IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S196 OF 2019

BETWEEN:

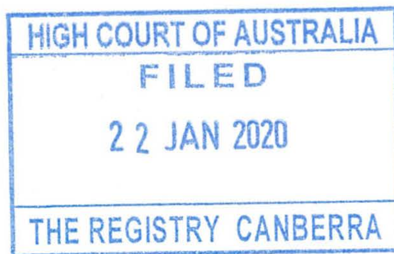
ANNIKA SMETHURST
First Plaintiff

NATIONWIDE NEWS PTY LTD
Second Plaintiff

and

COMMISSIONER OF POLICE
First Defendant

JAMES LAWTON
Second Defendant



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

Filed jointly on behalf of the First Defendant and the Attorney-General of the Commonwealth by:

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PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet. They address the two questions posed in the Court's letter dated 3 December 2019 (**Letter**).

PART II: ARGUMENT

2. The Commissioner and the Attorney accept that the injunction sought by the plaintiffs, however framed,[1] need not be an "injunction" within s 75(v) for the Court to have power to issue that injunction (plaintiffs' supplementary submissions (**PSS**) [3]). That acceptance does not depend on the fact that the plaintiffs' claim involves a matter arising under the Constitution or involving its interpretation, thereby attracting jurisdiction under s 76(i) of the Constitution and s 30(a) of the *Judiciary Act* (SCB 1 [4.2]; PSS [4]). It was sufficient to attract this Court's jurisdiction that the plaintiffs sought writs of prohibition and mandamus against an officer of the Commonwealth (SCB 1 [4.1]). Once the Court's jurisdiction was properly invoked, two consequences follow. First, as observed in PSS [4], the Court had jurisdiction (in the sense of authority to decide[2]) over the whole of the matter constituting the controversy between the parties.[3] Secondly, in quelling that controversy,[4] the Court may exercise the powers conferred by s 32 of the *Judiciary Act*,[5] including the power of a court of equity to grant an injunction.[6]

3. It is therefore unnecessary to address the unresolved question whether the Court would have jurisdiction under s 75(v) in an application that sought <u>only</u> an injunction with respect to a non-jurisdictional error.[7] The Court having <u>jurisdiction</u> independently of the claim for an injunction under s 75(v), and likewise having <u>power</u> to grant injunctive relief independently of s 75(v), those questions (and those raised in PSS [18]) do not arise.

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1 See the alternative formulations in SCB AH-AI [3]-[4A].

2 *Rizeq v Western Australia* (2017) 262 CLR 1 at [84]-[87] (Bell, Gageler, Keane, Nettle and Gordon JJ).

3 See, eg, *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 (***Edensor***) at [7], [52] (Gleeson CJ, Gaudron and Gummow JJ).

4 *Edensor* (2001) 204 CLR 559 at [65], [95] (Gleeson CJ, Gaudron and Gummow JJ); *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 279-280 (Gibbs CJ).

5 See, eg, *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld)* (1995) 184 CLR 620 at 651-652; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at [20]-[21], [55]-[58], [178]-[180], [267]-[269]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (***Plaintiff S157***) at [80]; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 477.

6 See, eg, *R v MacFarlane; Ex parte O'Flanagan* (1923) 32 CLR 518 at 537-538, 550 (Isaacs J, Rich J agreeing at 578); see also at 572 (Higgins J). See also, in the analogous context of s 22 of the *Federal Court of Australia Act 1976* (Cth), *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 161; *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 529 (Aickin J).

7 Gummow, "The Scope of Section 75(v) of the *Constitution*: Why Injunction but no Certiorari?" (2014) 42 *Federal Law Review* 241 at 242; *Edensor* (2001) 204 CLR 559 at [215] (Hayne and Callinan JJ).

4. Of course, the fact that the Court has power to grant the injunctive relief sought by the plaintiffs does not answer the question of whether the plaintiffs can obtain that relief in this proceeding.[8] In this case, the plaintiffs should not obtain that relief for two independent reasons, being that: they have not demonstrated the existence of any equitable, legal or public law wrong in respect of which an injunction could issue (Question 1); and discretionary considerations point against the issue of an injunction (Question 2).

