the Senate as the upper house of the Commonwealth Parliament, that it "shall be composed of senators for each State, directly chosen by the people of the State". And s 24 provides, in relation to the composition of the House of Representatives as the lower house, that it "shall be composed of members directly chosen by the people of the Commonwealth". Section 64 requires Ministers of State for the Commonwealth to be or become a senator or a member of the House of Representatives. Section 128 provides the sole means of altering the Constitution: it requires a proposed law for the alteration to be "submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives."

196 It is necessary that the flow of political communication be kept free in order to maintain the political sovereignty of the people of the Commonwealth. As this Court explained in *Lange v Australian Broadcasting Corporation*[234]:

> "ss 7 and 24 and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors."

197 The constitutional guarantee to the people of the Commonwealth of a free and informed choice as electors ensures free communication between them as equal participants in the exercise of political sovereignty[235].

198 The validity of s 93X of the Act is not to be determined by asking whether it infringes some personal right to express oneself in any way that one might choose akin to that created by the First Amendment to the Constitution of the

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233 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560-561; [1997] HCA 25.

234 (1997) 189 CLR 520 at 560.

235 *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 249 [135]; 304 ALR 266 at 295; [2013] HCA 58.

United States[236]. The relevant question is whether the law impairs the freedom of political communication necessitated by ss 7, 24, 64 and 128 of the Constitution. In *Unions NSW v New South Wales*[237], French CJ, Hayne, Crennan, Kiefel and Bell JJ said:

> "A legislative prohibition or restriction on the freedom is not to be understood as affecting a person's right or freedom to engage in political communication, but as affecting communication on those subjects more generally. The freedom is to be understood as addressed to legislative power, not rights, and as effecting a restriction on that power. Thus the question is not whether a person is limited in the way that he or she can express himself or herself, although identification of that limiting effect may be necessary to an understanding of the operation of a statutory provision upon the freedom more generally. The central question is: how does the impugned law affect the freedom?" (footnote omitted)

199 Whether s 93X burdens the implied freedom of communication on political and governmental matters is to be answered by reference to the test, usually referred to as the *Lange* test, which was most recently applied by this Court in *Unions NSW v New South Wales*[238]. In this regard, two questions must be answered before the validity of a law can be determined. First, does the law effectively burden freedom of communication about political or governmental matters 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 in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 of the Constitution for submitting a proposed amendment to the Constitution to the informed decision of the people?

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236 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 350 [27], 451 [381]-[382], 478 [451]; [2005] HCA 44; *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 236 [36], 246 [109]-[110]; 304 ALR 266 at 276-277, 290.

237 (2013) 88 ALJR 227 at 236 [36]; 304 ALR 266 at 276-277.

238 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Coleman v Power* (2004) 220 CLR 1 at 43 [74], 46 [83], 78 [196], 82 [210], 109 [288]; [2004] HCA 39; *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 236 [35]; 304 ALR 266 at 276. See also *Wotton v Queensland* (2012) 246 CLR 1 at 15 [25]; [2012] HCA 2; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 61 [131]; [2013] HCA 3; *Monis v The Queen* (2013) 249 CLR 92 at 129 [61]; [2013] HCA 4.

The proper construction of s 93X

200 The application of the first limb of the *Lange* test must begin with the ascertainment of the true construction of s 93X in order to understand which social interactions it proscribes[239].

201 It is apparent that s 93X is directed at a social interaction of a particular kind which may be effected by, or incidentally include, communication between persons. But it is not directed at all social interactions. The question which the plaintiffs present, for the purposes of the first limb of the *Lange* test, is whether s 93X has a necessary effect upon those social interactions which consist of communications upon political or governmental matters.

202 One argument advanced by the plaintiffs was that, because s 93W defines "consorting" so as to include consorting "by electronic or other form of communication", it encompasses every communication with or by a person convicted of an indictable offence. That argument may be dealt with immediately. Section 93W serves to ensure that consorting is not limited to personal interactions involving physical presence; but ss 93X and 93W do not operate to proscribe all forms of communication between an individual and a person convicted of an indictable offence. While consorting will usually, if not always, involve some communication between the putative consorts, not every communication between individuals can sensibly be described as consorting.

