HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

ANNIKA SMETHURST & ANOR PLAINTIFFS

AND

COMMISSIONER OF POLICE & ANOR DEFENDANTS

Smethurst v Commissioner of Police
[2020] HCA 14
Date of Hearing: 12 & 13 November 2019
Date of Judgment: 15 April 2020
S196/2019

ORDER

The questions of law stated in the special case filed on 6 September 2019 be answered as follows:

(1) *Is the search warrant issued on 3 June 2019 ("the Second Warrant") invalid on the ground that:*

(a) *it misstates the substance of s 79(3) of the* Crimes Act 1914 *(Cth), as it stood on 29 April 2018?*

Answer: *Yes.*

(b) *it does not state the offence to which it relates with sufficient precision?*

Answer: *Yes.*

(c) *s 79(3) of the* Crimes Act, *as it stood on 29 April 2018, was invalid on the ground that it infringed the implied freedom of political communication?*

Answer: *Does not arise.*

(2) *Is the order issued on 31 May 2019 under s 3LA of the* Crimes Act *invalid on the ground that:*

(a) *at the time it was made, the Second Warrant was not in force?*

(b) *it was made in aid of a different warrant, namely the warrant issued on 31 May 2019 ("the First Warrant")?*

(c) *it did not specify the information or assistance required to be provided by the first plaintiff, with sufficient precision, or at all?*

(d) *it did not specify the computer or data storage device to which it related, with sufficient precision, or at all?*

Answer: *Unnecessary to answer.*

(3) *Was s 79(3) of the* Crimes Act*, as it stood on 29 April 2018, invalid on the ground that it infringed the implied freedom of political communication?*

Answer: *Unnecessary to answer.*

(4) *If the answer to any or all of questions (1)–(3) is "yes", what relief, if any, should issue?*

Answer: *There should be an order for certiorari quashing the search warrant issued on 3 June 2019.*

(5) *Who should pay the costs of and incidental to this special case?*

Answer: *The first defendant should pay the plaintiffs' costs of the special case.*

Representation

S B Lloyd SC with P D Herzfeld and B Hancock for the plaintiffs (instructed by Ashurst Australia)

S P Donaghue QC, Solicitor-General of the Commonwealth, with C L Lenehan SC and S Zeleznikow for the first defendant and for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

C D Bleby SC, Solicitor-General for the State of South Australia, with K M Scott for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

K A Stern SC with D P Hume for the Australian Human Rights Commission, appearing as amicus curiae (instructed by Australian Human Rights Commission)

Submitting appearance for the second defendant

CATCHWORDS

Smethurst v Commissioner of Police

Police – Search warrants – Validity of warrant – Where police searched premises in reliance on warrant – Where police retained material copied from first plaintiff's mobile phone in reliance on warrant – Where warrant relied upon reasonable grounds for suspecting commission of Commonwealth offence – Where warrant purported to set out offence against s 79(3) of *Crimes Act 1914* (Cth) – Whether warrant misstated substance of s 79(3) of *Crimes Act* – Whether warrant failed to state offence to which it related with sufficient precision.

Injunctions – Mandatory injunction – Principles applicable – Where plaintiffs sought mandatory injunction requiring destruction or delivery up of material obtained under invalid warrant – Where plaintiffs sought injunction restraining police from making information available to prosecuting authorities – Whether statutory basis for injunction – Whether plaintiffs identified legal right to support injunction in auxiliary jurisdiction – Whether consequences of trespass provide basis for injunction – Whether s 75(v) of *Constitution* provides basis for injunction – Whether damages inadequate – Whether injunctive relief should be refused on discretionary grounds.

Words and phrases – "adequacy of damages", "auxiliary jurisdiction", "basis for injunction", "certiorari", "computer or data storage device", "constitutional injunction", "constitutional remedies", "constitutional writs", "description of the offence", "discretionary considerations", "entry, search and seizure", "equity", "evidential material", "injunction", "injunctive relief", "juridical basis", "legal right or interest", "mandatory injunction", "misstatement", "mobile phone", "nature of the offence", "official secrets", "privacy", "relief", "remedy", "right to privacy", "search warrants", "statement of offence", "substance of the offence", "sufficient interest", "sufficient particularity", "sufficient precision", "trespass".

Constitution, s 75(v).
Australian Federal Police Act 1979 (Cth), s 8.
Crimes Act 1914 (Cth), Pts IAA, VII; ss 3C, 3E, 3F, 3H, 3LA, 3ZQU, 79(3).
Judiciary Act 1903 (Cth), s 32.

1 KIEFEL CJ, BELL AND KEANE JJ. The first plaintiff, Ms Annika Smethurst, is a journalist. She is employed by the second plaintiff, Nationwide News Pty Ltd, which is the publisher of the *Sunday Telegraph* newspaper and a website. On 29 April 2018, the second plaintiff published articles in its newspaper and on its website of which the first plaintiff was the author. The three articles published in the newspaper were entitled: "We don't want Big Brother watching"; "Secret plan to spy on Aussies"; and "Spies told just keep looking elsewhere". Those articles published on the website were entitled: "Spying shock: Shades of Big Brother as cyber-security vision comes to light" and "We Don't Want Big Brother Watching". In general terms the articles informed the reader that amendments which were proposed to existing legislation would extend the powers of the Australian Signals Directorate ("the ASD") so as to enable it to covertly access data respecting not only foreigners but also Australian citizens. The articles contained expressions of concern and alarm.

2 Two of the articles contained an image of the top part of a document entitled "MINISTERIAL SUBMISSION". Its subject matter was stated to be "ASD AS A STATUTORY AGENCY – FURTHER AMENDMENTS TO THE INTELLIGENCE SERVICES ACT 2001". The document bore the markings "SECRET AUSTEO COVERING TOP SECRET COMINT AUSTEO".

The Second Warrant and the search

3 Sometime after 30 April 2018 the Australian Federal Police ("the AFP") commenced an investigation into the publication of the articles. On 31 May 2019, in the course of that investigation, a member of the AFP obtained a warrant from a magistrate ("the First Warrant") to enter and search the residential premises occupied by the first plaintiff and to search her motor vehicle. On the same day the magistrate made an order under s 3LA of the *Crimes Act 1914* (Cth) ("the s 3LA Order") directed to the first plaintiff, which required her to provide any reasonable and necessary information and assistance to enable a constable to access, copy and convert data held on a computer or data storage device into documentary form.

4 Due to concerns held by the member of the AFP who was named as the executing officer in the First Warrant about whether it authorised a search of the specified vehicle if it was not at the first plaintiff's premises, further separate warrants were obtained on 3 June 2019. One warrant ("the Second Warrant") was directed to the premises and the other to the vehicle. The warrant respecting the vehicle has never been executed.

5 The Second Warrant was in the same terms as the First Warrant so far as it concerned the search of the first plaintiff's residence. It was six pages in length. It stated that the magistrate was satisfied by information on oath that there were reasonable grounds for suspecting that there was, or would within the next

48 hours be, at those premises "evidential material, as defined in the *Crimes Act*" which satisfied all of the three conditions which were set out in the warrant.

6 The first condition was said to relate to the kinds of things that were the subject of the Second Warrant. It was stated broadly and included any notes, diaries, correspondence, emails and other forms of electronic messaging, minutes, reports, briefing documents, assessments, graphics, sketches or photographs, story pitch, planning logs, broadcast and online schedules, story boards, website content and USBs. The first condition also specified a document having the same title as the document the head of which appeared in two of the articles. It was described as a classified ASD document. The warrant was said to extend to both originals and copies of these things and to anything stored on a computer storage device or other storage device, together with any manual, instruction or password that assists to gain access to, interpret or decode any of those things.

7 The second condition referred to the persons or entities to whom those things might relate. They included the first plaintiff, the *Sunday Telegraph*, "News Corp", the ASD, the Department of Home Affairs, the Department of Defence, a named individual and the webpage on which one of the two articles mentioned above was published.

8 The third condition commenced by explaining the purpose of seeking the things relating to the persons identified. It was said to be "as to which there are reasonable grounds for suspecting that they will afford evidence as to the commission of the following indictable offence(s) against the laws of the Commonwealth". This statement then followed:

> "On the 29 April 2018, Annika Smethurst and the Sunday Telegraph communicated a document or article to a person, that was not in the interest of the Commonwealth, and permitted that person to have access to the document, contrary to section 79(3) of the *Crimes Act 1914*, Official Secrets. This offence was punishable by 2 years imprisonment."

9 On 4 June 2019, members of the AFP searched the first plaintiff's residence relying upon the authority of the Second Warrant. When the AFP located the first plaintiff's mobile telephone, the first plaintiff was required to provide its passcode to enable access to information stored on it. The data from the mobile phone was copied onto the AFP's forensic laptop computer and the mobile phone was returned to the first plaintiff. Keyword searches were undertaken by the AFP on the copied data, intended to identify documents that fell within the conditions of the Second Warrant, and those documents were reviewed by the executing officer. At the completion of this process, the documents identified as falling within the conditions of the Second Warrant were copied onto a USB stick which the AFP officers had brought with them, and the USB stick was taken from the premises.

The information taken from the mobile phone was deleted from the AFP laptop before it was removed from the premises. No other property was taken from the premises. The first defendant, the Commissioner of Police, has undertaken that the AFP will not access or use any of the material obtained during the execution of the Second Warrant until the final determination of these proceedings.

10 No criminal charges have been laid arising out of the AFP's investigation. It is not disputed that the AFP officers who conducted the search and required the first plaintiff to provide her mobile phone passcode believed that their actions were authorised by the Second Warrant and the s 3LA Order. If the Second Warrant is invalid for any of the reasons which are the subject of the first question of law in this special case it would follow, contrary to that belief, that the search conducted of the first plaintiff's premises was not authorised by law. The question which would then arise is what are the consequences of invalidity and more particularly what is to be done with the information now held by the AFP as a result of unlawful acts.

The *Crimes Act* provisions

The warrant provisions

11 Section 3E of the *Crimes Act* appears in Div 2 ("Search warrants") of Pt IAA of that Act, which is entitled "Search, information gathering, arrest and related powers (other than powers under delayed notification search warrants)". It provides the basis upon which search warrants may be issued. Section 3E(1) states in relevant part:

> "An issuing officer[1] may issue a warrant to search premises if the officer is satisfied, by information on oath or affirmation, that there are reasonable grounds for suspecting that there is ... any evidential material at the premises."

"Evidential material" is defined to include "a thing relevant to an indictable offence ... including such a thing in electronic form"[2]. A "thing relevant to an indictable [Commonwealth] offence" is defined to include "anything with respect to which an indictable offence against any law of the Commonwealth ... has been committed or is suspected, on reasonable grounds, to have been committed"; or "anything as

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1 A term which includes a magistrate: see *Crimes Act 1914* (Cth), s 3C(1).

2 *Crimes Act 1914* (Cth), s 3C(1).

to which there are reasonable grounds for suspecting that it will afford evidence as to the commission of any such offence"[3].

12 Section 3E(5) relevantly provides:

"If an issuing officer issues a warrant, the officer is to state in the warrant:

(a) the offence to which the warrant relates; and

(b) a description of the premises to which the warrant relates or the name or description of the person to whom it relates; and

(c) the kinds of evidential material that are to be searched for under the warrant".

The principal issue concerning these requirements is whether the Second Warrant satisfies s 3E(5)(a).

13 Section 3F(1) relevantly provides that a warrant that is in force in relation to premises authorises the executing officer or a constable assisting to enter the warrant premises[4] and:

"(c) to search the premises for the kinds of evidential material specified in the warrant, and to seize things of that kind found at the premises".

14 A copy of the warrant must be made available to the occupier of the premises if they are present when the warrant is being executed[5].

15 Section 3LA(2) provides that a magistrate may make an order requiring a specified person to provide any information or assistance that is reasonable and necessary to allow a constable to access data on a computer or data storage device that is on warrant premises if the magistrate is satisfied of certain matters.

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3 *Crimes Act 1914* (Cth), s 3(1).

4 *Crimes Act 1914* (Cth), s 3F(1)(a).

5 *Crimes Act 1914* (Cth), s 3H(1).

The offence provisions

16 Section 79(3) of the *Crimes Act*, which was referred to in the third condition of the Second Warrant, appeared in Pt VII of that Act, which was headed "Official secrets and unlawful soundings". Parts VI and VII of the *Crimes Act*, including s 79, were repealed on 29 December 2018 and replaced with provisions of the *Criminal Code* (Cth)[6] which are in different terms.

17 Section 79(3) in relevant part was in these terms:

> "If a person communicates a prescribed … document or article, or prescribed information, to a person, other than:
>
> (a) a person to whom he or she is authorized to communicate it; or
>
> (b) a person to whom it is, in the interest of the Commonwealth or a part of the Queen's dominions, his or her duty to communicate it;
>
> or permits a person, other than a person referred to in paragraph (a) or (b), to have access to it, he or she commits an offence.
>
> Penalty: Imprisonment for 2 years."

18 To ascertain what is a prescribed document or article or prescribed information it is necessary to refer to s 79(1). Consideration later in these reasons of the operation of s 79(1), in light of its importance to s 79(3), requires reference to most of its text:

> "For the purposes of this section, a … document, or article is a prescribed … document or article in relation to a person, and information is prescribed information in relation to a person, if the person has it in his or her possession or control and:
>
> (a) it has been made or obtained in contravention of this Part or in contravention of section 91.1 of the *Criminal Code*;
>
> (b) it has been entrusted to the person by a Commonwealth officer or a person holding office under the Queen or he or she has made or obtained it owing to his or her position as a person:

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6 *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth).

(i) who is or has been a Commonwealth officer;

(ii) who holds or has held office under the Queen;

(iii) who holds or has held a contract made on behalf of the Queen or the Commonwealth;

(iv) who is or has been employed by or under a person to whom a preceding subparagraph applies; or

(v) acting with the permission of a Minister;

and, by reason of its nature or the circumstances under which it was entrusted to him or her or it was made or obtained by him or her or for any other reason, it is his or her duty to treat it as secret".

The special case

19 The plaintiffs filed an amended application for a constitutional or other writ in which they sought orders for: writs of certiorari quashing the Second Warrant and the s 3LA Order; a declaration that s 79(3), as it stood at 29 April 2018, was invalid; writs of mandamus or injunctions compelling the delivery up or the destruction of the material seized pursuant to the Second Warrant or the s 3LA Order; and writs of prohibition or injunctions restraining the first defendant from providing that material to prosecuting authorities.

20 The parties subsequently agreed in stating questions of law for the opinion of the Full Court of this Court in a special case. Bell J ordered that those questions be referred for the consideration of the Full Court. The questions are:

"(1) Is the Second Warrant invalid on the ground that:

(a) it misstates the substance of s 79(3) of the Crimes Act, as it stood on 29 April 2018?

(b) it does not state the offence to which it relates with sufficient precision?

(c) s 79(3) of the Crimes Act, as it stood on 29 April 2018, was invalid on the ground that it infringed the implied freedom of political communication?

(2) Is the s 3LA Order invalid on the ground that:

(a) at the time it was made, the Second Warrant was not in force?

(b) it was made in aid of a different warrant, namely the First Warrant?

(c) it did not specify the information or assistance required to be provided by the First Plaintiff, with sufficient precision, or at all?

(d) it did not specify the computer or data storage device to which it related, with sufficient precision, or at all?

(3) Was s 79(3) of the Crimes Act, as it stood on 29 April 2018, invalid on the ground that it infringed the implied freedom of political communication?

(4) If the answer to any or all of questions (1)–(3) is 'yes', what relief, if any, should issue?

(5) Who should pay the costs of and incidental to this Special Case?"

21 Questions 1(a) and 1(b) should be answered in the affirmative, for the reasons which follow. Not only did the Second Warrant not satisfy the statutory condition that it state the offence to which it relates, it substantially misstated an offence said to arise under s 79(3) of the *Crimes Act*. It is not necessary to answer the further questions save as to the relief to be given (Question 4) and costs (Question 5).

A statement of the offence

22 The requirement that the offence to which a warrant relates be stated in the warrant has its origins in the common law's refusal to countenance the issue of general warrants[7] and its strictly confining any exception to the principle that a person's home is inviolable[8]. General warrants, as their name implies, contain no specification of the object of the search and purport to confer a free-ranging power of search. They were described in *Wilkes v Wood*[9] as a discretionary power given to messengers to search "wherever their suspicions may chance to fall" and as

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7 *Wilkes v Wood* (1763) Lofft 1 [98 ER 489]; *Money v Leach* (1765) 1 Black W 555 [96 ER 320]; *Entick v Carrington* (1765) 2 Wils KB 275 [95 ER 807].

8 *New South Wales v Corbett* (2007) 230 CLR 606 at 632 [104].

9 (1763) Lofft 1 at 18 [98 ER 489 at 498].

"totally subversive of the liberty of the subject". They were infamously used for the purposes of controlling the writing and printing of seditious and radical political works[10].

23 The power to search has always been regarded as an exceptional power, to be exercised only under certain justifying conditions[11]. One essential condition, found in statutes authorising the issue of warrants for search and seizure, both Commonwealth and State and Territory, is that the object of the search be specified by reference to a particular offence[12].

24 In *George v Rockett*[13], the Court observed that in prescribing conditions governing the issue of search warrants the legislature has sought to balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasion of their privacy[14]. A person's interest in privacy is recognised in all modern bills of rights and it has achieved a status in international human rights law[15].

25 It may be accepted that the balance struck by the legislature to a greater extent favours the public interest in the investigation and prosecution of crimes. Nevertheless it remains a concern of the legislature, in enacting provisions authorising warrants for search and seizure, to provide a measure of protection to persons affected by a warrant. It does so in large part by ensuring that the object of the warrant is identified by reference to a particular offence and that the limits of the authority to search may thereby be discerned. The courts' insistence on strict

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10 *New South Wales v Corbett* (2007) 230 CLR 606 at 629 [93], referring to Tronc, Crawford and Smith, *Search and Seizure in Australia and New Zealand* (1996) at 55.

11 Feldman, *The Law Relating to Entry, Search and Seizure* (1986) at [1.03].

12 General warrants are permitted in South Australia: see *Summary Offences Act 1953* (SA), s 67. General warrants are permitted in Tasmania with respect to a search for stolen property: see *Police Offences Act 1935* (Tas), s 60; but otherwise a search warrant is required to state the offence to which it relates: see *Search Warrants Act 1997* (Tas), s 5(2)(a).

13 (1990) 170 CLR 104 at 110.

14 See also *New South Wales v Corbett* (2007) 230 CLR 606 at 630 [96].

15 Feldman, *The Law Relating to Entry, Search and Seizure* (1986) at [1.01].

compliance with the statutory conditions for a warrant gives effect to this legislative purpose[16].

26 Provisions of the kind mentioned are found in Pt IAA of the *Crimes Act*, in its requirements that: there be reasonable grounds for suspecting that there is or will be on the premises to be searched material relevant to an offence (s 3E(1) read with s 3C(1)); and the warrant which issues under s 3E(1) state in it the particular offence to which it relates (s 3E(5)(a)). These conditions need only be shortly stated to appreciate the centrality of the identification of the offence in question to the scheme of authorisation of warrants. It is not disputed that unless these conditions are met a warrant purporting to be issued under s 3E(1) is not authorised and is not valid.

27 The protective purpose to which these provisions are directed is achieved by ensuring that each of the issuing officer, the officer executing the warrant and the persons affected by the warrant understand what is the object of the search and the limits to it. The issuing officer obviously needs to appreciate the boundaries of the authorisation which is to be given. The executing officer and those affected by the warrant must likewise understand the object of the search and comprehend the limits to the scope of the search which has been authorised[17]. In each case this can only be achieved by the nature of the offence the object of the warrant being stated on the face of the warrant, in a way which is both intelligible and sufficient to convey what those concerned with or affected by the warrant need to understand[18].

28 It is not necessary that the warrant state the offence with the same precision and specificity as is required for an indictment. The purpose of a warrant is not to define the issues for trial[19]. The power to issue a search warrant is given in aid of criminal investigation as well as finding evidence which will be admissible at

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16 *George v Rockett* (1990) 170 CLR 104 at 110-111; *New South Wales v Corbett* (2007) 230 CLR 606 at 628 [88].

17 *George v Rockett* (1990) 170 CLR 104 at 118; *New South Wales v Corbett* (2007) 230 CLR 606 at 632 [104]; *Williams v Keelty* (2001) 111 FCR 175 at 206 [140].

18 *New South Wales v Corbett* (2007) 230 CLR 606 at 632-633 [105]-[106].

19 *New South Wales v Corbett* (2007) 230 CLR 606 at 629-630 [95], [97]; *Beneficial Finance Corporation v Commissioner of Australian Federal Police* (1991) 31 FCR 523 at 533.

trial[20]. What emerges from the cases is a test of sufficiency to indicate the areas of the search. The test of sufficiency with respect to the statement of offence reflects the purpose of the condition, that persons executing and affected by the warrant understand what is being sought. If the object of the search is not identified the warrant becomes a general warrant.

29 It follows logically from the underlying rationale of the condition that the offence be stated that the test of sufficient particularity is an objective one, which has regard to the content of the warrant. It can be no answer to a challenge to the validity of a warrant on the ground that it fails clearly to state the nature of the offence in question to say that the persons whose premises are to be searched have some ancillary information as to the offence to which the warrant is intended to relate[21].

30 What is sufficient to be conveyed about the offence in question in a given case may vary with the nature of the offence[22]. Some offences may be shortly described. That in question in *New South Wales v Corbett*[23] furnishes an example. The statement of the offence of "Possession of Firearm, Firearms Act No 25/1989 Sect 5(a)" was held sufficiently to convey the nature of the offence in question for the purposes of s 5(1)(b) of the *Search Warrants Act 1985* (NSW), which provided for the making of applications for a search warrant where there were reasonable grounds for believing that there was in or on any premises "a thing connected with a particular firearms offence". While the Court held that the transitional provisions in the successor Act to the repealed 1989 Act had the effect that the reference to s 5(a) of the repealed Act was to be read as a reference to the relevant provision of the successor Act (which was in materially identical terms), a majority also found that, in any event, the reference to the repealed Act was "mere surplusage" which did not detract from the statement of the nature of the offence in the warrant[24]. On the other hand, when a statute provides for the commission of a somewhat indeterminate number of offences, a general reference to a section may not be sufficient[25]. No verbal formula is possible, rather in each case it is necessary to

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20 *George v Rockett* (1990) 170 CLR 104 at 119.

21 *Wright v Queensland Police Service* [2002] 2 Qd R 667 at 676 [31]-[32].

22 *Beneficial Finance Corporation v Commissioner of Australian Federal Police* (1991) 31 FCR 523 at 543.

23 (2007) 230 CLR 606.

24 *New South Wales v Corbett* (2007) 230 CLR 606 at 607 [1], 608 [3], 633 [107].

25 See eg *Australian Broadcasting Corporation v Cloran* (1984) 4 FCR 151.

apply the principle that the warrant should describe the nature of the offence so as to indicate the bounds of the search, and to assess the sufficiency of what is provided from the point of view of those reading it.

The statement in the Second Warrant

31 Ambiguity is evident upon a first reading of the statement in the third condition of the Second Warrant. It is not at all clear whether it is the document or article referred to which was, in some unspecified way, "not in the interest of the Commonwealth", or whether it was the communication of that document or article to a person that was contrary to the Commonwealth's interest.

32 It is not clear to whom the document or article was said to have been communicated. In their submissions the first defendant and the Attorney-General of the Commonwealth intervening (who together, for convenience, shall be referred to as "the Commonwealth") said that the reference "communicated a document or article to a person" was a reference to the publication of the articles by the second plaintiff. But the word "article" as it appears in s 79(3) means no more than a thing the object of a search; it is not referable to an article being something written by a journalist or other commentator and published in the media. The reference in the statement of offence in the third condition to the communication of a thing to "a person" is not apt to convey the meaning suggested by the Commonwealth of any reader of the publication. What is tolerably clear from the statement of offence in the warrant is that an element, if not the critical element, to be considered in connection with the search to be undertaken is whether a document, an article or information is "not in the interest of the Commonwealth".

33 A consideration of the terms of s 79(3) read with s 79(1) reveals that ambiguity is the least of the problems with respect to the statement of offence in the Second Warrant. The Second Warrant not only fails to identify any offence arising under s 79(3), it substantially misstates the nature of an offence arising under it.

34 Section 79(3) does not contain the words "not in the interest of the Commonwealth". It does not bespeak any offence which involves a document or article or a communication of such which is "not in the interest of the Commonwealth". In general terms the circumstances giving rise to an offence under s 79(3) are the communication of a "prescribed" document or article or "prescribed" information. Two exceptions are stated with respect to the conduct giving rise to the offence. The exception that is relevant for present purposes is that stated in s 79(3)(b): where a person who communicates a prescribed document or article or prescribed information is under a duty to communicate it, because it is in the interest of the Commonwealth to do so, no offence is committed. The statement of offence in the Second Warrant has succeeded in stating as a key

element of the offence in question an aspect of an exception to the offence and, in the process, has misstated the operation of s 79(3).

35 The other major problem with the Second Warrant is that s 79(3) does not, as the warrant asserts, refer to documents, articles or information more generally. It refers only to "prescribed" documents, articles or information. Section 79(3) appears in the suite of offences provided for in s 79(2) to (6) inclusive. Each of them, in general terms, concerns the communication, receipt or retention of, or failure to abide by a direction respecting, a prescribed document or article or prescribed information. The offence in s 79(3) does not hinge on the interests of the Commonwealth, as the statement in the warrant suggests. It hinges upon the documents, articles or information being prescribed within the meaning of s 79(1).

36 There are a number of circumstances which may result in a document, an article or information being prescribed. It needs also to be recalled that a document, an article or information is not prescribed generally, as for example it might be if it simply referred to information which was classified as secret. In the terms of s 79(1), it is prescribed in relation to a particular person.

37 Section 79(1) has been set out earlier in these reasons. In summary, s 79(1)(a) provides that a document, an article or information is prescribed if it has been made or obtained in contravention of Pt VII of the *Crimes Act* or in contravention of s 91.1 of the *Criminal Code* (which deals with defence secrets). Section 79(1)(b) relevantly requires, for the document, article or information to be prescribed, that it has been entrusted to the person by a Commonwealth officer, or that the person has made or obtained it owing to their position as a Commonwealth officer or through some other specified relationship with the Commonwealth. The circumstances in which it was entrusted to, or made or obtained by, the person must be such as to create a duty to treat it as secret. A document, an article or information is prescribed under s 79(1)(c) if it relates to a prohibited place or anything in a prohibited place and the person knows, or ought to know, that it should not be communicated to unauthorised persons.

