IN THE SUPREME COURT OF NEW SOUTH WALES

No. 2017/94322

Prothonotary of the Supreme Court of New South Wales
Plaintiff

-v-

Shane Francis Dowling
Defendant

FURTHER SUBMISSIONS OF THE PROTHONOTARY

Introduction

1. These submissions are filed in accordance with the directions made by the Court at the conclusion of the hearing on 4 May 2017, and respond to the "Additional Written Submissions" prepared by the defendant and dated 14 May 2017 (**AWS**).

Notice under s 78B of the Judiciary Act

2. At the conclusion of the hearing on 4 May 2017, Senior Counsel for the Prothonotary raised the possible need for a notice pursuant to s 78B of the *Judiciary Act 1903* (Cth), in relation to the defendant's argument, in the written submissions filed in Court that day, that the suppression orders that he is alleged to have breached infringed the implied freedom of political communication.

3. Having reviewed those written submissions, the transcript of the hearing, and the defendant's further written submissions, it is submitted that the defendant should issue a notice pursuant to s 78B. By way of assistance, counsel for the plaintiff have prepared a draft notice for the defendant's consideration, on the basis of the submissions contained in the AWS, and which will be served on the defendant as **annexure A** to these written submissions. At the conclusion of these submissions directions for the Court's consideration are proposed, in order to facilitate the issuing of the s 78B notice and the timetabling of any written submissions in response thereto.

Implied freedom of political communication

4. The implied freedom of political communication protects the free and informed exercise by the people of the Commonwealth of the political choices required by ss 7, 24 and 128 of the Constitution: *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions NSW***) at [36], [103], [112]; see also *ACTV v Commonwealth* (1992) 177 CLR 106 (***ACTV***) at 187; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (***Lange***) at 557, 560. It does so by operating as a constraint on legislative power: *Lange* at 560; see also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (***APLA***) at [27], [56], [381]; *Hogan v Hinch* (2011) 243 CLR 506 at [92]; *Unions NSW* at [36]; *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) at [2], [30].

5. The defendant's submissions are premised on the notion that the implied freedom of political communication means that what he describes as his "freedom to criticise courts" cannot be constrained, either by legislation or at common law (AWS p 4). However, the implied freedom does not "create a personal right akin to that created by the First Amendment [to the US Constitution] to communicate in any particular way one might choose": *Unions NSW* at [109]-[111], see also at [36]; see also *Lange* at 560; *Mulholland v AEC* (2004) 220 CLR 181 at [107]-[109], [184]; *Monis v The Queen* (2013) 214 CLR 92 (***Monis***) at [266]; *Attorney-General for the State of South Australia v Adelaide City Corporation* (2013) 249 CLR 1 at [166]; *McCloy* at [30]. Nor is the scope of the freedom as broad as the defendant suggests. As McHugh J observed in *Levy v Victoria* (1997) 189 CLR 579 at 622:

> "The freedom protected by the Constitution is not, however, a freedom *to* communicate. It is a freedom *from* laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution. Unlike the Constitution of the United States, our constitution does not create rights of communication. It gives immunity from the operation of laws that inhibit a right or privilege to communicate political and government matters."

6. Properly viewed, the protection afforded by the freedom of political communication implied from the constitutional prescriptions of representative and responsible government does not extend to discussion of the exercise of judicial

power. In *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 181 ALR 694 at [83], Spigelman CJ cautioned against reliance upon passages from the judgment in *Lange*, which concerned the scope of qualified privilege for the purposes of the law of defamation, so as to bring judges and courts within the sphere of public officials and bodies about whom the freedom could be exercised:

> "The inclusion of courts and judges in the scope of the subject matter with respect to which the public as a whole can be identified to have an interest, for purposes of applying the traditional rules of reciprocity in the context of qualified privilege for a defamatory statement, is not coextensive with the constitutional protection of freedom of communication. That protection, as *Lange* made clear, is an implication to be derived from the text and structure of the Constitution insofar as it makes provision for representative government. The conduct of courts is not, of itself, a manifestation of any of the provisions relating to representative government upon which the freedom is based."