A. Question 1: Is there a sufficient juridical basis for the grant of an injunction?

5. An injunction is a "curial remedy" that "can only issue to protect an equitable or legal right or … to prevent an equitable or legal wrong", or to prevent a "public wrong".[9] The need to establish such a "right" or "wrong" is consonant with the concept that a plaintiff seeking
10 equitable relief must demonstrate an "equity".[10] In this case, the plaintiffs have not demonstrated that they have suffered an equitable, legal or public law wrong in respect of which an injunction could issue. That position is not affected by the assumptions which are the basis for the questions in the Letter.

Tort law provides no basis for an injunction

6. The Commissioner and the Attorney accept that, if the Second Warrant were held invalid, the search of Ms Smethurst's premises would have constituted a trespass to real property,[11] and the search of her phone would constitute a trespass to goods (PS [48]; Plaintiffs' Note on Relief (**PNR**) [1]-[5]). If the plaintiffs' property had been seized unlawfully, they may have been able to recover it in detinue.[12] However, the plaintiffs' property was not seized. While
20 information was *copied*, that does not provide a juridical basis for an injunction to issue.

7. There is no general principle that a court will grant an injunction to "reverse" the consequences of a tort (cf PS [48]; PNR [3]). Consistently with the position that an equitable injunction in the auxiliary jurisdiction may issue to "restrain the threatened infringement, or the

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[8] *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 178 (Mason CJ); *Aala* (2000) 204 CLR 82 at [156] (Hayne J).

[9] *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 (***Lenah***) at [60] fn 153 (Gaudron J); see more generally [81], [88]-[91], [105] (Gummow and Hayne JJ, Gaudron J agreeing at [58]); *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 (***Cardile***) at [31] (Gaudron, McHugh, Gummow and Callinan JJ). See also Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, 2015) (***MGL***) at [21-025], [21-035].

[10] *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* (1998)
30 194 CLR 247 (***Bateman's Bay***) at [25] (Gaudron, Gummow and Kirby JJ).

[11] *Corbett* (2007) 230 CLR 606 at [81] (Callinan and Crennan JJ; Gleeson CJ and Gummow J generally agreeing at [1], [3]); *Coco v The Queen* (1994) 179 CLR 427 at 435-436 (Mason CJ, Brennan, Gaudron and McHugh JJ).

[12] Barker, Cane, Lunney and Trindade, *The Law of Torts in Australia* (5th ed, 2012) at [3.7.1]-[3.7.4].

continued or repeated infringement, of some legal right",[13] an injunction is capable of issuing in connection with trespass to land where the defendant has threatened a trespass, the defendant's trespass is continuing, or in order to restrain repetition of a trespass.[14] By contrast, injunctions will rarely issue in connection with a trespass to chattels: "[t]here is no general equity to restrain the commission" of a trespass to chattels, because "prima facie damages would be a sufficient remedy".[15] Tortious interference with chattels generally results in the recovery of their value by way of damages, although an order for specific delivery may be made in respect of very special goods (such order not being a form of injunction[16]). In this case, no evidence has been put before the Court as to the inadequacy of damages, notwithstanding that the plaintiffs do not contest that they are required to satisfy the Court of that issue.[17]

10 8. Despite the foregoing, the plaintiffs seek to draw from the case law two propositions. The **first** is that "[a]n injunction can go to restore the status quo prior to the commission of [a tort], by making orders with respect to the consequences of the tort – here, the copying of the data on the phone" (PNR [3]). While an injunction may sometimes have the effect of addressing the consequences of a tort, the cases cited by the plaintiffs do not indicate that an injunction could issue absent some threat or continuation of unlawful behaviour. For example, in *Redland Bricks* (PS [48] and PNR [3]), Lord Upjohn emphasised that a *quia timet* injunction could issue either in response to threats of "irreparable harm" or where a plaintiff, having "been fully recompensed both at law and in equity for the damage he has suffered ... alleges that the earlier actions of the defendant may lead to future causes of action".[18] *Vavasseur v Krupp* (PNR [3])
20 can be understood on a similar basis.[19] The cases cited by the plaintiffs do not establish that, without more, an injunction can issue to "stop further damage occurring from a past trespass".[20]

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13 *MGL* at [21-025] (emphasis added), see also at [21-035].

