IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S196 of 2019

BETWEEN:

ANNIKA SMETHURST
First plaintiff

NATIONWIDE NEWS PTY LTD
Second plaintiff

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and

COMMISSIONER OF POLICE
First defendant

JAMES LAWTON
Second defendant

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PLAINTIFFS' SUBMISSIONS

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PART I: PUBLICATION

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

PART II: ISSUES

2. The issues are disclosed by the questions of law in the special case (**SC**) (SCB 1).

PART III: SECTION 78B NOTICE

3. The plaintiffs have given notice under s 78B of the *Judiciary Act 1903* (Cth) (SCB AB).

PART IV: FACTS

4. The facts are set out in the special case at SCB 1–12.

PART VI: ARGUMENT

Q1. Validity of the Second Warrant

Applicable principles

5. Section 3E(1) of the *Crimes Act* permits the issue of a warrant if the issuing officer is satisfied there are reasonable grounds for suspecting there is or will be "evidential material" at the relevant premises. Section 3C(1) defines "evidential material" to mean "***a thing relevant to an indictable offence*** or a ***thing relevant to a summary offence***, including such a thing in electronic form". The emphasised phrases are defined in s 3(1). Each definition refers to an "offence against any law of the Commonwealth". Section 3E(5) requires the warrant to state the offence to which it relates (para (a)) and the kinds of evidential material to be searched for (para (c)). The latter flows through to the scope of the authorised search and seizure (s 3F(1)(c)). The validity of a warrant is dependent on strict compliance with the conditions governing its issue.[1] That has two relevant consequences for this case.

6. *First*, references to an "offence" in these provisions are to an offence known to law. A warrant will be invalid if the offence it states is not an offence known to law.[2] An instance of this is if a statutory offence is invalid, as constitutional invalidity operates *ab initio*.[3] Thus, a warrant relating to an invalid offence is itself invalid. It is for this reason that, if s 79(3) of the

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1 *George v Rockett* (1990) 170 CLR 104 at 111 per *curiam*; see also *NSW v Corbett* (2007) 230 CLR 606 at [104] per Callinan and Crennan JJ (Gleeson CJ and Gummow J agreeing generally).

2 *NSW v Corbett* (2007) 230 CLR 606 at [103] per Callinan and Crennan JJ (Gleeson CJ and Gummow agreeing generally), quoting *Parker v Churchill* (1986) 9 FCR 334 at 340; *Bradrose Pty Ltd v Commissioner of Police* [1989] 2 Qd R 304 (FC) at 308–309 per Kelly SPJ (Macrossan CJ agreeing).

3 *NSW v Kable* (2013) 252 CLR 118 at [51] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

Crimes Act, as it stood on 29 April 2018, was invalid, the Second Warrant was also invalid (question 1(c), question 3).

7. *Secondly*, the references to an "offence", and in particular the requirement that the warrant states the offence to which it relates, are not satisfied simply by referring in the warrant to the number of a provision creating an offence.[4] There must be a statement of "the particular offence relied upon",[5] ie ***the particular offending conduct***. The reason was explained in *NSW v Corbett*[6] by Callinan and Crennan JJ (Gleeson CJ and Gummow J agreeing generally):

> The concern of the common law courts to avoid general warrants and to strictly confine any exception to the principle that a person's home was inviolable is the original source of common, although differently expressed, statutory requirements. These requirements have as their purpose the proper identification of the object of a search by reference to a particular offence. This in turn limits the scope of the search authorised by the search warrant.

8. The question of the sufficiency of the statement of an offence "should not be answered by the bare application of a verbal formula, but in accordance with the principle that the warrant should disclose the nature of the offence so as to indicate the area of search".[7] Specificity is not merely to allow the issuing and executing officers to know the boundaries of the search, but to allow the person whose premises are searched to understand this.[8] It is thus not sufficient that the warrant provides information from which the offence may be deduced or inferred.[9]

Q1(a). The Second Warrant did not state the offence to which it related

9. The description of the offence in the third condition of the Second Warrant bears little relation to any offence created by s 79(3) of the *Crimes Act*, as it stood on 29 April 2018. It described the "offence" as: "On the 29 April 2018, Annika Smethurst and the Sunday Telegraph communicated a document or article to a person, that was not in the interest of the Commonwealth, and permitted that person to have access to the document, contrary to section 79(3) of the *Crimes Act 1914*, Official Secrets" (SCB 39). Read literally, it states as an element of the offence that the document or article was not in the interests of the

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4 See, eg, *Australian Broadcasting Corporation v Cloran* (1984) 4 FCR 151 at 153–154 per Lockhart J; *Williams v Keelty* (2001) 111 FCR 175 at [140] per Hely J.

5 *NSW v Corbett* (2007) 230 CLR 606 at [101] per Callinan and Crennan JJ (Gleeson CJ and Gummow J agreeing generally), quoting *R v Tillett; Ex parte Newton* (1969) 14 FLR 101 at 113–114 per Fox J.

6 (2007) 230 CLR 606 at [104]. See also at [99], quoting *Beneficial Finance Corporation v Commissioner of Australian Federal Police* (1991) 31 FCR 523 at 533 per Burchett J.

