HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 23 Dec 2020 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S129/2020
File Title:	Zhang v. The Commissioner of Police & Ors
Registry:	Sydney
Document filed:	Form 27C - Intervener's submissions-Submissions of the Atto
Filing party:	Interveners
Date filed:	23 Dec 2020

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S129 of 2020

BETWEEN:

JOHN SHI SHENG ZHANG
Plaintiff

and

THE COMMISIONER OF POLICE
First Defendant

JANE MOTTLEY
Second Defendant

JOSEPH KARAM
Third Defendant

MICHAEL ANTRUM
Fourth Defendant

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I: Certification

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

Parts II and III: Basis of intervention

2. The Attorney-General for New South Wales (**NSW**) intervenes pursuant to s 78A of the Judiciary Act 1903 (Cth), in support of the Defendants.

Part IV: Argument

3. NSW intervenes only in relation to the validity of ss 92.3(1) and (2) of the Criminal Code (Cth) (**Criminal Code**).

4. For the reasons set out in the submissions of the First Defendant and the Attorney-General of the Commonwealth (intervening) (**DS**) at [47], the question of the validity of the impugned provisions does not arise if the Court finds the impugned search warrants invalid for non-constitutional reasons.

5. If it is necessary to consider the validity of the impugned provisions, Questions 1(c)-(d), 3 and 4 should be answered "No". In summary, the impugned provisions do not infringe the implied freedom of political communication because the law imposes a limited burden on political communication for the compelling purpose of protecting Australian sovereignty against the risk of foreign interference.

Overview of the impugned provisions

6. Before turning to the validity of the impugned provisions, it is convenient to consider those provisions and the circumstances in which they were enacted.

7. At the outset, it is critical to distinguish between foreign influence and foreign interference. ASIO classifies conduct as "foreign interference" where it involves foreign influence that is undertaken in a way that is clandestine, deceptive and/or threatening, or is otherwise detrimental to a nation's interests (SC[38]; SCB 54). That is, it is these features that demarcate the line between legitimate foreign influence that is not of concern, and unacceptable foreign interference that is harmful to a nation's interests.

8. At the time that s 92.3 was inserted into the Criminal Code, ASIO had reported that Australia was a target of foreign interference (SC[44]; SCB 55). ASIO's view was that espionage and foreign interference activity against Australia's interests was

occurring on an "unprecedented scale" (SC[44]; SCB 55). It is ASIO's assessment that Australia continues to be the target of sophisticated and persistent espionage and foreign interference activities, which may affect large sectors of the community (SC[45]-[46]; SCB 56).

9. The consequences of foreign interference may be extremely serious. Influence by foreign actors can have serious implications for sovereignty and national policy when it is not disclosed or otherwise transparent, as it may result in the prioritisation of foreign interests over domestic interests (SC[37]; SCB 53). ASIO considers that foreign interference represents a serious threat to Australia's sovereignty and security and the integrity of its national institutions, as well as potentially harming Australia's interests in a number of ways (SC[48]; SCB 57).

10. The National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (**the EFI Bill**), by which s 92.3 was inserted, was introduced into Parliament in response to a report initiated by the Prime Minister into the threat of foreign states exerting improper influence over Australia's system of government (SC[55]; SCB 59). Two other Bills in response to the report were also introduced into Parliament on the same day: the Foreign Influence Transparency Scheme Bill 2017, and the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (SC[56]; SCB 59). Together, the three Bills were intended to "counter the threat of foreign states exerting improper influence over our system of government and our political landscape", by enacting a counter foreign interference strategy built on "the four pillars of sunlight, enforcement, deterrence and capability": see Second Reading Speech (Hansard, House of Representatives, 7 December 2017) at 13145 (SCB158).

11. The offences in the EFI Bill form part of the "deterrence" pillar. In introducing the EFI Bill, the Prime Minister again emphasised the distinction between foreign influence and foreign interference. In that respect, he noted that covert, coercive or corrupt conduct "is the line that separates legitimate influence from unacceptable interference". The Prime Minister also emphasized that foreign interference is "unacceptable from any country whether you might think of it as friend, foe or ally": Second Reading Speech at 13145 (SCB158).