14 See Barker, Cane, Lunney and Trindade, *The Law of Torts in Australia* (5th ed, 2012) at 178-179; *MGL* at [21-035], [21-110]. See more generally *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 (***Lincoln Hunt***) at 462 (Young J); *Brown* (2017) 261 CLR 328 at [387] (Gordon J). The cases referred to in fn 173 of *MGL*, which are relied upon at PNR [2], both fall within this paradigm.

15 *MGL* at [21-120].

16 *Doulton Potteries Ltd v Bronotte* (1971) 1 NSWLR 591 at 596 (Hope J), referred to in PNR [2]. *Bronotte* was endorsed in *CSR Ltd v Cigna Insurance Australia Ltd* (1996) 189 CLR 345 at 390; *Cardile* (1999) 198 CLR 380 at [30]; *Travelex Limited v Commissioner of Taxation* (2010) 241 CLR 510 at [101] fn 76.

17 *Smethurst* [2019] HCATrans 216 at T22-24; HCATrans 223 at T89-91, 94, 101-103. See also Young, Croft and Smith, *On Equity* (2009) at [16.230]; *MGL* at [21-040], [21-120].

30 18 *Redland Bricks Ltd v Morris* [1970] AC 652 at 665. His Lordship gave as examples the situations where a defendant has "withdrawn support from his neighbour's land or ... so acted in depositing his soil from his mining operations as to constitute a menace to the plaintiff's land".

19 (1878) 9 Ch D 351 at 360 (Cotton LJ), addressing "a suit to restrain the infringement of a patent".

20 *Smethurst* [2019] HCATrans 223 at T103.

9. The **second** proposition that the plaintiffs attempt to draw from the case law is that the grant of an injunction does not depend upon the confidentiality of the information copied from Ms Smethurst's phone, nor on Ms Smethurst having proprietary rights in respect of that information (PNR [3]). The principal decision upon which the plaintiffs seemingly rely, *Lincoln Hunt*,[21] does not support that claim. That case should be understood in the way explained by Gummow and Hayne JJ in *Lenah*: that is to say, "while not articulated" in *Lincoln Hunt*, the outcome may be supported by principles of intellectual property law.[22] *Lenah* itself suggests that *Lincoln Hunt* should not be understood more broadly: in *Lenah*, four Justices found that, in the absence of any other legal or equitable right, a plaintiff seeking to restrain the publication of information obtained by a defendant from a trespasser would need to establish the confidentiality of that information.[23] There is no principled basis to distinguish between publication or use by a (knowing) third party and publication or use by an (assumed) tortfeasor.[24] For that reason, the Court should reject the plaintiffs' submission that an injunction may issue despite the fact that the plaintiffs have not proved that the information copied from Ms Smethurst's phone was confidential or proprietary.

10. That should be determinative of the plaintiffs' claim for an injunction based in tort: absent any threat or continuation of unlawful behaviour, or proof that the information copied from the phone was confidential or proprietary, there is no basis for an injunction to issue.

Part IAA of the Crimes Act provides no basis for an injunction

11. If the Court were to hold the Second Warrant invalid, clearly certiorari could issue to quash the warrant. However, the circumstance that AFP officers would have acted in excess of statutory power in the purported execution of that warrant does not provide a sufficient juridical basis for issuing injunctions requiring the destruction, or prohibiting the use, of the information copied from Ms Smethurst's phone (cf PSS [9]). The engagement of equitable jurisdiction in this field arises from the inadequacy of the legal remedies otherwise available to "secure the compliance by others with particular statutory regimes or obligations of a public nature".[25]

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[21] *Lincoln Hunt* (1986) 4 NSWLR 457, referred to in *MGL* at [21-110] fn 178. Hunt J indicated that, absent confidentiality, a court would intervene to prevent publication by a trespasser only if the circumstances revealed unconscionability: at 463. See also *Lenah* (2001) 208 CLR 199 at [51], [100].

[22] *Lenah* (2001) 208 CLR 199 at [101]-[103] (Gaudron J agreeing at [58]).