7. Justice McHugh made observations to similar effect in *APLA* at [66], in a passage referred to with approval in *Hogan v Hinch* at [93]:

> "The distinction between communications concerning the administration of justice that are within the *Lange* freedom and those that are not may sometimes appear to be artificial. But it is a distinction that arises from the origins of the constitutional implication concerning freedom of communication on political and government matters. The *Lange* freedom arises from the necessity to promote and protect representative and responsible government. Because it arises by necessity, the freedom is limited to 'the extent of the need'. Courts and judges and the exercise of judicial power are not themselves subjects that are involved in representative or responsible government in the constitutional sense."

8. In *The Herald and Weekly Times Ltd v Popovic* (2003) 9 VR 1 at [9], Winneke ACJ observed that while judicial officers are "public figures", and that the executive branch of government "has a strong interest in the due administration of justice", it did not follow that the implication that a discussion about the discharge by a judicial officer of his or her function in a particular case is a discussion concerning political or government matters in the relevant sense:

> "It is true that, when discharging their functions, judicial officers are performing a public role; one which is to be performed in the 'public gaze' and, thus, open to public scrutiny and comment. It is also true that the discharge of functions by judicial officers in particular cases will attract comment by the media; some of it strongly critical of the judicial officer's

> handling and disposition of the case. However, that is not to say that such comment assumes the status of a communication concerning political or government matters which are relevant to the system of representative and responsible government so as to attract the freedom which the Constitution protects. Such comment and criticism could, in my view, have no impact or influence upon the choice of their representatives by the people of Australia."

9. In his Honour's opinion (at [10]), expression of a view, no matter how critical, about the manner in which a judicial officer has discharged his or her functions in a particular case fell short of discussion about government and political matters facilitating the system of representative and responsible government: "The fact that it can be inferred from the published article that the author thinks that the respondent should be removed from office does not, in my view, make the discussion any more or less relevant to that system of government". See also at [500]-[501] per Warren AJA; and *John Fairfax Publications Pty Ltd v O'Shane* (2005) Aust Torts Reports 81-789 at [94]-[95] per Giles JA.

10. Consistent with the above authorities, it is submitted that the content of the article that the defendant published on his website on 5 February 2017, which is relied on in support of the second and third charges, does not fall within the scope of the protection of the implied freedom of political communication. Contrary to the defendant's submission (AWS p 5), the article that he published on 5 February 2017 was not "clearly political communication".

11. Similarly, the comments that the defendant made in court on 3 February 2017 were not of a nature that the implied freedom of communication operates to protect. To the contrary, they were baseless and scurrilous accusations, levelled against the Registrar and a judge of the Supreme Court, in a manner that had a tendency, as a matter of practical reality, to interfere with the administration of justice.

12. Accordingly, the defendant's arguments as to the validity of the charges on constitutional grounds fall at the threshold. Consistent with the practice of courts not to determine constitutional questions unless it is necessary to do so, it is submitted that the present case does not require the Court to embark upon consideration of the interaction between the law of contempt and the implied freedom, or whether the provisions of the *Court Suppression and Non-publication*

Orders Act 2010 (**Suppression Orders Act**) which permit the Court to make suppression orders and non-publication orders impermissibly infringes the implied freedom. In relation to the practice to which the Prothonotary refers, see *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at [355] and the cases cited at footnote 482.

13. Even if the statements that the defendant made on 3 February 2017 could conceivably be characterised as being within the scope of communications protected by the implied freedom, it is submitted that the common law of contempt with respect to scandalising the court is not inconsistent with maintenance of the implied freedom. As Gleeson CJ observed in *Attorney-General for New South Wales v Time Inc Magazine Co Pty Ltd* (unreported, Court of Appeal, 15 September 1994), in a passage to which Kirby P referred with approval in *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81 at 109:

> "The common law principles...are themselves the result of a balancing of competing interests; the public interest in freedom of expression and the public interest in the administration of justice. Freedom of expression is not unconditional. Expression can, for legally relevant principles, be free even though it is subject to other legitimate interests."

14. In *John Fairfax v Doe* the appellant sought to contend that the law of contempt was controlled by the implied freedom. In rejecting that argument, Kirby P also referred with approval to the statement of Deane J in *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 that: "the justification for contempt lies not in the protection of the reputation of the individual judge or parliamentarian but in the need to ensure that parliaments and courts are able effectively to discharge the functions, duties and powers entrusted to them by the people". In *Attorney-General (NSW) v X* (2000) 49 NSWLR 653 at [113], Spigelman CJ observed that the compatibility of the laws of contempt and the implied freedom had been recognised in number of cases. In addition to citing Gleeson CJ's reasons in *Attorney-General (NSW) v Time Inc Magazine* and those of Kirby P in *Doe*, his Honour referred to *Civil Aviation Authority v Australian Broadcasting Corporation* (1995) 39 NSWLR 540; and *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316 at 324-325 per Ipp J and 343 per Anderson J (cf *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at [61]).

