IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S36 of 2014

BETWEEN: **SLEIMAN SIMON TAJJOUR**
Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

No. S37 of 2014

BETWEEN: **JUSTIN HAWTHORNE**
Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

No. S38 of 2014

BETWEEN: **CHARLIE MAXWELL FORSTER**
Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

ANNOTATED SUBMISSIONS OF THE STATE OF NEW SOUTH WALES

Part I: Publication

1. These submissions may be published on the internet.

Part II: The issues

2. The State of NSW ("the Defendant") agrees with the plaintiffs' identification of the issues.

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3. In summary, the Defendant submits that:

   a) s 93X does not infringe either limb of Lange;

   b) this court's decision in Wainohu v New South Wales (2011) 243 CLR 181, the correctness of which is not challenged by any plaintiff, precludes discernment here for the first time of any implication in the Constitution of a free-standing freedom of political association;

   c) mere entry by Australia into an international treaty imposes no limits on the legislative power of any State.

4. Focusing on the second Lange question, the Defendant submits the law is valid as:

   a) the policy end or object of s 93X is the prevention of crime;

   b) to apply what Mason J said in Johanson v Dixon (1979) 143 CLR 376 at 385, that end is achieved by inhibiting "a person from habitually associating with [specified] persons ... because the association might expose that individual to temptation or lead to his involvement in criminal activity";

   c) bearing in mind the elements of the offence – such as the need for a warning, and the circumstance that "consorting" denotes seeking or acceptance of association, but does not include coincidental contact – and the exceptions in s 93W; then

   d) even if the burden on freedom of political communication is effective, it is quite incidental; and

   e) the means thereby adopted by Parliament are appropriate and adapted (and, if it be the test, proportional) to that end.

5. Thus, stated questions 1-4 in the Tajjour and Hawthorne matters and question 1 in the Forster matter should each be answered: "No".

Part III: s 78B of the Judiciary Act

6. Appropriate notices have been given.

Part IV: Facts

7. In each of the three matters, there is a Special Case, removed into this court from the NSW Court of Appeal, which briefly relates that each plaintiff has been charged with an offence under s 93X, and that such charges are pending awaiting the outcome of the challenges to the validity of s 93X.

8. The Defendant accepts the statement of facts set out in the submissions filed on behalf of Mr Tajjour and Mr Hawthorne (the "Tajjour plaintiffs" and the "Tajjour submissions") and those set out in the submissions filed on behalf of Mr Forster (the "Forster submissions").

10

Part V: Applicable statutes

9. The applicable provisions are:

   a) The Constitution, ss 7, 24, 64, 128;

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

   c) Crimes Act 1900 (NSW), s 546A (repealed);

   d) Crimes Amendment (Consorting and Organised Crime) Act 2012 (Act No. 3 of 2012).

Part VI: Argument

20 **Overview**

10. Mr Forster contends that s 93X is invalid because it infringes the implied freedom of communication on political and government matters (Joint Special Case Book ("JSC") 52 at [6]).

11. Mr Tajjour and Mr Hawthorne (the "Tajjour plaintiffs") contend that s 93X is invalid because:

   a) it infringes the implied freedom of communication on political and governmental matters;

   b) there is a stand-alone freedom of association implied in the Constitution which is "quite independent of the need to safeguard the democratic process" (and

which protects "interaction encompassing familial, social etc. interaction (sic)": Tajjour submissions [5.49], [5.55]), and the provision contravenes that freedom;

c) it undermines the treaty-making power of the Executive (on the basis that the Commonwealth Executive has ratified the International Covenant on Civil and Political Rights ("ICCPR") and that treaty is said to operate as a constraint upon the power of the New South Wales Parliament to enact legislation inconsistent with it). (JSC 6 at [6], JSC 32 at [6]).

10 **The statutory scheme**

12. There is a "long history" of consorting and vagrancy laws in the United Kingdom, the Australian colonies and the States of Australia: see South Australia v Totani (2010) 242 CLR 1 at [32]-[33] per French CJ; see also A. Steel, "Consorting in New South Wales: Substantive Offence or Police Power?" (2003) UNSWLJ 567 at 592; A. McLeod, "On the Origins of Consorting Laws" (2013) MULR 103 at 114, 128, 132, 136.