7 (2007) 230 CLR 606 at [103], quoting *Beneficial Finance Corporation v Commissioner of Australian Federal Police* (1991) 31 FCR 523 at 543 per Burchett J.

8 *Beneficial Finance Corporation v Commissioner of Australian Federal Police* (1991) 31 FCR 523 at 539, 542–543 per Burchett J.

9 *Williams v Keelty* (2001) 111 FCR 175 at [140] per Hely J

Commonwealth. Read generously, it states an offence of communicating a document contrary to the interests of the Commonwealth. Neither reading states the offence.

10. Section 79(3) prohibits the communication by a person of a "prescribed" thing of the kind described or "prescribed" information. A thing or information is prescribed "in relation to a person" as specified in s 79(1). For s 79(3) to be engaged, it is necessary that the thing or information be prescribed, not in a general sense, but ***in relation to the accused***. As explained further below at [12]–[13], the variety of circumstances giving rise to prescription create a substantial number of permutations by which a thing or information may be prescribed in relation to a person. But it is critical that one or more be made out in relation to a person in order for the offence to be committed by that person.

11. In the context explained at [9] above, the failure to state that prescription was an element of the offence, let alone the manner in which it was suspected that the document or article was prescribed in relation to the plaintiffs, meant that the third condition did not state an offence known to law. It was apt to mislead Ms Smethurst and the executing officers into thinking that the boundaries of the search were fixed by reference to an offence centred upon whether the document or article, or the act of communicating, was "not in the interests of the Commonwealth". That is simply not what s 79(3) proscribes.

Q1(b). The offence was not stated with sufficient particularity

12. If the Second Warrant did state an offence known to law, it failed to do so with sufficient particularity. The first and second conditions (SCB 38–39) did not effectively limit the scope of the search. The only effective limit was imposed by the third condition. The precision required of the description of the offence was thus heightened.[10] That is particularly so since, given the terms of s 79(1), there are a substantial number of different ways in which a thing or information in the possession or control of a person can be prescribed in relation to that person. *First*, if it was entrusted to the person by a Commonwealth officer or person holding office under the Queen, or obtained by the person owing to their position as a person of a kind enumerated in sub-paras (i)–(v), and "by reason of its nature or the circumstances under which it was entrusted to him or her or it was made or obtained by him or her or for any other reason it was his or her duty to keep it secret". *Secondly*, if it relates to a "prohibited place" (defined by s 80 to cover a large variety of places). *Thirdly*, if it has been made or obtained — apparently by ***another person*** — in contravention of s 91.1 of the *Criminal Code*, as it then stood, or

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[10] *Caratti v Commissioner of the Australian Federal Police* (2017) 257 FCR 166 at [41] per *curiam*.

Pt VII of the *Crimes Act*, bringing in all of the possible offences under that Part including, among other things, the various offences in s 79 itself.

13. The Franks Committee said of s 2 of the *Official Secrets Act 1911* (UK), a predecessor to s 79 of the *Crimes Act*: "According to one calculation over 2,000 differently worded charges can be brought under it".[11] The same point can be made about s 79(3). Given s 79(1), the circumstances giving rise to a thing or information being prescribed in relation to a person could vary dramatically. Yet, to establish breach by Ms Smethurst of s 79(3), it must be shown that the "article or document" was prescribed in relation to her.

14. In this light, the description of the offence in the third condition lacked sufficient precision. It did not specify that any document or article was "prescribed" and did not specify how it was prescribed in relation to either plaintiff. It did not even specify what "document or article" or what communication constituted the offence. The second condition referred to a news article published on a website but the third condition was not limited to that article. It covered any publication by Ms Smethurst or the Sunday Telegraph on 29 April 2018 not in the interests of the Commonwealth — a potentially enormous pool, that could not ***all*** reasonably be suspected to provide evidence of contravention of s 79(3). Even the online article referred to a range of government material (SCB 18-23). None of these things defied particularisation.[12] As Lockhart J said in similar, but less egregious, circumstances: "it is impossible to know with any degree of particularity or precision what are the offences alleged to be committed".[13] The offence was not "stated sufficiently to enable the issuing justice to understand the object of the search and to appreciate the boundaries of the authorisation to enter, search and seize" such that "there could be no mistake about the object of the search or about the boundaries of the search warrant".[14]

Answer to question 1

15. Having regard to the submissions above, and those below concerning the invalidity of s 79(3), it follows that the Second Warrant is invalid, for each of the reasons referred to in question 1. Each paragraph of question 1 should be answered: "Yes".

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[11] *Departmental Committee on s 2 of the Official Secrets Act 1911* (Cmd 5104, 1972) (**Franks Committee Report**), vol 1, 14 [16].

[12] See *Optical Prescription Spectacle Makers Pty Ltd v Withers* (1987) 13 FCR 594 at 602–603 per Pincus J.

[13] *Australian Broadcasting Corporation v Cloran* (1984) 4 FCR 151 at 154.

[14] *NSW v Corbett* (2007) 230 CLR 606 at [106]–[107] per Callinan and Crennan JJ (Gleeson CJ and Gummow agreeing generally).

