IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: No. S36 of 2014

SLEIMAN SIMON TAJJOUR
Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

BETWEEN: No. S37 of 2014

JUSTIN HAWTHORNE
Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

BETWEEN: No. S38 of 2014

CHARLIE MAXWELL FORSTER
Plaintiff

and

STATE OF NEW SOUTH WALES
Defendant

WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR SOUTH AUSTRALIA

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Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis for intervention

2. The Attorney-General for South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth).

Part III: Leave to intervene

3. Not applicable.

Part IV: Applicable legislative provisions

4. South Australia adopts the statement of the applicable legislative provisions of the Plaintiffs Tajjour and Hawthorne.

Part V: Submissions

Issue and Summary

5. Each of the Plaintiffs has been charged with the offence of habitually consorting with convicted offenders, contrary to s93X of the *Crimes Act 1900* (NSW) (**Crimes Act**). A person is guilty of that offence if he or she habitually consorts with at least two convicted offenders, together or separately, on at least two occasions other than in permitted circumstances, one occasion of consorting with each convicted offender occurring after the accused is warned by police that those persons are convicted offenders and that it is an offence to consort with them. The offence may be characterised as preventative in nature in that it is concerned with reducing the risk of a person engaging in criminal activity by virtue of their association with persons who have a demonstrated capacity to engage in serious criminal activity.

6. In the premises, does the offence created by s93X, in prohibiting a person from habitually consorting with convicted offenders for the purpose of reducing the risk of criminal activity, impermissibly burden the implied freedom of political communication? Or, does the offence impermissibly burden an independent freedom of association to be implied from the *Constitution*? Or, is the offence beyond the power of the New South Wales' Parliament because it is inconsistent with the Commonwealth government's international obligations under the International Covenant on Civil and Political Rights (**ICCPR**)?

7. In summary, South Australia submits:

    a. While s93X of the Crimes Act burdens political communication, it is nonetheless valid as it is reasonably appropriate and adapted, or proportionate, to achieving a legitimate end, namely, the prevention of crime by reducing the risk of people being enlisted to aid others

in the commission of offences or being encouraged or emboldened to offend themselves, in a manner that is compatible with the constitutionally prescribed system of government;

b. the text and structure of the *Constitution* does not support an implication as to the existence of a freedom of association independent of the implied freedom of political communication;

c. on the assumption that s93X of the Crimes Act is inconsistent with the Commonwealth government's international legal obligations arising from its ratification of the ICCPR, such inconsistency would not lead to the invalidity of s93X of the Crimes Act as the entry by the Commonwealth into a treaty has no impact upon State legislative power.

10 The elements of an offence against s93X of the Crimes Act

8. In order that a person be convicted of the offence created by s93X of the Crimes Act, the prosecution must prove beyond reasonable doubt that the accused habitually consorted with persons (whether separately or together) each of whom has been convicted of an indictable offence (other than a s93X offence).

9. "Habitual consorting" contains both a physical and a fault element. As to the physical element:

a. To "habitually consort" is defined in negative terms. The definition provides what does not constitute habitual consorting, and what, at a minimum *could* constitute habitual consorting.

b. The negative definition has the effect that there must be more than one convicted offender consorted with. The section does not criminalise the maintenance of a relationship with a
20 single convicted offender. To show habitual consorting with convicted offenders, consorting with *at least* two convicted offenders is necessary.

c. Further, the negative definition has the effect that to prove habitual consorting with convicted offenders, it is not enough to show that the accused consorted with convicted offender A on one day, convicted offender B on another, convicted offender C on another, and so on. There must be at least two instances of consorting with each of the same convicted offenders.

d. As to the number of instances of consorting, the negative definition provides that two instances of consorting are necessary, *but not necessarily sufficient* to constitute habitual consorting. Whether particular instances of consorting will constitute habitual consorting
30 depends upon the meaning of that term. While the language of s93X is controlling, assistance may be gained from consideration of the term in other legislation. In *O'Connor v Hammond*,[1] it was said:

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1 (1902) 21 NZLR 573 at 575-576 (Stout CJ).

> The term 'habitually' is used often as an antithesis to 'occasionally'. It would have to appear that it was the habit of the person accused to consort with the kind of persons mentioned - 'thieves' or 'prostitutes', etc. 'Consort' has in a sense the meaning of frequent companionship, but I must assume that the Legislature, in placing the word 'habitually' before 'consorts', meant to require proof of a companionship other than one that was merely occasional. The companionship must have been so constant as to have created a habit.

In *Dias v O'Sullivan*, Mayo J elaborated upon what might be necessary to prove habitual consorting:[2]

> "Habitually" requires a continuance and permanence of some tendency, something that has developed into a propensity, that is present from day to day. A habit results from a condition of mind that has become stereotyped. In terms of conduct its presence is demonstrated by the frequency of acts that by repetition have acquired the characteristic of being customary or usual; behaviour that is to be regarded as almost inevitable when the appropriate conditions are present. The tendency will ordinarily be required to be demonstrated by numerous instances of reiteration. ... One occurrence (which, as a fact, is of a series of the like occurrence) may be given in evidence. It is unlikely that in the evidence describing that one happening, there will be any sufficient indication to warrant an inference that it is one happening of a like series, or that of the series (if inferred) the actions are respectively the creature of habit.

