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

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)

Date of Document: 28 April 2014

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PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. Section 78A of the *Judiciary Act 1903* (Cth) in support of the Defendant.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part V of the Defendant's Submissions.

PART V: SUBMISSIONS

5. The Attorney General for Western Australia intervenes to address the Plaintiffs' *Lange* contention and the contention as to the existence and scope of any freedom of association implied in the *Constitution*.

6. In respect of the asserted implied freedom of association, the Attorney General for Western Australia submits that, if it exists, it, and the *Lange* implied freedom of political communication, are co-extensive. As such, it does not require discrete consideration.

7. In respect of *Lange*; the Attorney General for Western Australia submits that the answer to the first question is yes. In respect of the second *Lange* question, the Attorney General for Western Australia submits that, however the question is formulated, s.93X of the *Crimes Act 1902* (NSW) ('Act') is valid in that the burden which it places upon maintenance of the system of representative government which the *Constitution* mandates is not undue.

IMPLIED FREEDOM OF ASSOCIATION

8. The allusion of McHugh J and Gaudron J in *ACTV*[1] to a free-standing implied freedom of association has received little support and was in *Wainohu*[2] rejected. In *Kruger*[3], Gummow J expressly rejected its existence[4], and only Gaudron J ascribed

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[1] *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 1; (1992) 177 CLR 106 at 212 (Gaudron J), 227 (McHugh J) ('*ACTV*').
[2] *Wainohu v New South Wales* [2011] HCA 24; (2011) 243 CLR 181 at 220 [72] (French CJ and Kiefel J), 230 [112] (Gummow, Hayne, Crennan and Bell JJ) ('*Wainohu*').
[3] *Kruger v Commonwealth* [1997] HCA 27; (1997) 190 CLR 1 at 45 (Brennan CJ), 68 (Dawson J), 142 (McHugh J) ('*Kruger*').
[4] *Kruger* [1997] HCA 27; (1997) 190 CLR 1 at 157.

an ongoing salience[5]. Toohey J referred to it as an emanation of the freedom of political communication[6].

9. In *Mulholland*, Gummow and Hayne JJ (with Heydon J[7]) expressly rejected the notion[8]. McHugh J[9] and Kirby J[10] can be understood as alluding to its existence.

10. In *Totani*, French CJ rather echoed the description of Toohey J in *Kruger*; referring to any implied freedom of association "as an incident of the implied freedom of political communication"[11]. Gummow J[12] and Heydon J[13] maintained their Honours' respective views in *Mulholland.*

11. *Wainohu* (per Gummow, Hayne, Crennan and Bell JJ[14], with French CJ and Kiefel J concurring[15]) determines that, to the extent that a notion of freedom of association can be derived from the *Constitution*, it, and the implied freedom of political communication, are coextensive. As such they are best considered as one.

12. The written submissions for the Plaintiffs Tajjour and Hawthorne refer to a decision of the Canadian Supreme Court[16], one decision of the European Court of Human Rights[17], and a decision of the New Zealand Supreme Court[18]. Plainly enough, each of these decisions dealt with the right as expressed in the particular, relevant human rights instrument; with freedom of association referred to in Article 2(d) of the *Canadian Charter of Rights and Freedoms* and in Article 11 of the *European Convention on Human Rights*. The New Zealand case of *Morse v Police* dealt with s.14 of the *Bill of Rights Act 1990* (NZ) referring to freedom of expression. None of these authorities are relevant.

THE SECOND *LANGE* QUESTION

13. The authority of the test stated by five Justices in *Wotton v Queensland*[19], in respect of the second question, must be reconsidered in light of *Monis*[20].

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[5] *Kruger* [1997] HCA 27; (1997) 190 CLR 1 at 115–116.
[6] *Kruger* [1997] HCA 27; (1997) 190 CLR 1 at 92: "the freedom of association which political communication demands".
[7] *Mulholland v Australian Electoral Commission* [2004] HCA 41; (2004) 220 CLR 181 at 300 [364] ('*Mulholland*').
[8] *Mulholland* [2004] HCA 41; (2004) 220 CLR 181 at 229 [148].
[9] *Mulholland* [2004] HCA 41; (2004) 220 CLR 181 at 220 [114]–[115].
[10] *Mulholland* [2004] HCA 41; (2004) 220 CLR 181 at 271–272 [284]–[286].
[11] *South Australia v Totani* [2010] HCA 39; (2010) 242 CLR 1 at 29 [31] ('*Totani*').
[12] *Totani* [2010] HCA 39; (2010) 242 CLR 1 at 54 [92].
[13] *Totani* [2010] HCA 39; (2010) 242 CLR 1 at 99–100 [253].
[14] *Wainohu* [2011] HCA 24; (2011) 243 CLR 181 at 230 [112].
[15] *Wainohu* [2011] HCA 24; (2011) 243 CLR 181 at 220 [72].
[16] *Reference re Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313.
[17] *Socialist Party of Turkey v Turkey* (1999) 27 EHRR 51.
[18] *Morse v Police* [2012] 2 NZLR 1.
[19] *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1 at 15 [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ) ('*Wotton*').
[20] *Monis v The Queen* [2013] HCA 4; (2013) 87 ALJR 340 ('*Monis*'). *Unions NSW v New South Wales* [2013] HCA 58; (2013) 88 ALJR 227 ('*Unions NSW*') did not require consideration of the test.