[23] *Lenah* (2001) 208 CLR 199 at [21], [32], [34]-[35], [43], [46], [52], [55] (Gleeson CJ); [58] (Gaudron J); [92], [100]-[105] (Gummow and Hayne JJ). See also *Smethurst* [2019] HCATrans 223 at T95-97.

[24] See, eg, *Glencore International AG v Federal Commissioner of Taxation* (2019) 93 ALJR 967 at [6].

[25] *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited* (1999) 200 CLR 591 at [98], see also [97] (Gummow J). See also *Bateman's Bay* (1998) 194 CLR 247 at [25], [50].

Necessarily that involves an extant statutory obligation which has not been met or an ongoing failure to comply with the statute. It is for that reason that the Court has identified the jurisdiction as resting upon the "continuance of ... unauthorized actions".[26] The absence of any such conduct means there is no basis for an injunction.

12. Contrary to PNR [6]-[10], Pt IAA does not implicitly prohibit the use of the information copied from Ms Smethurst's phone. While s 3ZQU delimits the purposes for which "a thing seized under this Part" may be used or made available, "a thing seized under this Part" means a thing lawfully seized (PNR [9]).[27] As such, s 3ZQU does not directly govern the use of information that is not lawfully seized (cf PNR [9]). Further, even if it did, the Commissioner seeks to use the information copied from Ms Smethurst's phone only for the purposes referred

10 to in s 3ZQU(1)(a) and (k). There is therefore no question of allowing to be done something that would not have been permitted by s 3ZQU.

13. The reasoning of Brennan J in *Johns*[28] (cf PNR [8]) does not support any wider prohibition. That case relevantly concerned whether information that was validly obtained in the exercise of statutory coercive powers could be used for a purpose other than that for which it was acquired. Brennan J explained, in reasoning subsequently adopted by the Court,[29] that ordinarily a statute impliedly limits the use of information obtained by compulsion to use for the purposes for which the power was conferred. Read in light of *Johns*, the apparent purpose of s 3ZQU(1) is to expand the use that may be made of lawfully seized material beyond the limits that would otherwise have been implied (which may not have extended beyond the

20 purpose identified in s 3ZQU(1)(a)). That said, the Commissioner and the Attorney do not suggest that unlawfully seized material can be used for purposes that would not be permissible had the material been lawfully seized. *Johns* would support an implied limitation to that effect, but no more. If it thought it appropriate to do so, the Court could make such a limitation express in any order permitting the Commissioner to retain the seized information.[30]

14. The plaintiffs' argument goes far beyond *Johns*, inviting the Court to imply a complete prohibition on the use of information that was invalidly obtained in the exercise of a statutory power.[31] The contention is that Pt IAA constitutes a "code" governing the use of all information

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[26] *Bradley v The Commonwealth* (1973) 128 CLR 557 at 564, see also at 575, 582 (Barwick CJ and Gibbs J).

[27] *Plaintiff S157* (2003) 211 CLR 476 at [75]-[77] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

30 [28] (1993) 178 CLR 408 at 424-425 (Brennan J).

[29] *Katsuno v The Queen* (1999) 199 CLR 40 at [24] (Gaudron, Gummow and Callinan JJ).

[30] As occurred in *Caratti v Commissioner, AFP (No 3)* [2016] FCA 1407 at [9]-[10] (Wigney J).

[31] *Smethurst* [2019] HCATrans 223 at T105-106.

obtained in any search (whether validly or invalidly).[32] As such, it invokes a form of *Anthony Hordern* analysis, whereby "affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise".[33] The argument should be rejected for two reasons. **First**, Pt IAA expressly denies the negative implication upon which the argument depends (see ss 3ZQU(4) and 3D). **Second**, while Pt IAA contains affirmative words addressing the use of *lawfully* seized information, it is silent on the topic of the use of *unlawfully* seized material. By contrast, that topic is expressly addressed in other Commonwealth legislation, being s 138 of the *Evidence Act 1995* (Cth). It would be inconsistent with the need to read Commonwealth legislation harmoniously to draw the negative implication from Pt IAA for which the plaintiffs contend.[34] That implication would mean that, while for most unlawfully obtained evidence a criminal court would decide the admissibility of that evidence by balancing the competing public interests in accordance with s 138, no such balancing would occur for material seized under an invalid search warrant, because that material could not even be included in a prosecution brief. Parliament should not be found to have brought about that result by implication,[35] given the ramifications it would have for the *Bunning v Cross* and *Puglisi*[36] lines of authority.