12. Section 92.3 creates offences of "reckless foreign interference". The offence in s 92.3(1) is directed to foreign interference generally, whereas the offence in s 92.3(2) is directed to interference involving a targeted person. Each offence has in common that the offender's conduct must be engaged in on behalf of or in collaboration with a foreign principal, or directed, funded or supervised by a foreign principal (s 92.3(1)(b); s 92.3(2)(b)). However, each offence is directed to different kinds of conduct.

13. In respect of s 92.3(1), the offence is targeted towards conduct that is covert or involves deception, involves the person making a threat to cause serious harm, or involves the person making a demand with menaces (s 92.3(1)(d)). These aspects reflect the characteristics of foreign interference identified by ASIO. The offender must be reckless as to whether the conduct will have a certain effect, namely influencing of an Australian political or governmental process or the exercise of a democratic or political right or duty; support of intelligence activities of a foreign principal; or prejudice to Australia's national security (s 92.3(1)(c)).

14. In respect of s 92.3(2), the offence is targeted towards transparency of foreign influence on a particular target. The person must conceal from or fail to disclose to the target that their conduct is on behalf of a foreign principal (s 92.3(2)(d)). This can be seen as reflecting a specific instance of clandestine or deceptive conduct in relation to a particular matter – that is, that the person's conduct is on behalf of a foreign principal. "Deception" is defined in s 92.1 as an intentional or reckless deception, whether by words or other conduct, and whether as to fact or as to law, and relevantly includes a deception as to the intentions of the person using the deception. The offender must be reckless as to whether the conduct will influence the target's exercise of an Australian political or governmental process or the exercise of a democratic or political right or duty (s 92.3(2)(c)).

15. NSW adopts the construction of the impugned provisions at DS[21]-[25].

The impugned provisions do not breach the implied freedom of political communication

16. It is common ground that the test for whether a law breaches the implied freedom of political communication is that set out in McCloy v New South Wales (2015) 257

CLR 178; [2015] HCA 34 (**McCloy**), as modified in Brown v Tasmania (2017) 261 CLR 328; [2017] HCA 43 (**Brown**) (set out at PS[29]).

Question 1: Burden

17. While it may be accepted that the offences in s 92.3 may burden political communications in some of their operations, any burden on the implied freedom imposed by s 92.3 is limited.

18. Section 92.3 is not on its face directed at political communication (or indeed to communication at all). While some of the conduct caught by s 92.3 may fall within the scope of protected political communication, the offences also apply to a range of conduct that may not involve communication of any kind. This may be particularly so for conduct falling within s 92.3(1)(c)(iii) and (iv), which could include conduct such as obtaining or collecting information about the identity, finances or activities of individuals, groups or other identities.

19. To the extent that conduct falling within the scope of s 92.3 can be characterised as political communication, much of that communication is not of the kind protected by the implied freedom for the reasons in DS[28]-[32]. Further, the restrictions imposed by the provisions apply only in limited circumstances, and can be relatively easily avoided for the reasons in DS[27].

Question 2: Legitimate purpose

20. It is common ground that the search for the purpose of the law goes beyond the language used in particular provisions, to identifying at a higher level of generality the mischief to which the statute is directed (PS[35]; DS[33]; Brown at [101] (Kiefel, Bell and Keane JJ), [208] (Gageler J) and [321] (Gordon J)).

21. For the reasons in DS[33] and [35], the purpose of s 92.3 can be properly described as protecting Australia's sovereignty by reducing the risk of foreign interference in Australia's political or governmental processes. That purpose is not only compatible with the maintenance of the constitutionally prescribed system of representative and responsible government but indeed serves to preserve and enhance it by safeguarding the free and informed choice of electors (DS[36]). The importance of that purpose is underscored by the growing global trend in foreign interference, including the current unprecedented level of espionage and foreign interference activity against

Australia's interests (SC[37]-[40]; SCB 54), and the serious consequences for Australia's interests and system of government (SC[48]-[49]; SCB 57).

22. It is clear that the offences in s 92.3 do not require proof of any specific malevolent intent, or the identification of a specific harmful effect resulting from the conduct (cf PS[42]). That is because the approach underpinning s 92.3, which in turn reflects ASIO's position, is that foreign interference (as distinct from foreign influence) is harmful in and of itself (see [7]-[11] above; see also DS[30]-[31]).