Q2. Validity of the s 3LA Order

Q2(a) and (b). The s 3LA Order did not relate to the Second Warrant

16. Section 3LA(1) of the *Crimes Act* provides that a constable may apply to a magistrate for an order requiring a specified person to provide information or assistance to allow a constable to access data held in a computer or data storage device that is, relevantly, on "warrant premises" (s 3LA(1)(a)(i)). "Warrant premises" is defined in s 3C(1) to mean "premises in relation to which a warrant is in force". This was the basis upon which the s 3LA Order was sought here (SCB 35).

17. Pursuant to s 3LA(2), a magistrate may make an order if satisfied of the matters in paras (a), (b) and (c). Paragraph (a) is that there are reasonable grounds for suspecting that evidential material is held in or accessible from "***the*** computer or data storage device" — this refers to the device in, relevantly, s 3LA(1)(a)(i), ie the computer or device on the warrant premises. Among other things, para (b) includes that the specified person is reasonably suspected of having committed the offence stated in the "relevant warrant" (sub-para (i)) — referring to the warrant in s 3LA(1)(a)(i) — or the owner, lessee or user of "***the*** computer or device" (sub-paras (ii) and (v)) — again, referring to the computer or device on the warrant premises. Paragraph (c) is that the specified person has knowledge of "***the*** computer or device" or measures applied to protect data held in or accessible from "***the*** computer or device" — again, referring to the computer or device on the warrant premises.

18. It is thus apparent that an order under s 3LA(2) based on s 3LA(1)(a)(i), as here, can only be issued in respect of a ***specific*** warrant.[15] That is because the matters of which the magistrate must be satisfied pursuant to s 3LA(2) necessarily relate to a specific warrant. Whether or not the required state of satisfaction is reached can only be answered by reference to that warrant and the search it authorises. More generally, the magistrate has a discretion whether to make an order. That may be influenced by the terms of the relevant warrant and the search it authorises, as well as other matters liable to change over time. A s 3LA Order can thus only require a specified person to give information or assistance in the execution of a specific warrant. An order issued in connection with one warrant cannot purport to require conduct during the execution of a different warrant, *ex hypothesi* one obtained at a later time.

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[15] Commonwealth, *Cybercrime Bill 2001*, Explanatory Memorandum at 17: "Proposed section 3LA would enable a law enforcement officer ***executing*** a search warrant to apply to a magistrate for an 'assistance' order."

19. Such a conclusion is consistent with a requirement of strict compliance with the conditions governing the issue of warrants (see paragraph 5 above), which must apply equally to orders made in aid of warrants. It is also consistent with a narrow approach to provisions authorising conduct that would otherwise be tortious, an aspect of the principle of legality.[16]

20. In this case, the s 3LA Order was made before the Second Warrant was issued, in aid of the execution of the earlier First Warrant (SC [15]–[17]). It could not require conduct by Ms Smethurst during the execution of the Second Warrant. This point is not answered by the similarity of the terms of the two warrants. What was executed was the Second Warrant, not the warrant in aid of which the s 3LA Order was made. This is not merely a technical point. Unlike the Second Warrant, the First Warrant covered a vehicle (SC 28 cf 38). It cannot be assumed Magistrate Lawton would have been satisfied of the matters in s 3LA(2), and exercised his discretion to issue an order, had he been asked to make one in respect of the residential premises alone. Further, the Second Warrant was issued three days after the First Warrant; again, it cannot be assumed that, in the intervening period, no event had occurred which might have been relevant to whether to make the s 3LA Order.

21. That being so, given the usual approach to prefer a construction that renders an instrument valid, the s 3LA Order did not purport to compel assistance in the execution of any warrant other than the First Warrant. That was the warrant in relation to which the s 3LA Order recorded that it was sought (SCB 35). In that event, it is unnecessary to answer question 2. On this construction, the s 3LA Order provided no authority for the members of the AFP to compel Ms Smethurst to give them access to her mobile telephone (SC [20.2]). If, however, the s 3LA Order purported to compel assistance in the execution of, relevantly, the Second Warrant, it was invalid to that extent and questions 2(a) and (b) should be answered: "The s 3LA Order was invalid insofar as it purported to require Ms Smethurst to provide information or assistance in connection with the execution of the Second Warrant."

Q2(c) and (d). The s 3LA Order was insufficiently specific

22. If the submissions above are accepted, it is not necessary to answer questions 2(c) and (d). If those questions are necessary to answer, they should each be answered: "Yes". That is because, properly construed, s 3LA only permits an order requiring assistance in respect of a ***particular*** computer or data storage device and only permits an order requiring the provision

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[16] See, eg, *Coco v The Queen* (1994) 179 CLR 427 at 435–436 per Mason CJ, Brennan, Gaudron and McHugh JJ.

of ***specified*** information or assistance. It does not permit an order "in gross" such as that made here. These were the conclusions correctly reached by White J in *Luppino v Fisher (No 2)*.[17]

23. As to the requirement that the assistance be in respect of a particular computer or data storage device, this is required by the text of s 3LA, in particular use of the definite article preceding "computer or data storage device" throughout. In particular, s 3LA(2) requires a magistrate making an order to form the required state of satisfaction with respect to "***the*** computer or data storage device", that is, the specific computer or device in relation to which the application is made. A conclusion that an order may be made requiring assistance in respect of devices about which the magistrate has not reached the requisite state of satisfaction would be contrary to the text. Further, it would give an order a broad and ambulatory operation, in circumstances where the principle of legality requires precisely the opposite result. The requirement to specify a particular computer or device is consistent with the purpose of amendments made in 2010 to permit an application for a s 3LA order to be made by any constable, rather than only by the executing officer, due to the impracticality of the executing officer leaving the warrant premises where the computer or device is located.[18]

