IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

NO S2196 OF 2019

ANNIKA SMETHURST

First Plaintiff

NATIONWIDE NEWS PTY LTD

Second Plaintiff

and

COMMISSIONER OF POLICE

First Defendant

JAMES LAWTON

Second Defendant

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

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

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Date of this document: 12 November 2019

File ref: 19004603

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PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

I. Validity of the Second Warrant (Questions 1(a)-(b)) (CS [6]-[8])

2. Section 3E(5)(a) of the *Crimes Act 1914* (Cth) (**the Act**) (**V1, T1**) relevantly requires no more than that a warrant state "the offence to which the warrant relates". That requirement is to be understood in light of a large body of Federal Court authority, some of which has been approved by this Court: *NSW v Corbett* (2007) 230 CLR 606, [1], [3], [93]-[107] (**V5, T39**); *Beneficial Finance Corporation v Commissioner, AFP* (1991) 31 FCR 523, 525, 529, 533-38, 543-44 (**V6, T45**); *Caratti v Commissioner, AFP* (2017) 257 FCR 166 (***Caratti FC***), [35]-[42], [112]-[115] (**V6, T49**). The Second Warrant (SCB 38-39) met the requirements identified in those authorities and was valid.

II. Relief (Question 4) (CS [52]-[55])

3. Even if the Court answers "yes" to any of Questions 1-3, it should decline to grant the injunction sought by the plaintiffs (CS [53], cf PS [50]). To order the destruction of the evidence seized pursuant to the warrant would be contrary to the rationale underlying *Bunning v Cross* (1978) 141 CLR 54 (**V3, T26**) and s 138(1) of the *Evidence Act 1995* (Cth) (**V2, T10**). Many authorities establish that law enforcement authorities may be permitted to retain material even if it was seized unlawfully, so that any issue concerning the use of such material can be determined in any subsequent criminal proceeding (whether or not such proceedings have been commenced): *Caratti v Commissioner, AFP (No 2)* [2016] FCA 1132, [444]-[448], [456], [462]-[463], [469]-[475] (**V6, T48**); *Caratti FC* (2017) 257 FCR 166, [158], [163] (**V6, T49**); *Gollan v Nugent* (1988) 166 CLR 18, 43-44 (**V3, T28**). Similar principles apply in other jurisdictions concerning the return of unlawfully seized material: *Davis v United States*, 564 US 229 (2011), 236-38; *Illinois v Krull*, 480 US 340 (1987), 347-50; *Gill v Attorney-General* [2010] NZCA 468 at [27].

4. Applying those principles, the Court should not order the destruction of evidence that may have high probative value, and be important to future criminal proceedings (including proceedings that do not relate to the plaintiffs or to a breach of s 79(3)), in circumstances where any unlawfulness was not deliberate or contumelious, the offences

under investigation are serious, and Ms Smethurst has not been deprived of any property. The Court may require it to be destroyed if and when the material seized is no longer required in connection with criminal proceedings: cf ss 3L(1B) and 3ZQU(1).

III. Construction of s 79 of the Act (Questions 1(c) and 3) (CS [17]-[32])

5. **Legislative history**: The substantial amendments made to s 79 in 1960 were intended to limit its application to "truly secret information" (CS [17]): Second Reading Speech to the *Crimes Bill 1960* (Cth), 8 September 1960, 1021-6, 1031-3 (**V8, T76**).

6. **Text and context**: Sections 70 and 79 were intended to achieve different objects. The "duty to treat as secret" in s 79 is more confined than the "duty not to disclose" in s 70. The operation of s 79 is confined by the concept of "prescribed information" in s 79(1), which confines the operation of s 79 by reference to both source and secrecy criteria. Those criteria set the standard for determining whether the "duty to treat as secret" exists, no duty "external" to the section being required: opinions of Sir Maurice Byers, 25 August 1983, [5]-[12] and Attorney-General, 29 August 1983, 5-7 (both at **V8, T84**).

7. Three aspects of the statutory text and context indicate that the operation of s 79 is concerned with material the disclosure of which will cause serious harm to Australia's defence and security (broadly understood), being: (1) the symmetry of the conduct proscribed by s 79(2), and that captured by s 79(3) and (4)(a)-(b); (2) the context that is apparent from the surrounding provisions in Pt VII; (3) the limited circumstances in which the nature of information or the circumstances in which it is obtained create a duty to protect the secrecy of information, as opposed to a duty not to disclose information.

8. A "duty to treat information as secret" has long been identified in the Commonwealth government policy frameworks governing classified documents, the relevant versions of which are the Protective Security Policy Framework (SCB 8, [36]), incorporating the Defence Security Manual (**DSM**): see SCB 10 [45]; 542 [1]-[3]; 544 [16]-[18]; 545 [21]; 552 [12], [16]; 553-554 [25]-[28]; 564 [107], [112]; 412 [91], (Table 2); 424 [174]; 427-428 (Table 4); 564-565 [109], [116], [126]; 381; 461 [50], (Table 2).

9. Properly construed, s 79(1)(b) captures documents that are subject to the comprehensive duty to protect secrecy that applies to documents marked, or required to be marked, SECRET or TOP SECRET under those policies (SCB 11 [47.1], 12 [52]).

IV Validity of s 79(3) (Question 3) (CS [33]-[51])

10. **Burden**: Section 79(3) burdened the implied freedom of political communication (SCB 12 [56]), but the burden was not "substantial" (cf PR [24]). It was imposed on limited classes of people, with respect to very limited classes of information, and was further reduced by the mental element of the offence: *Smith v The Queen* (2017) 259 CLR 291, [59]-[60] (**V5, T40**).

11. **Legitimate purpose**: The purpose of s 79 was to reduce the risk of prejudice to the security or defence of the Commonwealth from the disclosure of secret information (CS [43]; SCB 6 [27]). The attainment of such a purpose is not only compatible with the constitutionally prescribed system of government – it protects that system. Section 79 has been part of the context in which representative and responsible government has been conducted in Australia for most of its history, and is not incompatible with that system.

12. **Justification analysis**: Section 79 plainly had a rational connection to the legitimate purpose identified above, and was therefore suitable (CS [46]; PR [28]). In respect of necessity (CS [47]-[50]), there was no "obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden on the implied freedom" whether in 1960, or thereafter. Finally, s 79(3) was adequate in its balance. The plaintiffs' submissions rest on their overly wide construction of the provision and therefore proceed on a false premise (e.g. PS [45]).

V. Validity of the 3LA Order (Question 2) (CS [9]-[16]; facts at SCB 4 [15]-[20])

13. **Questions 2 (a)-(b):** The 3LA Order interacted with the Second Warrant in exactly the same way as it would have interacted with the First Warrant. The plaintiffs' submissions take an unduly technical view of the statutory scheme, contrary to *Baker v Campbell* (1983) 153 CLR 52, 83 (**V3, T24**) and *Hart v AFP* (2002) 124 FCR 384, [68] (**V4, T56**).

14. **Questions 2(c)-(d):** *Luppino v Fisher (No 2)* [2019] FCA 1100 (**V4, T57**) is wrong. On Question 2(c), it is a question of fact whether any assistance requested is "reasonable or necessary". On Question 2(d), it would be out of step with the "reasonable suspicion" required by s 3E, and with operational realities, to construe s 3LA so that orders may only be issued where investigators know in advance what assistance is needed.

Date: 12 November 2019

Stephen Donaghue **Craig Lenehan** **Sarah Zeleznikow**