HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S129 of 2020

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

PLAINTIFF'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 The issues in the proceeding, as disclosed by the Special Case filed on 11 November 2020 (**SC**) are as follows:

(1) Are the First Search Warrant, the Second Search Warrant, and the Third Search Warrant invalid, in whole or in part, on the ground that:

(a) they misstate the substance of s 92.3(2) of the *Criminal Code* (Cth) (**Criminal Code**)?

(b) they fail to state the offences to which they relate with sufficient precision?

(c) sec 92.3(1) of the *Criminal Code* is invalid on the ground that it impermissibly burdens the implied freedom of political communication?

(d) sec 92.3(2) of the *Criminal Code* is invalid on the ground that it impermissibly burdens the implied freedom of political communication?

(2) In light of the answer to Question 1, is the First s 3LA Order and/or the Second s 3LA Order invalid?

(3) Is sec 92.3(1) of the *Criminal Code* invalid on the ground that it impermissibly burdens the implied freedom of political communication?

(4) Is sec 92.3(2) of the *Criminal Code* invalid on the ground that it impermissibly burdens the implied freedom of political communication?

(5) If the answer to any or all of the questions (1)-(4) is "yes", what relief, if any, should issue?

(6) Who should pay the costs of the proceeding?

Part III: Section 78B of the *Judiciary Act 1903*

4 The plaintiffs have given notice under s78B of the *Judiciary Act 1903* (Cth).

Part V: Facts

6 The facts are set out in SC [5]-[58], Special Case Book (**SCB**) 46-59.

Part VI: Argument

Question (1)(a): Misstatement of the substance of sec 92.3(2) of the *Criminal Code*

7 Section 3E(5) of the *Crimes Act 1914* (Cth) (**Crimes Act**) requires that the issuing officer of a warrant state in it, amongst other matters, the offence to which the warrant relates. Strict compliance with the statutory conditions for a warrant is essential for its validity: *George v Rockett* (1990) 170 CLR 104 at 110-11 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Smethurst v Commissioner of Police* (2020) 94 ALJR 502; [2020] HCA 14 at 516-7 [25] - [26] (Kiefel CJ, Bell and Keane JJ). This is so that the protective purpose of ensuring that the issuing officer, the officer executing the warrant and the persons affected by the warrant understand the object of the search and its limits, and the detail in the warrant must be intelligible and of sufficient content and clarity to give reasonable guidance as to those matters.[1] Ambiguity in a warrant such that it is not possible to tell what offence is referred to is a basis for invalidity.[2]

8 Each of the search warrants the subject of these proceedings (**the Warrants**) misstated the alleged offence of sec 92.3(2) of the *Criminal Code*[3] by describing the element of recklessness as follows:

> (ii) In doing so was reckless that the conduct would influence the political process of an Australian State or Commonwealth or influence the exercise in Australia of an Australian democratic or political right or duty, in that the conduct would influence the NSW branch of the Australian Labor Party's policy positions on the PRC and the views of members of the NSW electorate in regard to the PRC, and

9 The element of recklessness contained in sec 92.3(2) is as to whether the conduct engaged in by the suspected offender would influence "another person" (defined in the

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[1] *Smethurst* at 517 [27], 519-20 [43] (Kiefel CJ, Bell and Keane JJ), 551-2 [204], [207], [211], 554 [225] (Edelman J).
[2] *Parker v Churchill* (1986) 9 FCR 334 at 340 (Jackson J; Bowen CJ and Lockhart J agreeing on this point).
[3] Page 3 of each the Warrants, at the second point (ii) in each case: SC-1 SCB 63; SC-3 SCB 73; SC-4 SCB 81.

provision as the "target") in relation to a political or governmental process of the Commonwealth or a State or Territory, or in the target's exercise of any Australian democratic or political right or duty. By incorrectly referring to recklessness as to whether the conduct would influence the particular political process or the exercise in Australia of an Australian democratic or political right or duty, without reference to the person who is the potential object of the influence, the offence under sec 92.3(2) was substantially misstated.

10 The above clause in the Warrants refers to the potential influence of the conduct upon the "NSW branch of the Australian Labor Party's policy positions on the [People's Republic of China (**PRC**)]" and "the views of the members of the NSW electorate in regard to the PRC". Neither of these references suffice. The target of the potential influence under sec 92.3(2)(c) must be a person. A "person" for the purposes of this offence is a body politic or corporate as well as an individual,[4] and a Commonwealth authority that is not a body corporate.[5] The New South Wales branch of the Australian Labor Party (**ALP**), not being a body politic, corporate, individual or Commonwealth authority, was not a person for this definition. Further, its policies on the PRC are not political or governmental processes, or an exercise of Australian democratic or political right or duties. Policies may result from these processes or such an exercise, but any link between its policy positions and a political or governmental process, or the exercise of a particular democratic or political right or duty is entirely absent from the description of the offence in the Warrants. Likewise, even if it be assumed that the relevant person or persons be "members of the New South Wales electorate", their views regarding the PRC could not themselves be a political or governmental process or an exercise of an Australian democratic or political right or duty.

11 The misstatement of the substance of the offence under sec 92.3(2) in this way did not constitute a statement of the offence as required under sec 3E(5) of the Crimes Act. It was apt to confuse or mislead, and an offence should not be described so as to mislead the reader as to the nature of the offence.[6] It was insufficient to guide as to the object of the search or its limits, because it did not convey that it was an element of the offence that the suspected offender be reckless as to whether his or her conduct would influence a target in relation to a particular political or governmental process or in the target's exercise of any Australian democratic or political right or duty. Without that information, the object and limits of the search were unknown.

