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 IN REPLY TO THE SUPPLEMENTARY SUBMISSIONS OF THE FIRST DEFENDANT AND THE ATTORNEY GENERAL OF THE COMMONWEALTH (INTERVENING)

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

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PART I: PUBLICATION

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

PART II: ARGUMENT IN REPLY

2. The Court gave leave for further submissions concerning the significance of s 75(v), not the general question of injunctive relief the subject of the plaintiffs' note on relief of 13 November 2019 (**PNR**) and oral submissions that day. The majority of the Commonwealth's supplementary submissions (**CSS**) focus on that question. On that basis, a question arises as to whether those submissions should have been made.[1] In any event, they are misconceived.

Q1. The basis for the injunction

10 3. **General law injunction: tort.** The legal rights in aid of which the plaintiffs seek an injunction are Ms Smethurst's property rights to her house and mobile phone (cf CSS [5]). The Commonwealth admits the searches of both constituted trespasses if the Second Warrant was invalid (CSS [6]). The injunction is to remedy the consequences of, ie prevent further damage from, the tortious conduct. For the reasons at T 101.4387–103.4472 and 113.4940–114.4955, damages would not be an adequate remedy (contra CSS [7]).

4. The description of an injunction in the auxiliary jurisdiction in CSS [7] involves selective quotation from *Meagher, Gummow and Lehane*. That is evidenced by the discussion in that text at [21-445]–[21-450] of the restorative mandatory injunction: it "compels a person to repair the consequences of some wrongful act done by him or her" and may be given where, "if the state
20 of affairs complained of had not actually occurred but had merely been threatened, the plaintiff would have been entitled to a *quia timet* injunction". That is the kind of injunction sought here.

5. Consistently with this (contra CSS [8]), the cases demonstrate that such an injunction can issue absent a threat or continuation of unlawful behaviour. In addition to *Lincoln Hunt*, see PNR [3], T 93.4014–94.4078, 99.4264–4306, 100.4338–101.4378 (including the ancient manuscript example) by reference to: Young, Croft and Smith at 1023 fn 57; *Vavasseur* — which did not involve a continuing or threatened wrong, as the patent infringement was complete; and *Shepherd Homes* and *Charrington* — neither of which is addressed by the Commonwealth, both accepting a mandatory injunction can issue to remedy a completed breach of a negative covenant though there is no ongoing or threatened infringement of the plaintiff's property or other rights.
30 The Commonwealth's submission is not merely an ossified approach to equity. It is fundamentally at odds with history and principle. It is a rogue's charter: if a tort is committed quickly and secretly enough, equity is defeated. That is the antithesis of a court of conscience.

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[1] *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90 at [192]; *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at [111].

6. The analysis above supports the conclusion in *Lincoln Hunt*, approved in *Meagher, Gummow and Lehane* at [21-110]. "Unconscionability" is a conclusion: following a decision by this Court that the Second Warrant was invalid, use by AFP officers of information known to have been obtained by them as the result of a tort would properly bear that description. The Commonwealth admits (CSS [16]) that its contrary position draws an unprincipled distinction between original documents (for which confidentiality is not required) and copy documents (for which the Commonwealth asserts confidentiality is required) (PNR [4], T 100.4338–101.4360). *Lincoln Hunt* should not be understood as based on intellectual property (contra CSS [9]). The *dicta* of Gummow and Hayne JJ in *Lenah Game Meats* relied on by the Commonwealth are equivocal and were not agreed in by a majority of the Court. Contrary to CSS [9], the distinction between a third party (as in *Lenah Game Meats*) and a tortfeasor (as here) is stark. The issue in *Lenah Game Meats* is thus distinguishable.

7. **General law injunction: public law.** The plaintiffs need not have a personal right for an injunction to issue in aid of ensuring observance of public law.[2] The *ultra vires* actions at PSS [9] support an injunction remedying the consequences. The statements from *Truth About Motorways* and *Bateman's Bay* (CSS [11]) do not require a continuing failure to comply with statute. An injunction preventing use of material obtained *ultra vires* secures, as much as possible after the event, compliance with the *Crimes Act*.[3] The passages in *Bradley* (CSS [11]) reflect the terms of relief sought by the plaintiff; they do not purport to limit the jurisdiction.