13. Section 93X of the Crimes Act 1900 (NSW) (together with the remainder of Pt 3A Div. 7 of the Crimes Act 1900) was introduced by the Crimes Amendment (Consorting and Organised Crime) Act 2012 (Act No. 3 of 2012), which commenced on 9 April 2012. That Amending Act also repealed the then existing consorting offence contained
20 in s 546A of the Crimes Act 1900.

14. As explained below, the consorting laws seek to avoid criminal activity by preventing deliberate as opposed to coincidental contact between criminals; or between criminals and others who might succumb, then or later, to criminal behaviour by reason of that contact. It is constitutionally irrelevant that they might not succumb in a particular case.

15. The first step in the making of an assessment of the validity of any given law is one of statutory construction of the impugned provision: Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (2008) 234 CLR 532 at [11] per Gummow, Hayne, Heydon and Kiefel JJ. The law has a number of features of note. It is convenient first to set out s 93X and some cognate provisions.

30

16. Section 93X 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.

17. Section 93W provides that:

> ***consort*** means consort in person or by any other means, including by electronic or other form of communication.
>
> ***convicted offender*** means a person who has been convicted of an indictable offence (disregarding any offence under section 93X).

18. Section 93Y provides the following defences to an offence under s 93X:

> 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.

19. The NSW Attorney-General described the elements of the s 93X offence in the Agreement in Principle/Second Reading Speech in the Legislative Assembly on 14 February 2012 (Hansard at pg 8131):

> The new offence provision also requires that a person be given an official warning in relation to each of those convicted offenders. No form is specified and it may be written or oral. It must, however, give the person notice that the convicted offender is a convicted offender as defined by the Act and tell the person that consorting with the convicted offender is an offence. When police give notice is a matter for them. What is important is that the person must then consort one more time with the convicted offender before consideration can be given to laying charges. The definition will assist police in knowing the minimum number of meetings that are necessary to trigger the offence. In effect, the number of instances of consorting that a person must have had is at least two each with two different convicted offenders. (emphasis supplied)

20. Section 93X criminalises consorting with a proscribed class of persons; namely "convicted offenders". Section 93X creates an offence based upon a norm of conduct: see Totani at [33] per French CJ. As a matter of constitutional law, this is unremarkable, as in general the Legislature can select whatever factum it wishes as the "trigger" of a particular legislative consequence: see Baker v The Queen (2004) 223 CLR 513 at [43] per McHugh, Gummow, Hayne and Heydon JJ.

21. The Defendant accepts that s 93X does extend to:

a) What may start as, or turn out to be, innocent association with the proscribed class of persons; namely "convicted offenders": Totani at [33] (citing Johanson). In this respect, the Crown does not have to prove that a charged defendant has consorted for an unlawful or criminal purpose: see generally Johanson at 383 per Mason J.

b) Consorting via electronic and other forms of communication such as Facebook, Twitter and SMS (see s 93W definition of "consort"; see Agreement in Principle/Second Reading Speech in the Legislative Assembly on 14 February 2012 (Hansard at pg 8131). That simply reflects current modes of communication.

22. However, contrary to the plaintiffs' submissions, the concept of "consorting" – and therefore the scope of the offence – does not extend to "virtually any form of human interaction" (cf. Tajjour submissions at [5.11]). As the Attorney-General described in the Agreement in Principle/Second Reading Speech in the Legislative Assembly on 14 February 2012 (Hansard at pg 8131-8132):

> It is important to note that the mere fact that the person has met a convicted offender the requisite minimum number of times is not in itself enough to establish the offence. There may be a case where a person coincidentally meets convicted persons regularly, at a bus stop, at the corner shop or while buying coffee. Coincidence is not consorting. 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 (*Johanson v Dixon* (1979) 143 CLR 376 per Mason J citing *Brown v Bryan* [1963] Tas SR 1). 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. (emphasis supplied)

23. It is clear that the term "consorting" when used in s 93X (and as defined in s 93W) carries with it the ordinary meaning of that term as described by Mason J in Johanson and in the Agreement in Principle/Second Reading Speech. It is not concerned with accidental or coincidental, as opposed to deliberate, contact.

24. Further, the requirements in s 93X(1) in relation to an official warning are clear. A person must be given one "official warning" in relation to each of the convicted offenders. The official warning may be given at any time. There is no requirement that the official warning be given after the elements of the offence have been made out (cf. Tajjour submissions [5.20]). The absence of the word "habitually" from s 93X(1)(b) is a clear indication that multiple instances of consorting need not follow the official warning. In short, as long as the official warning has been given in relation to each of the two convicted offenders and then further consorting occurs with each of the two convicted offenders after the warning, the element in s 93X(1)(b) of the offence is made out.

