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

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

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PART I: CERTIFICATION

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

PART II: BASIS OF INTERVENTION

2. Pursuant to s 78A of the *Judiciary Act 1903* (Cth), the Attorney-General for the State of Victoria intervenes in support of the defendant in each matter.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. The constitutional and legislative provisions are set out in the written submissions of plaintiffs Tajjour and Hawthorne filed on 28 March 2014 (**PWS**).

PART V: ARGUMENT

5. In summary:

   (a) s 93X of the *Crimes Act 1900* (NSW) does not infringe either limb of the test for applying the freedom of political communication implied by the Constitution;

   (b) the Constitution does not imply a general freedom of association; and

   (c) signing or ratifying a treaty by the federal executive does not operate to limit State legislative power.

(a) The freedom of political communication

6. The basic approach to the freedom of political communication implied by the Constitution is well settled. As stated by the joint reasons in *Wotton v Queensland*,[1] there are two questions:

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[1] *Wotton v Queensland* (2012) 246 CLR 1 (***Wotton***) at [25] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

> The first question asks whether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If this is answered affirmatively, the second question asks whether the law nevertheless is reasonably appropriate and adapted[2] to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government.

7. For the following reasons, with respect to s 93X of the *Crimes Act* the answer to the first question is "no" and the answer to the second question is, in any event, "yes".

(i) First question

8. The settled formulation of the implied freedom of political communication requires an "effective" burden upon freedom of communication about government or political matters.[3] The Court should accept that this is not satisfied by "insubstantial burdens or unrealistic threats" to the freedom.[4] Rather, to adopt the language of Heydon J in *Wotton*,[5] the burden must "must be 'meaningful'. That is, it must not be 'insubstantial or de minimis' — it must be 'a real or an actual burden upon relevant communications'; it must be 'a real impediment'; and it must be 'an obstacle in their way'". Similarly, in *Monis*, Crennan, Kiefel and Bell JJ stated that it "may be accepted that an effect upon political communication which is so slight as to be inconsequential may not require an affirmative answer to the first limb inquiry", drawing a contrast with "a real effect upon the content of political communication".[6]

9. This approach is consistent with that adopted concerning the express guarantee in s 51(xxxi) of the Constitution. In that field, it has been recognised that "the degree of impairment of the bundle of rights constituting the property in question may be

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2 A majority of the Court criticised the use of the "reasonably appropriate and adapted" expression in *Monis v The Queen* (2013) 87 ALJR 340; 295 ALR 259 (***Monis***) (see at [246] (Heydon J), [345]-[346] (Crennan, Kiefel and Bell JJ)), and it may be that the word "proportionate" can be used in its place: see *Unions NSW v New South Wales* (2013) 88 ALJR 227; 304 ALR 266 (***Unions NSW***) at [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

3 *Unions NSW* at [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

4 *Wotton* (2012) 246 CLR 1 at [54] (Heydon J), cf *Monis* (2013) 87 ALJR 340; 295 ALR 259 at [108]–[124] (Hayne J).

5 (2012) 246 CLR 1 at [54] (Heydon J).

6 *Monis* (2013) 87 ALJR 340; 295 ALR 259 at [343] (Crennan, Kiefel and Bell JJ).

insufficient to attract the operation of s 51(xxxi)".[7] If that is so for an express guarantee of individual rights such as s 51(xxxi),[8] it must be all the more so for an implied freedom which it has repeatedly been emphasised is a limit on legislative power and not a conferral of personal rights.[9]

10. The source of that limitation on legislative power is the constitutional requirement of free elections which underpins representative and responsible government. It arises from, and is limited in extent by, the necessity to promote and protect that system of government.[10]

11. Therefore, the critical question is not whether a person is limited in the way that
10 that person can express himself or herself; it is how the impugned law "affects the freedom generally".[11] It is therefore not sufficient to identify a burden, even a substantial one, on any particular individual. A burden on particular individuals, even of a substantial kind, may nevertheless be too insubstantial a burden on the freedom generally to be an effective burden upon the freedom.

12. This is not to assess the operation of the freedom by reference to whether the constitutional system of government can remain intact and functioning despite the burden; the premise is that there is a freedom of political communication, but one which promotes and protects that system rather than the communications of

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7 *Smith v ANL Ltd* (2000) 204 CLR 493 at [23] (Gaudron and Gummow JJ), cited in: *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [365] (Crennan J); *Phonographic Performance Co of Australia Ltd v The Commonwealth* (2012) 246 CLR 561 at [111] (Crennan and Kiefel JJ); *JT International SA v Commonwealth* (2012) 86 ALJR 1297; 291 ALR 669 at [134] (Gummow J). See also *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175 (FC).

8 So described in, eg, the cases collected in *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at [501] (Kirby J) and *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140 at [185] (Heydon J). See also, eg, *ICM Agriculture Pty Ltd v The Commonwealth* at [43] (French CJ, Gummow and Crennan JJ), [131] (Hayne, Kiefel and Bell JJ); *Phonographic Performance Co of Australia Ltd v The Commonwealth* (2012) 246 CLR 561 at [109]–[113] (Crennan and Kiefel JJ); *JT International SA v The Commonwealth* (2012) 86 ALJR 1297; 291 ALR 669 at [41] (French CJ), [226], [231], [236], [241] (Heydon J).

