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

JOINT ANNOTATED SUBMISSIONS OF THE FIRST DEFENDANT AND THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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

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PART I: CERTIFICATION

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

PART II: CONCISE STATEMENT OF ISSUES

2. The issues are reflected in the questions of law stated by the parties (SCB 13 [57]).

PART III: SECTION 78B NOTICES AND INTERVENTION

3. The Attorney-General of the Commonwealth intervenes in this proceeding under s 78A of the *Judiciary Act 1903* (Cth) (***Judiciary Act***), in support of the first defendant.

4. The plaintiffs have given notice under s 78B of the *Judiciary Act*. The first defendant and the Attorney-General do not consider that any further notice is required, on the assumption that the submissions of the Australian Human Rights Commission (**AHRC**) at [22]-[27] will not be received, in circumstances where the plaintiffs have not raised any head of power issue concerning s 79 of the *Crimes Act 1914* (Cth) (the **Act**).

PART IV: MATERIAL FACTS

5. The material facts, and the defined terms used below, are set out in SCB 1-12.

PARTS V AND VI: ARGUMENT

A. The validity of the Second Warrant (Question 1)

6. The plaintiffs' attack on the validity of the Second Warrant emphasises that "[t]he validity of a warrant is dependent on strict compliance with the conditions governing its issue" (PS [5]-[8]). That is true as far as it goes. However, as explained by Callinan and Crennan JJ in *Corbett* (with whom Gleeson CJ and Gummow J generally agreed), "[s]trict compliance, in the sense described in *Rockett*, is achieved when [the statutory] purpose is fulfilled".[1] It has long been settled that the purpose of the requirement in s 3E(5)(a) that a search warrant contain a statement of the "offence to which the warrant relates" "is not to define the issues for trial; but to set bounds to the area of search which the execution of the warrant will involve, as part of an investigation into a suspected crime".[2] That requirement is satisfied provided "the warrant

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1 *NSW v Corbett* (2007) 230 CLR 606 (***Corbett***) [105]; see also *Caratti v Commissioner of the Australian Federal Police* (2017) 257 FCR 166 (***Caratti***) [26]-[30] (the Court).

2 *Beneficial Finance Corporation v Commissioner of Australian Federal Police* (1991) 31 FCR 523 (***Beneficial Finance***) 533 (Burchett J, Sheppard and Pincus JJ agreeing), quoted with approval in *Corbett* (2007) 230 CLR 606, [99]-[100] (Callinan and Crennan JJ).

... disclose[s] the nature of the offence so as to indicate the area of search",[3] that being sufficient to distinguish a permissible warrant from a general warrant of the kind the law decisively rejected in the eighteenth century. In applying this criterion, courts "recognise the operational realities" in which warrants are issued and executed,[4] such that the statement of the offence "need not be made with the precision of an indictment".[5] Warrants are "to be read beneficially, and without overzealous technicality".[6]

7. In light of the above principles, the plaintiffs' two attacks on the validity of the Second Warrant should be rejected. ***First***, the plaintiffs contend that the Second Warrant failed to state the offence to which it related as required by s 3E(5)(a), apparently because it did not refer to the existence of "prescribed information" as an element of the offence (PS [11]). The plaintiffs also seek to equate the requirement to state the "particular offence" with a requirement to state "the particular offending conduct" (PS [7]). Those submissions substantially overstate what was required. The authorities discussed above confirm that the identification of an offence in a search warrant is not required to "state the offence in the precise terms of the statute".[7] So much is illustrated by cases where warrants have been held valid even when they identified the offence by reference to an incorrect statutory provision, or where statutory language was used loosely or inaccurately.[8] Here, the Second Warrant correctly referred to s 79(3) of the Act, which it noted concerned "Official Secrets". That, in itself, satisfied s 3E(5)(a).[9] The warrant then gave significant additional guidance as to the area of the search, including by conveying that the suspected offence related to articles written by Ms Smethurst and published by the Sunday Telegraph on 29 April 2018 (itself a confined class, cf PS [14], where the submission that it is an "enormous pool" apparently reads the word "and" in the third condition as if it said "or"). Further, when the third condition is read together with the first and second conditions (SCB 38-39),[10] the suspected offence could be seen to be connected with a classified document

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3 *Beneficial Finance* (1991) 31 FCR 523, 543 (Burchett J), endorsed in *Corbett* (2007) 230 CLR 606, [104] (Callinan and Crennan JJ). See also *Caratti* (2017) 257 FCR 166, [114] (the Court).

4 See eg *Hart v Australian Federal Police* (2002) 124 FCR 384 (***Hart***) [68] (the Court), endorsed in *Caratti* (2017) 257 FCR 166, [24] (the Court); see also *Beneficial Finance* (1991) 31 FCR 523, 543 (Burchett J), endorsed in *Propend Finance Pty Ltd v Commissioner, Australian Federal Police* (1994) 29 ATR 87, 99 (Davies J).

5 *Beneficial Finance* (1991) 31 FCR 523, 533 (Burchett J), endorsed in *Corbett* (2007) 230 CLR 606, [99].

6 See *Caratti* (2017) 257 FCR 166, [114] (the Court); *Beneficial Finance* (1991) 31 FCR 523, 533-535 and 543.

7 See eg *Ozzy Tyre & Tube Pty Ltd v Chief Executive Officer of Customs* [2000] FCA 891, [17] and [19], endorsed in *Caratti v Commissioner of the Australian Federal Police (No 2)* [2016] FCA 1132 (***Caratti (No 2)***) [117].

8 See eg *Corbett* (2007) 230 CLR 606, [103] (Callinan and Crennan JJ); *Parker v Churchill* (1986) 9 FCR 334, 340 (Jackson J, Bowen CJ and Lockhart J relevantly agreeing at 335); *Chong v Scultz* (2000) 112 A Crim R 59, [5]-[6], [9] (Heerey J).

9 The authorities cited in PS [7] fn 4 do not support the contrary proposition.

10 See *Propend Finance Pty Ltd v Commissioner, Australian Federal Police* (1994) 29 ATR 87, 98 (Davies J).

(the **ASD document**), the Department of Defence, the Department of Home Affairs and the Australian Signals Directorate (**ASD**). In those circumstances, the Second Warrant was far removed from a general warrant of the kind that s 3E(5)(a) guards against.

8. ***Second***, the plaintiffs contend that the offence was not stated with sufficient precision (PS [12]-[14]). However, for the reasons already given, it was not necessary for the Second Warrant to identify how the information contained in the articles was "prescribed" in order for it to "disclose the nature of the offence so as to indicate the area of search" (cf PS [14]). Even without that information, "[t]he substance of the offence could plainly be understood".[11] To imply a requirement to provide particulars would "be irrational, bearing in mind the stage of the investigation at which a search warrant may issue";[12] how the relevant information was "prescribed" in relation to Ms Smethurst depended on the circumstances in which she obtained that information, which may itself have been a matter under investigation.

