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

PLAINTIFFS' SUPPLEMENTARY SUBMISSIONS

(in response to the Court's letter dated 3 December 2019)

Ashurst
Level 11
5 Martin Place
Sydney NSW 2000

Telephone: 02 02 9258 6082 / 02 9258 5913
Fax: 02 9258 6999
Email: robert.todd@ashurst.com / jason.strachan@ashurst.com
Ref: Robert Todd / Jason Strachan

PART I: PUBLICATION

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

PART II: ARGUMENT

2. These submissions address the two questions in the Court's letter dated 3 December 2019. Abbreviations adopted in the plaintiffs' previous written submissions are adopted below.

Q1. The basis for the injunction

The injunction does not depend on s 75(v) of the Constitution

3. It is important first to note that the injunction sought by the plaintiffs, requiring the destruction of data copied from Ms Smethurst's mobile phone or alternatively prohibiting the use of that data, does not depend on s 75(v) of the Constitution.

4. The Court has jurisdiction in this matter apart from s 75(v). Given the plaintiffs' challenge to the constitutional validity of s 79 of the *Crimes Act* and their consequential challenge to the validity of the warrant, the Court has jurisdiction with respect to the whole of the matter, conferred by s 76(i) of the Constitution and s 30 of the *Judiciary Act 1901* (Cth) (SC [4.2]). Even if those constitutional questions are not reached, the Court retains jurisdiction with respect to the whole of the matter.[1] The Court's jurisdiction having been engaged, it has all the powers conferred by ss 31 and 32 of the *Judiciary Act*. As held in *Plaintiff S157/2002 v The Commonwealth*,[2] on this basis the Court has power to grant a writ of certiorari quashing the search warrant. The powers conferred by s 32 also include the general law powers of a court of equity to grant an injunction.[3]

5. That said, the plaintiffs also rely on the power to grant an injunction in s 75(v) of the Constitution. For the following reasons, it is sufficient to support the relief sought.

Officers of the Commonwealth

6. The requirement that the person the subject of an injunction granted pursuant to s 75(v) be an "officer of the Commonwealth" is met. That is so whether the injunction is directed to the Commissioner or any other member of the AFP. It is agreed that the Commissioner is an officer of the Commonwealth (SC [7.2]). That must be so, given the Commissioner is

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1 *Moorgate Tobacco Co Ltd v Phillip Morris Ltd* (1980) 145 CLR 457, 476–477 per Stephen, Mason, Aickin and Wilson JJ (Barwick CJ agreeing).

2 (2003) 211 CLR 476 at [80] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

3 *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518 at 550 per Isaacs J.

appointed to an office pursuant to s 17(1) of the *Australian Federal Police Act 1979* (Cth) by the Governor-General, with remuneration determined in accordance with s 20(1) by the Remuneration Tribunal. Members of the AFP are engaged pursuant to s 24(1) of the Act, with remuneration determined in accordance with s 27(1). Consistently with previous Federal Court authority,[4] it should be accepted that they, too, are officers of the Commonwealth.

Injunction for jurisdictional error

7. Section 75(v) supports the plaintiffs' claimed injunction even if it is limited to the grant of an injunction for "jurisdictional error" — i.e. where an officer's actions are not authorised by the statute under which they are purportedly taken, such that they are "invalid".[5]

10 8. If the Court accepts the plaintiffs' previous submissions that the *Crimes Act* impliedly prohibits the use of the data copied from Ms Smethurst's phone and that there is no other source of power for members of the AFP to do so, it follows that any such use would involve a jurisdictional error. Even if limited to injunctions for jurisdictional error, s 75(v) would support an injunction to restrain such use of the data.

9. There is a further basis upon which, even if s 75(v) is so limited, it would support an injunction requiring deletion of the data or prohibiting its use. If the Court accepts that the warrant relied upon to search Ms Smethurst's premises was invalid, copying data from her phone was a consequence of two separate administrative acts which were beyond power. ***First***, Magistrate Lawton acted beyond power in issuing the warrant. ***Secondly***, the AFP members
20 who, in executing the warrant, entered and searched Ms Smethurst's premises and copied data from her phone, acted beyond the power conferred by the provisions of the *Crimes Act* on which they relied (see, in particular, ss 3F(1)(a), (2A)(d)(ii) and 3L(1), (1A)). The power conferred by those provisions was premised on there being in existence "a warrant". That is defined in s 3C to mean "a warrant under this Part". That language describes only a ***valid*** warrant; it does not cover a warrant "purportedly" under Pt IAA.[6] It follows that it is a jurisdictional fact for the exercise of those powers that there is in force a valid warrant.