14. The different articulations of the second question in *Monis* ought not obscure that there is substantial commonality between them, and, as *Unions NSW*[21] exemplifies, and as Gleeson CJ has observed[22], it is likely that in most matters the different articulations will render the same result.

Object or end

15. All articulations of the second question require, as the first step of their application, identification of the object of the impugned law or the end it seeks to serve[23].

16. Identification of the object of a statute or statutory provision obviously enough involves construction of the impugned provision. But it is a process of construction different to the ordinary[24] process of determining the meaning of words in an instrument, even where sought to be construed purposively[25] and different too from construing a law to answer whether it is one with respect to a head of power.

17. Identification or characterization of object will often times, and for various reasons, be problematic. A single purpose can be variously expressed, with different layers of abstraction. Laws may have more than one object. Object must be differentiated from "political motive"[26].

18. The irrelevance of political motive to characterization of the object of legislation must not be understood to obscure the relevance and oftentimes importance of extrinsic material to the process. A stated object in a Second Reading speech will not determine object if the words of the statute do not reflect it. Generally, however, it will be rare, particularly when considering modern statutes, that Second Reading speeches and other extrinsic material will not be important in determining the object or end of a statute, in considering the second *Lange* question.

19. In respect of statutory provisions that create criminal offences, a convenient proposition to commence characterization is that the object of such laws is prevention of the prohibited or criminalized conduct, and thereby protection of the public (or potential victims) from such conduct. This is illustrated by *Monis*. For French CJ the impugned law's purpose was; "the prevention of uses of postal or similar services which reasonable persons would regard as being, in all the circumstances, offensive"[27]. Similarly for Hayne J, the purpose was, "the prevention of offence to recipients of, and others handling, articles committed to a postal or similar service"[28]. For Crennan, Kiefel and Bell JJ, the purpose was

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[21] See, in particular, *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 237 [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[22] See *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1 at 13 [33].
[23] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 363 [74] (French CJ), 370 [125] (Hayne J), 408 [347] (Crennan, Kiefel, Bell JJ). See also *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 237 [46]. Object and end are, in this context, synonymous.
[24] Contra *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 378 [175] (Hayne J).
[25] In the sense stated in *Thiess v Collector of Customs* [2014] HCA 12 at [23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ): "Objective discernment of statutory purpose is integral to contextual construction."
[26] See *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 379 [184] (Hayne J).
[27] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 362 [73].
[28] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 379 [184].

protective – to protect recipients from, "intrusion of seriously offensive material into a person's home or workplace"[29]. The formulations of French CJ and Hayne J on the one hand, and that of Crennan, Kiefel and Bell JJ on the other, are likely different sides of the same coin, and essentially coterminous – preventing a person from doing X as opposed to protecting a potential victim (or victims) from X.

20. Though John Austin would doubtless disagree, criminal laws can, in this context, be contrasted with regulatory type laws, even if a regulatory type law contains penalties for contravention. Even though the distinction between criminal laws and regulatory type laws is difficult, identification of the object of regulatory type laws will likely be more nuanced than for criminal laws. That said, even with what are, on their face, seemingly crime-creating laws, object can be more than prevention of, and correlative protection from, that conduct. This is illustrated by *Coleman v Power*[30] and *Wotton*[31].

21. In *Coleman v Power* it was possible to characterize the object of a law that prohibited use of threatening, abusive, or insulting words in a public place[32] as a public order measure for the prevention of (retaliatory) violence in public places[33]. In *Wotton,* the object of the impugned s.132(1)(a) of the *Corrective Services Act 2006* (Qld) was not prevention of the prohibited conduct[34], largely because the prohibition was read with the administrative power to authorize it[35]. So its object was; "crime prevention through humane containment, supervision and rehabilitation of offenders"[36].

The object or end of Division 7 of Part 3A (s.93X) of the *Crimes Act*

22. In this matter, the object of s.93X can only be determined if particular regard is had to the defences in s.93Y and, critically, the mandatory feature of the official warning in s.93X(1)(b).

23. The meaning of consort has been established in *Johanson v Dixon*[37], and as the Second Reading speech in this matter states, a purpose of the law was to pick up and apply this meaning[38]. Consort involves association and keeping company, where the accused seeks out or accepts the association. The scope and effect of such laws, as a means of combating criminal gangs and criminal associations, is plain.

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[29] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 408 [348].
[30] *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1.
[31] *Wotton* [2012] HCA 2; (2012) 246 CLR 1.
[32] Section 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld).
[33] See the characterisation of Hayne J in *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 371 [129].
[34] A person must not— (a) interview a prisoner, or obtain a written or recorded statement from a prisoner, whether the prisoner is inside or outside a corrective services facility.
[35] In s.132(2)(d) of the *Corrective Services Act 2006* (Qld).
[36] *Wotton* [2012] HCA 2; (2012) 246 CLR 1 at 16 [31] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
[37] *Johanson v Dixon* [1979] HCA 23; (1979) 143 CLR 376 at 382–383, 385 (Mason J), 395, 397 (Aickin J). Barwick CJ at 379 agreed with Mason J. Stephen J at 379 agreed with both Mason J and Aickin J.
[38] New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 February 2012, 8131–8132 (Greg Smith, Attorney General, Minister for Justice).