24. The requirement that an order specify the information or assistance required to be provided emerges from at least two matters. *First*, a pre-condition to the making of an order is that the magistrate be satisfied that the specified person has "relevant knowledge" of the computer or data storage device, or of the measures applied to protect data in that computer or device (s 3LA(2)(c)). "Relevant knowledge" refers to knowledge enabling the specified person to provide the specified assistance or information. The magistrate must therefore consider what assistance or information is to be provided by the specified person, in order to decide whether to require that person to provide that information or assistance. It is unlikely Parliament intended s 3LA to permit an order requiring a person to provide ***any*** reasonable and necessary assistance, regardless of whether the magistrate was satisfied that the person had the knowledge necessary to provide such assistance. *Secondly*, the alternative construction leaves the addressee of the order in the position of having to determine, during the execution of a warrant, whether assistance requested of them is "reasonable and necessary" without any further guidance. Placing the addressee in the position of having to make this determination, in respect of which opinions may well differ, is unlikely to have been Parliament's intention, given that

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[17] [2019] FCA 1100 at [105]–[126], [155]–[167].

[18] Commonwealth, *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*, Replacement Explanatory Memorandum at 93.

failure to comply with an order is an offence punishable by imprisonment for up to 10 years (s 3LA(5), (6)).[19] Once again, such an approach would be contrary to the principle of legality.

25. The s 3LA Order did not specify a particular computer or data storage device and did not specify the information or assistance Ms Smethurst was required to provide. It was therefore not authorised by s 3LA(2) and was invalid.

Q3. Validity of s 79(3) of the *Crimes Act* (Q3)

26. The principles applicable to the plaintiffs' challenge to the validity of s 79(3) of the *Crimes Act*, as it stood on 29 April 2018, are not in doubt:[20]

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

27. It is common ground the first question is answered "yes" (SC [56]). Given the terms of s 79(3) and the facts at SC [54]–[55], that conclusion is inevitable. Further, it is common ground that the articles referred to at SC [10] constitute political communication (SC [53]); given their content (see SCB 15–16, 18–26) that conclusion, too, is inevitable.

Illegitimate purpose

28. In answering the second question stated above, it is first necessary to identify the purpose of an impugned provision. That "is arrived at by the ordinary processes of statutory construction".[21] It may be necessary to consider the context of the provision, including its historical background.[22] However, the language of the statute is the surest guide.[23] The search

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[19] See similarly *Hogan v Hinch* (2011) 243 CLR 506 at [58] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ: "an injunction should not be framed in terms which do no more than reproduce the text of a statutory prohibition; rather, the injunction should indicate the conduct which is enjoined or commanded to be performed".

[20] *Clubb v Edwards* (2019) 93 ALJR 448 at [5] per Kiefel CJ, Bell and Keane JJ.

[21] *Unions NSW v NSW* (2013) 252 CLR 530 at [50] per French CJ, Hayne, Crennan, Kiefel and Bell JJ.

[22] *Monis v The Queen* (2013) 249 CLR 92 at [317] per Crennan, Kiefel and Bell JJ.

[23] *Monis v The Queen* (2013) 249 CLR 92 at [125] per Hayne J.

is not for the subjective purpose of the enacting legislature.[24] It is then necessary to decide whether the purpose identified is "legitimate" in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. That is so if the purpose "does not impede the functioning of that system".[25] Not every purpose that is within a head of legislative power is legitimate in this sense.[26]

29. The effective functioning of national governments — including those of representative democracies — in relation to national security, international relations and economic interests of the state, including in relationships with foreign governments and international organisations, requires some information to be kept secret from the public (at least for some period) (SC [27]). However, even if a law whose purpose is to enable information to be kept secret from the public for one or other of these reasons pursues a legitimate purpose, s 79(3) is not a law of this kind. Its purpose is the protection of government secrecy as an end in itself, whenever that is thought desirable by the Executive — and that purpose is illegitimate.

30. It is first necessary to focus on the text. It reveals five significant features.

31. *First*, s 79(3) is not simply a provision which applies to public servants[27] or even to persons who contract with government.[28] On their own, s 79(1)(b) and (c) extend to persons unconnected with the Commonwealth and s 79(1)(a) extends the offence yet further.

32. *Secondly*, nothing in s 79(1) or (3) limits the ambit of the offence to the kinds of information or circumstances that may justify secrecy referred to in paragraph 29 above. It stands in stark contrast to other prohibitions in force at the time. Unlike s 79(2), no "intention of prejudicing the security or defence of the Commonwealth" is required. Unlike s 91.1 of the *Criminal Code*, referred to in s 79(1)(a) of the *Crimes Act* as it then stood, there is no limitation to "information concerning the Commonwealth's security or defence" or "information concerning the security or defence of another country". Unlike reg 2.1 of the *Public Service Regulations 1999* (Cth), there is no limitation to disclosures where "it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government", or to

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[24] *Monis v The Queen* (2013) 249 CLR 92 at [125] per Hayne J. See also *Unions NSW v NSW* (2019) 93 ALJR 166 at [168]–[172] per Edelman J.