B. The validity of the s 3LA Order (Question 2)

9. The **first and second sub-questions within Question 2** relate to what, if any, consequences flow from the s 3LA Order having been granted contemporaneously with the First Warrant, and thus three days before the Second Warrant was issued (SCB 4 [15]). The Second Warrant was identical to the First Warrant, save that it confined the search premises (by excluding a car) and changed the name of the executing officer (SCB 4 [16]-[17]).

10. These two questions assume that the s 3LA Order was valid when it was made, and therefore that it would have required Ms Smethurst to assist in the execution of the First Warrant (as appears to be accepted in PS [21]). The question is whether that valid s 3LA Order required Ms Smethurst to assist in the execution of the Second Warrant, in circumstances where that warrant authorised only a subset of what was authorised by the warrant issued contemporaneously with the s 3LA Order. In those specific circumstances, the points made in PS [18] do not arise. The fact that the Second Warrant did not authorise anything that had not already been authorised by the First Warrant means that the s 3LA Order interacted with the Second Warrant in exactly the same way as it would have interacted with the First Warrant. What was required of Ms Smethurst by the s 3LA Order was the same, irrespective of which warrant was executed. There having been no change of substance, and taking a "practical rather

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[11] *Beneficial Finance* (1991) 31 FCR 523, 543 (Burchett J).
[12] *Beneficial Finance* (1991) 31 FCR 523, 533 (Burchett J).

than an unduly technical view" having regard to "operational realities",[13] the s 3LA Order was effective to require Ms Smethurst to assist in the execution of the Second Warrant.

11. Alternatively, the reasons the Magistrate decided to grant the s 3LA Order requiring Ms Smethurst to assist in the execution of the First Warrant were necessarily equally applicable to the Second Warrant. For that reason, any failure to obtain a new s 3LA order should not attract relief, because it could not have resulted in a different decision and therefore would not meet the relevant threshold of materiality.[14]

12. The two points raised in PS [20] do not stand against this conclusion. The plaintiffs' submission that the issuing officer may not "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" has an air of unreality about it. There is no rational process of reasoning by which the preparedness of the Magistrate to issue an order requiring Ms Smethurst to assist in accessing computers or devices found in her residence could depend on whether or not the police were also intending to search her car. Nor is there any reason to think that the Magistrate in fact considered the inclusion of the car in the First Warrant to be at all relevant to the s 3LA Order, which refers only to the residential premises (SCB 35).

13. The plaintiffs' submission that an "event" may have "occurred which might have been relevant to whether to make the s 3LA Order" in the three days between the issue of the Second Warrant and the s 3LA Order is entirely speculative. It is difficult to imagine what such an "event" could have been. In any case, the submission is at odds with the scheme of Pt IAA, by which search warrants may remain valid for up to seven days (ss 3E(5)(e) and (5A)), and no explicit temporal restrictions are placed on s 3LA orders. The fact that the s 3LA Order could have taken effect at any time in the seven days after it was granted denies the relevance of (hypothetical) changes in circumstances in the three days after it was granted.

14. The **third and fourth sub-questions within Question 2** relate to whether, properly construed, s 3LA requires an assistance order to specify the particular computer or data storage device in respect of which assistance is required, and to specify the specific information or

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[13] As to the first proposition, see *Ousley v The Queen* (1997) 192 CLR 69, 144 (Kirby J); see also *Baker v Campbell* (1983) 153 CLR 52, 83 (Mason J). As to the second, see *Hart* (2002) 124 FCR 384, [68] (the Court). In *Luppino v Fisher (No 2)* [2019] FCA 1100 (***Luppino***), both parties, and White J, appeared to accept that the principles stated in *Hart* had some application to the construction of s 3LA: [36]-[37] and [123].

[14] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, [29]-[31]; *Minister for Immigration and Border Protection v SZMTA* (2019) 93 ALJR 252, [46].

assistance that is required (PS [22]). While the plaintiffs' submissions on these points are supported by White J's judgment in *Luppino*,[15] that decision is under appeal, and the reasoning is wrong. Section 3LA does not require an order under that provision to specify the computer or device to which it relates, nor the specific assistance that is required. Those purported requirements are not supported by the text, and they should not be implied. Textually, the order contemplated by s 3LA(1) is an order requiring a specified person to "provide any information or assistance that is reasonable and necessary" for the identified purposes. As such, it is not for either the magistrate making the order, or the constable executing the warrant, to decide what is "reasonable or necessary".[16] Ordinarily the content of such assistance will be obvious (such as providing a password or fingerprint). If borderline cases arise, they will ultimately be determined by a court, which will decide for itself whether the assistance sought was "reasonable or necessary".

15. In contending that a particular computer or data storage device must be specified, the plaintiffs place significant weight on the use of the definite article in s 3LA(2) (PS [23]). However, it does not follow from that use of the definite article that an order must be made in respect of a particular computer or device.[17] To the contrary, the reference to "the computer or data storage device" can naturally be read as a reference to each computer or device that is subject to the proposed order. That construction is strongly supported by the legislative context of Pt IAA. Quite obviously, the evidential material that may be sought pursuant to a search warrant will often be located on computers and other devices. Equally obviously, if investigators have not previously entered the premises to which a search warrant relates, it will frequently be impossible for them to know before a warrant is executed what devices are located on the premises (eg laptops, smartphones and iPads), and how (if at all) the data on each of those devices is protected. In the absence of that knowledge, on the plaintiffs' construction, it will frequently be impossible to obtain a valid and effective s 3LA order prior to the execution of a warrant, because the requisite particularity cannot be achieved.

16. On that construction, whenever computers or other devices are located in the execution of a warrant then, unless it is practicable for a s 3LA order to be obtained from a magistrate during the period of execution, the executing officers will have to exercise their powers under s 3K(2) to take those computers or devices to another place for examination, in order to determine whether they may be seized under the warrant (as contemplated by s 3K(3A)). Once

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[15] [2019] FCA 1100.
[16] Cf *Luppino* [2019] FCA 1100, [105], [124] (White J); PS [24].
[17] Cf *Luppino* [2019] FCA 1100, [161] (White J); PS [23].

a computer or device is so taken, it will become possible to obtain a s 3LA order for the provision of specific assistance with respect to particular devices (s 3LA(1)(a)(ii)). But to construe s 3LA so that, in practical terms, it is only possible to obtain an order after computers or devices have been taken from the warrant premises is contrary to the evident purpose of s 3L(3). That subsection in effect provides that the seizure of computers and other devices is an option of last resort, to be exercised only if it is not practicable either to copy the relevant data (s 3L(1A)) or to put the evidential material in documentary form and then to seize the documents so produced (s 3L(2)(b)).[18] The plaintiffs' construction of s 3LA therefore does not cohere with the statutory design, for it would increase the disruption caused by the execution of a search warrant and delay access to evidential material, for no purpose. More broadly, Pt IAA clearly authorises search warrants to be issued based on reasonable suspicion that evidential material will be located at the premises. Viewed in that context, s 3LA, which is intended to aid the execution of search warrants, should not be construed so that it is available only when investigators already know what items will be found and what assistance they will need. Instead, it should be construed to facilitate the identification of the evidential material to which a warrant relates in the quickest and least disruptive manner possible. So construed, the s 3LA Order was valid.