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[4] *Acts Interpretation Act 1901* (Cth), sec 2C(1).
[5] *Criminal Code*, Dictionary, definition of "person".
[6] *Rosenberg v Jaine* [1983] NZLR 1 at 5 (Davison CJ); *Beneficial Finance Corporation & ors v Australian Federal Police Commissioner* (1991) 31 FCR 523 at 542-543 (Burchett J, Sheppard and Pincus JJ agreeing).

12 It is accepted that if there are defects in the description of the sec 92.3(2) offence, that part of the Warrants is severable.

Conclusion on question (1)(a)

13 Question (1)(a) should be answered "yes, insofar as they refer to the offence under sec 92.3(2)".

Question (1)(b): Failure to state the offences to which the Warrants relate with sufficient precision

14 It is necessary for search warrants to sufficiently convey the nature of offence in order to inform the nature and object of the search, although what is sufficient will vary with the nature of the offence.[7] Both of sec 92.3(1) and 92.3(2) of the *Criminal Code 1995* (Cth) (**Provisions**) are detailed. Each of the Provisions contains four mandatory elements and a series of alternatives within some of those elements. Due to this detail and relative complexity, the level of particularity and precision required in the statement of the offences in the Warrants will be greater than in the case of a simpler provision. Because the first and second conditions of each of the Warrants are expressed broadly and do not limit the scope of the search, the third condition assumes particular importance in setting the limits of the search.[8]

15 The Warrants failed to state the offences to which they related with sufficient precision, on two bases. In respect of the stated offence under sec 92.3(2), the Warrants did not identify the target with precision. In respect of both provisions, the Warrants did not identify the foreign principal with precision.

Failure to identify the target with precision – sec 92.3(2)

16 The identity of the alleged target was a key element of the offence, and was critical in informing the object and limits of the search, as the person potentially influenced by the potential offender's conduct. The identity of the alleged target is entirely unclear from the description in the third condition in respect of this offence in each of the Warrants. While the first and third clause of the second condition of the Warrants refer to "Shaoquett Moselmane" and "MOSELMANE", when each of the Warrants are read as a whole, it is by no means clear that the Hon Shaoquett Moselmane MLC was the alleged target.[9] The first clause of the third condition refers to the alleged conduct allegedly engaged in by the plaintiff and others, which

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[7] *Smethurst* at 94 ALJR 517-8 [30] (Kiefel CJ, Bell and Keane JJ); *Beneficial Finance* at 31 FCR 543 (Burchett J, Sheppard and Pincus JJ agreeing).

[8] *Caratti v Commissioner of the AFP* (2017) 257 FCR 166 at 189-190 [57], [59], [61], 192 [67] (Logan, Rangiah and Bromwich JJ).

[9] Cf Response at [11] SCB 36.

was described as engaging with Mr Moselmane in a private social media chat group and in other fora, and providing support and encouragement to him for the advocacy of Chinese State Interests. Rather than demonstrating that Mr Moselmane was the target, that clause could equally have conveyed that Mr Moselmane was a participant in the alleged conduct. As set out above, the second clause did not refer to Mr Moselmane at all. The third clause referred to Mr Moselmane as being the person from whom Mr Zhang and others concealed, or to whom Mr Zhang and others failed to disclose, their alleged acting on behalf of or in collaboration with the relevant foreign principal or person acting on their behalf. The clarity otherwise provided by this clause, read alone and alongside subsec 92.3(2)(d), failed to overcome the uncertainty and confusion caused by the failure to identify Mr Moselmane as the target when referring to the element of recklessness in the second clause, as well as the inclusion of references to members of the NSW electorate and the NSW branch of the ALP.

17 It is no answer that it is possible to infer or deduce from a combination of these references that the contemplated target was Mr Moselmane, and that the suspected offence was recklessness as to whether communicating with him may influence him in relation to a political or governmental process of the Commonwealth or a State, or in his exercise of an Australian democratic or political right or duty, which may impact upon the NSW branch of the ALP's policy positions regarding the PRC and the views of members of the NSW electorate regarding the PRC. Such a construction required the reader to understand, in the absence of express words, that Mr Moselmane was the person the subject of potential influence in relation to a political process or in his exercise of an Australian democratic right or political duty, in the absence of any reference in the Warrants to potential influence upon him or his exercise of any such right or duty. As observed by Kiefel CJ, Bell and Keane JJ in *Smethurst* at 94 ALJR 519 [42], the requirement that the offence to which a warrant relates be stated in the warrant is not satisfied by the provision of information falling short of such a statement but which might enable a person reading the warrant to deduce or infer what offence is intended.

18 Without clarity as to the identity of the target, the limits and object of the search were unknown. Clause (ii) of the statement of the offence directed the reader's attention well beyond communications involving Mr Moselmane to the New South Wales branch of the ALP and members of the New South Wales electorate as a whole. This suggested that a search under the Warrants may extend to communications with other members of the New South Wales branch of the ALP and residents of New South Wales. The reference to Mr Moselmane in the third clause did not cure this.