24. The official warning feature in s.93X(1)(b) excludes the innocent associate and clarifies the object of s.93X. Likewise, the defences in s.93Y make plain that the law is not directed at (and its object does not include the criminalizing of) innocent relationships or associations of everyday life, such as family, employment, education, medical treatment and legal advice.

25. The historical context of Australian consorting laws also assists with identifying the object of s.93X, and Division 7 of Part 3A of the Act, in which s.93X appears. Consideration of this context is made easier by the outstanding scholarship of McLeod[39]. Although Australian consorting laws[40] derived from prostitution and vagrancy laws, in all jurisdictions they have been introduced as a tool or means of combating crime and in particular the proliferation and workings of criminal gangs[41].

26. Such laws have existed in Australian States for decades[42]. They are a large part of what French CJ in *Totani* referred to as the "long history of laws concerned to prevent or impede criminal conduct by imposing restrictions on certain classes or groups of persons and on their freedom of association"[43].

27. The object of s.93X has been stated by the Defendant; preventing or impeding criminal conduct by deterring non-criminals from associating in a criminal milieu or criminals establishing, using or building up their networks[44]. This is confirmed not only by the express terms of the provision, and having regard to the matters noted immediately above, but by the statements of the Attorney General in moving the Bill; "the goal of the offence is not to criminalise individual relationships but to deter people from associating with a criminal milieu."[45]

The notion of legitimacy of the object – and legitimacy here

28. The function of the notion of legitimacy in the second *Lange* question is not settled. Legitimate and illegitimate are very large words.

29. Legitimacy of an object is central to the reasoning of Hayne J in *Monis*. In his Honour's analysis, some objects are illegitimate, and if so, a law with such object is invalid. As his Honour's judgment shows[46], a catalogue of legitimate objects can be compiled from decided cases, and clearly enough over time any such catalogue will

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[39] Andrew McLeod, 'On the Origins of Consorting Laws' (2013) 37 *Melbourne University Law Review* 103 ('McLeod').
[40] *Johanson v Dixon* [1979] HCA 23; (1979) 143 CLR 376 at 382–383 (Mason J).
[41] McLeod at 131–132.
[42] *Police Act Amendment Act 1928* (SA) s.5, inserting s 66(g2) into the *Police Act 1916* (SA); *Vagrancy (Amendment) Act 1929* (NSW) s.2(b), inserting s.4(j) into the *Vagrancy Act 1902* (NSW); *Police Offences (Consorting) Act 1931* (Vic) s.2; *Vagrants, Gaming, and Other Offences Act 1931* (Qld) s.4(1)(v); *Police Offences Act 1935* (Tas) s.6; *Police and Police Offences Ordinance 1947* (NT) s.3(b), inserting s.56(1)(i) into the *Police and Police Offences Ordinance 1923* (NT); *Police Offences Ordinance 1948* (ACT) s.2(b), inserting s.22(h) into the *Police Offences Ordinance 1930* (ACT); *Police Act Amendment Act 1955* (WA) s.2, inserting s.65(9) into the *Police Act 1892* (WA).
[43] *Totani* [2010] HCA 39; (2010) 242 CLR 1 at 30 [32].
[44] Defendant's Submissions at [33].
[45] New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 February 2012, 8131 (Greg Smith, Attorney General, Minister for Justice).
[46] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 371–372 [128]–[131].

grow. But, the question is not the length of the catalogue, but why objects are in the catalogue, and what common thread is sown through the catalogue[47]? No purpose is served by, over time, simply compiling and cataloguing "legitimate" legislative objects.

30. The notion that a regularly enacted law of an Australian Parliament can have an object or end that is "illegitimate" strains Australian constitutional conceptions of the proper exercise of judicial power in respect of, and judicial review of, legislation. If the object or end of a law is not the burdening of political communication or the undermining of the constitutional system of responsible and representative government, how is it "illegitimate"? If a Commonwealth law is beyond power – it is beyond power and a *Lange* question simply does not arise. If the impugned law is a State law, what legislation, within power, is "illegitimate", as opposed to beyond power? So long as its object is not to burden political communication or to undermine responsible and representative government (in the Commonwealth), how can any other object be illegitimate?

31. The difficulty of seeking to identify legitimate legislative objects is illustrated by Hayne J's assertion that "promoting civility of discourse is not a legitimate object or end"[48]. With respect, why not? Why would a State law requiring children to give up their seat in public transport for an adult be illegitimate?

32. It is difficult to conceive of a clear or proper role for this notion of legitimacy. If, in truth, it means nothing more than that the object of a law cannot be to burden political communication or to undermine the system of responsible and representative government, then this should be the test of object, unencumbered by a very large concept such as legitimacy, foreign as it is to Australian conceptions of judicial power and review. Inevitably, it will be rare that the object of a law is to make political communication more difficult or to undermine the system of responsible and representative government.

