HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **JOHN SHI SHENG ZHANG**
Plaintiff

and

THE COMMISSIONER OF POLICE
First Defendant

JANE MOTTLEY
Second Defendant

JOSEPH KARAM
Third Defendant

MICHAEL ANTRUM
Fourth Defendant

JOINT ANNOTATED SUBMISSIONS OF THE FIRST DEFENDANT AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

PART I: CERTIFICATION

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

PART II: CONCISE STATEMENT OF ISSUES

2. The issues are reflected in the questions of law stated by the parties (SCB 59-60 [59]).

PART III: SECTION 78B NOTICES AND INTERVENTION

3. The Attorney-General of the Commonwealth intervenes in this proceeding under s 78A of the *Judiciary Act 1903* (Cth), in support of the first defendant.

4. The plaintiff has given notice under s 78B of the *Judiciary Act*. The first defendant and the Attorney-General (**the Commonwealth**) consider that no further notice is required.

PART IV: MATERIAL FACTS

5. The material facts, and the defined terms used below, are set out in SCB 45-60.

PART V: ARGUMENT

6. In summary, the Commonwealth submits as follows:

6.1. ***Challenge to the Warrants and s 3LA Orders.*** The First, Second and Third Search Warrants (the **Warrants**) each complied with the requirement to "state … the offence" to which they related. They conveyed what was necessary to mark out the boundaries of the search. Whether or not they were required to identify the relevant "target" for the purposes of the s 92.3(2) offence, or the relevant foreign principal for the purposes of both the s 92.3(1) and (2) offences, they did so. If there was any defect in the description of the s 92.3(2) offence but not the s 92.3(1) offence, the statement of the s 92.3(2) offence can be severed. The validity of the s 3LA Orders rises or falls with the validity of the First Search Warrant.

6.2. ***Challenge to s 92.3(1) and (2).*** Properly construed, the provisions have a narrower operation than that for which the plaintiff contends. At most, they place a very limited burden on political communication. The purpose of the provisions — protecting Australia's sovereignty by reducing the risk of foreign interference in Australia's political or governmental processes — is not only legitimate, but serves to preserve and enhance the system of representative and responsible government. The provisions are reasonably appropriate and adapted to that significant purpose. Accordingly, any burden on the freedom is justified.

6.3. ***Relief.*** If the Warrants and/or the s 3LA Orders are invalid, certiorari should issue to quash them. However, the plaintiff should be granted declaratory relief only if the Court dismisses the challenge to the Warrants based on the alleged mis-statement of the offences, but finds that s 92.3(1) or (2) contravene the implied freedom. Otherwise, as occurred in *Smethurst*,[1] declaratory relief concerning the validity of the impugned provisions should be refused. Finally, the injunctive relief sought should be refused even if the Warrants are quashed in their entirety, as again is consistent with *Smethurst*.

A. Validity of the Warrants and s 3LA Orders (Questions 1(a)-(b) and 2)

7. ***Applicable principles.*** Section 3E(5)(a) of the *Crimes Act 1914* (Cth) required each Warrant to "state … the offence to which the warrant relates". While that requirement is important in preventing the issuing of general warrants, it does not do the work that the plaintiff's submissions suggest (which treat it as requiring warrants to state "with precision" the way the suspected facts relate to every element of the offence): PS [15].

8. As recently explained in *Smethurst*, s 3E(5)(a) requires the relevant offence to be "stated on the face of the warrant, in a way which is both intelligible and sufficient to convey what those concerned with or affected by the warrant need to understand".[2] The test is one of "sufficiency to indicate the areas of the search".[3] It is not necessary for a warrant to state the offence with the same precision and specificity as is required for an indictment.[4] Nor is it necessary that the statement of the offence be framed by reference to the elements of the offence.[5] That being so, the omission or misstatement of an element of the offence does not, of itself, constitute a failure to comply with s 3E(5)(a). It will do so if, and only if, the omission or misstatement means that the warrant fails sufficiently to indicate the areas of search.[6] The question is one of substance.[7]

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1 *Smethurst v Commissioner of Police* (2020) 94 ALJR 502.
2 *Smethurst* (2020) 94 ALJR 502 at [27] (Kiefel CJ, Bell and Keane JJ; Gageler, Nettle and Gordon JJ agreeing).
3 *Smethurst* (2020) 94 ALJR 502 at [28].
4 *Smethurst* (2020) 94 ALJR 502 at [28], see also at [29]-[38]; *New South Wales v Corbett* (2007) 230 CLR 606 at [99] (Callinan and Crennan JJ, with whom Gleeson CJ and Gummow J generally agreed).
5 So much is demonstrated by *Corbett* (2007) 230 CLR 606 at [97], [99] and [103]-[104] (Callinan and Crennan JJ, with whom Gleeson CJ and Gummow J generally agreed).
6 See also *Smethurst* (2020) 94 ALJR 502 at [204] (Edelman J).
7 *Caratti v Commissioner of the Australian Federal Police* (2017) 257 FCR 166 at [105] and [114] (the Court).

9. Those propositions reflect the practical nature of the requirement that the warrant "state … the offence to which the warrant relates". The warrant must be read as a whole,[8] in a manner reflecting a broad practical approach and without overzealous technicality.[9] That is necessary to give effect to Parliament's judgment that, in order to advance the public interest in the investigation and prosecution of crimes,[10] warrants can be granted on the basis of a reasonable suspicion of crime (and therefore before all the facts are known) "in aid of a criminal investigation being conducted by police officers … not a curial process conducted by lawyers".[11] Accordingly, "[i]t is general warrants that must be avoided, not warrants that lack the precision of … curial processes, either civil or criminal".[12]

10. ***First ground: Alleged misstatement of the s 92.3(2) offence.*** The plaintiff submits that para (ii) of each statement of the s 92.3(2) offence misstated the offence, because it referred to recklessness as to whether the conduct would influence a political process or the exercise of a political right or duty, rather than recklessness as to whether the conduct would influence another person — the target — in relation to those matters (PS [8]-[9]). That submission proceeds from the mistaken premise that in order to "state the offence" under s 3E(5)(a) a warrant must correctly state all the elements thereof.

11. The real question is whether the Warrants failed sufficiently to indicate the areas of the search. In that regard, the account at PS [10]-[11] fails to acknowledge that an objective and practical reading of the relevant part of the third condition of each Warrant disclosed that the suspected offence was against s 92.3(2) of the *Criminal Code*, and related to the plaintiff's dealings with Mr Moselmane, allegedly on behalf of the People's Republic of China (**PRC**), from about 1 July 2019 to 25 June 2020, in order to advance the interests and policy goals of the PRC. That was ample to indicate the area of the search.