203 The plaintiffs also urged that "consorting" is a broad term apt to encompass all, or virtually all, communications between individuals on any subject. Senior counsel for Mr Tajjour went so far as to contend that a member of Parliament who sends a weekly newsletter to his or her constituents is thereby habitually consorting with those constituents who happen to have been convicted of an indictable offence. Similarly, it was said that a minister of religion, addressing his or her congregation weekly, would be in peril of contravening s 93X if his or her congregation happened to include persons who had been convicted of an indictable offence. Of course, it was necessary to the plaintiffs' arguments for invalidity that a broad view be taken of the scope of s 93X. But the breadth of s 93X should not be exaggerated.

204 Section 93X is not a modern version of the medieval declaration of outlawry, "caput gerat lupinum" (let him bear the head of a wolf), upon the making of which it became the right and duty of every law abiding subject to

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239 *Coleman v Power* (2004) 220 CLR 1 at 21 [3], 40-41 [64]-[68], 55-56 [110], 68 [158], 80-81 [207], 111 [295]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]; [2008] HCA 4.

hunt the outlaw down[240]. Section 93X does not purport to sever the ties of persons convicted of an indictable offence with civil society. In particular, it does not in terms disqualify any person from the performance of that person's civic responsibilities. And it is difficult to discern any indication of necessary intendment that it should do so.

205 Not every conceivable social interaction between individuals, one or more of whom happens to have been convicted of an indictable offence, amounts to consorting with convicted offenders. Quite apart from s 93Y, no one would sensibly suggest that the sending of a letter of demand by a creditor to a debtor could, of itself, amount to consorting. Equally, an individual who regularly catches the same bus to work as a group of persons previously convicted of indictable offences could not sensibly be said to consort with persons convicted of an indictable offence. Similarly, a pollster who canvasses the political opinions of persons convicted of indictable offences on a regular basis cannot be said to be habitually consorting with those convicted offenders. A member of a political party would not contravene s 93X merely by attending a branch meeting of the party which is also attended by fellow party members who happen to be persons who have been convicted of an indictable offence. Similarly, a political blogger could not be said to consort with convicted offenders by reason of the fact that they are on his or her mailing list. Nor could it be suggested that persons chatting while waiting to vote at a polling booth are consorting with each other.

206 The authorities suggest that these kinds of social interactions are not cases of consorting for two reasons: first, there is no intentional seeking out or acceptance of a personal social relationship with or by a person convicted of an indictable offence[241]; and secondly, the interaction in question lacks the personal intimacy which characterises the relationship between consorts[242].

Consorting

207 The offence of consorting has long been deployed in an attempt to limit the spread of criminogenic influences in the community. In New South Wales, consorting was an offence under s 4(1) of the *Vagrancy Act* 1902 (NSW) by

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240 Pollock and Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed (1898), vol 2 at 449.

241 *Beer v Toms; Ex parte Beer* [1952] St R Qd 116 at 126; *Bryan v White* [1962] Tas SR 113 at 118-119.

242 *O'Connor v Hammond* (1902) 21 NZLR 573 at 575-576; *Auld v Purdy* (1933) 50 WN (NSW) 218 at 219; *Dias v O'Sullivan* [1949] SASR 195 at 199-202; *Reardon v O'Sullivan* [1950] SASR 77 at 86.

virtue of an amendment made by the *Vagrancy (Amendment) Act* 1929 (NSW)[243]. The offence, although previously a summary offence, remained a part of New South Wales criminal law in s 93X's most recent predecessor, s 546A of the Act.

208 In *Johanson v Dixon*[244], this Court was concerned with the Victorian consorting legislation, which expressly excused from criminal responsibility those consorts who were able to give "a good account" of their conduct. The Court rejected the contention that a defendant who establishes that his or her consorting is for an innocent purpose thereby gives "a good account … of his [or her] so consorting" so as thereby to avoid criminal responsibility for what is otherwise shown to be habitual consorting. It is sufficient to note that the Court accepted the submission of Mr D M Dawson QC, Solicitor-General for the State of Victoria, that[245]:

> "'Good account' is an account which excuses the consorting in some way. A good account is not one which merely shows that the consorting amounted to nothing more than consorting."