38 It may be observed from a closer reading of s 79(1) that a document, an article or information may be prescribed in relation to a person, thus opening the possibility of an offence under the following sub-sections of s 79 in a range of different circumstances. Moreover, there may be a combination of factors which result in the same document, article or information being prescribed in relation to more than one person. By way of example, a document, an article or information may be prescribed where person A has obtained it by reason of their position and gives it to person B. In addition to it being prescribed in relation to person A, it may be prescribed in relation to person B because it has been obtained (by person A) in contravention of Pt VII and is in person B's possession.

39 It is only where a document, an article or information is prescribed in relation to a person and is communicated to another, outside of the limited exceptions, that an offence under s 79(3) can be said to arise. And as the summary of s 79(1) and the example given above suggest, there are many possible scenarios and combinations which can arise under s 79(1) by which a document, an article or information comes to be prescribed. An offence under s 79(3) is not one which may be stated as pithily as that in question in *New South Wales v Corbett*[26], referred to above. More to the point is the type of provision discussed in *Australian Broadcasting Corporation v Cloran*[27], which allows for the possibility of a number of offences. Such a provision will require more by way of description of the particular offence and how it is said to arise.

40 In the course of argument there was some discussion as to what would or would not satisfy the requirements of s 3E(5)(a) and what level of specificity of the offence or the offending conduct needs to be stated in a search warrant. Such considerations do not arise in a case such as this, where the particular offence, one of many possible offences, is not identified at all.

41 The number of ways in which an offence under s 79(3) may arise is one reason why the Commonwealth's submission, that what was provided in the third condition of the Second Warrant was sufficient, cannot be accepted. The Commonwealth submitted that no more was necessary than to provide a reference to the plaintiffs to s 79(3) of the *Crimes Act* and to "Official secrets", which was the heading to s 79 and, it will be recalled, part of the heading to Pt VII. If more was necessary, the Commonwealth submitted, the reference to the articles published by the second plaintiff and their date and the matters set out with respect to the first and second conditions, including the ASD document identified in the first condition, provided sufficient guidance for the search.

42 It may be accepted that regard may be had to other parts of the warrant to assist in an understanding of what is said in the third condition[28]. But it remains necessary that what is thereby conveyed to the ordinary reader be sufficiently specific to identify the nature of the particular offence. As Hely J said in *Williams v Keelty*[29], the requirement that the offence to which the warrant relates be stated

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26 (2007) 230 CLR 606.

27 (1984) 4 FCR 151 at 154.

28 *Australian Broadcasting Corporation v Cloran* (1984) 4 FCR 151 at 154; *Brewer v Castles* (1984) 1 FCR 55 at 62.

29 (2001) 111 FCR 175 at 206 [140].

in the warrant is not satisfied by the provision of information falling short of such a statement but which might enable a person reading the warrant to deduce or infer what offence is intended. Nothing meaningful is conveyed about the particular offence which was intended as the object of the Second Warrant.

43 Not only did the Second Warrant not state the nature of the offence to which the Second Warrant was said to relate, it succeeded in misstating it and thereby compounded the problem. Contrary to the submissions of the Commonwealth, it is not possible to ignore the words "that was not in the interest of the Commonwealth" and treat them as mere surplusage. In the way the warrant was drawn they gave the impression of being the key to what was said to be the offence the object of the warrant. Those reading the warrant were not only uninformed about any offence under s 79(3), they were misinformed that the offence stated concerned the provision of a document to another person which was somehow said not to be in the interest of the Commonwealth. It is not immediately apparent how the first plaintiff and the executing officer were to understand the boundaries of the search to be drawn by reference to this criterion. It made the authorisation for the search appear impossibly wide.

44 It follows that the condition in s 3E(5)(a) of the *Crimes Act* was not complied with, with the result that the Second Warrant was invalid. The entry, search and seizure which occurred on 4 June 2019 were not authorised by that Act and were therefore unlawful.

Relief

45 As the Second Warrant is invalid it is liable to be quashed by an order for certiorari. The question then is whether the plaintiffs are entitled to the injunctive relief that they seek.

46 It is convenient at the outset to record what the plaintiffs do not seek and the limited bases upon which their claims for injunctions are made. The plaintiffs eschew any claim for damages for trespass or other intentional tort. The relief which they seek is either a mandatory injunction requiring the destruction or delivery up of the information taken from the first plaintiff's mobile phone during the search and retained by the AFP, or an injunction restraining the first defendant from making that information available to the prosecuting authority.

47 The plaintiffs do not seek an injunction in the exercise of the Court's exclusive equitable jurisdiction, which is to say an injunction in aid of an equitable right. They do not claim that the information on the AFP's USB stick which was taken from the first plaintiff's premises is confidential to them and thus of a kind which would found the grant of an injunction in that jurisdiction to "restrain the

publication of confidential information improperly or surreptitiously obtained"[30]. The information, they concede, could only be described as confidential in the sense that it is not readily accessible to anyone but the person who controls access to the phone. The plaintiffs frankly accept that they may have difficulty establishing a breach of confidential information without prejudicing themselves with respect to any possible criminal proceedings.

48 The plaintiffs' principal claim to an injunction is based upon the Court's auxiliary jurisdiction in equity. This would ordinarily require that it be granted in aid of some legal right or interest or title to property. The plaintiffs make no claim to the property in the AFP's USB stick. They do not claim a right to privacy which is actionable for breach. They do not ask this Court to continue the debate, left open by Gummow and Hayne JJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[31], as to whether the courts should recognise such a tort. The plaintiffs nevertheless contend that an injunction should be granted to reverse or protect them from the effects of the trespass committed as a result of the Second Warrant being invalid. Those effects are that the information may be used to further the investigation as to whether offences against s 79(3) of the *Crimes Act* have been committed and, if charges are laid, as evidence of the commission of those offences.

49 The plaintiffs' alternative argument relies upon the scheme of Pt IAA of the *Crimes Act* respecting search warrants and in particular the provisions of s 3ZQU. It is contended that a prohibition is to be found as implied in the provisions of Pt IAA, and that this has the effect that the AFP cannot disclose the information obtained and provides the basis for a negative injunction. Such an injunction may be sought by a person with a sufficient interest in the enforcement of the implied prohibition.

50 It is convenient first to consider the argument based upon Pt IAA.

A statutory basis for an injunction?

51 The plaintiffs' argument begins with the propositions that when a statute confers a power to obtain information for a purpose, it impliedly prohibits the

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30 *Lord Ashburton v Pape* [1913] 2 Ch 469 at 475.

31 (2001) 208 CLR 199 at 258 [132].

disclosure or use of that information for any other purpose[32] and the prohibition may be enforced by an injunction[33]. *Johns v Australian Securities Commission*[34] most clearly is authority for these propositions.

52 The provisions of Pt IAA of the *Crimes Act*, the plaintiffs submit, form something of a code respecting search warrants. Nevertheless, it is s 3ZQU which is central to the plaintiffs' argument. Section 3ZQU appears in Div 4C of Pt IAA ("Using, sharing and returning things seized and documents produced") and is entitled "Purposes for which things and documents may be used and shared". Section 3ZQU(1) relevantly commences:

> "A constable or Commonwealth officer may use, or make available to another constable or Commonwealth officer to use, a thing seized under this Part ... for the purpose of any or all of the following if it is necessary to do so for that purpose".

There are then listed, in paras (a) to (l), various purposes for which a constable or a Commonwealth officer may use things seized. They begin with "(a) preventing, investigating or prosecuting an offence", and conclude with "(l) the performance of the functions of the Australian Federal Police under section 8 of the *Australian Federal Police Act 1979*". Sub-sections (2) to (5) of s 3ZQU include a power to use things seized for the purpose of State and Territory laws and to make the things available to State and Territory law enforcement agencies. Section 3ZQU(4) provides that:

> "To avoid doubt, this section does not limit any other law of the Commonwealth that:
>
> (a) requires or authorises the use of a document or other thing; or
>
> (b) requires or authorises the making available … of a document or other thing."

53 The plaintiffs point out that the *Crimes Act* confers a power to obtain material pursuant to a warrant and that s 3ZQU sets out the purposes for which that material may be used. In reliance on *Johns*, they submit that Pt IAA therefore

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32 Citing *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 424; *Katsuno v The Queen* (1999) 199 CLR 40 at 57 [24].

33 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 427.

34 (1993) 178 CLR 408.

impliedly prohibits the use of such information for any purposes other than those which the Act authorises.

54 *Johns* concerned the exercise by the Australian Securities Commission ("the ASC") of a power to require certain persons to appear before it and be examined on oath. Another provision of the statute in question obliged the ASC to take all reasonable measures to protect information obtained in the exercise of its powers from unauthorised use or disclosure, but authorised the disclosure of such information where it would enable or assist the government or an agency of a State or Territory to perform a function or exercise a power. A delegate of the ASC authorised the disclosure of transcripts of an examination conducted by the ASC to a State Royal Commission.

55 Brennan J explained[35] that a statute which confers a power to obtain information defines, expressly or impliedly, the purpose for which the information obtained can be used. The person obtaining information in the exercise of such a statutory power is therefore under a duty, closely analogous to that imposed by equity, to treat the information obtained as confidential. The information obtained in exercise of the powers conferred by the statute may be used or disclosed for any purpose specified in the statute, but for no other purpose.

56 The other case relied on by the plaintiffs, *Katsuno v The Queen*[36], concerned provisions of the *Juries Act 1967* (Vic) which authorised the provision to the Chief Commissioner of Police of the names of potential jurors in order that the Chief Commissioner could make inquiries as to whether any person was disqualified from serving as a juror and report the results to the sheriff. Other provisions emphasised the confidential nature of information obtained in the exercise of powers and under the Act. The Chief Commissioner had a practice of providing details of convictions and other information to the Director of Public Prosecutions in relation to those persons named on the panel from which a jury was to be struck. The practice was held to be unlawful. The scheme of the Act was held to give rise to a negative implication that no one but the sheriff was to receive the information obtained by the Chief Commissioner as a result of the inquiries made pursuant to the Act. Any other provision or use of the information was impliedly prohibited.

57 The decisions in *Johns* and *Katsuno* have application where there arises a question of construction as to whether a statute authorises the use to which information has been or is intended to be put. The plaintiffs accept that the decisions stand for the proposition that information obtained in the exercise of a

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35 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 424-425.

36 (1999) 199 CLR 40.

statutory power for one purpose cannot be used for another, unauthorised purpose. No such question of construction arises in this case. The use to which the information taken from the first plaintiff's mobile phone is intended to be put is the further investigation of an offence under s 79(3). That use is expressly authorised by s 3ZQU(1)(a).

58 The real issue raised by the plaintiffs concerns the source of authority to use the information where s 3ZQU(1) does not apply. The plaintiffs themselves point out that the sub-section specifies the uses to which material "seized under this Part" may be put. The reference to material "seized under this Part" is to material the seizure of which was actually authorised by the Part. It would follow that neither s 3ZQU(1) nor any other provision of Pt IAA of the *Crimes Act* authorises the use of material seized pursuant to an invalid warrant.

59 It may be accepted that the words "seized under this Part" refer only to things that are taken lawfully in accordance with Pt IAA. *Plaintiff S157/2002 v The Commonwealth*[37] concerned s 474(2) of the *Migration Act 1958* (Cth), which defined a privative clause decision as a decision "of an administrative character made, proposed to be made, or required to be made … under this Act" other than decisions of certain specified kinds. Gaudron, McHugh, Gummow, Kirby and Hayne JJ explained that when regard was had to the phrase "under this Act", the words of the sub-section in question were not apt to refer to decisions purportedly made under the statute[38]. To be a decision made "under" the Act required that it be made under the authority of the statute.

60 It may therefore be concluded that s 3ZQU(1) does not authorise the use of the information by the AFP for the purpose of an investigation, since the authority it gives is referable only to things seized under a warrant which satisfies the conditions of Pt IAA. But so to conclude does not foreclose the possibility that there is another, more general, source of power for that use.

61 Section 3ZQU is not directed to the circumstance of an invalid warrant. The section was inserted in the *Crimes Act* to meet concerns about uncertainties as to

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37 (2003) 211 CLR 476.

38 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 505-506 [75]; see also *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 635.

the uses for which seized material might be authorised. The Replacement Explanatory Memorandum to the Bill which inserted it[39] explained[40]:

> "The current provisions in Part IAA do not specify how things seized under Part IAA can be used. As a result, there is uncertainty as to whether law enforcement agencies can use seized material for purposes other than those for which it was seized."

62 The Replacement Explanatory Memorandum did not deny that there may be existing sources of authorisation for such uses. It said that its provisions[41]:

> "do not presuppose that these uses are not available currently, but puts the issue beyond doubt by providing a direct legislative basis [for the uses specified in s 3ZQU(1)]".

63 Section 3ZQU(4), it will be recalled, provides that s 3ZQU does not affect the operation of any other Commonwealth law which authorises the use of a document or other thing. Section 3ZQU(1)(l) itself points to s 8 of the *Australian Federal Police Act 1979* (Cth) as a source of the powers of the AFP.

64 Section 8 of the *Australian Federal Police Act* specifies the functions of the AFP. They include the provision of police services in relation to the laws of the Commonwealth[42]. "Police services" is defined[43] to include "services by way of the prevention of crime and the protection of persons from injury or death … whether arising from criminal acts or otherwise". The functions of the AFP also include "to do anything incidental or conducive to the performance of the … functions"[44]. The description of "police services" has been held to encompass associated activities

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39 *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*.

40 Australia, Senate, *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*, Replacement Explanatory Memorandum at 71.

41 Australia, Senate, *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*, Replacement Explanatory Memorandum at 73.

42 *Australian Federal Police Act 1979* (Cth), s 8(1)(b)(i).

43 *Australian Federal Police Act 1979* (Cth), s 4(1).

44 *Australian Federal Police Act 1979* (Cth), s 8(1)(c).

such as the investigation of complaints about the commission of crimes with a view to the identification of offenders[45].

65 The general power given by s 8 is not expressed to be subject to a restriction respecting the use of documents or information and the manner in which they were obtained. Any such restrictions are to be found elsewhere. But neither the common law nor statute law presumes that information unlawfully obtained may not be used in the investigation or prosecution of an offence. *Bunning v Cross*[46] held that evidence is not on that account alone excluded as admissible evidence. The public interest in bringing persons to conviction is to be weighed against any perception that the courts may be seen to approve unlawful conduct[47]. The discretionary process by which this is achieved is now governed by s 138 of the *Evidence Act 1995* (Cth). It would be to give decisive weight to the fact that the information was unlawfully obtained, contrary to the rationale of *Bunning v Cross* and s 138 of the *Evidence Act*, if the AFP was not able to retain the information for so long as it is required for the purposes of investigating and, if appropriate, prosecuting an offence or offences against Commonwealth law.

66 The plaintiffs' argument that Pt IAA is the sole source of an authority to use the information taken and that it provides a basis for an injunction must be rejected.

The consequences of trespass – a basis for injunction?

67 It is well settled that conduct involving the search of premises and the seizure of property under an invalid warrant constitutes a trespass[48]. The trespass extends to goods on the premises the possession of which is subject to interference. But as earlier mentioned, the plaintiffs do not seek damages for the trespass. The principal relief that they seek is a mandatory injunction which would require the information held by the AFP to be destroyed or delivered up to the plaintiffs.

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45 See *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308 at 319 [31]; *O'Malley v Keelty, Australian Federal Police Commissioner* [2004] FCA 1688 at [5].

46 (1978) 141 CLR 54 at 66.

47 *Bunning v Cross* (1978) 141 CLR 54 at 72.

48 *Coco v The Queen* (1994) 179 CLR 427 at 436, cited in *New South Wales v Corbett* (2007) 230 CLR 606 at 626 [81].

68 The plaintiffs' argument for an injunction of this kind commences with a discussion of what would have occurred had they been able to apply for an injunction prior to the search being conducted and the trespass committed. They contend that the Court would have been in a position to grant a prohibitive injunction in its auxiliary equitable jurisdiction. It would not have been necessary for the plaintiffs to assert an entitlement to an injunction in the exclusive jurisdiction based on an equitable claim for breach of confidence. The threatened tort would have been sufficient to found an entitlement to the injunction. So much may be accepted. But it is also well settled that if a trespass is complete the courts will not interfere. They will only do so if the damage which has occurred is serious or the trespass is continuing in its effects[49].

69 The argument then proceeds to the proposition that equity does not abandon persons such as the plaintiffs because they were unable to obtain an interlocutory order. An injunction may be granted to restore the status quo as it existed prior to the trespass by the court making orders with respect to the consequences of the tort, which is to say the copying of the information from the mobile phone. Again, this is not said to depend upon the plaintiffs having proprietary rights or a claim to confidential information. Rather, it is said that equity will act in the auxiliary jurisdiction to restore the plaintiffs to the position in which they would have been had their legal rights not been infringed.

70 The plaintiffs' argument appears to be premised on the notion that "equity will not suffer a wrong to be without a remedy", but the maxim has never meant that the courts of equity would invent a remedy solely because the plaintiff had suffered an injustice for which no remedy was available. A "wrong" refers to conduct which is recognised as being contrary to law. The maxim means no more than that the court would afford a remedy for the invasion of a subsisting legal or equitable right.

71 To the extent that the plaintiffs may be understood to contend that a mandatory injunction may be granted where there is some ongoing effect from tortious conduct, the contention gains some support from *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*[50]. There Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ said[51] that, in a conspiracy case, where

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49 Kerr, *A Treatise on the Law and Practice of Injunctions*, 6th ed (1927) at 94-95.

50 (1998) 195 CLR 1.

51 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 31 [33].

the acts referable to the conspiracy have occurred and the tort is complete, ordinarily the plaintiff is limited to the recovery of pecuniary damages. But, their Honours said, there is no rule which prevents a court from granting a mandatory injunction where the damage caused by tortious conduct is ongoing and is "extreme, or at all events very serious"[52]. A mandatory injunction may issue to prevent the occurrence of further damage.

72 It may be accepted in the present case that the use of the information obtained from the first plaintiff's mobile phone may have serious consequences for the plaintiffs, but that is not to say that the plaintiffs have suffered damage by reason of the information being taken or that its use, in the investigation of an offence, constitutes damage recognised by the law. In *Patrick Stevedores*, had the conspiracy been carried through to its completion, employees who were members of the respondent union would have lost their employment and found it difficult to obtain other work. Those consequences were described as "extremely serious"[53] and it was said that damages would be "very large"[54] or "enormous" and hence a factor relevant to the scope of relief available[55].

73 In cases of trespass what may constitute injury is somewhat wider than in some other torts. Injury in the nature of an affront to a plaintiff's dignity[56] or the apprehension of harm may qualify as damage for the purpose of an award of damages. Even so, it is not possible to regard the prospect that one may be investigated for an offence as injury. And needless to say, public policy would not permit such a course.

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52 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 31 [33], referring *inter alia* to *Durell v Pritchard* (1865) LR 1 Ch App 244 at 250 and Joyce, *The Law of Injunctions* (1872), vol 1 at 439.

53 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 31 [32].

54 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 31 [32].

55 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 32 [34].

56 Sappideen and Vines (eds), *Fleming's The Law of Torts*, 10th ed (2011) at [9.10]; *New South Wales v Ibbett* (2006) 229 CLR 638.

74 It may also be accepted that an award of damages will not redress the consequence that the information taken as a result of the trespass may be used in aid of the investigation of one or both of the plaintiffs. At a number of points in their submissions the plaintiffs placed some weight upon damages being an inadequate remedy as supporting the grant of an injunction.

75 The principle that a plaintiff does not obtain an injunction for actionable wrongs for which damages are the proper remedy is well established[57]. If damages are adequate a party "should be relegated to that remedy; only if damages are inadequate will an injunction lie"[58]. The principle is given effect as a rule, in the nature of a negative condition, for a grant of an injunction. It is a necessary, but not sufficient, condition for a grant. It cannot be elevated to an independently sufficient basis for an injunction, as the plaintiffs suggest.

76 No doubt the plaintiffs' argument takes as its starting point the proposition that they would have been granted an interlocutory injunction prohibiting the trespass, had they been in a position to apply in time, because that has been said to be a requirement for a mandatory restorative injunction, one which reverses an act done by the defendant where damages are not an adequate remedy[59]. Examples given in the text to which the plaintiffs refer[60] of cases where such an order has been made include those involving damage to property and other rights and breach of contract, where the order is akin to specific performance. But nowhere is it suggested that such an order will be made where the plaintiff has no legal right. And here the plaintiffs can point to none.

77 It is well settled that for the grant of an injunction in equity's auxiliary jurisdiction, interlocutory or final, a plaintiff must have a legal right which the injunction will protect[61]. It is so well settled that arguments concerning it tend to focus upon what may or may not constitute such a right. By way of example,

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57 *London and Blackwall Railway Co v Cross* (1886) 31 Ch D 354 at 369.

58 Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at [21-040].

59 Young, Croft and Smith, *On Equity* (2009) at [16.110].

60 Young, Croft and Smith, *On Equity* (2009) at [16.110] (footnote 57).

61 Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at [21-035].

recently, in *Glencore International AG v Federal Commissioner of Taxation*[62], the plaintiffs accepted that they needed to show that they had an actionable right, but they did not succeed in establishing that legal professional privilege qualified as such a right[63].

78 What was said by Young J in *Lincoln Hunt Australia Pty Ltd v Willesee*[64] might appear to lend some support to the plaintiffs' argument that equity might grant an injunction respecting information even if no equity of confidence attached to it. In that case an injunction was sought to prevent the publication of a film taken by a trespasser in circumstances where the trespasser's conduct was egregious. His Honour considered that the circumstances in which the filming occurred, combined with evidence that the publication might affect the plaintiff's goodwill, required that serious consideration be given as to whether an injunction should be granted[65]. His Honour expressed the opinion that the courts have power to grant an injunction even though no confidentiality was involved, although he qualified that by saying that the court would only intervene "if the circumstances are such to make publication unconscionable"[66]. His Honour did not have to decide that question. Injunctive relief was denied in that case on the basis that an award of exemplary damages at trial would be an adequate remedy.

79 At a factual level the circumstances of the present case are remote from those in *Lincoln Hunt*. There is nothing to suggest any untoward conduct on the part of the AFP officers who executed the Second Warrant. It is an agreed fact that they believed the warrant to be valid and the search and seizure therefore to be authorised. But these observations should not be taken as accepting the point of principle stated in *Lincoln Hunt*.

80 The approach of Young J in *Lincoln Hunt* may be contrasted with that of the Full Court of the Supreme Court of Queensland in *Coco v Shaw*[67]. There the

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62 (2019) 93 ALJR 967; 372 ALR 126.

63 *Glencore International AG v Federal Commissioner of Taxation* (2019) 93 ALJR 967 at 969 [8], 970 [12]; 372 ALR 126 at 128, 129.

64 (1986) 4 NSWLR 457.

65 *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 464.

66 *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 463.

67 [1994] 1 Qd R 469.

primary judge had ordered the delivery up to the plaintiff of recordings which had been obtained through the use of an unauthorised listening device. McPherson SPJ observed[68] that the fact that the conversation recorded was private did not make it confidential in the sense spoken of in equity. His Honour stated that the law does not protect conversations as such, whether private or otherwise, from disclosure. What it protects from disclosure is information which properly justifies and attracts judicial protection. Ryan J observed[69] that if the entry for the purpose of putting the listening devices in place was unauthorised and therefore unlawful, that circumstance might provide a basis for the rejection of the evidence as a matter of discretion, in accordance with *Bunning v Cross*, but it would not warrant the making of the orders made by the primary judge.

81 The respondent in *Lenah Game Meats* faced a similar difficulty to the plaintiffs in the present case. The respondent's claim to an injunction to prevent the publication of a film taken of processes in its abattoir in the course of a trespass was not based upon a claim to property or to the intellectual property in the film. It attempted, unsuccessfully, to establish an equitable right by analogy with confidential information.

82 The respondent in *Lenah Game Meats* also relied upon what Young J had said in *Lincoln Hunt*, but it cannot be said that that case received any real measure of support from members of this Court. Gleeson CJ considered that a remedy could be provided only where the information obtained by the trespasser could be regarded as confidential[70]. Whether his Honour considered that that condition might be fulfilled if the activities filmed were sufficiently private may presently be put to one side[71]. So far as concerns what appears to be the basis given by Young J for injunctive relief, that the conduct of the defendant be unconscionable, Gleeson CJ concluded that "the circumstance that the information was tortiously obtained in the first place is not sufficient to make it unconscientious of a person

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68 *Coco v Shaw* [1994] 1 Qd R 469 at 486.

69 *Coco v Shaw* [1994] 1 Qd R 469 at 493.

70 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 230-231 [55].

71 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 230 [52].

into whose hands that information later comes to use it or publish it. The consequences of such a proposition are too large."[72]

83 In the view of Gummow and Hayne JJ[73], the term "unconscientious", rather than "unconscionable", better indicates the areas in which equity intervenes to vindicate the requirements of good conscience, such as where it denies the enforcement of legal rights, sets aside transactions or holds a person estopped. The notion of unconscionable behaviour does not operate at large as the respondent had contended, their Honours observed.

84 Gummow and Hayne JJ accepted that orders of the kind referred to in *Lincoln Hunt* and later cases[74] might have been made on grounds other than unconscionability. Their Honours considered that a basis in principle might be found in the imposition of a constructive trust over the maker's rights under the *Copyright Act 1968* (Cth) in favour of the plaintiff. However, that would only arise where the making of the film involved the invasion of the plaintiff's legal or equitable rights or a breach of confidence. In such a circumstance it might be inequitable or against good conscience for the maker to assert ownership against the plaintiff and to broadcast the film[75].

85 Nothing said in *Lenah Game Meats* detracts from the need for a plaintiff to identify a legal right as the subject of the court's protection by way of injunction in the auxiliary jurisdiction. Even accepting that the injunction remedy is still the subject of development by courts exercising equitable jurisdiction, as Gummow and Hayne JJ said, "[t]he basic proposition remains that where interlocutory injunctive relief is sought ... it is necessary to identify the legal ... or equitable

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72 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 231 [55].

73 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 244-245 [98] (Gaudron J agreeing at 231 [58]), referring to *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 444, 446.

74 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 246 [100], referring to *Emcorp Pty Ltd v Australian Broadcasting Corporation* [1988] 2 Qd R 169 and *Rinsale Pty Ltd v Australian Broadcasting Corporation* (1993) Aust Torts Reports ¶81-231.

75 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 246 [101]-[102].

rights which are to be determined at trial"[76]. The plaintiffs can point to no authority which recognises their interest in not being investigated in relation to an offence as a right.

An invasion of privacy?

86 The real difficulty for the respondent in *Lenah Game Meats*, Gummow and Hayne JJ observed, was that it did not raise a recognised cause of action[77]. That is not to say that one might not be available with respect to an invasion of privacy, but the development of the law in that regard will benefit only natural persons, not companies such as the respondent in that case[78]. Their Honours went on to say that the debate about the tort of privacy should not be regarded as foreclosed[79] including by the decision in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*[80].

