IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S37 of 2014

BETWEEN:

JUSTIN HAWTHORNE
Plaintiff

AND:

STATE OF NEW SOUTH WALES
Defendant

PLAINTIFF'S REPLY

Filed on behalf of the Plaintiff by
Messrs Matouk Joyner, Solicitors
24 Little Riley Street
Surry Hills NSW 2010

Dated: 12 May 2014
Tel: (02) 9281 5498
Fax: (02) 9281 5478
Ref: Simon Joyner

Part I: Internet publication

1. These submissions are suitable for publication on the internet.

Part II: Submissions in reply

2. The defendant states in its written submissions ("DS") at [33] that the ultimate purpose of s 93X is "preventing or impeding criminal conduct". The operation of s 93X is remote from that purpose:[1]

   (a) s 93X proscribes communication many steps removed from apprehended criminal conduct and its operation is considerably antecedent to the area of inchoate criminal conduct traditionally regulated by the criminal law (eg conspiracy, attempt, incitement or other accessorial liability);

   (b) s 93X also operates potentially in relation to a myriad of communications unconnected with the preparation of and planning for criminal conduct: it prohibits conduct without a criminal purpose and it prohibits conduct without any connexion (however remote) to such a purpose or to any form of criminality;[2]

   (c) a notice can be issued to a person even if the police have not observed any communication between the relevant person and a convicted offender, let alone any communication connected with criminal activity or preparatory thereto;

   (d) s 93X is not confined to communications between convicted offenders: the offence can be committed by any "person";[3] and

   (e) s 93X applies to communications with convicted offenders whose convictions are of considerable antiquity and to communications with those whom judges (and other persons knowledgeable about recidivism) have determined to be highly unlikely to reoffend.

3. At DS [33] the defendant states that "it is evident that a person's association with convicted offenders might well expose that individual to temptation to, or lead to

---

1 Compare the approach taken in *Unions New South Wales v New South Wales* (2013) 304 ALR 266; (2013) 88 ALJR 227 at [50]-[52], [60] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

2 Compare the power to impose parole conditions considered in *Wotton v Queensland* (2012) 246 CLR 1, which authorised the imposition of parole conditions reasonably considered necessary to stop the parolee committing an offence: see at [12].

3 Which includes "any society, company or corporation": *Crimes Act 1900* (NSW) s 4(1). See also *Interpretation Act 1987* (NSW) s 21(1).

becoming involved in, criminal activity". However, this emphasis on remote possibilities, which *may* have only a very indirect and insubstantial relation to crime or its prevention, only serves to underline the absence of the requisite connexion between the law and the prevention of crime.

4. At DS [48(b)] it is asserted that it may be assumed that the number of "convicted offenders" is small. However, this Court is in no position to make that assumption.[4]

5. At DS [31] it is said that "by application of s 31 of the Interpretation Act 1987 (NSW), s 93X may not apply to political communications protected by the implied freedom" citing *Coleman v Power* (2004) 220 CLR 1 at [109]-[110]. However, s 31 cannot be applied to read down s 93X if other indicators of Parliament's intention manifest a "contrary intention": *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at [248] per Gummow, Crennan and Bell JJ. Here, there is such a contrary intention. Section 93X must be read in the context of its companion provision, s 93Y. Section 93Y articulates six defences and political communication is not one of them. The positive expression of those six defences, coupled with the omission of a political communication defence, indicates that Parliament did not intend s 93X to be read down as the defendant contends.[5]

6. Moreover, an exception for "political communication" would suffer from considerable uncertainty given the vagueness of that concept: see *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, at 124 per Mason CJ, Toohey and Gaudron JJ (the freedom covers "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about"); *Hogan v Hinch* (2011) 243 CLR 506 at [49] per French CJ (the "range of matters that may be characterised as 'government and political matters' for the purpose of the implied freedom is broad" and "[t]hey arguably include social and economic features of Australian society"). The vagueness of the exception would mean that there was no "clear limitation" within accepted reading down principles (*Victoria v Commonwealth* (1996) 187 CLR 416, at 502-503) and means that Parliament cannot be taken to have intended it.[6] This restricted

---

4 It is noteworthy that the NSW Ombudsman in *Consorting Issues Paper: Review of the use of the consorting provisions by the NSW Police Force* (November 2013) at 21 stated that there were at least 199,945 persons in NSW who were "convicted offenders".

5 Brennan J (at 339) and McHugh J (at 372) relied on a similar structural inference in declining to read down the *Industrial Relations Act 1988* (Cth) in *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.

6 See, eg, *AMS v AIF* (1999) 199 CLR 160 at [64] per Gaudron J.

meaning of s 93X would depart so markedly from its ordinary meaning that such a meaning ought not to be ascribed to the provision.[7]

Dated: 12 May 2014

G O'L Reynolds
Telephone: (02) 9232 5016
Fax: (02) 9233 3902
Email: guyreynolds@sixthfloor.com.au

David Hume
Telephone: (02) 8915 2694
Fax: (02) 9233 3902
Email: dhume@sixthfloor.com.au

7 See, eg, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [42] per French CJ.