IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S38 of 2014

BETWEEN: **CHARLIE MAXWELL FORSTER**

Plaintiff

and

STATE OF NEW SOUTH WALES

10 Defendant

PLAINTIFF'S ANNOTATED AMENDED WRITTEN SUBMISSIONS

Part I: Certification

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

Part II: Statement of issues arising in the proceedings

20 2. The issue that arises in the proceedings are those identified in the questions stated at 52 [6] of the Joint Special Case.

3. In summary, the plaintiff submits that s 93X infringes both limbs of *Lange*.

4. Focusing on the second *Lange* question, the plaintiff submits that the law is invalid as:

   a) The policy end or object of s 93X does not support the breadth of the matters caught by that statutory provision.

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   b) The defences available under s 93Y do not save the offence provision from invalidity.

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c) The burden on freedom of political communication is effective and not incidental.

d) The means adopted by Parliament are not appropriate and adapted (or proportionate) to that end.

5. Thus, the stated question should be answered: "Yes".

Part III: Notice in accordance with s 78B of the *Judiciary Act* 1903 (Cth)

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6. The plaintiff has served notices under s 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Material facts

7. The material facts are set out at 51at [1] to 52 at [2] of the Joint Special Case Book.

Part V: plaintiff's argument

20 8. The plaintiff contends that s 93X is invalid because it infringes the implied freedom of communication on political and government matters.

9. The plaintiff relies and adopts as his own the written submissions filed on behalf of:

a) The plaintiffs, Tajjour and Hawthorne (at [5.1] to [5.25])

b) Proposed submission of Australian Human Rights Commission (at [20] to [53]).

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c) The reply of the plaintiff, Tajjour (at [2.1] to [2.11]).

d) The reply of the plaintiff, Hawthorne (at [2] to [6]).

10. The relevant authorities of this Court relating to the freedom of political communication support the proposition that the freedom operates as a restraint on legislative power by the Commonwealth as well as the states: *Unions NSW* at [31].

11. There are many in the people in the community who are not electors but who are governed and are affected by the decisions of government. These people have a legitimate interest in government action and the direction of policy. Ultimately, it is their choice as to who should govern and what policies should be implemented: *Unions NSW* at [30].

12. The very purpose of the freedom is to permit the expression of unpopular or minority points of view. It is not the case that the freedom is there for the protection of "mainstream" political discourse, or what would otherwise be accepted as a norm of communication relating to an "orthodox" view held by "right-thinking" members of society: *Monis* at [122] per Hayne J. Properly understood the freedom permits a broad range of expression which many in society would consider heterodox. Steps taken to silence dissent, by forcing people not to talk to each other for fear of prosecution, is as worthy of protection by the freedom, as it would be were there an overt attempt to regulate communication.

In its effect does s 93X effectively burden the freedom of communication on government and political matters?

13. In accordance with the first question posed by *Lange*, the first question is simply whether the freedom is in fact burdened. The defendant has submitted that that the impugned law does not effectively burden the freedom, either in terms of operation or effect (defendant's submissions at [28] to [31]).

14. The central question for the first limb has been stated thus: how does the impugned law affect the freedom?: *Unions NSW* at [36],

15. Aspects of the breadth of the legislative prohibition necessarily come into play. The prohibition has no temporal limitation and applies without distinction to the communication of ideas about government and political matters and any other communication: *Monis* at [63]. The prohibition stifles debate between a class of persons falling within the chapeau of s 93X.

16. Such a submission by the defendant cannot be supported having regard to the terms of s 93X which in its effect regulates norms of conduct and prohibits in almost near absolute terms the manner, mode and type of communication. The prohibition exists for all forms of communication and extends beyond physical meeting into the digital realm.

17. The defendant further submits that here is no effective burden because the plaintiff could make a public speech on television, in a town hall, or in a public or private place or make a post on a website (defendant's submissions at [30]). That may be taken for granted, but such individual could not together with or in the presence of another convicted offender the subject of a warning. They would not be able to form a political party because to do so would place them at peril, a peril that exists were they to come to the High Court to hear a challenge to the validity of s 93X. Such a person the subject of a s 93X warning would not be able communicate with a convicted offender the subject of a warning and, conceivably, such prohibition exists for life.

18. So construed, s 93X effectively burdens the freedom. No resort to principles of severance would alleviate that burden.

Is s 93X appropriate and adapted, or proportionate, to serve a legitimate end?

19. In accordance with the second limb of the *Lange* test it is necessary to consider whether s93X is appropriate or proportionate in the means that it

employs to achieve its object and this will require a consideration of whether there are alternative, reasonably practicable and less restrictive means of doing so: *Unions NSW* at [44], *Coleman* at [93], [95]-[96], [196] and [211].

20. The first inquiry of the second limb begins with the identification of the true purpose of the statutory provision: *Unions NSW* at [47]. The defendant frankly submits that the legitimate object or end of s 93X is the prevention or impeding criminal conduct by deterring non-criminals from associating (defendant's submissions at [33]). That prohibition extends far beyond association to any form of communication. The plaintiff does not concede or accept that the purpose of s 93X is to "control crime". The process of inferential reasoning that because a person has a conviction for an indictable offence he or she is more likely to commit further indictable offences is fallacious and an example of *post hoc ergo propter hoc* thinking. The question of purpose in this context is one of substance to be determined from the surrounding circumstances and from reflecting on how the statutory provision is implemented in practice. Such reflection reveals that the provision is one primarily but not exclusively involved with social control, aimed at the marginalized members of society: homeless people, children aged 10 to 15 and young people aged 16 to 17, Aboriginals (NSW Ombudsman Consorting Issues Paper, Ch 6 [6.1.1] to [6.4.3]) (hereinafter "CIP"). In relation to that latter group, well over one third of all warnings issued in NSW were targeted at Aboriginals (CIP at [6.2.1.1]).