Failure to identify the foreign principal with precision – sec 92.3(1) and 92.3(2)

19 The identity of the foreign principal in respect of both stated offences was critical to an assessment of the object and limits of the searches under the Warrants. When the third condition of each of the Warrants is read as a whole, the identity of the "foreign principal" is unclear. Although the "foreign principal" is named as the "Government of the People's Republic of China" in clause (i) of each stated offence, that same clause implies, prior to that reference, that the foreign principal is the "Chinese State and Party apparatus", by reason of it being the body on whose behalf it is suspected that the plaintiff and others acted. That implication is reinforced in the case of the stated offence under sec 92.3(2) by the repetition of that term in clause (iii), in the context of the plaintiff and others allegedly concealing from, or failing to disclose to, Mr Moselmane that they were allegedly "acting on behalf of or in collaboration with Chinese State and Party apparatus including the Ministry of State Security and the United Front Work Department". The effect of these matters is that the foreign principal is variously expressly and impliedly identified as the Chinese government, apparatus of the "Chinese State and Party", and more specifically, the Ministry of State Security, and the United Front Work Department, a department of the Chinese Communist Party.[10]

20 "Chinese State and Party apparatus" is a general term which lacks specificity, and its express inclusion is suggestive of a meaningful distinction between it and the Chinese government. The lack of clarity as to that distinction only serves to illustrate the lack of clarity as to the identity of the foreign principal. As the PRC is a one-party state governed by the Chinese Communist Party,[11] the term is not necessarily restricted to members of the Chinese Communist Party or government officials, but may refer to an array of organisations or entities operating in China. So expressed, the object of the searches under the Warrants could extend to communications with many people within China.

21 While the inclusion of each of these terms directed attention to the Chinese government, the references to different terms invites speculation as to the rationale for the inclusion of each. The definition of "foreign principal" is multi-faceted. It may be a government of a foreign country,[12] a foreign political organisation,[13] an entity or organisation owned, directed or controlled by a foreign principal,[14] or an authority of the government of a

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[10] SC [41.2] SCB 55.
[11] SC [41.2] SCB 55.
[12] *Criminal Code,* sec 90.2(a); sec 90.3(a).
[13] *Criminal Code,* sec 90.2(aa).
[14] *Criminal Code,* sec 90.2(d).

foreign country.[15] The legislature therefore recognised distinctions between the government of a foreign country, and particular foreign political organisations or authorities of a government. As far as a reader of the Warrants was concerned, any of the identified bodies could have been the intended foreign principal. It was necessary for the Warrants to identify with specificity the foreign principal concerned, so that the plaintiff and those executing the warrants could identify the entity on whose behalf or with whom it was suspected the plaintiff and others collaborated in engaging in the relevant conduct. This was a critical element to both offences.

22 As the foreign principal was identified in such broad terms and with a lack of precision, the recipient, the issuing officer and those executing the Warrants could not have understood from the Warrants the limits and object of the search thereunder. There was a failure to set bounds to the area of search which the execution of the Warrants would involve by failing to set limits as to what material may be relevant and what may be irrelevant: *Beneficial Finance* at 31 FCR 533-534 (Burchett J, Sheppard and Pincus JJ agreeing). The effect of these defects in each of the Warrants was that they lacked the clarity required to fulfil the basic purposes of the requirement set out above, and are therefore invalid.

Conclusion on question 1(b)

23 Question (1)(b) should be answered "yes, in whole".

Question 2: the validity of the First s3LA Order and the Second s3LA Order

24 By reason of the invalidity of the first search warrant issued on 25 June 2020 (**First Warrant**), the two orders made under sec 3LA of the *Crimes Act* (**First Section 3LA Order** and **Second Section 3LA Order,** respectively), made in relation to that warrant, are invalid.

25 The First Section 3LA Order was made upon the second defendant's satisfaction that there were reasonable grounds for suspecting that evidential material was held in, or was accessible from, a computer or storage device at the plaintiff's residential premises, apparently pursuant to sec 3LA(1)(a)(i) of the *Crimes Act*, which refers to a computer or data storage device that is on "warrant premises".[16] "Warrant premises" are "premises in relation to which a warrant is in force": sec 3C of the *Crimes Act*. If the First Warrant was invalid, it was void ab initio, and so was not in force at the time the First Section 3LA Order was made.

26 The Second Section 3LA Order was made upon the fourth defendant's satisfaction that there were reasonable grounds for suspecting that evidential material was held in, or was accessible from, a computer or data storage device seized under the First Warrant, apparently

[15] *Criminal Code,* sec 90.3(b).
[16] SC-2 SCB 69.

pursuant to subsec 3LA(1)(a)(iii) of the *Crimes Act*, which refers to a computer or data storage device that has been "seized under this Division".[17] Material can only be seized in respect of warrants in relation to premises if a warrant is in force in relation to the particular premises: sec 3F(1)(c), (d) and (e) of the *Crimes Act*. If the First Warrant was invalid, it follows that the material was not seized under Division 2 of Part IAA of the *Crimes Act*.

27 If the Warrants are invalidated on the basis that the Provisions themselves are invalid, the Section 3LA Orders are invalid and must be quashed. For the Section 3LA Orders to be valid, there must be an offence to which any "evidential material" could relate: sec 3LA(2)(a). "Evidential material" is defined in sec 3C(1) of the *Crimes Act* as a thing relevant to an indictable offence. If the Provisions are invalid, there was no indictable offence to which evidential material could attach.

Conclusion on question 2

28 Question 2 should be answered "yes, as to both".

Questions (1)(c), (d), (3) and (4): The Provisions impermissibly burden the implied freedom of communication on governmental and political matters

29 The relevant test governing the validity of the Provisions is as follows:[18] (1) Does the law effectively burden the implied freedom in its terms, operation or effect? (2) If "yes" to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? (3) If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

Burden

30 The High Court of Australia held in *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448; [2019] HCA 11 at 466 [35], [41], (Kiefel CJ, Bell and Keane JJ), 528 [377] (Gordon J) that the question of whether a statute burdens the implied freedom is to be answered by reference to the terms, legal effect or operation and practical effect or operation of the statute, not by reference to whether it limits the freedom on the facts of a particular

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[17] SC-5, SCB 86.