9 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 560 (the Court); *Unions NSW* (2013) 88 ALJR 227; 304 ALR 266 at [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

10 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at [66] (McHugh J), cited with approval in *Hogan v Hinch* (2011) 243 CLR 506 at [93] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

11 *Unions NSW* (2013) 88 ALJR 227; 304 ALR 266 at [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also *Wotton* (2012) 246 CLR 1 at [80] (Kiefel J); *Attorney-General (SA) v Corporation of the City of Adelaide* (***Adelaide Corporation***) (2013) 87 ALJR 289; 295 ALR 197 at [220] (Crennan and Kiefel JJ); *Monis* (2013) 87 ALJR 340; 295 ALR 259 at [62] (French CJ).

particular individuals who are governed by it.[12] It is the burden on that freedom which must be identified.

13. In this light, while s 93X of the *Crimes Act* is clearly capable of burdening the communication of some individuals about government or political matters in some circumstances, the Court should conclude that that burden is too insubstantial a burden upon the freedom generally to satisfy the first question. That is so for at least the following reasons:

(a) the offence is committed only if the "official warning" described by s 93X(3) is given;

(b) that warning is only able to be given to a person who "habitually consorts" (as defined) with convicted offenders (s 93X(1)), and the warning must relate to each of those convicted offenders (s 93X(3));[13]

(c) as a matter of construction, the exercise of the power to warn must be exercised for a proper purpose, in accordance with the subject matter, scope and purpose of the provision — a desire to prohibit or impede political communication would not be a proper purpose;[14]

(c) the offence is committed only if the person continues to consort with the convicted offenders the subject of the warning;

(d) the offence is limited to consorting with those convicted of one or more indictable offences (see s 93W), which signifies the more serious criminal conduct prohibited by the laws of New South Wales;[15]

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[12] See, generally, *Monis* (2013) 87 ALJR 340; 295 ALR 259 at [117]-[119] (Hayne J).

[13] See further, n 35 below.

[14] *Adelaide Corporation* (2013) 87 ALJR 289; 295 ALR 197 at [140]–[141] (Hayne J).

[15] While the specification of which offences are indictable and which may be dealt with summarily is within the control of the Parliament of New South Wales, it is notorious that the division in general reflects a division between more and less serious offences (cf PWS [5.20]). Thus, among other offences that must be dealt with summarily pursuant to s 6 of the *Criminal Procedure Act 1986* (NSW) are (subject to certain exceptions) those for which the maximum penalty that may be imposed is not and does not include imprisonment for more than 2 years.

(e) consorting of the kinds specified in s 93Y that is reasonable in the circumstances cannot give rise to the offence; and

(f) the kinds of consorting specified in s 93Y are calculated substantially to diminish interference with activities and communications that are an incident to everyday life.

14. Moreover, in considering the effect of s 93X on the freedom generally, such burden on individual communications as the provision imposes does not prevent a person from making the same communications to any person other than a convicted offender in respect of whom he or she has received an official warning (and in relation to whom none of the defences in s 93Y is available). The effect of s 93X is therefore confined to a person's communications with particular individuals, not their ability to exchange communications about government or political matters with the wider community.

15. Accordingly, the effect of the provision on the freedom of political communication generally is insubstantial and inconsequential. Its effect is so confined because of:

(a) the extent of the persons whose communications may be affected;

(b) the purposes for which their communications may be affected;

(c) the range of persons with whom their communications may be affected for such purposes;

(d) the circumstances in which their communications with those persons may be affected; and

(e) the fact that their political communications generally are otherwise unaffected.

(ii) Second question

16. Even if it is concluded that s 93X effectively burdens the freedom of communication about government or political matters, like the law at issue in

Hogan v Hinch, s 93X "does not display a 'direct' rather than 'incidental' burden upon that communication".[16] As the plurality continued:[17]

> The distinction was explained as follows by Gleeson CJ in *Mulholland v Australian Electoral Commission*. After pointing out that there are many laws (and s 42 of the Act is one such law) which affect freedom to communicate, his Honour continued:
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> > Some such laws have only an indirect or incidental effect upon communication about matters of government and politics. Others have a direct and substantial effect. Some may themselves be characterised as laws with respect to communication about such matters. In *Australian Capital Television Pty Ltd v The Commonwealth*, Deane and Toohey JJ said that "a law whose character is that of a law with respect to the prohibition or restriction of [political] communications ... will be much more difficult to justify ... than will a law whose character is that of a law with respect to some other subject and whose effect on such communications is unrelated to their nature as political communications'. The passage was cited by Gaudron J in *Levy v Victoria*."
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> Earlier, in *Cunliffe v The Commonwealth*, Deane J spoke of cases where the law in question involved no significant curtailment of the freedom of political communication and discussion, and continued:
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> > That may even be so in a case where the law prohibits or regulates a particular type of communication or discussion which is neither inherently political in its nature nor a necessary ingredient of political communication or discussion (eg incitement or conspiracy to commit a serious criminal offence). In such cases, any incidental curtailment of freedom of political communication and discussion will be consistent with the constitutional implication if it is reasonably capable of being seen as necessary or appropriate and adapted to the legitimate legislative aim being pursued by the Parliament.