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4 *Coward v Allen* (1984) 52 ALR 320 (FCA) at 325 per Northrop J; *Duff v McCulloch* (1986) 11 FCR 237 at 239 per Wilcox J; *Carmody v Mackellar* (1996) 68 FCR 265 at 275 per Merkel J.

5 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [91]–[93] per McHugh, Gummow, Kirby and Hayne JJ; *Enfield City Corp v Development Assessment Commission* (2000) 199 CLR 135 at [20]–[21] per Gleeson CJ, Gummow, Kirby and Hayne JJ; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [16] per Gaudron and Gummow JJ; *Plaintiff S157* (2003) 211 CLR 476 at [5] per Gleeson CJ; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [17]–[22] per Kiefel CJ, Gageler and Keane JJ; Aronson, Groves and Weeks, *Judicial Review of Administrative Action* (6th ed, 2017) at [1.100].

6 *Plaintiff S157* (2003) 211 CLR 476 at [75]–[76] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ

10. For both of these reasons, even if s 75(v) is limited to the grant of an injunction for jurisdictional error, had the plaintiffs been able to come to this Court before the search had taken place, s 75(v) would have supported an injunction restraining the search. For the following reasons, it should be accepted that it would now support an injunction remedying the ***consequences*** of the search.

11. ***First***, for the reasons previously submitted, a general law injunction in the auxiliary jurisdiction of equity would extend to such a remedy. That being so, the injunction under s 75(v) must, in cases of jurisdictional error, so extend.

12. ***Secondly***, even if a general law injunction in the auxiliary jurisdiction of equity would ***not*** extend to such a remedy, an injunction under s 75(v) does so. As this Court observed in *Re Refugee Review Tribunal; Ex parte Aala*,[7] the modern reach of the "constitutional writs" is not to be regarded as fixed by the reach of their general law counterparts at Federation. In any event, that the injunction to which s 75(v) refers extends to remedying the consequences of the unauthorised search is supported by consideration of the reach of a writ of prohibition. Given the inclusion of both of the remedies in s 75(v), the approach taken in respect of each may inform the approach taken in respect of the others.

13. Prohibition has long extended to remedying the ***consequences*** of the excess of jurisdiction. Thus, in *R v Hibble; Ex parte Broken Hill Pty Co Ltd*,[8] where this Court held a purported industrial award invalid, a majority went on to issue a prohibition to the chairman of the relevant tribunal directing him not to proceed further on the award despite there being no further step to be taken by the chairman. The prohibition issued in order to deal with the consequence that, unless rescinded, the award imposed obligations on all participants in the relevant industry. In *Aala*, the Tribunal's rejection of the applicant's protection visa application involved a denial of procedural fairness. Prohibition issued to prevent the Minister from taking any action on the decision of the Tribunal. This was not based upon any conclusion that such action by the Minister would, itself, have involved jurisdictional error. It was simply to deal with the consequences of the Tribunal's excess of jurisdiction.[9] Likewise, in this case, prior to the search prohibition could have issued to prevent members of the AFP taking any further steps on the invalid warrant.

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7 (2000) 204 CLR 82.

8 (1920) 28 CLR 456.

9 See generally *London Corporation v Cox* (1867) LR 2 HL 239 at 280 per Willes J (for the Judges).

14. Importantly, the reach of prohibition is not limited to ***preventing*** consequences. At least in some circumstances, it extends to ***reversing*** consequences. Thus, in the course of his Honour's reasons in *Hibble*,[10] Starke J referred to *Jones v Owen*.[11] There, a County Court judge made an order for possession of land in favour of the plaintiff, which order was executed the following day. Prohibition could issue, even though the order had already been executed: a term of the writ required restitution of the land. That was not consequent on any analysis of the defendant's proprietary rights; it was simply to make the writ of prohibition effective. In *Coward v Allen*,[12] the Federal Court held that a writ of prohibition could issue to police officers who had executed an invalid warrant to prevent them from retaining possession of things seized. In substance, this reversed the consequences of the invalid warrant and the unauthorised search. A like approach here would justify a writ of prohibition preventing retention of the data copied from Ms Smethurst's phone. To the extent prohibition is not available, for example if there is no ongoing "decision" to retain the data, an injunction should go to restrain the conduct.