[25] *Clubb v Edwards* (2019) 93 ALJR 448 at [44] per Kiefel CJ, Bell and Keane JJ. See also *Unions NSW v NSW* (2019) 93 ALJR 166 at [173]–[176] per Edelman J.

[26] *Monis v The Queen* (2013) 249 CLR 92 at [132]–[141] per Hayne J.

[27] cf the provisions considered in *Comcare v Banerji* (2019) 93 ALJR 900.

[28] cf, eg, *Criminal Code* (WA), s 81, considered in *Cortis v The Queen* [1979] WAR 30 (FC) and *Western Australia v Burke* (2011) 42 WAR 124 (CA).

information "communicated in confidence within the government" or "received in confidence by the government from a person or persons outside the government".

33. Section 79(3) of the *Crimes Act*, as it stood on 29 April 2018, also stands in stark contrast to the provisions of the *Criminal Code* which replaced Pt VII with effect from 29 December 2018.[29] Unlike those provisions, there is no requirement that the information be "inherently harmful" (s 122.1), that its communication "causes harm to Australia's interests" (s 122.2) or that any duty of non-disclosure is one that "arises under a law of the Commonwealth" (s 122.4). The scope of these new provisions is further tightened by the limited definitions of "inherently harmful" and "causes harm to Australia's interest" in s 121.1. In particular, the former includes "security classified information", which is defined to mean information that has a "security classification". That is in turn defined in s 90.5 to mean:

> a classification of secret or top secret that is applied in accordance with the policy framework developed by the Commonwealth for the purpose (or for purposes that include the purpose) of identifying information:
>
> (i) for a classification of secret—that, if disclosed in an unauthorised manner, could be expected to cause serious damage to the national interest, organisations or individuals; or
>
> (ii) for a classification of top secret—that, if disclosed in an unauthorised manner, could be expected to cause exceptionally grave damage to the national interest; or …

Nothing in s 79(3) of the *Crimes Act*, as it stood on 29 April 2018, limited it to information classified "secret" or "top secret" in accordance with the Commonwealth's policy framework, or indeed linked to that system of classification at all.

34. As was said of s 2 of the *Official Secrets Act* — the inspiration for the predecessor of s 79(3) of the *Crimes Act* — the offence "is committed whatever the document contains, whatever the motive for disclosure is and whether or not the disclosure is prejudicial to the state".[30] It applies whether the material in question is already in the public domain,[31] wholly innocuous,[32] or merely embarrassing to the government or its individual officers.[33] The Franks

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[29] *National Security Legislation Amendment (Espionage And Foreign Interference) Act 2018* (Cth), sched 2.

[30] *R v Fell* [1963] Crim LR 207 at 207–8. See also *Cortis v The Queen* [1979] WAR 30 at 31–32 per Burt CJ (Wickham and Smith JJ agreeing).

[31] *R v Galvin* [1987] QB 862 at 868–870 per Lord Lane CJ (for the Court). See also *R v Crisp* (1919) 83 JP 121 at 122–123 per Avory J; *Cortis v The Queen* [1979] WAR 30 at 31–32 per Burt CJ (Wickham and Smith JJ agreeing); *WA v Burke* (2011) 42 WAR 124 at [158] per Buss JA (Martin CJ and Mazza J agreeing).

[32] H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Final Report* (1991) (**Gibbs Committee Report**), 242 [25.12]: "No distinction is drawn for the purposes of these provisions between information the disclosure of which may cause real harm to the public interest and information the disclosure of which may cause no harm whatsoever to the public interest."

[33] See generally "Official Secrecy in England" (1968) 3 FLR 20; E Campbell, "Public Access to Government

Committee's description of s 2 of the *Official Secrets Act* as "an ancient blunderbuss, scattering shot in all directions"[34] applies equally to s 79(3) of the *Crimes Act*.

35. *Thirdly*, no legitimate purpose is disclosed by the fact that the thing or information be such that it is the duty of a person referred to in s 79(1)(b) to treat it as secret. To the contrary, given the broad terms of the tailpiece to s 79(1)(b), this requirement transfers to the largely unconstrained discretion of the Executive the ability to decide what is to be covered. Irrespective of the nature of the thing or information, or the justification for secrecy, such an obligation can generally be imposed upon (for instance): a member of the public service, who is directed to keep a thing or information secret by a more senior public servant authorised to give such directions (s 79(1)(b)(i));[35] a person contracted by the Commonwealth, the terms of whose contract require them to keep certain things or information secret (s 79(1)(b)(iii));[36] an employee of a Minister, such as a ministerial staffer, the terms of whose employment contract require them to keep certain things or information secret (s 79(1)(b)(iv));[37] or some other person who obtains a thing or information with the permission of a Minister but who is told by the Minister that they must keep the thing or information secret (s 79(1)(b)(v)).[38]

36. *Fourthly*, this problem of Executive control is compounded by the prospect of "authorization" in s 79(3)(a). No provision is made as to who may give such authorisation or how it may be given. Placing such an unconfined discretion in the Executive "may, or may appear to, 'result in censorship'".[39] The way that the equivalent provision of s 2 of the *Official Secrets Act* operated in practice was described by the Franks Committee as:[40]

> rest[ing] heavily on a doctrine of implied authorisation, flowing from the nature of each Crown servants job. In the words of the Home Office, "the communication of official information is proper if such communication can be fairly regarded as part of the job of the officer concerned".