12. ***Second ground: Alleged failure to identify the target with precision.*** Given the applicable principles, it would not of itself be a ground of invalidity that a warrant does not expressly identify a target within the meaning of s 92.3(2): as explained above, a

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8 *Smethurst* (2020) 94 ALJR 502 at [42].

9 *Caratti* (2017) 257 FCR 166 at [105] and [114] (the Court), referring with approval to *Beneficial Finance Corporation Ltd v Commissioner of Australian Federal Police* (1991) 31 FCR 523 at 538, 543 (Burchett J; Sheppard J agreeing, Pincus J substantially agreeing).

10 *Smethurst* (2020) 94 ALJR 502 at [25].

11 *Caratti* (2017) 257 FCR 166 at [114] (the Court); *Beneficial Finance* (1991) 31 FCR 523 at 533 (Burchett J); *Hart v Commissioner of the Australian Federal Police* (2002) 124 FCR 384 at [68] (the Court), endorsed in *Caratti* (2017) 257 FCR 166 at [24].

12 *Caratti* (2017) 257 FCR 166 at [114] (the Court).

warrant need not be framed by reference to the elements of the offence, and hence, need not give particulars of such elements. In any event, contrary to PS [15]-[16], the target of the alleged s 92.3(2) offences identified by the Warrants was plainly Mr Moselmane. In para (iii) of each statement of the s 92.3(2) offence, the Warrants referred to the plaintiff "conceal[ing] from or fail[ing] to disclose to" ***Mr Moselmane*** that the plaintiff was "acting on behalf of or in collaboration with Chinese State and Party apparatus". That references the language of s 92.3(2)(d) of the *Criminal Code*, being that the offender "conceals from, or fails to disclose to, ***the target*** the circumstance mentioned in paragraph (b)" (emphasis added). The plaintiff accepts that para (iii), either read alone or alongside s 92.3(2)(d), clearly identified Mr Moselmane as the target, but then suggests that other aspects of the Warrants' framing detract from that clarity (PS [16]). That submission should be rejected. Contrary to PS [16], para (i) of each statement of the s 92.3(2) offence reinforces the conclusion above: it demonstrates that part of the conduct alleged to constitute the offence was that the plaintiff "engaged… with" Mr Moselmane to advance the policy goals of the PRC "by providing support and encouragement to [Mr Moselmane] for the advocacy of Chinese State interests". That conveys that it was through the plaintiff's influence on Mr Moselmane that any further influence was to be achieved. On a fair reading of the Warrants, no other person could plausibly be thought to have been the target.

13. In any event, the test being "sufficiency to indicate the areas of the search", in light of the express references in paras (i) and (iii) to Mr Moselmane, it is fanciful to suggest that the absence of reference to Mr Moselmane in para (ii) led to the search being any broader than it would otherwise have been (cf PS [18]). To the contrary, para (i) specified the conduct the subject of the alleged offending, being that the plaintiff "engaged … with Mr Moselmane", while para (ii) was directed to the mental state alleged to have accompanied ***that conduct*** (as the introductory words of para (ii), "in doing so", made clear). Given that language, para (ii) could not reasonably be read as expanding the scope of the search to communications with members of the New South Wales branch of the ALP or residents of New South Wales other than Mr Moselmane.

14. ***Third ground: Alleged failure to identify the foreign principal with precision.*** Again, having regard to the applicable principles, it was not a requirement that the Warrants be framed so as to identify a foreign principal simply because that is an element of the offences. In any event, contrary to PS [19], there is no lack of clarity as to the relevant

foreign principal in respect of the statements of both the s 92.3(1) and (2) offences. Paragraph (i) of the statement of each offence specified, in terms, that the relevant foreign principal was the "Government of the People's Republic of China".[13] There is no inconsistency between that clear and express statement and the subsidiary references to the "Chinese State and Party apparatus", given that the PRC is a one-party State which is governed by the Chinese Communist Party (SCB 55 [41.2]). The submission that the use of the term "Chinese State and Party apparatus" is "suggestive of a meaningful distinction between it and the Chinese government" (PS [20], see also [21]) reflects precisely the kind of overzealous technicality that is to be eschewed. The plaintiff correctly acknowledges that each of the terms about which he complains "directed attention to the Chinese Government" (PS [21]). That being so, there is no substance to the proposition that the Warrants failed to identify the foreign principal. In any case, while clearly there must ***be*** a foreign principal, s 92.3(3) makes it unlikely that precision in the identification of that foreign principal within a warrant is essential to its validity.

15. ***Severance.*** If, contrary to the foregoing, the Court concludes that there is a material defect in the statement of the s 92.3(2) offence, but not the s 92.3(1) offence, the plaintiff correctly accepts that the former is severable (PS [12]). It follows that, unless the plaintiff succeeds in the third ground discussed above, none of the Warrants is wholly invalid.

16. ***Section 3LA Orders.*** If the First Search Warrant is wholly invalid, the Commonwealth accepts that the First and Second s 3LA Orders are likewise invalid. Otherwise, the submissions at PS [24]-[27] concerning the validity of the s 3LA Orders do not arise.

B. Validity of s 92.3(1)-(2) of the *Criminal Code* (Question 1(c)-(d), 3-4)

17. For the reasons set out in paragraph 47 below, the Court need only consider the constitutional validity of the provisions if it answers Questions 1(a)-(b) favourably to validity. Following *McCloy* and *Brown*,[14] whether s 92.3(1)-(2) offend the implied freedom of political communication is to be determined through the application of the three-part test identified in PS [29]. Before turning to the application of that test, it is necessary to resolve any question of construction attending the provisions.[15]

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13 A "foreign principal" within the meaning of *Criminal Code*, ss 90.2(a) and 90.3(a).

14 *McCloy v New South Wales* (2015) 257 CLR 178; *Brown v Tasmania* (2017) 261 CLR 328.

15 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at [11] (Gummow, Hayne, Heydon and Kiefel JJ).

(a) Construction of the provisions

18. The plaintiff's response to many of the constructional choices presented by the provisions — reminiscent of the "all-or-nothing" approach discouraged by Gageler J in *Tajjour*[16] — is that the relevant term is undefined and, read in context, should be given a broad meaning (in addition to the matters specifically addressed below, see PS [33], [52] re "influence"; PS [52] re "support" and "intelligence activities"). In three important respects, the plaintiff's construction of s 92.3 is overbroad. However, before addressing those matters, it is necessary to address the relationship between s 92.3(1) and 92.3(2).