The notion or role of *legitimacy* in proportionality analysis as applied to the freedom of political communication

33. The judgment of Crennan, Kiefel and Bell JJ in *Monis* makes reference to and imputes the European concept (or technique) of proportionality, as a means of determining, or as a tool to assist in determining, constitutional validity[49]. Most (if not all) formulations of the concept, whether suggesting a two, three or four stage process[50], involve criteria or tests of *suitability* and *necessity*[51]. After these is the

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[47] A similar issue arises with ascription of the term "analogous". Of course, analogical reasoning requires an understanding of why contexts are analogous, not just assertion that they are. See (for instance) John Glover, 'Identification of Fiduciaries' in Peter Birks (ed) *Privacy and Loyalty* (Oxford University Press, 1997) 269 at 270–271.

[48] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 384 [214]. Further, and with respect, it is difficult to accept that this proposition is established by *Coleman v Power* as his Honour states at [214].

[49] This in turn is to be contrasted with the European use of proportionality analysis in what in Australian law would be considered judicial review of administrative action.

[50] Of course, there is a mountain of material about all of this. To illustrate, however, see the two stage test, with three parts, stated by Takis Tridimas, 'Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999) 65 at 68 ('Tridimas'). See the four rules in Matthias Klatt and Moritz

consideration of proportionality "*stricto sensu*"[52] or "in the narrow sense"[53]. In some formulations, suitability involves consideration of whether the impugned law is "suitable to achieve a legitimate aim" and if so, whether the law is "reasonably likely" to achieve it[54]. In other formulations, identification of "legitimate ends", in the sense of whether the impugned law "pursues a legitimate aim" precedes suitability[55]. Either way, a notion of legitimacy is involved. This is the sense in which Crennan, Kiefel and Bell JJ are to be understood in *Monis* when referring to "valid legislative object"[56].

34. This notion of legitimacy is the same as that considered above. The submission made above[57], that it should play no role in the second *Lange* question, applies equally to the notion in this context.

If required – the object of s.93X of the *Crimes Act* is legitimate

35. If the submission as to the rejection of the notion of legitimacy is not accepted, and if it is required to determine whether the object of s.93X is legitimate, it cannot be doubted that the object of preventing or impeding criminal conduct by deterring non-criminals from associating in a criminal milieu or criminals establishing, using or building up their networks, is "legitimate", whatever the word means in this context. It is not *per se* incompatible with a freedom of political communication nor does it undermine the system of responsible and representative government created by the *Constitution*.

36. The plaintiffs, Tajjour and Hawthorne, do not appear to contend that the object of the impugned law is illegitimate in this sense[58].

The notion of *suitability* in proportionality analysis

37. In most formulations of the concept of proportionality, the criterion of suitability involves judicial determination of whether the impugned law is capable of achieving, or is suitable to achieve, its (legitimate) object. This is a notion completely foreign to Australian conceptions of judicial power and judicial review. It should be rejected. To an even greater extent than other inquiries required to answer the second *Lange* question, for a Court to embark on a process of determining whether legislation is suitable to achieve its object would, as Keane J

Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, 2012) at 8 ('Klatt and Meister'). See also Robert Alexy, 'Constitutional Rights, Balancing and Rationality' (2003) 16 *Ratio Juris* 131 at 135; Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 *Cambridge Law Journal* 174 at 177–178 ('Rivers').

[51] See Hayne J's formulation in *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 373–374 [144].

[52] Tridimas at 68.

[53] Klatt and Meister at 8.

[54] Tridimas at 68.

[55] Klatt and Meister at 8.

[56] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 396 [280]. This is to be contrasted with their Honours' notion of the illegitimate burdening of the freedom of political communication, at 408 [346]. As will be discussed, this refers to a later stage of the proportionality process.

[57] At [29]–[32].

[58] Tajjour and Hawthorne Submissions at [5.12], [5.13].

has observed, "countenance a form of decision-making having more in common with legislative than judicial power"[59].

38. The incorporation of this alien criterion of suitability into Australian law should be rejected.

The notion of *necessity* in proportionality analysis

39. Necessity in this sense is the inquiry of whether the impugned law is necessary to achieve its legitimate object[60], which is to be understood as asking; "whether there are other less restrictive means capable of producing the same result (the least restrictive alternative test)"[61]. This formulation conforms to the inquiry of Crennan, Kiefel and Bell JJ in *Monis*; as to the existence of "other, less drastic, means of achieving a legitimate object"[62], which will result in invalidity where other means are "obvious and compelling"[63].

40. No doubt, many obvious things are not compelling. Whether a putative alternative is compelling can only really be assessed by comparing it with the impugned legislative means. For an alternative or alternatives to be compelling, the impugned law can only really be understood to be a legislative choice that is not reasonably open. To hypothesise compelling alternatives otherwise is simply to substitute the political judgment of the Court for that of Parliament or, again, "to countenance a form of decision-making having more in common with legislative than judicial power"[64].

41. If there is a compelling alternative, in this sense, then the impugned law will be invalid. But, it must be supposed that such conclusions will be exceedingly rare. The Court must find that different legislation would obviously (and compellingly so) achieve the Parliament's object. It is difficult to imagine this being so unless the means chosen by Parliament is simply unconnected to the end sought to be achieved.

42. It is in respect of this inquiry that the well understood reasoning that Parliament must be accorded a "wide margin of appreciation"[65] arises.