17. Contrary to the proposed submissions of the Australian Human Rights Commission dated 4 April 2014 (**AHRCS**) at [24], as is clear from these passages, a burden is only to be regarded as "direct" if it may be characterised as directed to burdening communications which are inherently political or a necessary ingredient of political

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[16] (2011) 243 CLR 506 at [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[17] (2011) 243 CLR 506 at [95]–[96] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, citations omitted).

communication.[18] The law in *Australia Capital Television Pty Ltd v The Commonwealth*[19] was an example.

18. Plainly, s 93X is not a law of that character. It is not directed to burdening freedom of communication about government or political matters. It regulates types of communication which are neither inherently political nor a necessary ingredient of political communication or discussion. In this respect (though not in others) s 93X is similar to laws prohibiting incitement or conspiracy. Thus, it is wrong to characterise s 93X as imposing a direct burden so far as that is relevant to the second question posed by *Lange* (cf AHRCS [24]). In any event, s 93X cannot even be characterised as a law which directly burdens communication, political or otherwise: it is directed to the preclusion of "consorting" and any burden on communication is incidental to that aim.

19. Laws which may generally be described as prohibiting consorting with criminals have long been a feature of the Australian legal system.[20] Though introduced in 2012,[21] s 93X of the *Crimes Act* clearly forms part of this historical trend. It was explained as being "to replace and clarify the offence of consorting with convicted offenders".[22]

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[18] See also *Wotton* (2012) 246 CLR 1 at [30] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Monis* (2013) 87 ALJR 340; 295 ALR 259 at [64] (French CJ), [342] (Crennan, Kiefel and Bell JJ).

[19] (1992) 177 CLR 106 (***ACTV***).

[20] In New South Wales, the offence was first introduced by the *Vagrancy (Amendment) Act 1929* (NSW), which added a new paragraph (j) into s 4(1) of the *Vagrancy Act 1929* (NSW). It applied to any person who "habitually consorts with reputed criminals or known prostitutes or persons who have been convicted of having no visible lawful means of support". Such an offence had already been introduced in South Australian in 1928: *Police Act Amendment Act 1928* (SA), inserting s 66(g2) into the *Police Act 1916* (SA). It was introduced into Queensland in 1931: *Vagrants, Gaming, and Other Offences Act 1931* (Qld), s 4(1)(v). It was introduced into Western Australia in 1955: *Police Act Amendment Act 1955* (WA), s 2, inserting s 65(9) into the *Police Act 1892* (WA). Provisions were also introduced in the Northern Territory and the ACT: *Police and Police Offences Ordinance 1947* (NT), 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). Modified forms of the offences were introduced in Victoria in 1931 (*Police Offences (Consorting) Act 1931* (Vic), s 2) and Tasmania in 1935: *Police Offences Act 1935* (Tas), s 6. These latter provisions excepted what would otherwise be consorting done with sufficient reasons. In *Johanson v Dixon* (1979) 143 CLR 376 at 383, Mason J traced the origin of the offence to s 4 of the *Police Offences Amendment Act 1901* (NZ), which inserted s 26(4) into the *Police Offences Act 1884* (NZ). Earlier antecedents may also be identified: see McLeod, "On the Origins of Consorting Laws" (2013) 37 *Melbourne University Law Review* 103.

[21] *Crimes Amendment (Consorting and Organised Crime) Act 2012* (NSW).

[22] Explanatory Notes to the Crimes Amendment (Consorting and Organised Crime) Bill 2012 (NSW).

20. The precise social circumstances motivating the enactment of such provisions has, no doubt, changed over time.[23] However, in general, the object has remained the same. It was expressed by Mason J in *Johanson v Dixon*[24] as follows: "to inhibit a person from habitually associating with persons of the ... designated classes, because the association might expose that individual to temptation or lead to his involvement in criminal activity". That bears a clear resemblance to the stated object of s 93X.[25] In particular, the focus historically and today has been upon what may colloquially be referred to as "criminal gangs".[26]

21. The plaintiffs do not in terms submit that the object identified by Mason J is illegitimate. However, the burden of the plaintiffs' submissions appears to be that there must be some "nexus to criminal conduct" (PWS [5.22]) or "tethering criminal liability to a criminal design" (PWS [5.24]). Plainly, s 93X of the *Crimes Act* discloses a nexus to criminal conduct: it applies only to consorting with those convicted of indictable offences. The plaintiffs' submission appears to suggest that there must be some criminal conduct, or criminal design, by the person convicted of the consorting offence. If so, that submission denies the legitimacy of directing the criminal law to a stage before the formation of any criminal design, to that at which a person may, by association, be drawn into criminal activity.

22. The Court should not accept that submission. It would be a very large step to conclude that it can never be a legitimate end, or is not in the current context a legitimate end, within the system of government prescribed by the Constitution, to criminalise association with those previously convicted of offences without proof

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[23] See the discussion of the origins of the original Australian laws in Steel, "Consorting in New South Wales: Substantive Offence or Police Power?" (2003) 26 *University of New South Wales Law Journal* 567 at 580–588.

[24] (1979) 143 CLR 376 at 385.

[25] New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 7 March 2012 at 9092: "the goal of the offence is not to criminalise individual relationships, but to deter people from associating with a criminal milieu".