19. ***The different focuses of s 92.3(1) and (2).*** Section 92.3(1) and (2) create quite different offences. Section 92.3(2) is concerned with foreign influence that is not disclosed to, or that is concealed from, a target. Thus, the mischief to which it is directed is the harm caused by ***undisclosed foreign influence***. That is why that subsection has no operation in any case where a person discloses his or her relationship with a foreign principal to the target (that being the necessary consequence of s 92.3(2)(d)).

20. By contrast, s 92.3(1) does not require there to be a target, and if there is a target, does not depend on the target being unaware of the alleged offender's relationship with a foreign principal. Instead, s 92.3(1) criminalises foreign influence that is pursued by ***illegitimate means*** – specifically, those identified in s 92.3(1)(d): covert conduct, deception, threats of serious harm or demands with menaces. That is important in understanding the relationship between the "conduct" referred to in sub-ss (a) and (d) — which in cases where the conduct may have the consequences identified in sub-ss (c)(i) or (ii) may conveniently be called the "***influencing conduct***" — and the "circumstance" of the relationship to a foreign principal referred to in sub-s (b). When sub-s (d) refers to "any part of the conduct", it can only be referring to the same conduct identified in sub-s (a). Accordingly, to come within s 92.3(1), at least part of the influencing conduct must involve one or more of the illegitimate means identified in sub-s (d). For that reason, influencing conduct that takes place wholly in the open (e.g. consisting only of a speech or opinion article) will ordinarily be incapable of contravening s 92.3(1) unless the influencing conduct is deceptive.[17] Influencing conduct cannot be "covert" if it takes

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16 *Tajjour v New South Wales* (2014) 254 CLR 508 at [175].

17 On the assumption that threats to cause harm, and demands with menaces, will not take place in the open. "Deception" is defined in s 92.1 to mean intentional or reckless deception by "words or other conduct" and to include "a deception as to the intentions of the person using the deception or any other person".

place wholly in the open, even if the alleged offender takes steps to keep secret that the conduct is undertaken on behalf of a foreign principal, because the quality of "covertness" must attach to the influencing conduct in sub-s (a), rather than just to the "circumstance" in sub-s (b). Of course, much will depend on how the influencing conduct is particularised. However, to the extent that the example in the Revised Explanatory Memorandum suggests that s 92.3(1)(d)(i) may be satisfied if the only thing which is kept secret is the fact that the conduct is undertaken on behalf of a foreign principal, that may be correct only for some operations of 92.3(1).[18]

21. ***First issue of construction: the meaning of "covert".*** Contrary to PS [38], the word "covert" in s 92.3(1)(d)(i) should not be construed to include conduct that is simply "private" or "not openly acknowledged". The ordinary meaning of the text, and its context, point against such a construction. As to the ***text***, the plaintiff accepts that the ordinary meaning of covert is "concealed, hidden, secret; disguised".[19] It is inherent in that formulation that covertness involves taking ***action*** to conceal, hide, keep secret or disguise the relevant conduct. On that ordinary meaning, the quality of being private is therefore insufficient to render something covert.

22. That conclusion is reinforced by ***context***. The heading of both the Subdivision and s 92.3 itself make clear that s 92.3 is concerned with "foreign interference", being "foreign influence that is undertaken in a way that is clandestine, deceptive and/or threatening, or is otherwise detrimental to a nation's interests" (SCB 54 [38]). In addition, s 92.3(1)(d)(i) collocates the concept of "covertness" with "or involves deception". Rather than inviting a "juxtaposition" (cf PS [38]), the grouping of the terms "covert or involves deception" suggests a commonality between them: it indicates that each term "will have a quality at least as serious in effect … as the other word[ ] convey[s]".[20] The seriousness of the effects with which the section is concerned is reinforced by sub-s (d)(ii)-(iii).[21] Further, deception, threats and demands with menaces each involve the taking of some ***action***, thereby reinforcing the conclusion that covertness involves taking some action to

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18 See, eg, Revised Explanatory Memorandum, EFI Bill, 205 [927]. The example would not be correct where the influencing conduct was wholly public, but might be correct where covert communications with a foreign principal are themselves part of the conduct which may have one of the effects in, eg, s 92.3(1)(c)(iii) or (iv).

19 See PS [38] and *The New Shorter Oxford English Dictionary* (4th ed, 1993), vol 1, 535. See also the *Macquarie Dictionary (Online)*, accessed 20 November 2020, meaning 2 ("concealed; secret; disguised").

20 *Monis v The Queen* (2013) 249 CLR 92 at [310] (Crennan, Kiefel and Bell JJ).

21 See the definition of "menaces" in ss 92.1 and 138.2 of the *Criminal Code*, and the definitions of "threat" and "serious harm" in the Dictionary to the *Criminal Code*.

conceal, hide, keep secret or disguise the relevant conduct. The Revised Explanatory Memorandum supports that construction. Having explained that "[t]he reference to 'covert' is intended to cover any conduct that is hidden or secret or lacking transparency", the Memorandum goes on to give examples of covert conduct that involve the taking of some ***action*** of concealment: eg a person copying "documents or listen[ing] into private conversations without the targeted person's knowledge or consent".[22] It may be accepted that the word "covert" thus has a similar meaning to the word "clandestine", as used in s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (PS [39]–[40]), but nothing turns on this: that is a different Act to the one being construed and the *Criminal Code* does not use the word "clandestine".

23. On the above construction, use of an encrypted messaging service may or may not be sufficient to render conduct "covert" depending on all the circumstances (cf PS [41]). Consistently with the Revised Explanatory Memorandum, something further than mere use of that service would be required, such as the participants to the encrypted messaging discussion keeping that discussion separate from more usual communications on an unencrypted platform.

24. ***Second issue of construction: the fault element attaching to "covert".*** At PS [42], the plaintiff submits that "[i]ntent is only a fault element of the offence under sec 92.3(1) insofar as the person must have intentionally engaged in the conduct". That is not correct. For the reasons that follow, the matters specified in s 92.3(1)(d) are properly to be regarded as "conduct" physical elements (s 4.1(1)(a)), with the result that the fault element is intention (s 5.6(1)).[23] *First*, s 92.3(1)(a) plainly contains a "conduct" physical element, with the fault element of intention. As s 92.3(1)(d) refers to the ***same conduct*** to which s 92.3(1)(a) refers (or to a part of that same conduct), it follows that sub-s (d) refers to conduct for which the default fault element is intention. Any other approach risks introducing inconsistency in fault elements with respect to the same conduct. *Secondly*, the qualities referred to in sub-s (d)(i)-(iii), including covertness, are more readily characterised as "state[s] of affairs" or "act[s]" (and thus "conduct": s 4.1(2)) than as "a circumstance in which conduct, or a result of conduct, occurs" (s 4.1(1)(c)). The

[22] Revised Explanatory Memorandum, EFI Bill at 205 [925].