21. The comparison made by the defendant with comparable preventative measures is apt to mislead (defendant's submissions at [37]). This is not a case of a distinction without a difference. The distinction lies in the difference: s 93X creates a criminal offence the breadth and scope of which far exceeds comparable preventative measures.

22. The fact that Parliaments have long regarded the fact of habitual association as undesirable and to be deterred by criminal sanction is largely irrelevant to the true purpose of s 93X, as that section bears all the

hallmarks of those provisions but shares none of the safeguards regarding the number of times a person was to be observed within a set time frame for such an offence to be made out (see s 546A *Crimes Act* 1900, the precursor of s 93X). The practice was for NSW police to establish seven or more occasions of consorting within a fixed period of 6 months to found a conviction (CIP at [2.1]).

23. The second enquiry regarding the second limb of *Lange* dwells on the issue the consideration of which is whether there are alternative, reasonably practicable and less restrictive means of doing so: *Unions NSW* at [44], *Monis* at [347]-[348]. McHugh J in *Coleman* at [93], referring to the reasons expressed in *Lange*, stated that the second limb required "both the end and the manner of its achievement to be compatible with the system of representative and responsible government".

24. This approach necessarily entails an examination as to whether there are "other less drastic means by which the objectives of the law could be achieved": *Lange* at p. 568, *Wooton* at [82] and [89] per Kiefel J, *Adelaide City Corporation* at [206]-[207] per Crennan and Kiefel JJ (who added as a "necessary qualification..that the alternative means are equally practicable"), *Monis* at [280] and [347] per Crennan, Kiefel and Bell JJ (who added the gloss "at least where those means are equally practicable and available") .

25. It is respectfully submitted that the above qualification to the second enquiry regarding the second limb of *Lange* does not compel, let alone warrant, a conclusion that there is an additional criterion, namely that the "alternative means [is] obvious and compelling": *Monis* at [347] per Crennan, Kiefel and Bell JJ. The cases cited by their Honours in support of that proposition (*Betfair* and *North Eastern Dairy*) do not explicitly refer to such criterion and the test of reasonable necessity (*Betfair* at [102]) would not necessitate an inquiry as to whether the measure the subject of the enquiry is both "obvious and compelling". These cases, drawn from the jurisprudence of regulation of interstate trade under s 92 are, it is respectfully submitted, an

imperfect measure to determine the extent to which the freedom could or should be limited. In addition, the criterion also seems to sit uneasily with the gloss that the means be equally practicable and available.

Other less drastic means by which the objectives of the law could be achieved

26. Section 93X has been described as representing the broadest consorting regime in Australia as compared with the other States and it also has the highest penalty (CIP, p.19).

27. The statutory provision catches all those who fall within the ambit of being a "convicted offender", estimated to be some 199,945 individuals in NSW (CIP at [5.1.3]). That estimate is limited to that class of individuals who have been convicted in the past ten years, so the class involved is actually much larger as there is no limitation in time precluding the scope of operation of the catch of the section. Limiting the pool of convicted offenders by time frame would constitute a less drastic means by which the objectives of the law could be achieved.

28. Children are caught within the scope of s 93X. Eighteen children between the ages of 10 to 15 years have been given a relevant warning, and sixty five young people of Aboriginal status aged between 16 to 17 years has been given a warning (CIP at [6.3.3]). Limiting the pool of convicted offenders to adults aged 18 years and over would constitute a less drastic means within the meaning of the freedom.

29. Homeless people have been given warnings, ostensibly for drinking and talking in public with other convicted offenders the subject of a warning (CIP at [6.4.2]). Limiting the application of the pool of convicted offenders by providing for issues relating to homelessness and disadvantaged status would constitute a less drastic means by which the objectives of the law could be achieved.

30. Many states have a defence to their consorting laws which provide for a defence of reasonable excuse (CIP at [Appendix 3]). This measure would constitute a less drastic means by which the objectives of the law could be achieved.

31. A less drastic means of achieving the same end could be limiting the indictable offence the subject of the relevant conviction to an indictable offence with a maximum penalty of a certain duration in years: *Summary Offences Act* 1966 (Vic), s 49F (an indictable offence attracting at least a maximum penalty of 10 years), *Summary Offences Act* 1953 (SA), s 13 (a serious and organized crime offence which is either a life sentence or involves an aggravated form of offending).

32. A less drastic means of achieving the same end could be to utilize the process (where available) of the court to make a declaration that a person is a convicted offender of a particular category or type. For instance, in Western Australia the consorting provisions provide that for a declared drug trafficker or child sex offender may be liable for consorting: *Criminal Code* (WA), ss 557J-557K.

33. No time limitation exists within the terms of s 93X (or the limited defence under s 93Y) regarding when the occasions that the consorting is said to have occurred, or the time when a convicted offender was the subject of a conviction. Time limits exist for the prosecution of consorting offences, a limit not present under s 93X (CIP at [5.6.1]). Any of these measures would constitute less drastic means.

34. As less drastic means are available by which the objectives of the law could be achieved, s 93X is invalid as it infringes the freedom of political and governmental communication.

Conclusion

35. In relation to the first stated question should be answered "Yes".

36. The plaintiff seeks costs and question 2 should be answered "The defendant".

Part VI: Applicable constitutional provisions and statutes

37. *Crimes Act* 1900 (NSW), ss 93W, 93X and 93Y. Those statutory provisions are found at Annexure A of Tajjour and Hawthorne's submissions (being Legislative Instruments Referenced in plaintiff's submissions).

Part VII: Oral Argument

38. The plaintiff estimates that up to 20 minutes is needed for the presentation of its oral argument.

Dated: 5 June 2014

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