C. The construction of s 79(3) of the Act

17. The first step in determining the validity of s 79(3) is to determine its true construction.[19] That requires close attention to its text, read in its statutory context. The plaintiffs substantially eschew that task, urging the Court to adopt a wide interpretation of s 79, presumably so as to maximise the prospect that the Court will find that it imposes an unjustified burden on political communication (an "all-or-nothing" approach deprecated by Gageler J in *Tajjour*[20]). To that end, many of the plaintiffs' submissions draw upon critiques of s 2 of the *Official Secrets Act 1911* (UK) (the **1911 Act**), on the implicit premise that s 2 is indistinguishable from s 79: eg PS [34], [36]-[38]. In fact, however, s 79(3) was introduced into the Act in the form relevant to this proceeding by the *Crimes Act 1960* (Cth) (the **1960 Act**)[21] for the express purpose of overcoming deficiencies that had been identified in the previous section (which was modelled on s 2). When introducing the Bill that became the 1960 Act, the Attorney-General (Sir Garfield

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[18] See also, to similar effect, s 3K(2)(a)(i) of the Act.
[19] *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, [11].
[20] *Tajjour v New South Wales* (2014) 254 CLR 508 (***Tajjour***) [175].
[21] Section 52 of the 1960 Act. The provision remained in a similar form until its repeal in 2018 (SCB 7 [33]).

Barwick QC) expressed concern that the previous language, "if literally construed, would cover information which had come to the knowledge or possession of a person in the course of his office which was not truly secret information".[22] The Attorney-General explained that the problem was to be remedied by inserting a definition of "prescribed information" in s 79(1), to "make it quite clear that what is being dealt with, in section 79, is secret information".[23]

18. Focusing on the text of the provision, s 79(3) contained two elements. The aspects most centrally relevant to the plaintiffs were as follows:

18.1. a person (**first person**) communicated prescribed information to another person (**second person**), or permitted the second person to have access to such information; and

18.2. the second person was not a person to whom the first person was authorised to communicate or give access to that information, nor a person to whom it was, in the interest of the Commonwealth, the first person's duty to communicate or give access to that information.

19. The first element involved conduct constituted by a single physical act,[24] attracting the fault element of intention (Criminal Code, s 5.6(1)). The prosecution must therefore establish both that the accused intended to communicate the information and intended that it bear the character of "prescribed information" (a concept discussed further below). That intention may be inferred from proof of awareness of a significant or real chance that the information had that character.[25] This fault element, which considerably confined the breadth of the offence, is not addressed by the plaintiffs at all.

20. As the Attorney-General foreshadowed in the second reading speech to the 1960 Act, and as the plaintiffs correctly accept (PS [10], [12]-[13]), the operation of s 79(3) hinged upon the meaning of "prescribed information". That term was defined (disjunctively) in s 79(1)(a)-(c). Section 79(1)(c) is not presently relevant, and is not further addressed.

21. Section 79(1)(a) provided that information was "prescribed information" in relation to a person if they had the information in their possession or control and it had been obtained in contravention of Pt VII of the Act (including s 79) or s 91.1 of the Criminal Code. As is

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22 Hansard, House of Representatives, *Crimes Bill 1960* (Cth), 8 September 1960, 1032.

23 Hansard, House of Representatives, *Crimes Bill 1960* (Cth), 8 September 1960, 1032.

24 See, by way of analogy, *He Kaw Teh v The Queen* (1985) 157 CLR 523, 584 (Brennan J); *R v Saengsai-Or* (2004) 61 NSWLR 135, [72] (Bell J, Wood CJ at CL and Simpson J agreeing); *PJ v The Queen* (2012) 36 VR 402, [17], [20] and [24] (the Court).

25 *Smith v The Queen* (2017) 259 CLR 291, [60] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Channel Seven Adelaide Pty Ltd v Australian Communications and Media Authority* (2014) 223 FCR 65, [14].

developed below, this paragraph is the basis upon which it was reasonable to suspect that the information in the ASD document was "prescribed information" in relation to Ms Smethurst.

22. Section 79(1)(b) provided that information was "prescribed information" in relation to a person if it satisfied both source and secrecy criteria.

23. The source criteria were set out in s 79(1)(b)(i)-(v), which broadly required the information either to have been "entrusted" to the person by a Commonwealth officer, or the person to have made or obtained the information owing to his or her position as a Commonwealth officer or through another close relationship to the Commonwealth.

24. There were three alternative secrecy criteria. ***First***, information which "by reason of its nature … it is [the person's] duty to treat as secret". ***Second***, information which "by reason of … the circumstances under which it was entrusted to [the person] or it was made or obtained by [them] … it is [the person's] duty to treat as secret". The word "entrusted" here carried its ordinary meaning, being to "confide the care or disposal of".[26] As such, this criterion contemplated that the circumstances in which information was entrusted to a person might enliven a "duty to treat [that information] as secret". It was not satisified simply by showing that a person possessed secret information. ***Third***, information which "for any other reason … it is [the person's] duty to treat … as secret". This criterion was enlivened by a legal obligation exterior to s 79, pursuant to which a person was under a duty to treat information as secret (as opposed to a mere duty to keep information confidential). When an obligation of that kind existed (whether pursuant to statute or the common law: cf AHRC [34]-[35]), this limb attached criminal consequences to breach of that duty provided that the relevant fault element was established. However, the exterior legal duties that engaged this limb were not at large, for the "other reasons" that could enliven s 79 had to be identified in light of the purpose of that provision (discussed below). If an externally sourced duty did not relate to that purpose, s 79 did not attach criminal liability to breach of that duty.[27]

25. Read in context, the "duty" referred to in each of the secrecy criteria was a legal obligation, whether that obligation arose by force of s 79(1)(b) itself (as it did for the first two criteria) or from an external source (as it did for the third criterion). An externally sourced duty

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[26] *Stephens v The Queen* (1978) 139 CLR 315, 333 (Gibbs J, Jacobs and Murphy JJ agreeing at 336-337).