[23] It may be accepted that the Revised Explanatory Memorandum, EFI Bill at 204 [924] described the fault element for s 92.3(1)(d) as recklessness. However, clearly such a statement does not control the correct construction of the provision: see, eg, *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at [31]-[32] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

plaintiff seemingly accepts that to be the case in respect of s 92.3(2)(d), which bears some similarities to s 92.3(1)(d) (PS [42]).

25. ***Third issue of construction: "on behalf of".*** Contrary to PS [51], the expression "on behalf of" in s 92.3(1)(b)(i) and 92.3(2)(b)(i) does not extend to "conduct engaged in in support of, or in the interests of, a foreign principal". That is to adopt what this Court in *R v Toohey; Ex Parte Attorney-General (NT)* described as "perhaps [the] least specific use" of the expression, instancing "someone who does no more than express support for persons or for a cause, as with one who speaks on behalf of the poor or on behalf of tolerance".[24] When used to describe the relationship of the alleged offender with a foreign principal in the context of a criminal statute,[25] in conjunction with the words "in collaboration with" and "directed, funded or supervised", the expression has a narrower meaning. The kind of relationship at issue is evidenced by an example given in the Revised Explanatory Memorandum: where the alleged offender is "tasked" by a foreign official or person acting on behalf of a foreign principal.[26] It connotes a circumstance where the alleged offender is the instrument of the foreign principal.

(b) Effective burden

26. For two reasons, the impugned provisions burden the implied freedom to at most a very limited extent. It is only ***insofar as*** the impugned provisions burden the implied freedom that the Court's supervisory role is engaged to consider the justification for that burden.[27]

27. First, the provisions on their face proscribe only a limited class of political communication. They do not proscribe communication by individuals on their own behalf, nor do they proscribe communication directly by foreign principals.[28] Similarly, they do not proscribe communication lacking the qualities identified in s 92.3(1)(d) and (2)(d). For example, all a person needs to do to avoid any operation of s 92.3(2) is to disclose to the target their relationship to the foreign principal. Once such a disclosure occurs, the person can engage in any political communication they wish, unburdened by

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24 (1980) 145 CLR 374 at 386 (Stephen, Mason, Murphy and Aickin JJ).

25 See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [57] (Hayne, Heydon, Crennan and Kiefel JJ).

26 Revised Explanatory Memorandum, EFI Bill at 203 [915]-[916] and 209 [946]-[947].

27 *McCloy* (2015) 257 CLR 178 at [127] (Gageler J), see also at [68] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 261 CLR 328 at [90] (Kiefel CJ, Bell and Keane JJ), [180] and [192]-[195] (Gageler J), [269] (Nettle J) and [397] (Gordon J); *Clubb v Edwards* (2019) 93 ALJR 448 at [75] (Kiefel, Bell and Keane JJ).

28 See, by analogy, *Clubb* (2019) 93 ALJR 448 at [127] (Kiefel CJ, Bell and Keane JJ).

s 92.3(2). In those circumstances, the effect on the "freedom generally" is at most very limited.[29]

28. *Secondly*, the communication burdened by s 92.3 is overwhelmingly of a kind that the implied freedom of political communications does not protect. That freedom exists only so far as is necessary to give effect to ss 7, 24, 64 and 128 of the Constitution.[30] What is protected was described in *Lange* as "that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors".[31] However, the extent of the implied freedom is marked out not by that phrase, construed as if it were a statutory provision, but by what is necessary to give effect to the constitutional provisions just mentioned and, in particular, the free and informed choice by electors that they mandate.[32]

29. Given its foundations, the implied freedom does not protect communications that are inimical to the free and informed choice of electors. For example, a communication which seeks to subvert the choice of an elector by threatening the elector with violence unless they exercise that choice in a particular way receives no protection. Nor does a communication which seeks to foment the violent overthrow of a democratic system of government.[33] No doubt at one level the communications in both of these examples concern "political or government matters". But they are nevertheless wholly outside the range of communications necessary to give effect to the constitutional provisions upon which the implied freedom is based. Just as "not all speech can claim the protection of the constitutional implication",[34] not all things which might loosely be termed "political speech" can do so.

30. The Constitution creates a fully sovereign nation. The framers' concern to protect the

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29 *Unions NSW v New South Wales* (2013) 252 CLR 530 (***Unions No 1***) at [35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

30 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567 (the Court). See generally *Re Gallagher* (2018) 263 CLR 460 at [24] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ; Gageler J agreeing), see also at [58], [68] (Edelman J).

31 *Lange* (1997) 189 CLR 520 at 560 (the Court). See also *Tajjour* (2014) 254 CLR 508 at [140]-[141] (Gageler J); *Brown* (2017) 261 CLR 328 at [312]-[313] (Gordon J).

32 *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322 at [27] (Gleeson CJ and Heydon J), [61]-[68] (McHugh J), [451]-[452] (Callinan J). See also *Unions NSW v New South Wales* (2019) 264 CLR 595 (***Unions No 2***) at [163] (Edelman J).

33 See, eg, *Communist Party of US v Subversive Activities Control Board*, 367 US 1 at 88-89 and 95-96 (1961) (Frankfurter J, delivering the opinion of the Court).

34 *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 125 (Mason CJ, Toohey and Gaudron JJ).

political system of that nation from foreign influence is evidenced by s 44(i), which disqualifies a person from sitting as a senator or member of the House of Representatives simply on the basis of foreign citizenship, even if that person is unaware of such citizenship, in order to "prevent persons with foreign loyalties or obligations from being members of the Australian Parliament".[35] The Constitution does not simultaneously mandate a system of representative and responsible government of a sovereign nation, and seek to protect that system from foreign influence, but then by implication limit the capacity of the Parliament to legislate to protect the free and informed choice of electors in that nation from foreign interference. Of its very nature, foreign interference undermines the sovereignty of the Australian people that the implied freedom exists to protect.[36] As Brennan J put it, "the salutary effect of freedom of political discussion on performance in public office can be neutralized by covert influences".[37] That is so whether the foreign interference has the effect that the choices made by electors are not free and informed, or that elected officials are unwilling or unable to give effect to those choices because they are beholden to foreign principals.