It is clear that no hard and fast rule can be laid down as to what constitutes "habitual consorting". As Gavan Duffy J said in *Brealy v Buckley*:[3]

> To be in the company of reputed thieves on one occasion is not evidence of habit: to be in their company twice is evidence of the slightest; but no rule can be laid down as to the number of times that will suffice... Incidents weak in themselves may gain significance from others, and a number of incidents each trivial in itself may together make a damning whole.

e. The definition imposes a rule that one instance of consorting will not constitute habitual consorting. However, it does not necessarily follow that two instances of consorting with two convicted offenders will constitute habitual consorting. For example, those instances may be so remote in time that they are insufficient to answer the description "habitually consort".

f. As to the form of contact necessary, "consort" is defined to include consorting in person or by any other means, including by electronic or other forms of communication. To this extent, the traditional definition is modified to capture communication that does not involve speaking in person.

g. As to the meaning of "convicted offender", the defined meaning is subject to the *Criminal Records Act 1991* (NSW) (and in relation to certain offences which resulted in a recognizance, s579 of the Crimes Act) such that certain convictions that are spent are not to be considered as rendering a person a "convicted offender".

10. As to the fault element, the word "consort" connotes intentional contact. As Mason J said in *Johanson v Dixon* in relation to s6(1)(c) of the *Vagrancy Act 1966* (Vic):[4]

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2 [1949] SASR 196 at 200-201 (Mayo J).

3 [1934] ALR 371 at 372 (Gavan Duffy J).

> 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 (*Brown v. Bryan*[5]).

11. To similar effect, in *Dias v O'Sullivan*, Mayo J said:[6]

> 'Consorting' ...requires, of course, some form of overt activity. The notion of association by persons comprehends (*inter alia*) the grouping of two or more persons where the individuals enjoy, or at least tolerate, the presence and proximity of each other, whether they congregate for no more than a few moments or for longer periods. The congregating together may be merely upon an accidental meeting of the group and without any discoverable motive whatsoever. The idea implicit in consorting, however, 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 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 the people meet (*inter alia*) to carry on some trade or occupation is not inconsistent with a fraternising contemporary therewith amounting to consorting.

12. Accordingly, to constitute habitual consorting, it is necessary that the accused intended to associate and did associate with each of the convicted offenders on each occasion.

13. If it is accepted that two instances of consorting with each of two convicted offenders is not necessarily sufficient to constitute habitual consorting, where the prosecution chooses to rely on two instances the character of those instances must be such as to warrant an inference that they are two of a series answering the description of a habit. This being so, where the prosecution relies upon two instances of consorting with each of two convicted offenders the circumstances in which those two instances took place will be critical. In all likelihood they will be circumstances indicative of ongoing or habitual mutual involvement in an organisation or organised activity.

14. To the physical and fault elements there is added two circumstances that must be proved beyond reasonable doubt. First, the accused must have been given an official warning by a police officer in relation to each of the persons consorted with, in the form required by s93X(3). Second, one of the instances of consorting with each convicted offender relied upon by the prosecution must take place after the accused has been warned. Here, the distinction between the reference to *habitual consorting* in s93X(1)(a) and *consorting* in s93X(1)(b) is significant. It shows that the official warning need not precede all of the instances of consorting relied upon to constitute the habitual consorting. It is enough that one instance of consorting occurred with each of the convicted offenders after the official warning in relation to each was given.

15. The obvious purpose of making the warning an element of the offence is to provide people with an opportunity to avoid committing an offence.

16. The warning is not a general warning. It is a tailored warning given in relation to specified convicted offenders, of which there must be at least two (the warning may be given in relation to multiple specified offenders, or there may be separate warnings in relation to each). It follows that the

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4 (1979) 143 CLR 376 at 383 (Mason J). See also Aickin J at 395.
5 [1963] Tas. S.R. 1, at p. 2.
6 [1949] SASR 196 at 201 (Mayo J).

warning is given against a background of the police becoming aware that the accused has consorted on at least one occasion or may intend to consort with persons each of whom the police know is a convicted offender.

17. Before a person is liable to be prosecuted, he or she must act contrary to the warning with respect to each of the convicted offenders in relation to whom he or she has been warned. Whilst so acting renders the person liable to prosecution, as indicated above, any prospect of success in prosecuting an offender will depend upon satisfying the trier of fact that the consorting is habitual.

18. To make out the offence, the prosecution is not required to prove:

    a. that the accused knew that the persons consorted with were convicted offenders. The requirement that there be an official warning that a person is a convicted offender given prior to one of the instances of consorting relied upon in proof of the offence makes plain that it is not necessary to prove that the accused knew that the persons he or she is accused of consorting with were convicted offenders.

    b. that the purpose of the accused in habitually consorting with the convicted offenders was a criminal purpose. As was stated in relation to a consorting offence in s6(1)(c) of the *Vagrancy Act 1966* (Vic):[7]

> It is not for the Crown to prove that the defendant has consorted for an unlawful or criminal purpose. The words creating the offence make no mention of purpose: cf. s. 6(1)(b) where the proviso refers to "upon some lawful occasion". Nor does the word "consorts" necessarily imply that the association is one which has or needs to have a particular purpose.

19. Section 93Y provides that certain forms of consorting are to be disregarded where:

    a. they are of a kind referred to in s93Y; and

    b. the accused satisfies the court they were reasonable in the circumstances.