15. In *John Fairfax v Doe* the appellant sought to publish telephone intercept material to which a private individual was a party. Kirby P described as "unthinkable" a situation in which the beneficial development of the implied freedom "were seen, by the appellant or anyone else, as a vehicle for destroying the essential power and duty of the courts in this country to protect the fair trial right of persons accused of crimes" (at 110). Although the compatibility between the law of contempt for scandalising the court and the implied freedom appears not to have been the subject of specific judicial consideration, it is submitted that the reasoning of Kirby P in *Doe* would apply equally to the interests of the administration of justice secured by the prosecution of this category of contempt.

16. As to the defendant's breach of the suppression orders, even if the Court were to conclude that the defendant's communications were of a nature that is protected by the implied freedom it is submitted that the provisions of the Suppression Orders Act, in particular ss 7 and 10, do not infringe the implied freedom of political communication.

17. The central question for consideration in this context is what the impugned law does: *APLA* at [381]; *Hogan v Hinch* at [5], [50]; *Monis v The Queen* (2013) 214 CLR 92 at [62]; *McCloy* at [24]. In determining whether the law in question infringes the implied freedom of political communication, the questions for the Court's consideration are:

    a. Do the provisions effectively burden the relevant freedom, either in its terms operation or effect, which requires consideration as to how the section affects the freedom generally: *Unions NSW* at [35] (French CJ, Hayne, Kiefel, Crennan and Bell JJ), citing *Lange* at 567 and *Wotton v Queensland* (2012) 246 CLR 1 at [80]?

    b. If the answer to the first question is yes, are the provisions reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government: *Lange* (1997) 189 CLR 520 at 567-568, as modified in *Coleman v Power* (2004) 220 CLR 1 at 50, 77-78 and 82; *Unions NSW* at [44]; *McCloy* at [67]-[68]?

18. The making of suppression and non-publication orders is addressed in Part 2 of the Suppression Orders Act. Section 6 of the Act, which is the first provision in that Part, provides that in deciding whether to make such an order "a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice". The power to make an order, which is conferred by s 7 of the Act, is conditioned by the enumerated grounds in s 8(1) of the Act, one or more of which must be satisfied before an order under s 7 can be made. That subsection provides:

> "A court may make a suppression order or non-publication order on one or more of the following grounds:
>
> (a) the order is necessary to prevent prejudice to the proper administration of justice,
>
> (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,
>
> (c) the order is necessary to protect the safety of any person,
>
> (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency),
>
> (e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice."

19. The period for which an order is to remain in force is to be specified in the order (s 12). The Court may review such orders of its own motion (s 13(1)); and various parties may otherwise apply for a review, including a party to the proceedings, the Government and a media organisation (s 13(2)). The same persons identified in s 13(2) may also appeal (with leave) from a decision of a court to make a suppression order (see s 14). If leave is granted, an appeal is to be by way of rehearing and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be led (s 14(5)).

20. As to the scheme under the Suppression Orders Act for the making of suppression orders, it may be observed that to the extent that such orders may

burden political communication, they do not do so directly. That is, they do not directly touch upon that "indispensable incident" of the constitutional system, being communications concerning government or political matters between electors and legislators and the officers of the Executive, and between electors themselves, on matters of government and political matters: *Lange* at 559-560; *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at [44]. As Deane and Toohey JJ observed in *ACTV*, "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".

21. To the extent that orders made under s 7 of the Suppression Orders Act may indirectly burden the implied freedom, it is submitted that the provision is reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of representative and responsible government provided for in the Constitution. By reference to the consideration in s 6, and the grounds on which an order can be made in s 8, the clear purpose of the provision is to ensure that, in appropriately limited cases, the proper administration of justice can be secured. Aspects of the scheme such as:

    a. the limited bases on which an order under s 7 may be made;

    b. the fact that the orders are reviewable not only of the Court's own motion, but also on the application of a broader range of persons than the parties alone; and

    c. the fact that the orders may be appealed with leave,

    all support the proposition that the means chosen by the legislature are proportionate to the purpose being pursued: *Tajjour v New South Wales* (2014) 254 CLR 508 at [113].