23. In addition to protecting the integrity of the political and governmental processes by reducing the risk of foreign interference, s 92.3 may also be characterised as having a further ancillary purpose of protecting the perceived integrity of Australian political and governmental processes by reducing the risk of foreign interference. One of the consequences of foreign interference is the potential undermining of public trust in the policy decisions made by the government (SC[49]; SCB 57). It follows that reducing the risk of foreign influence also serves the purpose of promoting public trust in the integrity of Australian political and governmental processes more generally.

24. This Court has accepted that a legitimate purpose of laws restricting political donations is to address *perceptions* of corruption and undue influence, which may undermine public confidence in the government and in the electoral system itself: McCloy at [7], [34] (French CJ, Kiefel, Bell and Keane JJ); [98] (Gageler J); [320]-[323], [330], [344] (Gordon J). It should similarly be accepted here that protecting the perceived integrity of the Australian political system against foreign interference is a legitimate purpose.

25. Insofar as the plaintiff argues that the purpose of preventing foreign interference is not a legitimate purpose because it prevents communication within the Australian political system of advancing policy positions favourable to foreign actors (PS[45]), that argument should be rejected. It elides the purpose and the effect of the law (cf McCloy at [40] (French CJ, Kiefel, Bell and Keane JJ); see also Brown at [100] (Kiefel CJ, Bell and Keane J)). That a law may have the *effect* of preventing certain political communication does not mean that its overall *purpose* is not legitimate. Indeed, the plaintiff later appears to accept that "maintaining the integrity of the Australian political and democratic system" is a legitimate aim (see PS[53]).

26. Further and in any event, the impugned provisions do not prevent the advancement of policy positions favourable to foreign actors. Section 92.3 does not prevent the advancement of such policy positions by individuals or other organisations on their own behalf, or by foreign principals directly on their own behalf. It does not prevent the advancement of policy positions in other cases, provided that such advancement is not done by covert, deceptive or otherwise illegitimate means (s 92.3(1)) and that the connection to the foreign principal is disclosed to the target (s 92.3(2)) (see DS[27], [38]). The restrictions imposed by s 92.3 apply only to the manner or circumstances of any communication; the provision does not restrict the content of any such communications and does not prevent the advancement of any particular viewpoint.

27. The plaintiff does not go so far as claim that the purpose of the law should be characterised as being to prevent such communications. Any such argument would be "forcefully denie[d]" by the fact that there is no proscription of such communications in the circumstances just outlined (cf Clubb v Edwards; Preston v Avery (2019) 276 CLR 171; [2019] HCA 11 (**Clubb**) at [257] and [309] (Nettle J)).

Question 3: proportionality

28. Question 3 is, in broad terms, directed to whether the restriction is justified. It is convenient in the present case to use the three-stage test adopted as an analytical tool by the plurality in McCloy, which has been applied by the parties in their submissions (PS[47]; DS[39]-[43]).

Suitability

29. This element requires a rational connection between the impugned provision and the statute's purpose: Brown at [132]-[133] (Kiefel CJ, Bell and Keane JJ) and [281] (Nettle J); McCloy at [80] (French CJ, Kiefel, Bell and Keane JJ). That simply requires that the means chosen must be "capable of realising that purpose": Comcare v Banerji (2019) 93 ALJR 900; [2019] HCA 23 (**Banerji**) at [33] (Kiefel CJ, Bell, Keane and Nettle JJ).

30. Section 92.3 is capable of achieving the purpose of protecting Australia's sovereignty by reducing the risk of foreign interference in Australia's political or governmental processes, by criminalising conduct that in broad terms can be characterised as foreign interference (see DS[39]).

31. Insofar as the plaintiff argues that the provisions "overreach" the purpose, none of the matters identified by the plaintiff is sufficient to sever the connection between the impugned provisions and their purpose (even if it is accepted that the plaintiff's interpretation of the scope of s 92.3 is correct). The plaintiff's core complaint is that the application of the offences to conduct which is not necessarily intended to, and may not in fact, bring about any foreign influence overreaches any legitimate purpose (PS[50]-[52]). However, that complaint fails to recognise that, as discussed above, the purpose of the provisions is to reduce the risk of foreign interference on the basis that foreign interference is inherently harmful. There is therefore no "overreach" of that purpose on the basis that the conduct need not specifically be inconsistent with the interests of Australia (PS[51]).