[27] Any burden on communication arising from the third secrecy criterion can be assessed only by reading that limb together with a specific external duty. If the resultant burden would be unjustifiable then, construing s 79 so as to operate validly, s 79(1)(b) would not attach consequences to breach of that duty. Alternatively, if necessary, the third secrecy criterion would be severable: *Acts Interpretation Act 1901* (Cth) s 15A.

was not essential to the operation of s 79 (unlike s 70, which was differently drafted).[28]

26. Section 79 was rarely litigated.[29] However, in 1983, an opinion was released of the then Attorney-General, the Hon Senator Evans, concerning the operation of s 79(3) (the Attorney-General having consulted with both the Solicitor-General, Sir Maurice Byers QC, and Mr Murray Gleeson QC). The Attorney-General concluded that "the kind of information most likely to attract the operation of the section would be sensitive material directly related to defence and security".[30] There are at least four considerations of text and context that support the conclusion that, properly construed, s 79 was concerned only with the disclosure of information that created a risk of prejudice to the security or defence of the Commonwealth.

27. ***First***, the close similarity between the language of ss 79(2)(a) and (3) indicated that those provisions were concerned with the same conduct, the difference being the fault element.[31] If that conduct was undertaken "with the intention of prejudicing the security or defence of the Commonwealth", then s 79(2)(a) made it an indictable offence punishable by up to 7 years imprisonment.[32] If the same conduct was undertaken "without a prejudicial purpose",[33] it was captured by s 79(3) and punishable by up to 2 years imprisonment. Consistently with the purpose of s 79 (discussed below), once it is recognised that s 79(2)(a) and (3) applied to the same conduct, it is apparent that the conduct in question was conduct that had the capacity to prejudice the security or defence of the Commonwealth.

28. ***Second***, the obligation that engaged s 79(1)(b) was expressed as a duty to "treat as secret".[34] That language stood in clear contrast to a mere "duty not to disclose" information of the kind previously found in s 70 of the Act (and elsewhere: cf PS [45]). As Justice Hope observed, the textual differences between ss 70 and 79 indicated that s 79(1)(b) was directed to matters the disclosure of which potentially affected "national security", as opposed to matters

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28 Sir Maurice Byers QC, Opinion, 25 August 1983, [11]-[12] (published in full in *The Age*, 31 August 1983); cf AHRC [58].

29 See eg *Grant v Headland* (1977) 17 ACTR 29 (***Grant***) 31 (Smithers J); *R v Lappas* (2003) 152 ACTR 7, [20], [24] (Higgins CJ) and [117] and [130] (Cooper and Weinberg JJ).

30 Senator Gareth Evans, Letter to Prime Minister RJ Hawke, 29 August 1983 (released by the Prime Minister to the media on 30 August 1983). See also Sir Maurice Byers QC, Opinion, 25 August 1983, [11]-[12].

31 That is confirmed by s 79(10) – formerly s 79(8) – which provided that a person charged with an offence against s 79(2) may be found guilty of an offence against ss 79(3) or (4).

32 *R v Lappas* (2003) 152 ACTR 7, [115] (Cooper and Weinberg JJ), noting that such a purpose is "self-evidently a heinous one, involving as it does a threat to the security of the state."

33 See eg Hansard, House of Representatives, *Crimes Bill 1960* (Cth), 8 September 1960, 1032 (the Attorney-General), see also 1033 in relation to s 79(3)-(6).

34 In contrast to the Western Australian provision in issue in *Cortis v The Queen* [1979] WAR 30, 30-31 ("and which it is his duty to keep secret").

which needed to be kept confidential by Commonwealth officers for other reasons.[35] Further, even leaving aside the contrast with s 70, a duty to "treat" information as "secret" entailed more than a constraint upon unauthorised disclosure (contra AHRC at [38]). It referred to a duty of a kind that involved taking steps to protect the secrecy of information, including, for example, steps of the kind required with respect to documents classified SECRET or TOP SECRET under detailed policies that have existed at the Commonwealth level at least since 1948.[36] The relevance of obligations concerning storage and handling to a "duty to treat as secret" was confirmed by contextual considerations, including: ss 79(2)(b) and (4)(a), which indicated that a "duty to treat as secret" included a "duty" not to retain certain prescribed information; ss 79(2)(c) and (4)(b), which contemplated that a person may come under a relevant obligation by reason of directions being given regarding the retention and disposal of prescribed information; and s 79(4)(c), which created an offence for failing to take "reasonable care" of prescribed information.

29. ***Third***, other contextual features of Pt VII also pointed to s 79 being concerned with disclosures of secrets that created a risk of prejudice to the security[37] or defence of the Commonwealth. Prior to its repeal, the title of Pt VII was "Official secrets and unlawful soundings". Each offence contained within Pt VII related to the use of information which, if not kept secret, could prejudice the security or defence of the Commonwealth: ss 79(2)-(6) criminalised specific dealings with prescribed information (as explained above); and s 85 criminalised the taking, recording, possessing or communication of "unlawful soundings". Consistently with the links recognised between espionage-related offences and official secrecy provisions in the 1914 and 1960 second reading speeches,[38] both ss 79(1)(a) and 79(5) provided paths by which the on-communication of information that a person had received in contravention of s 91.1 of the Criminal Code might be criminalised (s 91.1 being the espionage

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35 Royal Commission on Intelligence and Security, Fourth Report, 1977, vol 2, 38-39; see also Fourth Report, 1977, vol 1, 203. This is generally consistent with the approach taken in *Grant* (1977) 17 ACTR 29, 31.

36 See eg SCB 7-8 [34], 131 (1948 manual), 186-188 (1954 manual), 143-144 (1960 manual).

37 The term "security" (which was not defined in the Act, although a non-exhaustive definition was included in s 90.1 of the Criminal Code) was substituted for the word "safety" by the *Criminal Code Amendment (Espionage and Related Matters) Act 2002* (Cth). It was intended to capture information about the operations, capabilities and technologies, methods and sources of Australian intelligence and security agencies. The concern was that "safety" was unlikely to include such information: see Revised Explanatory Memorandum, *Criminal Code Amendment (Espionage and Related Matters) Bill 2002* (Cth), 5.