22. Accordingly, and only to the extent that it is necessary to consider the question, it is submitted that s 7 of the Suppression Orders Act does not infringe the implied freedom of political communication.

Validity of the suppression orders

23. Further, and in any event, for the purposes of the charges laid against the defendant a finding that the legislation pursuant to which they are made is invalid would not affect the validity of earlier orders made thereunder by the Supreme Court. In *State of NSW v Kable* (2013) 252 CLR 118, the plurality (French CJ, Hayne, Kiefel, Bell and Keane JJ) stated (at [32]):

> "It is now firmly established by the decisions of this Court that the orders of a federal court which is established as a superior court of record are valid until set aside, even if the orders are made in excess of jurisdiction (whether on constitutional grounds or for reasons of some statutory limitation on jurisdiction)."

24. The issue before the High Court was whether the State could be liable for false imprisonment on the basis that the order of Levine J (made pursuant to legislation which the High Court held invalid in *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51) was unlawful. The Court of Appeal had held that the order was not an exercise of judicial power, and hence could not support the lawfulness of Mr Kable's imprisonment at any stage. In reversing that decision, the cases to which the Court referred in support of the proposition extracted above included *Cameron v Cole* (1944) 68 CLR 571 at 590, 598, 606-607; *DMW v CGW* (1982) 151 CLR 491 at 501-505, 507; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 193-194, 222-223; and *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [19]-[23], [46]-[57], [214]-[220], [253]-[257], [342]-[344].

25. As to the general proposition, arising in a contempt context, that orders of a superior court must be obeyed unless and until they are set aside, see also *Rumble v Liverpool Plains Shire Council* (2015) 90 NSWLR 506 at [60]-[61] per Beazley P; and at [114]-[118] per Basten JA (McColl JJA agreeing).

Irrelevance of other proceedings

26. The defendant's submission that the charges against him should be dropped because neither the Registrar nor the judicial officer who were the subject of his allegations in the present case, have sued him for defamation or otherwise complained about the articles he has written (AWS p 11-12) should be rejected. The fact that the officers who are the subject of the allegations have not taken

action against the defendant does not gainsay the impact of the allegations that he made on the administration of justice, with which the present contempt proceedings are concerned.

27. Nor is it necessary (or appropriate), in order to prove the charges, for the Registrar and judicial officers in question to file affidavits in the proceedings (cf AWS p 12). The evidence led by the Prothonotary establishes the elements of the charges beyond reasonable doubt.

The evidence of Richard Keegan

28. The defendant's contention that Mr Keegan deliberately edited the transcript of the directions hearing before Registrar Bradford (AWS p 12) is plainly incorrect. Annexure "A" to Mr Keegan's affidavit is a copy of the transcript as originally prepared by Reporting Services Branch (**RSB**). Mr Keegan's evidence was that the transcript accorded "generally" with his recollection of what transpired when he was present in court (at [10]).

29. The Prothonotary subsequently obtained a copy of the audio recording of the directions hearing. That recording was exhibited to the affidavit of Ms Moore, and was played in Court during the hearing on 4 May 2017. In providing the recording, RSB made a number of amendments to the transcript. A copy of the amended transcript was also provided to the Court, and the defendant, as an aide memoire to the audio recording.

30. The amendments to the transcript included the addition of the words "an absolute grub" to the defendant's description of Hoeben CJ at CL (MFI 1 p 3). However, that amendment does not support the defendant's contention that Mr Keegan deliberately edited the transcript annexed to his affidavit. To the contrary, a comparison of Annexure "A" to his affidavit with Annexure "B" to the affidavit of Jillian Caldwell affirmed on 5 April 2017 shows that the version of the transcript in the possession of the Prothonotary before 3 May 2017 also did not include the phrase.