[18] *McCloy v New South Wales* (2015) 257 CLR 178 at 194-195 [2] (French CJ, Kiefel, Bell and Keane JJ), *Brown v Tasmania* (2017) 261 CLR 328 at 363-4 [104] (Kiefel CJ, Bell and Keane JJ), 375-6 [155] – [156], 416 [277] (Nettle J), 478 [481] (Gordon J), *Clubb v Edwards; Preston v Avery* (2019) 93 ALJR 448; [2019] HCA 11 at 462 [5] (Kiefel CJ, Bell and Keane JJ).

case. A statute will effectively burden the implied freedom of political communication if it prohibits, or puts some limitation on, the making or content of political communications.[19]

31 The range of matters which may be characterised as "governmental and political matters" for the purpose of the implied freedom is broad, and is not limited to matters concerning the current functioning of government.[20] Freedom of political communication between citizens, and between citizens and their elected representatives, entails freedom on the part of citizens to associate with those who wish to communicate information and ideas with respect to political matters and those who wish to listen, and freedom of access to the institutions of government.[21] The influence of others to a political viewpoint constitutes political communication.[22]

32 Offences are purportedly created by the Provisions in respect of conduct engaged in by a person in particular circumstances, by reference to three criteria in the case of each provision. The first, which is common to both Provisions, is that the person engages in conduct with the requisite connection with a foreign principal or person acting on its behalf, as set out in subsec (b) to each of the Provisions. In respect of sec 92.3(1), the second criterion is that the person is reckless as to whether the conduct will have a particular effect, as set out in subsec (c). The third criterion with respect to that provision is as to whether any part of the conduct has a particular character or involves certain matters. The second and third criteria with respect to sec 92.3(2) are that the person is reckless as to whether the conduct will influence another person (the **target**) in respect of particular matters and that the person conceals from, or fails to disclose to, the target the connection that the conduct has with the foreign principal or person acting on its behalf, as set out in paragraph (b).

33 In each case, the particular effect of the conduct about which the person may be reckless in order to constitute an offence concerns, in addition to other matters in the case of sec 92.3(1), the influence of a political or governmental process of the Commonwealth, a State or Territory;[23] the influence of the exercise of an Australian democratic or political right or duty;[24] the influence of the target in relation to a political or governmental process of the

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[19] *Monis v R; Droudis v R* (2013) 249 CLR 92 at 142 [108] (Hayne J), *Unions New South Wales v State of New South Wales* (2013) 252 CLR 530 ***(Unions NSW 2013)*** at 574 [119] (Keane J); *Tajjour v New South Wales* (2014) 254 CLR 508 at 569 – 70 [105] – [107] (Crennan, Kiefel and Bell JJ); *McCloy* at 257 CLR 230 [126] (Gageler J); *Clubb v Edwards* at 93 ALJR 502 [250] (Nettle J).
[20] *Hogan v Hinch* (2011) 243 CLR 506 at 543-4 [49] (French CJ).
[21] *Kruger v Commonwealth* (1997) 190 CLR 1 at 115 – 6 (Gaudron J).
[22] *Unions NSW 2013* at 551-2 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
[23] Sec 92.3(1)(c)(i).
[24] Sec 92.3(1)(c)(ii).

Commonwealth, a State or Territory;[25] and the influence of the target's exercise of any Australian democratic or political right or duty.[26] None of these key terms is defined, and in the context in which they appear in the Provisions, they carry a broad meaning, clearly concerning political matters. Criminalisation of conduct which may have the effect of influencing a person in that regard, or the particular process, right or duty, limits the making or content of political communications and thus burdens the implied freedom.

34 The suspected offences set out in the Warrants plainly concern political communication, being that the plaintiff and others engaged with Mr Moselmane while acting on behalf of "Chinese State and Party apparatus" to advance the interests and policy goals of the Government of the PRC in Australia. The subject matter of these alleged communications is political in nature. The proscription of this conduct burdens the freedom of political communication.

Legitimacy of purpose

35 The purpose of the law is identified by ordinary processes of statutory construction,[27] including its context,[28] and is a search for the meaning of the words used by that legislature.[29] The relevant enquiry is not as to the subjectively-held purposes of the legislature who enacted it.[30] The search goes beyond the language used in the particular provisions and is a search for the mischief to which the statute is directed.[31]

Identification of the purpose

36 Ordinary processes of statutory construction reveal that the purpose of the Provisions is the prevention of any potential undisclosed or non-transparent foreign influence over Australian political or governmental processes, or over Australian democratic political rights or duties, regardless of whether or not that influence is malicious, harmful to, or in conflict with, the interests of Australia. This can be seen from the following features of the Provisions.

37 Although the conduct criminalised by the provisions enacted in sec 92 of the Criminal Code was described in the Revised Explanatory Memorandum to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (Cth) (**Bill**) as

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[25] Sec 92.3(2)(c)(i).
[26] Sec 92.3(2)(c)(ii).
[27] *Unions NSW v NSW* (2019) 264 CLR 595 (**Unions NSW 2019**) at 656 [169] (Edelman J); *Monis* at 249 CLR 139 [95], 148 [126] (Hayne J).
[28] *Brown v Tasmania* at 261 CLR 392 [209] (Gageler J), 432 [321] (Nettle J).
[29] *Unions NSW 2019* at 656 [169] (Edelman J).
[30] *Monis* at 147 [125] (Hayne J); *Unions NSW 2019* at 656-7 [168] – [172] (Edelman J).
[31] *McCloy* at 257 CLR 232 [132] (Gageler J); *Brown v Tasmania* at 363 [101] (Kiefel CJ, Bell and Keane JJ), 391-2 [208] – [209] (Gageler J); 432 [321] (Gordon J).