Documents" (1967) 41 ALJ 73 at 78; BA Hocking, "What Lies in the Public Interest? A Legal History of Official Secrets in Britain" (1993) 9 QUTLJ 31 at 45–48.

[34] Franks Committee Report, 42 [105]. See also 14 [17]: "It catches all official documents and information. It makes no distinctions of kind, and no distinctions of degree. All information which a Crown servant learns in the course of his duty is 'official' for the purposes of section 2, whatever its nature, whatever its importance, whatever its original source. A blanket is thrown over everything; nothing escapes."

[35] *Public Service Act 1999* (Cth), s 13(5).

[36] See *WA v Burke* (2011) 42 WAR 124 at [165] per Buss JA (Martin CJ and Mazza J agreeing)

[37] *Members of Parliament (Staff) Act 1984* (Cth), s 14.

[38] That is especially if the "duty" in s 79(1)(b) need not be a legal duty as asserted in the Opinion of Attorney-General Evans 29 August 1983 incorporated in Commonwealth Senate, *Parliamentary Debates* (Hansard), 9 December 1983, p 3613. See also Royal Commission on Australia's Security and Intelligence Agencies, *Report on Term of Reference (c)* (1983), 194 [7.32].

[39] *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 at [103]. See also Gibbs Committee Report at [31.3].

[40] Franks Committee Report, 14–15 [18]. See also 19 [32]–[33].

> Ministers are, in effect, self-authorising. They decide for themselves what to reveal. Senior civil servants exercise a considerable degree of personal judgment in deciding what disclosures of official information they may properly make, and to whom.

37. *Fifthly*, the problem of Executive control is further compounded by the fact that a prosecution may be instituted only by or with the consent of the Attorney-General or a person acting on their behalf (s 85(1)). The Attorney-General thus has an unreviewable[41] discretion as to which contraventions are prosecuted. As the Franks Committee said of s 2 of the *Official Secrets Act*: "A catch-all provision is saved from absurdity in operation only by the sparing exercise of the Attorney General's discretion to prosecute. Yet the very width of this discretion, and the inevitably selective way in which it is exercised, give rise to considerable unease."[42]

38. These features do not merely demonstrate a poor fit between a legitimate object and the means by which it is pursued in s 79(3) of the *Crimes Act*. They reveal that the purpose of the provision is not a legitimate object of that kind at all.[43] Rather, its purpose is the protection of government secrecy as an end in itself, whenever that is thought desirable by the Executive. That this is so should not come as a surprise, given its origins. The Franks Committee traced the legislative history of s 2 of the *Official Secrets Act*,[44] and noted that "[o]ne of its objects was to give greater protection against leakages of any kind of official information, whether or not connected with defence or national security". The same object is manifest in its progeny. These provisions derive from a time when a desire on the part of government to be able to keep ***any*** information secret may readily be identified in the historical material.[45]

39. Whatever may once have been thought, an object of protecting the secrecy of government information as an end in itself, subject only to the will of the Executive, is not compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. The entire basis of the implied freedom is that that system depends upon free communication about government and political matters.[46] The functioning

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41 *Barton v The Queen* (1980) 147 CLR 75; *Administrative Decisions (Judicial Review) Act 1975* (Cth), sch 1 [xa].

42 Franks Committee Report, 37 [88].

43 See similarly *Unions NSW v NSW* (2013) 252 CLR 530.

44 Franks Committee Report, 23–26, 120–124. See also D Williams, *Not in the Public Interest* (1965), ch 1.

45 See, eg, *Civil Service Regulations 1867* (Vic), reg 20 [SCB 84]; *Civil Services Regulations 1890* (Qld), reg 20 [SCB 89]; *Criminal Code 1899* (Qld), s 86 [SCB 106; *Crimes Act*, s 70 [SCB 115]; "Instructions for the Security of Official Documents and Information" (1948) [SCB 129, 130 [2], [4]]; the 1954 replacement of that document [SCB 141 [2], 164 [3]]. See generally E Campbell, "Public Access to Government Documents" (1967) 41 ALJ 73; ALRC Report No 112, *Secrecy Laws and Open Government in Australia* (2009), 42ff.

46 *Lange v ABC* (1997) 189 CLR 520 at 559–562 per *curiam*. "Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government": *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50 per Brennan J, quoting

of the system is obviously impeded by conferring on unidentified members of the Executive the ability to prevent the dissemination of information solely on the basis that they think it should be kept secret and to relax the prohibition at their discretion.[47]

40. The illegitimacy of this object is highlighted by comparison between s 79(3) of the *Crimes Act* and the common law.[48] As explained by Mason J in *The Commonwealth v John Fairfax & Sons Ltd*,[49] for the government to obtain an injunction to restrain the publication of government information, it is not sufficient that the information be confidential:

> [I]t can scarcely be a relevant detriment to government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action. Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.