25. In any prosecution for an offence under s 93X, the burden rests on the Crown to prove beyond reasonable doubt that an "official warning" was in fact given and that each of the other elements of the offence is proven.

Freedom in relation to political communication

26. All three plaintiffs assert that s 93X infringes the implied freedom of communication on political and government matters.

27. As Hayne J stated in Attorney-General (SA) v Corporation of the City of Adelaide [2013] HCA 3; (2013) 87 ALJR 289 at [131] (citations omitted):

> The accepted doctrine of the Court is to be found in the unanimous joint judgment in *Lange v Australian Broadcasting Corporation* as modified by a majority of the Court in *Coleman v Power*. As the plurality in *Wotton v Queensland* recently observed the terms of the questions identified in *Lange* are settled. The first question is whether the impugned law "effectively burden[s] freedom of communication about government or political matters either in its terms, operation or effect". If the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications, then the boundaries of the freedom are marked by two conditions, which together make up the second question identified in *Lange*. First, is the object or end of the impugned law "compatible with the maintenance of the constitutionally prescribed system of representative and responsible government" and second, is the impugned law "reasonably appropriate and adapted to achieving that legitimate object or end" *in a manner* which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? (emphasis supplied)

The first limb: a burden on the freedom?

28. The first question is whether the impugned law "effectively burdens" freedom of communication about government or political matters either in its terms, operation or effect: Unions NSW v New South Wales [2013] HCA 58; (2013) 88 ALJR 227 at [35] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 at 567; Monis v The Queen [2013] HCA 4; (2013) 87 ALJR 340 at [343] per Crennan, Kiefel and Bell JJ. Although no decided case in this sphere in this court finds an impugned law does not "effectively burden" the freedom, logically it must be possible to demonstrate this. The Defendant submits that this law does not effectively burden the freedom, for three reasons, noting that, in Unions NSW, the plurality at [36] said (omitting footnotes):

> 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?

29. First, the Defendant submits that s 93X, like the statute under consideration in Wainohu at [113], "is not directed at political communication...", and, to apply the distinction drawn by Crennan, Kiefel and Bell JJ in Monis at [343], the law has no "real effect upon the content of political communication"; at best, it is "so slight as to be inconsequential."

30. Second, identifying possible limiting effects for the permissible purpose mentioned in this extract from Unions NSW above, i.e. as "necessary to an understanding of the operation" of s 93X, it is equally difficult to discern an effective burden in its operation. Assume for this purpose that one of the plaintiffs wishes to make a political statement or communication covered by the freedom. He can do so by public speech on television, or in a town hall, or in a public or private place, or make a post on a website, and all such communications may be listened to by anyone at all. All that s 93X precludes that putative communication of the plaintiff from comprising, is such communication which occurs:

    a) as an incident to deliberately seeking out or accepting an association;

    b) amounting to consorting;

    c) with two or more persons convicted of indictable offences;

    d) in relation to whom warnings have previously been given;

    e) which does not fall within the broadly drafted exceptions in s 93W.

31. Third, and in the alternative, the Defendant contends that, if necessary, by application of s 31 of the Interpretation Act 1987 (NSW), s 93X may not apply to political communications protected by the implied freedom: see McHugh J in Coleman v Power (2004) 220 CLR 1 at [109]-[110].

The second limb

The object or end of the law

32. The first enquiry which arises on the second limb of the Lange test concerns the identification of a legitimate statutory purpose for the provision in question: Unions NSW at [44], [46] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; Lange at 567; Coleman at 50 [93], 51 [95]-[96] per McHugh J, at 78 [196] per Gummow and Hayne JJ, at 82 [211] per Kirby J. It is not possible to consider whether the prohibitions effected by the impugned provision are a proportionate response until the object which it seeks to achieve is identified: Unions NSW at [46] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

33. In summary, the legitimate object or end of s 93X is preventing or impeding criminal conduct by deterring non-criminals from associating in a criminal milieu or criminals establishing, using or building up their networks because it is evident that a person's association with convicted offenders might well expose that individual to temptation to, or lead to becoming involved in, criminal activity. In this respect, it is noted that the Tajjour plaintiffs accept that the purpose of the legislation, as disclosed in the Second Reading Speech, is to "control crime" (Tajjour submissions at [5.13]).