87 Their Honours were of course speaking of the development of the common law. A right of privacy has been recognised in only some jurisdictions in Australia in human rights legislation[81]. It has been observed by the Australian Law Reform Commission[82] that there has been considerable opposition to reform in this area from the media and that some have expressed reluctance to create a statutory cause

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76 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 241 [91].

77 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 238 [81].

78 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 257 [129], 258 [131].

79 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 258 [132].

80 (1937) 58 CLR 479.

81 *Human Rights Act 2004* (ACT), s 12 and *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 13, both referred to in Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) at 2539; see also New South Wales Law Reform Commission, *Invasion of Privacy*, Consultation Paper 1 (2007) at 14 [1.31].

82 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) at 2556, 2558-2562.

of action when privacy protection could be left to the incremental development of the common law[83]. On the other hand, the legislature has acknowledged the need to protect persons from invasions of privacy when enacting statutes concerning search warrants, as has been observed earlier in these reasons[84].

88 What was said in *Lenah Game Meats* concerning the recognition by the common law of privacy as a possible right and a basis for relief post-dated decisions such as *Lincoln Hunt* and *Coco v Shaw* where the focus was upon equitable principles. It is noteworthy that in *Lenah Game Meats* Gleeson CJ considered that the question stated by Young J in *Lincoln Hunt*, as to whether the circumstances made publication unconscionable, could be answered in the affirmative "provided the activities filmed were private"[85].

89 There have been other recognitions of relief founded upon an invasion of privacy. *Hart v Commissioner of Australian Federal Police*[86] relevantly concerned an invalid seizure by the AFP of material contained on tapes, cartridges and disks and the taking of copies from them. In dealing with an argument put by the AFP a Full Court of the Federal Court (French, Sackville and R D Nicholson JJ) said[87]:

> "The disk or other storage devices onto which information is downloaded … do not thereby become the property of the owner of the equipment from which the information was copied. But having been copied in consequence of an unauthorised invasion of privacy, the Court will, in such a case, award appropriate relief which may include the delivery up of the relevant storage devices to the owner or occupier of the premises."

90 Without determining whether the common law of tort may recognise a tort of privacy, it cannot be said that there is no prospect of a remedy, at least for the first plaintiff. The plaintiffs do not seek to have that question determined. In argument they did, however, rely upon the information or material which was

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83 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) at 2555-2556 [74.81]-[74.82]; see also New South Wales Law Reform Commission, *Invasion of Privacy*, Report 120 (2009) at 8-9 [3.3].

84 See above at [24].

85 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 230 [52].

86 (2002) 124 FCR 384.

87 *Hart v Commissioner of Australian Federal Police* (2002) 124 FCR 384 at 406 [88].

taken as something which the first plaintiff sought "to keep private" and they relied upon the fact that the trespass was to her home and her personal mobile phone as "an invasion of her privacy".

Section 75(v)

91 According to the special case, this matter is brought in the original jurisdiction of this Court including as a matter "in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth", as s 75(v) of the *Constitution* provides. In their submissions before and at the hearing the plaintiffs did not rely upon s 75(v) as expanding the power to grant an injunction. They did not suggest that the jurisdiction given by s 75(v) is to be exercised by the courts other than in accordance with the principles by which injunctions are usually granted by the courts, although obviously enough s 75(v) is concerned with conduct or decisions by persons having a particular status which may have public as well as private effects.

92 Following the hearing of argument on the special case the Court invited further written submissions from the parties and intervenors as to whether the circumstance that officers of the AFP, acting in the purported execution of the Second Warrant, committed a trespass or acted in excess of statutory power provides a sufficient juridical basis for the issuing of an injunction under s 75(v) and whether that provision affects the discretionary arguments put by the parties. The latter subject will be dealt with later in these reasons.

93 The plaintiffs by written submissions responded to the effect that, to the extent that a general law injunction is incapable of reversing the consequences of the tortious conduct in question, s 75(v) should not be regarded as so constrained. That is because, like the constitutional writ of prohibition, an injunction under s 75(v) is not limited to preventing consequences but extends to reversing consequences. The protective constitutional purpose of s 75(v), it is submitted, requires that relief be given where a Commonwealth officer has acted in excess of jurisdiction with "ongoing consequences" but where there is no threat of continued acts in excess of jurisdiction.

94 The Commonwealth submits that s 75(v) does not put the plaintiffs in any stronger position with respect to the grant of an injunction. There is no general principle of the law which says that the court will grant an injunction to reverse the consequences of a tort. If there be any analogy between an injunction under s 75(v) and the remedy of prohibition, it is that prohibition, like an injunction, is not directed to the "consequences" of wrongful conduct, let alone to bringing about their "reversal". In the cases relied upon by the plaintiffs the remedy was said to have in fact issued on a much narrower basis, namely to ensure that the exercise of power made in excess of jurisdiction did not remain in force so as to impose

liabilities on an individual[88], or to prevent further action based on a decision which had been quashed[89]. The constitutional purposes of s 75(v), it is submitted, do not require it to have some "wrong-reversal" capacity or operation. Nothing in the Convention Debates suggests that the injunction for which s 75(v) provides was to be given any extended reach[90].

95 The framers no doubt provided the equitable remedy of an injunction to address concerns that the basis for the writs of mandamus and prohibition might be too narrow[91]. The technicalities associated with prerogative writs rendered them inadequate in some respects[92]. Equitable relief might be available when a prerogative remedy is not[93].

96 The framers of the *Constitution* must be taken to have understood the bases upon which the three remedies provided by s 75(v) were given by the courts, even if the constitutional writs are not to be regarded as fixed by the general law[94]. At Federation, the injunction was used in England and the United States to restrain injury to the rights of a person by administrative decisions tainted by abuse of

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88 *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1920) 28 CLR 456; likewise *Jones v Owen* (1848) 5 Dow & L 669 at 674.

89 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 117 [84].

90 Citing, *inter alia*, *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1876-1878, 1883-1884.

91 Leeming, "Standing to seek injunctions against officers of the Commonwealth" (2006) 1 *Journal of Equity* 3 at 7, referring to *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 31 January 1898 at 320 (Barton).

92 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257 [25]; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 144 [19], 157 [58].

93 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 158 [58].

94 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 92-93 [18]-[21], 133-134 [138].

power[95]. In this context an injunction may be understood as directed to an unlawful exercise of power[96]. It lies to prevent the implementation of invalid exercises of power[97]. But this says nothing about conduct in excess of power which is not continued. The fact that an officer of the Commonwealth has acted in excess of power may bring s 75(v) into focus but is not itself sufficient for the grant of an injunction. A critical question regarding the grant of that remedy relates to the effect that that conduct has had on the plaintiff and then whether there are discretionary considerations to be weighed. The distinction to be borne in mind is as between the jurisdiction to grant a remedy and the matters which inform the grant.

97 Section 75(v) is an irremovable source of jurisdiction and power[98]. Its purposes are clear. It was included in the *Constitution* "to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power"[99]. It is a means of assuring all that officers obey the law and neither exceed nor neglect any jurisdiction which the law confers on them[100]. These purposes do not speak to the operation of s 75(v) for which the plaintiffs contend.

98 The remedy of injunction under s 75(v) remains essentially an equitable type of remedy. It may not be subject to the same limitations as are the constitutional writs but, as Gaudron J has observed[101], "[i]n the field of public law,

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95 Gummow, "The Scope of Section 75(v) of the *Constitution*: Why Injunction but No Certiorari?" (2014) 42 *Federal Law Review* 241 at 242.

96 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 178-179, 204-205; see also Reynolds, "The Injunction in Section 75(v) of the Constitution" (2019) 30 *Public Law Review* 211 at 214.

97 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146.

98 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

99 *Bank of New South Wales v The Commonwealth* ("the *Bank Nationalisation Case*") (1948) 76 CLR 1 at 363.

100 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513-514 [104].

101 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 158 [58].

equitable remedies are subject to the same considerations, including discretionary considerations, as apply in any other field".

Discretionary considerations

99 Even if the plaintiffs had been able clearly to identify a juridical basis for the injunctive relief sought, strong discretionary considerations, based on the policy of the law, would deny a grant. It has long been accepted that the courts will refuse to exercise their discretion to grant equitable relief when to do so would prevent the disclosure of criminality which it would, in all circumstances, be in the public interest to reveal[102]. Even injunctions which may be given in the exclusive jurisdiction of equity to protect an equitable right such as confidential information may be refused on this ground, for, as has often been said, there is "no confidence as to the disclosure of iniquity"[103].

100 The public interest in question is the same public interest that is recognised by the legislature in enacting statutes which authorise search warrants and which informs the view of the courts[104] and the legislature[105] as to whether evidence unlawfully obtained might nonetheless be admitted into evidence. The fact that documents or information have been obtained without lawful authorisation is not itself sufficient to foreclose their use.

101 The public interest in the investigation and prosecution of crimes, or more generally the enforcement of the criminal law, has been considered by the courts in connection with orders where the police might have been liable to return material seized under warrant. In *Malone v Metropolitan Police Commissioner*[106], the owner of bank notes seized by police acting under a search warrant sought their return. The police defended the claim on the ground that they were to be used as evidence in a prosecution. The original seizure had been valid but a reasonable time had passed since the seizure. The police would have been obliged to return

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102 *A v Hayden* (1984) 156 CLR 532 at 544-545; see also at 559-560, 573-574.

103 *Gartside v Outram* (1856) 26 LJ Ch 113, quoted in *A v Hayden* (1984) 156 CLR 532 at 545, 572.

104 See *Bunning v Cross* (1978) 141 CLR 54.

105 See *Evidence Act* 1995 (Cth), s 138.

106 [1980] QB 49.

them had the court not held that they were entitled to retain the money until the conclusion of the criminal proceedings.

102 *Malone* was referred to with approval by Deane, Dawson, Toohey and Gaudron JJ in *Gollan v Nugent*[107], which also concerned articles seized by the police. In the circumstances of that case, it was not suggested that there was to be any prosecution of the plaintiffs for an offence and therefore no issue was raised as to whether the articles were required as evidence in any future trial. However, their Honours unequivocally stated that in the event that the articles were required in any prospective trial there would be a legitimate ground for retention of the articles by the police[108]. This statement reflects the practice which has been adopted in many cases involving things illegally seized. As Hill J observed in *Puglisi v Australian Fisheries Management Authority*[109], the preponderance of opinion in relation to the exercise of discretion tends to be in favour of refusing to order the return of things, even when they have been illegally seized, if there are criminal proceedings pending in which the items may be used as evidence.

103 It is not irrelevant to the exercise of the discretion in question that another discretion exists, that of a trial judge under s 138 of the *Evidence Act*, as to whether the information should be admitted into evidence. The considerations relevant to that discretion include the probative value and importance of the evidence in the proceeding, the gravity of the unlawful conduct, and whether the conduct was deliberate or reckless[110]. The existence of such a discretion would suggest that the prospective use of the information should not be foreclosed.

104 The question then is whether the fact that no decision has been made whether to prosecute any person or offence under s 79(3) of the *Crimes Act* puts this case in a different category. Here it may be inferred that no decision can be made whilst the first defendant's undertaking, that the information seized will not be accessed or used by the AFP, is in force. But there is nothing hypothetical about the possibility of prosecution here. After all, it is the plaintiffs' own case that disclosure of the information held by the AFP exposes them to the risk of prosecution. The public interest in both the investigation and the prosecution of crime would not suggest as appropriate an order that the information be taken from

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107 (1988) 166 CLR 18 at 43-44.

108 *Gollan v Nugent* (1988) 166 CLR 18 at 43-44.

109 (1997) 148 ALR 393 at 405.

110 *Evidence Act 1995* (Cth), s 138(3).

the AFP and given to the plaintiffs. The prospect that criminal conduct may be disclosed is a sufficient reason to decline the relief sought.

The question as to the validity of s 79(3)

105 As mentioned earlier in these reasons, it is not necessary to consider the further question as to the validity of s 79(3) of the *Crimes Act*. There would be no utility in making a declaration of the kind sought because, since the events in question, that provision has been repealed. The plaintiffs nevertheless submitted that in the event that injunctive relief is refused, they would press for a declaration of the invalidity of s 79(3) as useful to them, in that it might result in the investigation and possibility of prosecution being brought to an end.

106 The difficulty for the plaintiffs is that they have no interest in questions about s 79(3) which sets them apart from persons generally and is sufficient to give them standing. A party who seeks a declaration that a law is invalid must have a sufficient interest in having their legal position clarified. Unless and until they are charged with an offence under s 79(3), the plaintiffs have no more interest than anyone else in clarifying what the law is[111].

107 No analogy may be drawn with respect to the position of the plaintiffs in *Croome v Tasmania*[112]. There the law criminalised the plaintiffs' relationship with other people and affected their freedom of action. The plaintiffs pleaded that they had engaged in conduct which, if the impugned provisions of the *Criminal Code* (Tas) were operative, rendered them liable to prosecution, conviction and punishment[113]. The plaintiffs here understandably do not say that their past conduct has contravened s 79(3).

Costs

108 It follows from the Court having found the Second Warrant to be invalid that the plaintiffs have had substantial success in this matter. They should have their costs.

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111 *Kuczborski v Queensland* (2014) 254 CLR 51 at 106 [175]-[176].

112 (1997) 191 CLR 119.

113 *Croome v Tasmania* (1997) 191 CLR 119 at 127, 138-139.

Orders

109 The questions of law stated for the opinion of the Full Court should be answered as follows:

(1) (a) Yes.

(b) Yes.

(c) Does not arise.

(2) Unnecessary to answer.

(3) Unnecessary to answer.

(4) There should be an order for certiorari quashing the search warrant issued on 3 June 2019.

(5) The first defendant should pay the plaintiffs' costs of the special case.

110 GAGELER J. Section 75(v) of the *Constitution* confers original jurisdiction on the High Court in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. As a conferral of jurisdiction, it is not to be construed "by making implications or imposing limitations which are not found in [its] express words"[114]. As a constitutional conferral of jurisdiction, it is to be construed "with all the generality which the words used admit"[115] and to include all that is "necessary or proper to render it effective"[116]. Necessarily encompassed within it is therefore constitutional power[117] to issue each of the "constitutional remedies"[118] for which it provides: the "constitutional writs"[119] and the "constitutional injunction"[120].

111 Underlying that conferral of jurisdiction and concomitant power are two traditional conceptions. Together they are aspects of the rule of law, which forms an assumption of the *Constitution*[121]. One is that the holder of a constitutional or statutory office cannot do anything in an official capacity except that which is authorised by the *Constitution* or by statute[122]. The other is that the holder of a

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114 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.

115 *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225.

116 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278. See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 90-91 [14].

117 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 25 [42]-[43]; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513-514 [103]-[104].

118 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 107 [54].

119 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 665-666 [37].

120 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 21 [65].

121 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [40] and *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513 [103], each quoting *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

122 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24 [39]. See also *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at

constitutional or statutory office is bound by the common law when doing anything in an official capacity except to the extent that non-compliance with the common law is specifically authorised or excused by statute[123].

112 The jurisdiction conferred by s 75(v) of the *Constitution* to issue a constitutional injunction against a constitutional or statutory officer of the Commonwealth can arise for exercise in two corresponding categories of matter. One is where the officer does or threatens to do something in an official capacity that is beyond constitutional or statutory authority. There an injunction can issue in the exercise of judicial discretion to vindicate the limitation on constitutional or statutory authority. The other is where the officer does or threatens to do something in an official capacity to infringe a common law right. There an injunction can issue in the exercise of judicial discretion to vindicate the common law right. The two categories are not mutually exclusive. Nor can they be taken necessarily to exhaust the jurisdiction[124].

113 Just as the exercise of power to issue a constitutional writ of mandamus or prohibition is informed without being confined by principles which historically informed the issue of a writ of mandamus or prohibition by a court administering the common law[125], so the exercise of power to issue a constitutional injunction is informed without being confined by principles which historically informed the issue of an injunction by a court administering equity[126]. Noteworthy in that respect is that courts administering equity had by the end of the nineteenth century become accustomed to issuing injunctions against public officers and public authorities, where common law remedies were unavailable or inadequate to "meet the justice

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188-189; *R v Somerset County Council; Ex parte Fewings* [1995] 1 All ER 513 at 524, affirmed in *R v Somerset County Council; Ex parte Fewings* [1995] 1 WLR 1037 at 1042; [1995] 3 All ER 20 at 25.

123 *Coco v The Queen* (1994) 179 CLR 427 at 435-436, citing amongst other cases *Entick v Carrington* (1765) 19 St Tr 1029. See also *Clough v Leahy* (1904) 2 CLR 139 at 155-156; *A v Hayden* (1984) 156 CLR 532 at 580.

124 cf *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 393 [100].

125 *Re Grimshaw; Ex parte Australian Telephone and Phonogram Officers' Association* (1986) 60 ALJR 588 at 594; 66 ALR 227 at 237; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 93 [24].

126 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 162 [47]-[48].

of the case"[127], in categories which included tortious infringement of a common law or statutory right[128] and want or excess of statutory authority[129]. The practical overlap and conceptual distinction between those categories had been noticed by text writers[130], and came to be reflected in the formulation at the beginning of the twentieth century of the principle that a citizen would have standing to seek injunctive relief in equity against a public officer or a public authority where "suing upon an alleged private right" or where "suing in respect of an interference with a public right from which [the citizen] personally sustains special damage"[131].

114 The final mandatory injunction which Ms Smethurst seeks against the Commissioner of Police in the proceeding in which this special case arises is, of its nature, a constitutional injunction. That is because the proceeding is in the original jurisdiction of the High Court, because the Commissioner is an officer of the Commonwealth, as was each of the members of the Australian Federal Police ("the AFP") who performed the role of the executing officer or of a constable assisting in the purported execution of the search warrant at Ms Smethurst's home, and because the injunction is sought against the Commissioner in his official capacity. No distinction has been drawn between the Commissioner and other members of the AFP for the purpose of the proceeding and no point has been taken that the injunction sought against the Commissioner ought to have been sought

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127 *Attorney-General v Mid-Kent Railway Co and South-Eastern Railway Co* (1867) LR 3 Ch App 100 at 103; *Jeanneret v Hixson* (1889) 11 NSWLR Eq 1 at 11.

128 eg *Attorney-General v Council of the Borough of Birmingham* (1858) 4 K & J 528 [70 ER 220]; *Imperial Gas Light and Coke Co v Broadbent* (1859) 7 HLC 600 [11 ER 239]; *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 146; *Jeanneret v Hixson* (1889) 11 NSWLR Eq 1 at 8-9, quoting *Glossop v Heston and Isleworth Local Board* (1879) 12 Ch D 102 at 111.

129 eg *Frewin v Lewis* (1838) 4 My & Cr 249 [41 ER 98]; *Oldaker v Hunt* (1854) 19 Beav 485 [52 ER 439]; *Attorney-General v Bishop of Manchester* (1867) LR 3 Eq 436; *Attorney-General v Cockermouth Local Board* (1874) LR 18 Eq 172; *Attorney-General v Borough of North Sydney* (1893) 14 NSWLR Eq 154.

130 eg Joyce, *The Doctrines and Principles of the Law of Injunctions* (1877) at 50-51, 296-297; High, *A Treatise on the Law of Injunctions*, 2nd ed (1880), vol II at 861 §1309; Kerr, *A Treatise on the Law and Practice of Injunctions*, 3rd ed (1888) at 118, 176, 568.

131 *Boyce v Paddington Borough Council* [1903] 1 Ch 109 at 113. See Finn, "A Road Not Taken: The Boyce Plaintiff and Lord Cairns' Act – Part I" (1983) 57 *Australian Law Journal* 493 at 500. See also *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 256 [21]-[22], 264-267 [42]-[48].

against some other member. The injunction sought against the Commissioner can therefore be treated as an injunction to bind all relevant members of the AFP.

115 I agree with Kiefel CJ, Bell and Keane JJ for the reasons they give that the search warrant which the AFP purported to execute at Ms Smethurst's home did not comply with s 3E(5)(a) of the *Crimes Act 1914* (Cth) and was for that reason invalid. The invalidity of the search warrant means that entry into Ms Smethurst's home by the AFP was not authorised by s 3F(1)(a), that the search which the AFP conducted there was not authorised by s 3F(1)(c), that the operation by the AFP of electronic equipment there to access data on her mobile phone was not authorised by s 3L(1), that the copying by the AFP there of data from her mobile phone onto a USB drive which was then taken from her home by the AFP was not authorised by s 3L(1A), and that the retention by the AFP of the data for the purpose mentioned in s 3ZQU(1)(a) of investigating or prosecuting an offence is not authorised by s 3L(1B).

116 I also agree with Kiefel CJ, Bell and Keane JJ for the reasons they give that the lack of specific statutory authority for the AFP to do or have done each of those things does not mean that the current retention of the data is outside the statutory authority of the AFP. Retention of the data is within the capacity that the AFP must have to perform its function under s 8(1)(b)(i) of the *Australian Federal Police Act 1979* (Cth) of providing "police services" in relation to laws of the Commonwealth. The discretion conferred on a court by s 138 of the *Evidence Act 1995* (Cth) to admit evidence obtained "in contravention of an Australian law" in the prosecution of an offence against a law of the Commonwealth would make little sense unless a law enforcement agency such as the AFP has capacity to retain for the purpose of investigating and prosecuting such an offence material that it was not authorised by statute to obtain. Section 8(1)(b)(i) of the *Australian Federal Police Act* is sufficiently broad to provide the requisite source of that capacity.

117 My disagreement with Kiefel CJ, Bell and Keane JJ is as to the relief that should issue in the exercise of the jurisdiction conferred by s 75(v) of the *Constitution*. I do not share their Honours' doubts as to the existence of a juridical basis for the final mandatory injunction which Ms Smethurst seeks, requiring the AFP to deliver up the USB drive on which the copied data is stored to enable that data to be deleted. And I disagree with their Honours' view that such an injunction should be refused in the exercise of discretion.

118 Read in light of the principle of statutory construction that "[s]tatutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language"[132], s 8(1)(b)(i) of the *Australian Federal Police Act* is far too general to be interpreted as purporting to

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132 *Coco v The Queen* (1994) 179 CLR 427 at 436. See also *Board of Fire Commissioners of New South Wales v Ardouin* (1961) 109 CLR 105 at 116.

provide statutory immunity against an infringement of common law rights or against the remedial consequences of an infringement of common law rights. Mention was made in argument of the specific common law power of an officer of police to retain an item that may be evidence of an offence for the purpose of investigating and prosecuting the offence, existence of which can provide a common law answer to a common law action for its wrongful retention. Together with other common law powers of a police officer, that power can be accepted to be made applicable to a member of the AFP when performing functions in the Australian Capital Territory by operation of s 9(1)(b) of the *Australian Federal Police Act*. The common law power, however, has never been held to extend beyond retention of an item that police have obtained "without wrong on their part"[133]. Thus, a need on the part of police to retain personal property lawfully obtained for the purpose of investigating and prosecuting an offence can provide an answer to a common law action by the owner who wants it back[134]. But a need on the part of police to retain personal property unlawfully obtained for the purpose of investigating and prosecuting an offence can provide no answer to a common law action by the owner for its unlawful taking and retention[135]. Because the AFP did not obtain the copied data without wrong on its part, the common law power cannot avail the AFP here.

119 What invalidity of the search warrant means is that, although the AFP is not acting beyond its statutory authority merely in retaining the data on the USB drive, the AFP had no statutory justification for the infringements of Ms Smethurst's common law rights that occurred in the purported execution of the search warrant to obtain the data and that the AFP has no statutory immunity from the common law consequences of those infringements. The infringements are incontrovertible. The unauthorised entry into her home was a trespass to her land. The handling of her mobile phone there, including the unauthorised operation of electronic equipment to access data on her mobile phone, was a trespass to her goods. For each of those trespasses, she has a common law cause of action against the AFP in respect of which she is entitled to damages at common law. In the theory of the common law, she is entitled to receive from the AFP compensatory damages in an amount which, so far as money could do, would restore her to the position she would have been in had those trespasses not been committed.

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133 *R v Lushington; Ex parte Otto* [1894] 1 QB 420 at 423; *Dixon v Stephens* (unreported, Supreme Court of New South Wales, 2 September 1971).

134 cf *Ghani v Jones* [1970] 1 QB 693 at 708.

135 *Levine v O'Keefe* [1929] VLR 302; *Levine v O'Keefe* [1930] VLR 70.

120 It is important to be clear about what the common law would be attempting to compensate for in awarding compensatory damages. The gist of a common law cause of action for trespass, whether to land or to goods, is "the wrong to the right to possession"[136]. At the heart of the common law right to possession is the common law right to control access by others and thereby to exclude others from access. In protecting the right to possession, the policy of the common law is to protect the right to exclude others which is bound up in possession[137].

121 The common law would accordingly be attempting to compensate Ms Smethurst for the AFP's infringement of her right to possession of her home and for the AFP's infringement of her right to possession of her mobile phone. Compensatory damages would seek to vindicate her interest in "maintaining the right to exclusive possession ... free from uninvited physical intrusion by strangers"[138]. To those compensatory damages, aggravated damages might well be added to take account of the "circumstances and manner of the wrongdoing" including the "affront" to her dignity and quiet enjoyment[139].

122 In circumstances where the AFP continues to hold a copy of the data downloaded by the AFP from Ms Smethurst's mobile phone through the commission of the trespasses, however, how can damages possibly be an adequate remedy? The essential characteristic of the information embedded in the data as it existed on the mobile phone before the commission of the trespasses was that access to the information was within her exclusive power to control by virtue of her possession of the mobile phone and its location in her home. The information embedded in the data is information to which she alone would continue to control access but for the AFP having trespassed against her. For so long as the information remains in the hands of the AFP, the direct effects of the infringement of her rights to possession of her home and of her mobile phone are serious and ongoing. There being no suggestion that the value of the information embedded in the data to her is wholly commercial, money alone cannot restore her to the position she would have been in had the trespasses not been committed.

123 Had some technologically adept scoundrel forced his way into Ms Smethurst's home, hacked into her mobile phone, downloaded the same data and refused to give the data back, I cannot imagine that an application by her in

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136 *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 227. See also *New South Wales v Ibbett* (2006) 229 CLR 638 at 646 [29].

137 *Plenty v Dillon* (1991) 171 CLR 635 at 647, 654-655.

138 *New South Wales v Ibbett* (2006) 229 CLR 638 at 646 [29].

139 *New South Wales v Ibbett* (2006) 229 CLR 638 at 646-647 [31].

the "auxiliary jurisdiction"[140] of equity to aid the common law for an injunction to compel the scoundrel to return the data would be refused on the basis that the trespasses did not have an ongoing effect that was legally cognisable or on the basis that damages were an adequate remedy. But even if such a response could be imagined in a matter between citizen and citizen, the constitutional dimension of the trespasses here and the constitutional nature of the jurisdiction invoked cannot be ignored. There is nothing "auxiliary" about the jurisdiction conferred by s 75(v) of the *Constitution*, and there is every reason not to be reticent about its exercise.