[26] Historically, see, eg, New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 October 1929 at 682; Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 10 November 1931 at 4092; Queensland, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 October 1931 at 1418; Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 25 August 1955 at 328. With respect to s 93X of the *Crimes Act*, see New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 7 March 2012 at 9091.

that the purpose of the association is to advance a criminal design. The history of consorting provisions in Australia tells against such a proposition.

23. Once it is concluded that the object is legitimate, the only question is whether the means by which that end is pursued is reasonably appropriate and adapted, or proportionate, to serve that end in a manner compatible with the maintenance of the constitutionally prescribed system of government. In that assessment, it is not for the Court to consider the desirability or importance of the object chosen by the legislature, any more than that is so in, for instance, the context of statutory construction[27] or the validity of regulations.[28] That is a matter for the legislature, not the Court. It would be an intrusion into the legislative function for the Court to determine whether an object is of greater or lesser importance and apply an approach to the second question which is stricter for those laws with objects deemed less important.

24. For the reasons in paragraph 13 above, the means by which s 93X pursues the end to which it is directed is reasonably appropriate and adapted in the requisite way. The fact that there may be alternative means, such as, for example, by adopting a generally expressed exclusion for consorting "with reasonable excuse",[29] to address the identified object does not spell invalidity. While the existence of alternative, less restrictive, means of achieving an end may be relevant to invalidity,[30] the mere existence of alternatives does not demonstrate that one is less restrictive than the other. The alternative means must be "obvious and compelling".[31] Nor does the second question require that the means chosen are in all respects the least restrictive

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[27] See, eg, *Johanson v Dixon* (1979) 143 CLR 376 at 385 (Mason J): "It is not to the point that the section is a provision of long standing and that it reflects a policy which came into existence many years ago. The fact, if it be a fact, that the policy is now a matter of some controversy, is no justification for our construing the provision otherwise than in accordance with its terms. If a change in the statute is thought to be desirable on account of changed conditions or changed attitudes, it is for Parliament to decide whether that change should be made." Such changes may indeed be seen in the narrowing of the New South Wales provision, from the former s 546A of the *Crimes Act*, to circumstances following an official warning and the introduction of a provision excluding some forms of consorting from the scope of the offence.

[28] *South Australia v Tanner* (1989) 166 CLR 161 at 168 (Wilson, Dawson, Toohey and Gaudron JJ); *Adelaide Corporation* (2013) 87 ALJR 289; 295 ALR 197 at [60] (French CJ), [117] (Hayne J).

[29] As noted in fn 20, that was in substance the model introduced in Victoria and Tasmania. Now see *Summary Offences Act 1966* (Vic), s 49F.

[30] *Unions NSW* (2013) 88 ALJR 227; 304 ALR 266 at [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

[31] *Monis* (2013) 87 ALJR 340; 295 ALR 259 at [347] (Crennan, Kiefel and Bell JJ).

or on some other measure "the best". The formulation "reasonably appropriate and adapted" admits of legislative choice.[32] In this instance, Parliament has chosen to specify clearly defined exclusions rather than to provide for an open-ended test of "reasonableness". It cannot be said that it was obvious and compelling that the latter approach would be just as effective to achieve the legislative object. Indeed, such an alternative approach may have many deficiencies of application and enforcement. Nor do the existence of postulated alternative means of preventing future criminal activity identified in AHRCS [49]–[52] suggest invalidity: those alternative means are of much narrower focus than s 93X. Parliament is entitled to conclude that these narrowly focused means are not the most satisfactory way to prevent future criminal activity and to prefer other means, alone or in combination — Parliament is able to employ multiple approaches to preventing crime simultaneously.

25. The particular criticisms made by the plaintiffs do not render the means otherwise than reasonably appropriate and adapted. The exclusion in s 93Y(e) would clearly be construed, favourably to the alleged offender, so as to permit the provision of legal advice, and all the communication and association necessary to achieve that end (cf PWS [5.15]).[33] The exclusions in s 93Y more generally substantially remove what may otherwise be the difficulties identified by King CJ in *Jan v Fingleton*[34] (cf PWS [5.18]). The fact that being given an official warning might require an individual "to withdraw from his segment of the community, upon pain of being prosecuted" (PWS [5.19]) does not evidence a burdening of political communication. Even if s 93X permitted an official warning to be given before

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[32] *Thomas v Mowbray* (2007) 233 CLR 307 at [22]–[23] (Gleeson CJ), cited in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at [102] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [39] (Gleeson CJ); *Hogan v Hinch* (2011) 243 CLR 506 at [72] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

[33] There is therefore no foundation for the apparent suggestion by the plaintiffs of inconsistency with aspects of Ch III of the Constitution. Such a suggestion is not raised by the special case or the s 78B notices which have been filed.

[34] (1983) 32 SASR 379 at 380 (FC).

any consorting had taken place (PWS [5.20]), that would be entirely consistent with the object identified.[35]

26. Accordingly, even if s 93X of the *Crimes Act* effectively burdens freedom of political communication, it is reasonably appropriate and adapted to a legitimate end. It therefore does not infringe the implied freedom of political communication.