31. The communication burdened by s 92.3 was selected specifically due to its tendency to undermine free and informed electoral choice. That follows because s 92.3 relevantly applies only in circumstances where the conduct that may influence Australian political or governmental processes is intentionally covert, or involves deception, threats of serious harm or the making of demands with menaces (sub-s (1)) or where the fact of the foreign influence is intentionally not disclosed or concealed (sub-s (2)). Attempts by or on behalf of a foreign principal to influence Australia's political system by any of those means are inherently harmful to the system of government for which the Constitution provides (SCB 53 [37], 57 [48]-[49]).[38] For the reasons just outlined, communications of that kind are not protected by the implied freedom. Accordingly, if s 92.3 places any burden at all on political communication of the kind the implied freedom exists to protect,

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35 *Re Canavan* (2017) 263 CLR 284 at [24]-[26] (the Court), quoting *Sykes v Cleary* (1992) 176 CLR 77 at 127 (Deane J).

36 *Unions No 1* at [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), [104] (Keane J); *McCloy* (2015) 257 CLR 178 at [215]-[216] (Nettle J); *Brown* (2017) 261 CLR 328 at [88] (Kiefel CJ, Bell and Keane JJ); *Unions No 2* (2019) 264 CLR 595 at [40] (Kiefel CJ, Bell and Keane JJ).

37 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 159.

38 Such communication is readily distinguishable from insulting or offensive communications that are nonetheless capable of contributing to free and informed electoral choice: eg *Coleman v Power* (2004) 220 CLR 1 at [27]-[28] (Gleeson CJ), [81], [105] (McHugh J), [197] (Gummow and Hayne JJ), [229] (Kirby J).

it is at most an incidental and very limited one.[39]

32. For completeness, consistently with the plaintiff's acknowledgment that the inquiry as to burden is to be answered at the level of general effect, rather than by reference to the facts of a particular case (PS [30]), the matters set out at PS [34] are not relevant.

(c) Legitimate purpose

33. Applying the principles set out in PS [35],[40] the purpose of s 92.3 is properly described as protecting Australia's sovereignty by reducing the risk of foreign interference in Australia's political or governmental processes. That purpose is apparent from the text of the provisions, as already addressed above. It is reinforced by the legislative context. Thus, s 92.3 is entitled "Offence of reckless foreign interference", and forms part of Subdiv B of Div 92, both of which are entitled "Foreign interference". Division 92 resides in Part 5.2 of the *Criminal Code*, "Espionage and related offences". Part 5.2 in turn falls within Ch 5, headed "The security of the Commonwealth".

34. The special case contains many facts that demonstrate the importance of the above purpose, having regard to the "growing global trend of foreign interference operations that attempt to interfere in governmental and political processes" (SCB 54 [39]; see also SCB 53-57 [37], [40], [45], [48]-[49]). At the time s 92.3 was enacted, ASIO advised that "espionage and foreign interference activity against Australia's interests was 'occurring at an unprecedented scale'", including "foreign powers clandestinely seeking to shape the opinions of members of the Australian public, media organisations and government officials to advance their own country's political objectives" (SCB 55 [44]). The scale of the threat is illustrated by the fact that there are "more foreign intelligence officers and their proxies operating in Australia now than at the height of the Cold War" (SCB 56 [45]). Given that threat, the purpose of s 92.3 in reducing the risk of foreign interference "may be the most important factor in justifying the effect that the measure has on the freedom", for "some statutory objects may justify very large incursions".[41]

35. The purpose of protecting Australia's political or governmental processes from foreign interference is confirmed by the relevant extrinsic materials. In particular, the Revised

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39 See, by analogy, *Theophanous* (1994) 182 CLR 104 at 124-125 (Mason CJ, Toohey and Gaudron JJ); *APLA* (2005) 224 CLR 322 at [27]-[28] (Gleeson CJ and Heydon J), [67]-[68] (McHugh J) and [460] (Callinan J).

40 Cf. *Brown* (2017) 261 CLR 328 at [101] (Kiefel, Bell and Keane JJ), [208] (Gageler J) and [321] (Gordon J).

41 *McCloy* (2015) 257 CLR 178 at [84] and [86] (French CJ, Kiefel, Bell and Keane JJ).

Explanatory Memorandum explained that "[f]oreign interference can erode Australia's sovereignty by diminishing public confidence in the integrity of Australia's political and government institutions, and undermining Australian societal values", before going on to identify specific concerns about foreign interference in elections.[42] To address those harms, the Bill introduced "new foreign interference offences targeting covert, deceptive or threatening actions by foreign actors who intend to influence Australia's democratic or government processes or to harm Australia".[43] The new s 92 offences "complement the espionage offences by criminalising a range of other harmful conduct undertaken by foreign principals who seek to interfere with Australia's political, governmental or democratic processes, to support their own intelligence activities or to otherwise prejudice Australia's national security".[44] Similarly, the Second Reading Speech identified "the line that separates legitimate influence from unacceptable interference" as whether the activities are "in any way covert, coercive or corrupt", and said that the foreign interference offences "criminalise[d] covert, deceptive and threatening actions by persons acting on behalf of, or in collaboration with, a foreign principal aiming to influence Australia's political processes or prejudice our national security".[45]

36. The purpose of protecting Australia's sovereignty by reducing the risk of foreign interference in Australia's political or governmental processes is plainly compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. So much is confirmed by s 44(i) of Constitution, which pursues a similar purpose, as described above. The purpose of s 92.3(1)-(2) is not only compatible with that system, but serves to "preserve and enhance it".[46] In that respect, there is a clear analogy with provisions that seek to safeguard the integrity of political and electoral processes by minimising the risk of corruption and undue influence, including by promoting transparency as to the interests that are being advanced.[47]

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42 Revised Explanatory Memorandum, EFI Bill, 10 [31], see also 206-7 [937] and 210 [956] (both referring to the commission of the s 92.3 offences having "serious consequences for the sovereignty of Australia").

43 Revised Explanatory Memorandum, EFI Bill, 2 [4], see also 7 [20].

44 Revised Explanatory Memorandum, EFI Bill, 3 [9] and 43 [19].

45 Commonwealth, House of Representatives, Hansard, 7 December 2017, 13145 and 13148. See also Commonwealth, House of Representatives, Hansard, 26 June 2018, 6351-2 and 6398.

46 *McCloy* (2015) 257 CLR 178 at [47] (French CJ, Kiefel, Bell and Keane JJ). See also *Smith v Oldham* (1912) 15 CLR 355 at 358 (Griffiths CJ), endorsed in *McCloy* at [42].