The absence of any requirement of injury to the public interest in the operation of s 79(3) demonstrates how far beyond the common law it travels.

Not reasonably appropriate and adapted

41. If s 79(3) is directed to the purpose of protecting government secrecy for some ***legitimate*** purpose, it is not reasonably appropriate and adapted to that purpose. Adopting the proportionality analysis identified in *McCloy v NSW*,[50] the plaintiffs make the following points.

42. *First*, there is no rational connection between s 79(3) and any legitimate purpose. Its overbreadth demonstrates it is not ***suitable*** to the achievement of that purpose.

43. *Secondly*, s 79(3) is not ***necessary*** for the achievement of any legitimate purpose. It was obvious that a narrower law, more tailored to the legitimate ends sought to be achieved, could have been drafted. Such an approach has been adopted by the 2018 amendments. But it was not only in 2018 that the obviousness of such an alternative became apparent. Such an alternative was recommended by the Franks Committee in 1972;[51] the *Official Secrets Act 1989*

Reference re Alberta Statutes [1938] SCR 100 at 145 per Cannon J; Gibbs Committee Report at [31.2].

47 *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 52 per Mason J. See also Gibbs Committee Report at [24.2], [31.1].

48 *Monis v The Queen* (2013) 249 CLR 92 at [128] per Hayne J.

49 (1980) 147 CLR 39 at 51–52.

50 (2015) 257 CLR 178.

51 Franks Committee Report, 40 [100], 101–109.

(UK) adopts such an approach (SCB 52ff).[52] Such an alternative was recommended in 1991 in the review of federal criminal laws led by Sir Harry Gibbs[53] and in 2009 by the Australian Law Reform Commission.[54] One can go back even further: given that the Commonwealth has had in place policies dealing with security classification since at least 1944 (SC [34]), it was obvious even then that a provision could be enacted which hinged upon such classification.

44. *Thirdly*, s 79(3) is not ***adequate in its balance***. While it may be accepted that protecting government secrecy in some cases can be of great importance, the provision imposes a much greater restriction on the implied freedom than is required. As noted by the Gibbs Committee, the effect of s 79(3) is that "unauthorised disclosure of most information held by the Commonwealth Government and its agencies is subject to the sanctions of the criminal law".[55] There is a gross or manifest imbalance.[56] Section 79(3) extends well beyond any circumstances which may justify a "brightline rule against disclosure".[57] The section applies criminal sanctions to conduct by people both within and outside government that may more appropriately be governed by disciplinary sanctions in respect only of governmental employees. There is no attempt to distinguish between these classes. Once again, the gross imbalance has long been recognised.[58]

45. As Finn J said when holding invalid a "catch-all" provision like s 79(3) of the *Crimes Act*, which prohibited an APS employee from disclosing, except in the course of their duties or with approval of their Agency Head, anything of which the employee has official knowledge: "Official secrecy has a necessary and proper province in our system of government. A surfeit of secrecy does not."[59]

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[52] For the legislative history, see *R v Shayler* [2003] 1 AC 247 at [9]–[11] per Lord Bingham.

[53] Gibbs Committee Report, ch 31.

[54] ALRC Report No 112, *Secrecy Laws and Open Government in Australia* (2009), pp 9–12.

[55] Gibbs Committee Report, [25.12], see also at [32.8].

[56] *Clubb v Edwards* (2019) 93 ALJR 448 at [69]–[70] per Kiefel CJ, Bell and Keane JJ, [270]–[272] per Nettle J, [324] per Gordon J, [497] per Edelman J.

[57] *R v Shayler* [2003] 1 AC 247 at [36] per Lord Bingham, referring to "documents relating to security or intelligence obtained in the course of their duties by members or former members of those services".

[58] Franks Committee Report, 38 [88]: "Its [s 2 of the *Official Secrets Act*] scope is enormously wide. Any law which impinges on the freedom of information in a democracy should be much more tightly drawn." Gibbs Committee Report, [31.4]: "The catchall provisions of the existing law are wrong in principle" and see also at [24.2] and [31.1]. See also Hope Royal Commission on Intelligence and Security, *Fourth Report* (1977), vol 2, Appendix 4F, p 34–35.

[59] *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 at [98]. See also at [81]–[82]: "The regulation is a relic of an era of government in which the practice of politics and of public administration differed markedly from our own … Whatever may have been regarded as acceptable a century and a half ago, the vices of excessive secrecy in the conduct of government, its effect on the quality of public debate and, ultimately, on the practice of democracy itself, have more recently been both exposed and

Answer to question 3

46. It follows that s 79(3) of the *Crimes Act*, as it stood on 29 April 2018, was invalid. Question 3 should be answered: "Yes". The plaintiffs will address any argument as to severance or reading down in reply.

Q4. Relief

Relief flowing from the invalidity of the Second Warrant and the s 3LA Order

47. As the Second Warrant is invalid, it should be quashed by a writ of *certiorari*. To the extent that the s 3LA Order is invalid, it should likewise be quashed.