15. ***Thirdly***, the ability to reverse the consequences of an unlawful act is consistent with the purpose of s 75(v). That purpose has been variously, but consistently, described as to "make it certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power"[13] and to assure "to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them".[14] That purpose would be frustrated if s 75(v) could not provide effective relief where a Commonwealth officer has acted in excess of jurisdiction, with ongoing consequences, but is not continuing, or threatening to continue, to act in excess of jurisdiction. The Court's jurisdiction could be stymied by a sufficiently secret or speedy excess of power. As Lord Denman CJ observed over 150 years ago of an argument that prohibition could not issue because there was nothing to prohibit: "These arguments, for obvious reasons, require to be narrowly watched, for they would give effect to unlawful proceedings merely because they were brought to a conclusion."[15]

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[10] (1920) 28 CLR 456 at 492.

[11] (1848) 18 LJ QB 8.

[12] (1984) 52 ALR 320 at 325 per Northrop J.

[13] *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 363 per Dixon J.

[14] *Plaintiff S157* (2003) 211 CLR 476 at [104] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

[15] *In the Matter of the Visitation of the Archbishop of York of the Dean and Chapter of York* (1841) 2 QB 1 at 40; 114 ER 1 at 17.

16. To the extent that the principles governing the issue of an injunction at general law have the result that an injunction cannot issue to remedy the consequences of unlawful acts, they would substantially derogate from the protective role s 75(v) is intended to have. For this reason, they should not automatically be transported into the constitutional context. To do so risks "denying the evident constitutional purpose that relief should be available to restrain excess of federal power and to enforce performance of federal public duties"[16] and would be inconsistent with the principle that "the grant of jurisdiction carries with it the power to issue orders effectively to exercise the whole of that jurisdiction."[17]

Injunction beyond jurisdictional error: Two possibilities

10 17. The submissions above proceed on the premise that s 75(v) is limited to injunctions involving jurisdictional error. However, as noted in *Plaintiff S157*:[18] "Given that prohibition and mandamus are available only for jurisdictional error, it may be that injunctive relief is available on grounds that are wider than those that result in relief by way of prohibition and mandamus". So much was confirmed by Gummow, Hayne, Heydon and Crennan JJ in *Federal Commissioner of Taxation v Futuris Corporation Ltd*,[19] who said: "principles of jurisdictional error control the constitutional writs but do not attend the remedy of injunction including that provided in s 75(v)". While their Honours went on to observe that such an injunction ***can*** operate to "restrain the implementation of invalid exercises of power", their Honours did not suggest that this was the ***limit*** of such an injunction.

20 18. If s 75(v) is not limited to injunctions involving jurisdictional error, there are two possibilities. ***First***, s 75(v) may extend to exercises of public power in breach of a statutory prohibition which does not constitute a jurisdictional error — i.e. a "directory" requirement rather than a "mandatory" requirement.[20] ***Secondly***, s 75(v) may extend to any case where an injunction would go in equity, for instance to restrain a tort by an officer of the Commonwealth.

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16 *Aala* (2000) 204 CLR 82 at [162] per Hayne J

17 Leeming, "Standing to Seek Injunctions Against Officers of the Commonwealth" (2006) 1 J Eq 3 at 11. See recently *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [40] per Kiefel CJ, [52] per Gageler J, [114]-[115], [118] per Keane, Nettle and Gordon JJ.

18 (2003) 211 CLR 476 at [80] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

19 (2008) 237 CLR 146 at [47].

20 *Project Blue Sky* (1998) 194 CLR 355 at [92]–[93] per McHugh, Gummow, Kirby and Hayne JJ; *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 at [25]–[27] per Gageler and Keane JJ.