31. The defendant also asserts that he was denied the opportunity to cross-examine Mr Keegan. He was not denied such opportunity. While, even now, it would be open to the Court to have the matter relisted for the purpose of Mr Keegan being

cross-examined, it is doubtful whether there would be any utility in doing so. The sound recording of the directions hearing before Registrar Bradford of 3 February 2017 is in evidence. In the present case, Mr Keegan's credibility is not in issue. Further, that the defendant, on 3 February 2017, "spoke in a loud and aggressive tone" (Affidavit or Richard Keegan sworn 5 April 2017 at [8])) is readily apparent from the sound recording that is in evidence and which the Prothonotary played at the hearing in the present case on 4 May 2017.

Further Directions

32. Consistently with the submission that the defendant should issue a notice pursuant to s 78B of the *Judiciary Act*, it is proposed that the following directions be made in chambers by the Court:

(i) On or before 5 June 2017 the defendant serve a notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) on the Attorneys-General of the Commonwealth, the States, the Australian Capital Territory, the Northern Territory and on the plaintiff.

(ii) On or before 14 June 2017, the defendant file with the court, and serve on the plaintiff, an affidavit of service of each notice required to be served under order 1.

(iii) Any Attorney General seeking to intervene in the proceeding is to file and serve written submissions on or before 26 June 2017.

(iv) If any written submissions are received by 26 June 2017 from any Attorney General seeking to intervene in the proceedings, the defendant is to file and serve submissions in response on or before 10 July 2017.

(v) If the Court considers a further hearing is necessary in relation to the matters the subject of the s 78B notice, the matter is to be listed for directions on a date to be fixed.

(vi) Liberty to apply on two days' notice.

33. It may be noted that the direction contemplated in sub-paragraph (ii) above is consistent with the approach taken by r 1.23 of the *Uniform Civil Procedure Rules 2005*.[1]

34. Attached to these submissions, as **annexure B**, is a list of the address details of the Attorneys-General of the Commonwealth, the States, the Australian Capital Territory, the Northern Territory, which the defendant can utilise for service of the s 78B notice contemplated by proposed direction in sub-paragraph (i) above.

26 May 2017

David Kell SC
Crown Advocate
Crown Advocate's Chambers

Anna Mitchelmore
Sixth Floor Selborne Chambers

[1] Putting to one side, as not presently needing to be determined, the question of whether the *Uniform Civil Procedure Rules 2005* apply to proceedings for criminal contempt. See *Prothonotary of the Supreme Court of NSW v Chan* (No 6) [2014] NSWSC 153 at [36].

ANNEXURE A

NOTICE OF A CONSTITUTIONAL MATTER

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
Registry	Sydney
Case number	2017/94322

TITLE OF PROCEEDINGS

Plaintiff	**Prothonotary of the Supreme Court of New South Wales**
Defendant	**Shane Francis Dowling**

FILING DETAILS

Filed for

Legal Representative

Legal Representative Reference

Contact name and telephone

Contact email

NATURE OF CONSTITUTIONAL MATTER

1. The Defendant's Additional Written Submissions in this matter, a copy of which is annexed hereto and marked with the letter "A", seek to raise the following issues:

    "1. Is what is said in court protected by the freedom of communication on matters of government and politics as per Lange v ABC (1997) HCA?"

    2. Is criticism and/or allegations of corruption against Judicial officers protected by the freedom of communication on matters of government and politics as per Lange v ABC (1997) HCA?

    3. Are suppression orders issued by a court invalid if they infringe on the freedom of communication on matters of government and politics as per Lange v ABC (1997)?

4. Are proceedings for contempt invalid if they infringe on the freedom of communication on matters of government and politics as per Lange v ABC (1997)?"

2. The Defendant's references to "Lange v ABC (1997) HCA" are understood to be to the decision of the High Court of Australia in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

FACTS SHOWING SECTION 78B *JUDICIARY ACT 1903* (CTH) APPLIES

3. The nature of the proceedings, and the particular facts giving rise to the constitutional issues described at [1] above, are set out in the transcript of proceedings before Wilson J dated 4 May 2017, a copy of which is annexed hereto and marked with the letter "B". The defendant supplemented his oral argument before Wilson J with the Additional Written Submissions which comprise Annexure A hereto.

4. The circumstances in this notice of a constitutional matter is issued are set out in the transcript of proceedings before Wilson J dated 4 May 2017, a copy of which is attached hereto and marked with the letter "B".

5. The matter has no current listing date.

SIGNATURE

Signature

.....

Date of signature

ANNEXURE B –
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