124 It is now more than 250 years since the celebrated judgment of Lord Camden in *Entick v Carrington*[141] cemented the position at common law that the holder of a public office cannot invade private property for the purpose of investigating criminal activity without the authority of positive law. Lord Camden referred to the private papers unlawfully seized in that case as their owner's "dearest property". He said that "though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass"[142]. In so saying he recognised a link between protection of personal property and protection of freedom of thought and political expression[143].

125 Of the judgment in *Entick v Carrington*, it has been said[144]:

> "The principles laid down in [it] affect the very essence of constitutional liberty and security. They ... apply to all invasions on the part of the government and its [officers] of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some

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140 *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660 at 665 [11].

141 (1765) 19 St Tr 1029.

142 (1765) 19 St Tr 1029 at 1066. See also *Beardmore v Carrington* (1764) 2 Wils KB 244 at 250 [95 ER 790 at 793-794].

143 Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (2012) at 128; Rowbottom, "*Entick and Carrington*, the Propaganda Wars and Liberty of the Press", in Tomkins and Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (2015) 85.

144 *Boyd v United States* (1886) 116 US 616 at 630.

public offence, – it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment."

126 The principles of constitutional liberty and security carried forward from *Entick v Carrington* are part of our common law inheritance. We ignore them – or, worse, devalue them – at our peril. For those principles to have appropriate contemporary operation in Australia, their practical application must be adapted to the contemporary reality that digital technology has provided new means by which personal property can be a repository of privately held information as well as new means by which such information can be extracted through the invasion of that private property and afterwards retained and disseminated.

127 More importantly, in an age in which invasions of common law rights can result in more than just common law remedies, talk of those principles must be backed up by a preparedness on the part of all courts "within the limits of their jurisdiction and consistent with their obligation to act judicially ... [to] provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise"[145]. The remedy of an injunction being constitutionally available within the original jurisdiction of the High Court, the appropriate remedy for the unauthorised invasion by an officer of the Commonwealth of a common law right of a citizen of Australia cannot be presumptively confined to the common law remedy of damages: "for if an owner of property is truly to have a 'strict' or 'fundamental' right not to be unlawfully invaded then this right must be supported by an effective sanction otherwise the term will be just meaningless rhetoric"[146]. In answer to an application by a citizen for a prohibitory injunction to restrain an unauthorised invasion of a common law right to property that is about to occur or is occurring, no officer of the Commonwealth should be heard to say "you can have your damages later". And in answer to an application by a citizen for a mandatory injunction to prevent the ongoing effect of an unauthorised invasion of such a common law right that has occurred, no officer of the Commonwealth should be heard to say "your damages are enough".

128 The juridical basis for the final mandatory injunction sought by Ms Smethurst does not lie in her having an interest in preventing the copied data from being used by the AFP. In the absence of statutory immunity validly

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145 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 [56].

146 Samuel, "The Right Approach?" (1980) 96 *Law Quarterly Review* 12 at 14, quoted in part in *Plenty v Dillon* (1991) 171 CLR 635 at 655.

conferred, no one has a legally cognisable interest in being protected from investigation for an offence[147].

129 The juridical basis for the injunction is also not dependent on the common law of Australia coming to recognise an independent cause of action for infringement of a distinct right of privacy. Unlike *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[148], where that question was explored and left open, this is not a case in which a remedy is sought against someone other than a trespasser. Nor is it a case like *Coco v Shaw*[149], where the unauthorised use of a listening device to record a "private" but not "confidential" telephone conversation was not suggested to involve infringement of any right to possession. This is a case within the heartland of the tort of trespass.

130 The juridical basis for the final mandatory injunction sought by Ms Smethurst lies in its issue within the discretion of the Court being constitutionally appropriate to restore Ms Smethurst to the position she would have been in had her common law rights to control access to her real and personal property not been invaded by the tortious conduct of the AFP in circumstances in which money alone cannot restore her to that position[150].

131 An injunction requiring delivery up of the USB drive on which the copied data is stored to enable that data to be deleted is relief of a kind which the Full Court of the Federal Court (French, Sackville and R D Nicholson JJ) in *Hart v Commissioner of Australian Federal Police*[151] considered appropriate to be issued under the statutory equivalent of s 75(v) of the *Constitution* – s 39B of the *Judiciary Act 1903* (Cth) – in a case where the AFP had copied data in circumstances unauthorised by an earlier form of s 3L of the *Crimes Act*. In my opinion, that view was correct.

132 If an injunction of that nature is to be refused in the present proceeding, that refusal can occur only as a matter of discretion. The Solicitor-General of the Commonwealth, who appeared for the Commissioner and for the

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147 *A v Hayden* (1984) 156 CLR 532.

148 (2001) 208 CLR 199 at 248-258 [105]-[132].

149 [1994] 1 Qd R 469.

150 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 31 [33].

151 (2002) 124 FCR 384 at 406 [88].

Attorney-General of the Commonwealth intervening, quite properly made no submission to the contrary.

133 Beginning with the decision of Hope J in *Marinko v Rames*[152], a series of decisions of single judges in State Supreme Courts[153] and in the Federal Court[154] have given consideration to the exercise of discretion to refuse mandatory injunctions requiring the return to owners of unlawfully seized property sought to be retained by police or other holders of public office for the purpose of investigating or prosecuting criminal offences. Beyond recognising the accuracy of the observation of Hope J that a mandatory injunction to remedy an official invasion of a proprietary right will sometimes appropriately be withheld by reference to non-proprietary considerations[155], it would be unrewarding to review the correctness of each of those decisions, just as it would be imprudent even if it were possible to be categorical about the circumstances in which refusal of an injunction would be appropriate.

134 Even so, two guiding principles can be stated with confidence. The first is that where a tortious infringement of a common law right has been committed by the holder of a public office in circumstances where damages are not an adequate remedy, the onus must lie on the holder of the public office to establish a sound basis for the discretionary refusal of the injunction[156]. The second is that the mere fact that the public officer can establish a want to retain personal property or

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152 Unreported, Supreme Court of New South Wales, 13 August 1971.

153 *Dixon v Stephens* (unreported, Supreme Court of New South Wales, 2 September 1971); *GH Photography Pty Ltd v McGarrigle* [1974] 2 NSWLR 635; *Rowell v Larter* (1986) 6 NSWLR 21; *Island Way Pty Ltd v Redmond* [1990] 1 Qd R 431; *Tye v Commissioner of Police* (1995) 84 A Crim R 147; *Ozzie Discount Software (Aust) Pty Ltd v Muling* (1996) 86 A Crim R 387; *Cassaniti v Croucher* (1997) 37 ATR 269; *Wright v Queensland Police Service* [2002] 2 Qd R 667.

154 *Parker v Churchill* (1985) 9 FCR 316; *Esso Australia Ltd v Curran* (1989) 39 A Crim R 157; *Challenge Plastics Pty Ltd v Collector of Customs* (1993) 42 FCR 397; *Puglisi v Australian Fisheries Management Authority* (1997) 148 ALR 393; *Caratti v Commissioner of the Australian Federal Police [No 2]* [2016] FCA 1132; *Caratti v Commissioner of the Australian Federal Police [No 3]* [2016] FCA 1407.

155 *Marinko v Rames* (unreported, Supreme Court of New South Wales, 13 August 1971) at 9.

156 cf *Parker v Churchill* (1985) 9 FCR 316 at 332-333, referring to *Trimboli v Onley [No 3]* (1981) 56 FLR 321 at 337; *Esso Australia Ltd v Curran* (1989) 39 A Crim R 157 at 169-170; *Island Way Pty Ltd v Redmond* [1990] 1 Qd R 431 at 435-436.

information obtained through the commission of the tort for the purpose of a criminal investigation must be insufficient to discharge that onus[157]. In the vindication of common law rights against unauthorised official invasion, considerations merely of convenience have no place[158]. If a statute prescribes means by which the holder of the public office can lawfully obtain personal property or can lawfully extract information from personal property for the purpose of a criminal investigation, it is fundamental to the maintenance of the rule of law that the public officer not be relieved from compliance with those statutory means by an exercise of judicial discretion.

135 Where police can establish that personal property unlawfully obtained or information unlawfully extracted from personal property is proposed to be tendered in existing or imminent criminal proceedings, an ordinarily sufficient justification for the exercise of the discretion to refuse an injunction will lie in the undesirability of permitting civil process to interfere with the course of criminal proceedings[159]. To the extent that dicta in *Gollan v Nugent*[160] might be read to suggest that refusal of an injunction would be justified where criminal proceedings are no more than prospective, I consider that the suggestion goes too far. Criminal proceedings will always be in prospect for so long as a criminal investigation remains on foot, and the mere fact that a criminal investigation remains on foot cannot be enough.

136 Where police can establish that personal property unlawfully obtained or information unlawfully extracted from personal property is relevant to an offence that is the subject of an ongoing criminal investigation, a range of considerations might properly inform the exercise of the discretion to refuse an injunction. Any delay on the part of the plaintiff in seeking the injunction and any use made by police of the property or information in the meantime would be relevant. In the case of information, so would any dissemination to third parties that might already have occurred[161]. Any realistic risk that evidence of the crime under investigation

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157 cf *Ozzie Discount Software (Aust) Pty Ltd v Muling* (1996) 86 A Crim R 387 at 396-397.

158 *Levine v O'Keefe* [1930] VLR 70 at 72; *Plenty v Dillon* (1991) 171 CLR 635 at 654; *Coco v The Queen* (1994) 179 CLR 427 at 436.

159 *Sankey v Whitlam* (1978) 142 CLR 1 at 26; *Yates v Wilson* (1989) 168 CLR 338; *Gedeon v Commissioner of New South Wales Crime Commission* (2008) 236 CLR 120 at 133-134 [23]-[24]. cf *Puglisi v Australian Fisheries Management Authority* (1997) 148 ALR 393 at 405.

160 (1988) 166 CLR 18 at 43-44.

161 cf *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 431.

would be lost were the injunction to be issued must weigh heavily against issuing an injunction.

137 That is not the situation here. No attempt has been made by the AFP in agreeing the facts of the special case to provide an evidentiary foundation for an inference that the copied data in fact provides evidence of the commission of any offence or in fact will be useful to the AFP in investigating the commission of any offence. The most that can be inferred is that the member of the AFP who copied the data onto the USB drive believed at the time of copying that some or all of the data was relevant to whatever offence the member understood was described by the garbled language of the third condition of the search warrant. The plaintiffs moved quickly for relief. The copied data has been quarantined and has not been used by the AFP or anyone else pending the outcome of the proceeding.

138 Nor is there any basis for considering that such evidence of a crime as the information embedded in the data might possibly reveal would be at risk of being lost were an injunction to be issued. That is because the injunction can be framed in terms that would ensure that the data or some part of it could be lawfully seized. It would remain open to the AFP to seek to satisfy a magistrate or other issuing officer that there are reasonable grounds for suspecting that the data or some part of it is relevant to a Commonwealth offence. If the issuing officer were to be reasonably so satisfied on a correct understanding of the law, it would be open to the issuing officer to issue a warrant authorising a search of any premises at which the issuing officer was satisfied the USB drive would be located within the period of 72 hours after the issue of the warrant[162]. Such a warrant, if issued, would then be available to be executed by the AFP immediately upon complying with the injunction.

139 There is nothing cute about framing the mandatory injunction in terms which would facilitate the execution of a valid warrant. The injunction would serve to remedy the infringements of Ms Smethurst's common law rights to possession that have occurred in the past without doing anything to impede the capacity of the AFP lawfully to exercise a power of search and seizure in the future.

140 Otherwise agreeing with the answers proposed by Kiefel CJ, Bell and Keane JJ to each of the questions posed in the special case, I would therefore expand their Honours' proposed answer to question (4). To the writ of certiorari to quash the purported legal effect of the search warrant, I would add a mandatory constitutional injunction.

141 The injunction would require the Commissioner to deliver up to Ms Smethurst the USB drive onto which the data was copied from her mobile phone and to provide such technical information or assistance as may be necessary

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162 See s 3E(1) of the *Crimes Act*.

to enable her to delete the data from the USB drive. If the USB drive is not seized at the time of delivery up in due execution of a valid search warrant, the deletion of the data from it would have to occur within a reasonable time of the delivery up. The USB drive would, of course, remain the property of the AFP; the injunction could provide no justification for Ms Smethurst retaining possession of it once the data had been deleted.

142 NETTLE J. I have had the advantage of reading in draft the plurality's reasons for judgment, and I agree with their Honours for the reasons they give[163] that the Second Warrant was invalid and, consequently, that the search and seizure executed on 4 June 2019 was not authorised by Pt IAA of the *Crimes Act 1914* (Cth) and was, therefore, unlawful. I also agree with their Honours that the plaintiffs should not be granted the injunctive relief they seek. But my reasons for that conclusion are in some respects different from the plurality's reasons.

Jurisdiction and power

143 At the outset, and throughout what follows, it is necessary to bear in mind the distinction, "made repeatedly by this Court", "between jurisdiction and power"[164]. In this matter, this Court has original jurisdiction on at least two bases[165]: first, and most obviously, because "an injunction is sought against an officer of the Commonwealth" within the meaning of s 75(v) of the *Constitution*[166]; and, secondly, because the plaintiffs' claim, by asserting an "immunity" derived from the *Constitution*[167], raises a matter "arising under the Constitution" within the meaning of s 30(a) of the *Judiciary Act 1903* (Cth), enacted pursuant to s 76(i) of the *Constitution*[168].

144 The Court's jurisdiction in cases where injunctive relief is sought pursuant to s 75(v) of the *Constitution* is not constrained by the principles of jurisdictional error that limit the issue of the constitutional writs of mandamus and prohibition[169]. But as the framers of the *Constitution* were aware, the injunction was "forged in

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163 See reasons of Kiefel CJ, Bell and Keane JJ, especially at [31]-[35], [43]-[44].

164 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 593 [48] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

165 See also *Naismith v McGovern* (1953) 90 CLR 336 at 342 per Williams, Webb, Kitto and Taylor JJ; *Maguire v Simpson* (1977) 139 CLR 362 at 397-399 per Mason J, 406 per Jacobs J.

166 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 208 per Deane and Gaudron JJ.

167 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

168 *Felton v Mulligan* (1971) 124 CLR 367 at 408 per Walsh J.

169 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 162 [47] per Gummow, Hayne, Heydon and Crennan JJ.

the realm of private law", and hence its availability in "the field of public law" depends primarily on whether statute authorises an actual or apprehended interference with private or public rights[170]. This fundamental attribute of the remedy is not lessened by the appellation "constitutional injunction"[171]. To say so is not to deny that the "central place" of this Court "in the Australian judicial system", as embodied in s 75(v) of the *Constitution*, informs the Court's power "to ensure the rule of law by granting relief against Commonwealth officers who act without ... power"[172], and may, accordingly, justify an expansion of the Court's power to grant an injunction under s 75(v). But for the most part, and, for reasons to be explained, in this case, the Court's power to grant s 75(v) injunctive relief, like the Court's power to grant any other kind of injunctive relief, is defined by s 32 of the *Judiciary Act*.

145 Section 32 of the *Judiciary Act* confers power on the Court to grant "all such remedies whatsoever as any of the parties ... are entitled to in respect of any legal or equitable claim properly brought forward by them respectively". The provision has an "affinity" with s 14 of the *Judiciary Act 1789* (US) ("the All Writs Act")[173], but its terms are derived from s 24(7) of the *Supreme Court of Judicature Act 1873* (Eng) ("the 1873 Act")[174]. Section 24(7) of the 1873 Act embodied the "fundamental idea" of the Judicature Acts[175] and included a specific power to grant injunctions[176], which, perforce of s 25(8) of the 1873 Act, was exercisable "in all

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170 Sykes, "The Injunction in Public Law" (1953) 2 *University of Queensland Law Journal* 114 at 114, 127. See also Spigelman, "The Equitable Origins of the Improper Purpose Ground", in Pearson, Harlow and Taggart (eds), *Administrative Law in a Changing State* (2008) 147 at 149-153.

171 See and compare *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 142 [165] per Hayne J.

172 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 465-466 [263] per Hayne J.

173 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 403 [56] per Gaudron and Gummow JJ, 467 [268]-[269] per Hayne J.

174 36 & 37 Vict c 66. See *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2015) 255 CLR 231 at 249 [44] fn 46 per French CJ, Hayne, Kiefel, Bell, Gageler and Keane JJ. See also *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 489 per Gibbs J.

175 *McGowan v Middleton* (1883) 11 QBD 464 at 468 per Brett MR.

176 See *Wright v Redgrave* (1879) 11 Ch D 24 at 32 per James LJ.

cases in which it shall appear to the Court to be just or convenient that such Order should be made". Despite the apparent breadth of the provision, however, it has been held to extend only as far as the powers formerly exercised by courts of equity and later by courts of law pursuant to s 79 of the *Common Law Procedure Act 1854* (Eng) ("the 1854 Act")[177].

146 The starting point in this matter is, therefore, that this Court's power under s 32 of the *Judiciary Act* to grant injunctive relief in the exercise of its original jurisdiction – whether under s 75(v) of the *Constitution* or otherwise – is defined by doctrines of equity as they have developed over time[178], and by the settled construction of the 1854 Act empowering courts of law to grant injunctions in lieu of damages[179].

Basis for injunctive relief

147 I agree with the plurality that "a thing seized under this Part" in s 3ZQU of the *Crimes Act* refers to a thing seized lawfully in accordance with Pt IAA of that Act[180]. Where, therefore, a thing has been so seized, s 3ZQU authorises the Commissioner to use it for the enumerated purposes and s 3ZQX authorises the Commissioner to detain it until it is no longer required for any such purpose or for "other judicial or administrative review proceedings" in which production of things seized may be "necessary ... as proof that they were properly seized under the warrant"[181].

148 Where, however, a thing is seized purportedly, but not lawfully, under Pt IAA of the *Crimes Act*, ss 3ZQU and 3ZQX of the Act have no application. In such a case, just as the unlawful execution of a warrant, including an otherwise

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177 17 & 18 Vict c 125. See *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30 at 36-37 per Brett LJ; *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428 at 454 per Dixon CJ (McTiernan J agreeing at 456-457); cf *Beddow v Beddow* (1878) 9 Ch D 89 at 93 per Jessel MR.

178 See Gummow, "The Scope of Section 75(v) of the *Constitution*: Why Injunction but No Certiorari?" (2014) 42 *Federal Law Review* 241 at 247-248, 249-250.

179 See *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 79-81 [58]-[64] per Gummow and Hayne JJ, 122-123 [189]-[191], 124-129 [195]-[202] per Heydon J.

180 See reasons of Kiefel CJ, Bell and Keane JJ at [59].

181 Australia, Senate, *Crimes Legislation Amendment (Serious and Organised Crime) Bill (No 2) 2009*, Replacement Explanatory Memorandum at 80.

apparently valid execution of an invalid warrant, may amount to trespass to land[182], trespass to chattels, conversion and detinue[183], so, too, may the retention and use of what has been unlawfully seized amount to a tort[184], and, if the thing seized contains confidential or proprietary information, its retention and use may amount to a breach of confidence[185] or infringement of copyright[186]. It would not be a defence to such a claim, whether at law or in equity or under statute, that the only use that was made of the thing was one that would have been lawful if the thing had been lawfully seized under Pt IAA.

149 It follows that, if at trial it is determined that a seizure is unlawful, then, subject to it being established that damages are unavailable or would be an inadequate remedy to compensate for the Commissioner's further detention or use of a thing seized, final injunction *may* go to compel delivery up of the thing in question[187], and, if the thing contains proprietary or confidential information, to compel the delivery up or destruction of copies[188]. Likewise, where a plaintiff has a prima facie case and the balance of convenience favours interlocutory relief, interlocutory injunction will go to restrain the use of the thing seized pending final

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182 See *Halliday v Nevill* (1984) 155 CLR 1 at 10, 20 per Brennan J; *Plenty v Dillon* (1991) 171 CLR 635 at 639-640 per Mason CJ, Brennan and Toohey JJ, 647-648 per Gaudron and McHugh JJ; *Kuru v New South Wales* (2008) 236 CLR 1 at 14-15 [43] per Gleeson CJ, Gummow, Kirby and Hayne JJ.

183 See *Willey v Synan* (1937) 57 CLR 200 at 212 per Rich J; *Gollan v Nugent* (1988) 166 CLR 18 at 24-25 per Brennan J.

184 See *Russell v Wilson* (1923) 33 CLR 538 at 545-546 per Isaacs and Rich JJ.

185 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 230 [53]-[55] per Gleeson CJ, 247-248 [104] per Gummow and Hayne JJ.

186 But see *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279 at 287-289 [6]-[13] per Gleeson CJ, Gummow, Heydon, Crennan and Kiefel JJ.

187 See *Gollan v Nugent* (1988) 166 CLR 18 at 25-26 per Brennan J, 45 per Deane, Dawson, Toohey and Gaudron JJ. See generally Van Hecke, "Equitable Replevin" (1954) 33 *North Carolina Law Review* 57.

188 See *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 567 per Gummow J. See generally Forrai, "Confidential Information – A General Survey" (1971) 6 *Sydney Law Review* 382 at 391.

determination of the claim[189]. But it needs to be borne steadily in mind that the availability of such injunctive relief is dependent on the nature of the thing seized.

150 In the case of the unlawful seizure of tangible or intangible property, or confidential information, the continuing wrong with respect to the tangible or intangible property, or confidential information, may provide the juridical basis for the grant of injunctive relief to compel delivery up of the thing seized or the delivery up or destruction of copies. Where, however, as here, a plaintiff does not assert any tangible or intangible property in the information seized, and the information seized is not alleged to be confidential information, the situation is different. Presumably, for that reason, the plaintiffs rested the claim for injunctive relief on two alternative bases.

(i) No implied prohibition

151 The first was an "implication", said to arise from Pt IAA of the *Crimes Act*, that a thing "in fact" seized "pursuant to the processes of the Act ... can only be used in accordance with the Act", and, therefore, that if "it is seized unlawfully it cannot be used for any purpose". The argument was presented as based on "a sensible reading" or "a logical expansion" of *Johns v Australian Securities Commission*[190] giving rise to "a public law right" enforceable by injunction at the suit of someone with "a sufficient interest in the matter".

152 The argument should be rejected as ill-according with the legislative intention manifested by Pt IAA of the *Crimes Act*[191]. In *Johns*[192], as in *Katsuno v The Queen*[193], the legislation conferring power to obtain the information in question contained express provisions for confidentiality[194]. Statements in both

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189 See *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153-154, 156 per Mason A-CJ.

190 (1993) 178 CLR 408.

191 See *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at 229-230 [76]-[78] per Gageler J; 363 ALR 188 at 206-207.

192 (1993) 178 CLR 408 at 423, 428 per Brennan J, 435 per Dawson J, 452-453 per Toohey J, 458 per Gaudron J, 467-468 per McHugh J.

193 (1999) 199 CLR 40 at 56 [18], 57 [25] per Gaudron, Gummow and Callinan JJ, 86-87 [107]-[109] per Kirby J.

194 *Australian Securities Commission Act 1989* (Cth), s 127(1) and *Juries Act 1967* (Vic), s 21(2), respectively.

cases may, nevertheless, be taken to support a principle of construction that a conferral of power to obtain information for particular purposes implies a prohibition against use for any other purpose[195]. Thus, where a thing is lawfully seized in accordance with Pt IAA, the express authorisation of its use for the purposes enumerated in s 3ZQU may be taken to imply a prohibition against the Commissioner using it for any other purpose. But, as has been emphasised, ss 3ZQU and 3ZQX have no application to a thing seized purportedly, but not lawfully, under Pt IAA.

153 Needless to say, unless there is some other lawful basis for the seizure, officers of the Commonwealth – no less and no more than other members of the public[196] – may be seen to have committed a legal wrong by the seizure and any subsequent use of the thing seized. But there is no basis in principle for, and there is nothing in the text of Pt IAA from which to infer, a legislative intention to prohibit the use of a thing seized merely because an officer has erroneously relied on that Part for its seizure. And, even if there were, there would then be questions (which do not arise here) as to who would have a sufficient right or interest to enforce the prohibition[197].

(ii) Restoration of the status quo ante

154 The second asserted alternative basis for injunctive relief was said to be "to reverse the consequences of the tort" constituted of the unlawful search and seizure, including retention and use of copies of documents which would not amount per se to any interference with property or breach of confidence. That argument should also be rejected.

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195 See and compare *Johns* (1993) 178 CLR 408 at 424 per Brennan J, 458, 462-463 per Gaudron J, 467 per McHugh J; *Katsuno* (1999) 199 CLR 40 at 50 [2] per Gleeson CJ, 56 [19]-[21], 57 [24]-[25] per Gaudron, Gummow and Callinan JJ, 65 [55] per McHugh J, 87-88 [110]-[112] per Kirby J. But see *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 586-587 [54] per Gummow and Hayne JJ, observing that, "whilst 'rules' or principles of construction may offer reassurance, they are no substitute for consideration of the whole of the particular text, the construction of which is disputed, and of its subject, scope and purpose".

196 See *A v Hayden* (1984) 156 CLR 532 at 591 per Brennan J.

197 See and compare *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 405 per Kitto J; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263 [39], 264 [42]-[43], 267 [49] per Gaudron, Gummow and Kirby JJ.

155 The argument was largely based on Young J's observation in *Lincoln Hunt Australia Pty Ltd v Willesee*[198] that a court of equity has "power to grant an injunction in the appropriate case to prevent publication of a videotape or photograph taken by a trespasser even though no confidentiality is involved", provided "the circumstances are such [as] to make publication unconscionable". But Young J's reference to "unconscionability" outside the contexts in which that term is traditionally applied[199] was criticised in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[200]. As was there observed, used as a compendious description of "any conduct which attracts the intervention of equity"[201], the term may add little to analysis or, worse, conceal what Julius Stone described as "fact-value complexes"[202]. The limits of the court's power to grant injunctions are better expressed in terms of an actual or apprehended "invasion of the legal or equitable rights of the plaintiff"[203] and the inadequacy of damages at law to compensate for such a wrong. Furthermore, in this matter, it is not so much the exact formulation of the principle as its application to the facts of the matter which gives rise to the problem.

156 To date, there have been but few cases in which a mandatory injunction has been granted on the basis of a past wrong. As Joseph Story observed during the mid-nineteenth century[204]:

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198 (1986) 4 NSWLR 457 at 463.

199 See, eg, *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 400 [14], 426 [123], 437 [152] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ; *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 547 [29] per Kiefel J, 575 [148] per Gageler J, 611 [268] per Keane J, 631 [330], 634 [342] per Nettle J.

200 (2001) 208 CLR 199 at 218-219 [17], 227 [44]-[45] per Gleeson CJ, 244-246 [98]-[100] per Gummow and Hayne JJ.