20. It will be for the trier of fact to decide if the consorting was reasonable in all of the circumstances. A significant consideration will be the purpose of the consorting. It may be observed that the exceptions listed in s93Y are described by reference, not to the purpose of the consorting, but to the circumstances in which the consorting happened to occur. Consistently with the view that the purpose of s93X is to reduce the risk of criminal activity (discussed below), "reasonable" should be construed as including consideration of the purpose of the consorting. Thus, if the purpose of the consorting is to directly or indirectly enlist a person to criminal conduct, or to encourage or plan criminal activities, it will not be reasonable.

21. Were the purpose of the consorting not relevant to whether it was "reasonable", it could lead to the result that the section would permit consorting with the sole purpose of conspiring to commit

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7 *Johanson v Dixon* (1979) 143 CLR 376 at 383 (Mason J).

criminal offences, if it happened to occur, for example, between people who are family members (s93Y(a)), while they are at work (s93Y(b)), or if they are students and are present in a lecture theatre (s93Y(c)).

The purpose of s93X of the Crimes Act and its historical analogues

22. The evident purpose of s93X of the Crimes Act is to reduce the risk of criminal activity by prohibiting certain associations which create an opportunity for a person to be recruited to crime directly, or, indirectly in terms of them being emboldened to act alone by the experience and values of those with whom they consort. That purpose is discernible from the character of the persons with whom consorting is prohibited, namely persons who have been convicted of an indictable offence, and from the fact that the offence requires consorting with more than one convicted offender. It is not enough for a person to maintain a single relationship with a person with a criminal history. Nor is sporadic contact prohibited. Rather, the section seeks to criminalise the regular involvement of a person in a criminal milieu, such involvement creating a significant risk of criminal offending.

23. That a criminal purpose of habitual consorting is not an element of the offence does not deny the provision this purpose. The section operates in acknowledgement of a risk that may arise by virtue of particular associations. It addresses that risk by prohibiting the circumstances in which it arises. Simultaneously it impedes convicted offenders from further offending by reducing their opportunities for the recruitment of others to their criminal purposes.

24. That the purpose of s93X is to reduce the risk of criminal activity is confirmed having regard to the historical background to s93X (which it is appropriate to consider for the purpose of the *Lange* test[8]).

25. It has been said that consorting laws are an Australasian contribution to the criminal law,[9] with the first offence using the label of "consorting" being s26(4) of the *Police Offences Act 1884* (NZ), inserted by s4 of the *Police Offences Amendment Act 1901* (NZ). However, consorting offences in Australia and New Zealand take their place in a long history of laws intended to reduce the risk of criminal activity, classed as vagrancy laws.[10] The common theme of these laws is an attempt to address inchoate criminality through an identification by Parliament of a risk of criminal offending posed by certain types of persons, conduct or associations.

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8 *Monis v The Queen* (2013) 87 ALJR 340 at [317] (Crennan, Kiefel and Bell JJ).

9 *Johanson v Dixon* (1979) 143 CLR 376 at 582-383 (Mason J).

10 *South Australia v Totani* (2010) 242 CLR 1 at [32] (French CJ). See also, Andrew McLeod, "On the Origins of Consorting Laws" (2013) 37 *Melbourne University Law Review* 103 in which the lineage of consorting offences is traced to vagrancy offences in medieval England. McLeod also refers to instances of colonial vagrancy laws imposing criminal liability for certain associations, at p121. Further, while noting the influence of the *Police Offences Act 1884* (NZ), McLeod refers to association offences in existence in the United States from the 1870s, at p127.

26. In the late 1920s, consorting offences were introduced in South Australia and New South Wales, apparently at the request of police.[11] In New South Wales, the introduction of s4(1)(j) of the *Vagrancy Act 1902* (NSW) in 1929 followed a period of media pressure to address the emergence of razor gangs following the creation of gaol terms for possession of an unlicensed pistol.[12]

27. In more recent years there has been a renewed interest in consorting offences as a means of addressing organised crime. In 2009, Ministers of the Standing Committee of Attorneys-General agreed to the States and Territories considering the introduction of measures to combat organised crime, including "[c]onsorting or similar provisions that prevent a person associating with another person who is involved in organised criminal activity as an individual or through an organisation".[13]

28. The most recent amendment in New South Wales occurred in 2012 with the *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW), which deleted s546A of the Crimes Act and introduced s93X. In the Second Reading Speech on the Bill in the New South Wales Legislative Council, the Hon David Clarke said:[14]

> ... The bill proposes to make a number of amendments to the Crimes Act 1900 to ensure that the provisions of the Act remain effective at combating criminal groups in NSW.
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> The Government is determined to ensure that the NSW Police Force has adequate tools to deal with organised crime, and this bill represents part of a suite of reforms aimed at achieving that. ...
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> ...
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> Finally, schedule 2, Item [9] of the bill will modernise the offence of consorting. Section 546A of the Crimes Act makes it an offence to habitually consort with persons who have been convicted of indictable offences. This is an old offence, and NSW Police have indicated that it is difficult to use, in part because there is no statutory guidance as to what constitutes 'habitual consorting'. The bill will modernise the language of this provision and provide more guidance as to when the offence may be enlivened.
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> The bill states that a person does not habitually consort with convicted offenders unless he or she consorts with at least two convicted offenders, whether on the same or separate occasions, and the person consorts with each offender on at least two occasions. 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. A convicted offender is someone who has been convicted of an indictable offence, other than the consorting offence itself.
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> 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.