38 Hansard, House of Representatives, *Crimes Bill 1914* (Cth), 21 October 1914, 265-266; Hansard, House of Representatives, *Crimes Bill 1960* (Cth), 8 September 1960, 1023, 1026 and 1031.

offence that replaced s 78, which formerly also appeared in Pt VII).[39]

30. ***Fourth***, the legislative history of s 79 supports the same conclusion. Laws regulating the disclosure of official information have been in force in Australia since before Federation (SCB 6-7 [28]-[31]). When the Act was enacted in 1914, it contained a number of offences of that nature, including earlier versions of ss 70 and 79 (SCB 7 [31]). Section 70 was contained in Pt VI of the Act, entitled "Offences by and against Public Officers". By contrast, s 79 was contained in Pt VII, entitled "Breach of Official Secrecy", along with the offences of unlawful spying, prohibited places, harbouring spies and unlawful soundings (ss 78, 80, 81 and 83). The second reading speech of the *Crimes Bill 1914* (Cth) emphasised that espionage-related offences and "offences against the Commonwealth, such as copying plans of fortresses, and obtaining military secrets" were related; both were to be understood as "offences against the vital interests of the nation".[40] Accordingly, even in the terms in which it was originally enacted, the legislative history of s 79 denied that its object was "the protection of government secrecy as an end in itself, whenever that is thought desirable by the Executive": cf PS [29], [38]. Section 79 – like s 2 the 1911 Act, on which it was modelled (SCB 7 [30]-[31], 109, 116) – was always intended to capture material the disclosure of which stood to harm important national interests.[41] It is true that s 2 of the 1911 Act was subsequently recognised as having been cast too broadly.[42] But, notwithstanding the plaintiffs' attempts to tar s 79 with the same brush, s 79 was amended by the 1960 Act for the explicit purpose of aligning that provision with the object of protecting the nation's "vital" interests. For that reason, the plaintiffs' submissions drawing on s 2 of the 1911 Act (PS [34], [37]-[38]) do not assist in assessing the validity of s 79.

31. For the above reasons, while s 79(1) did not expressly include a requirement that the disclosure of prescribed information would harm Australia's security or defence, such a requirement was implicit. The absence of an express requirement likely reflected a recognition in 1960 that the operation of s 79 would extend beyond matters that directly concerned security or defence.[43] The 1955 Royal Commission on Espionage had pointed out that the aims of

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[39] A further textual link existed between s 79(2) of the Act and s 91.1(1) of the Criminal Code: see the common requirement for the relevant conduct to have been undertaken with the intention of prejudicing the security or defence of the Commonwealth. That link existed since 1960 – see the former terms of ss 78 and 79(2).

[40] Hansard, House of Representatives, *Crimes Bill 1914* (Cth), 21 October 1914, 265-266.

[41] For example, in the second reading speech to the *Official Secrets Bill 1889* (UK): Hansard, House of Lords, *Official Secrets Bill 1889* (No 112), 11 July 1889, vol 338, cc 85-86.

[42] See eg *Departmental Committee on Section 2 of the Official Secrets Act 1911* (Cmd 5104, 1972), vol 1, [17] and [105]; D Williams, *Not in the Public Interest* (1965), 38.

[43] Hansard, House of Representatives, *Crimes Bill 1960* (Cth), 8 September 1960, 1031 (Attorney-General).

espionage had expanded to include "the whole political, economic, and social life, of the community … so that no part of the machinery of government, or of the organisation of civil life, can be regarded – even in times of peace – as exempt from its attentions".[44] The second reading speech to the 1960 Act indicated a concern to address such harms.[45] That speech is inconsistent with the plaintiffs' submission that s 79 was intended to protect government security as an end in itself, whenever thought desirable by the Executive (PS [29]). Indeed, a purpose of the 1960 amendments was to ensure that s 79 did not so operate.[46]

32. In light of the four matters identified above, there is no substance to the plaintiffs' submissions that s 79 left to the "largely unconstrained discretion of the Executive the ability to decide what is to be covered": cf PS [35]. To the contrary, whichever limb of s 79(1)(b) applied, s 79 itself set "the standard for determining whether a duty exists". That was the conclusion reached by former Solicitor-General Sir Maurice Byers QC in 1983,[47] and by the Attorney-General in the opinion mentioned above. Those opinions were correct.

D. The validity of s 79(3) of the Act (Question 3)

33. The Commonwealth agrees that the principles applicable to determining the validity of s 79(3) of the Act, as it stood on 29 April 2018, are those identified at PS [26].

Burden

34. It is common ground that s 79(3) of the Act, as it stood on 29 April 2018, burdened the implied freedom of political communication (PS [27], SCB 12 [56]). It is, nevertheless, important to identify the extent of the burden that is in issue.[48]

35. Section 79 had a potentially wide range of operations, not all of which can be explored or justified on the material before the Court. No such exercise is required, because the various limbs of s 79 operated independently of one another. Indeed, even within s 79(1)(b), the three secrecy criteria provided parallel bases upon which a person who received information could be under a "duty to treat it as secret", and those bases operated independently of one another.

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[44] Report of the Royal Commission on Espionage (1955) 13. A similar point was made by the Royal Commission on Intelligence and Security, Second Report, 1975, vol 2, 25-26, noting that by reason of the increasing complexity of international relations, matters such as finance, economics, resources or trade may well affect the nation's safety or defence in certain circumstances.

[45] Hansard, House of Representatives, *Crimes Bill 1960* (Cth), 8 September 1960, 1026 and 1030-1033.

[46] Hansard, House of Representatives, *Crimes Bill 1960* (Cth), 8 September 1960, 1032.

[47] Sir Maurice Byers QC, Opinion, 25 August 1983, [11].

[48] See eg *Comcare v Banerji* (2019) 93 ALJR 900 (***Banerji***) [38] (Kiefel CJ, Bell, Keane and Nettle JJ).

Each of those parallel bases would, if necessary, be severable.[49]

36. Consistently with the above, the plaintiffs seek a declaration that s 79(3), as it stood on 29 April 2018, was invalid "at least so far as [s 79(3)] applied to the plaintiffs' conduct" (SCB AH [2], AN [15]). That language implicitly acknowledges that the plaintiffs are not entitled to roam at large over possible applications of s 79(3) that do not relate to them.[50] Given the relief sought, the question is whether any one of the limbs of s 79 validly applied to the plaintiffs. If it did, it follows that the declaratory relief must be refused, without the Court needing to determine whether any other possible operations of s 79 would be invalid.[51]

37. This case concerns the publication of part of a document that was created by the ASD, and to which the protective markings "SECRET AUSTEO COVERING TOP SECRET COMINT AUSTEO" (SCB 3 [11]-[12]) were applied. The appropriateness of those markings was confirmed by senior officers within ASD by reference to the *Defence Security Manual* (**DSM**) (SCB 3 [12]). That means that those officers considered that aspects of the ASD document (other than the covering document, which itself contained information classified at the level of SECRET) required the "highest degree of protection", because the disclosure of the information therein could cause "exceptionally grave damage to the national interest" (SCB 11 [47.1], 12 [52]).[52] The correctness of that assessment has not been put in issue.