(b) The asserted freedom of association

27. The plaintiffs assert that the Constitution implies a freedom of association which is not limited to government or political matters. That submission should be rejected. For the following reasons, it is contrary to precedent and principle.

(i) Precedent

28. The plaintiffs submit (PWS [5.26]) that there has been general acceptance that a freedom of association is implied by the Constitution. The reverse is the case.

29. Prior to the authoritative restatement of the implied freedom of political communication in *Lange*[36] an implied freedom of association had been recognised by some judges[37] but rejected by others.[38] There were different views among those who had recognised the freedom as to whether it was limited in scope to "political" association or not.

30. Following *Lange*, the matter was considered in *Mulholland v Australian Electoral Commission*.[39] McHugh and Kirby JJ accepted the existence of a freestanding freedom of association but, again, with uncertainty as to its scope.[40] In contrast, all the other members of the Court rejected the existence of any freestanding freedom.

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[35] The better view is that this is not permitted by the section, in any event: a person must habitually consort with convicted offenders and do so after having been given an official warning in relation to those offenders: s 93X(1). The offenders the subject of the warning cannot be identified unless the requisite habitual consorting has already taken place.

[36] (1997) 189 CLR 520.

[37] *ACTV* (1992) 177 CLR 106 at 212 (Gaudron J), 227, 232 (McHugh J); *Kruger v The Commonwealth* (1997) 190 CLR 1 at 89–91 (Toohey J), 114–115 (Gaudron J), 142 (McHugh J).

[38] *Kruger v The Commonwealth* (1997) 190 CLR 1 at 45 (Brennan CJ), 156–157 (Gummow J).

[39] (2004) 220 CLR 181.

[40] (2004) 220 CLR 181 at [114], [284].

Gummow and Hayne JJ, with whom Heydon J agreed, said of the freedom of association asserted in that case:[41]

> There is no such "free-standing" right to be implied from the Constitution. A freedom of association to some degree may be a corollary of the freedom of communication formulated in *Lange v Australian Broadcasting Corp* and considered in subsequent cases. But that gives the principle contended for by the appellant no additional life to that which it may have from a consideration later in these reasons of *Lange* and its application to the present case.

10 31. Gleeson CJ expressed a similar opinion.[42] Callinan J regarded an implied freedom of association in relation to federal elections as "fall[ing] far short of being necessary".[43]

32. The approach set out above was adopted by the Court in *Wainohu v New South Wales*.[44] Citing the observations of Gummow and Hayne JJ in *Mulholland* quoted above, Gummow, Hayne, Crennan and Bell JJ said:[45]

> Any freedom of association implied by the Constitution would exist only as a corollary to the implied freedom of political communication and the same test of infringement and validity would apply.

French CJ and Kiefel J agreed.[46] Heydon J drew attention to the fact that no
20 authority supported the existence of "an implied right to political association, or an implied right to association for the purpose of political communication".[47]

33. *Mulholland* and *Wainohu* are thus clear authority against the proposition that there is a freestanding freedom of association implied in the Constitution. They leave open that there may be a freedom of association implied by the Constitution, but only as a corollary to the implied freedom of political communication and no broader in scope than that freedom. Contrary to AHRCS [13], nothing in *Unions*

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41 (2004) 220 CLR 181 at [148], [364].

42 (2004) 220 CLR 181 at [42].

43 (2004) 220 CLR 181 at [335].

44 (2011) 243 CLR 181.

45 (2011) 243 CLR 181 at [112].

46 (2011) 243 CLR 181 at [72].

47 (2011) 243 CLR 181 at [186].

NSW v New South Wales[48] supports any broader view; the reference in the joint reasons to freedom of association drew the link between that freedom and the freedom of communication as a means of building and asserting political power, not in any broader sense.

34. Thus, the plaintiffs' submission (PWS [5.55]) that "the *Constitution* guarantees freedom of association, not merely for the purpose of protecting communication about political matters, but more broadly, to protect interaction encompassing familial, social, etc. interaction" is directly contrary to authority. For the same reasons, if the references in AHRCS [16] to a freedom of association being a "cognate of the freedom of communication" go beyond *Mulholland* and *Wainohu*,[49] they too are contrary to authority.

35. The plaintiffs acknowledge that the approach for which they contend is contrary to *Mulholland* and *Wainohu* (PWS [5.45]). Yet no attempt is made to demonstrate why the recent and clear view of the Court in these cases should be reconsidered. There is no reason that it should be. To the contrary, for the following reasons, the plaintiffs' submissions are contrary to principle.

(ii) Principle: text and structure

36. While there is no definitive statement of when an implication may be drawn from the Constitution,[50] the plaintiffs' argument fails to satisfy two essential and well-established conditions. The first is, as emphasised in cases such as *Lange*[51] that any implication must be sourced in the text or structure of the Constitution and that no implication can be derived from doctrines or principles outside the Constitution.

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48 (2013) 88 ALJR 227; 304 ALR 266 at [29] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

49 It is not apparent whether this is intended by AHRCS, given what appears at [20].

50 On implications from the Constitution generally, see Herzfeld, Prince and Tully, *Interpretation and Use of Legal Sources* (2013) at 42–55.