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11 Andrew McLeod, "On the Origins of Consorting Laws" (2013) 37 *Melbourne University Law Review* 103 at pp129-130.

12 Alex Steel, "Consorting in New South Wales: Substantive Offence or Police Power?" (2003) 26 *UNSW Law Journal* 567 at pp582-587. Section 4(1)(j) of the *Vagrancy Act 1902* (NSW) as inserted in 1929 was not amended until the *Summary Offences Act 1970* (NSW), which repealed the *Vagrancy Act 1902* (NSW) and enacted an offence of habitual consorting, which was in substantially similar terms, save for the inclusion of "reputed drug offenders" as one of the categories of person with whom habitual consorting was prohibited: *Summary Offences Act 1970* (NSW), s25. The offence was again amended in 1979 with its repeal from the *Summary Offences Act 1970* (NSW), and the introduction of s546A of the Crimes Act.

13 Standing Committee of Attorneys-General, Communique, 16-17 April 2009.

14 *Hansard*, New South Wales Legislative Council, 7 March 2012, 9091-9093 (Hon David Clarke).

29. Although the Second Reading Speech refers to addressing "organised crime", the purpose of s93X of the Crimes Act, as discerned from its text and context, is broader, being to reduce the risk of criminal offending by criminalising associations in which that risk may arise. That said, one important consequence of criminalising such associations is to hinder the ability of organised crime groups to plan criminal activity, and recruit others for such activity.

The implied freedom of political communication

30. In *Lange v Australian Broadcasting Corporation*,[15] this Court unanimously settled upon the test to be applied to determine whether a law is invalid for impermissibly burdening the implied freedom of political communication. The *Lange* test, as modified by *Coleman v Power*,[16] was set out by French CJ in *Hogan v Hinch* as follows:[17]

> ...to determine whether a law offends against the implied freedom of communication involves the application of two questions:
>
> 1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?
> 2. 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 of the Constitution to the informed decision of the people?
>
> If the first question is answered yes, and the second answered no, the law will be invalid.
> (footnote omitted)

31. The second limb of *Lange* has been seen as involving two inquiries. First, it requires consideration of whether the objective or end of the law is "legitimate".[18] In order to be "legitimate", the end of a law must be compatible with the constitutionally prescribed system of representative and responsible government.[19] The end of a law will be illegitimate where it aims to subvert, destroy or frustrate that system. Second, it requires consideration whether the law serves that end in a manner compatible with the maintenance of the constitutionally prescribed system of government.[20] Relevant matters will be the extent of the burden imposed,[21] whether the burden is a direct or incidental effect of the law,[22] and the availability of alternative means. However, an impugned law is not invalid simply because it can be shown that it was not the *least restrictive* measure available to achieve the legitimate end served by the law.[23] The measure need not be "essential" or

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15 (1997) 189 CLR 520.
16 (2004) 220 CLR 1.
17 (2011) 243 CLR 506 at [47] (French CJ). Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ applied the same test at [94]-[97]. The test was stated in relevantly identical terms in *Wotton v Queensland* (2012) 246 CLR 1 at [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
18 *Monis v The Queen* (2013) 87 ALJR 340 at [74] (French CJ).
19 *Monis v The Queen* (2013) 87 ALJR 340 at [128] (Hayne J).
20 *Monis v The Queen* (2013) 87 ALJR 340 at [74] (French CJ).
21 *Monis v The Queen* (2013) 87 ALJR 340 at [124] (Hayne J).
22 *Hogan v Hinch* (2011) 243 CLR 506 at [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v Queensland* (2012) 246 CLR 1 at [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
23 *Coleman v Power* (2004) 220 CLR 1 at [31] (Gleeson CJ), [100] (McHugh J) [328] (Heydon J); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [360] (Callinan J); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [29] (French CJ); *Levy v Victoria* (1997) 189 CLR 579 at598 (Brennan CJ).

"unavoidable".[24] The role of the court is supervisory, in terms of determining whether the means chosen by the legislature is within a reasonable range, given the nature of the burden imposed by the impugned provision.[25]

32. In *Monis v The Queen* Crennan, Kiefel and Bell JJ queried the utility of the linguistic formula of "reasonably appropriate and adapted" in the second limb of *Lange*, expressing a preference for a "proportionality analysis" to be applied.[26]

33. Under this approach, the first inquiry is one of proportionality between the means adopted by the law and its legitimate end. Even if the burden imposed by the law is small, it might still be invalid because it goes further than is necessary, in terms of trammeling upon the implied freedom in the course of pursuing its end, and is disproportionate.[27] The second inquiry is one of proportionality between the law and the constitutional imperative of representative government. That in turn requires an assessment of the compatibility of the law with that system in terms of:

    a. the law's object;[28] and

    b. the means by which the law achieves that object. Here, the question whether the burden imposed by the law is too great or "undue" will be addressed.[29] That is, despite the means of achieving the legitimate end trammeling upon the implied freedom no more than is reasonably necessary, the extent to which the implied freedom is trammeled is too great.

34. For the reasons set out below, whichever approach is adopted, the law impugned in this case is valid.

Lange applied

35. Applying *Lange*, it may be accepted that s93X of the Crimes Act, in proscribing regular contact between individuals, including contact constituted by communication by electronic and other means, burdens free political communication. The answer to the first limb of the *Lange* test is "yes".