Injunction beyond jurisdictional error but limited to public power

19. On the first possibility, s 75(v) would support the injunction sought by the plaintiffs in the following way. If the Court accepts the submissions made previously that the *Crimes Act* impliedly prohibits the use of the data copied from Ms Smethurst's phone, an injunction could issue to enforce that prohibition ***even if*** there might be some other source of power to use the data. The fact that contravention of the prohibition would not render the act beyond power is not essential on this view of s 75(v). So too, the analysis in paragraphs 7–16 above would support an injunction requiring destruction of the copied data or restraining its use ***even if*** the presence of a valid warrant is not a jurisdictional fact upon which the powers in the *Crimes Act* depend.

20. For the reasons in paragraphs 3–4 or paragraphs 7–16 above, it is not necessary in this case for the Court to conclude that the injunction to which s 75(v) refers extends beyond jurisdictional error. However, if it were, for the following reasons the Court should do so.

21. As explained in *Project Blue Sky Inc v Australian Broadcasting Authority*,[21] an injunction can issue to restrain breach of a statutory prohibition which, if breached, would not constitute a jurisdictional error, i.e. a "directory" prohibition, or to restrain the taking of further action based on such a breach. There is no reason the injunction to which s 75(v) refers should be more limited. No such limitation is suggested by the reference to "prohibition" and "mandamus". While, at Federation, prohibition was limited to restraining an excess of jurisdiction,[22] mandamus extended to compelling performance of ***any*** unperformed public duty.[23] It was not limited to a public duty which, if unperformed in the course of taking some step under a statute, meant that that step was invalid. As observed by Wade and Forsyth: "The fact that the statutory duty is directory as opposed to mandatory, so that default will not invalidate some other action or decision, is no reason for not enforcing it by a mandatory order."[24] This difference between mandamus and prohibition is borne out by the discussion of Quick and Garran.[25] Thus, while it was noted in *Plaintiff S157* that, like prohibition, mandamus

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[21] (1998) 194 CLR 355 at [100] per McHugh, Gummow, Kirby and Hayne JJ

[22] *R v Electricity Commissioners; Ex parte London Electricity Joint Committee Co* [1924] 1 KB 171 (CA) at 205 per Atkin LJ.

[23] *Randall v Northcote Corporation* (1910) 11 CLR 100 at 105 per Griffith CJ, 109–111 per O'Connor J, 114–115 per Isaacs J; *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242 per Rich, Dixon and McTiernan JJ.

[24] *Administrative Law* (11th ed, 2014) p 524, citing *Brayhead (Ascot) Ltd v Berkshire County Council* [1964] 2 QB 303 at 313–314 per Winn J (for the Court).

[25] *The Annotated Constitution of the Australian Commonwealth* (1901, rep 2002) at 780–783.

goes only for jurisdictional error,[26] that is because the failure to perform any public duty can be seen as a failure to exercise jurisdiction.[27] The statement does not mean that mandamus will enforce a public duty only if that duty is a "mandatory" as opposed to a "directory" obligation.

22. This is consistent with the reasons which it appears grounded the inclusion within s 75(v) of the injunction, as revealed by the Convention Debates. This material may be referred to "for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged".[28]

23. The original draft of the forerunner to s 75(v) did not mention "injunction".[29] This word appeared in the version of the clause proposed by Edmund Barton on 4 March 1898.[30] During that debate, Barton referred[31] to a passage from the decision of the Supreme Court of the United States in *Board of Liquidation v McComb*:[32]

> But it has been well settled that when a plain official duty requiring no exercise of discretion is to be performed and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance, and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby for which adequate compensation cannot be had at law may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other.

This passage supports the proposition that, just as mandamus will issue to compel performance of any public duty whether or not such failure to perform will invalidate any subsequent step, an injunction will issue to restrain contravention of any prohibition whether or not such contravention will invalidate any subsequent step. The injunction is "correlative" to the mandamus.

24. In any event, the Court's power to grant an injunction should not be limited by the circumstances in which the former prerogative writs would have been granted. To adopt that approach would be to deny the role that the injunction has played, and continues to play, in

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26 (2003) 211 CLR 476 at [82]–[83].

27 *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia* (2012) 249 CLR 398 at [57] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.

28 *Cole v Whitfield* (1988) 165 CLR 360 at 385 per *curiam*.

29 See cl 63 of the *Draft Bill for the Federation of the Australasian Colonies*, 6 February 1891, reproduced in J Williams, *The Australian Constitution: A Documentary History* (2005) p 89.