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[59] *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 248 [129] (Keane J).
[60] In the formulation of Crennan, Kiefel and Bell J in *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 408 [347]; "reasonably necessary to achieve the end".
[61] Tridimas at 68.
[62] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 408 [347].
[63] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 408 [347].
[64] *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 248 [129] (Keane J).
[65] See *ACTV* [1992] HCA 45; (1992) 177 CLR 106 at 159 (Brennan J); *Cunliffe v The Commonwealth* [1994] HCA 44; (1994) 182 CLR 272 at 300 (Mason CJ), 325 (Brennan J), 357 (Dawson J); *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46; (1994) 182 CLR 104 at 156–157 (Brennan J); *Betfair Pty Ltd v the State of Western Australia* [2008] HCA 11, (2008) 234 CLR 418 at 459–460 [34]–35] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Unions NSW* [2013] HCA 58; (2013) 88 ALJR 227 at 235 [34] (French CJ, Hayne, Crennan, Kiefel, Bell JJ), 249 [131] (Keane J).

The *necessity* of s.93X – an alternative obvious and compelling means to achieve the object?

43. In the sense in which any inquiry as to necessity, so understood, is to be undertaken, the following matters are relevant to whether there is an alternative obvious and compelling means to achieve the object of Division 7 of Part 3A of the Act.

44. *First*, similar consorting laws have existed in Australian States for decades. These laws are a legislative means that have achieved objects. The deliberate invocation and application of such laws to disrupt and restrict[66] organized criminal organizations is intimately connected to their object. Indeed, with Division 7 of Part 3A of the Act, means and end are largely the same.

45. *Second*, having regard to the significance and profile of organized criminal organizations, were there an obvious and compelling alternative to the impugned law to disrupt and restrict their activities, it can be supposed that it would have been implemented.

46. *Third*, any such obvious and compelling alternative would, and likely must, be contended by the Plaintiffs. It is difficult to conceive that it is for the Court to speculate by proffering alternatives not put by a party. No doubt, if different legislation (say X) is not asserted by the party contending invalidity of the impugned provisions, it cannot be that X is obvious and compelling.

47. *Fourth*, at [5.24] of their submissions, the plaintiffs, Tajjour and Hawthorne, contend the existence of a better "less drastic" means to achieve the object of s.93X. A number of things can be said about this submission. First, the explanation of why the alternative is compelling is hardly compelling, nor is it obviously less drastic. Second, the *Crimes (Criminal Organisation Control) Act 2012* (NSW) does not address one of the objects of s.93X. The official warning process in s.93X(1)(b) is absent from the *Crimes (Criminal Organisation Control) Act 2012* (NSW), and is relevant to the object of deterring (by warning) non-criminals from associating in a criminal milieu. Third, the submission exemplifies that for the Court to conclude that legislation is invalid because other "less drastic" legislation (real or hypothetical) could achieve the same object will only occur in extreme cases. Can it seriously be contended that the choice between the two alternatives falls beyond the margin of appreciation accorded to Parliaments? To conclude that the *Crimes (Criminal Organisation Control) Act 2012* (NSW) is an obvious and compelling alternative to better achieve the object of s.93X is simply a political judgment. Even if the object of the *Crimes (Criminal Organisation Control) Act 2012* (NSW) and Division 7 of Part 3A of the *Crimes Act 1900* (NSW) is the same, the NSW Parliament has concluded that it would prefer to have both legislative means available to assist with achieving such object.

48. No other obvious and compelling means of achieving the object of s.93X has been demonstrated.

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[66] *Wainohu* [2011] HCA 24; (201) 243 CLR 181 at 192 [8] (French CJ and Kiefel J).

Proportionality *stricto sensu* in proportionality analysis

49. The search for what is comprehended by the notion of proportionality "*stricto sensu*"[67] or "in the narrow sense"[68] unearths some enterprising formulations. In conventional proportionality type analysis, even if there is no obvious and compelling alternative means of achieving the (legitimate) object of the impugned law, the Court then engages in a "balancing exercise"; balancing the object of the impugned law against its "adverse effect" on other rights[69] to determine whether the impugned law gives rise to a "net gain"[70]. It has been otherwise expressed as requiring that the Court determine whether the impugned law has an "excessive effect"[71] on (here) the Plaintiffs' "right"[72] to freedom of political communication[73]. As will be discussed, these different formulations, of balancing competing rights, on the one hand, and determining the effect of a law on a "right", on the other, is important.

50. The notion of proportionality *stricto sensu* is expressed by Crennan, Kiefel and Bell JJ in *Monis* as asking; whether the impugned law "imposes too great a burden upon the implied freedom by the means it employs"[74].

51. Before considering these notions of balancing of competing rights and determining excessive burden, it is well, first, to deal with the relation of this notion of proportionality *stricto sensu* in this matter to the (alternatively expressed) assessment of whether the impugned law is reasonably appropriate and adapted to achieving its legitimate end. As will be seen, in both, the question of whether competing rights are to be balanced or excessive burden determined is the same.