47 *Unions No 1* (2013) 252 CLR 530 at [8], [49], [53] and [64] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) and [138] (Keane J); *McCloy* (2015) 257 CLR 178 at [7], [33]-[34], [42], [47] and [53] (French CJ, Kiefel, Bell and Keane JJ), [137] and [183]-[184] (Gageler J), [218] (Nettle J) and [351], [355] and [365] (Gordon J);

37. In contending that s 92.3 lacks a legitimate purpose (PS [36]), the plaintiff asserts that it applies to foreign influence "whether or not that influence is malicious, harmful to, or in conflict with, the interests of Australia". It is not to the point that s 92.3 does not in terms require foreign influence to be malicious, for there is no evidence that foreign influence is problematic only when it is malicious. It can be problematic simply because covert or deceptive actions by or on behalf of foreign principals may result in the unwitting prioritisation of foreign interests over domestic interests (SCB 53 [37]). However, the more fundamental vice is that foreign influence pursued by covert, deceptive or threatening conduct, or which is concealed from its targets, by its very nature impairs the ***free*** and ***informed*** choice of electors that is mandated by the Constitution. While "foreign influence may be entirely benign" (PS [44]), once it is deliberately covert or concealed it becomes "foreign interference" (SCB 54 [38]). Foreign interference is not benign. It "represents a serious threat to Australia's sovereignty and security and the integrity of its national institutions"; and it may have significant consequences for liberal democratic systems of government (SCB 57 [48]-[49]; PS [49]). For that reason, the plaintiff is wrong to suggest that s 92.3 applies to foreign influence that is not "harmful": "foreign clandestine or deceptive intrusion into the political or governmental processes of Australia" can "[o]f its nature … be regarded as detrimental to the interests of Australia" (cf PS [37]).[48]

38. The plaintiff's claim that the purpose of s 92.3 is illegitimate "because it prevents communication within the Australian political system of advancing policy positions favourable to foreign actors" (PS [45]) should be rejected. Section 92.3 does not prevent communications advancing such policy positions, provided that is not done by covert, deceptive or otherwise illegitimate means. The conclusion that such a law is legitimate is consistent with the position that has been reached in other liberal democracies, where courts have upheld the legitimacy of laws intended to prevent foreign influence *per se* over their political processes.[49]

Unions No 2 (2019) 264 CLR 595 at [31] and [35] (Kiefel CJ, Bell and Keane JJ), [71]-[72] (Gageler J) and [189]-[190] (Edelman J).

48 Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Australian Security Intelligence Organization* (December 1984) at [3.43]. See, to similar effect, Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13145.

49 As to the United States, see, eg *Bluman v Federal Electoral Commission*, 800 F Supp 2d 281 at 288 (DDC, 2011), affirmed in a summary opinion: 565 US 1104 (2012); *United States v Singh*, 924 F 3d 1030 at 1042-1044 (9th Circ, 2019); and more generally *Viereck v United States*, 318 US 236 at 251 (1943) (Black J,

(d) Reasonably appropriate and adapted

39. ***Suitability.*** Section 92.3 is suitable to the purpose of reducing the risk of foreign interference in Australian governmental and political processes, as it "exhibits a rational connection to its purpose".[50] Like any criminal offence provision, by criminalising particular conduct, s 92.3 reduces the likelihood that people will engage in that conduct. The plaintiff's submissions that s 92.3 is not "suitable" (PS [50]-[52]), which are directed towards whether it "overreaches" its purpose, attribute to the "suitability" inquiry a role that finds no support in the judgments of this Court.[51] Accordingly, even if any of the deficiencies alleged by the plaintiff could be made good (which is denied), that would not demonstrate that s 92.3 is not suitable, because those deficiencies would not sever the rational connection between that section and its purpose.[52]

40. ***Necessity.*** Section 92.3 is necessary, in the sense that there is no "obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the implied freedom" (cf PS [53]-[54]).[53] In *McCloy*, the plurality emphasised that the necessity inquiry must be appropriately confined so as to preserve "the role of the legislature to select the means by which a legitimate statutory purpose may be achieved", and to ensure that courts do not "exceed their constitutional competence by substituting their own legislative judgments for those of parliaments".[54] Thus, the necessity inquiry should not be answered adversely to validity merely because the plaintiff is able to hypothesise alternative measures which may be less restrictive of the freedom. Instead, in order to demonstrate that s 92.3 is not "necessary", the plaintiff must demonstrate that: alternative measures are "obvious" and available; they entail a ***significantly*** lesser burden on the freedom; and they are equally capable of fulfilling the legislative purpose ("quantitatively, qualitatively, and probability-wise"[55]).

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dissenting, with whom Douglas J concurred). As to Canada, see *Harper v Canada (A.G.)* (2001) ABQB 558 at [25], [118] and [187]-[189]; the relevant provisions were not considered by the Supreme Court on appeal in [2004] 1 SCR 827.

50 *Comcare v Banerji* (2019) 93 ALJR 900 at [33] (Kiefel CJ, Bell, Keane and Nettle JJ); see also *McCloy* (2015) 257 CLR 178 at [80] (French CJ, Kiefel, Bell and Keane JJ).

51 See, eg, *McCloy* (2015) 257 CLR 178 at [54]-[56] and [80] (French CJ, Kiefel, Bell and Keane JJ), discussing in part *Unions No 1* (2013) 252 CLR 530; *Clubb* (2019) 93 ALJR 448 at [84] and [124] (Kiefel CJ, Bell and Keane JJ), [276] and [313]-[315] (Nettle J) and [472]-[473] (Edelman J).

52 *McCloy* (2015) 257 CLR 178 at [56] (French CJ, Kiefel, Bell and Keane JJ).

53 *Banerji* (2019) 93 ALJR 900 at [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

54 *McCloy* (2015) 247 CLR 178 at [58] and [82] (French CJ, Kiefel, Bell and Keane JJ).

55 *Tajjour* (2014) 254 CLR 508 at [114] (Crennan, Kiefel and Bell JJ).