36. It is thus necessary to consider the second limb of *Lange*. It must be accepted that the prevention of crime by inhibiting the recruitment of people to crime through association with convicted offenders

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24 *Roach v Electoral Commissioner* (2007) 233 CLR 162 at [85] (Gummow, Kirby and Crennan JJ), referring to *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [39]-[40] (Gleeson CJ); *Hogan v Hinch* (2011) 243 CLR 506 at [72] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

25 *Nationwide News v Wills* (1992) 177 CLR 1 at 50, 52 (Brennan J); *Levy v Victoria* (1997) 189 CLR 579 at 598 (Brennan CJ), 627 (McHugh J).

26 *Monis v The Queen* (2013) 87 ALJR 340 at [282]-[283], [345]-[346] (Crennan, Kiefel and Bell JJ).

27 *Monis v The Queen* (2013) 87 ALJR 340 at [280] (Crennan, Kiefel and Bell JJ); *Attorney-General v Adelaide City Council* (2013) 87 ALJR 289 at [202] (Crennan and Kiefel JJ).

28 *Monis v The Queen* (2013) 87 ALJR 340 at [281], [349] (Crennan, Kiefel and Bell JJ).

29 *Monis v The Queen* (2013) 87 ALJR 340 at [278], [282], [350] (Crennan, Kiefel and Bell JJ).

is a legitimate end.[30] As Crennan, Kiefel and Bell JJ noted in *Monis*, it is a "rare case" in which a conclusion of outright incompatibility will be reached.[31]

37. The issue is thus whether s93X of the Crimes Act is reasonably appropriate and adapted to serve that end in a manner compatible with the constitutionally prescribed system of government. Alternatively the issue is whether the means adopted by s93X is proportionate to its end and to the constitutionally prescribed system of representative government.

38. Prohibiting certain associations that create a risk of criminal conduct is a reasonable means of preventing criminal conduct. Section 93X reflects a legislative judgment that individuals who have committed certain offences in the past are more likely to have a criminal disposition, and that habitual association with them may create a risk of criminal offending. The nexus to criminal conduct is no mere supposition on the part of the legislature. The risk of criminal offending is identified by reference to past, and proven, conduct on the part of the individuals involved. As the brief outline of the history of consorting offences discussed above highlights, legislatures have for many years identified the prevention of association with certain types of people as a means of preventing crime. In criminalising associations of that kind, s93X of the Crimes Act does not impose a direct burden upon political communication. Rather it imposes an incidental burden upon communication,[32] in furtherance of its aim of preventing crime.

39. Section 93X of the Crimes Act does not impose a blanket ban on consorting with convicted offenders. The extra element of an official warning is required. This aspect ensures that the offence provision does not apply arbitrarily or too broadly. It ensures it is narrowly tailored, thus supporting the conclusion that it is reasonably appropriate and adapted to, and reasonably necessary for, the end of crime prevention.[33] Of course, it must be acknowledged that the purpose of the official warning requires restrictions to be placed on the ability of people to contact each other and communicate, and therefore some restriction may be placed upon the freedom. Accordingly, the discretion does not, of itself, save the section from invalidity.[34] However, it shows that the law has been tailored to have a narrow application.

40. To the extent that it is relevant to consider whether a less drastic means could have been adopted, the suggestion that Parliament ought to have tethered liability to criminal design cannot be sustained. Such a means is not equally compelling and practicable. Section 93X of the Crimes Act operates in acknowledgment that for some people, the sanctions attached to criminal conduct may

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30 See by comparison, the examples of legitimate objects identified in previous cases listed by Hayne J in *Monis v The Queen* (2013) 87 ALJR 340 at [129].

31 *Monis v The Queen* (2013) 87 ALJR 340 at [281] (Crennan, Kiefel and Bell JJ).

32 Consequently, a stricter degree of scrutiny is not involved: *Hogan v Hinch* (2011) 243 CLR 506 at [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Wotton v Queensland* (2012) 246 CLR 1 at [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

33 *Monis v The Queen* (2013) 87 ALJR 340 at [100] (Hayne J). See also, *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289 at [141] (Hayne J).

34 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289 at [215] (Crennan and Kiefel JJ).

be insufficient to deter them, particularly where the conduct may be difficult to detect, investigate and prosecute. Accordingly, it addresses a step prior to criminal conduct, by prohibiting conduct that the legislature reasonably deems likely to provide a forum that facilitates it.

41. While the section does not provide a defence for communications for political purposes, it cannot be said that a law of that kind would be equally practicable, or obvious and compelling. In particular, because of the variety of circumstances in which a political communication may occur, including in circumstances that would not be considered overtly political, difficulties would arise in structuring a defence in a way that could appropriately demarcate associations involving political communications from associations involving non-political communications. By comparison, s93Y of the Crimes Act has been designed such that an instance of consorting of a kind referred to in s93Y will be readily identifiable from the circumstances, for example, because the persons involved are family members (s93Y(a)), or because the consorting occurred at a place of employment (s93Y(b)), or at a training or education institution (s93Y(c)).

42. Finally, it cannot be said that the burden imposed by the law upon political communication, is undue.[35] For the reasons explained above, the narrow tailoring of the provision through the official warning requirement ensures that the burden upon the freedom is small, and occurs only incidentally to the achievement of the purpose of the provision. The prevention of criminal conduct is essential to an ordered society. It cannot be said that the Parliament has struck a plainly unreasonable balance between the relevant interests.

