



Précis Paper

Constitution: Implied Freedom

The Hon. Gregory James AM QC (Barrister), Peter Lange (Barrister) and Peter Lowe (Barrister) discuss *Tajjour v State of New South Wales*; *Hawthorne v State of New South Wales*; *Forster v State of New South Wales* [2014] HCA 35. The unrestrictive interpretation of the s 93X *Crimes Act 1900* (NSW) consorting provision extends police powers at the cost of freedoms of communication and association. It remains to be seen just how far the courts are willing to defer to the Government's will.

Discussion Includes

- Section 93X was an effective burden on political communication – restricted meetings, some of which might include discussion of political matters
- Section 93X remains valid because the law was appropriately adapted to the legitimate end of preventing crime
- Propositions of alternatively worded, hypothetical consorting legislation were rejected in deference to the legislature's actual approach
- A standalone, implied freedom of association was not recognized and a treaty not implemented by Federal law could not interfere with State legislative powers
- Equivalent legislation will likely be adopted in other jurisdictions with broad powers to control people

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Constitution: Implied Freedom

1. In this edition of BenchTV, the Hon. Gregory James AM QC (Barrister), Peter Lange (Barrister) and Peter Lowe (Barrister) discuss the High Court's decision not to invalidate s 93X of the *Crimes Act 1900* (NSW) in the case of *Tajjour v State of New South Wales; Hawthorne v State of New South Wales; Forster v State of New South Wales* [2014] HCA 35. Mr James QC appeared as the lead Counsel for Mr Tajjour together with Mr Lange as the Senior Junior in that matter. Mr Lowe appeared for the third plaintiff, Mr Forster.

Material Facts

2. The plaintiffs had been charged with offences contrary to s 93X:

SECTION 93X:

Consorting

(1) *A person who:*

- (a) *habitually consorts with convicted offenders, and*
- (b) *consorts with those convicted offenders after having been given an official warning in relation to each of those convicted offenders,*

is guilty of an offence.

Maximum penalty: Imprisonment for 3 years, or a fine of 150 penalty units, or both.

(2) *A person does not "habitually consort" with convicted offenders unless:*

- (a) *the person consorts with at least 2 convicted offenders (whether on the same or separate occasions), and*
- (b) *the person consorts with each convicted offender on at least 2 occasions.*

(3) *An "official warning" is a warning given by a police officer (orally or in writing) that:*

- (a) *a convicted offender is a convicted offender, and*
- (b) *consorting with a convicted offender is an offence.*

3. The section makes it an offence for a person to continue to 'habitually consort' with convicted offenders after receiving an "official warning", either verbally or in writing, from a police officer.
4. Tajjour and Hawthorne, members of an outlawed motorcycle club, were alleged to have consorted in the coffee shop of the Downing Centre Local Court.

5. Forster, an intellectually disabled 21-year-old from northern NSW, was charged with consorting while grocery shopping with his housemate.
6. The applicants contended that the law was invalid because it impermissibly burdened the implied freedom of political communication, contravened an implied freedom of association, and was contrary to the *International Covenant on Civil and Political Rights*.
7. Particularly with regard to Forster, the Ombudsman's Report into the provisions was sought to be adduced to indicate that the provisions had been used as a social control rather than to prevent crime given its disproportionate application to Indigenous Australians.

Resolution of the Case

8. A majority (6:1) of the Court held that s 93X did not impermissibly contravene the implied freedom of political communication.
9. As explained by Hayne J at [61], the test from *Lange v Australian Broadcasting Corporation* [1997] HCA 25 requires the Court to consider two questions:
 - i. *Does the law have the legal or practical effect of burdening political communication?*
 - ii. *If it does, is the law proportionate to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government?*
10. All members of the Court (except Keane J) agreed that the law was an effective burden on political communication because it restricted meetings, some of which might include discussion of political or government matters. Keane J held that the implied freedom did not extend to situations where political communication merely might occur (see [234]).
11. Five judges (Hayne J, Crennan, Kiefel and Bell JJ, Gageler J, in separate judgments) held that s 93X was rationally connected to the legitimate end of preventing crime. Hayne J, Crennan, Kiefel and Bell JJ also rejected the plaintiffs' submission that the end could be achieved by less drastic alternatives (e.g. with time restrictions or exemptions for political communication).
12. French CJ, dissenting, held that s 93X was an impermissible burden on the implied freedom and was thus invalid at [45] because it did not discriminate between cases in which the legitimate end of preventing crime was served and those "in which it patently is not".

13. Gageler J held at [178] that the burden on the implied freedom was not proportionate because of the absence of exemptions for political communication, but held that it could be read down.
14. The Court also rejected the notion that a standalone implied freedom of association exists, and that a treaty not implemented by federal law could interfere with State legislative powers.

Implications

15. During the presentation, Mr James QC states:

Any police officer can under the Act give the warning and in the event of habitual association after the giving of the warning, any police officer can arrest. The breadth of the term "indictable offences" is such that prisoners aid organisations which certainly involve association with persons who have committed indictable offences, legal professionals and such... including those who might furnish reports and so forth to the courts are not obviously at risk of officers pursuing their duties and accepting that such bodies are in the interests of the community and the proper working of the system of justice. On the other hand, that is not to say that all police officers will share that view and the Act does not define with any particularity the purposes for which a warning can be given. The High Court looked to the use of the consorting laws for the suppression of crime and a police officer might well consider that for the purpose of suppression of crime a more indirect approach may be warranted rather than simply dealing with those who are said to be criminals.

16. It is likely that the rest of Australia will follow with equivalent legislation that may not be used solely for bikies but for a whole variety of people the government believes should be controlled.

BIOGRAPHY

Hon. Greg James AM QC

Eleventh Floor, Garfield Barwick Chambers, Sydney

Former Judge of the Supreme Court of New South Wales

Former President of the Mental Health Review Tribunal of New South Wales

Peter Lange

Peter Lange was admitted as a Solicitor in 2001 before being called to the NSW bar in 2002. His primary practise is in Criminal Law, 'White Collar', Asset Forfeiture, Extradition, Private International Law, Commercial Law, International Arbitration.

Peter Lowe

Peter Lowe was admitted as a Solicitor in 1986 before being called to the NSW bar in 1999. His primary practise is in administrative law, criminal law, appellate and inquests.

BIBLIOGRAPHY

Focus Case

Tajjour, Hawthorne and Forster v State of New South Wales (2014) 313 ALR 221; [2014] HCA 35

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_29-07-2015_insurance_banking_construction_government.pdf

Judgment Link

<http://www.austlii.edu.au/au/cases/cth/HCA/2014/35.html>

Cases

Building Construction Employees and Builder's Labourers Federation of NSW v Minister for Industrial Relations (1986) 7 NSWLR 372

Cascade Coal Pty Ltd v New South Wales; Duncan v New South Wales; NuCoal Resources Ltd v New South Wales [2015] HCA 13

Lange v Australian Broadcasting Corporation [1997] HCA 25

Legislation

Crimes Act 1900 (NSW)

Extrinsic Materials

Ombudsman's Report - Consorting Issues Paper - Review of the use of the consorting provisions by the NSW Police Force - Division 7 Part 3A of the Crimes Act 1900 - November 2013