41. The alternatives put forward by the plaintiff (PS [53]) fall far short of these requirements. *First*, the plaintiff fails to explain how each of his purported alternatives are obvious and available, those alternatives seemingly not having been selected by any other legislature.[56]

42. *Secondly*, and more significantly, the plaintiff fails to explain how each purported alternative is equally capable of fulfilling the legislative purpose ***to the same extent***, given that each applies to a narrower subset of conduct than that proscribed by s 92.3(1) and (2), and there are good reasons to think that such a narrowing would render the purported alternatives less effective in achieving the statutory purpose. For example, to replace the fault element of "recklessness" with "malicious intent" would substantially narrow the provision, yet (as noted above) there is no evidence that the only foreign interference that may harm Australia's interests is that undertaken with "malicious intent". Indeed, Parliament evidently did not consider it sufficient to criminalise only intentional interference (let alone only malicious interference), as the juxtaposition of ss 92.2(1)-(2) and 92.3(1)-(2) makes plain. Similarly, limiting the reach of the provisions to conduct involving "unconscionable or dishonest means" or "undue influence" would remove from their reach at least some conduct which "involves deception", threats of "serious harm" and "demand[s] with menaces" (s 92.3(d)(i)-(iii)). Yet those qualities were carefully selected,[57] and are entirely consistent with ASIO's assessment as to what constitutes foreign interference (SCB 54 [38]). Finally, the plaintiff's alternatives leave entirely out of account the operation of s 92.3(2), which seeks to ensure that potential Australian targets are not subject to influences they are unaware are foreign, whatever the other characteristics of that foreign influence. For all of those reasons, the plaintiff's "alternatives" would mean that "the impugned provisions would cease to operate as a deterrent against a significant potential source"[58] of foreign interference, meaning they cannot constitute an obvious and compelling alternative to s 92.3. They cannot be considered a "true alternative for the purposes of the analysis".[59]

43. ***Adequacy in its balance.*** Finally, s 92.3 is adequate in its balance, because "the benefit

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56 See *Unions No 2* (2019) 264 CLR 595 at [42] (Kiefel CJ, Bell and Keane JJ) and the cases cited therein; see also *Monis* (2013) 249 CLR 92 at [347] (Crennan, Kiefel and Bell JJ).

57 Revised Explanatory Memorandum, EFI Bill at 205-206 [926]-[931].

58 *Banerji* (2019) 93 ALJR 900 at [36] (Kiefel CJ, Bell, Keane and Nettle JJ).

59 *McCloy* (2015) 257 CLR 178 at [361] (Gordon J); see also *Tajjour* (2014) 254 CLR 508 at [89]-[90] (Hayne J) and [113]-[115] (Crennan, Kiefel and Bell JJ).

sought to be achieved … is [not] manifestly outweighed by its adverse effect on the implied freedom" (cf PS [55]).[60] That is so because foreign interference poses a serious threat to Australia's political or governmental processes, and in addressing that threat s 92.3 places (at most) a limited burden on political communication. Contrary to PS [56], the Commonwealth does not submit that "a person need only become registered under the FITSA" to avoid the impugned provisions, though registration under that Act would be one way of removing the element of non-disclosure for the purposes of s 92.3(2). In fact, avoiding the provisions is much simpler: in respect of s 92.3(1), it can be done (relevantly) by acting in a manner that is open; in respect of s 92.3(2), it can be done merely by disclosing to any target that a person is acting on behalf of a foreign principal. If those things are done, then s 92.3 does not burden the mode or content of political communication at all. In those circumstances, there is no excess or disproportion in the balance struck by the provisions, let alone manifest excess or gross disproportion.[61]

44. ***Severance.*** If, contrary to the submissions above, the Court were to find s 92.3(1)-(2) invalid in some of their operations, any limb of s 92.3(1)(b)-(d) or 92.3(2)(b)-(d) could be severed. The operation of the remaining parts of the provisions would remain unchanged, and their combinatorial structure means that there would be no difficulty in selecting the appropriate method of severance.[62]

C. Relief (Question 5)

45. ***Answers sought by the Commonwealth.*** The questions at SCB 59-60 [59] should be answered: as to Questions 1(a)-(d) and 2-4: "No"; as to Question 5, "Unnecessary to answer"; and as to Question 6: "The plaintiff".

46. ***Certiorari.*** If the Court were to answer any of Questions 1(a)-(d) to the effect that any of the Warrants is ***wholly*** invalid, certiorari should issue to quash that Warrant (PS [58]).[63] Further, if the First Search Warrant is ***wholly*** invalid, certiorari should also issue to quash the First and Second s 3LA Orders (PS [58]).

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60 *Banerji* (2019) 93 ALJR 900 at [38] (Kiefel CJ, Bell, Keane and Nettle JJ); see also *Clubb* (2019) 93 ALJR 448 at [69]-[70], [102] and [128] (Kiefel CJ, Bell and Keane JJ), [270]-[275] (Nettle J) and [495]-[497] (Edelman J).

61 See, eg, *Clubb* (2019) 93 ALJR 448 at [69]-[70], [102] and [128] (Kiefel CJ, Bell and Keane JJ), [270]-[272], [292]-[293] and [324] (Nettle J) and [495]-[501] (Edelman J).

62 *Spence v Queensland* (2019) 93 ALJR 643 at [87] (Kiefel CJ, Bell, Gageler and Keane JJ); see also *Acts Interpretation Act 1901* (Cth), s 15A.

63 See, eg, *Smethurst* (2020) 94 ALJR 502 at [45] (Kiefel CJ, Bell and Keane JJ).

47. ***Declaratory relief.*** If the Court were to answer "no" to Questions 1(a) and (b), but "yes" to Question 1(c)-(d), 3 or 4, the Court should grant the declaratory relief sought by the plaintiff (PS [59]). However, if the Court were to answer "yes" to Questions 1(a) or (b), and therefore to quash the Warrants for non-constitutional reasons, it should not proceed to answer Questions 1(c)-(d), 3 or 4. To do so would require the Court to adjudicate on an abstract question of constitutional validity, in aid of which no declaration could issue.[64] Contrary to PS [59], the plaintiff's only interest in the validity of the provisions is as a basis for the invalidity of the Warrants. *Smethurst* is indistinguishable. If the Warrants are invalid for non-constitutional reasons then, as explained by the plurality in *Smethurst* (with whom Gordon J relevantly agreed), "[u]nless and until" the plaintiff is charged under the provisions, he has "no more interest than anyone else in clarifying what the law is".[65] That statement was not confined to circumstances in which the underlying offence provisions had been repealed, and there would be no principled reason to confine it in that way. Nor does *Brown* assist the plaintiff: the passage on which he relies clarified that standing was not lost in circumstances where charges were withdrawn ***after*** proceedings had been commenced, and drew attention to the plaintiffs' independent basis for standing, being their intention to engage in conduct proscribed by the impugned Act.[66] Neither factor is relevant here.