48. The invalidity of the Second Warrant means that the search of Ms Smethurst's premises was a trespass.[60] In any event, the fact that the s 3LA Order did not as a matter of construction, or could not as a matter of power, require Ms Smethurst to give the members of the AFP the passcode to unlock her mobile telephone means that the AFP's search of that telephone, and copying of data from it, was a trespass to goods or conversion.[61] Either way, obtaining the copied documents comprising the only property taken from the premises was a tort. In neither case is the belief of the AFP officers in their lawful authority a defence (cf SC [25]). The Court has power to grant an injunction to reverse the consequences of the tort.[62] Here, that would involve deletion of the copies retained by the Commissioner (SC [21]–[22]). While such relief is discretionary, there is no reason to exercise the discretion against the grant of such relief. The plaintiff will address any such reasons put forward by the Commissioner in reply.

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addressed in this country and on some number of fronts." Compare the Explanatory Statement to the *Public Service Amendment Regulations 2006 (No 1)*, Attachment A, which inserted the current, replacement provision: "It is essential in a healthy democracy that members of the public have the opportunity to contribute to policy development and decision-making, and that there is public scrutiny and accountability of government. Public access to information in the possession of government agencies helps to make this possible. The Regulations provide an appropriate balance between the public interest in having access to information held by government, the public interest in limiting disclosure to ensure the effective and proper conduct of government, and the constitutional rights of freedom of expression of individual public servants."

60 *NSW v Corbett* (2007) 230 CLR 606 at [81] per Callinan and Crennan JJ (Gleeson CJ and Gummow J agreeing generally).

61 *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 229 per Dixon J; *Slaveski v Victoria* [2010] VSC 441 at [293]–[307] per Kyrou J.

62 Young, Croft and Smith, *On Equity* (2009) pp 1022–1024 [16.110]; *Redland Bricks Ltd v Morris* [1970] AC 652 at 665. See also *Lincoln Hunt Aust Pty Ltd v Willesee* (1986) 4 NSWLR 457; *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [52] per Gleeson CJ, [100]–[104] per Gummow and Hayne JJ (Gaudron J agreeing), [168]–[184] per Kirby J.

Relief flowing from the invalidity of s 79(3) of the Crimes Act

49. As s 79(3) of the *Crimes Act*, as it stood on 29 April 2018, was invalid, the Court should grant a declaration to that effect. Notwithstanding its repeal, such a declaration would have utility. *First*, it provides a foundation for the invalidity of the Second Warrant. *Secondly*, members of the AFP evidently asserted to Magistrate Lawton their suspicion that, on 29 April 2018, the plaintiffs contravened s 79(3) of the *Crimes Act* as it then stood (SCB 29, 35, 39) and are continuing to give consideration to whether a brief of evidence should be referred to the Commonwealth DPP (SC [24]). A declaration of invalidity would put an end to that prospect.

Answer to question 4

10 50. Question 4 should be answered: "(a) A writ of certiorari should issue to quash the warrant for the search of the first plaintiff's premises purportedly issued by the second defendant on 3 June 2019. (b) (To the extent that the s 3LA Order is invalid:) A writ of certiorari should issue to quash the order purportedly made by the second defendant under s 3LA(2) of the *Crimes Act 1914* (Cth) on 31 May 2019 directed to the first plaintiff. (c) An injunction should be granted compelling the first defendant to destroy all copies of the data copied from the mobile telephone of the first plaintiff by members of the Australian Federal Police on 4 June 2019. (d) There should be a declaration that s 79(3) of the *Crimes Act 1914* (Cth), as it stood on 29 April 2018, was invalid."

PART VII: ORDERS

20 51. Questions 1–4 at SC [57] (SCB 13) should be answered as set out in paragraphs 15, 21–22, 46 and 50 above, respectively. The Commissioner should pay the costs of and incidental to the special case (question 5).

PART VIII: ESTIMATE FOR ORAL ARGUMENT

52. It is estimated that 3.5 hours will be required to present oral argument, including oral argument in reply.

Dated: 25 September 2019

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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

ANNEXURE TO PLAINTIFFS' SUBMISSIONS
LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

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CONSTITUTIONAL PROVISIONS

1. Nil.

LEGISLATION

2. *Crimes Act 1914* (Cth), as enacted.

3. *Crimes Act 1914* (Cth), compilation no. 118, as in force on 29 April 2018.

4. *Crimes Act 1914* (Cth), compilation no. 127, as in force on 31 May 2019, 3 June 2019 and 4 June 2019.

5. *Criminal Code Act 1995* (Cth), compilation no. 114, as in force on 29 April 2018.

6. *Criminal Code Act 1995* (Cth), compilation no. 127, current.

7. *Members of Parliament (Staff) Act 1984* (Cth), current.

8. *National Security Legislation Amendment (Espionage And Foreign Interference) Act 2018* (Cth), as enacted.

9. *Public Service Act 1999* (Cth), compilation no. 20, current.

10. *Criminal Code Act 1899* (Qld), as enacted.

11. *Criminal Code Act Compilation Act 1913* (WA), current.

12. *Official Secrets Act 1911* (UK), as enacted.

13. *Official Secrets Act 1989* (UK), as enacted.

14. *Civil Services Regulations 1890* (Qld), as made.

15. *Civil Service Regulations 1867* (Vic), as made.

STATUTORY INSTRUMENTS

16. Nil.