38. The DSM was issued with the authority of the Chief of the Defence Force and the Secretary of the Department of Defence (SCB 10 [45]). It formed part of the Commonwealth Government's Protective Security Policy Framework (SCB 8 [35]-[36]). The DSM imposed mandatory requirements[53] on employees of the Department of Defence (which, at the relevant time, included the ASD).[54] Failure to comply with those requirements could result in

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[49] Having regard to the constructional imperative in favour of severance in s 15A of the *Acts Interpretation Act 1901* (Cth). See *Clubb v Edwards* (2019) 93 ALJR 448 (***Clubb***) [140] (Gageler J) and [340] (Gordon J); *Knight v Victoria* (2017) 261 CLR 306 (***Knight***) [34]-[35] (the Court).

[50] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, [156] (Gummow, Crennan and Bell JJ); *Real Estate Institute of NSW v Blair* (1946) 73 CLR 213, 227 (Starke J).

[51] See *Clubb* (2019) 93 ALJR 448, [32]-[35] (Kiefel CJ, Bell and Keane JJ), [133] (Gageler J), [330] (Gordon J) and [412] and [443] (Edelman J); *Knight* (2017) 261 CLR 306, [6] and [37] (the Court).

[52] The classification SECRET was used to designate information, the compromise of which could cause serious damage to national security, serious damage to the national interest more broadly, or serious damage to organisations and individuals (SCB 11 [47.2]). The classification TOP SECRET was used to designate information requiring the highest degree of protection, as compromise could cause exceptionally grave damage to national security or exceptionally grave damage to the national interest more broadly (SCB 11 [47.1]).

[53] The matters expressed to be "mandatory requirements" of the DSM constituted a general order to Defence Members for the purposes of the *Defence Force Discipline Act 1982* (Cth), and were intended to have effect as a direction to Defence employees by the Secretary for the purpose of s 13(5) of the *Public Service Act 1999* (Cth) (SCB 10 [45.2]).

[54] The term used in SCB 564 [107] is "defence personnel". "Defence personnel" includes "all defence employees": SCB 534 [5]. Before 1 July 2018, the ASD formed part of the Department of Defence: SCB 2 [9].

disciplinary or other action under, inter alia, the Act, the *Defence Force Discipline Act 1982* (Cth) or the *Public Service Act 1999* (Cth) (SCB 550). The mandatory requirements included that official information must not be protectively marked in order to hide violations of the law or administrative error, to prevent embarrassment to an individual, organisation or agency, or to prevent or delay the release of information that did not need protection in the public interest (SCB 553 [27]). The mandatory requirements also included that "Australian Government employees **must** have agency authorisation to release any information to members of the public" (SCB 552 [11]) and "**must** ensure that official information is protected from unauthorised access as indicated by the protective markings" (SCB 564 [107]). In practical terms, subject to very limited exceptions, that means that the ASD document could be disclosed only to a person who had obtained at least a Negative Vetting Level 2 security clearance (SCB 412 [91]). To obtain such a clearance, a person had to undergo a security assessment by the Australian Security Intelligence Organisation (SCB 427), and had to sign an 'Official Secrets' declaration (SCB 12 [50] and 588). The DSM also imposed strict storage and handling requirements in relation to security classified documents (SCB 564-566 [107]-[128]).

39. The comprehensive regime created by the DSM with respect to the persons who may be given access to security classified documents, the circumstances in which that access may be provided, and storage and handling requirements that follow from that access, relevantly defined for all relevant employees (SCB 10 [45]) the "circumstances under which" documents were "entrusted" to those employees within the meaning of s 79(1)(b)(ii). By reason of those circumstances, it was the duty of those employees to treat such documents as secret (ie the second secrecy criterion). Similarly, at least in cases where a document was marked with a SECRET or TOP SECRET classification in accordance with the DSM, the "nature" of the document was such that the person was under a duty to treat it as secret (ie the first secrecy criterion). In both cases, the mandatory requirements of the DSM in that way informed the operation of s 79(1)(b). That is consistent with Gummow J's analysis in *Grollo v Palmer*,[55] where his Honour indicated that s 79(3) may operate in tandem with externally sourced duties, seemingly so as to bring information within the first or second secrecy criteria. Further or alternatively, the mandatory requirements of the DSM were an "other reason" that Defence employees were under a duty to "treat as secret" at least SECRET and TOP SECRET classified documents (ie the third secrecy criterion).

40. Ms Smethurst does not have a security clearance (SCB 2 [5.4]). Accordingly, it was

[55] (1995) 184 CLR 348, 397.

reasonable to suspect that the person who gave her the ASD document did so contrary to the mandatory requirements of the DSM, and therefore contrary to his or her duty to treat that information as secret on one or more of the three bases identified above. In that event, the ASD document was "obtained" by Ms Smethurst contrary to Pt VII of the Act, with the result that it was a "prescribed document" in relation to Ms Smethurst by reason of s 79(1)(a). As such, s 79(3) restricted the further disclosure of that document by Ms Smethurst if she both intended that further disclosure and she knew that the disclosure of the information to her was contrary to a duty to keep that information secret (see paragraph 19 above).

41. In light of the above, s 79(3) "applied to the plaintiffs' conduct" only to the extent that it prevented any person from communicating information that was obtained in breach of Pt VII of the Act, if the person was aware of that fact. If the burden on political communication that results from that operation of s 79(3) is justifiable, then s 79 validly applied to the plaintiffs' conduct and declaratory relief should be refused. Other operations of s 79 are not in issue.

Legitimate purpose

42. The purpose of s 79 is discerned through the ordinary processes of interpretation, giving consideration to the meaning of the words in the particular provision, to other provisions in the Act, to the historical background, and to any apparent social objective.[56] That purpose is properly identified at a higher level of generality than the meaning of the words of s 79 itself.[57] It is the goal or "mischief" to which the section is directed.[58]

43. Having regard to those matters, for the reasons outlined in paragraphs 27 to 31 above, the purpose of s 79, properly identified, was to reduce the risk of prejudice to the security or defence of the Commonwealth from the disclosure of secret information. It is not in dispute that that purpose was legitimate. The plaintiffs concede that the effective functioning of national governments – including representative democracies – in relation to national security, international relations and economic interests of the State requires some information to be kept secret from the public (SCB 6 [27]; PS [29]). That is confirmed by the fact that comparable

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[56] *Unions NSW v New South Wales* (2019) 93 ALJR 166 (***Unions No 2***) [171] (Edelman J); see also *Monis v The Queen* (2013) 249 CLR 92, [125] (Hayne J) and [317] (Crennan, Kiefel and Bell JJ); *Unions NSW v New South Wales* (2013) 252 CLR 530, [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy v New South Wales* (2015) 257 CLR 178 (***McCloy***) [132] (Gageler J), [232] (Nettle J) and [320] (Gordon J); and *Brown v Tasmania* (2017) 261 CLR 328 (***Brown***) [321] (Gordon J).