15. For the above reasons, Pt IAA does not impliedly prohibit any use being made of unlawfully seized information. As the plaintiffs do not put forward any other basis for an injunction to issue in connection with a public law wrong, no such injunction can issue.

16. The result would be that, in cases where a search warrant is held to be invalid, then (subject to the discretionary considerations addressed in Question 2), any property seized pursuant to the warrant would have to be returned, because the invalidity of the warrant would mean that the AFP could not rely upon s 3ZQX to answer a claim for return. By contrast, where information was copied in purported execution of the invalid warrant then, unless the information is confidential or proprietary (so as to ground an action for breach of confidence or infringement of intellectual property rights), that information could be used by the AFP in the exercise of its functions under s 8(1)(b) and (c) of the *AFP Act*,[37] subject to any statutory

32 *Smethurst* [2019] HCATrans 223 at T122-123.

33 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [54].

34 See, eg, *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1 at [98]-[100] (Gageler J).

35 Specifically, when it introduced Pt IAA of the Act in the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* (Cth), and when it introduced s 3ZQU by enacting the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010* (Cth).

36 (1978) 141 CLR 54; *Puglisi v Australian Fisheries Management Authority* (1997) 148 ALR 393 (***Puglisi***).

37 Otherwise the AFP would have lacked the capacity to retain and use lawfully seized material prior to the enactment of Pt IAA: see *Smethurst* [2019] HCATrans 223 at T125.

prohibition that limits the use of that information (including s 138, and also the implied limitation identified in [13] above that the AFP can use the information only for purposes that would have been permitted had the material been seized lawfully).

17. If the Court rejects the plaintiffs' submission that Pt IAA contains an implied prohibition, the Commonwealth does not understand the plaintiffs to put in issue the AFP's capacity to retain and use material seized pursuant to an invalid warrant. However, as foreshadowed at the hearing, if that capacity is in issue, then in addition to submitting that s 8(1)(b) and (c) of the *AFP Act* supply the necessary capacity, the Commissioner and the Attorney also submit that the executive power referred to in s 61 of the Constitution supplies that capacity.[38] Accordingly, if, in reply, the plaintiffs say that the AFP's capacity is in issue,
10 then the Commissioner and the Attorney seek an opportunity to advance further written submissions on that point, and will issue further notices under s 78B of the *Judiciary Act*.

Section 75(v) does not put the plaintiffs in any stronger position

18. The plaintiffs acknowledge the possibility that an injunction may not issue at general law "to remedy the consequences of unlawful acts", and on that basis they submit, in the alternative, that the injunction for which s 75(v) provides is of a different character to an injunction at general law, such that it should not be regarded as subject to the same constraint (PSS [16], [29]). That submission should be rejected.

19. The first argument raised by the plaintiffs in support of the extended reach of an injunction under s 75(v) is that prohibition "extends to reversing consequences", and that the
20 "approach taken in respect of each [remedy] may inform the approach taken in respect of the others" (PSS [12], [14]). However, it is not a permissible mode of reasoning to identify characteristics of other remedies referred to in s 75(v) and to then transpose those characteristics in order to inflate the reach of the injunction. To the contrary, "injunctions and prohibitions are remedies of very different scope and purpose",[39] and each remedy was included in s 75(v) for a distinct reason.[40] Those distinctions should not be elided. In any event, prohibition is not

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[38] *Williams v Commonwealth* (2012) 248 CLR 156 at [22] (French CJ).

[39] Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017) (**Aronson et al**) at [12.50].