34. It cannot be said that s 93X does nothing calculated to promote the achievement of that legitimate purpose: Unions NSW at [51], [60] per French CJ, Hayne, Crennan, Kiefel and Bell JJ. To the contrary, Parliaments have long regarded the mere fact of habitual association by someone with a convicted criminal as undesirable and to be deterred by criminal sanction. A number of cases may be mentioned in this regard.

35. The consorting offences considered in Johanson provide examples. As Mason J there said (at 385):

> ... [the] policy [in enacting the law was] ... to inhibit a person from habitually associating with persons of the three designated classes, because the association might expose that individual to temptation or lead to his involvement in criminal activity. (emphasis supplied)

36. French CJ has observed that the object or "end" of consorting and vagrancy laws (in the Australian colonies and then in the States of Australia) is "concerned to prevent or impede criminal conduct by imposing restrictions on certain classes or groups of

persons and on their freedom of association": Totani at [32]-[33] per French CJ; see also at [375] per Heydon J (cf. Tajjour submissions at [5.21]).

37. In Thomas v Mowbray (2007) 233 CLR 307, Gummow and Crennan JJ noted at [116]-[120] some historical and current examples of laws, including apprehended violence orders and bail conditions, and binding persons over to keep the peace, as supporting "a notion of protection of public peace by preventative measures imposed by court order, but falling short of detention in the custody of the State" at [121]. Although such laws evidently differ from consorting laws creating criminal offences, they share a common object or end.

10 38. It is apparent that the object or end that s 93X serves is legitimate, and that the end itself is compatible with the maintenance of constitutionally prescribed government: see generally Adelaide at [136] per French CJ; at [221] per Crennan and Kiefel JJ (Bell J agreeing at [224]); Monis at [125] per Hayne J.

The law is reasonably appropriate and adapted or proportionate to achieving that legitimate object or end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government

39. Where a statutory provision effectively burdens the freedom, the second limb of the Lange test asks whether the provision is reasonably appropriate and adapted, or
20 proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government: Unions NSW at [44] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; Lange at 567; Coleman at 50 [93], 51 [95]-[96] per McHugh J, at 78 [196] per Gummow and Hayne JJ, at 82 [211] per Kirby J. On this question it is to be noted that s 93X requires multiple occasions of consorting and multiple convicted offenders and an official warning. Moreover, s 93Y excludes various forms of consorting as an offence if the defendant satisfies the court that it was reasonable in the circumstances.

40. The enquiry whether a statutory provision is appropriate or proportionate in the means it employs to achieve its object may involve consideration of whether there are
30 alternative, reasonably practicable and less restrictive means of doing so: Unions NSW at [44] per French CJ, Hayne, Crennan, Kiefel and Bell JJ; Monis at [347]-[348] per Crennan, Kiefel and Bell JJ. That has an important qualification, namely as Crennan,

Kiefel and Bell JJ said in the passage just cited from Monis "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...". That qualification is fundamentally important in this field of legal discourse: human ingenuity will always permit alternatives to be imagined, but courts are at a disadvantage compared to the other branches of government in appreciating the feasability and consequences of alternative laws in the difficult and shifting field of prevention of crime. Any suggested alternative means would have to be particularly obvious and compelling in the context of a law that is not directed to the discussion of government or political matters and might be thought to seldom, if ever, impinge upon that discussion.

41. This is only one aspect of the important distinction between laws that have the purpose of restricting discussion of government or political matters, and those that merely affect it incidentally. A burden upon communication is more readily seen to satisfy the second limb of Lange if the law incidentally restricts political communication, rather than where it regulates communications which are inherently political or a necessary ingredient of political communication: see generally Adelaide at [217] per Crennan and Kiefel JJ (Bell J agreeing at [224]); Monis at [64] per French CJ, at [342] per Crennan, Kiefel and Bell JJ; Wotton v Queensland (2012) 246 CLR 1 at [30] per French CJ, Gummow, Hayne, Crennan and Bell JJ; Hogan v Hinch (2011) 243 CLR 506 at [95] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.