32. Other aspects complained of by the plaintiff are similarly consistent with the purpose of the law to reduce all foreign interference, regardless of the source (see again at [11] above). That the definition of "foreign principal" includes an international organisation (PS[51]) reflects the view that foreign interference is harmful from any source. That the offender need not have a particular foreign principal in mind is intended to cover situations where a defendant may assist an individual who has identified themselves to the defendant as a foreign official but without specifying which foreign country they represent, or where a defendant may provide assistance knowing that their conduct may assist multiple foreign principals (see the Revised Explanatory Memorandum to the EFI Bill at [917]). Again, that is consistent with the purpose of protecting against foreign interference, whatever the source and regardless of whether the foreign principal may be considered an ally or foe.

33. Finally, to the extent that elements of the offence have a fault element of recklessness rather than intention, that does not sever the connection between the law and its purpose. A fault element of recklessness broadens the scope of the provision, but it does not mean that s 92.3 is no longer *capable* of achieving its purpose. It may also be noted that recklessness is defined in a way that takes it beyond a mere lack of prudence or caution (see s 5.4 of the Criminal Code). For example, for the purposes of s 92.3(1)(c) or s 92.3(2)(c), the offender must be aware of a "substantial risk" that his or her conduct will (relevantly) influence a governmental process or the exercise of a power, and it must be "unjustifiable" to take that risk having regard to the circumstances known to the offender.

Necessity

34. This element requires that there be no "obvious and compelling alternative which is equally practicable", and which would result in a "significantly lesser burden" on the implied freedom: Banerji at [35] (Kiefel CJ, Bell, Keane and Nettle JJ) and [194] (Edelman J). Critically, the alternative measures must be means of achieving the same object (Brown at [139] (Gageler J)), to the same or a similar extent (Clubb at [479] (Edelman J)).

35. None of the alternative measures suggested by the plaintiff satisfy those requirements.

36. *First,* it is unclear what precisely the plaintiff suggests as an alternative. The plaintiff puts forth an assortment of alternative features and suggests that conduct with "one or more" of those specified features could be criminalised (PS[53]). It is unclear whether these features are intended to entirely replace s 92.3 with an entirely new and different provision, or whether each alternative feature is only intended to replace the corresponding element of the existing provision. For example, insofar as the plaintiff suggests that the fault element of recklessness could be replaced with "malicious intent", it is unclear whether on the plaintiff's argument this would be sufficient for validity or whether other changes would also be required to other elements of the offence. Further, as noted in DS[42], the plaintiff's alternatives appear to be directed to aspects of s 92.3(1), but fail to address s 92.3(2). In those circumstances, the plaintiff's alternative(s) can hardly be described as "obvious and compelling".

37. *Secondly,* and in any event, the alternative elements proposed by the plaintiff are not equally capable of fulfilling the legislative purpose of the offences in s 92.3. It is not sufficient to identify more narrowly drafted provisions that would achieve some other legitimate purpose (cf PS[53]). Nor is it to the point that there may be other means of protecting the system of representative government (cf PS[54]). As outlined above, the question is whether there are equally effective alternatives to achieve the same purpose identified at the first stage of the McCloy/Brown analysis.

38. The plaintiff suggests criminalising conduct with a harmful effect upon Australia's interests. However, the need to prove a specific harmful effect upon Australia's interests would result in a far narrower protection against foreign interference – as already discussed above, the legislation proceeds on the basis that *all* foreign interference is inherently harmful. Further, the act of foreign interference plainly poses a threat to Australian sovereignty, regardless whether the intended outcome or any identifiable harm eventuates; the plaintiff's argument fails to recognise the protective approach of the legislation (cf Clubb at [79] (Kiefel CJ, Bell and Keane JJ). A requirement to prove identifiable harm is also impracticable, and therefore less likely to deter foreign interference, in circumstances where any harm may not materialise for several years or decades (SC[50]).