"harmful",[32] it is clear from the Provisions that harm is not a necessary element of an offence under either of the Provisions. The minimum quality of the conduct necessary for an offence under sec 92.3(1) is that it be "covert". In the case of sec 92.3(2), the connection between the person's conduct and the foreign principal or person acting on its behalf need only be undisclosed to the target. That particular conduct is covert, or that the connection with a foreign principal has not been disclosed, is insufficient to amount to harm.

38 The term "covert" had no established meaning in the criminal law at the time of enactment of the Criminal Code. Its ordinary meaning is broad. The Oxford English Dictionary defines it as "concealed, hidden, secret; disguised". Used to describe conduct, it may therefore include any conduct which is not openly acknowledged, shown or engaged in, which lacks transparency or is private. Conduct need not extend to active concealment to avoid detection in order to be covert. This can be seen from the juxtaposition of "covert" in the alternative to the term "involves deception" in the context of sec 92.3(1)(d), thereby suggesting that the term carries a different meaning. Consistently with the ordinary meaning of the term, the Revised Explanatory Memorandum to the Bill states that the term was "intended to cover any conduct that is hidden or secret, or lacking transparency".[33] The conduct caught by the Provisions is therefore much broader than conduct which involves deception, threats or demands, as para 92.3(1)(d) otherwise provides. Subsec 92.3(2) does not require that the conduct itself have any particular quality, beyond the concealment of, or failure to disclose to, the target the person's connection with the foreign principal.

39 The use of this term is a departure from that used by the legislature in the *Australian Security Intelligence Organisation Act 1979* (Cth). Section 4 of that Act defines the term "acts of foreign interference" to mean:[34]

> activities relating to Australia that are carried on by or on behalf of, are directed or subsidised by or are undertaken in active collaboration with, a foreign power, being activities that:
>
> (a) are clandestine or deceptive and:
>
> (i) are carried on for intelligence purposes;
>
> (ii) are carried on for the purpose of affecting political or governmental processes; or
>
> (iii) are otherwise detrimental to the interests of Australia; or
>
> (b) involve a threat to any person.

40 Unlike the term "clandestine", which connotes illicit behaviour, the ordinary meaning of "covert" does not necessarily carry that connotation. Clandestine is defined in the Oxford

[32] At [19], extracted in the Response at [14] SCB 37.
[33] At 195 [872].

English Dictionary Online as "secret, private, concealed; usually in a bad sense, implying craft or deception; underhand, surreptitious."

41 It follows that the term "covert" may capture a range of private or non-transparent communications, including communications on encrypted communication platforms.[35] As messaging applications that are encrypted for privacy are readily available and widely used both in Australia and around the world as a means of aiding connectivity, and sharing information and opinions,[36] it follows that communications conducted on such messaging applications between an Australian and a "foreign principal" or person acting on its behalf which have the potential to influence political or governmental processes, or democratic political rights or duties, or a particular person in relation to the exercise of those rights or duties, may be entirely harmless to the interests of Australia.

42 There is no requirement that the conduct of either the relevant foreign principal or their agent, or that of the person engaging in the conduct the subject of the Provisions, have any harmful effect upon the processes, political rights or duties sought to be protected, nor that any of the actors possess any malicious intent (or indeed, any intent whatsoever) or for the conduct to actually have the particular influence contemplated by the Provisions. The influence need not be undue, or malicious. Intent is only a fault element of the offence under sec 92.3(1) insofar as the person must have intentionally engaged in the conduct.[37] It is an element of the offence under sec 92.3(2) insofar as the person must have intentionally engaged in the conduct, and intentionally concealed from, or failed to disclose, the connection with the foreign principal.[38]

43 The mischief to which the Provisions were directed was described in the second reading speech of the Bill of the then Prime Minister, the Hon Malcolm Turnbull MP, as follows:[39]

> We are also introducing, for the first time, offences for acts of foreign interference. Addressing a clear gap, we will criminalise 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.

44 As set out above, the Provisions go beyond criminalising the actions described by the Prime Minister. A foreign principal need not have the aim of influencing Australia's political processes or prejudicing Australia's national security, bearing in mind that the aim of foreign

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[34] See also SC [38] SCB 54.
[35] As suggested in the Replacement Explanatory Memorandum to the Bill at [1036].
[36] SC [14] SCB 48.
[37] *Criminal Code*, sec 5.6.
[38] *Criminal Code*, sec 5.6.

influence may be entirely benign,[40] in order for a person acting on the foreign principal's behalf or in collaboration with it to commit an offence under the Provisions.

The purpose of the Provisions is not legitimate

45 A legitimate purpose is one which is compatible with the system of representative and responsible government provided for by the Constitution, such that the purpose does not impede the functioning of that system and all that it entails: *McCloy* at 257 CLR 203 [31] (French CJ, Kiefel, Bell and Keane JJ); 231 [129] (Gageler J); 258 [220] (Nettle J); 280 [306] (Gordon J). The purpose of preventing any potential undisclosed or non-transparent foreign influence, in the absence of malevolent intent or harmful effects, is incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government in a pluralistic democracy. This is because it prevents communication within the Australian political system of advancing policy positions favourable to foreign actors. Those communications are seemingly only potentially legitimised by registration under the *Foreign Influence Transparency Scheme Act 2018* (Cth) (**FITSA**), yet the potentially significant role to be played by diaspora communities in the facilitation of Australia's international relationships has been recognised by the Australian government.[41]

46 The proposition advanced by the first defendant that in order to be affected by the Provisions, the communication need be covert, deceptive or harmful, requires some qualification.[42] While this is true in broad terms of sec 92.3(1), it does not follow that "covert" conduct is harmful, for the reasons set out above. A person's conduct need not be covert, deceptive or harmful in order to have committed an offence under sec 92.3(2), unless the failure to disclose a connection with the foreign principal amounts to "covert" conduct.