209 There are differences between the legislation considered in *Johanson v Dixon* and s 93X of the Act. In particular, s 93X does not use the concept of "good account" as a circumstance excluding criminal responsibility under the section; and s 93Y provides examples of circumstances where the particular purpose of the consorting may afford a defence to a charge of contravening s 93X. Nevertheless, *Johanson v Dixon* requires that one accept that, s 93Y apart, the circumstance that consorting is for an innocent purpose does not excuse criminal responsibility under s 93X. That is because the proscription of consorting is intended to suppress social interactions which, though themselves innocent, may have a tendency to expand criminal networks.

210 Accordingly, the application of s 93X depends, not on whether the purpose of consorting is innocent, but on whether an occasion of consorting is established by the facts of any given case. Consideration of this issue requires closer attention to the nature of the relationship described as consorting.

Consorting as intentional social interaction

211 In *Johanson v Dixon*, Mason J, with whom Barwick CJ and Stephen J agreed, said that "[i]n its context 'consorts' means 'associates' or 'keeps company'"

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243 Steel, "Consorting in New South Wales: Substantive Offence or Police Power?", (2003) 26 *University of New South Wales Law Journal* 567 at 568.

244 (1979) 143 CLR 376; [1979] HCA 23.

245 (1979) 143 CLR 376 at 378.

and that it "denotes some seeking or acceptance of the association on the part of the defendant"[246].

212 In the same case, Aickin J, with whom Stephen J also agreed, said[247]:

> "The ordinary meaning of the words 'to consort' is to 'accompany; to escort or attend, to be a consort to (someone) or to associate oneself with (someone)', and thus to associate with or to keep company with a particular person is to 'consort' with such person. In this respect I agree with the views expressed in *Brown v Bryan*[248] that it denotes some seeking or acceptance of the association with other specified persons on the part of a defendant."

213 The issues in *Johanson v Dixon* were not such as to require their Honours to explain more fully the nature of the association proscribed as consorting. But it is apparent that their Honours regarded consorting as a social interaction involving more than the mere physical presence of two or more persons at the same location: one aspect of consorting is the intentional seeking out of the company of a person convicted of an indictable offence.

Personal intimacy

214 The nature of the association which is sought out is also material to whether the relationship is to be characterised as consorting. To meet casually with an acquaintance is not to consort, both because the meeting is not sought out, and because an acquaintance is not necessarily a consort.

215 It has long been understood that "consorting" involves the seeking out or acceptance of a relationship of personal intimacy[249]. In *O'Connor v Hammond*[250], Stout CJ said: "Consorting would be proved by companionship." One of the meanings given by *The Oxford English Dictionary*[251] to the verb "consort" captures this idea: "To associate in a common lot, to sort together

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246 (1979) 143 CLR 376 at 383.

247 (1979) 143 CLR 376 at 395.

248 [1963] Tas SR 1 at 2.

249 *Auld v Purdy* (1933) 50 WN (NSW) 218 at 219; *Dias v O'Sullivan* [1949] SASR 195 at 199-202.

250 (1902) 21 NZLR 573 at 575-576.

251 2nd ed (1989), vol 3 at 780.

(persons or things)." This understanding reflects the appreciation that the vice at which the law is directed is the potential spread of criminogenic influence by one's choice of companions.

216 In *Dias v O'Sullivan*[252], Mayo J said:

> "The idea implicit in consorting … suggests a more or less close personal relationship, or at least some degree of familiarity, or intimacy with persons, or attraction from, or an enjoyment of, some feature in common, that results in a tendency towards companionship. Where there is consorting it may be expected to be in obedience to an inclination, or impulse, to gravitate into the presence of, or, if accidentally in such presence, to remain in a group with some other person or persons. The fundamental ingredient is companionship. The fact that people meet (inter alia) to carry on some trade or occupation is not inconsistent with a fraternising contemporary therewith amounting to consorting.
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> …
>
> If the elements, that I have discussed, are present, the reasons for, or purposes of, any meetings, or every meeting, are irrelevant. The offence does not postulate any criminal activity. It is *comradeship with [convicted offenders]*. The legislative intent is, as I think, precautionary and preventative, rather than to administer punishment for dishonest planning, criminal transactions, or machinations whilst the group are together." (emphasis added; citations omitted)