48. ***Injunction.*** Even if the Warrants are wholly invalid and are quashed, the Court should decline to grant the mandatory injunction sought by the plaintiff (cf PS [60]). The basis upon which he relies for his injunction (PS [60]) did not command the support of a majority of the Court in *Smethurst*. Only Gageler and Gordon JJ held that s 75(v) would ***itself*** support the issue of an injunction there sought (PS [60]). No other member of the Court accepted the proposition that s 75(v) had a substantive operation of this kind, distinct from the equitable jurisdiction to grant injunctive relief.[67] As for that equitable jurisdiction, while there would be power to order return of the plaintiff's own property,

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64 As to the former proposition, see *Knight v Victoria* (2017) 261 CLR 306 at [32] (the Court). As to the latter, see, eg, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Plaintiff M61/2010E v The Commonwealth* (2010) 243 CLR 319 at [103] (the Court).

65 *Smethurst* (2020) 94 ALJR 502 at [106], see also [105] and [107] (Kiefel CJ, Bell and Keane JJ; Gordon J agreeing at [198]); see also *Kuczborski v Queensland* (2014) 254 CLR 51 at [175]-[182] (Crennan, Kiefel, Gageler and Keane JJ).

66 *Brown* (2017) 261 CLR 328 at [17] (Kiefel CJ, Bell and Keane JJ).

67 *Smethurst* (2020) 94 ALJR 502 at [95]-[98] (Kiefel CJ, Bell and Keane JJ), [144]-[146] (Nettle J) and [229]-[233] (Edelman J).

there would be no basis for its exercise in respect of copied data in which the plaintiff has no proprietary rights: neither the special case nor the plaintiff's submissions provide any basis for a factual finding that he is suffering the "extreme" or "very serious" ongoing damage necessary to enliven a power to remedy the consequences of a past tort.[68]

49. In any event, discretionary factors — especially "[t]he public interest in both the investigation and prosecution of crime" — weigh heavily against the issue of an injunction.[69] As explained by the plurality in *Smethurst*, "[i]t has long been accepted that the courts will refuse to exercise their discretion to grant equitable relief when to do so would prevent the disclosure of criminality which it would, in all the circumstances, be in the public interest to reveal".[70] That is especially so where any unlawful conduct was inadvertent, and the material in question is potentially important to the investigation and proof of serious offences (SCB 51-53 [26], [29], [31]-[32], [35]-[36]).[71] In such circumstances, the preferable and orthodox course is to decline to order the return of the seized material, and to leave the question of admissibility of such material to the trial judge in any future criminal prosecution. That course also accommodates the rationale of s 138 of the *Evidence Act 1995* (Cth), which requires a balancing of competing public interests, rather than giving decisive weight to the fact that particular material was unlawfully obtained.

50. The public interest in the investigation and prosecution of crime has particular significance in circumstances where the plaintiff did not commence proceedings until approximately five weeks after the First and Second Search Warrants were executed (during which time he was aware that the AFP was accessing and using the material seized under those warrants: SCB 88, 90, 95), and where he elected not to seek interlocutory relief despite being informed (both before and after proceedings were commenced) that the Commissioner would not give an undertaking not to use the seized material (SCB 53 [34]). Indeed, the plaintiff was expressly told that, unless restrained from doing so, the AFP intended to continue to process, consider and take investigative

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68 See, eg, *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [33] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ), discussed in *Smethurst* (2020) 94 ALJR 502 at [71]-[72] (Kiefel CJ, Bell and Keane JJ), [156] (Nettle J) and [251] (Edelman J).

69 *Smethurst* (2020) 94 ALJR 502 at [104] (Kiefel CJ, Bell and Keane JJ), see also [160] (Nettle J).

70 *Smethurst* (2020) 94 ALJR 502 at [99], also at [102] (Kiefel CJ, Bell and Keane JJ) and [160] (Nettle J); see also *Puglisi v Australian Fisheries Management Authority* (1997) 148 ALR 393 at 405 (Hill J).

71 *Caratti v Commissioner of the Australian Federal Police* [2016] FCA 1132 at [469] (Wigney J); *Caratti* (2017) 257 FCR 166 at [158]-[163] (the Court).

steps in respect of the seized material, in part due to "the prospect that delay may prejudice the ongoing investigation into your client" (SCB 95; see also SCB 53 [34]). As Kirby J recognised in granting an interlocutory injunction to prevent access to seized documents pending an application for special leave, in the absence of such an injunction, "[i]t would be impossible for the officers of the Commonwealth … to put out of their minds information which then came to their notice. In particular, it would be impossible for them to ignore leads for inquiry and investigation which might then be raised."[72] The plaintiff's conduct has given rise to that very situation. In the absence of an injunction, the duty of the AFP was to progress its criminal investigations in the public interest. The plaintiff allowed that to occur, when he could have sought to prevent it, in which case the Court would have determined the appropriate balance of competing interests. That not having occurred, if the injunction the plaintiff now seeks were to be granted, it would require the AFP to attempt to unscramble the components of ongoing investigations into serious offences committed by the plaintiff and other persons, to the possible prejudice of those investigations (SCB 52 [31], [33]). That is a strong discretionary reason to refuse such relief, particularly in circumstances where the plaintiff can protect his legitimate interests by reliance on s 138 of the *Evidence Act*, if that be necessary in the future.

PART VII: ESTIMATE OF TIME FOR ORAL ARGUMENT

51. Up to 3 hours will be required to present the oral argument of the first defendant and the Attorney-General of the Commonwealth.

Dated: 9 December 2020

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[72] *Malubel Pty Ltd v Elder* (1998) 73 ALJR 135 at [13].

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S 129 OF 2020**

BETWEEN: **JOHN SHI SHENG ZHANG**
First Plaintiff

and

COMMISSIONER OF POLICE
First Defendant

JANE MOTTLEY
Second Defendant

JOSEPH KARAM
Third Defendant

MICHAEL ANTRUM
Fourth Defendant

ANNEXURE TO FIRST DEFENDANT AND ATTORNEY-GENERAL OF THE COMMONWEALTH'S SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Commonwealth sets out below a list of the particular constitutional provisions and statutes referred to in its submissions.

No	Description	Version	Provision(s)
1.	*Commonwealth Constitution*	Current	ss 7, 24, 44(i), 64, 75(v), 128
2.	*Acts Interpretation Act 1901* (Cth)	Current	s 15A
3.	*Commonwealth Electoral Act 1918* (Cth)	Current	s 327
4.	*Crimes Act 1914* (Cth)	Current	ss 3E, 3LA
5.	*Criminal Code Act 1995* (Cth)	Current	Sched 1, ss 4.1, 5.4, 5.6, 83.4; Pt 5.2; ss 138.2, 139.1, 141.1; Dictionary
6.	*Foreign Influence Transparency Scheme Act 2018* (Cth)	Current	Pt 2, Div 2; Pt 3, Div 2; Pt 5
7.	*Judiciary Act 1903* (Cth)	Current	ss 78A, 78B