Proportionality

47 Proportionality testing is required in order to justify any restriction on the freedom. It is a tool of analysis for ascertaining the rationality and reasonableness of the legislative restriction: *McCloy* at 213 [68], 215-6 [73]- [74] (French CJ, Kiefel, Bell and Keane JJ). This test requires a response to three questions:[43] (1) Are the Provisions **suitable** in that they have a rational connection to their purpose? (2) Are the Provisions **necessary** in that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom? (3) Are the Provisions **adequate** in

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[39] SC-12 SCB 157.
[40] SC [37] SCB 53.
[41] SC [52] – [53] SCB 58.
[42] Cf Response at [15] SCB 37.

their balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom?

48 Any effective burden on the freedom must be justified: *McCloy* at 257 CLR 201 [24]; *Clubb v Edwards* at 93 ALJR 469-70 [64] (Kiefel CJ, Bell and Keane JJ). The question is whether the burden effected by the Provisions is undue, in the sense that it is disproportionate to the law's effect in achieving its legitimate purpose: *Clubb v Edwards* at 470 [67]-[68] (Kiefel CJ, Bell and Keane JJ); *McCloy* at CLR 214-5 [71], 218 [86] (French CJ, Kiefel, Bell and Keane JJ). The greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate.[44] It is the effects of the law which are to be balanced, rather than competing notions of social importance.[45] The burden upon the implied freedom imposed by the Provisions is a heavy one, and therefore requires a significant justification.[46]

49 If the Provisions are directed to a legitimate purpose, they are not reasonably appropriate and adapted to advance that purpose. It is agreed that foreign interference may have serious consequences for liberal democratic systems of government,[47] and that undisclosed or non-transparent foreign influence can have "serious implications for sovereignty and national policy as it may result in the prioritisation of foreign interests over domestic interests".[48] The Provisions are not proportionate to these potential threats.

50 The Provisions are not **suitable** to the achievement of a legitimate purpose as there is no rational connection between the Provisions and a legitimate purpose.[49] The breadth of the effect of the Provisions overreaches any legitimate purpose, if there be one. This is illustrated by the extension of sec 92.3(1) to "covert" conduct, as set out above, the extension of sec 92.3(2) to conduct which is engaged in "on behalf of" a foreign principal, and the extension of both Provisions to conduct which is not necessarily intended to, and may not in fact, bring about any foreign influence (let alone inappropriate or harmful foreign influence) upon the particular process, right or duty concerned.

51 The application of the Provisions to conduct engaged in "on behalf of" a foreign principal, or person acting on its behalf illustrates their breadth. That term is not defined, and its ordinary meaning carries a broader meaning than that of a formal legal relationship or

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[43] *McCloy* at 194-5 [2] (French CJ, Kiefel, Bell and Keane JJ); *Clubb v Edwards* at 93 ALJR 462 [6] (Kiefel CJ, Bell and Keane JJ).
[44] *McCloy* at 219 [87] (French CJ, Kiefel, Bell and Keane JJ).
[45] *Clubb v Edwards* at 471 [72] (Kiefel CJ, Bell and Keane JJ).
[46] *Brown v Tasmania* at 261 CLR 369 [128] (Kiefel CJ, Bell and Keane JJ), see also 389 [199] (Gageler J).
[47] SC at [49] SCB 57.
[48] SC [37] SCB 53.

engagement such as a contractual dealing or power of attorney. Instead, it may extend to conduct engaged in in support of, or in the interests of, a foreign principal.[50] The standard falls short of a person being effectively controlled by, or acting as an agent of, the foreign principal, and the person need only have a state of mind of recklessness, rather than intent.[51] The person need not even have a particular foreign principal in mind when engaging in the conduct in order to commit the offence,[52] demonstrating the reach of the Provisions. Such conduct need not be inconsistent with the interests of Australia. It could embrace a person's support for, and lobbying of politicians in relation to, a human rights cause in another country, following communications with a representative of that country, or indeed with a public international organisation. The definition of "foreign principal" relevantly includes an organisation constituted by persons representing two or more countries, and so would include public international organisations such as the World Health Organisation, the Office of the United Nations High Commissioner for Refugees, and any other United Nations affiliated organ, commission, council, body, committee, or subcommittee.[53]

52 The Provisions' breadth and lack of connection with a legitimate purpose is further demonstrated by the fact that they import a requirement of recklessness on the part of the person engaging in the conduct as to whether the person's conduct will "influence" various matters, in the case of sec 92.3(1), or a particular person in relation to various matters, in the case of sec 92.3(2). What amounts to "influence" is also undefined and, in the context of a person, embraces an extremely broad range of circumstances including any impact on a person's mind or action.[54] As noted above, there is no definition of "political or governmental process" or "Australian democratic or political right or duty". These terms are very broad and, expressed in unconfined terms, may embrace both an individual's right or duty, or a collective right or duty. Further, the terms "support" and "intelligence activities" in sec 92.3(c)(iii) are undefined. The lack of definition of these terms which may otherwise qualify their broad operation contributes to the overreach of the Provisions and illustrates the range of conduct which may constitute an offence, without any malice or threat of malice towards Australia.