51 (1997) 189 CLR 520 at 566–567 (the Court). See also *McGinty v Western Australia* (1996) 186 CLR 140 at 168–169 (Brennan CJ), 182, 188 (Dawson J), 230–232 (McHugh J), 291 (Gummow J); *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at [14] (Gaudron, McHugh, Gummow and Hayne JJ); *APLA* at [32]–[33] (Gleeson CJ and Heydon J), [56]–[57] (McHugh J), [385]–[389] (Hayne J), see also at [240]–[242] (Gummow J), [469]–[470] (Callinan J); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at [20], [39], [54] (Gleeson CJ, Gummow and Hayne JJ), [82]–[85] (Kirby J), [171] (Heydon, Crennan and Kiefel JJ).

37. The plaintiffs' submissions pay only lip service to this fundamental proposition (PWS [5.50], [5.55]). They are replete with references to principles outside the Constitution, such as "free and democratic society" (PWS [5.33]), "representative democracy" (PWS [5.46]), "the democratic process" (PWS [5.49]) and "the benefit of the people" ([5.51]). The drawing of implications based on these concepts rather than the text and structure of the Constitution, which has features in common with the approaches in some of the judgments of this Court in the early freedom of political communication cases, was precisely the course deprecated in *Lange*.

38. The plaintiffs' recourse to this impermissible approach is seen starkly in the submission that the need for an implication to be sourced in the text or structure of the Constitution means no more than that "there must be a rational basis between the right, which is sought to be implied, and the *Constitution* itself or, one might say, the purpose of the *Constitution*" (PWS [5.50]). The slide from "text and structure" to "purpose" conceals what is in truth a reference to matters wholly extrinsic to the Constitution.[52] Further, it is a reference to purpose stated at such a high level of generality — "to create an environment for the benefit of the people" (PWS [5.51]) — that almost any implication could be justified, no matter how divorced from the text and structure of the Constitution.

39. The gulf between the plaintiffs' submissions and the established approach to implications is underlined by their reliance upon statements of Murphy J and Gaudron J enunciated before *Lange*. The approach of Murphy J relied upon (PWS [5.29]–[5.31]) — that implications should be made which would promote principles of "responsible government and democratic principles generally" or even "the concept of the Commonwealth of Australia"[53] — cannot stand with the approach now recognised as correct. Nor can the reasons of Gaudron J in *Australian Capital Television Pty Ltd v The Commonwealth*,[54] where her Honour referred to "[t]he

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[52] The plaintiffs' approach to purpose is akin to that recently deprecated by this Court in the context of statutory construction, namely to identify an *a priori* purpose instead of identifying the purpose from the text: see *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at [28] (French CJ, Hayne, Kiefel and Bell JJ); *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378 at [26] (French CJ and Hayne J).

[53] *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556 at 581–582.

[54] *ACTV* (1992) 177 CLR 106 at 212.

notion of a free society governed in accordance with the principles of representative parliamentary democracy" as a basis for implication. The plaintiffs submit that because Gaudron J joined in the unanimous reasons in *Lange* "without in any way distancing herself from her earlier comments", it must follow that *Lange* did not overrule the approach which Gaudron J had previously adopted (PWS [5.40]). But that ignores that the reasons in *Lange* were expressed as being to reconsider "some of the expressions and reasoning" in earlier freedom of political communication cases.[55] Gummow J was thus correct in *Kruger v The Commonwealth*[56] to conclude that the views expressed by Gaudron J were inconsistent with *Lange*.

10 40. The need for any implication to be sourced in the text and structure of the Constitution also casts doubt on the utility of reference to statements made by courts of jurisdictions such as Canada and New Zealand in which freedom of association is protected by Bills of Rights (cf PWS [5.47], [5.49]). Those statements may explain the treatment of freedom of association under the law of those jurisdictions. But they go no way to establishing that it is implied by the Constitution.

41. The requirement that any implication be sourced in the text and structure of the Constitution, not extrinsic matters or doctrines, defeats the attempt by the plaintiffs to support a freestanding freedom of association, as a limit on State legislative
20 power, as one of the "rights deeply rooted in our democratic system of government and the common law".[57] If the text and structure of the Constitution does not imply such a freedom, characterising it as a "deeply rooted right" does not advance the argument (cf PWS [5.52]). Furthermore, freedom of association has under both common law and statute historically been subject to many limitations.[58] It is

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[55] *Lange* (1997) 189 CLR 520 at 556 (the Court).

[56] (1997) 190 CLR 1 at 156–157. No shift in Gummow J's view is demonstrated by the statement made by Gummow and Crennan JJ in *Thomas v Mowbray* (2007) 233 CLR 307 at [61] quoted in PWS [5.40]. That statement was made not in the context of drawing implications from the Constitution but rather the scope of the judicial power of the Commonwealth.

[57] See also *Building and Construction Employees' and Builders Labourers' Federation (NSW) v Minister for Industrial Relations (NSW)* (1986) 7 NSWLR 372 at 385–387 (Street CJ), 404–405 (Kirby P); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 71–76 (Dawson J); *Kruger v The Commonwealth* (1997) 190 CLR 1 at 72–73 (Dawson J).

[58] At common law, see eg the tort of conspiracy by unlawful means (see eg *Williams v Hursey* (1959) 103 CLR 30), the tort of conspiracy by lawful means (see, eg, *McKernan v Fraser* (1931) 46 CLR 343) and

impossible to regard a right with that history as "deeply rooted" such that the Constitution should be taken by implication alone to have precluded Australian legislatures from enacting limitations on it in future.