30 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1875.

31 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1875–1876.

32 92 US 531 at 541 per Bradley J (for the Court) (1875).

public law to overcome the limitations of such remedies.[33] Further, to limit the injunction in s 75(v) to cases of jurisdictional error would allow Commonwealth legislation to impose a prohibition but, by making it a "directory" prohibition only, to deny the ability of this Court to enforce that prohibition. That would be contrary to the purpose of s 75(v) noted in paragraph 15 above of conferring a jurisdiction on this court to assure to all people affected that officers of the Commonwealth obey the law.

Injunction beyond jurisdictional error extending beyond public power

25. On the second possibility described in paragraph 18 above, s 75(v) would support an injunction sought by the plaintiffs based solely upon the tortious conduct of members of the AFP. Again, for the reasons in paragraphs 3–4 above, or alternatively paragraphs 7–16 above, or alternatively paragraphs 19–24 above, it is not necessary in this case for the Court to conclude that s 75(v) extends to the enforcement of private rights. However, if it were, for the following reasons the Court should do so.

26. It may be accepted that mandamus is limited to enforcing a duty of a "public" nature[34] and that prohibition likewise does not go to enforce purely private rights, such as those created by contract.[35] It may also be accepted that the immediate object of the inclusion of "injunction" in s 75(v) may have been to deal with the fact that, at Federation, prohibition applied only to bodies required to act "judicially"[36] while mandamus was not so confined.[37] While a duty imposed on a body not required to act judicially could be enforced by mandamus, a prohibition imposed on a body not required to act judicially could not be enforced by prohibition. Injunction supplied the deficiency.[38]

27. But these considerations are insufficient to deny to the word "injunction" in s 75(v) its ordinary reach. It is not, and has never been, limited to the enforcement of prohibitions imposed by statute. So much was recognised by Quick and Garran: "An injunction is on a

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[33] *Enfield* (2000) 199 CLR 135 at [19] per Gleeson CJ, Gummow, Kirby and Hayne JJ, [57]–[58] per Gaudron J; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at [25] per Gaudron, Gummow and Kirby JJ.

[34] See n 23 above.

[35] *R v Wilson; Ex parte Robinson* [1982] Qd R 642; *Monash University v Berg* [1984] VR 383 (CA). See generally *R v Panel on Take-Overs & Mergers; Ex parte Datafin plc* [1987] QB 815 (CA).

[36] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 22 per Griffith CJ, 33 per Barton J, 41–42 per O'Connor J.

[37] *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 539 per Lord Halsbury LC, 569 per Lord Herschell; *Whybrow* (1910) 11 CLR 1 at 33 per Barton J.

[38] *Whybrow* (1910) 11 CLR 1 at 33 per Barton J.

different footing altogether from mandamus and prohibition; it is an ordinary remedy in private suits between party and party."[39] Thus, while it is true that, prior to Federation, the injunction was an available remedy against public authorities to restrain breaches of statutory provisions conferring powers upon them,[40] it also went against public authorities to restrain breaches of ***private*** rights. That is evidenced by authorities in both the United Kingdom[41] and the United States.[42] On one view, *McComb* may be such a case.[43] In any event, the distinction between a private right and a public right may be somewhat illusory, as, on its proper construction, a statute of a public nature may confer private rights.[44]

28. Against this background, there is no warrant for construing "injunction" in s 75(v) as referring only to some subset of the injunctions available against officers of the Commonwealth. It should be understood as covering "all classes of injunctions, both prohibitory and mandatory".[45] It provides a constitutionally entrenched foundation for restraint of government action which would injure the rights of the individual where damages would be an inadequate remedy. This would not preclude Commonwealth legislation from authorising what would otherwise be a wrong. But it would ensure that if that has not been done, Commonwealth legislation cannot remove the remedy of injunction.

29. For these reasons, s 75(v) provides a basis for the grant of an injunction consequent upon the tortious entry into Ms Smethurst's property and dealing with her mobile phone. To the extent that the Court considers that a general law injunction is incapable of reversing the consequences of that tortious conduct, for the reasons in paragraphs 12–16 above the constitutional injunction for which s 75(v) provides should not be regarded as so constrained.