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[49] *McCloy* at 195 [2], 217 [80] (French CJ, Kiefel, Bell and Keane JJ); 232 [132] (Gageler J).
[50] See *R v Toohey; Ex parte Attorney-General (NT)* (1980) 145 CLR 374 at 386 (Stephen, Mason, Murphy and Aickin JJ).
[51] *Criminal Code*, sec 5.6.
[52] *Criminal Code*, subsec 92.3(3).
[53] *Criminal Code*, subsec 90.2(b), sec 70.1.
[54] *Habib v Nationwide News Pty Ltd* (2010) 76 NSWLR 299; [2010] NSWCA 34 at [238] – [240] (Hodgson, Tobias, McColl JJA); *R v HG (No 1)* [2019] NSWSC 573 at [117] - [120] (Bellew J).

53 That the Offence Provisions are not **necessary** for the achievement of any legitimate purpose is emphasised by the recognition that there are obvious and complete alternatives,[55] or reasonably practicable means of achieving the same purpose which have a less restrictive effect on the implied freedom.[56] An "obvious and compelling"[57] alternative is the criminalisation of conduct with one or more of the following features: conduct with a harmful effect upon Australia's interests, conduct engaged in with malicious intent rather than mere recklessness, conduct engaged in using unconscionable or dishonest means, conduct where the alleged offender was genuinely under the control of a foreign principal, or conduct where undue influence is exercised or attempted to be exercised. The introduction of the offences of intentional foreign interference in sec 92.2(1) and (2) satisfy some of these aims, as they require that the person must have intended that their conduct will have the requisite influence. More narrowly drafted provisions would achieve a legitimate purpose of maintaining the integrity of the Australian political and democratic system without imposing such a significant burden upon the implied freedom of communication on political matters.

54 Unlike in *McCloy* at 257 CLR 220-1 [93] where French CJ, Kiefel, Bell and Keane JJ held that the impugned provisions in that case did not affect the ability of any person to communicate with another about matters of politics or government nor to seek access to or influence politicians in ways other than those involving the payment of substantial sums of money, that is the precise effect of the Provisions. The Provisions present a serious interference with political communication, and are not the only means of protecting the system of representative government. As McHugh J said in *Coleman v Power* (2004) 220 CLR 1 at 40 [98], *"ordinarily, the complete prohibition on, or serious interference with, political communication would itself point to the inconsistency of the objective of the law with the system of representative government."* That is so here. The effect upon political communication is not merely incidental, and the effect on the freedom is extensive. The Provisions criminalise communications of a political nature which are not necessarily malicious or harmful and substantially impair the opportunity for the Australian people to form necessary political judgments.[58]

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[55] *McCloy* at 257 CLR 195 [2]; 211 [58] (French CJ, Kiefel, Bell and Keane JJ), 270 [258] (Nettle J); 285-6 [328] (Gordon J); *Monis* at 249 CLR 214 [347] (Crennan, Kiefel and Bell JJ).
[56] *McCloy* at 210 [57] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* at 261 CLR 371-2 [139] (Kiefel CJ, Bell and Keane JJ).
[57] *Monis* at 347 [214] (Crennan, Kiefel and Bell JJ).
[58] *Monis* at 216 [352] (Crennan, Kiefel and Bell JJ); *Nationwide News v Wills* (1992) 177 CLR 1 at 50-51 (Brennan J).

55 The Provisions are not **adequate in their balance** between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom. The Provisions impose a burden on the implied freedom which is "manifestly excessive by comparison to the demands of a legitimate purpose" or grossly disproportionate.[59] Even if an impugned law's purpose is compatible with the constitutionally-prescribed system of representative and responsible government, the law will be invalid if it pursues that purpose by means that have the effect of impermissibly burdening the implied freedom.[60] The effect on the freedom is direct, as the Provisions affect the ability of a person to communicate with another about matters of politics and government. The restriction is not balanced by the benefits sought to be achieved.

56 It is no answer to the above arguments that a person need only become registered under the FITSA in order to avoid prosecution under the Provisions. The conduct criminalised under the Provisions is broader than that for which a person is liable to register under the scheme in the FITSA, pursuant to sec 18. While many key terms in the Provisions are undefined, sec 11 of the FITSA prescribes when a person "undertakes activity on behalf of a foreign principal" and sec 12 prescribes when a person "undertakes activity for the purpose of political or governmental influence" thus limiting the circumstances in which a person will be liable to register under the scheme. The same limitations do not apply to the wording of the Provisions. The FITSA also contains various exemptions from registration. Therefore, a person may not be liable to register under the FITSA yet their conduct may nevertheless fall foul of the Provisions. Conversely, registration under the Scheme will not necessarily mean activities are not covert for the purposes of sec 92.3(1)(d)(i), nor will it mean that the connection with the foreign principal has been disclosed for the purposes of sec 92.3(2)(d). The consequence is then that the burden is disproportionate.

Conclusion on questions (1)(c) and (d), and (3) and (4)

57 Questions (1)(c) and (d) should be answered "unnecessary to answer" on the basis that questions (1)(b) is answered "yes". Questions (3) and (4) should be answered "yes".

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[59] *Clubb v Edwards* at 93 ALJR 470 [69] – [70] (Kiefel CJ, Bell and Keane JJ); 508-9 [270] – [272], 518-9 [324] (Nettle J), 552 [497] (Edelman J).
[60] *Clubb v Edwards* at 474 [96] (Kiefel CJ, Bell and Keane JJ).