The comparison between *proportionality stricto sensu* and means reasonably appropriate and adapted to the end – and their application to s.93X

52. Conventional proportionality analysis requires that, where there are no compelling alternative means[75], the Court then asks whether the impugned law "imposes too great a burden upon the implied freedom by the means it employs"[76]. This is also the inquiry expressed, in substance, by French CJ in *Monis* in determining whether the impugned law is reasonably appropriate and adapted to achieving its legitimate purpose or end[77]. Understood in this way, strict proportionality and "reasonably appropriate and adapted" analyses are likely conceptually and practically coterminous. That said, the reasoning of Crennan, Kiefel and Bell J in *Monis* makes plain that this further inquiry only takes place after the Court has concluded

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[67] Tridimas at 68.
[68] Klatt and Meister at 8.
[69] Tridimas at 68.
[70] Klatt and Meister at 8.
[71] *Rowe v Electoral Commissioner* [2010] HCA 46; (2010) 243 CLR 1 at 145 [476] (Kiefel J).
[72] As is discussed below, the infusion into this analysis of a Plaintiff's right to a freedom of political communication is (at least) a misnomer.
[73] Tridimas at 68.
[74] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 409 [350]. As will also be submitted, there is a difference between notions of balancing competing "rights" and erosion of (or excessive effect on) a right.
[75] The least restrictive alternative test is passed.
[76] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 409 [350].
[77] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 363 [74].

that there are no compelling alternative means available to achieve the impugned law's legislative object or end, in the sense explained. If this conclusion (that there is no compelling alternative) is not accommodated in an assessment of whether the impugned law is reasonably appropriate and adapted to achieving its legitimate purpose or end, then different results may emerge. The absence of compelling alternative means to achieve the impugned laws object must have a substantial consequence when the final value judgment, as to the extent of burden, is made by the Court.

53. Before addressing the extent of the burden imposed by s.93X it is necessary to address the issue which emerges (*inter alia)* from Hayne J's judgment in *Monis* concerning "balancing" of competing rights[78] as opposed to the burdening of a "right".

The difference between *balancing* and *burdening*

54. It is likely that there exists a subtle, though important, difference between the some of the alternative articulations of the second *Lange* question. It is oftentimes conflated with the first question. This difference can be illustrated by the judgments in *Monis*, though it is seen in earlier cases.

55. As noted, in the reasoning of Crennan, Kiefel and Bell JJ in *Monis*, the final question asked is whether the impugned law "imposes too great a burden upon the implied freedom by the means it employs"[79]. This is the same as the reference by Crennan and Kiefel JJ in *Corneloup*[80] to assessment of the "extent of the burden imposed" by the law, and by whether the extent, or effect, of the burden is "undue"[81]. This inquiry is the same as that expressed by French CJ in *Monis*[82] and in *Corneloup*[83], and McHugh J in *Coleman v Power*[84]. It focuses upon the extent of the burden on the freedom of political communication, which in turn means the burden of the impugned law on the maintenance of "the system of representative government which the *Constitution* mandates."[85]

56. In Hayne J's judgment in *Monis,* the final question is expressed differently; "... how the [impugned] law curtails or burdens political communication on the one hand

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[78] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 374 [145]: "... how the [impugned] law curtails or burdens political communication on the one hand and how it relates to what has been identified as the law's legitimate end on the other".

[79] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 409 [350].

[80] *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; (2013) 87 ALJR 289 at 338 [220] ('*Corneloup*').

[81] *Corneloup* [2013] HCA 3; (2013) 87 ALJR 289 at 338 [220], citing *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 at 568–569, 575.

[82] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 363 [74].

[83] *Corneloup* [2013] HCA 3; (2013) 87 ALJR 289 at 312 [68].

[84] *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1 at 29–30 [91]: "In determining whether a law is invalid because it is inconsistent with freedom of political communication, it is not a question of giving special weight in particular circumstances to that freedom. Nor is it a question of balancing a legislative or executive end or purpose against that freedom... The question is not one of weight or balance but whether the federal, State or Territory power is so framed that it impairs or tends to impair the effective operation of the constitutional system of representative and responsible government by impermissibly burdening communications on political or governmental matters."

[85] *Corneloup* [2013] HCA 3; (2013) 87 ALJR 289 at 338 [220] (Crennan and Kiefel JJ).

and how it relates to what has been identified as the law's legitimate end on the other"[86]. They are "balanced" or compared. This technique is seen perhaps most clearly in his Honour's conclusion in *Corneloup*[87] where the by-law was valid because it effected an "adequate balance" between "the competing interests in political communication and the reasonable use by others of a road."

57. This difference, between balancing and assessing the extent of burden, is real. It is, in essence, the distinction between qualitative and quantitative assessment. Hayne J in *Monis*[88], though in the context of the first *Lange* question, expressly abjured the relevance of a quantitative assessment of the effect or extent of the burden of an impugned law on political communication. His Honour's reasoning in this respect is a repudiation of the reasoning, *inter alia,* of Crennan, Kiefel and Bell JJ in *Monis* and their Honours' concentration on whether the "extent of the burden imposed" by the law is "undue".

58. For the following reasons, and with respect, Hayne J's reasons for rejecting this analysis should not be accepted, and the notion of balancing competing rights in this context rejected.