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39 *The Annotated Constitution of the Australian Commonwealth* (1901, rep 2002) at 783.

40 See, eg, *Frewin v Lewis* (1838) 4 My & Cr 249, 255; 41 ER 98, 100; *Attorney-General v Corporation of Norwich* (1848) 16 Sim 225; 60 ER 860; *Attorney-General v Great Northern Railway Co* (1860) 1 Dr & Sm 154; 62 ER 337; *Attorney-General v Newcastle-upon-Tyne* (1889) 23 QBD 492; *Attorney-General v Borough of North Sydney* (1893) 14 LR (NSW) Eq 154; *London County Council v Attorney-General* [1902] AC 165. See generally Gummow, "The Scope of Section 75(v) of the Constitution: Why Injunction But No Certiorari" (2014) 42 Fed LR 241.

41 See, eg, *Attorney-General v Council of the Borough of Birmingham* (1858) K & J 528; 70 ER 220; *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch 146; *Fenwick v East London Railway Co* (1875) LR 20 Eq 444; Joyce, *The Doctrines and Principles of the Law of Injunctions* (1877) p 50–51; Kerr, *A Treatise on the Law and Practice of Injunctions* (1889) p 198.

42 See, eg, *Keene v Borough of Bristol*, 26 Pa 46 (1856); *Davis v Gray*, 83 US 203 (1873); High, *A Treatise on the Law of Injunctions* (2nd ed, 1880) p 861.

43 See Reynolds, "The Injunction in Section 75(v) of the Constitution" (2019) 30 PLR 211.

44 *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited* (2000) 200 CLR 591 at [97] per Gummow J.

45 Leeming, "Standing to Seek Injunctions Against Officers of the Commonwealth" (2006) 1 J Eq 3 at 11.

Q2. Discretion

30. Turning to discretion, the plaintiffs accept that each of the remedies in s 75(v) of the Constitution is discretionary and that the discretionary factors the subject of previous submissions[46] would remain relevant. However, there is a further consideration that tends strongly against any exercise of discretion against the grant of relief.

31. The discretionary refusal of constitutional writ relief is not to be done lightly. The exercise of the discretion is to be undertaken in the light of the principle that courts should provide remedies to ensure the executive acts only in accordance with the laws which govern the exercise of its powers.[47] The protective purpose of the remedies in s 75(v) discussed above weighs against the exercise of a discretion not to grant relief.

32. A useful analogy may be drawn between the nature of the discretion to be exercised by the Court in determining whether to issue a writ of prohibition. It is settled that, where an excess of jurisdiction has been made out and the plaintiff is a party aggrieved, the writ will issue almost as of right, although the Court retains a discretion to refuse relief if that seems the proper course in all the circumstances.[48] Although not exhaustive, the matters that will typically be thought to support the exercise of that discretion concern the conduct of the plaintiff.[49] Other potentially relevant factors include that there is a more convenient or satisfactory remedy, or if no useful result could ensue.[50] None of those features is present here.

PART III: ORAL ARGUMENT

33. The plaintiffs will indicate whether they wish to make further oral argument on the issues canvassed above following review of the Commonwealth's submissions.

Dated: 17 December 2019

Stephen Lloyd
T: 9235 3753
E: stephen.lloyd@sixthfloor.com.au

Perry Herzfeld
T: 02 8231 5057
E: pherzfeld@elevenwentworth.com

Ben Hancock
T: 02 8023 9010
E: ben.hancock@elevenwentworth.com

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46 Including that the constitutional validity of the underlying offence is relevant to the exercise of the discretion.

47 *Aala* (2000) 204 CLR 82 at [55] per Gaudron and Gummow JJ (Gleeson CJ agreeing).

48 *Aala* (2000) 204 CLR 82 at [51]–[52] per Gaudron and Gummow JJ (Gleeson CJ agreeing), see also at [148] per Kirby J.

49 *Aala* (2000) 204 CLR 82 at [53] per Gaudron and Gummow JJ (Gleeson CJ agreeing).

50 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400 per Latham CJ, Rich, Dixon, McTiernan and Webb JJ, quoted with approval in *Aala* (2000) 204 CLR 82 at [55] per Gaudron and Gummow JJ (Gleeson CJ agreeing), see also at [148] per Kirby J.