201 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd [No 2]* (2000) 96 FCR 491 at 498 [14] per French J, quoted in *Lenah Game Meats* (2001) 208 CLR 199 at 245 [99] per Gummow and Hayne JJ.

202 Stone, *Legal System and Lawyers' Reasonings* (1964) at 264.

203 *Lenah Game Meats* (2001) 208 CLR 199 at 246 [102] per Gummow and Hayne JJ.

204 Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (1836), vol 2, §862 at 155 (footnote omitted). See also *Isenberg v East India House Estate Co Ltd* (1863) 3 De G J & S 263 at 272 per Lord Westbury LC

> "The object of this process [of injunction], which is most extensively used in Equity proceedings, is generally preventive, and protective, rather than restorative; though it is by no means confined to the former. It seeks to prevent a meditated wrong more often, than to redress an injury already done."

Moreover, on those few occasions when the power to grant a restorative injunction has been exercised[205], it has been with a caution which recognises both that an award of damages is ordinarily an adequate remedy to compensate for wrongs recognised at law and that the characteristic hardship of mandatory orders ordinarily weighs against such discretionary relief[206]. As the majority observed in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia*[207]:

> "Where the acts contemplated by the conspirators have all occurred and the tort is complete, the remedy available to an injured plaintiff is ordinarily limited to the recovery of pecuniary damages[208]. But for over a century it has been established that 'there is no rule which prevents the court from granting a mandatory injunction where the injury sought to be restrained has been completed before the commencement of the action'[209]. *Where the damage caused by tortious conduct is ongoing and is 'extreme, or at all events very serious', a mandatory injunction may issue compelling the wrongdoer to prevent the occurrence of further damage*[210]."

[46 ER 637 at 641]; *Smith v Smith* (1875) LR 20 Eq 500 at 504 per Jessel MR. But see Holdsworth, *A History of English Law*, vol 5, 3rd ed (1945) at 324-325.

205 See, eg, *McManus v Cooke* (1887) 35 Ch D 681 at 698 per Kay J; *Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd* [1974] QB 142 at 156 per Bridge J.

206 See *Redland Bricks Ltd v Morris* [1970] AC 652 at 665 per Lord Upjohn; *Charrington v Simons & Co Ltd* [1970] 1 WLR 725 at 730 per Buckley J; [1970] 2 All ER 257 at 261. See also *Glossop v Heston and Isleworth Local Board* (1879) 12 Ch D 102, concerning mandatory injunction to enforce positive statutory duties.

207 (1998) 195 CLR 1 at 31 [33] per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ (emphasis added).

208 See *Deere v Guest* (1836) 1 My & Cr 516 [40 ER 473].

209 Kerr, *A Treatise on the Law and Practice of Injunctions*, 3rd ed (1888) at 50.

210 *Durrell v Pritchard* (1865) LR 1 Ch App 244 at 250 per Turner LJ (Knight Bruce LJ agreeing at 252); *McManus v Cooke* (1887) 35 Ch D 681 at 698 per Kay J; *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 810 per

157 Admittedly, the potential application of the power to grant a restorative injunction in a case like the present was noticed in *Lenah Game Meats*. Although Gummow and Hayne JJ there concluded[211] that an injunction should *not* go to restrain publication by the Australian Broadcasting Corporation of non-proprietary, non-confidential information unlawfully obtained by a trespass to land, their Honours stressed[212] that it was not alleged that the Australian Broadcasting Corporation was a knowing participant in the trespass. By contrast, here the Commissioner was involved in the trespass constituted of the unlawful search and seizure by the officers who executed the Second Warrant. But it does not follow that the Commissioner's involvement, in that sense, is sufficient of itself to engage this Court's power under s 32 of the *Judiciary Act* to grant restorative injunctive relief in the exercise of its original jurisdiction.

158 In a case like the present, questions as to the adequacy of damages and justifiable hardship require an assessment of the nature, gravity and contumacy of the trespass committed by the unlawful search and seizure and of the nature and extent of the damage that would be inflicted on the plaintiff if the Commissioner were not restrained. Thus, if this matter had involved a deliberate flouting of the law – as it would have if seizing officers had gone onto the first plaintiff's land and effected the seizure knowing, or recklessly indifferent as to whether, they had no lawful authority to do so – the public interest may have provided good reason to regard the official retention and use of the information as raising an equity for restorative injunction[213]. And that would have been so whether the proceedings were brought in this Court, to ensure the rule of law against officers of the Commonwealth, or in a State Supreme Court having the powers of the courts at Westminster[214] against officials of the State. But where, as here, it is not suggested that the unlawfulness of the search and seizure was the result of anything other than an honest error made in the course of a bona fide attempt to comply with the provisions of Pt IAA of the *Crimes Act* (by reason of the misdescription of the suspected offence in the warrant), it is difficult to see that the unlawfulness of the

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Brightman J; [1974] 2 All ER 321 at 337; Joyce, *The Law and Practice of Injunctions in Equity and at Common Law* (1872), vol 1 at 439; Williams and Guthrie-Smith (eds), *Daniell's Chancery Practice*, 8th ed (1914), vol 2 at 1400.

211 *Lenah Game Meats* (2001) 208 CLR 199 at 248 [105], 258 [132], 259 [138].

212 *Lenah Game Meats* (2001) 208 CLR 199 at 247-248 [104]; see also at 273-275 [174]-[180] per Kirby J, 318 [304] per Callinan J.

213 See and compare *Attorney-General v Harris* [1961] 1 QB 74 at 89, 92 per Sellers LJ, 94-95 per Pearce LJ (Devlin LJ agreeing at 96); *Attorney-General v Greenfield* [1962] SR (NSW) 393 at 395 per Myers J.

214 See [144]-[145] above.

search and seizure, of itself, should be regarded as so obliquitous as to render continued detention and use of the information inequitable.

159 Presumably for that reason, the principal consideration on which the plaintiffs relied was the nature and extent of the damage that would be inflicted if detention and use of the information were not enjoined. For the reasons which follow, however, that is not persuasive either.

160 As was made plain in the course of argument, the Commissioner does not seek to use the information for any purpose other than purposes that, but for the invalidity of the Second Warrant, would be expressly authorised by Pt IAA of the *Crimes Act*. Consequently, as was also made plain in argument, the only potential damage that the first plaintiff faces is the possibility that, if the Commissioner uses the information as intended, it may lead to the first plaintiff being prosecuted for a criminal offence (the commission of which she denies) of the kind that was infelicitously described in the warrant. The claim for injunction thus confronts the difficulty that, generally speaking, injunction will not go to restrain publication of information where the consequence of restraint would be to prevent disclosure of criminality which, in all the circumstances, it would be in the public interest to reveal[215].

161 No doubt, it cannot yet be said, and it may not be, that the information will disclose criminality which it is in the public interest to reveal. So far, the Commissioner has been bound by undertaking – given shortly after the claim of unlawful seizure was first made – not to look at the information until the question of the lawfulness of the seizure is determined. But what can be said is that the information was seized because the executing officer considered that it related to the unlawful disclosure of secret information, which, if proved, would be a serious criminal offence of the kind inadequately described in the warrant, and that the Commissioner has offered to undertake – and, if needs be, can be enjoined to ensure – that the information is used only as if it had been seized lawfully under Pt IAA. Consequently, if, upon examination by the Commissioner, it appears to the Commissioner that the information does not assist in disclosing the commission of such an offence, the information will be returned to the first plaintiff as if it had been lawfully seized under Pt IAA, and no prejudice will have been caused to the first plaintiff.

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215 See *Weld-Blundell v Stephens* [1919] 1 KB 520 at 528 per Bankes LJ; *Howard v Odhams Press Ltd* [1938] 1 KB 1 at 41-42 per Greene LJ (Greer LJ agreeing at 22); *A v Hayden* (1984) 156 CLR 532 at 544-546 per Gibbs CJ; *Coco v Shaw* [1994] 1 Qd R 469 at 499 per Ryan J. See also *Sankey v Whitlam* (1978) 142 CLR 1 at 21-22, 25-26, 43 per Gibbs A-CJ.

162 On the other hand, if it is determined that there is to be a prosecution, a question may then arise as to the admissibility of the information into evidence. But, if so, that will be a question that falls to be determined by the trial judge in accordance with s 138 of the *Evidence Act 1995* (Cth). Contrary to the way in which the grant of injunctive relief has been approached in some other cases of this kind[216], the potential application of s 138 is not a relevant consideration for the purposes of determining whether to grant or withhold injunctive relief – not least, but not only, because there is as yet too little information to determine whether s 138 would be engaged.

Conclusion

163 In the result, I agree in the orders proposed by the plurality.

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216 See, eg, *Puglisi v Australian Fisheries Management Authority* (1997) 148 ALR 393 at 405 per Hill J.

164 GORDON J. The question that divides the Court is what relief the Court should grant when it concludes that an officer of the Commonwealth acted in excess of power. In particular, what, if any, relief should the Court grant when an officer of the Commonwealth entered premises without a valid search warrant, copied data from the occupant's device to a laptop and then from the laptop to a USB drive, deleted the data from the laptop, and took away the USB drive? Can the Court grant an injunction requiring delivery up of the USB drive or destruction of the data taken? Can the Court grant that injunction only if continued retention of the USB drive or the data breaches some private right?

165 The law would take a seriously wrong turn if this Court held that it could not grant an injunction to restore a plaintiff, so far as possible, to the position they would have been in had power not been exceeded without the plaintiff demonstrating that, in addition to the excess of power, a private right is also breached by retaining what was seized. To require demonstration of some further or additional private law wrong as the only basis on which injunction may go treats the excess of power as irrelevant and ignores the constitutional purpose of s 75(v) of the *Constitution*.

166 The circumstances giving rise to this special case are set out in the reasons of Kiefel CJ, Bell and Keane JJ[217]. It is unnecessary to repeat them except to the extent necessary to explain these reasons. I agree with Kiefel CJ, Bell and Keane JJ that the search warrant in respect of Ms Smethurst's premises issued on 3 June 2019 ("the Second Warrant") was invalid.

167 As a result of the invalidity of the Second Warrant, the entry, search and seizure purportedly pursuant to s 3F of the *Crimes Act 1914* (Cth) were not authorised and were unlawful. Moreover, the separate taking[218] of data by copying it from Ms Smethurst's mobile phone to a laptop, copying some of that data to a USB drive, deleting the copied data from the laptop, and then removing the USB drive from Ms Smethurst's premises, purportedly pursuant to the Second Warrant and s 3L(1A) of the *Crimes Act*, were not authorised and were unlawful.

168 In addition to certiorari to quash the Second Warrant, an injunction should issue requiring the Commissioner of Police, on a particular date and at a particular time and place, to deliver up the USB drive to Ms Smethurst so as to allow the data to be deleted from it. That order would enable, if appropriate, the Australian Federal Police ("the AFP") to apply for a warrant under s 3E(1) of the *Crimes Act* and, if a valid warrant is obtained within 72 hours preceding the delivery up, that

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217 Reasons of Kiefel CJ, Bell and Keane JJ at [1]-[10].

218 *Hart v Commissioner of Australian Federal Police* (2002) 124 FCR 384 at 406 [87].

order would allow the AFP to access and copy afresh the whole or some part of the data under that valid warrant[219].

Relief

169 Officers of the Commonwealth are subject to the law and must obey the law. Thus, there need to be effective remedies when they exceed their powers. And those remedies must be effective whether or not an individual has some separate private law claim giving rise to other remedies, remedies different in character and purpose from those available when an officer of the Commonwealth acts in excess of power.

Section 75(v) of the Constitution

170 Section 75(v) of the *Constitution* exists to make constitutionally certain that this Court has jurisdiction to restrain officers of the Commonwealth from exceeding federal power[220]. As Gaudron, McHugh, Gummow, Kirby and Hayne JJ said in *Plaintiff S157/2002 v The Commonwealth*, s 75(v) introduces into the *Constitution* "an entrenched minimum provision of judicial review"[221] and "[t]he reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs *or an injunction are sought against an officer of the Commonwealth* is a means of assuring 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*"[222]. The "evident constitutional purpose" of s 75(v) is "that relief should be available to restrain excess of federal power and to enforce performance of federal public duties"[223].

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219 Under s 3E of the *Crimes Act*, an issuing officer of a search warrant must be satisfied that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, evidential material at the premises.

220 See *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 363.

221 (2003) 211 CLR 476 at 513 [103].

222 (2003) 211 CLR 476 at 513-514 [104] (emphasis added). See also *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 172 [87]; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 46 [102]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at 457-458 [87].

223 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 141 [162]. See also *Bank of NSW* (1948) 76 CLR 1 at 363.

171 Prerogative or constitutional writs are sometimes inadequate as general remedies to compel the executive government and administrative bodies to operate within the limits of their powers[224]. Injunction may be required.

172 The idea that certiorari, prohibition and mandamus may provide inadequate relief in matters of public law, and that some other form of relief may also be necessary, is not new[225]. As explained in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*, the role of equity in light of the inadequacies of legal remedies, including prerogative remedies, is "to vindicate the public interest in the maintenance of due administration"[226]. Thus, where, as here, a statute imposes obligations but neither the statute nor prerogative relief provides the means, or adequate means, to enforce obligations or restrain unlawful activity, other forms of relief may also be engaged[227]. The injunction available under s 75(v) of the *Constitution* is one such form of relief.

173 This is also consistent with the proper role of the Court in granting remedies, as explained by Gaudron J in *Enfield City Corporation v Development Assessment Commission*[228]:

> "Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in

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224 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 257 [24]-[25]; *Abebe v The Commonwealth* (1999) 197 CLR 510 at 551 [104]; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157-158 [58].

225 *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 628 [97]. See also *Abebe* (1999) 197 CLR 510 at 551 [104].

226 *Abebe* (1999) 197 CLR 510 at 551 [104], quoting *Bateman's Bay* (1998) 194 CLR 247 at 257 [25].

227 *Truth About Motorways* (2000) 200 CLR 591 at 628 [97].

228 (2000) 199 CLR 135 at 157 [56] (footnote omitted).

accordance with the laws which govern their exercise. The rule of law requires no less."

174 At the time of the drafting of s 75(v), Edmund Barton was of the view that the provision would ensure that "where it is proposed to put into operation against [a person] some process of the law, [that person], as a subject, having the right to have this process of law properly exercised, can obtain an injunction against its wrongful exercise"[229]. This was said to be consistent with "known principles of law"[230], and the accuracy of that view is confirmed both by case law[231] and by commentary[232] in the period leading up to that time. That is, where a statutory body exceeds (or threatens to exceed) its statutory powers, an injunction can issue to restrain the unlawful action. Those materials are instructive when considering s 75(v) of the *Constitution*, though they do not control its meaning[233].

175 In the Convention Debates, Mr Barton also observed that s 75(v) "is applicable to those three special classes of cases in which public officers can be dealt with, and in which it is necessary that they should be dealt with, so that

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229 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1884.

230 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1884.

231 *Attorney-General v Aspinall* (1837) 2 My & Cr 613 [40 ER 773]; *Frewin v Lewis* (1838) 4 My & Cr 249 [41 ER 98]; *Attorney-General v Corporation of Norwich* (1848) 16 Sim 225 [60 ER 860]; *Attorney-General v Andrews* (1850) 2 Mac & G 225 [42 ER 87]; *Oldaker v Hunt* (1854) 19 Beav 485 [52 ER 439]; *Oldaker v Hunt* (1855) 6 De G M & G 376 [43 ER 1279]; *Tinkler v Board of Works for the Wandsworth District* (1858) 2 De G & J 261 [44 ER 989]; *Attorney-General v Great Northern Railway Co* (1860) 1 Dr & Sm 154 [62 ER 337]; *Attorney-General v Bishop of Manchester* (1867) LR 3 Eq 436; *Attorney-General v Mayor, &c, of Newcastle-upon-Tyne and North-Eastern Railway Co* (1889) 23 QBD 492; *Attorney-General v Borough of North Sydney* (1893) 14 LR (NSW) Eq 154. See also Gummow, "The Scope of Section 75(v) of the *Constitution*: Why Injunction but No Certiorari?" (2014) 42 *Federal Law Review* 241 at 247-248.

232 Joyce, *The Doctrines and Principles of the Law of Injunctions* (1877) at 296; Kerr, *A Treatise on the Law and Practice of Injunctions*, 3rd ed (1888) at 568.

233 cf *Aala* (2000) 204 CLR 82 at 92-93 [18]-[23], 134-135 [141]-[142], 141-142 [164]-[165].

the High Court may exercise its function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution"[234].

176 Those three special classes of case are directed at different ends: prohibition goes to prohibit actions in excess of power[235]; mandamus goes to compel performance of a duty[236]; and injunction serves a number of purposes. An injunction may go as an interim or interlocutory restraint or as a permanent order (restraining or mandatory). When it goes as an interim or interlocutory restraint, it goes because there is a threat to act, or an existing action, in excess of power and the plaintiff seeking the relief has standing to complain of the excess[237]. If it is necessary to address it in terms of rights or causes of action, the right is a right to seek relief against an officer of the Commonwealth who threatens to act in excess of power. An interim or interlocutory injunction goes to preserve the status quo[238]. At trial, the plaintiff might show that any exercise of the alleged power would in fact be beyond power and that a permanent injunction should go to restrain future exercise of that power. In other cases, the excess of power relied on might be capable of remedy in some other way and in that kind of case a permanent injunction would not go. But injunction can, and in an appropriate case will, go to prevent future acts in excess of power[239].

177 A mandatory injunction, long recognised by the law, will go where the defendant "is ordered to undo the wrong he has done, and give the [plaintiff]

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234 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1885. On the purposes of s 75(v), see also at 1875, 1878-1879, 1881-1883.

235 *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 429; *Plaintiff S157/2002* (2003) 211 CLR 476 at 483 [5].

236 *Plaintiff S157/2002* (2003) 211 CLR 476 at 483 [5]; *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at 483 [38], 484 [41].

237 See *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493 at 527-528, 542, 547-548; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35-37; *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558.

238 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 218 [16], 233 [64], 296 [245]; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 82 [65].

239 *Cooney v Ku-ring-gai Corporation* (1963) 114 CLR 582 at 605.

complete relief by putting him in the position in which he was before the injury was committed"[240]. It took some time before a mandatory order was framed positively rather than negatively[241] but, as the authorities recognise[242], this was a question of drafting practice, not a matter of substance.

178 That what might be described as a s 75(v) injunction may issue to ensure that officers of the Commonwealth obey the law is not new. In addition to the statements in *Plaintiff S157/2002*[243], in *Federal Commissioner of Taxation v Futuris Corporation Ltd* it was observed that[244]:

> "principles of jurisdictional error control the constitutional writs but do not attend the remedy of injunction including that provided in s 75(v) ... The same is true of the other equitable remedy, the declaratory order. Nevertheless, the *equitable remedies*, which are available at the suit of a party with a sufficient interest, operate to declare invalidity and to *restrain the implementation of invalid exercises of power*."

It is clear that the reference to "equitable remedies" in this context was intended to encompass an injunction pursuant to s 75(v), informed by equitable principles, to "restrain the implementation of invalid exercises of power"[245].

179 The question which arises is: when might an injunction issue where what has been done by an officer of the Commonwealth was done beyond power? The circumstances cannot be prescribed. What can be said is that, first, in considering an injunction issued under s 75(v) as a public law remedy, it would be an error to consider the circumstances in which that injunction may issue to be confined by equitable principles governing private law cases. In particular, it would be an error to proceed on any basis which assumed, as a governing

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240 Seton, *Forms of Judgments and Orders in the High Court of Justice and Court of Appeal*, 7th ed (1912), vol 1 at 518; see also at 649.

241 See, eg, *Earl of Mexborough v Bower* (1843) 7 Beav 127 [49 ER 1011]; Kerr, *A Treatise on the Law and Practice of Injunctions*, 3rd ed (1888) at 48; cf *Jackson v Normanby Brick Co* [1899] 1 Ch 438.

242 *Jackson* [1899] 1 Ch 438; Seton, *Forms of Judgments and Orders in the High Court of Justice and Court of Appeal*, 7th ed (1912), vol 1 at 518.

243 (2003) 211 CLR 476 at 513-514 [104].

244 (2008) 237 CLR 146 at 162 [47]-[48] (emphasis added; footnote omitted).

245 *Futuris* (2008) 237 CLR 146 at 162 [47].

principle, that an injunction will go only to protect a proprietary or other legal right advanced by a plaintiff[246]. As Gaudron J suggested in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, "it may be that, in the case of some public wrongs, an injunction will issue notwithstanding that no equitable or legal right is infringed"[247]. The fact that an injunction as a public law remedy may issue in those circumstances reflects the particular importance of s 75(v) of the *Constitution*, which exists in order to address, among other things, an excess of power by an officer of the Commonwealth[248].

180 Second, "[g]iven 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"[249]. Indeed, in *Abebe v The Commonwealth*, Gaudron J observed that the "jurisdiction under s 75(v) extends to matters in which an injunction is sought against an officer of the Commonwealth and it may be that the grounds upon which injunctive relief can be granted are not as circumscribed as those which determine the availability of prerogative relief"[250]. As her Honour said, in the context of s 75(v), "it may well be that an injunction will lie to prevent an officer of the Commonwealth from giving effect to an administrative decision based on error, even if that error is not jurisdictional error"[251].

181 Section 75(v) was included in the *Constitution* "to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the

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246 *Bateman's Bay* (1998) 194 CLR 247 at 258 [27].

247 (2001) 208 CLR 199 at 232 [60] fn 153, citing *Bateman's Bay* (1998) 194 CLR 247 at 257-260 [24]-[32], 267-268 [49]-[52].

248 *Aala* (2000) 204 CLR 82 at 141 [162]; *Plaintiff S157/2002* (2003) 211 CLR 476 at 513-514 [104].

249 *Plaintiff S157/2002* (2003) 211 CLR 476 at 508 [82] (footnote omitted).

250 (1999) 197 CLR 510 at 551 [103].

251 *Abebe* (1999) 197 CLR 510 at 552 [105]. See also *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 977 [47]; 190 ALR 601 at 615. The scope of an injunction pursuant to s 75(v) has been described by reference to the concept of unlawfulness rather than jurisdictional error: see, eg, *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 204-205, quoted in *Aala* (2000) 204 CLR 82 at 92 [20]; *Plaintiff S157/2002* (2003) 211 CLR 476 at 482-483 [5]; French, "The Interface between Equitable Principles and Public Law", paper delivered at the Society of Trust and Estate Practitioners, 29 October 2010 at 17.

Commonwealth from exceeding Federal power"[252]. Reference to injunction in s 75(v) is part of the constitutional means for achieving that purpose. The reference to injunction also makes it constitutionally certain that there is a jurisdiction to remedy the consequences that follow for others from officers of the Commonwealth having exceeded federal power. It is the excess of power (that an officer of the Commonwealth has acted or threatens to act in excess of power), not any separately identified right, that warrants the grant of an injunction to remedy, so far as can be, the consequences brought about by that excess. That is, the availability of injunction, in cases of excess of federal power, is not confined by reference to practices or principles developed by the English courts of equity in relation to the grant of injunction. Indeed, "[a]ny automatic transposition of such principles runs the risk of denying the evident constitutional purpose that relief should be available to restrain excess of federal power and to enforce performance of federal public duties"[253].

182 As was explained in *Re Refugee Review Tribunal; Ex parte Aala*, the grounds for the issue of the constitutional writs of mandamus and prohibition were not frozen according to the practices that prevailed in 1900[254]. Likewise, the grounds for the issue of an injunction to remedy the consequences of acts done in excess of federal power were not frozen according to the practices that prevailed in 1900. Indeed, the constitutional setting in which s 75(v) appears makes it impossible to confine the availability of the remedies with which it deals to the practices adopted in relation to those remedies by other courts in other contexts, whether at the time of Federation or since[255]. Other courts developed the principles and practices they did in circumstances very different from those with which s 75(v) deals – cases of excess of federal power. Rather, both the constitutional purpose of s 75(v) and the provisions of Pt IV of the *Judiciary Act 1903* (Cth) (especially ss 32 and 33 of the *Judiciary Act*[256]) point to this Court, in its original jurisdiction, having the power (and the duty) to grant all such remedies, in respect of a claim that federal power has been exceeded, as will not only prevent excess of federal power but will also, when federal power has been exceeded, restore the

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252 *Bank of NSW* (1948) 76 CLR 1 at 363, quoted in *Aala* (2000) 204 CLR 82 at 138 [155]. See also *Plaintiff S157/2002* (2003) 211 CLR 476 at 482-483 [5], 511-512 [98], 513-514 [103]-[104]; *Graham* (2017) 263 CLR 1 at 25 [42], 27 [48].

253 *Aala* (2000) 204 CLR 82 at 141 [162].

254 (2000) 204 CLR 82 at 141 [164].

255 *Aala* (2000) 204 CLR 82 at 141 [164].

256 See also *Edwards v Santos Ltd* (2011) 242 CLR 421.

parties affected, so far as possible, to the position in which they would have been had power not been exceeded[257].

183 Thus, the search for some freestanding right or entitlement in this case to have the taken data destroyed is misconceived. Some separate or freestanding right or cause of action or entitlement is not required. Injunction goes (and has always gone) to undo the wrong that has been done and to give the plaintiff complete relief. Indeed, the search for a freestanding right makes an assumption which was rejected in *Aala* – that the availability of s 75(v) remedies is tied to practices or procedures that existed in some other (unspecified) courts before Federation[258]. It does that because it seems to seek some cause of action beyond the circumstances with which s 75(v) deals – excess of federal power. What the *Bank of NSW v The Commonwealth*[259], *Aala*, *Plaintiff S157/2002* and *Graham v Minister for Immigration and Border Protection*[260] line of authority establishes is that s 75(v) is to be understood as achieving a particular constitutional purpose and that the *availability* and *grant* of the remedies referred to in s 75(v) are moulded by that purpose – prevention of, and remedy for, officers of the Commonwealth exceeding power or failing to perform a duty.

Injunction in this case

184 In the circumstances of this case, the executing officer, an officer of the Commonwealth[261], acted in excess of the power to enter, search and seize in s 3F of the *Crimes Act*, and in excess of the separate power of "taking" in s 3L of the *Crimes Act*. Certiorari issues to quash the Second Warrant[262]. But neither the *Crimes Act* nor the issue of certiorari addresses the consequences of the unlawful conduct of the executing officer.

185 It is the excess of power that founds the grant of injunction not to use what has been taken (and to destroy the copy of the data that was taken). No further or

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257 *Bank of NSW* (1948) 76 CLR 1 at 363, quoted in *Aala* (2000) 204 CLR 82 at 138 [155]. See also *Plaintiff S157/2002* (2003) 211 CLR 476 at 482-483 [5], 511-512 [98], 513-514 [103]-[104]; *Graham* (2017) 263 CLR 1 at 25 [42], 27 [48].

258 *Aala* (2000) 204 CLR 82 at 141 [164].

259 (1948) 76 CLR 1.