217 Mayo J[253] discussed the social mischief at which the consorting laws are aimed by reference to the phrase "habitual consorting". His Honour said that habitual consorting is:

> "the regular meeting of congeries of individuals ... in circumstances where the meetings have the appearance of *fraternising*. Each instance of such meetings relied on is not a separate offence. The conduct dealt with includes numbers of occurrences over a period. These will be illustrative of tendencies, and collectively may justify an inference that these tendencies are prone to affect the behaviour of the person accused to such a degree as to amount to a habit, that has influenced his conduct during the period alleged in the charge, or at least some part of that period." (emphasis added)

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252 [1949] SASR 195 at 201-202.

253 [1949] SASR 195 at 199.

218 It is to be noted that in *Johanson v Dixon*[254], Mason J referred to *Dias v O'Sullivan*, and to that part of the reasons of Mayo J which included the passages cited above, with evident approval.

Extrinsic material

219 In the Agreement in Principle Speech in the Legislative Assembly in respect of the proposed s 93X, the Attorney-General for the State of New South Wales, referring to *Johanson v Dixon*, confirmed the purpose of the provision in terms which reflect the concern to suppress social interactions which may have a criminogenic tendency[255]:

> "The High Court has found that consorting need not have a particular purpose but denotes some seeking or acceptance of the association on the part of the defendant. It does not extend to chance or accidental meetings, and it is not the intention of the section to criminalise meetings where the defendant is not mixing in a criminal milieu or establishing, using or building up criminal networks." (citation omitted)

220 It is tolerably clear that s 93X does not target communications directed indiscriminately to all and any who might be disposed to engage in civic activity. Such communications generally lack the deliberate choice and personal intimacy that give rise to the criminogenic tendency which is the concern of s 93X. It was not suggested, and could not sensibly be suggested, that genuine communications confined to political or governmental matters can themselves be regarded as having that tendency.

The proper approach to the construction of s 93X

221 It is also to be borne in mind that the construction of s 93X is to be approached on the basis that the legislation is presumed not to interfere with common law rights and freedoms of individuals "except by clear and unequivocal language for which the Parliament may be accountable to the electorate."[256]

222 In seeking to distinguish those communications which are burdened by s 93X from those which are not[257], it is well understood by the legislature and

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254 (1979) 143 CLR 376 at 385.

255 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 14 February 2012 at 8131-8132.

256 *South Australia v Totani* (2010) 242 CLR 1 at 29 [31]; [2010] HCA 39.

257 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 403 [217].

courts alike that any limitation upon the common law liberties of speech and association is not to be read expansively.

223 As was said in *Lange*[258], "[u]nder a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law'". Under the common law an individual is free to communicate and associate as he or she wishes. That liberty encompasses the right to enter into such engagements as to the individual seem fit and proper. It also, in the case of contractual engagements, encompasses the right to have those engagements enforced by the courts[259]. In this respect, as McHugh J said in *York v The Queen*[260]:

> "The common law's conception of liberty is not limited to 'liberty in a negative sense', that is, 'the absence of interference by others'. It extends to a conception of liberty in a 'positive' sense, which is 'exemplified by the condition of citizenship in a free society, a condition under which each is properly safeguarded by the law against the predations of others'." (footnotes omitted)

224 In *Australian Communist Party v The Commonwealth*[261], Dixon J spoke of "the right of association" in this sense as a fundamental aspect of our legal system. It is necessary here to keep in mind that when one speaks of the right of association as Dixon J spoke of it in the *Communist Party Case*, one is speaking of the freedom of an individual under the common law, not the freedom derived from the constitutional implication, which operates as a denial of power to legislate in a given area of activity. The right of association under the common law is subject to legislative regulation whereas the constitutional implication limits the possibility of legal regulation. Before any question arises of the validity of legal regulation of an activity, one must determine whether a given piece of legislation affects the activity at all; and it is in relation to this step in the analysis that the presumption against interference with the right of association under the common law is to be taken into account.

225 The civic responsibilities which s 93X does not seek to trench upon are not confined to those which arise under the Constitution, but since the plaintiffs' challenge is based on the contention that s 93X is necessarily a burden on communications protected by the implied constitutional freedom, it is convenient to focus upon those communications. As noted earlier in these reasons, the

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258 (1997) 189 CLR 520 at 564.