Question 5: Relief

58 Writs of certiorari should issue quashing the Warrants in consequence of their invalidity.[61] Writs of certiorari should also issue quashing the First and Second Section 3LA Orders.[62]

59 A declaration as to the invalidity of the Provisions should also be made. The plaintiff has standing to seek declaratory relief as a person affected by the Warrants, and who relies upon the constitutional invalidity of the Provisions as a basis for the invalidity of the Warrants.[63] Quite apart from the plaintiff's reliance upon the invalidity of the Provisions as a basis for the invalidity of the Warrants, he has a real interest in the determination of whether or not the Provisions are invalid as a person who is being investigated for suspected offences under the Provisions.[64] Although a decision has not yet been made as to whether he will be charged with offences under the Provisions,[65] the fact that he is being investigated for suspected offences under the Provisions gives him sufficient interest in having his legal position clarified and sets him apart from persons generally who have no more interest than anyone else in clarifying what the law is.[66] He need not have been charged with offences under the Provisions in order to have sufficient interest in having his legal position clarified, just as it was accepted in *Brown v Tasmania* at 261 CLR 343 [17] that the plaintiffs had standing partly on the basis that although charges previously brought against them had been withdrawn, those charges may be brought again.[67] A declaration regarding the invalidity of the Provisions has utility in circumstances where, unlike in *Smethurst*, the Provisions remain in force.[68]

60 The Court should exercise its discretion to grant an injunction under section 75(v) of the Constitution requiring the destruction, or delivery up to the plaintiff, of material seized under the Warrants. The Australian Federal Police (AFP) continues to retain some original items seized, including the plaintiff's Australian passport, two mobile phones, hard drives and other personal items,[69] as well as electronic copies of data on computers and devices found on

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[61] Application [1] – [3] SCB 6; *Smethurst* at 94 ALJR 520 [45] (Kiefel CJ, Bell and Keane JJ); 536 [140] (Gageler J); 543 [168], 547 [184] (Gordon J).
[62] Application [4] – [5] SCB 7.
[63] *Smethurst* at 567 [280] (Edelman J).
[64] SC [33] SCB 52-53.
[65] SC [35] SCB 53.
[66] Cf *Kuczborski v Queensland* (2014) 254 CLR 51 at 107 [175] – [177] (Crennan, Kiefel, Gageler and Keane JJ).
[67] Cf *Smethurst* at 529 [106] (Kiefel CJ, Bell and Keane JJ); 550 [198] (Gordon J).
[68] See *Smethurst* at 529 [105] (Kiefel CJ, Bell and Keane JJ).
[69] SC [30] SCB 52, SC [13.1] SCB 48.

the plaintiff's residential and business premises[70] and copies of material found on electronic systems within the Jubilee Room at New South Wales Parliament House.[71] The invalidity of the Warrants renders the search of the plaintiff's residence and business premises a trespass and the unauthorised access to the plaintiff's property a trespass to goods, such that the seizure and removal of his property and continued retention of it was unlawful. Damages are inadequate to compensate the plaintiff for his loss.[72] The juridical basis for the relief sought by the plaintiff is that identified by Gageler J (dissenting on this issue) in *Smethurst* at 94 ALJR 535 [130]; see also 547 [183], [186] (Gordon J). It lies in its issue within the jurisdiction of the Court being constitutionally appropriate to restore the plaintiff to the position he would have been in had his common law right to control access to his real and personal property not been invaded by the tortious conduct of the Australian Federal Police in circumstances in which money alone could not restore him to that position. The first defendant bears the onus of establishing a sound basis for the discretionary refusal of the injunction.[73]

Conclusion on question (5)

61 Question 5 should be answered "writs of certiorari quashing each of the Warrants, writs of certiorari quashing the Section 3LA Orders, a declaration that the Provisions are invalid, a mandatory injunction requiring the destruction, or delivery up to the plaintiff, of material seized under the Warrants, and costs, as set out at paragraphs 1 to 7 of the Application".

Part VII: Orders sought

62 The questions of law stated for the Court should be answered as follows: Question (1)(a): "yes, insofar as they refer to the offence under sec 92.3(2)". Question (1)(b): "yes, in whole". Questions (1)(c) and (d): "unnecessary to answer". Question (2): "yes, as to both". Question (3): "yes". Question (4): "yes". Question 5: as set out above. Question 6: "the first defendant should pay the costs of the proceeding".

Part VIII: Time estimate

63 The plaintiff seeks no more than 3 hours for the presentation of the plaintiff's oral argument.

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[70] SC [18.2.1] SCB 49.
[71] SC [20] – [21] SCB 50.
[72] *Smethurst* at 94 ALJR 532-3 [119] - [122] (Gageler J); 549-50 [196] - [197] (Gordon J).
[73] *Smethurst* at 535 [134] (Gageler J).

18th November 2020

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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

ANNEXURE TO THE PLAINTIFF'S SUBMISSIONS
LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019

CONSTITUTIONAL PROVISIONS

1. Section 75.

STATUTES

2. *Criminal Code Act 1995* (Cth), compilation no. 134, current.
3. *Crimes Act 1914* (Cth), compilation no. 133, current.
4. *Acts Interpretation Act 1901* (Cth), current.
5. *Australian Security Intelligence Organisation Act 1979* (Cth), current.
6. *Foreign Influence Transparency Scheme Act 2018* (Cth), current.

STATUTORY INSTRUMENTS

7. Nil.