59. *First*, Hayne J's reasoning requires a qualitative assessment of competing rights. But, how does the Court balance the object (or value) of "preventing or impeding criminal conduct by deterring non-criminals from associating in a criminal milieu or criminals establishing, using or building up networks"[89] against the value of political speech? Is the value of free political speech greater than the value of the object of s.93X and if so, why? If so, are there different levels or intensity of value? Does the object of s.93X have a different value to that of "prevention of physical injury"[90] or "the prevention of violence in public places"[91]? How might an apple be compared to an orange or thee to a summer's day?

60. The imponderability of these qualitative questions is encapsulated in the notion of "incommensurability"[92], addressed in European law in certain formulations of the strict proportionality requirement[93]. How does the Court go about comparing, weighing or balancing "political communication on the one hand" and the impugned law's "legitimate end on the other"[94]? This might be thought particularly

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[86] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 374 [145].
[87] *Corneloup* [2013] HCA 3; (2013) 87 ALJR 289 at 324 [141].
[88] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 369 [120].
[89] Defendant's Submissions at [33].
[90] *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579, per the description of Hayne J in *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 371 [129].
[91] *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1, per the description of Hayne J in *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 371 [129].
[92] There is a massive literature on this. See, for instance, Frederick Schauer, 'Commensurability and its Constitutional Consequences' (1994) 45 *Hastings Law Journal* 785; Jeremy Waldron, 'Fake Incommensurability: A Response to Professor Schauer' (1994) 45 *Hastings Law Journal* 813; Rivers; Stavros Tsakyrakis, 'Proportionality: an Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468, in particular at 474–475; Stavros Tsakyrakis, 'Proportionality: an Assault on Human Rights?: a Rejoinder to Madhav Khosla' (2010) 8 *International Journal of Constitutional Law* 307. Of course, the issue is much older than all of this.
[93] Which is not accepted or applied by Crennan, Kiefel and Bell JJ in *Monis*.
[94] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 374 [145].

so where the legislative object is "legitimate" and where there are no obvious, compelling alternative means available to achieve it.

61. The difficulty that these sorts of qualitative balancing exercises would inspire is exemplified by the theorem or "weight formula" of Professor Klatt and Dr Meister:

$$W_{i,j} = \frac{W_i \cdot I_i \cdot R_i^g \cdot R_i^n}{W_j \cdot I_j \cdot R_j^g \cdot R_j^n}$$

Where:

W_i and W_j stand for the abstract weights of the two principles P_i and P_j, respectively. The abstract weight of a principle is the weight that the principle has relative to other principles, but independently of the circumstances of any concrete case. The abstract weights of colliding human rights are often equal and, then, can be disregarded in balancing. Sometimes, however, the abstract weights of the colliding principles are not equal. The right to life, for example, has a higher abstract weight than the right to property.

I_i and I_j stand for the intensities of interference with the two principles, respectively. The action submitted to the proportionality test is interference by means of a certain measure M. Thus, I_i and I_j always refer to a particular case; they are by definition concrete variables, as opposed to the abstract variables W_i and W_j.

The third and fourth pair of variables refer to the reliability of the empirical (R_i^g and R_j^g) and normative (R_i^n and R_j^n) premises concerning what the measure means for the non-realization of the one principle and the realization of the other principle. ... The reliability of the premises actually follows the second, or epistemic, law of balancing, which reads: The more heavily an interference with a right weighs, the greater must be the reliability of its underlying premises.[95]

62. It is unlikely that this formula will be gladly embraced in Australian law. Obviously enough, the questions posed above[96] cannot be answered as matters of principle. There is no principled basis for weighing "political communication on the one hand" and "the prevention of violence in public places"[97] on the other, and then preferring one over the other, or according one a weight greater than the other.

63. *Second*, the notion of *balancing* is inapposite because conflicting rights are not being balanced. *Lange* does not confer rights.

64. *Third*, Hayne J embraces this qualitative balancing of competing rights, in part, because of his Honour's criticism of seeking to discern the effect of an impugned law on political communication; in a sense a quantitative assessment. His Honour's

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[95] Klatt and Meister at 10–11.
[96] At [59]–[60].
[97] *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1, per the description of Hayne J in *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 371 [129].

principal objection to this is that, "the constitutional freedom would be subordinated to small and creeping legislative intrusions until some point where it could be said that there are so few avenues of communication left that the last and incremental burden is no longer to be called a "little" burden. This is not and cannot be right."[98]

65. Several things can be said about this reasoning. First, it cannot be doubted that if the quantitative effect of any single law is substantial its validity will not be determined by seeking to work out what is left after the substantial burden is imposed. Outside of circumstances of war and emergency, any law which limits speech to the extent that it substantially erodes the maintenance of "the system of representative government which the *Constitution* mandates"[99] is unlikely to be valid, whatever its purpose.

66. Second, the notion of an insidious incremental burden[100] in this context is not conceptually compelling. This can be illustrated by this matter. It can be accepted here that the answer to the first *Lange* question is yes, because it is conceivable that convicted offenders (as defined) might wish to meet to discuss political issues. But common sense and experience compel the conclusion that this legislation will have no appreciable effect upon political communication. This is so because consorting laws have existed in all Australian States for decades, and in all since 1992, when the freedom of political communication was first recognised. It has never been contended, because it would be ridiculous to do so, that these laws have in any sense stifled political communication. On this understanding, the notion of a creeping or incremental intrusion on the freedom, until none of it is left, is (with respect) inapposite. A better analogy is that quantitatively insignificant increments coalesce into the same insignificance rather than accumulate to comprise a larger impediment.