260 (2017) 263 CLR 1.

261 See, eg, *Coward v Allen* (1984) 52 ALR 320 at 325.

262 Reasons of Kiefel CJ, Bell and Keane JJ at [45].

additional right of action or equity need be shown. The fact that there is no ongoing trespass does not preclude the grant of an injunction. The executing officer acted in excess of power. That the executing officer did not act knowing that what was done was beyond power is irrelevant. And it cannot be assumed that what was seized reveals criminality when the warrant under which it was taken was invalid.

186 Ms Smethurst has standing to complain about the excess of power. She has been specially harmed by the conduct done in excess of power. Accordingly, Ms Smethurst is to be put in the position she was in before she was subjected to that unlawful exercise of power. To look for some additional right of action is to ignore the constitutional conferral of jurisdiction on the Court to remedy excesses of power not only by the grant of the constitutional writs but also by injunction – injunction to restrain *and* mandatory injunction.

187 Thus, an injunction under s 75(v) of the *Constitution*, in aid of certiorari, should issue against the Commissioner of Police[263] to restore Ms Smethurst to the position she would have been in but for the officer of the Commonwealth acting unlawfully, in excess of power. The form of the injunction under s 75(v) of the *Constitution* should require the Commissioner of Police on a particular date and at a particular time and place to deliver up to Ms Smethurst the USB drive containing the data copied from Ms Smethurst's mobile phone[264], so as to allow that data to be deleted.

188 The form of the order is important. It does not prevent further lawful steps being taken by the AFP in an investigation[265]. A mandatory injunction in those terms would enable, if appropriate, the AFP to apply for a warrant under s 3E(1) of the *Crimes Act* and, if validly obtained, to access and copy the whole or some part of the data under a valid warrant able to be issued within 72 hours of the delivery up of the USB drive. Put in different terms, the AFP could seek a valid warrant to recover what the injunction would bind the Commissioner of Police to hand over on the designated date, at the designated time and place.

189 The form of the order has legal and practical consequences: it permits the AFP to determine whether it will apply for a further warrant and, of course, that further warrant may well permit the search, seizure and taking of material that is

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263 No distinction was drawn between the Commissioner of Police and the executing officer by the parties in this proceeding and there is no reason to doubt that the Commissioner would comply with an injunction.

264 cf the orders contemplated in *Hart* (2002) 124 FCR 384 at 406 [88].

265 See *Australian Federal Police Act 1979* (Cth), s 8.

different from, or only part of, what was the subject of the unlawful search, seizure and taking which has already occurred in this case.

190 The order does no more than require the AFP to comply with the law. It requires that, in order for the AFP to enter, search and seize and to access and copy data from Ms Smethurst's mobile phone, there be a valid warrant and that the warrant be executed according to the law. In the present case, the drafting of the search warrant was "the direct, or substantial indirect, source of all of the issues and problems"[266]. As the Full Court of the Federal Court of Australia said in *Caratti v Commissioner of the Australian Federal Police*, "[w]hen proper regard is had to the importance of the efficient, effective and fair obtaining and execution of search warrants, and the delay, fragmentation of the criminal investigation process, cost, time of the parties and the use of scarce court time when challenged, the obtaining of proper *independent* legal advice ... as to the terms of the search warrants sought to be obtained", including "from experienced solicitors with[in] the Office of the Commonwealth Director of Public Prosecutions", would improve both the process and the outcome[267].

Discretion

191 Discretionary considerations are still relevant to considering whether there is any reason *not* to grant an injunction under s 75(v) of the *Constitution*. It is neither necessary nor appropriate to prescribe what those discretionary considerations might be in any future case. It will always be for the parties in a particular case to identify the discretionary considerations for and against the making of an order when the question arises. The identification of relevant considerations must be developed on a case-by-case basis.

192 In the present case, there was no suggestion that the plaintiffs delayed in seeking relief. The form and timing of an order requiring delivery up of material, but which leaves open the possibility that the material will be seized or taken under a new and valid warrant, are not inconsistent with the *Bunning v Cross*[268] line of

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266 *Caratti v Commissioner of the Australian Federal Police* (2017) 257 FCR 166 at 224 [169]; see also at 222-225 [164]-[172].

267 (2017) 257 FCR 166 at 225 [171]-[172] (emphasis in original).

268 (1978) 141 CLR 54.

authority[269] or s 138 of the *Evidence Act 1995* (Cth)[270]. On the proper execution of a valid warrant, the use in a prosecution of anything lawfully seized or taken by the AFP falls to be considered on the grounds of relevance and admissibility in those proceedings. Moreover, the form and timing of such an order address any concern that return of the data on the USB drive would prevent disclosure of criminality[271] and avoid the need to ascertain whether charges have been or are likely to be laid for the purposes of *Bunning v Cross*[272].

Caratti line of authority

193 A line of authority[273] developed in the intermediate courts sought to address what could permissibly be done with unlawfully seized material. One element of the approach set out in those authorities was that where a person's material had been unlawfully seized, that person had a "prima facie" right to have the seized material returned to them[274]. The second element was that the court had a "discretion" whether or not to return the unlawfully obtained material[275], or to instead allow the police to retain the unlawfully obtained material[276]. The second

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269 See, eg, *Miller v Miller* (1978) 141 CLR 269; *Cleland v The Queen* (1982) 151 CLR 1; *Foster v The Queen* (1993) 67 ALJR 550; 113 ALR 1; *R v Swaffield* (1998) 192 CLR 159; *Nicholas v The Queen* (1998) 193 CLR 173.

270 Each of *Bunning v Cross* and s 138 of the *Evidence Act* deals with the admission of evidence improperly or illegally obtained.

271 *Sankey v Whitlam* (1978) 142 CLR 1 at 25-26; *A v Hayden* (1984) 156 CLR 532 at 544-545.

272 (1978) 141 CLR 54.

273 *Puglisi v Australian Fisheries Management Authority* (1997) 148 ALR 393; *Cassaniti v Croucher* (1997) 37 ATR 269; *Wright v Queensland Police Service* [2002] 2 Qd R 667; *Caratti v Commissioner of the Australian Federal Police [No 2]* [2016] FCA 1132; *Caratti v Commissioner of the Australian Federal Police* (2017) 257 FCR 166.

274 *Puglisi* (1997) 148 ALR 393 at 403; *Cassaniti* (1997) 37 ATR 269 at 280; *Caratti [No 2]* [2016] FCA 1132 at [468].

275 *Wright* [2002] 2 Qd R 667 at 683-684 [57]; *Caratti [No 2]* [2016] FCA 1132 at [456]-[457].

276 *Cassaniti* (1997) 37 ATR 269 at 280; *Caratti [No 2]* [2016] FCA 1132 at [456], [475].

element was premised on the potential for the unlawfully obtained material to be used as evidence in a criminal prosecution, subject to its admissibility in view of *Bunning v Cross*[277] and s 138 of the *Evidence Act*[278].

194 The prima facie right and the discretion were treated as related: they were not always clearly distinguished and were often collectively referred to as "the discretion". The prima facie right of a person to have seized material returned to them was said to support the return of the unlawfully seized material, but that prima facie right had to be balanced against "the significant public interest in the administration of, and non-interference with, the investigation and prosecution of criminal offences and the administration of justice"[279]. Despite the language of a "prima facie right" on one hand and a discretion not to return on the other, the principle did not operate as a presumption in favour of the return of unlawfully seized items. Rather, it entailed a balancing exercise.

195 Indeed, in *Caratti v Commissioner of the Australian Federal Police [No 2]*, it was said that the prima facie right and the discretion "arise[] in any case where it is found that items were illegally seized"[280]. That assumption was most clearly expressed in *Caratti [No 2]*, when Wigney J noted that "Mr Caratti did not seek writs of mandamus in relation to specific items ... which would have had the effect of requiring the Commissioner to return any specific items"[281] and that "[t]he Commissioner did not appear to take issue with the fact that Mr Caratti's application did not seek any specific orders, or the issue of any writs, directed at any specific items"[282]. That line of authority is wrong and should not be followed.

Trespass

196 I have dealt already with the availability of an injunction under s 75(v) of the *Constitution*. However, if it were necessary in this case for Ms Smethurst to identify an infringement of a legal right or cause of action (other than that an officer

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277 (1978) 141 CLR 54. See also *Miller* (1978) 141 CLR 269; *Cleland* (1982) 151 CLR 1; *Foster* (1993) 67 ALJR 550; 113 ALR 1; *Swaffield* (1998) 192 CLR 159; *Nicholas* (1998) 193 CLR 173.

278 *Puglisi* (1997) 148 ALR 393 at 405; *Caratti [No 2]* [2016] FCA 1132 at [478].

279 *Caratti [No 2]* [2016] FCA 1132 at [468].

280 [2016] FCA 1132 at [456].

281 [2016] FCA 1132 at [439].

282 [2016] FCA 1132 at [440].

of the Commonwealth exceeded their power) as a basis for an injunction to issue in equity, Ms Smethurst would have such a right. It has long been recognised that invasions of private property may only take place with positive legal authority[283]. The right in aid of which equity would act is the right not to suffer a trespass. It is not necessary to identify a further right or a *continuing* trespass[284] for equity to intervene in aid of that right not to suffer a trespass, if equity is intervening, *against the trespasser*[285], in order to address harm flowing from the trespass[286]. That is the case here, where copying data from Ms Smethurst's mobile phone and taking the copy of the data were only possible due to the trespass to her goods by the executing officer. Moreover, damages would not restore Ms Smethurst to the position she was in prior to the unlawful exercise of power because the AFP would continue to have a copy of data obtained from her mobile phone.

197 Since damages are not an adequate remedy, equity would seek to restore the position of Ms Smethurst to that prior to the trespass, which extends to a consideration of the consequences of the trespass. In the current age, where information may be as valuable to individuals as property, the law cannot overlook the obtaining of data as a consequence of trespass that falls within the damage suffered as part of the trespass. It is not necessary to establish rights of property in the data itself to reach that conclusion. Nor, in circumstances where the point was not argued, is it necessary to consider whether the law should be developed in respect of privacy or confidentiality[287].

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283 *Entick v Carrington* (1765) 2 Wils KB 275 [95 ER 807]; *Coco v The Queen* (1994) 179 CLR 427.

284 cf Kerr, *A Treatise on the Law and Practice of Injunctions*, 6th ed (1927) at 94-95.

285 cf *Lenah* (2001) 208 CLR 199 at 229-230 [50]-[52], 235 [72], 247-248 [104].

286 *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 31-32 [33]. See, eg, *Goodson v Richardson* (1874) 9 Ch App 221; *Woodhouse v Newry Navigation Co* [1898] 1 IR 161; Seton, *Forms of Judgments and Orders in the High Court of Justice and Court of Appeal*, 7th ed (1912), vol 1 at 518; *Council of the Shire of Hornsby v Danglade* (1928) 29 SR (NSW) 118; *Redland Bricks Ltd v Morris* [1970] AC 652 at 665-666.

287 cf *Lenah* (2001) 208 CLR 199 at 257-258 [129]-[132], 277-279 [185]-[191].

Constitutional validity

198 For the reasons given by Kiefel CJ, Bell and Keane JJ[288], there is no need to consider the further question as to the constitutional validity of s 79(3) of the *Crimes Act*.

Orders

199 For those reasons, the questions of law stated for the opinion of the Full Court should be answered as follows:

(1) (a) Yes.

(b) Yes.

(c) Does not arise.

(2) Unnecessary to answer.

(3) Unnecessary to answer.

(4) There should be an order:

(a) for certiorari quashing the search warrant issued on 3 June 2019; and

(b) that on a date, at a time and at a place agreed between the parties (or, in default of agreement, on a date, at a time and at a place fixed by a single Justice), the Commissioner of Police deliver up to Ms Smethurst the USB drive containing the data copied from Ms Smethurst's mobile phone on 4 June 2019 so as to allow the data to be deleted from the USB drive, and delete any other copies of that information held by, or within the control of, the Australian Federal Police.

(5) The first defendant should pay the plaintiffs' costs of the special case.

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288 Reasons of Kiefel CJ, Bell and Keane JJ at [105]-[107].

EDELMAN J.

Introduction

200 On 4 June 2019, the Australian Federal Police searched the residence of Ms Smethurst, a journalist who is employed by Nationwide News Pty Ltd, the publisher of the *Sunday Telegraph*. The police held a search warrant that had been issued by a Magistrate the previous day ("the second warrant"). On any view, the warrant was poorly expressed. However, it was clear that it relied upon acts by Ms Smethurst and the *Sunday Telegraph* on 29 April 2018 that were contrary to "section 79(3) of the *Crimes Act 1914*, Official Secrets".

201 In the belief that the second warrant was valid, the Australian Federal Police took possession of Ms Smethurst's mobile phone. They demanded, and obtained, her passcode to unlock access to the mobile phone. After they copied the data from her mobile phone to a laptop, the executing officer reviewed documents returned from keyword searches of the data obtained, and selected the documents that he thought fell within the terms of the second warrant. Those documents were copied onto a Universal Serial Bus (USB) storage device. The USB storage device was kept by the Australian Federal Police and the mobile phone data which had been copied to the laptop was deleted from the laptop.

202 The central issue in this special case is a challenge by Ms Smethurst and Nationwide News to the validity of the second warrant. The second warrant is challenged on the grounds: that it misstates the substance of s 79(3) of the *Crimes Act 1914* (Cth), as that provision stood on 29 April 2018 (question 1(a)); that it does not state the offence to which it relates with sufficient precision (question 1(b)); and that s 79(3) of the *Crimes Act*, as it stood on 29 April 2018, was invalid on the ground that it infringed the implied freedom of political communication (question 1(c)). If the second warrant is invalid there is also a dispute about the consequential relief that should be granted, in particular whether this Court should issue a mandatory injunction requiring the return to Ms Smethurst of the information obtained by the Australian Federal Police (question 4).

203 If question 1(a) is read literally, it appears directed only to the question of whether the content of the second warrant, when properly interpreted, correctly states the substance of s 79(3) of the *Crimes Act*. In apparent contrast, question 1(b), read literally, appears to be directed only to whether the second warrant states the substance of s 79(3) with sufficient precision. However, the plaintiffs, correctly, did not suggest that any error in the statement of an offence would invalidate a warrant. Their submissions concerning question 1(a) were essentially part of question 1(b): the warrant was expressed with such a lack of clarity that it was invalid. In order to reflect accurately the manner in which the special case was presented, and the legal issues involved, it is appropriate to reframe questions 1(a) and 1(b) as the following single question: is the second

warrant invalid due to a failure to state the offence to which it relates with sufficient clarity?

204 The second warrant was not invalid merely because it misstated the terms of the offence in s 79(3) of the *Crimes Act*. A misstatement will only cause a warrant to be invalid if it has the effect that the warrant does not have the minimum required degree of content. However, the effect of the misstatement in the second warrant, together with the lack of clarity in its expression, was that the second warrant lacked the clarity required to fulfil its basic purposes of adequately informing Ms Smethurst why the search was being conducted and providing the executing officer and those assisting in the execution of the warrant with reasonable guidance to decide which things came within the scope of the warrant. It was invalid for that reason.

205 The remaining question is what relief, if any, Ms Smethurst is entitled to as a consequence of the finding that the second warrant was invalid. The usual basis for the grant of an injunction is to respond to threatened or continuing wrongful conduct. One submission supporting such a grant in this case might have been that the law should recognise a new or developed wrong that gives direct effect to a person's ability to maintain their privacy. But although senior counsel for the plaintiffs, a journalist and a media organisation, relied upon Ms Smethurst's privacy and the private nature of the information on her mobile phone, the plaintiffs eschewed any submission that the law of wrongdoing should be so developed. The plaintiffs relied instead upon privacy in an indirect manner. They argued that the mandatory injunction was required in order to reverse the consequential effect on Ms Smethurst's privacy of the tort of trespass to chattels that was committed by the Australian Federal Police. That submission should be accepted.

Requirements for validity of a warrant

206 Section 3E(5) of the *Crimes Act* requires a warrant to state, together with certain procedural details: the offence to which the warrant relates; a description of the premises to which the warrant relates or the name or description of the person to whom it relates; and the kinds of evidential material that are to be searched for under the warrant. These are minimum requirements imposed "to protect the individual from arbitrary invasions of ... privacy and property"[289]. They are rules that require a minimum level of clarity as well as a minimum level of content for the purposes of the warrant to be fulfilled.

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289 *George v Rockett* (1990) 170 CLR 104 at 110.

207 In light of the purpose of s 3E(5), a warrant must have both sufficient content and sufficient clarity as to (i) the offence(s), (ii) the place or person, and (iii) the kinds of material sought, in order to "ensur[e] the proper identification of the object of the search"[290]. Necessarily, since a search warrant will often precede a charge, the minimum degree of content is less than the particulars that would be required in an indictment. Nevertheless, it has been repeatedly stated for decades that the detail in the warrant must be of sufficient content and clarity to give reasonable guidance to the executing officer and those assisting in the execution of the warrant to decide if the things to be seized are within the scope of the warrant[291] and to enable the person whose premises are subjected to the search to understand the basis for the search[292].

208 A determination of the content of a warrant is a matter of interpretation. The basic principles for interpretation of a warrant do not differ from those for interpretation of a statute, a written contract or a trust deed. Nor do they differ fundamentally from the manner in which a person interprets the words of a conversation or in a newspaper. In each case, the reader interprets from the words a meaning to be ascribed to the actual or notional speaker. The interpretative principles are essentially the tools of communicative language.

209 When the statement in a warrant is interpreted, in some circumstances it will have sufficient content even if it provides only the section and subject matter of the offence. For instance, in *Brewer v Castles*[293], the statement of one relevant offence was "[s]ection 86(1)(e) of the *Crimes Act* 1914 (Cth), to wit, conspiracy to defraud the Commonwealth". That statement was described by Pincus J in

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290 *New South Wales v Corbett* (2007) 230 CLR 606 at 628 [88].

291 *Coward v Allen* (1984) 52 ALR 320 at 332; *Quartermaine v Netto* (unreported, Federal Court of Australia, 14 December 1984) at 7-8; *Beneficial Finance Corporation v Commissioner of Australian Federal Police* (1991) 31 FCR 523 at 539; *R v Gassy [No 3]* (2005) 93 SASR 454 at 488 [100]; *Caratti v Commissioner of the Australian Federal Police* (2017) 257 FCR 166 at 180 [34], 182 [37].

292 *R v Tillett; Ex parte Newton* (1969) 14 FLR 101 at 113; *Australian Broadcasting Corporation v Cloran* (1984) 4 FCR 151 at 153; *Quartermaine v Netto* (unreported, Federal Court of Australia, 14 December 1984) at 6; *Parker v Churchill* (1986) 9 FCR 334 at 348; *Beneficial Finance Corporation v Commissioner of Australian Federal Police* (1991) 31 FCR 523 at 539, 542-543; *R v Gassy [No 3]* (2005) 93 SASR 454 at 488 [100]; *New South Wales v Corbett* (2007) 230 CLR 606 at 612 [22]; *Caratti v Commissioner of the Australian Federal Police* (2017) 257 FCR 166 at 180 [34], 181 [37].

293 (1984) 1 FCR 55 at 56.

Beneficial Finance Corporation v Commissioner of Australian Federal Police[294] as a "good example" of one of the wide statements of the nature of an offence in a warrant which have "survived attack". Indeed, provided that the correct offence can be identified as a matter of interpretation, a description can be valid even if an incorrect section number in the relevant statute is specified[295].

210 In other circumstances, however, such as where the terms of an offence are expressed at a high level of generality and capable of application to a wide variety of circumstances, the mere reference to the section and subject matter of the offence will not be sufficient[296]. For instance, in a search warrant for a many-storied building of a multinational company it would not be sufficient to state only that the offence is a contravention of the open-textured s 184 of the *Corporations Act 2001* (Cth), "Good faith, use of position and use of information".

211 Separate from a minimum requirement of content is the requirement of sufficient clarity upon which the plaintiffs relied. That requirement is not satisfied merely because the best interpretation of a warrant fulfils the content requirements. That interpretation must be able to be reached without considerable difficulty by the owner or occupier of the premises, and by those executing the warrant.

The validity of the second warrant

212 Several days before the issue of the second warrant a first warrant had been issued accompanied by an order under s 3LA of the *Crimes Act* ("the s 3LA order"). The s 3LA order required Ms Smethurst to give assistance to a constable to access, copy or convert data on a computer or data storage device. The first warrant was never executed because the executing officer had expressed concern that the first warrant might not permit a search of Ms Smethurst's vehicle at a location other than her residence. Since the search of Ms Smethurst's premises was undertaken upon the purported authority only of the second warrant it is unnecessary to consider the validity of the first warrant or the s 3LA order. Neither the first warrant, nor the s 3LA order issued in the Magistrate's discretion in respect of it, can rectify any deficiency in the later, invalid, second warrant.

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294 (1991) 31 FCR 523 at 525.

295 *Parker v Churchill* (1986) 9 FCR 334 at 340; *R v Gassy [No 3]* (2005) 93 SASR 454 at 487 [96].

296 *New South Wales v Corbett* (2007) 230 CLR 606 at 631-632 [103]. See also *Beneficial Finance Corporation v Commissioner of Australian Federal Police* (1991) 31 FCR 523 at 543.

213 As it is the terms of the second warrant which are said to give rise to its invalidity, the question of validity is to be determined as at the time of the issue of the second warrant[297]. The second warrant is in a common form, containing three overlapping but cumulatively necessary conditions. The three conditions operate in a manner which may be expressed visually as a Venn diagram[298], permitting various actions to be taken only when all three conditions are met[299]. The permitted actions include "to copy any data to which access has been obtained".

214 The first condition concerns "the kinds of evidential material that are to be searched for under the warrant"[300]. It is extremely broadly stated in the second warrant and includes: "[c]orrespondence – internal and external"; "[m]inutes"; "[r]eports"; "[s]tory pitch"; "[w]ebsite content"; "[e]mails and other forms of electronic messaging"; "USB's"; and "[a]ssessments". It also includes a particular document described as "[c]lassified Australian Signals Directorate document/s titled 'ASD AS A STATUTORY AGENCY – FURTHER AMENDMENTS TO THE INTELLIGENCE SERVICES ACT 2001'".

215 The second condition concerns the subject matter to which the kinds of evidential material specified in the first condition must relate. It lists eight categories: "Annika Claire Smethurst, born 6 September 1987"; "Cameron Jon Gill, born 24 July 1979"; "Sunday Telegraph"; "News Corp"; "Australian Signals Directorate"; "Department of Home Affairs"; "Department of Defence"; and a link to a webpage: "https://www.dailytelegraph.com.au/news/nsw/spying-shock-shades-of-big-brother-as-cybersecurity-vision-comes-to-light/news-story/bc02f35f23fa104b139160906f2ae709?memtype=anonymous".

216 The third condition reads as follows:

> "And as to which there are reasonable grounds for suspecting that they will afford evidence as to the commission of the following indictable offence(s) against the laws of the Commonwealth:
>
> On the 29 April 2018, Annika Smethurst and the Sunday Telegraph communicated a document or article to a person, that was not in the interest of the Commonwealth, and permitted that person to have access to the

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297 *Williams v Keelty* (2001) 111 FCR 175 at 211 [157].

298 See *Caratti v Commissioner of the Australian Federal Police* (2017) 257 FCR 166 at 191 [62].

299 A ∩ B ∩ C.

300 *Crimes Act 1914* (Cth), s 3E(5)(c).

document, contrary to section 79(3) of the *Crimes Act 1914*, Official Secrets. This offence was punishable by 2 years imprisonment."

217 Section 79(3), as it existed at the time of the second warrant, was a highly open-textured provision. If the warrant had merely referred to s 79(3) alongside the first condition and the name of the *Sunday Telegraph* then it would have effectively been an instruction to the executing officer, and information to Ms Smethurst, that the premises were to be searched for the numerous materials including notes, diaries, correspondence, and similar things. That would be close to a general warrant, which has long been held invalid[301] as being "totally subversive of the liberty of the subject"[302]. However, when the description of the offence in the third condition is read in light of the second condition, the best interpretation of the second warrant, with considerable attention and thought, is that it directs the search to materials related to the article on the webpage described in the second condition.

218 An important matter in interpreting the content of the third condition is the reference in the third condition to s 79(3) of the *Crimes Act*. Any reasonable reader of the second warrant would understand the reference to s 79(3) to be a statement of the relevant offence, with the first and second conditions, and the preceding words of the third condition, providing particular content to the open-textured language of that offence. At the time of the alleged commission of the offence, the offence in s 79(3) had two limbs. The first limb, relevantly, was the communication of a prescribed article to a person. The second limb was permitting a person to have access to a prescribed article, where there are a multitude of ways in which an article could be a prescribed article[303]. Section 79(3) recognised two exceptions that applied to each limb. Those exceptions were: (a) "a person to whom he or she is authorized to communicate it"; and (b) "a person to whom it is, in the interest of the Commonwealth or a part of the Queen's dominions, his or her duty to communicate it".

219 The words of the third condition, although somewhat garbled, are therefore best interpreted as describing both limbs of the offence in s 79(3). The reference to communicating a "document or article" to a person is best interpreted as a reference to the first limb of s 79(3) and the reference to permitting "that person" to have access to the document is best understood as a reference to the second limb.

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301 See *Money v Leach* (1765) 1 Black W 555 [96 ER 320]; *Entick v Carrington* (1765) 19 St Tr 1029.

302 *Wilkes v Wood* (1763) Lofft 1 at 18 [98 ER 489 at 498].

303 *Crimes Act*, s 79(1) (as at 29 April 2018).

The words "not in the interest of the Commonwealth" are best interpreted as excluding the second exception.

220 If the cumulative requirements of the three conditions had been expressed in plain English and with a clear statement in the second warrant of "the offence to which the warrant relates" as required by s 3E(5)(a) of the *Crimes Act*, then the third condition could have read in terms as follows:

> "Any thing satisfying the first two conditions, which provides reasonable grounds for suspecting that it will afford evidence as to the commission of the following indictable offence against the laws of the Commonwealth, namely:
>
> An offence committed on 29 April 2018 by Annika Smethurst and the Sunday Telegraph, which consisted of the following conduct concerning information contained in the article in the webpage set out in condition two above: (i) communicating prescribed information to the public; and (ii) providing the public with access to prescribed information, in a manner that was contrary to section 79(3) of the *Crimes Act 1914*, Official Secrets."

221 When the second warrant is interpreted with this meaning, as the Solicitor-General submitted it should be, it is not defective due to insufficiency of content as to offence, premises or person, or the kinds of evidentiary material for which the search is conducted. Ultimately, however, the plaintiffs' submission about invalidity did not concern the content of the second warrant. The plaintiffs' argument in questions 1(a) and 1(b) of the special case was essentially that the second warrant was invalid due to a lack of sufficient clarity.