39. Another alternative suggested by the plaintiff is criminalising conduct with malicious intent, rather than mere recklessness. However, this overlooks that there is already an offence for intentional foreign interference in s 92.2. Section 92.3 reflects a deliberate parliamentary decision that the criminalisation of relevantly reckless conduct was also required to achieve the statutory purpose (see DS[42]). Requiring intention rather than recklessness is therefore not equally capable of achieving the legislative purpose to the same extent.

40. A further proposed alternative is to require the offender to be "genuinely under the control of a foreign principal". It is unclear whether that is intended to replace the element in s 92.3(1)(b) and s 92.3(2)(b) in its entirety, or whether that element is intended only to be a substitute for *one* of the circumstances captured by s 92.3(1)(b) and (2)(b) – that the conduct is engaged in "on behalf of" a foreign principal. If the former, the proposed alternative would again appear to be less effective in reducing foreign interference because of its narrower scope.

41. *Thirdly,* it is unclear whether any of the plaintiff's alternatives would result in a significantly lesser burden on the freedom. Where (as in the present case) the burden on the freedom is limited, it will be difficult for a plaintiff to establish that any available alternative measures would imposes a significantly lesser burden while at the same time being equally efficacious: Clubb at [64] (Kiefel, Bell and Keane JJ).

42. To the extent that the plaintiff's proposed alternatives involve a narrower proscription than the present provisions, it is not evident that those alternatives would

result in any significantly lesser burden on the freedom. The relationship between the existing provisions and the plaintiff's proposed alternatives is unclear and the plaintiff has not identified with any precision the scope of any protected communications that would be caught by the existing provisions but not by its proposed alternatives. For example, while the plaintiff proposes criminalising conduct that involves "unconscionable or dishonest means" or "undue influence", it is unclear whether the difference between these proscriptions and the current proscription is such that this would result in a significantly lesser burden on the freedom. That is particularly so given that much conduct of this kind falls outside the protection of the implied freedom in any event.

Adequacy of balance

43. The final element of the analysis involves comparing the burden against the importance of the purpose and the benefit to be achieved: McCloy at [87] (French CJ, Kiefel, Bell and Keane JJ). The importance of the purpose does not depend on "idiosyncratic policy preference" but must give due weight to the importance placed on the purpose by Parliament itself: Clubb at [496] (Edelman J). Further, "[t]he question whether a law is 'adequate in its balance' is not concerned with whether the law strikes some ideal balance between competing considerations": Clubb at [69] (Kiefel CJ, Bell and Keane JJ). Rather, a law will be adequate in its balance unless the burden on the freedom is manifestly excessive or grossly disproportionate: Clubb at [69] (Kiefel CJ, Bell and Keane JJ; [270] per Nettle J; [496]-[497] per Edelman J).

44. In the present case, any burden imposed by the impugned provisions is limited (see at [17]-[19] above). The purpose of the law is of high importance, particularly having regard to the context in which the law was enacted and the mischief to which Parliament was responding (see at [8]-[9] above). In the light of those matters, the balance struck by the impugned provisions cannot be said to be manifestly excessive or grossly disproportionate.

Part V: Estimate of time

45. NSW anticipates that it will require no longer than 15 minutes for the presentation of oral argument.

Dated 23 December 2020

M G Sexton SC SG
T: 02 8093 5502
E: michael.sexton@justice.nsw.gov.au

K N Pham
T: 02 8915 2626
E: kpham@sixthfloor.com.au

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S129 of 2020

BETWEEN:

JOHN SHI SHENG ZHANG
Plaintiff

and

THE COMMISIONER OF POLICE
First Defendant

JANE MOTTLEY
Second Defendant

JOSEPH KARAM
Third Defendant

MICHAEL ANTRUM
Fourth Defendant

ANNEXURE TO SUBMISSIONS ON BEHALF OF ATTORNEY GENERAL FOR NEW SOUTH WALES INTERVENING

Pursuant to paragraph 3 of Practice Direction No 1 of 2019, the Attorney General for New South Wales sets out below a list of the particular constitutional provisions, statutes and statutory instruments referred to in his submissions.

No	Description	Version	Provision(s)
1.	*Judiciary Act 1903* (Cth)	Current	s 78A
2.	*Criminal Code* (Cth)	Current	ss 5.4, 92.2, 92.3