An implied freedom of association?

43. It is well-settled that constitutional interpretation permits the drawing of implications from the *Constitution*, though the test to be applied in determining whether an implication should be drawn may depend upon whether the implication has a "structural" or "textual" basis. The position was summarised by Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth*:[36]

> Of course, any implication must be securely based. Thus, it has been said that "ordinary principles of construction are applied so as to discover *in the actual terms* of the instrument their expressed or necessarily implied meaning"[37] (emphasis added). This statement is too restrictive because, if taken literally, it would deny the very basis — the federal nature of the Constitution — from which the Court has implied restrictions on Commonwealth and State legislative powers[38]. That the statement is too restrictive is evident from the remarks of Dixon J. in *Melbourne Corporation v. The Commonwealth*[39]where his Honour stated that "the efficacy of the system logically demands" the restriction which has been implied and that "an intention of this sort is ... to be plainly seen in the very frame of the Constitution".

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35 *Monis v The Queen* (2013) 87 ALJR 340 at [282] (Crennan, Kiefel and Bell JJ).

36 (1992) 177 CLR 106 at 134-135 (Mason CJ). Chief Justice Mason's approach was endorsed by Brennan CJ in *McGinty v Western Australia* (1996) 186 CLR 140 at 168-169 (Brennan CJ).

37 *The Engineers' Case* (1920) 28 CLR 129 at 155 (Knox CJ, Isaacs, Rich and Starke JJ.) (emphasis added).

38 *West v Commissioner of Taxation (NSW); Essendon Corporation v. Criterion Theatres Ltd.* (1947) 74 CLR 1; *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v. The Commonwealth; State Chamber of Commerce and Industry v The Commonwealth ("the Second Fringe Benefits Tax Case")* (1987) 163 CLR 329.

39 (1947) 74 CLR 31 at 83.

> It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure.
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> It is essential to keep steadily in mind the critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution[40]. The former is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument. Thus, the founders assumed that the Senate would protect the States but in the result it did not do so. On the other hand, the principle of responsible government — the system of government by which the executive is responsible to the legislature — is not merely an assumption upon which the actual provisions are based; it is an integral element in the Constitution[41]. In the words of Isaacs J. in *The Commonwealth v. Kreglinger & Fernau Ltd. and Bardsley*[42]: "It is part of the fabric on which the written words of the Constitution are superimposed."

44. More recently, Hayne J said in *APLA Limited v Legal Services Commissioner (NSW)*:[43]

> There may be room for debate about the way in which to express the test that is to be applied in deciding whether an implication is to be drawn from the Constitution's text or structure. The better view may be that no single formula will fully capture the circumstances in which an implication has been identified in the past decisions of the Court. What is clear, however, is that account must be taken of both the text and the structure of the Constitution.
>
> ...
>
> It need not be decided in this case whether it is necessary to show logical or practical necessity in every case where the structure of the Constitution is said to carry an implication. Nor is it necessary to decide whether attempting to distinguish between structural and textual bases for an implication (for the purpose of articulating different tests for when an implication is to be drawn) has difficulties that are insuperable. The critical point to recognise is that "any implication must be securely based"[44]. Demonstrating only that it would be reasonable to imply some constitutional freedom, when what is reasonable is judged against some unexpressed a priori assumption of what would be a desirable state of affairs, will not suffice. Always, the question must be[45]: what is it in the text and structure of the Constitution that founds the asserted implication?

45. The Plaintiffs Tajjour and Hawthorne seek to justify the drawing of an implication of freedom of association, as a separate implication (not merely corollary) to the implied freedom of political communication. The suggested justifications for the implication may be grouped together under two categories. First, it is said that:

    a. associations play an essential part in the democratic process;

    b. associations that are ostensibly less political such as familial and social associations are important for the formation of opinion relevant to political decision-making.

46. Second, it is said that:

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40 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 81 (Dixon J).
41 *The Engineers' Case* (1920), 28 C.L.R., at p. 147, per Knox C.J., Isaacs, Rich and Starke JJ.
42 (1926) 37 CLR 393 at p 413.
43 *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at [385], [389] (Hayne J).
44 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 134 per Mason CJ.
45 *Lange* (1997) 189 CLR 520 at 556, 567.

a. the importance of freedom of association extends beyond the right to be involved in political decision-making, and that the freedom plays an important role in the democratic order;

b. the *Constitution* is intended to create an environment for the benefit of the people, providing a backdrop against which the nation can develop;

c. that the legislative power of the States may be subject to certain restraints deeply rooted in the common law.

47. The first category of argument does not support the drawing of the implication. It may be accepted that associations play an important role in the democratic process, and opinions relevant to political decision-making may be formed within the context of associations which are not overtly "political". However, describing such activities as "associations" conceals the fact that the activity which is relevant to political decision-making within the label "association" is communication. It is *communication* within and by a political association that is important to the democratic process. Likewise, it is the *communication* that occurs within familial and social associations that assists in the formation of opinions relevant to political decision-making. The association itself serves no function relevant to democratic choices, save for facilitating communication.[46]

48. The same may be said in response to the Australian Human Rights Commission submission. Articles 19(2), 21, 22(1) and 25(a) of the ICCPR may be seen as facilitative of communication. In the Australian constitutional context those rights may be assumed by the *Constitution*, but they are not required by ss 7, 24, 64 and 128.

