

5 **BETWEEN:**

**ANNIKA SMETHURST**  
First Plaintiff

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**NATIONWIDE NEWS PTY LTD**  
Second Plaintiff

**AND:**



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**COMMISSIONER OF POLICE**  
First Defendant

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**JAMES LAWTON**  
Second Defendant

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**OUTLINE OF ORAL ARGUMENT OF THE AUSTRALIAN HUMAN RIGHTS  
COMMISSION (AS AMICUS CURIAE)**

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## CERTIFICATION

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1. This document is in a form suitable for publication on the internet.

## SUMMARY OF ARGUMENT

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### Introduction

- 5 2. Question 3 of the Special Case raises a question as to the validity of the whole of s 79(3) of the *Crimes Act 1914* (Cth).
3. The validity of section 79(3) cannot be determined without first construing it: AHRCS<sup>1</sup> [9]. When it is said that a statutory provision infringes the implied freedom, construction of the provision is a precursor to identifying its purpose and the nature  
10 and extent of any burden: AHRCS [9].
4. The Australian Human Rights Commission only seeks to make oral submissions on the proper construction of s 79(3).

### Construction of section 79(3)

5. Section 79(3) picks up s 79(1), and the two must be read together.
- 15 6. Section 79(3) should be construed in the context of the principle of legality, and therefore so as to minimise or avoid any burden on freedom of expression: AHRCS [18].
7. Section 79(3) should, if possible, be given a meaning which ensures that it is valid: *Acts Interpretation Act 1901* (Cth) s 15A; AHRCS [21].
- 20 8. The definition of “prescribed information” in s 79(1) is, on its face, very broad. Section 79(3) does not simply apply to public servants or those who contract with the Commonwealth; it extends to persons who have no direct connection with the Commonwealth.
- 25 9. Section 79(1)(b) prescribes information if it is made or obtained by a person owing to his or her position as a person (inter alia) who holds or has held a contract made on behalf of the Commonwealth (s 79(1)(b)(iii)) or is or has been employed by a person who is (or was) a Commonwealth officer or who holds (or has held) a contract made on behalf of the Commonwealth (s 79(1)(b)(iv)).

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<sup>1</sup> Submissions of the Australian Human Rights Commission dated 9 October 2019.

10. On the face of s 79(1), information is “prescribed information” if it was made or obtained by a person owing to his or her position as:

(a) an employee of a law firm or an advertising agency who holds (or has held) a contract with the Commonwealth; or

5 (b) a cleaner, nanny or personal trainer employed by a person who is (or was) a Commonwealth public servant,

whether or not there is a sufficient connection between the information (or the circumstances of its secrecy) and the interests of the Commonwealth.

11. Criminalisation of communication of information of that kind, even if conveyed in  
10 circumstances of secrecy, would not readily be supported by any positive head of power: AHRCS [24]-[26].

12. The connection between s 79(1)(b) and a positive head of power arises from the nature of the “duty” referred to in the chaussette: AHRCS [27]. The “duty” referred to must be a “duty” arising under a valid exercise of Commonwealth legislative,  
15 executive or judicial power: AHRCS [33]-[34].

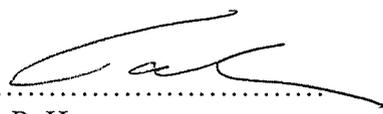
13. “Authorised” in s 79(3)(a) means “not prohibited” and does not require a positive legal right: AHRCS [40].

14. The duty to communicate in s 79(3)(b) covers moral and ethical duties; it is not limited to legal duties: AHRCS [41]-[42].

20 15. The suggested implicit condition on the commission of the offence in s 79(3) proposed by the Defendants is difficult to reconcile with the language of s 79. Further, it infringes the rule that a provision imposing criminal liability should be “certain and its reach ascertainable by those who are subject to it”: *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459 at [48].

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**12 November 2019**