30 [40] See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898 (***Convention Debates***) 1883-1885. See also *Plaintiff S157* (2003) 211 CLR 476 at [5] (Gleeson CJ), [123] (Callinan J); *Aala* (2000) 204 CLR 82 at [24]-[25] (Gaudron and Gummow JJ, Gleeson CJ agreeing at [5]), [159] (Hayne J); Burton, "Why These Three? The Significance of the Selection of Remedies in Section 75(v) of the *Australian Constitution*" (2014) 42 *Federal Law Review* 253 (**Burton**) at 257, 259.

addressed to notions of "consequences" at large, let alone their "reversal". In cases such as *Hibble*, the availability of the remedy rested upon a considerably more confined basis, being whether the exercise of power made in excess of jurisdiction "remain[ed] in force so as to impose liabilities upon an individual".[41] *Jones v Owen* may be understood on a similar basis.[42] In *Coward v Allen*, Northrop J found that police officers' claims "to be entitled to retain the things seized under the authority of the warrants" in the exercise of an "implied authority to ... decide which of the things mentioned in the warrant should be seized and retained" was sufficient to make the officers subject to prohibition (although prohibition did not issue).[43] The case is analogous to *Hibble* because, unless the warrant provided continuing authority to retain the seized property, the applicant had an enforceable right to the return of that property. Finally, in *Aala*, prohibition issued to prevent further action by the Minister based on the (quashed) Tribunal decision,[44] rather than to reverse the consequences of that decision.

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20. The second argument raised by the plaintiffs is that "the ability to reverse the consequences of an unlawful act is consistent with the purpose of s 75(v)" (PSS [15]). While the purposes of s 75(v) doubtless include those identified by Dixon J in the *Bank Nationalisation Case* and the plurality in *Plaintiff S157* (PSS [15]), those purposes do not require that an injunction under s 75(v) be given any greater "wrong-reversal" capacity than that which exists at general law (cf PS [15], [16], [29]). Indeed, three related aspects of the Convention Debates reveal that the framers did not intend an injunction under s 75(v) to have any extended reach. ***First***, and most significantly, s 75(v) was only intended to operate as a grant of jurisdiction, rather than to confer any novel right of action of the nature contended for by the plaintiffs.[45] This was confirmed in the course of the Melbourne Convention of 1898, in which Symon emphasised that "[t]he right to mandamus or prohibition is not conferred one whit more than at present".[46] Barton made clear that s 75(v) was "simply a provision conferring jurisdiction", not a provision that conferred "upon any person any new right", and that it did

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[41] *R v Hibble; Ex parte Broken Hill Pty Co Ltd* (1920) 28 CLR 456 (***Hibble***) at 463 (Knox CJ and Gavan Duffy J). See more generally *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Plaintiff S157* (2003) 211 CLR 476 at [5] (Gleeson CJ), [131] (Callinan J); *Dimitrov v Supreme Court of Victoria* (2017) 263 CLR 130 at [19] (Edelman J); Aronson et al at [12.20].

[42] (1848) 18 LJ QB 8 at 9. Until the rule of prohibition was made absolute, the judgment of the County Court, made in "total want of jurisdiction", remained in operation and purported to determine the rights and obligations of the parties. Note also the discussion of *Jones* in *Hibble* at (1920) 28 CLR 456 at 482-483 (Isaacs and Rich JJ, dissenting).

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[43] (1984) 52 ALR 320 at 325, 332, 334.

[44] See, eg, *Aala* (2000) 204 CLR 82 at [84] (Gaudron and Gummow JJ, Gleeson CJ agreeing at [5]).

[45] See Burton at 259; see also the sources cited in fn 8 above.

[46] *Convention Debates*, 1878, see also 1877.

not "give anybody a right to pursue in any way an officer of the Commonwealth, except such right as arises out of the known principles of law".[47] ***Secondly***, that passage of the debates was preceded by several framers expressing concern that s 75(v) may constitute "a declaration that the Judiciary should interfere with the Executive";[48] the comments made in the passage referred to above were clearly intended to demonstrate that those "apprehensions [were] ... not well founded" in circumstances where s 75(v) was solely a grant of jurisdiction.[49] ***Thirdly***, nothing in the Convention Debates suggests that the "injunction" for which s 75(v) provides was to be given any extended reach; indeed, the framers did not even make reference to the fact that the injunction was an equitable remedy.[50] Nor have the plaintiffs been able to identify any authority which suggests that an injunction under s 75(v) has the extended reach for which they contend.