49. Because of the close connection between association and communication, a law which burdens association will be very likely to burden political communication. Associations of the kind described above are therefore already protected within the ambit of the implied freedom of political communication. If this view is correct, freedom of association is only protected as a corollary to the freedom of communication, giving the principle "no additional life".[47]

50. The second category of argument attempts to derive an implication from the *Constitution*'s guarantee of a "democratic order of a free country". However, that argument relies upon an impermissible approach to constitutional implication. As this Court said in *Lange*:[48]

> Since *McGinty* it has been clear, if it was not clear before, that the Constitution gives effect to the institution of "representative government" only to the extent that the text and structure of the

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46 An assembly of people at a particular time and place may of course be used as a form of political communication as in a demonstration or march. Such an activity would attract the protection of the freedom of political communication: *Levy v Victoria* (1997) 189 CLR 579 at 594-595 (Brennan CJ), 613 (Toohey and Gummow JJ), 622-623 (McHugh J), 637-638 (Kirby J).

47 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [148] (Gummow and Hayne JJ). The same test of infringement and validity would apply: *Wainohu v New South Wales* (2011) 243 CLR 181 at [112] (Heydon J).

48 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-567 (The Court).

> Constitution establish it[49]. In other words, to say that the Constitution gives effect to representative government is a shorthand way of saying that the Constitution provides for that form of representative government which is to be found in the relevant sections. Under the Constitution, the relevant question is not, "What is required by representative and responsible government?" It is "What do the terms and structure of the Constitution prohibit, authorise or require?"

51. The *Constitution* guarantees a democratic order only to the extent provided by it, in particular by ss7 and 24 of the *Constitution*. Nothing in those sections, or any other sections of the *Constitution* such as s92 and 116 supports the implication of a general freedom of association. It may be that each of those sections carries with it a limited requirement for free association. They do not, however, support the implication of a broader freedom of association.

52. Nor is it a permissible approach to seek to imply freedoms because they are "important" to the nature of the Commonwealth as a free and democratic society, or by reference to the undoubted proposition that the *Constitution* is intended to sustain the nation and operate for the benefit of the people. These arguments do not assist in identifying what it is in the text or structure of the *Constitution* which supports an implied freedom of association. There can be no doubt that the *Constitution* is intended to operate for the benefit of the people, but that observation is equally consistent with the proposition that the *Constitution* leaves it to the Parliaments of the Commonwealth and States to determine what restrictions on freedom of association are consistent with and necessary for the benefit of the people.

53. Finally, it is submitted that State legislative power is subject to restraints by reference to rights deeply rooted in our democratic system of government and the common law.[50] As French CJ noted in *South Australia v Totani*, it is self-evidently beyond the power of the courts to maintain unimpaired common law freedoms which a State Parliament acting within its constitutional power has by clear language abrogated, restricted or qualified.[51] If the question left unresolved in *Union Steamship v King* has any work to do, it can only be because the common law informs the meaning of the *Constitution* and the constraints it imposes. However, it must still be necessary to identify something in the constitutional text or structure which the common law informs. Here, there is no textual or structural hook upon which the suggested freedom may be pegged.

<u>The entry into international treaties by the Commonwealth government</u>

54. The Plaintiffs Tajjour and Hawthorne submit that s93X of the Crimes Act is invalid because the Commonwealth government's international obligations under the ICCPR operate as a constraint upon the legislative power of State Parliaments. Before considering that submission, some basic propositions regarding the entry into treaties should be noted:

    a. The entry by the Commonwealth government into an international treaty involves an exercise of Commonwealth executive power as an aspect of its prerogative power located in

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49 *McGinty* (1996) 186 CLR 140 at 168, 182-183, 231, 284-285.
50 *Union Steamship v King* (1988) 166 CLR 1 at 10 (The Court).
51 *South Australia v Totani* (2010) 242 CLR 1 at [31] (French CJ).

s61 of the *Constitution*.[52] That power is exercised exclusively by the Commonwealth executive, as the States do not have international legal personality.[53]

b. The ratification of an international treaty does not have any immediate effect on Australian domestic law.[54] The rule was restated in *Minister for Immigration and Ethnic Affairs v Teoh*:[55]

> It is well established that 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 our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law. (footnotes omitted)

c. International law is not a "higher law" giving rise to invalidity. As Latham CJ said in *Polites v Commonwealth*:[56]

> The Commonwealth Parliament can legislate on these matters in breach of international law, taking the risk of international complications. This is recognized as being the position in Great Britain … The position is the same in the United States of America … It must be held that legislation otherwise within the power of the Commonwealth Parliament does not become invalid because it conflicts with a rule of international law, though every effort should be made to construe Commonwealth statutes so as to avoid breaches of international law and of international comity. The question, therefore, is not a question of the power of the Commonwealth Parliament to legislate in breach of international law, but is a question whether in fact it has done so.

d. The effect of ratification is to impose international legal obligations on Australia - the legal consequences are "external".[57]

e. Entry into treaties may, however, have an indirect effect, through a preference for a construction of a statute that accords with Australia's international obligations under a treaty, whether Commonwealth[58] or State,[59] or through the development of the common law.[60]

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52 *R v Burgess; ex parte Henry* (1936) 55 CLR 608 at 643-644 (Latham CJ).