259 *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465.

260 (2005) 225 CLR 466 at 473 [22]; [2005] HCA 60.

261 (1951) 83 CLR 1 at 200; [1951] HCA 5.

freedom of communication throughout the Commonwealth necessitated by ss 7, 24, 64 and 128 of the Constitution serves "to preserve the political sovereignty of the people of the Commonwealth."[262] The association of the people of the Commonwealth as electors, on which s 24 of the Constitution is expressly predicated, is an association of a unique kind. It is ultimately by virtue of that association that sovereign power is exercised within the Commonwealth by its citizens. It is necessarily a public association; in one sense it might be said to be the ultimate public association, free of the social separation implicit in particular individuals sorting together.

226 Association in this abstract sense, politically important as it is, is the antithesis of the relationship characteristic of consorts: it is not a relationship which involves any seeking out; and it does not involve any notion of personal intimacy or sorting together. Interactions between citizens on the occasion of the performance of their civic responsibilities do not require personal intimacy. To participate in the public affairs of the people of the Commonwealth is not to engage in the personal interaction characteristic of consorting. Further, it was not, and cannot be, suggested that communications on political or governmental matters might of themselves have criminogenic tendencies.

227 Section 93X of the Act is directed at fraternisation with criminals which, as a deliberate choice of companionship, is apt to lead to further criminal activity by the exercise of influence of one companion over the other. Section 93X of the Act is not directed at political communication, or association for the purposes of political communication, at either the State or federal level.

228 It is significant in this regard that the researches of counsel did not reveal that the offence of consorting has ever been held to apply to association for, or communication about, political or governmental matters. To adapt the observations of Gleeson CJ and Heydon J in *APLA Ltd v Legal Services Commissioner (NSW)*[263], if proscriptions upon consorting with criminals are incompatible with the requirements of ss 7, 24, 64 and 128 of the Constitution, "such incompatibility has passed unnoticed for most of the time since Federation."

Political communication between consorts

229 Where persons who interact socially, so that they can be said to be consorts, also speak to each other on political or governmental matters, they are no less consorting because their interaction includes that discussion. The

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262 *Unions NSW v New South Wales* (2013) 88 ALJR 227 at 249 [135]; 304 ALR 266 at 295.

263 (2005) 224 CLR 322 at 351 [29].

occurrence of political discussion between individuals who happen to be consorts does not exclude them from the operation of s 93X of the Act.

230 In *APLA Ltd v Legal Services Commissioner (NSW)*[264], it was held that Pt 14 of the Legal Profession Regulation 2002 (NSW), which prohibited a barrister or solicitor publishing advertisements containing certain kinds of content, was not a burden on communication about political or governmental matters for the purpose of the first limb of the *Lange* test for the reason that the prohibition was upon "communications [which were] an essentially commercial activity" rather than upon communications about political or governmental matters[265].

231 In *Levy v Victoria*[266], a regulation prohibited persons other than holders of a valid game licence from entering a permitted hunting area. The plaintiff was charged with contravening the regulation, and he challenged the validity of the regulation. The regulation survived the *Lange* test, notwithstanding that each member of the Court either held or assumed that the first limb of that test was satisfied in that the regulation was a burden upon communication about political or governmental matters because it prevented the plaintiff from entering upon the hunting area to make a political demonstration against duck-shooting[267].

232 The case proceeded on the footing that the plaintiff entered the hunting area "for the purpose of protesting against the laws of the Victorian Parliament which authorised the holders of valid game licences to shoot game birds"[268]. That the impugned regulation was a burden upon the implied freedom was explained by Brennan CJ[269]:

> "A law which simply denied an opportunity to make [a televised] protest about an issue relevant to the government or politics of the Commonwealth would be as offensive to the constitutionally implied freedom as a law which banned political speech-making on that issue. …

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264 (2005) 224 CLR 322.

265 (2005) 224 CLR 322 at 351 [28]-[29], 362 [69]-[71], 403-404 [216]-[220], 451 [380]-[382], 480 [457].

266 (1997) 189 CLR 579; [1997] HCA 31.