[57] *Brown* (2017) 261 CLR 328, [208] (Gageler J); *Unions No 2* (2019) 92 ALJR 166, [170] (Edelman J).

[58] *Brown* (2017) 261 CLR 328, [101] (Kiefel, Bell and Keane JJ), [208] (Gageler J) and [321] (Gordon J); *Clubb* (2019) 93 ALJR 448, [56] and [70] (Kiefel CJ, Bell and Keane JJ) and [257] (Nettle J).

countries have analogous legal frameworks (SCB 6 [27]). Achievement of that purpose facilitated the ability of the Commonwealth government to act in the national interest. The purpose is not only compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, in the sense that it does not "adversely impinge upon the functioning of the system of representative government"[59] – the attainment of that purpose in fact protects such a system.

44. The legitimacy of the above purpose is underscored by the fact that, prior to Federation, the Imperial Parliament and the legislatures of the Australian colonies had enacted laws regulating the disclosure of official information (SCB 6-7 [28]-[29]). Similar laws operated from Federation until 1960, when s 79(3) was enacted. It cannot be right that laws of that kind, which have operated constantly since Federation (for much of that time with a less targeted operation than that of the law presently in issue), have a purpose that is incompatible with the maintenance of the constitutionally prescribed system of representative and responsible government. They are, instead, a feature of that system. In that respect, they have much in common with laws that have long restricted political comment by public servants.[60]

45. In contending that s 79 had an illegitimate purpose, the plaintiffs assert that the purpose of s 79 was to protect "government secrecy as an end in itself, whenever that is thought desirable by the Executive": PS [29], [38], [39]. That contention should be rejected. It is not supported by any of the "five significant features" of the text to which the plaintiffs point.[61] The plaintiffs' allegations as to the purpose of s 79 mostly concern criticisms of s 2 of the 1911 Act, and fail to engage with the features of s 79 examined above. Finally, their suggestion that the conferral of a discretion on the Attorney-General to decide whether to consent to prosecutions somehow supports their submission of incompatible purpose impugns a feature of our system of government that has existed since Federation, that being a feature that ensures that political responsibility is taken for certain decisions: cf PS [37].[62]

Reasonably appropriate and adapted

46. Section 79(3) was ***suitable***, in the sense that there was "a rational connection" between the provision and its legitimate purpose.[63] As explained above, the purpose of the provision was

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59 *McCloy* (2015) 257 CLR 178, [2] (French CJ, Kiefel, Bell and Keane JJ).

60 *Banerji* (2019) 93 ALJR 900, [30]-[31], and [34] (Kiefel CJ, Bell, Keane and Nettle JJ), [54] and [100]-[101] (Gageler J), [111], [154]-[156] (Gordon J) and [202] and [206] (Edelman J).

61 To the extent that submission is based on s 79(1)(b)(i) to (v) (as PS [35] suggests), it gives no content to the three secrecy criteria that follow in the balance of s 79(1)(b).

62 See generally *Taylor v Attorney-General (Cth)* [2019] HCA 30, [21]-[34].

63 *McCloy* (2015) 257 CLR 178, [2], see also [80] (French CJ, Kiefel, Bell and Keane JJ).

to ensure that information the disclosure of which would be prejudicial to the security or defence of the Commonwealth was kept secret. If that purpose is accepted, then s 79(3) was clearly rationally connected to it.

47. The provision was also ***necessary***, in the sense that there was "no obvious and compelling alternative, reasonably practicable means of achieving the same purpose" that had a "significantly" less restrictive effect upon the freedom.[64] As explained by the plurality in *McCloy*, "the question of necessity does not deny that it is the role of the legislature to select the means by which a legitimate statutory purpose may be achieved … Once within the domain of selections which fulfil the legislative purpose with the least harm to the freedom, the decision to select the preferred means is the legislature's".[65] So understood, the circumstances in which the Court will invalidate a law on the basis of a lack of necessity are, and should be, limited. This ensures that courts do not exceed their constitutional competence by substituting their own judgments for those of parliaments.[66]

48. Pointing to the 2018 legislative amendments, to a series of earlier law reform proposals and to UK legislation, the plaintiffs assert that it was "obvious that a narrower law, more tailored to the legitimate ends sought to be achieved, could have been drafted" (PS [43]). Those submissions assume the answer to the potentially difficult issue of the point in time at which the proportionality tests should be applied.[67] The Commonwealth has previously accepted that, where constitutional validity depends in part on questions of fact the answers to which are capable of changing over time, the validity of a law may likewise fluctuate.[68] Assuming that to be so, the existence of alternative legislative models does not strictly involve any change of fact, for such models always theoretically exist. However, it is a question of fact whether any such model is "obvious and compelling", "equally practicable and available" and would achieve the same purpose while resulting in a significantly lesser burden on the implied freedom. The answer to those questions of fact will ordinarily be strongly influenced by whether such a model

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[64] *McCloy* (2015) 257 CLR 178, [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 261 CLR 328, [282] and [289] (Nettle J); *Clubb* (2019) 93 ALJR 448, [479] (Edelman J); *Banerji* (2019) 93 ALJR 900, [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

[65] *McCloy* (2015) 257 CLR 178, [82] (French CJ, Kiefel, Bell and Keane JJ); see also *Clubb* (2019) 93 ALJR 448, [267]-[269] (Nettle J).

[66] *McCloy* (2015) 257 CLR 178, [58] (French CJ, Kiefel, Bell and Keane JJ), referring to *Tajjour* (2014) 254 CLR 508, [36] (French CJ); *Clubb* (2019) 93 ALJR 448, [267] (Nettle J).

[67] *Clubb* (2019) 93 ALJR 448, [470]-[471] (Edelman J). See also *Murphy v Electoral Commissioner* (2016) 261 CLR 28, [191]-[200] (Keane J).

[68] *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217, 235.

has actually been enacted in a closely comparable jurisdiction.[69] Hypothetical measures ordinarily will not support such factual findings (for unless a proposed alternative has been enacted it will not be shown that any comparable jurisdiction has thought the proposed alternative to be workable, to reflect an appropriate balance between competing interests, or to be effective to achieve its purpose).