42. Plainly, s 93X cannot be characterised as being directed to restricting discussion of government or political matters. The provision does not have "as [its] direct operation, the denial of the exercise of the constitutional freedom in a significant respect": Levy v Victoria (1997) 189 CLR 579 at 614 per Toohey and Gummow JJ. Its effect on such communications is, at most, incidental: see Monis at [93], [124]-[125] per Hayne J, at [343] per Crennan, Kiefel and Bell JJ; see also Adelaide at [67] per French CJ, at [131], [133] per Hayne J and at [209] per Crennan and Kiefel JJ.

43. Section 93X is proportionate in its effects upon the system of representative government, which is the object of the implied freedom, because the law only has (at most) an incidental burden on the implied freedom: Adelaide at [217] per Crennan and Kiefel JJ (Bell J agreeing at [224]); Monis at [342] per Crennan, Kiefel and Bell JJ.

44. In undertaking the enquiry as to whether the law is proportionate to the end it seeks to serve, the Court assesses the restriction imposed on *political* communication (which is the subject of the freedom): Monis at [139] per Hayne J, at [280], [282], [343], [352] per Crennan, Kiefel and Bell JJ; see Adelaide at [210] per Crennan and Kiefel JJ (Bell J agreeing at [224]).

45. Here the Tajjour plaintiffs identify potential burdens relating to social and personal matters (see Tajjour submissions at [5.19]). But those types of burdens are not relevant to the enquiry that the Court is to undertake.

46. The proposition by the Tajjour plaintiffs (Tajjour submissions at [5.24]) that the law is not proportionate because "tethering criminal liability to a criminal design" would be a "less drastic measure" must be rejected because doing so would not clearly achieve the legislative objective.

47. Likewise, the contention that a law more akin to the Crimes (Criminal Organisations Control) Act 2012 (NSW) (Tajjour submissions at [5.24]) would be a more proportionate manner of achieving the legitimate end is also misconceived. In contrast to s 93X, that Act's proscriptions focus on membership – actual or prospective – of a particular, declared, criminal organisation.

48. Equally, the alternatives to, or criticisms of, s 93X raised in the submissions of the Australian Human Rights Commission must be rejected. In particular:

(a) there are numerous offences in the Crimes Act 1900 (NSW) and in other legislation that are to be dealt with summarily unless the prosecutor or the person charged elects otherwise: Table 1A of Schedule 1 to the Criminal Procedure Act 1986 (NSW). There are numerous other indictable offences that are to be dealt with summarily unless the prosecutor elects otherwise: Table 2 to Schedule 1 of the Criminal Procedure Act 1986 (NSW);

(b) it might be assumed that the number of persons in the community convicted of even one indictable offence is a small group so that the ambit of s 93X is in that sense relatively limited;

(c) given the law is preventative in nature, aiming to prevent an individual or group "mixing in a criminal milieu or establishing, using or building up criminal networks", there needs to be sufficient flexibility in the law to accommodate the wide variety of possibilities which might arise, bearing in mind that an innocent

meeting may swiftly become an occasion for contemplation of crime or its commission, and, if it does so, that is something peculiarly within the knowledge of those consorting:- the law bites early and for good reason;

(d) Parliaments are entitled to employ particular laws for particular criminal problems, including preparatory acts. For example, as Spigelman CJ (with whom Sully J agreed) aptly said in Lodhi v R [2006] NSWCCA 121 at [66]:

> Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, e.g. well before an agreement has been reached for a conspiracy charge. The courts must respect that legislative policy.

49. 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.

50. The analysis of any alternatives must be means by which the objectives of the legislation could be achieved: see Monis at [280], [282], [347] per Crennan, Kiefel and Bell JJ; see also at [145]-[146] per Hayne J; see Unions NSW at [34], [45]-[46] per French CJ, Hayne, Crennan, Kiefel and Bell JJ. No plaintiff suggests alternative means that are "reasonably practicable" (Unions NSW at [44]) let alone "obvious and compelling" as a means of achieving the legislative objective of s 93X: Monis at [347] per Crennan, Kiefel and Bell JJ.

51. Finally, it is noted that the legislation under consideration in Wainohu was only found to be invalid because the relevant Act imposed no obligation upon an eligible judge to provide reasons when deciding applications (at [99]-[109] per Gummow, Hayne, Crennan and Bell JJ). The claim that the relevant Act infringed the implied freedom of political communication was rejected by all members of the Court: Wainohu at [112], [113] per Gummow, Hayne, Crennan and Bell JJ (French CJ and Kiefel J

agreeing at [72]); at [186] per Heydon J. There is thus no infringement of the implied freedom.