267 (1997) 189 CLR 579 at 595, 609, 614, 625-626, 647.

268 (1997) 189 CLR 579 at 592.

269 (1997) 189 CLR 579 at 595.

> In the present case, the plaintiff entered upon the proclaimed area and, had he not been removed, he would have stayed there to make a dramatic and televised protest against duck shooting and the laws and policies which permitted or encouraged the practice. He was prohibited from being able lawfully to make that protest and he was removed from the proclaimed area in exercise of an authority arising from the provisions of the [impugned regulation]. The conduct in which the plaintiff desired to engage and which was proscribed by [the regulation] was calculated to express and was capable of expressing a political message."

233 In *Levy*, McHugh J also explained that the effect of the regulation was to prevent political communication as distinct from merely preventing conduct in the course of which a political communication might occur. His Honour said[270]:

> "[T]he constitutional implication extends to protecting political messages of the kind involved here and also the opportunity to send those messages. …
>
> The argument for both parties assumed … that, in the absence of [the regulation], the plaintiff and others were entitled to enter the *permitted hunting area* to make their protests. Because of this assumption, the proper course is to proceed on the basis that [the regulation] and not the proprietary rights of the Crown or the operation of the general law prevented access to the hunting area." (emphasis in original)

234 So far as the first limb of the *Lange* test is concerned, *Levy* can be understood as a case where the impugned regulation prevented communication on political or governmental matters. It does not support the broader proposition that an otherwise valid law infringes the implied freedom because it proscribes an activity in the course of which constitutionally protected communications *might* occur. To accept the proposition that an activity otherwise proscribed by the criminal law is excused by the mere *possibility* that the proscribed activity may also be accompanied by a communication on political or governmental matters would be to expand the scope of the implied freedom in an unprecedented fashion. It would also be inconsistent with the decision in *APLA Ltd v Legal Services Commissioner (NSW)*[271].

Conclusion: s 93X and the implied freedom of political communication

235 The considerations of text, history and purpose referred to above lead to the conclusion that s 93X of the Act does not proscribe social interactions which

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270 (1997) 189 CLR 579 at 625-626.

271 (2005) 224 CLR 322.

do not involve the intentional seeking out or acceptance of an interaction with individuals who have been convicted of an indictable offence. Nor does it proscribe personal interactions which lack the irreducible degree of social intimacy required to characterise the relationship as one of companionship or fraternisation.

236 Section 93X operates upon social interactions arranged by or with persons who have been convicted of an indictable offence, and which, by reason of the companionship so engendered, are apt to have criminogenic tendencies. Section 93X cannot fairly be interpreted as stripping a person convicted of an indictable offence of his or her civic responsibilities or the associated liberty to participate in political sovereignty. Section 93X leaves free the exercise of civic responsibilities, including those shared with the other people of the Commonwealth for the purposes of ss 7, 24 and 128 of the Constitution.

237 Accordingly, if a person who happens to have been convicted of an indictable offence issues an invitation to all and sundry to engage in a public demonstration of a point of view about political or governmental matters, or if another person accepts such an invitation, neither the person who issues the invitation nor the person who accepts the invitation is consorting, the one with the other. Similarly, a person convicted of an indictable offence may issue invitations to his or her acquaintances who have also been convicted of an indictable offence to join him or her in a public campaign for the repeal of s 93X without contravening the provision.

238 Even if a convicted person were to speak directly to another about political or governmental matters, that would not be sufficient, of itself, to constitute an act of consorting because the interactions of the kind required to be kept free by ss 7, 24, 64 and 128 of the Constitution are public interactions, which do not exhibit the personal intimacy characteristic of consorts. This is so, not because the purpose of the invitation or acceptance or resultant assembly is an "innocent purpose", but because the circumstances of the interaction do not involve a deliberate seeking out or acceptance of the personal companionship of a person or persons convicted of an indictable offence.

239 If the personal interactions between individuals are confined to communications on political or governmental matters, they could not be characterised as consorting, because those persons would not be engaged in deliberately sought interactions of personal intimacy apt to generate criminogenic tendencies. Of course, if their contact during a political campaign was such as to include private personal interactions beyond acts of genuine political communication, those acts might amount to conduct properly characterised as consorting notwithstanding their association with the campaign.