42. The plaintiffs make no attempt to demonstrate how the freedom of association for which they contend — which extends beyond government or political matters to familial and social interactions — is sourced in the text and structure of the Constitution. Nothing is identified in the Constitution as being directed to the broader matters which the freedom of association asserted by the plaintiffs encompasses.

10 *(iii) Principle: necessity*

43. The second condition concerning the drawing of implications from the Constitution which the plaintiffs fail to satisfy is that the implication sought to be drawn must be a "necessary" implication.[59] It appears that "necessary" here does not mean logical necessity but rather that the implication is conveyed by the language with such strength of impression that to entertain the contrary view would be wholly unreasonable.[60] Certainly, an implication will not be drawn merely where some may consider it reasonable.[61]

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the offence of conspiracy (see, eg, *R v LK* (2010) 241 CLR 177). Under statute, see, eg, vagrancy laws which prohibited keepers of public houses from allowing common prostitutes and reputed thieves to assemble at their premises (13 & 14 Vict c 33 (1850), s 103; *General Police and Improvement (Scotland) Act 1862* (25 & 26 Vict c 101), s 337; *Habitual Criminals Act 1869* (Imp) (32 & 33 Vict c 99), s 10; *Prevention of Crimes Act 1871* (Imp) (34 & 35 Vict c 112), s 10; *Vagrancy Act 1835* (NSW), s 2; *Police Act 1863* (SA), s 56(7); *Police Offences Statute 1865* (Vic), s 35(iv); *Police Act 1892* (WA), s 65(7)). The freedom to associate is subject to many more general common law rules and statutory provisions which impose limits on the freedom. The owner of land may exclude others from entering it, even if they wish to do so in order to associate with one another. Legislation has long prohibited association for the purposes of gambling: see, eg, *Police Offences Statute Amendment Act 1872* (Vic), s 4; *Police Offences Act 1890* (Vic), s 49. Picketing on or near a public highway may constitute a nuisance: *McFadzean v Construction, Forestry, Mining and Energy Union* (2007) 20 VR 250 at [124]–[126] (CA).

[59] *Lange* (1997) 189 CLR 520 at 567 (the Court); *APLA* (2005) 225 CLR 322 at [33] (Gleeson CJ and Heydon J), [56]–[57] (McHugh J), [469]–[470] (Callinan J); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at [20], [39], [54] (Gleeson CJ, Gummow and Hayne JJ), [83] (Kirby J), [171] (Heydon, Crennan and Kiefel JJ); cf *ACTV* (1992) 177 CLR 106 at 135 (Mason CJ); *APLA* (2005) 225 CLR 322 at [389] (Hayne J). See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129 at 155 (Knox CJ, Isaacs, Rich and Starke JJ); *Victoria v The Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353 at 386 (McTiernan J), 417–418 (Gibbs J).

[60] See *Attorney-General (Qld) v Attorney-General (Cth)* (1915) 20 CLR 148 at 163 (Griffith CJ); *Victoria v Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353 at 417 (Gibbs J); *ACTV* (1992) 177 CLR 106 at

44. Nothing in the plaintiffs' submissions demonstrates why a freedom of association of the kind asserted is necessary, in the requisite sense, for the operation of the Constitution. The link between the election of candidates by voters at elections, and voting at referendums, and association on a familial and social level, is too tenuous to provide the requisite necessity.[62] There are ample means by which voters can form opinions, especially given the freedom of political communication. Since the freedom of communication already protects and promotes the constitutionally required system of government and free elections, and that freedom extends over the same ground as a discrete freedom of association for political purposes would cover, there is nothing further that a freedom of association would achieve in respect of that constitutional requirement, and therefore no necessity for its implication on that basis.

(iv) Conclusion

45. For the reasons above, the Court should reject the plaintiffs' contention that there is a freedom of association implied by the Constitution that extends beyond government or political matters to all forms of association. So far as there is any freedom of association implied by the Constitution, it is a corollary to the implied freedom of political communication, and the same test of infringement and validity would apply. For the reasons above, s 93X of the *Crimes Act* satisfies that test.

(c) The asserted limit on State legislative power

46. Finally, plaintiffs Tajjour and Hawthorne submit that a treaty entered by the federal executive "operates as a constraint upon the power of the State to enact contrary legislation" (PWS [5.57]). That submission should be rejected.

47. Pursuant to s 106 of the Constitution, the constitution of each State continues subject to the Constitution. Pursuant to s 107 of the Constitution, every power of the Parliament of a Colony which became a State continues unless exclusively

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135 (Mason CJ). In the statutory context, see *Worrall v Commercial Banking Co of Sydney Ltd* (1917) 24 CLR 28 at 32 (the Court), applied in *Carr v Western Australia* (2007) 232 CLR 138 at [17] (Gleeson CJ).

61 *APLA* (2005) 225 CLR 322 at [389] (Hayne J), [469]–[470] (Callinan J).