67. Even if this is wrong, and Hayne J's concern that "small and creeping legislative intrusions" aggregate to the point that there are left only limited avenues of communication, this could be addressed. The final burden is then too great and because of its effect invalid. If the point is reached that a particular impugned limit on communication is undue in that it, by accretion threatens maintenance of "the system of representative government which the *Constitution* mandates"[101], not only would this measure be invalid, but earlier otherwise valid limits could be re-visited. It would be unexceptional, in this circumstance, for the Court to review earlier decisions upholding the validity of earlier legislative limits on communication.

The extent of the burden

68. Rejection of a notion of balancing competing rights does not answer all difficult questions, but it clarifies.

69. It is recalled that the question of whether a law is proportionate *stricto sensu* arises after two prior inquiries. First, that the object of the law is not to burden political

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[98] *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 369 [120].
[99] *Corneloup* [2013] HCA 3; (2013) 87 ALJR 289 at 338 [220] (Crennan and Kiefel JJ).
[100] Or eating the cake until it is all gone.
[101] *Corneloup* [2013] HCA 3; (2013) 87 ALJR 289 at 338 [220] (Crennan and Kiefel JJ).

communication or to undermine the system of responsible and representative government; or if one likes – that the object is legitimate. If the object of a law is to burden political communication or to undermine the system of responsible and representative government, then different questions will arise. That is not this case. After this first inquiry, it is then determined (or not) that no other obvious and compelling alternative exists to achieve the object of the legislation, in the sense discussed above.

70. Having determined both of these prior inquiries, the next inquiry is; how substantial is the burden. In addressing this, as explained by Crennan and Kiefel JJ[102], the inquiry is not as to the effect of the impugned law on the Plaintiffs, but rather the extent of the effect of the impugned law on the "maintain[ence of] the system of representative government which the *Constitution* mandates".

71. In respect of certain laws the quantitative burden will likely be significant. A law that "prohibit[s] or regulate[s] communications which are inherently political or a necessary ingredient of political communication"[103] is of such a nature. Conversely and as well understood, laws that "incidentally restrict political communication"[104] are less likely to have any meaningful, substantial or undue effect on political communication.

The burden of s.93X

72. Section 93X will incidentally affect political communication, and so the burden is clearly less than it would be for a law that prohibits political speech or is directed at it.

73. The extent of burden is not determined by the number of people who might be affected by a prohibition. A direct prohibition of political speech by a class may well be an undue burden however many are in the class. Yet an incidental effect upon political communication by a few is unlikely to impose an undue burden. This is particularly so if there are other avenues available to those incidentally affected to communicate with the community about political matters.

74. The extent of the burden is not ameliorated in this matter, as it was in *Wotton* and *Corneloup*, by the interposition or interpolating of an administrative power of authorisation of communication that could only be exercised conformably with the freedom. The official warning regime cannot be construed to require that a warning not be given if the purpose of the consorting is to communicate in respect of political matters. But, as the reasoning in *Wainohu* in respect of interim control orders[105] makes plain, prohibiting certain forms of association directed at putative

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[102] *Corneloup* [2013] HCA 3; (2013) 87 ALJR 289 at 338 [220].
[103] *Wotton* [2012] HCA 2; (2012) 246 CLR 1 at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ) citing *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506 at 555–556 [95]–[99].
[104] See, eg, *Monis* [2013] HCA 4; (2013) 87 ALJR 340 at 360 [64] (French CJ), 407 [342]–[343] (Crennan, Kiefel and Bell JJ); *Corneloup* [2013] HCA 3; (2013) 87 ALJR 289 at 337 [217] (Crennan and Kiefel JJ, Bell J agreeing at 338 [224]); *Wotton* [2012] HCA 2; (2012) 246 CLR 1 at 16 [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506 at 555–556 [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
[105] *Wainohu* [2011] HCA 24; (2011) 243 CLR 181 at 220 [72] (French CJ, Kiefel J), 231 [113] (Gummow, Hayne, Crennan and Bell JJ), 251 [186] (Heydon J).

criminal activity does not unduly affect maintenance of the system of representative government which the *Constitution* mandates.

75. Section 93X could limit a person communicating about political matters with convicted offenders and convicted offenders communicating about political matters with other convicted offenders and others. But such limits only arise where communication would involve consorting with at least two convicted offenders on at least two occasions and only after an official warning.

76. The effect on the "maintain[ence of] the system of representative government which the *Constitution* mandates" of laws that criminalize habitual consorting by and with convicted offenders will be inconsequential. It is relevant in this respect to observe that consorting laws have existed in all Australian States for decades, have involved broader definitions of consort than in s.93X and have not stifled political communication.

77. Any effect of this law on political communication would be inconsequential.

78. On this basis, s.93X is valid.

PART VI: LENGTH OF ORAL ARGUMENT

79. It is estimated that the oral argument for the Attorney General for Western Australia will take 30 minutes.

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