240 No doubt, there will be cases which present difficulties of fact in drawing the line, but the necessity of drawing such a line cannot be denied for that would give s 93X an operation which it does not claim.

241 The plaintiffs' contention that s 93X necessarily burdens communications on political or governmental matters must be rejected.

A separate implied freedom of association?

242 Mr Tajjour and Mr Hawthorne argued that the freedom of association is an important element of democratic government and is more than a mere extension or "corollary to the implied freedom of political communication." To the extent that association may be, and often is, an aspect of political communication, this submission may be accepted. To the extent that it is contended that the Constitution guarantees a right of association free from legislative intervention separately from the implication to be derived from ss 7, 24, 64 and 128 of the Constitution, that contention is contrary to authority and should be rejected.

243 In *Mulholland v Australian Electoral Commission*[272], it was held that:

> "There is no such 'free-standing' right to be implied from the Constitution. A freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v Australian Broadcasting Corporation* and considered in subsequent cases. But that gives the principle contended for by the appellant no additional life to that which it may have from a consideration later in these reasons of *Lange* and its application to the present case." (footnotes omitted)

244 This view was recently confirmed by this Court in *Wainohu v New South Wales*[273]: "Any freedom of association implied by the Constitution would exist only as a corollary to the implied freedom of political communication".

245 For the same reasons that s 93X of the Act does not affect the implied freedom of political speech, it does not purport to burden this aspect of the freedom of communication on political and governmental matters.

The Commonwealth executive's treaty-making power

246 Mr Tajjour and Mr Hawthorne argued that Australia's signing of the ICCPR prohibited States from enacting legislation which was contrary to the treaty's provisions, relevantly, the right to freedom of association.

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272 (2004) 220 CLR 181 at 234 [148]; [2004] HCA 41.

273 (2011) 243 CLR 181 at 230 [112]; [2011] HCA 24.

247 On their behalf, it was urged that if a State could enact legislation contrary to the treaty's provisions, there would be an interference with both the expression of intention made on behalf of the Australian people and the power reserved to the Commonwealth by virtue of s 61 of the Constitution. Accordingly, so it was said, the enactment of s 93X of the Act is ultra vires due to its contravention of Art 22 of the ICCPR.

248 The submission by Mr Tajjour and Mr Hawthorne that the act of the executive government of the Commonwealth imposes a restriction on the State's legislative power unduly exalts the executive power of the Commonwealth over the laws of the States. It is contrary to authority and should not be accepted.

249 The Commonwealth's ratification of the ICCPR did not affect the ability of the States to enact legislation contrary to that Convention. The validity of State legislation is not dependent on its conformity with international agreements made by the Commonwealth where the international agreement has not been given effect by Commonwealth legislation whereby s 109 of the Constitution might be engaged[274].

Conclusion

250 In Proceedings No S36 and No S37 of 2014, commenced by Mr Tajjour and Mr Hawthorne respectively, the questions stated for the opinion of this Court should be answered as follows:

1. Is s 93X of the *Crimes Act* 1900 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

   Answer: No.

2. Is there implied into the Commonwealth Constitution a freedom of association independent of the implied freedom of communication on governmental and political matters?

   Answer: No.

3. Does s 93X of the *Crimes Act* 1900 (NSW) contravene any implied freedom of association referred to in question 2?

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274 *Dietrich v The Queen* (1992) 177 CLR 292 at 305-306, 321, 348-349, 359-360; [1992] HCA 57; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; [1992] HCA 64; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287; [1995] HCA 20.

Answer: No.

4. Is s 93X of the *Crimes Act* 1900 (NSW) invalid because it is inconsistent with the International Covenant on Civil and Political Rights as ratified by the Commonwealth of Australia?

Answer: No.

5. Who should pay the costs of the special case?

Answer: The plaintiff.

251 In Proceeding No S38 of 2014, commenced by Mr Forster, the questions stated for the opinion of this Court should be answered as follows:

1. Is s 93X of the *Crimes Act* 1900 (NSW) invalid because it impermissibly burdens the implied freedom of communication on governmental and political matters, contrary to the Commonwealth Constitution?

Answer: No.

2. Who should pay the costs of the special case?

Answer: The plaintiff.