222 The third condition presents considerable difficulty for clarity of interpretation for three reasons. First, it is not clear that the prescribed document said to have been communicated is contained on the webpage described in the second condition. The third condition does not refer to the webpage at all, still less as containing the relevant "document or article" that is communicated. Indeed, the third condition initially refers to the communication of a "document or article" and then refers to permitting access to "the document". In other words, it initially appears to express a concern with a particular document rather than with the "information" in a document that is alleged to have been communicated by the article on the webpage.

223 Secondly, the third condition refers to the communication of the document or article to "a person", singular, and permitting "that person", singular, to have access to the document. This suggests, contrary to the proper interpretation of the third condition, that the person to whom the relevant communication was made is not the general public (the relevant communication being made by means of the newspaper article contained on the webpage).

224 Thirdly, the third condition contains numerous omissions and misstatements. It omits to say that the information communicated was prescribed information, whether in relation to a person or persons, or the basis upon which it was prescribed. It omits reference to the first exception to the offence in s 79(3). It misstates the second exception in s 79(3). And it assimilates the misstated second exception with the description of the offence.

225 The requirement of clarity is not satisfied simply because a court, after careful consideration following the benefit of lengthy written and oral submissions by counsel who have themselves carefully considered the meaning of the third condition, is able to interpret the warrant in a way that provides sufficient content to the statement of the offence. A statement of an offence for the purposes of s 3E must have sufficient clarity that, without careful thought and consideration, it will inform the owner or occupier of a premises of the basis for the search and will reveal the nature and boundaries of the search to those executing the warrant. For the three reasons above, the second warrant did not achieve this minimum requirement. It was invalid. Questions 1(a) and 1(b) of the special case, reframed as a single question, ask whether the second warrant is invalid on the ground that it does not state the offence to which it relates with sufficient clarity. The answer is "Yes".

The jurisdiction and power to order an injunction

226 Question 4 of the special case asks what relief, if any, should issue if the second warrant was invalid. The relief sought by the plaintiffs includes an injunction compelling the Commissioner of Police to deliver up to the plaintiffs all material seized or otherwise obtained pursuant to the warrant or during its execution, together with all copies of such material.

227 This matter falls within the original jurisdiction of this Court as a matter arising under s 76(i) of the *Constitution* and s 30(a) of the *Judiciary Act 1903* (Cth), and also because remedies of writs of prohibition or mandamus and injunction are sought against an officer of the Commonwealth, taking the matter within s 75(v) of the *Constitution*. Within this Court's jurisdiction over the entirety of the matter it has powers including those under s 32 of the *Judiciary Act* to order an injunction as an equitable remedy "to protect a legal right"[304]. That section "concentrated" the "aggregation of power" by English courts which included the expanded principles concerning the availability of equitable injunctions provided that "pecuniary compensation would be inadequate protection"[305].

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304 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 550. See also at 537-538.

305 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 550.

228 Subsequent to the first hearing of this matter, this Court sought submissions from the parties on issues including whether the principles concerning the exercise of power to order an injunction are different if the source of jurisdiction is s 75(v) of the *Constitution*. The plaintiffs submitted that the constitutional authority to order the injunction was unique and shaped by its proximity to writs of mandamus and prohibition so that the injunction could extend generally to instances of "reversing consequences", which was said to be the focus of a writ of prohibition. The plaintiffs walked a tightrope in making this submission because they also claimed that the proximity of the authority for the injunction remedy to the authority to order remedies of writs of mandamus and prohibition in s 75(v) did not constrain the content of the injunction to instances of jurisdictional error. The plaintiffs' submissions should not be accepted.

229 Although s 75(iii) creates original jurisdiction in all matters in which the Commonwealth is a party, s 75(v) was designed to ensure, beyond the jurisdiction created by s 75(iii)[306], the existence of original jurisdiction to respond to the exercise, or likely exercise, of ultra vires acts by officers of the Commonwealth or to respond to an officer of the Commonwealth acting wrongfully in the performance of a duty[307]. It assumed the existence of powers rather than creating new, undefined, powers against public officers governed by a new set of principles which would operate in parallel with equitable principles. Mr Symon, who described the provision as a "safeguard" at the 1898 Melbourne Convention[308], said of s 75(v) that "[t]he provision merely throws within the ambit of the jurisdiction of the federal tribunal the right to determine the question"[309]. Mr Barton, who also insisted that the provision "does not confer any right"[310], later added that the provision "does not give anybody a right to pursue in any way an

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306 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1884.

307 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1879, 1881-1885 and see especially at 1875-1876, 1884. See also *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 363.

308 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1877.

309 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1878.

310 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1877.

officer of the Commonwealth, except such right as arises out of the known principles of law"[311].

230 Unsurprisingly, it was common ground between the parties that s 75(v) confers jurisdiction, or authority, on this Court in matters in which an injunction is sought against an officer of the Commonwealth. It has been held that this "irremovable jurisdiction" cannot be abolished by legislation[312]. In a very limited sense, therefore, s 75(v) is also a guarantee of a source of power because ensuring the existence of jurisdiction, or authority, has been held to prevent the power within that jurisdiction being diminished to such a point as practically to amount to abolition of the jurisdiction[313]. But this does not change the nature of the power being exercised.

231 Although there was, unsurprisingly, no direct suggestion in this case to the effect that s 75(v) confers a separate, unique, and substantive power to order an injunction, the plaintiffs came close to such an assumption by their submission that an injunction authorised by s 75(v) might operate upon some unique, undefined principles which permit orders to compel the general reversal of consequences of wrongdoing. It is usually the case that this Court will not embark upon consideration of constitutional matters that are not necessary for its decision. But it suffices here to say that the submission that s 75(v) involves a conferral of a separate source of substantive power, replacing the principles of what is "right or just" that underlie equitable injunctions with a vague and undefined content that has never been enunciated since Federation, is a very controversial proposition. Such a proposition has never been accepted by this Court. In the context of the writs of prohibition and mandamus in s 75(v), one member of this Court has rejected the suggestion that s 75(v) involves a positive conferral of a new

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311 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1883-1884. See also Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 784: "What is given by this section is jurisdiction merely, not a right of action."

312 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513-514 [103]-[104].

313 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 25 [42]-[43], 27 [48].

constitutional power[314] and others have suggested that s 75(v) "may not add to the jurisdiction conferred by s 75(iii)"[315].

232 The proposition that s 75(v) creates a new and independent source of power is contrary to the concept and essential meaning of "injunction" in s 75(v), which was an order requiring or prohibiting action, based on the developed and developing principles of what is "right, or just"[316]. It was not a mandate for a court to disregard any or all principles developed in favour of novel, and potentially idiosyncratic, notions of justice. Indeed, it is hard to understand what norms would govern such a new and independent source of power. Since the principles concerning equitable injunctions have developed by reference to principles of what is right or just, would new and independent principles permit injunctions based upon that which is not right or that which is unjust? Such reasoning might explain why the framers "clearly intended to tie the scope of the s 75(v) jurisdiction to the scope of the remedies listed therein"[317].

233 In summary, although the s 75(v) remedies must operate consistently with the constitutional context in which they appear, the authority to order an injunction referred to in s 75(v) was not a licence for a court to make any preferred order requiring an officer of the Commonwealth to act or refrain from acting, under the guise of asserted constitutional values. Rather, the developed, and developing, principles governing when it is right or just to issue the injunction in the "discretion" of the court were the means by which those open-ended concepts were, and would be, delimited. However, three points should be made about the scope of the power to issue an injunction as one of the remedies for which authority is conferred by s 75(v).

234 First, there is a natural curiosity about the inclusion of the general equitable remedy of an injunction alongside two remedies concerned only with errors concerning jurisdiction[318]. But in light of one evident purpose of s 75(v) being to restrain Commonwealth officers from exceeding or abusing power, "injunction"

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314 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 142 [166].

315 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 92 [18].

316 Dale et al, *Daniell's Chancery Practice*, 7th ed (1901), vol 2 at 1328.

317 Burton, "Why These Three? The Significance of the Selection of Remedies in Section 75(v) of the *Australian Constitution*" (2014) 42 *Federal Law Review* 253 at 260.

318 Gummow, "The Scope of Section 75(v) of the *Constitution*: Why Injunction but No Certiorari?" (2014) 42 *Federal Law Review* 241 at 249-250.

should not be interpreted in any confined way such as by limiting injunctions to instances of jurisdictional error[319]. The inclusion of injunction was "a deliberate decision to invoke equity's traditional role of supplementing deficiencies in the common law"[320].

235 Secondly, the "injunction" in s 75(v), like the writs of mandamus and prohibition[321], is a legal term of art or technical legal expression. The use of that term of art tied the meaning of "injunction" to the type of order made in equity but did not freeze it from further development. Speaking of the boundaries of power arising from the terms of art in s 51(xviii)[322], six members of this Court in *Grain Pool of Western Australia v The Commonwealth*[323] emphasised the necessity to give sufficient "allowance for the dynamism which, even in 1900, was inherent in any understanding of the terms". As four members of this Court said in *Re Refugee Review Tribunal; Ex parte Aala*[324], in 1900 the law concerning prerogative writs was in a state of development which should be accommodated, subject to the *Constitution*, in the development of the constitutional writs. The constitutional injunction is in the same position. In 1900, the equitable injunction was a developing remedy and that development could reasonably have been expected to continue[325].

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319 *Abebe v The Commonwealth* (1999) 197 CLR 510 at 552 [108]; *Muin v Refugee Review Tribunal* (2002) 76 ALJR 966 at 977 [47]; 190 ALR 601 at 615. See also Reynolds, "The Injunction in Section 75(v) of the Constitution" (2019) 30 *Public Law Review* 211; Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 248.

320 Leeming, *Authority to Decide: The Law of Jurisdiction in Australia*, 2nd ed (2020) at 249.

321 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 93 [24].

322 *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 504.

323 (2000) 202 CLR 479 at 496 [23]. See also at 518 [98]-[99].

324 (2000) 204 CLR 82 at 97 [34] per Gaudron and Gummow JJ (Gleeson CJ agreeing at 89 [5]). See also at 141-142 [164]-[165] per Hayne J.

325 See, for instance, Ashburner, *Principles of Equity* (1902) at 461. See, now, *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 395 [30]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 241 [90], citing

236 Thirdly, even in 1901, the scope of an equitable injunction was not narrow. As I have explained, it extended to any case in which it was right or just to issue. The developed principles governing when it was right or just to issue the injunction in the "discretion" of the court extended to a wide variety of cases and they permitted a variety of categories of injunction.

237 As to the categories of case in which the equitable injunction could be ordered, these included both the purported exercise of public power without authority and abuses of public power[326]. In the Convention Debates, Mr Barton quoted from a leading decision in the United States to the effect that when a "plain official 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"[327]. Mr Barton and Dr Quick and Mr Garran also observed the analogy between mandamus and injunction[328].

238 As to the categories of injunction, the injunction could be either prohibitory (negative) or mandatory (positive). It was recognised that there was "no rule which prevents the Court from granting a mandatory injunction where the injury sought to be restrained has been completed"[329] and that an injunction could issue if "the

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Enfield City Corporation v Development Assessment Commission (2000) 199 CLR 135.

326 Joyce, *The Law and Practice of Injunctions in Equity and at Common Law* (1872), vol 1 at 721, 729; Joyce, *The Doctrines and Principles of the Law of Injunctions* (1877) at 296-297; Gummow, "The Scope of Section 75(v) of the *Constitution*: Why Injunction but No Certiorari?" (2014) 42 *Federal Law Review* 241 at 247. See *Attorney-General v Aspinall* (1837) 2 My & Cr 613 [40 ER 773].

327 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1875-1876, quoting *Board of Liquidation v McComb* (1875) 92 US 531 at 541.

328 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1876, quoting *Board of Liquidation v McComb* (1875) 92 US 531 at 541; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 783. See Burton, "Why These Three? The Significance of the Selection of Remedies in Section 75(v) of the *Australian Constitution*" (2014) 42 *Federal Law Review* 253 at 271.

329 Joyce, *The Law and Practice of Injunctions in Equity and at Common Law* (1872), vol 1 at 439. See also Kerr, *A Treatise on the Law and Practice of Injunctions*, 3rd ed (1888) at 50.

injury is of so serious or material a character that the restoring things to their former condition is the only remedy which will meet the requirements of the case"[330].

239 For these reasons, the mere fact that a source of authority for an injunction might be s 75(v) of the *Constitution* is not a basis for the exercise of the power to order an injunction to depart from those developing equitable principles by which a court exercises its "discretion" to order an injunction[331]. In particular, contrary to the plaintiffs' submissions, it is not permissible to resort to assertions of a generally unarticulated new principle such as a power to "reverse consequences" by the mere assertion that the violation of a plaintiff's property rights was committed by the State. No such principle was recognised in *Entick v Carrington*[332], which involved neither an injunction nor the exercise of jurisdiction under s 75(v) of the *Constitution*. Indeed, the highfalutin language in that case might reflect an eighteenth century elevation of the right to property above other rights, which are at least as fundamental, such as bodily integrity or liberty. It would be remarkable if today the remedies for infringement of rights to property were somehow elevated to a privileged position over bodily integrity or liberty[333].

The right upon which the injunction is based

An equitable wrong of misuse of private information

240 The usual basis upon which an injunction is sought is to protect a right by preventing threatened or continuing wrongful conduct. Since the plaintiffs sought an injunction requiring delivery up of all the information copied from Ms Smethurst's mobile phone and all copies of that information, it would usually be necessary for the plaintiffs to demonstrate that the retention or use of the information was unlawful.

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330 Kerr, *A Treatise on the Law and Practice of Injunctions*, 3rd ed (1888) at 49.

331 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157-158 [58]; *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 162 [48].

332 (1765) 19 St Tr 1029 at 1066.

333 Compare *Trobridge v Hardy* (1955) 94 CLR 147 at 152.

241 In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[334], in the course of considering the existence of any rights to privacy for corporations, Gummow and Hayne JJ described Murphy J's earlier identification of an "unjustified invasion of privacy" as "one of the 'developing torts'". However, rather than searching for a wrong such as intrusion of privacy, which would be expressed at a high level of generality, their Honours suggested that the better course for development would be to "look to the development and adaptation of recognised forms of action to meet new situations and circumstances"[335]. Callinan J also pointed to the recognition in the United States that the general law of privacy there comprises "four distinct kinds of invasion of four different interests" including the intrusion into a plaintiff's private affairs and the "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness"[336].

242 In this special case, the plaintiffs' written submissions appeared to suggest a development of the rights of individuals in this manner. They relied upon the decision in *Lincoln Hunt Australia Pty Ltd v Willesee*[337]. In that case, an interlocutory injunction was sought to restrain the defendants from publication of video tape said to have been obtained in the course of a trespass on the property of the plaintiff. Young J refused the interlocutory injunction because damages were an adequate remedy for the plaintiff. However, his Honour accepted that even if the matters filmed were not confidential there was nevertheless a prima facie case for an injunction based upon the unconscionable nature of the alleged conduct[338]. Unpacking the conclusory nature, or expression of a result[339], inherent in the adjective "unconscionable", his Honour referred to United States authorities

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334 (2001) 208 CLR 199 at 248 [106], quoting *Church of Scientology v Woodward* (1982) 154 CLR 25 at 68. See also Callinan, "Privacy, Confidence, Celebrity and Spectacle" (2007) 7 *Oxford University Commonwealth Law Journal* 1.

335 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 250 [110].

336 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 325 [323], quoting Prosser, "Privacy" (1960) 48 *California Law Review* 383 at 389.

337 (1986) 4 NSWLR 457.

338 *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 463-464.

339 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 409 [34]. See also *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 73 [43].

concerning the boundaries of liability for invasion of particular privacy interests[340], and identified the private nature of the premises upon which the trespass occurred[341].

243 Whether or not the result in *Lincoln Hunt Australia Pty Ltd v Willesee*[342] can be explained on another basis[343], it appears that the underlying reasoning by which Young J recognised a prima facie case was essentially based upon an extension of the protection of confidential information to the protection of private information[344], thus anticipating the incremental extension of existing causes of action as contemplated by Gummow and Hayne JJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[345]. Indeed, apparently building upon such reasoning, senior counsel for the plaintiffs in this case described the purported execution of the second warrant as involving "sift[ing] through [Ms Smethurst's] private materials".

244 However, at the brink of making such a submission for development of the law expressly, senior counsel for the plaintiffs eschewed any suggestion that the law of torts or equitable wrongdoing should be developed to further an underlying principle of privacy. In the absence of proper argument, therefore, the decision in *Lincoln Hunt Australia Pty Ltd v Willesee*[346] and any development of the law

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340 *Ali v Playgirl Inc* (1978) 447 F Supp 723; *Ann-Margret v High Society Magazine Inc* (1980) 498 F Supp 401. See American Law Institute, *Restatement (Second) of the Law of Torts* (1977), vol 3, §652C at 380-383 and compare Wacks, *Privacy and Media Freedom* (2013) at 165-166 with Gorman, "Publicity and Privacy Rights: Evening out the Playing Field for Celebrities and Private Citizens in the Modern Game of Mass Media" (2004) 53 *DePaul Law Review* 1247 at 1251-1261.

341 *Lincoln Hunt Australia Pty Ltd v Willesee* (1986) 4 NSWLR 457 at 463-464.

342 (1986) 4 NSWLR 457.

343 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 246-247 [101]-[103].

344 See also *Giller v Procopets* [2004] VSC 113 at [150]-[158] and, on appeal, *Giller v Procopets* (2008) 24 VR 1 at 102 [429]-[431], 106 [448]; *Campbell v MGN Ltd* [2004] 2 AC 457 at 464-465 [13]-[15], 473 [51]-[52]. Compare *Coco v Shaw* [1994] 1 Qd R 469 at 486.

345 (2001) 208 CLR 199.

346 (1986) 4 NSWLR 457.

concerning confidential information to encompass the "intrusion"[347] into a plaintiff's private affairs must be put to one side.

The tort of trespass to goods

245 All of the plaintiffs' eggs were ultimately placed in the basket of trespass to goods. Unfortunately, there was little focus upon why the protection of Ms Smethurst's property rights should permit an injunction to reverse the consequences of any infringement of those rights. With the emphasis in this special case on validity of the warrant and discretionary considerations for the order of an injunction, the parties made few submissions concerning whether, and why, the protection of a right to non-interference with property permits an order requiring reversal of the consequences of the trespass. By focusing upon the wrong, the parties took their eyes off the right[348].

246 The plaintiffs are correct that the Australian Federal Police committed the tort of trespass to goods. The tort of trespass to goods, like that of trespass to land, protects property from interference by any intended act: unless legally authorised, no person can set "foot upon my ground without my licence"[349]. Although the consent, licence or waiver of the owner is sometimes said to deny an element of the cause of action[350], the better view is that the consent, licence or waiver operates as a justification for conduct that would otherwise be wrongful. Likewise, a statutory authorisation to interfere with the goods or land of another is also a justification.

247 The Commissioner and the Attorney-General of the Commonwealth (intervening), correctly, did not assert that the Australian Federal Police had acted with the licence of Ms Smethurst. Whilst Ms Smethurst did not object to either the taking of her mobile phone or the copying of the information from her mobile phone (with the passcode that she provided), her implied consent was entirely conditional upon the validity of the second warrant, pursuant to which the police had purported to act in copying the information from Ms Smethurst's mobile phone. The invalidity of the second warrant means that there was a failure of the

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347 *PJS v News Group Newspapers Ltd* [2016] AC 1081 at 1099 [29], 1100 [30], 1108 [58]-[59], 1110 [68].

348 Compare *Law Debenture Trust Corporation v Ural Caspian Oil Corporation Ltd* [1995] Ch 152 at 166.

349 *Entick v Carrington* (1765) 19 St Tr 1029 at 1066, quoted in *Plenty v Dillon* (1991) 171 CLR 635 at 639.

350 See the discussion in Goudkamp, *Tort Law Defences* (2013) at 67.

objective condition upon which Ms Smethurst's consent was based and hence there was no basis for any right of the police to copy the information[351]. The invalidity of the warrant also precludes any reliance upon the warrant as an authorisation[352] or, more accurately, a justification[353] for the police action without consent.

A mandatory injunction to ameliorate the consequences of wrongdoing

An injunction without continuing or anticipated unlawfulness

248 Injunctions are generally ordered to protect rights or to restrain wrongs[354]. There are two bases upon which an injunction is commonly ordered. The first basis is to require or prevent some action in order to prevent the likely commission, recurrence or continuation of a public wrong. In the absence of a special individual interest, a civil action to vindicate a wrong to the public generally can be brought by the Attorney-General, either ex officio (from the office) or ex relatione (at the instance of another) through a relator proceeding[355]: "[i]t is the traditional duty of the Attorney-General to protect public rights and to complain of excesses of a power bestowed by law"[356]. The second basis is to require or prevent some action in order to prevent the likely commission, recurrence or continuation of a wrong

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351 See *Mumford v Whitney* (1836) 15 Wend 380 at 385; *Morton v Copeland* (1855) 16 CB 517 at 533 [139 ER 861 at 868]; *Freeman v Headley* (1869) 4 Vroom 523 at 532; *Chapman v Pendleton* (1912) 82 A 1063 at 1067; *Ashcraft v King* (1991) 228 Cal App 3d 604 at 610, 614; American Law Institute, *Restatement (Second) of the Law of Torts* (1979), vol 4, §892A, Comment f at 368.

352 *George v Rockett* (1990) 170 CLR 104 at 110; *Plenty v Dillon* (1991) 171 CLR 635 at 639, 647; *Coco v The Queen* (1994) 179 CLR 427 at 435-436.

353 See *Plenty v Dillon* (1991) 171 CLR 635 at 647; *Kuru v New South Wales* (2008) 236 CLR 1 at 13-14 [38]-[39].

354 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 232 [60].

355 *Taylor v Attorney-General (Cth)* (2019) 93 ALJR 1044 at 1067-1068 [103]-[105]; 372 ALR 581 at 608-609. See also *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 263 [39]; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 628-629 [97]-[98].

356 *Attorney-General (Vict) v The Commonwealth* (1945) 71 CLR 237 at 272.

to a private person. In such cases the injunction is usually sought by the person whose rights might be, or are being, infringed by the defendant.

249 Whether the wrong is public or private, the injunction can be in a negative or prohibitory form or it can be in a positive or mandatory form. It has been held that a mandatory injunction cannot be obtained "by merely saying 'Timeo' [I fear]"[357] and that there must be a "likelihood of a future apprehended wrong"[358]. What is far less usual, whether for private or public wrongs, is for a mandatory injunction to issue in order to ameliorate the consequences of a wrong rather than to prevent it occurring or continuing. As Story explained, an injunction "seeks to prevent a meditated wrong more often, than to redress an injury already done"[359].

250 A libertarian principle of the common law is that it is usually easier to justify ordering a wrongdoer to pay money to ameliorate the consequences of wrongdoing than to justify ordering a wrongdoer personally to act to ameliorate those consequences. The legal rules concerned with the legal response to the consequences of wrongdoing for which the wrongdoer is liable are usually rules concerned with the measure of damages. Damages interfere with the defendant's liberty only by requiring payment of money. These money awards can respond to the consequences of wrongdoing in various ways beyond compensating for losses. In appropriate cases restitution of a gain or an account and disgorgement of profits or exemplary damages might be ordered. By contrast with orders for payment, orders requiring a defendant personally to perform other acts, when omitting to act would be lawful, were described by Lord Westbury LC as delivering the defendant to the plaintiff, "bound hand and foot"[360]. Hence, other things being equal, it is often the case that "[a] permanent injunction will only issue to prohibit acts which the law categorises as unlawful"[361].

251 However, other things are not always equal. As five members of this Court said in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of*

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357 *Attorney-General for the Dominion of Canada v Ritchie Contracting and Supply Co* [1919] AC 999 at 1005.

358 *Redland Bricks Ltd v Morris* [1970] AC 652 at 666.

359 Story, *Commentaries on Equity Jurisprudence, As Administered in England and America* (1836), vol 2, §862 at 155.

360 *Isenberg v The East India House Estate Company Ltd* (1863) 3 De G J & S 263 at 273 [46 ER 637 at 641].

361 *Law Debenture Trust Corporation v Ural Caspian Oil Corporation Ltd* [1995] Ch 152 at 171.

Australia[362], it has been established for more than a century that in exceptional cases a mandatory injunction can be granted despite the completion of the "injury sought to be restrained". The joint judgment in that case cited a line of authorities affirming the power to grant a mandatory injunction, after completion of the wrong, in order to restrain the continuation of damage caused by the wrongdoing where that damage is ongoing and very serious[363].

252 The central rationale for a mandatory injunction in cases where there is no anticipated or continuing unlawful action is that the interference with the liberty of the defendant by ordering the defendant to take action where inaction would be lawful is justified by the extent of the inadequacy of damages to ameliorate the consequences of the wrongdoing. However, the greater the intrusion into a defendant's liberty arising from the injunction the more that the decision to make the order must be "attended with the greatest possible caution"[364].

253 A mandatory injunction is most easily justified where the consequences are ongoing and serious, the interference with the defendant's liberty is trivial and, compared with an injunction, damages are an inadequate means to "undo the consequences of a wrong"[365]. For instance, in *McManus v Cooke*[366], a mandatory injunction was granted to require the defendant to take action involving what was described as the insignificant inconvenience of removing a skylight from which "it would be extremely difficult to estimate the damage" that the plaintiff would suffer[367].

254 The concerns of (i) inconvenience to, and interference with the liberty of, the defendant and (ii) adequacy of damages to the plaintiff are matters requiring

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362 (1998) 195 CLR 1 at 31 [33], quoting Kerr, *A Treatise on the Law and Practice of Injunctions*, 3rd ed (1888) at 50.

363 See, eg, *Durell v Pritchard* (1865) LR 1 Ch App 244 at 250; *McManus v Cooke* (1887) 35 Ch D 681 at 698; *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 810; [1974] 2 All ER 321 at 337. See also *Smith v Smith* (1875) LR 20 Eq 500 at 505.

364 *Isenberg v The East India House Estate Company Ltd* (1863) 3 De G J & S 263 at 272 [46 ER 637 at 641].

365 Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (2019) at 271.

366 (1887) 35 Ch D 681.

367 (1887) 35 Ch D 681 at 698.

caution before ordering a mandatory injunction which compels a defendant to act despite the lack of actual or anticipated unlawful conduct by the defendant. A simple, but powerful, example is where the police, without knowledge of the invalidity of a search warrant, take an ordinary saucer which contains the fingerprints of the perpetrator of a very serious offence[368]. Could it really be suggested that it is just to compel the police to return the saucer to the perpetrator of the offence, so that the perpetrator can destroy the evidence of their crime, rather than to require the police to pay any damages, possibly nominal, if the saucer is wrongfully retained for a period in order to be used for the purpose of prosecution? No rhetorical resort to the fundamental nature of the sanctity of property could justify such a result.