49. Even when an alternative legislative regime has been enacted that does not, without more, demonstrate invalidity. The Court should not lightly require Parliament to keep a watching brief over its entire statute book and constantly to recalibrate (or wholly revise) existing laws which touch upon the freedom every time an alternative model for addressing the subject matter of those laws emerges in any comparable jurisdiction. Even accepting that laws that were valid when enacted can become invalid, the circumstances in which that will occur should be limited by a strict application of the "obvious and compelling" and "equally practicable and available" and "significantly less restrictive" tests, so as to minimise the prospect of courts being repeatedly called upon to adjudicate whether the means selected by Parliament to achieve a particular legislative goal have ceased to be valid. Such a strict application would recognise that the enactment of alternatives well after the enactment of an impugned provision does not reveal the legislative choice in fact made by the Parliament to be "inexplicable".[70] The alternative would have adverse rule of law implications, and would not sit well with the notion that the courts do not, for reasons of constitutional competence, substitute their own legislative judgments for those made by Parliaments.[71]

50. The plaintiffs give no real explanation of how the alternatives to which they point were "equally practicable and available", and "obvious and compelling", while having a "significantly" less restrictive effect upon the freedom (PS [43]).[72] Significantly, despite referring in their Application (SCB AO-AP) to the current cognate offence contained in s 122.4A of the Criminal Code, the plaintiffs do not address that provision, nor the "journalist defence" contained in s 122.5(6), in any detail in their submissions. The inclusion of that defence in fact strongly suggests that s 122.4A does not achieve the purpose that s 79(3) sought to achieve "to the same extent".[73] It indicates that Parliament chose to pursue one legitimate

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[69] *Unions No 2* (2019) 92 ALJR 166, [42] (Kiefel CJ, Bell and Keane JJ), giving as examples the existing legislative measures discussed in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, [64], and [110] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) and *Brown* (2017) 261 CLR 328.

[70] *Brown* (2017) 261 CLR 328, [130] (Kiefel CJ, Bell and Keane JJ).

[71] *McCloy* (2015) 257 CLR 211, [58] (French CJ, Kiefel, Bell and Keane JJ).

[72] *Banerji* (2019) 93 ALJR 900, [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

[73] *McCloy* (2015) 257 CLR 178, [81] (French CJ, Kiefel, Bell and Keane JJ); *Tajjour* (2014) 254 CLR 508, [83].

objective (freedom of the press) at some cost to the different legitimate objective of protecting the security or defence of the Commonwealth (by exempting journalists from liability even if their communication of certain information would otherwise have been prohibited because it risks prejudicing those security or defence interests). Parliament is entitled to make that policy choice in shaping the democracy in which we live, but the necessity test does not mandate it.

51. Finally, s 79(3) was ***adequate in its balance***, in the sense that "the benefit sought to be achieved by the law [was] not manifestly outweighed by its adverse effect on the implied freedom".[74] The plaintiffs' submissions to the contrary rest on their overly wide construction of the provision. For example, s 79 plainly did not apply to anything "of which the employee has official knowledge": cf PS [45]. Having misidentified the purpose of s 79, the plaintiffs necessarily fail to give that purpose adequate weight in the balancing process. The purpose of reducing the risk of prejudice to the security and defence of the Commonwealth is centrally important to the preservation and protection of the system of representative and responsible government. Statutory objects of that kind are of such importance that they "may justify very large incursions on the freedom".[75] When correctly construed, the benefit achieved by s 79 was not manifestly outweighed by its limiting effect on political communication.

D. Relief (Question 4)

52. The questions at SCB 13 should be answered: as to Questions 1(a)-(c), 2(a)-(d) and (3): "No"; as to Question 4: "Unnecessary to answer"; and as to Question 5: "The plaintiffs".

53. If the Court is minded to answer "yes" to any of Questions 1 to 3, then the first defendant and the Attorney-General respectfully submit that, in answer to Question 4, the Court should decline to grant an injunction compelling the first defendant to destroy the data copied from Ms Smethurst's mobile phone (cf PS [50]). That relief should be refused because even if the Second Warrant, the s 3LA Order and/or s 79(3) were invalid (which is denied), the material seized pursuant to the Second Warrant might still be admissible in the event that criminal proceedings are commenced in relation to the facts underlying this proceeding (including against persons other than the plaintiffs, for offences against provisions other than s 79(3)). In any such proceeding, the admissibility of the material would depend on the court's view as to how to balance the competing public interests identified in s 138 of the *Evidence Act 1995*

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[74] *Banerji* (2019) 93 ALJR 900, [38]; see also *Clubb* (2019) 93 ALJR 448, [102] and [128].
[75] *McCloy* (2015) 257 CLR 178, [84] (French CJ, Kiefel, Bell and Keane JJ).

(Cth).[76] There is considerable authority to the effect that, in circumstances such as the present, the police should be permitted to retain the material even if it was seized unlawfully, so that the question of its use can be determined in such a subsequent proceeding.[77] To proceed otherwise would give decisive weight to the fact that particular material was unlawfully obtained, contrary to the rationale underlying s 138.

54. The above approach is particularly appropriate where there is a strong argument that evidence should be admitted under s 138. That is the position here, as: if the seizure was unlawful, it was not deliberately or contumeliously so (it being agreed that the AFP officers who executed the Second Warrant believed their actions to be authorised: SCB 6 [25]); the only material that was seized was the data copied from Ms Smethurst's phone (SCB 5 [20.3], [21]), meaning that she was not deprived of access to her property; and the offences identified in the third condition of the Second Warrant, and the third condition of the warrant executed in relation to another person on 4 September 2019 (SCB 5 [23], 46), are serious offences.

55. The Special Case reveals that the AFP is continuing to give consideration to whether a brief of evidence should be referred to the Commonwealth Director of Public Prosecutions in relation to these matters (SCB 6 [24]). If charges are laid, the data seized from Ms Smethurst's phone may well be important. In those circumstances, the Court should not order that the data be destroyed. It should leave it to the trial judge in any future criminal prosecution to determine whether that material will be admitted.

PART VII: ESTIMATE OF TIME FOR ORAL ARGUMENT

56. Approximately 3.5 hours will be required to present the oral argument of the first defendant and the Attorney-General of the Commonwealth.

Dated: 23 October 2019

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[76] Or, if the common law applies, pursuant to the discretion in *Bunning v Cross* (1978) 141 CLR 54.

[77] See eg *Caratti* (2017) 257 FCR 166, [158] (the Court), endorsing *Puglisi v Australian Fisheries Management Authority* (1997) 148 ALR 393, 403-405 (Hill J); *Caratti (No 2)* [2016] FCA 1132, [469]-[470]; *Parker v Churchill* (1985) 9 FCR 316, 330-332 (Burchett J). See also *Gollan v Nugent* (1988) 166 CLR 18, 43-44 (Deane, Dawson, Toohey and Gaudron JJ), endorsing *Malone v Metropolitan Police Commissioner* [1980] QB 49.