Freedom of association

52. The Tajjour plaintiffs contend that s 93X is invalid because it is said there is a stand-alone right to freedom of association implied in the Constitution and s 93X is alleged to offend that right (Tajjour submissions at [5.26] ff).

53. The proposition that there is a stand-alone right to freedom of association implied in the Constitution is unsupported by, indeed it is contrary to, authority and must be rejected. Recent High Court authority confirms that there is no stand-alone implied freedom of association in relation to government and political matters.

54. Even more so, the proposition that there is a general "freedom of association" which is "quite independent of the need to safeguard the democratic process", which is said to extend to "human interaction more generally" (including "participation in community life" and "association on a familial, social etc. level"), must be rejected (Tajjour submissions at [5.49], [5.55]).

55. In Wainohu (the correctness of which remains unchallenged) at [112], Gummow, Hayne, Crennan and Bell JJ stated, as a reason for rejecting a particular ground of challenge, and thus not merely as obiter, see [110], that any freedom of association implied by the Constitution would exist only as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply: see also Mulholland v Australian Electoral Commission (2004) 220 CLR 181 at 225-226 [113]-[117] per McHugh J, at 234 [148] per Gummow and Hayne JJ, at 306 [364] per Heydon J; Totani at 54 [92] per Gummow J; see recently O'Flaherty v City of Sydney Council [2013] FCA 344; (2013) 210 FCR 484 at [85] per Katzmann J. In this respect, cases from the United States or Strasbourg are irrelevant as they arise in a significantly different constitutional context (cf. Tajjour submissions at [5.22]).

56. As such, the Tajjour plaintiffs' claims in relation to "freedom of association" do not add anything to the contentions made in relation to the implied freedom of political communication. Accordingly, it is unnecessary to consider whether there is an implied freedom of association in relation to government and political matters or whether it has

been infringed and it is submitted the Court should not do so: ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140 at [141] per Hayne, Kiefel and Bell JJ.

57. Finally, it should be noted that it has been recognised that "freedom of association" is a nebulous concept which, if, constitutionally entrenched, would cut down many laws, as the Final Report Of The Constitutional Commission (1988, Australian Government Publishing Service, Vol 1) recognised at [9.367]:

> One reason, and perhaps the main reason, why a concept of freedom of association is such a difficult one to pin down, is that most human activities involve association and interactions between individuals on a continuing basis. Laws are basically about people's interactions with another. Many laws are therefore likely to affect freedom of association, in the broad sense. Some examples are the laws of contract; rules governing the formation and operation of corporations, partnerships, cooperatives, trade unions, political parties, and of unincorporated associations generally; the law forbidding restrictive trade practices, rules governing capacity to marry and the rights and obligations of all those in a family relationship; the law about conspiracy, civil and criminal; the law declaring certain associations to be unlawful [Crimes Act 1914 (Cth), Part 11A was there cited]; rules which either forbid consorting with persons of a defined class or which authorised judges or other officers of government to make orders forbidding particular individuals from associations with each other. (emphasis supplied)

Treaty-making power of the Executive

58. The submission by the Tajjour plaintiffs (Tajjour submissions at [5.57]) that a treaty not transposed into municipal, ie Australian, law "operates as a constraint upon the power of the State to enact contrary legislation" is contrary to long-standing authority and must be rejected: see Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 at 286-287 per Mason CJ and Deane J (with whom Toohey J and Gaudron J in substance or in terms agreed on this issue); Dietrich v The Queen (1992) 177 CLR 292 at 305-306 per Mason CJ and McHugh J, at 321 per Brennan J, at 348-349 per Dawson J, at 359-360 per Toohey J; collection of authorities summarised by Goldberg, Merkel and Ryan JJ in Minogue v Williams (2000) 60 ALD 366; [2000] FCA 125 at [21]-[25]; Zhang v Zemin (2010) 79 NSWLR 513 at [125] per Spigelman CJ (Allsop P agreeing at [157] and McClellan CJ at CL at [174]).

Conclusion

59. Thus, stated questions 1-4 in the Tajjour and Hawthorne matters and question 1 in the Forster matter should each be answered: "No". The Defendant seeks its costs of each proceeding (and thus, submits that question 5 in each of the Tajjour and Hawthorne matters and question 2 in the Forster matter should be answered: "The plaintiff").

Part VII: Oral Argument

60. The Defendant estimates that up to1.5 hours is needed for the presentation of its oral argument.

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