62 For the same reason, the link drawn at AHRCS [14]–[16] should be rejected.

vested in the federal Parliament or withdrawn from the Parliament of the State by the Constitution. Thus, the legislative powers of the States are made subject only to the express provisions of the Constitution and the implications to be drawn from those provisions. Nothing in those express provisions or any implications to be drawn from them supports a limitation of State legislative power by reason of the federal executive's signing or ratification of a treaty. The implication is quite to the contrary.

48. The executive power of the Commonwealth extends to the signing and ratification of treaties.[63] But it is settled law that signing and ratifying a treaty does not make it part of Australian municipal law: that requires the enactment of federal legislation to implement the treaty. Absent such federal legislation, the treaty does not confer rights or impose obligations under Australian municipal law.[64] The conferral of rights or imposition of obligations in accordance with the treaty is thus beyond the scope of the federal executive power. Accordingly, for a State to legislate in a manner contrary to the terms of a treaty which has been signed and ratified, but not implemented by federal legislation, is not an interference with the executive power of the Commonwealth (cf PWS [5.61]).

49. If the treaty is implemented by federal legislation, State legislation inconsistent with the federal legislation will be invalid by force of s 109 of the Constitution.[65] But that provision applies only to federal laws. It does not apply to treaties entered into by the executive. The fact that the Constitution provides expressly for the case of inconsistent federal and State laws, but not inconsistency between treaties and State laws, tends against the conclusion that in the case of such an inconsistency

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[63] *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 643–644 (Latham CJ); *Barton v The Commonwealth* (1974) 131 CLR 477 at 498 (Mason J); *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 476 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[64] *Brown v Lizars* (1905) 2 CLR 837 at 851 (Griffith CJ); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 644 (Latham CJ); *Chow Hung Chin v The King* (1948) 77 CLR 449 at 478 (Dixon J); *Bradley v The Commonwealth* (1973) 128 CLR 557 at 582 (Barwick CJ and Gibbs J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286–288 (Mason CJ and Deane J), 298 (Toohey J), 315 (McHugh J); *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 480–482 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). For very limited exceptions to this principle, see Starke, "The High Court of Australia and the rule in *Walker v Baird* [1892] AC 491" (1974) 48 *Australian Law Journal* 368.

[65] See, eg, *The Commonwealth v Tasmania (The Tasmanian Dam Case)* (1983) 158 CLR 1.

treaties are to prevail. Rather, the manner in which s 109 operates implies that signing or ratifying a treaty has no effect, of itself, on any State law.

50. That is especially so since the framers had before them the model of the United States Constitution which makes precisely the contrary provision. It conditions the power of the President to make treaties upon "the Advice and Consent of the Senate" and "provided two thirds of the Senators present concur" (Art II s 2) but treaties so made are expressly stated to be "the supreme Law of the Land" (Art VI). Thus the conclusion that a treaty made in the way prescribed by the United States Constitution displaces State law[66] to the contrary is mandated by the express words. The absence of such an express provision, in the face of the model provided by the United States Constitution, tends strongly against acceptance of the plaintiffs' submission. Thus, contrary to PWS [5.61], the position in the United States does not support the plaintiffs' submission: it weakens it. This very distinction was recognised at Federation by Quick and Garran.[67]

51. The plaintiffs' reliance upon the significance of ratification of a treaty in administrative law (PWS [5.59]–[5.60]) is misplaced. In that sphere, it has been said that ratification of a treaty by the federal executive gives rise to a "legitimate expectation" that the federal executive will act in accordance with its terms. On that view, procedural fairness requires that a person adversely affected by a departure from those terms be given the opportunity to be heard on whether the federal executive should so depart.[68] Even if this approach is correct — and strong doubts have been expressed whether that is so[69] — its focus is upon the limitation imposed on the actions of the federal executive by reason of its own previous action by ratifying the treaty. The approach provides no support for the contention that such action by the federal executive can limit legislative power or, further, that it can limit the legislative power of a different polity.

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[66] See, eg, *Ware v Hylton*, 3 US (3 Dall) 199 (1796).

[67] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at pp 769–770.

[68] See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

[69] See, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [95]–[102] (McHugh and Gummow JJ), [147] (Callinan J), see also at [122] (Hayne J).

52. The plaintiffs' submission would have the result that a State law which was valid when enacted is rendered invalid by the act of the federal executive in signing and ratifying a treaty. That would be so even if that treaty is never implemented by federal legislation, so that s 109 is never engaged. Indeed, it would be so even if legislation to implement the treaty were placed before the federal Parliament but failed to pass. Further, if the plaintiffs' submission were correct, it would require reconsideration of authorities concerning the scope of the federal executive's treaty-making power. Those authorities are to the effect that the federal executive may enter into a treaty on any topic, regardless of its connection with a head of federal legislative power. That view proceeds upon the premise that the mere entry into such a treaty does not affect the federal distribution of legislative powers.[70] The plaintiffs' submission contradicts that premise.

53. For these reasons, the Court should affirm that the mere signing and ratification of a treaty by the federal executive does not limit State legislative power in any way. Accordingly, whether or not s 93X of the *Crimes Act* is inconsistent with the *International Covenant on Civil and Political Rights* is irrelevant to the question of its validity.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

54. It is estimated that approximately 20 minutes will be needed for the presentation of Victoria's oral argument.

Dated 28 April 2014

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[70] See, eg, *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 480ff (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).