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B. Question 2: The discretionary arguments relating to the grant of an injunction

21. The discretionary arguments only fall to be considered if, contrary to the above, the plaintiffs establish a legal, equitable or public law wrong that could ground an injunction. In that event, it is a "matter of discretion" whether the Court should order the return or destruction of the seized information.[51] In respect of injunctive relief, that discretion is "wide".[52]

22. The discretionary arguments presented to date are not undermined by the circumstance that the Court is exercising jurisdiction under s 75(v) and that the injunction sought by the plaintiffs relates to an (assumedly) unlawful exercise of public power;[53] rather, those circumstances are the premise upon which the parties' arguments to date have proceeded.

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23. It may be accepted that there is an "evident constitutional purpose that relief should be available to restrain excess of federal power and to enforce performance of federal public duties" (PSS [16]).[54] But that is not the only weighty public interest at stake in cases where material has been seized pursuant to an invalid warrant. There is also "the public interest in the effective administration of criminal justice".[55] As explained in *Puglisi*, while the court would

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[47] *Convention Debates*, 1883-1884 (emphasis added), see also 1877.
[48] *Convention Debates*, 1877 (Mr Kingston), see also at 1876-1877 (Mr Glynn), 1877 (Sir John Forrest).
[49] *Convention Debates*, 1877 (Mr Symon).
[50] Burton at 272. For the key discussion of the scope of the injunction, see *Convention Debates*, 1884.
[51] *Caratti* (2017) 257 FCR 166 at [158] (the Court).
[52] *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 (***Enfield***) at [23] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

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[53] *Enfield* (2000) 199 CLR 135 at [58] (Gaudron J); *FCT v Futuris Corporation Ltd* (2008) 237 CLR 146 at [48] (Gummow, Hayne, Heydon and Crennan JJ).
[54] *Aala* (2000) 204 CLR 82 at [162] (Hayne J).
[55] *George v Rockett* (1990) 170 CLR 104 at 110 (the Court); see also *Nicholas v The Queen* (1998) 193 CLR 173 at [35]-[36] (Brennan CJ), [76] (Gaudron J), [99]-[105] (McHugh J) and the cases cited therein.

not wish to be seen to be rewarding members of the police who obtain possession of material without lawful authority, "there is to be weighed against that a public interest in the administration of and non-interference with justice".[56] The *Puglisi/Caratti* line of authority (being cases for the most part decided in the exercise of jurisdiction under s 39B of the *Judiciary Act*) correctly recognises that this public interest is weighty, particularly where any unlawful conduct was inadvertent; the material in question is potentially important to the proof of serious offences (including against persons other than the person from whom material was seized); and no person has actually been deprived of property. To accept the plaintiffs' submission that relief should be granted "almost as of right" (PSS [32]) would give no weight to that public interest. It would also be inconsistent with the authorities in both Australia and the UK that have recognised that, at least in cases where the above factors are present, the balance of competing public interests is ordinarily best left to the criminal courts, with the result that applications that attempt to intercept material before it can be considered by those courts should be refused on discretionary grounds. Any other approach would simply encourage the fragmentation of criminal proceedings.[57] For those reasons, the *Puglisi/Caratti* line of authority appropriately identifies the manner in which the Court's discretion should be exercised, irrespective of whether the Court is exercising jurisdiction under ss 75(v), 75(iii) or 76(i) of the Constitution.

PART III: ORAL ARGUMENT

24. The Commissioner and the Attorney do not presently seek a further oral hearing. However, they seek to reserve their final position (including for the reason identified in paragraph 17 above) until they have received the plaintiffs' submissions in reply.

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[56] (1997) 148 ALR 393 at 405, generally endorsed in *Caratti* (2017) 257 FCR 166 at [158]-[162].

[57] Cf *Sankey v Whitlam* (1978) 142 CLR 1 at 25-26 (Gibbs ACJ), 82 (Mason J); *Flanagan v Commissioner of Australian Federal Police* (1996) 60 FCR 149 at 187-188 (the Court); *Obeid v The Queen* (2016) 90 ALJR 447 at [15] (Gageler J) and the cases cited therein.