255 In the above example, the mandatory injunction would be refused on the grounds that the plaintiff has no interest that could not be satisfied by damages but the intrusion into the liberty of the defendant would have significant adverse consequences. The injunction would be refused despite the continuing unlawfulness of the police retaining the saucer. The caution before interfering with the liberty of a defendant applies with even greater force where, as here, the injunction would compel a defendant to act when inaction would not otherwise be unlawful. However, there is nevertheless power in an appropriate case, where the interference with the liberty of the defendant is slight and the consequences of the wrongdoing to the plaintiff are significant, to order a mandatory injunction to reverse or ameliorate the consequences of a wrong even if the injunction would compel a defendant to act when inaction would not otherwise be unlawful. There is considerable authority that supports the existence of this power.

256 An example is *Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd*[369]. In that case, a defendant who was likely to have committed the tort of inducing a breach of contract by purchasing land that was used as a garage was ordered in interlocutory proceedings to transfer title to the land back to the vendor. The defendant had no legal duty to take the limited step of transferring title to the land back to the vendor, for whom the consequences of wrongdoing were significant. The primary judge, Bridge J, described the defendant as attempting to "get away with it subject only to a liability to pay damages"[370] and asked, "what reason can there be in principle why the tortfeasor should not be ordered to undo

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368 Adapted from *Ghani v Jones* [1970] 1 QB 693 at 708.

369 [1974] QB 142. See also *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 1 WLR 1676; [1971] 3 All ER 1175.

370 *Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd* [1974] QB 142 at 157.

that which he has done?"[371] Although the hearing in that case was interlocutory, it necessarily follows that the same remedy would have been available on a final basis[372].

257 The potential availability of a mandatory injunction to ameliorate the consequences of wrongdoing without an independent legal duty to perform that act is also supported by the existence of other orders which, while having the same goal, are sometimes given different descriptions. Sometimes orders requiring a defendant to act are described simply by the effect of the order. Sometimes they are described as a declaration of a constructive trust. Sometimes they are described as an order for delivery up of materials.

258 As to examples of orders akin to a mandatory injunction to ameliorate the consequences of wrongdoing but which are described by their effect, courts and tribunals, acting under both specific[373] and general[374] powers, have made orders compelling a defendant to make an apology or a corrective statement, on the apparent premise that, in the circumstances of the case, interference with a defendant's lawful liberty to speak is seen as slight and the intangible consequences of the wrongdoing for which damages or another order would be inadequate are seen as significant[375]. Some of these orders for apologies or corrective statements

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371 *Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd* [1974] QB 142 at 156.

372 See *Council of the Shire of Hornsby v Danglade* (1928) 29 SR (NSW) 118 at 124; *Law Debenture Trust Corporation v Ural Caspian Oil Corporation Ltd* [1995] Ch 152 at 166, 170.

373 *Anti-Discrimination Act 1977* (NSW), s 108(2)(d); *Anti-Discrimination Act 1991* (Qld), s 209(1)(e); *Anti-Discrimination Act 1992* (NT), s 89(1); *Anti-Discrimination Act 1998* (Tas), s 92(1). See also *Trade Practices Act 1974* (Cth) (as at 17 December 2010), s 86C(2)(d), see earlier s 80A(1)(b), and see now *Competition and Consumer Act 2010* (Cth), Sch 2, s 246(2)(d).

374 *Equal Opportunity Act 1984* (SA), s 96(1)(c); *Equal Opportunity Act 1984* (WA), s 127(b)(iii); *Australian Human Rights Commission Act 1986* (Cth), s 46PO(4)(b); *Human Rights Commission Act 2005* (ACT), s 53E(2)(b); *Equal Opportunity Act 2010* (Vic), s 125(a)(iii).

375 See, for instance, *White v Gollan* (1990) EOC ¶92-303 at 78,068 [16]-[17]; *Mungaloon v Stemron Pty Ltd* (1991) EOC ¶92-345 at 78,408; *De Simone v Bevacqua* (1994) 7 VAR 246 at 273-274; *Australian Competition and Consumer Commission v On Clinic Australia Pty Ltd* (1996) 35 IPR 635 at 640-641; *Australian Competition and Consumer Commission v McCaskey* (2000) 104 FCR 8 at 30 [60]-[62]; *Burns v Radio 2UE Sydney Pty Ltd [No 2]* [2005] NSWADT 24 at [28]-[30];

were made under general powers described as powers to order an injunction or powers to redress loss or damage[376].

259 An example of the use of a declaration of constructive trust to achieve the same goal of requiring a defendant to perform an act can be seen in *Attorney-General for Hong Kong v Reid*[377]. In that case, a corrupt Hong Kong prosecutor had used the proceeds of bribery to purchase freehold titles which were conveyed to him, his wife, and his solicitor. The Privy Council rejected an argument that the Crown was confined to a money remedy and held that the freehold titles were held on constructive trust for the Crown[378]. This recognition of a constructive trust over the freehold titles, property rights for which the common law has long accepted that money is an inadequate substitute, was merely an instrument to obtain a conveyance to the Crown of the freehold title. It was "akin to orders for conveyance"[379]. Such orders are made where money orders are not capable of doing full justice[380].

260 Another analogous order arises when a defendant is ordered to deliver up goods to the plaintiff. A court can order delivery up of the goods if a money award would not be adequate redress, such as where the goods are unique[381] or where

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Australian Competition and Consumer Commission v Telstra Corporation Ltd (2007) ATPR ¶42-207 at 48,428 [4]. See also Carroll, "Apologies as a Legal Remedy" (2013) 35 *Sydney Law Review* 317.

376 *Trade Practices Act 1974* (Cth) (as at 17 December 2010), ss 80, 87AAA(1) and see now *Competition and Consumer Act 2010* (Cth), Sch 2, ss 232, 239(1). See *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 95 FCR 114 at 132-133 [45]-[49]; *Eatock v Bolt* (2011) 197 FCR 261 at 363 [455], 365-366 [465]-[468] read with *Eatock v Bolt [No 2]* (2011) 284 ALR 114 at 117-119 [14]-[23]. See also *Moore v Canadian Newspapers Co* (1989) 69 OR (2d) 262; *TV3 Network Ltd v Eveready New Zealand Ltd* [1993] 3 NZLR 435.

377 [1994] 1 AC 324.

378 *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 at 331.

379 *Giumelli v Giumelli* (1999) 196 CLR 101 at 112 [5].

380 See *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 45 [128]. Compare *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250.

381 See, eg, *Pusey v Pusey* (1684) 1 Vern 273 [23 ER 465]; *Duke of Somerset v Cookson* (1735) 3 P Wms 390 [24 ER 1114]; *Saville v Tankred* (1748) 1 Ves Sen 101 [27 ER

alternative goods are not immediately available and the goods are particularly needed by the plaintiff[382]. In these cases, there is little concern with the liberty of the defendant to use the goods owned by the plaintiff to the exclusion of the plaintiff. The governing principle is that the order is made to redress the consequences of the wrongdoing by "a complete remedy" in equity whenever "the remedy afforded by the ordinary courts is incomplete"[383]. Although the order for delivery up of goods is not, in form, an injunction[384], it has the same basic aims and in a system of fused administration of law and equity could often be alternatively expressed as a mandatory injunction for delivery of the goods[385]. The cases concerning orders for delivery up of goods are often, but not always, cases where there is a continuing wrong due to the retention of a good over which the plaintiff has title. In *Hart v Commissioner of Australian Federal Police*[386], the Full Court of the Federal Court of Australia held that copying by the police of electronic information was not authorised by s 3K of the *Crimes Act* as it stood at the time. The police had title to the devices upon which the information was held. Although only declaratory relief was sought and ordered, French, Sackville and R D Nicholson JJ said that in a case involving an "unauthorised invasion of privacy" appropriate relief may include orders for delivery up of the storage devices containing the copied information[387].

The inadequacy of damages and the liberty of the defendant in this case

261 The inadequacy of damages is to be assessed from the perspective of Ms Smethurst only, and not the perspective of the Australian Federal Police.

918]; *Fells v Read* (1796) 3 Ves 70 [30 ER 899]; *Lloyd v Loaring* (1802) 6 Ves 773 [31 ER 1302]; *Lowther v Lowther* (1806) 13 Ves 95 [33 ER 230].

382 *Aristoc Industries Pty Ltd v R A Wenham (Builders) Pty Ltd* [1965] NSWR 581 at 589; *Doulton Potteries Ltd v Bronotte* [1971] 1 NSWLR 591 at 598-599.

383 Mitford, *A Treatise on the Pleadings in Suits in The Court of Chancery, by English Bill*, 5th ed (1847) at 138-139; *North v Great Northern Railway Co* (1860) 2 Giff 64 at 68 [66 ER 28 at 30]. See also *Dougan v Ley* (1946) 71 CLR 142 at 151, 153; Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed (2019) at 495.

384 *Doulton Potteries Ltd v Bronotte* [1971] 1 NSWLR 591 at 596.

385 See *Aristoc Industries Pty Ltd v R A Wenham (Builders) Pty Ltd* [1965] NSWR 581.

386 (2002) 124 FCR 384.

387 *Hart v Commissioner of Australian Federal Police* (2002) 124 FCR 384 at 406 [88].

From Ms Smethurst's perspective, the question is whether a damages award would be inadequate to ameliorate the consequences of the trespass by the Australian Federal Police. Contrary to Ms Smethurst's submission, the relevant consequence is not the possibility that she might be exposed to jeopardy due to any incriminating material on her mobile phone or the costs or distress associated with such exposure. Ms Smethurst pointed to no basis for any immunity from investigation by the Australian Federal Police and therefore no lawful interest in resisting investigation or exposure to jeopardy.

262 However, independently of any development of the law concerning private information, Ms Smethurst does have an interest in resisting the potential dissemination of private information contained on her mobile phone which has not been lawfully obtained. In an appropriate case, the strength of that interest will establish that damages are inadequate. The question is whether this case is such an appropriate case. I have not found this question easy. The reasons of Nettle J[388] concerning the limited use to which the Australian Federal Police are likely to put the information in the performance of their functions present a powerful case for a conclusion that damages would be adequate. Ultimately, however, I have concluded that Ms Smethurst's interest in privacy is sufficient to establish that damages would not be adequate.

263 There was no dispute that the information obtained from Ms Smethurst's password-protected mobile phone was private information. If that information had been obtained lawfully, it would have been subject to the protections afforded by Pt IAA of the *Crimes Act*. Those protections, undoubtedly motivated by a concern for unspecified individual rights and freedoms[389], which would encompass privacy, include: (i) in some circumstances providing the occupier of the premises, upon request, with a copy of the information as soon as practicable after the seizure[390]; (ii) restrictions upon using the information as a "thing seized under this Part" for particular purposes and only "if it is necessary to do so for that purpose"[391]; (iii) restrictions on sharing the information with a State, Territory, or

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388 Reasons of Nettle J at [158]-[162].

389 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 November 1993 at 3031; Australia, House of Representatives, *Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1993*, Explanatory Memorandum at 1. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 1 February 1994 at 67, 74.

390 *Crimes Act*, s 3N.

391 *Crimes Act*, s 3ZQU(1).

foreign agency[392]; and (iv) subject to limited exceptions, requirements to return the information when it is no longer required for purposes provided by statute or for judicial or administrative review proceedings[393].

264 I agree with Kiefel CJ, Bell and Keane JJ that those restrictions do not apply to information obtained by an unlawful warrant[394]. The consequence of the trespass, therefore, is that Ms Smethurst's private information is held by the Australian Federal Police without the privacy protection to which she would otherwise have been entitled. Further, in circumstances in which the second warrant was substantially lacking in clarity, the private information obtained might have gone well beyond the information to which the Australian Federal Police were lawfully entitled. An award of damages, unlike a mandatory injunction, would provide no privacy protection over information that should not have been obtained or even information that would otherwise have been obtained but which would have been subject to the privacy protections of the *Crimes Act*. In the likely absence of any pecuniary loss, damages would also be very difficult to calculate.

265 The inadequacy of damages is a consideration in favour of an injunction only from the plaintiff's perspective. The perspective of the defendant must also be considered when assessing whether the defendant should be compelled to take action to reverse or ameliorate the consequences of a wrong where the defendant is not under a duty otherwise to perform the act.

266 From the perspective of the Australian Federal Police, a mandatory injunction could involve a substantial interference with their liberty to act lawfully. Subject to the effect on the statutory powers of police of any development of common law or equitable principles concerning privacy, the Australian Federal Police are at liberty to disseminate private information about others in connection with their lawful investigation of Commonwealth offences[395].

267 The paucity of facts before this Court makes an overall assessment of the relative effect of a mandatory injunction upon each party particularly difficult. There are insufficient facts from which to draw any inference about the nature or quality of the private information copied from Ms Smethurst's mobile phone. Nor are there sufficient facts from which any inference can be drawn about the relevance of any of the private information copied from Ms Smethurst's mobile

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392 *Crimes Act*, s 3ZQU(5).

393 *Crimes Act*, ss 3ZQX(1), 3ZQX(2).

394 Reasons of Kiefel CJ, Bell and Keane JJ at [58]-[65].

395 *Australian Federal Police Act 1979* (Cth), s 8(1)(b)(i).

phone to the investigation of Commonwealth offences, particularly in light of the lack of clarity in the second warrant.

268 Some of the formulations of the injunctive relief sought by the plaintiffs require a greater restriction of the liberty of the Commissioner than could be necessary to ameliorate the adverse consequences of the wrongdoing to Ms Smethurst. For instance, in circumstances where it is not known whether the private information is still possessed by Ms Smethurst, an injunction that required all copies of the private information to be destroyed could prevent the Australian Federal Police from ever lawfully obtaining that information, which might be required to investigate and prosecute crime.

269 The Solicitor-General of the Commonwealth submitted that this Court might permit the Commissioner to retain and use the copied data on terms that restrict the Australian Federal Police to use of the information only according to the regime in the *Crimes Act* as if the information had been obtained lawfully. An injunction in these terms would protect the interest of Ms Smethurst in her privacy to the same extent as if no trespass had occurred and the warrant had been obtained lawfully. The injunction would constrain the liberty of the Australian Federal Police by restricting them to acting as if the information had been lawfully obtained. However, an injunction in these terms does not truly reverse the consequences of the unlawful action. Rather, it treats the unlawful action as though it were lawful. It should be no answer to a claim for delivery up from a person who unlawfully takes a valuable heirloom for that person to say that the owner would have given him the heirloom if he had asked for it. Further, the lack of clarity of the second warrant means that there is a real possibility that some of the information might never have been lawfully obtained even if the warrant had been clearly expressed.

270 There is a further alternative which does not require treating the trespass as though it were lawful and which would also preserve the liberty of the Australian Federal Police to obtain the information, provided that it can be done lawfully. The appropriate form of such a mandatory injunction, which should be expressed as subject to any lawful warrant that would, in effect, permit the information to be obtained and retained by the Australian Federal Police, would be:

> "Upon 72 hours' notice from Ms Smethurst, and subject to the terms of any lawful warrant, the Commissioner of the Australian Federal Police deliver up to Ms Smethurst, at an agreed time and place, or in default of agreement at an address for service upon Nationwide News Pty Ltd, a Universal Serial Bus (USB) storage device containing the information copied from Ms Smethurst's mobile phone in an accessible form, and delete all other copies of that information held by, or within the control of, the Australian Federal Police."

271 By expressing an injunction in this form, the order ameliorates the consequences of the trespass by intruding to the minimum degree possible upon the liberty of the Commissioner to act lawfully without treating the trespass as though it were lawful. By making the injunction subject to the terms of a lawful warrant the order also avoids the comic possibility of the simultaneous return of the information to Ms Smethurst on a USB storage device and seizure of that USB storage device pursuant to a valid warrant[396]. Naturally, and in any event, the Australian Federal Police would retain title to any USB storage device delivered to Ms Smethurst.

Considerations external to the parties that inform the discretion to refuse the injunctive relief

272 Even where an injunction would be warranted as necessary to do justice between the parties there remains a "discretion" to refuse the injunction. However, the cases have sometimes conflated the separate questions of (i) whether, as between the parties, a plaintiff would have a right that could support the injunction and (ii) whether the injunction should be refused for "discretionary" reasons. An example is the decision in *A v Hayden*[397]. In that case, the plaintiffs were members of the Australian Secret Intelligence Service whose identity was not known to the Chief Commissioner of Police but who were believed to have committed breaches of the criminal law. The plaintiffs sought an injunction to restrain the Commonwealth from disclosing their identity to the Chief Commissioner including on the ground that to do so would violate confidentiality terms in their contracts of employment with the Commonwealth. The injunction was refused. A simple reason for refusal might have been that there was no right upon which the injunction could be based because parties cannot, by agreement, confer upon themselves a right that the other will maintain the confidentiality of a crime, arguably other than a trivial misdemeanour[398]. At one point in his judgment Gibbs CJ appeared to favour that view, saying that the injunction would not issue because, quoting Wood VC, "there is no confidence as to the disclosure of iniquity"[399]. However, at another point Gibbs CJ said that the contract term was "not in itself invalid" but a "discretion" should be exercised to

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396 Compare *Puglisi v Australian Fisheries Management Authority* (1997) 148 ALR 393.

397 (1984) 156 CLR 532.

398 See *A v Hayden* (1984) 156 CLR 532 at 546, 574.

399 *A v Hayden* (1984) 156 CLR 532 at 545, quoting *Gartside v Outram* (1856) 26 LJ Ch 113 at 114.

deny the injunction[400]. Similarly, Mason J held that although the contract term was not void or unenforceable, the court could refuse a remedy on the ground of "public policy"[401], citing the example of *Beresford v Royal Insurance Co*[402]. Yet, in that case, Lord Atkin, with whom Lords Thankerton and Russell of Killowen agreed, held that the effect of the "public policy" was that the "contract is in the circumstances unenforceable"[403].

273 For the reasons given in the previous section, as between the parties the plaintiffs were entitled to an injunction to reverse the consequences of the trespass committed. However, the Commissioner and the Attorney-General also relied upon the Court's discretion to refuse the injunction. The discretionary factors relied upon were reasons independent of the conduct of the parties. These independent reasons of discretion nevertheless involve the application of general principles[404]. If a court were to refuse an injunction for reasons other than those of general principle then, as Lindley LJ said of damages in lieu of an injunction, there would be a danger that the court could be turned into a "tribunal for legalizing wrongful acts"[405].

274 A common instance where an injunction is refused due to considerations of general principle beyond the justice between the parties is where the injunction would interfere with the rights of third parties[406]. Another is where it would interfere with a clear and compelling interest of the general public, such as where a need for public housing meant that, despite their construction being a result of a

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400 *A v Hayden* (1984) 156 CLR 532 at 544-545.

401 *A v Hayden* (1984) 156 CLR 532 at 557.

402 [1938] AC 586.

403 *Beresford v Royal Insurance Co* [1938] AC 586 at 601.

404 *Doherty v Allman* (1878) 3 App Cas 709 at 724; *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 559.

405 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 315, see also at 322-323. See also *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 855 [121].

406 See *Wood v Sutcliffe* (1851) 2 Sim (NS) 163 at 165-166 [61 ER 303 at 304]; *Miller v Jackson* [1977] QB 966 at 988; Spry, *The Principles of Equitable Remedies*, 5th ed (1997) at 402-403, quoted in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 42 [65]. See also now Spry, *The Principles of Equitable Remedies*, 9th ed (2014) at 416-417. See also *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 46 [129].

breach of a negative covenant, it would be "an unpardonable waste of much needed houses to direct that they now be pulled down"[407]. In this case, the reason effectively relied upon by the Commissioner and the Attorney-General is the "public interest in the administration of and non-interference with justice"[408], which, more specifically, has been said to include a liberty for the police lawfully "to do whatever is necessary and reasonable to preserve the evidence of the crime"[409]. It was submitted by the Commissioner and the Attorney-General that, since unlawfully obtained evidence will not always be excluded under s 138 of the *Evidence Act 1995* (Cth), the information "might still be admissible in the event that criminal proceedings are commenced", and hence that the public interest required that the police be able to retain and use it.

275 In some cases it has been said or held to be a sufficient reason to refuse to make an order to return seized material that the material is to be tendered as part of an existing or reasonably certain prosecution[410]. These cases do not assist here for three reasons. First, in this case, no inference can be drawn that any prosecution will be brought, and no inference can be drawn that the material is relevant to any prosecution. Secondly, many of the cases involve claims for the return of lawfully seized material. Where material is lawfully seized, there is a common law power associated with the power to seize, which gives effect to the purpose of seizure, for the material to be retained for as long as it is reasonably required to achieve the purpose for which it has been seized[411].

276 Thirdly, and most fundamentally, in none of the cases was there any separate consideration of the two different issues described above which arise upon a claim for the return of seized material: (i) whether the plaintiff would have been

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407 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 811; [1974] 2 All ER 321 at 337.

408 *Puglisi v Australian Fisheries Management Authority* (1997) 148 ALR 393 at 405. See also *George v Rockett* (1990) 170 CLR 104 at 110.

409 *Ghani v Jones* [1970] 1 QB 693 at 708.

410 *Walker v West* [1981] 2 NSWLR 570 at 584; *Parker v Churchill* (1985) 9 FCR 316 at 330-333; *Rowell v Larter* (1986) 6 NSWLR 21 at 32; *Ozzie Discount Software (Aust) Pty Ltd v Muling* (1996) 86 A Crim R 387 at 397; *Puglisi v Australian Fisheries Management Authority* (1997) 148 ALR 393 at 405; *Caratti v Commissioner of the Australian Federal Police [No 2]* [2016] FCA 1132 at [463]; *Caratti v Commissioner of the Australian Federal Police* (2017) 257 FCR 166 at 221-222 [158].

411 *Ghani v Jones* [1970] 1 QB 693 at 709.

entitled to the return of the seized material as against the defendant, and (ii) whether discretion should nevertheless be exercised to refuse to order the return. For instance, in *Malone v Metropolitan Police Commissioner*[412], the Court of Appeal of England and Wales refused to order the return of the banknotes lawfully seized from Mr Malone, on the basis that they were potentially material evidence at a pending criminal trial[413]. Due to the conclusion by the Court that it was lawful to retain the banknotes, there was no consideration of either (i) whether damages for the capital value or use value of the notes would be adequate for any period of unlawful retention of the banknotes, or, if not, (ii) whether a "discretion" should be exercised to refuse the return of the seized banknotes. These two issues are also not separated in the discussion of any return of the electronic equipment seized in the *Caratti* litigation[414], or the money and jewellery in *Walker v West*[415], or in the example given by Lord Denning MR of a saucer with the fingerprints of the great train robbers[416]. In each instance, it is strongly arguable that there would be no basis for an order for return of the material, as between the parties, thus rendering moot the issue of "discretion" based upon an asserted public interest in preserving the evidence of crime.

277 I accept that the public interest in the administration of criminal justice could, particularly in circumstances of serious crime, allow the refusal of an order for the return of unlawfully seized material to which a plaintiff would otherwise have been entitled if the material is (i) reasonably likely to be admissible evidence to prove a crime and (ii) necessary to give that evidence effectively. In contrast, if there is no reasonable likelihood of criminal proceedings, or no reasonable likelihood that the material could be admissible, or if the evidence could be given effectively without the material, such as by identical copies of the material, then there could not be any sufficient public interest to justify denying a plaintiff the right that they would otherwise have to the return of the material.

278 The onus of establishing that a plaintiff should be denied a right to the return of material for reasons of public interest rests upon the person asserting that public

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412 [1980] QB 49.

413 *Malone v Metropolitan Police Commissioner* [1980] QB 49 at 70. See also *Gollan v Nugent* (1988) 166 CLR 18 at 43-44.

414 *Caratti v Commissioner of the Australian Federal Police [No 2]* [2016] FCA 1132 at [463]; *Caratti v Commissioner of the Australian Federal Police* (2017) 257 FCR 166 at 221-222 [158]-[159].

415 [1981] 2 NSWLR 570.

416 *Ghani v Jones* [1970] 1 QB 693 at 708.

interest, here the Commissioner and the Attorney-General. A principle of public interest is not established by speculation. For instance, it would be in the public interest to refuse the return of seized goods to a plaintiff if it were known that the goods would necessarily be used in the commission of a crime. But it is not sufficient to speculate that the goods might be so used, even from evidence that the plaintiff intended to use the goods in the commission of a crime, because the plaintiff might repent of that intention[417].

279 The Commissioner's and the Attorney-General's assertion of a public interest that would justify the refusal of the mandatory injunction should not be accepted. It requires speculation upon speculation upon speculation. First, there is no basis from which any inference can be drawn that the information contained on the USB storage device held by the police contains evidence of any crime. Secondly, even if it could be assumed that there was information which established evidence of a crime, there is no basis from which it could be concluded that any criminal proceedings are reasonably likely. Thirdly, there is no basis to conclude that information establishing evidence of a crime was reasonably likely to be admissible in such proceedings. Fourthly, and again in the absence of any detail in the special case about the content of the information, there is no basis from which it can be concluded that the information was reasonably necessary to permit admissible evidence to be given effectively. Fifthly, as I have explained, an injunction in the form described at [270] above does not necessarily prevent the Commissioner from lawfully obtaining the information.

Conclusion

280 It was not in dispute that the plaintiffs had standing to challenge the constitutional validity of s 79(3) of the *Crimes Act*, upon which the second warrant was based. They relied upon the constitutional invalidity of s 79(3) as a basis to establish the invalidity of the second warrant, which depended upon the existence of an offence known to law. They also relied upon the constitutional invalidity of s 79(3) to negate the Commissioner's and the Attorney-General's assertion of a public interest in the retention of the information for a prosecution under s 79(3). However, since the basis for the plaintiffs' challenge to the validity of the second warrant was not limited to the constitutional invalidity of s 79(3), and since the plaintiffs have succeeded in their challenge to the validity of the second warrant and obtained a form of the relief that they sought, it is unnecessary to consider their case concerning the constitutional validity of s 79(3) of the *Crimes Act*.

281 The questions stated in the special case, as reframed in these reasons, should be answered as follows:

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417 *Feret v Hill* (1854) 15 CB 207 at 226 [139 ER 400 at 408]; *Gollan v Nugent* (1988) 166 CLR 18 at 45, 48.

(1)(a)-(b) Yes.

(1)(c) Unnecessary to answer.

(2) Unnecessary to answer.

(3) Unnecessary to answer.

(4) Orders should be made:

(i) for certiorari to quash the search warrant issued on 3 June 2019; and

(ii) that upon 72 hours' notice from Ms Smethurst, and subject to the terms of any lawful warrant, the Commissioner of Police deliver up to Ms Smethurst, at an agreed time and place, or in default of agreement at an address for service upon Nationwide News Pty Ltd, a Universal Serial Bus (USB) storage device containing the information copied from Ms Smethurst's mobile phone in an accessible form, and delete all other copies of that information held by, or within the control of, the Australian Federal Police.

(5) The first defendant should pay the plaintiffs' costs of the special case.