8. Even if there must be some ongoing statutory prohibition, there is a prohibition implied by the *Crimes Act* on any use of unlawfully seized material (PNR [6]–[10], T 103.4472–112.4860). The text of s 3ZQU does not support the more confined implication, accepted by the Commonwealth, limiting use of unlawfully seized material to the same uses as lawfully seized material (cf CSS [13]). Whether or not s 3ZQU was included to expand the use that may be made of *lawfully* seized material, it specifies those purposes and, because it does not authorise use of *unlawfully* seized material, by implication prohibits use of such material. Sections 3D and 3ZQU(4) do not contradict this: they simply allow other laws of the Commonwealth to qualify s 3ZQU. Section 138 of the *Evidence Act* will still have work to do in other cases (cf CSS [14]).

9. **Section 75(v).** The Commonwealth does not dispute the submission in PSS [6] that the Commissioner and AFP officers are "officers of the Commonwealth" or the submission in PSS [7]–[9] identifying jurisdictional errors in this case. The Commonwealth makes no

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2 *Lenah Game Meats* (2001) 208 CLR 199 at [89].

3 See similarly *Hornsby SC v Danglade* (1928) 29 SR (NSW) 118, where a mandatory injunction was granted at the suit of the council to compel demolition of buildings erected in breach of local government legislation.

responsive submission as to whether s 75(v) injunctions extend beyond jurisdictional error.

10. The submission (CSS [19]) that the interpretation of one word in s 75(v) ("prohibition") cannot bear on the interpretation of another word in the same paragraph ("injunction") is contrary to basic principles of interpretation. And it is contrary to authority: *Aala*[4] referred to the fact that an injunction is a discretionary remedy in support of the conclusion that prohibition is also.

11. Contrary to CSS [19], the cases at PSS [14] cannot be explained as ones where ongoing liabilities were imposed by the invalid action. In *Jones v Owen*, the invalid order of the County Court had no further operation after the plaintiff obtained possession. The prohibition in *Coward v Allen* cannot be explained as enforcing a private law right to return of seized property, as prohibition cannot enforce private rights (PSS [26]). As the Commonwealth notes (CSS [2]), in addition to an injunction the plaintiffs here seek prohibition: *Coward v Allen* supports such relief.

12. The submission (CSS [20]) that the purposes of s 75(v) do not justify any greater "wrong-reversal" capacity than that at general law (if there is no such capacity at general law) is an unexplained assertion that fails to grapple with the consequences at PSS [15]. The appeal to the subjective beliefs of the framers in the *Convention Debates* is contrary to basic doctrine.[5]

Q2. Discretion

13. The plaintiffs do not say no weight should be given to the administration of justice (contra CSS [23]). But reference to a possible future criminal trial cannot, of itself, justify refusal of injunctive relief in every invalid warrant case, or even every case absent bad faith. Nor can concern about fragmentation of the criminal process.[6] If it did, in almost every case police and prosecutors could use information seized unlawfully to further their investigations and prosecution entirely unimpeded, save for a discretion enlivened only if and when evidence is tendered. That is inconsistent with the importance given by the law to the freedom from government intrusion on private property underlying the strict approach to the construction of warrant provisions and which is an aspect of the principle of legality.[7]

Oral hearing

14. The plaintiffs do not seek a further oral hearing.

Dated: 31 January 2020

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4 (2000) 204 CLR 82 at [54].
5 See, eg, *Cole v Whitfield* (1988) 165 CLR 360 at 385; *Work Choices Case* (2006) 229 CLR 1 at [120]–[121].
6 See also *Ousley v The Queen* (1997) 192 CLR 69 at 127.
7 *George v Rockett* (1990) 170 CLR 104 at 110–111; *Corbett* (2007) 230 CLR 606 at [87]–[109].