53 *New South Wales v Commonwealth* (1975) 135 CLR 337 at 506 (Murphy J). The exercise of the Commonwealth's executive power is subject to Parliamentary oversight through the tabling of treaty actions and by the Joint Standing Committee on Treaties. Consultation with the States occurs in accordance with the *Principles and Procedures for Commonwealth-State Consultation on Treaties* agreed upon by the Council of Australian Governments in 1996: Anne Twomey, "International Law and the Executive" in Brian Opeskin and Donald Rothwell, *International Law and Australian Federalism* (1997), p82.

54 *Kioa v West* (1985) 159 CLR 550 at 570 (Gibbs CJ); *Dietrich v The Queen* (1992) 177 CLR 292 at 305 (Mason CJ and McHugh J).

55 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287 (Mason CJ and Deane J).

56 *Polites v Commonwealth* (1945) 70 CLR 60 at 69 (Latham CJ).

57 *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478 (Dixon J).

58 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38 (Brennan, Deane and Dawson JJ).

59 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 (Gummow and Hayne JJ); *Cornwell v The Queen* (2007) 231 CLR 260 at [174] (Kirby J).

60 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 (Brennan J).

The Commonwealth's entry into the International Covenant on Civil and Political Rights

55. The Commonwealth government signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980. The initial instrument of ratification deposited on 13 August 1980 included the following declaration and reservation:

> *Article 20*
> Australia interprets the rights provided for by Articles 19, 21 and 22 as consistent with Article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the Article in matters of practical concern in the interests of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters.[61]

56. By indicating its interpretation of Articles 19, 21 and 22 as being consistent with Article 20, the Commonwealth government indicated that it did not regard the protection of freedom of opinion, expression, the right to peaceful assembly and freedom of association as inconsistent with the existence of laws preventing war propaganda or racial vilification. Plainly, the Commonwealth did not regard the rights protected by those Articles as absolute, but rather that they could permissibly be affected by laws addressed to legitimate aims in the interests of public order. That legitimate restrictions may be placed on such rights is in any event clear from the text of those Articles, including paragraph 3 of Article 19, Article 21, and paragraph 2 of Article 22.

57. In light of the limited right established by Article 22, it may be doubted whether s93X of the Crimes Act is inconsistent with Australia's international legal obligations to ensure freedom of association under the ICCPR. However, for the reasons that follow, it is unnecessary to determine that issue. Any such inconsistency would not result in the invalidity of s93X of the Crimes Act.

The effect of the Commonwealth government's international legal obligations arising from ratification of the ICCPR on State legislative power

58. The Plaintiffs Tajjour and Hawthorne submit that s93X of the Crimes Act is invalid because the Commonwealth government's international obligations under the ICCPR operate as a constraint upon the legislative power of State Parliaments. While accepting that a treaty cannot operate as a direct source of individual rights and obligations, the Plaintiffs submit that it nonetheless operates as a limit upon State legislative power.

59. The submission should be rejected for the following reasons.

60. It is correct that the implementation of treaties may face complexities in some federal systems, because of constitutional difficulties in the national government implementing the treaty.[62] However, the Commonwealth Parliament has available a mechanism by which it may give effect to the ICCPR should it choose. It may pass a law, pursuant to s51(xxix) of the *Constitution* to

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61 Certain reservations and declarations made on ratification were withdrawn by Australia on 6 November 1984. However, the reservation and declaration to Article 20 remained.

62 See *New South Wales v Commonwealth* (1975) 135 CLR 337 at 445 (Stephen J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 215-216 (Stephen J).

implement the ICCPR, so long as the law is reasonably capable of being considered appropriate and adapted to that end.[63] As Mason J said in *Koowarta v Bjelke-Petersen*, section 51(xxix) "arms the Commonwealth Parliament with a necessary power" to incorporate an international instrument into domestic law.[64] Combined with s109, s51(xxix) provides the Commonwealth with the means to give effect to its international legal obligations, including by legislating to invalidate State law. The availability of this mechanism tells against the submission that an exercise of the prerogative power in s61 operates as a fetter on State legislative power.

61. Further, the submission is contrary to long-standing authority regarding the effect of international law on domestic law and legislative power. Were the submission accepted, it would dramatically change the constitutional division of power between the Commonwealth executive and State Parliaments. It would permit the Commonwealth, by executive act, to extract legislative power from the States.

62. Finally, the reliance placed on the distinction between direct effect and limitation on legislative power does not assist in this context. In the case of the implied freedom of political communication that distinction flows from the source and nature of the implication. There, ss7 and 24, and related sections of the *Constitution* have been recognised as necessarily protecting freedom of communication. However, those sections do not confer personal rights on individuals.[65] In contrast, the right recognised in Article 22 of the ICCPR is couched in terms of a positive *right*, not merely an area of immunity from legislative interference.

Part VI: Estimate of time for oral argument

63. South Australia estimates that 20 minutes will be required for the presentation of oral argument.

Dated 28 April 2014

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63 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643-644 (Latham CJ), 679-681, 687 (Evatt and McTiernan JJ), *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 224 (Mason J), 241 (Murphy J), 253-260 (Brennan J); *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 130-132 (Mason J), 170-172 (Murphy J), 232 (Brennan J), 259 (Deane J); *Victoria v Commonwealth* (1996) 187 CLR 416 at 485-487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

64 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 224 (Mason J).

65 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560 (The Court).