



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

BETWEEN:

JOHN SHI SHENG ZHANG

Plaintiff

and

THE COMMISSIONER OF POLICE

First Defendant

JANE MOTTLEY

Second Defendant

JOSEPH KARAM

Third Defendant

MICHAEL ANTRUM

Fourth Defendant

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

PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Validity of the Warrants (CS [7]-[15])

2. Section 3E(5)(a) of the *Crimes Act 1914* (Cth) did not require the Warrants to state the elements of the suspected offences, or to state “with precision” the way that suspected facts related to elements of the suspected offences. The provision required no more than that the Warrants “state ... the offence to which [they] relate[d]” so as to indicate the area of the search (CS [7]-[9]).

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- *Smethurst* (2020) 94 ALJR 502, [22], [24]-[25], [28], [30], [39] (Kiefel CJ, Bell and Keane JJ, Gageler, Nettle and Gordon JJ relevantly agreeing at [115], [142], [166] respectively), [204], [207], [209] (Edelman J) (**Pt D, V3, T50**); *Corbett* (2007) 230 CLR 606, [97]-[99] (**Pt C, V4, T24**)

3. The Warrants are not invalid on any of the three bases identified by the plaintiff. Only the third argument concerns the statement of both the s 92.3(1) and 92.3(2) offences. The plaintiff accepts that, if there is a material defect in the statements of the s 92.3(2) offence, but not the s 92.3(1) offence, the former are severable (**PS [12]; CS [15]**). It follows that, unless the plaintiff succeeds on his third argument, none of the Warrants are wholly invalid, and the plaintiff will not have established that any material was unlawfully seized (whether or not the other attacks on the Warrants succeed).
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4. As to the third argument, the foreign principal was clearly identified as the “Government of the People’s Republic of China” (CS [14]; SC [41.2]). In any case, it was not necessary for the Warrants to identify a foreign principal in order to comply with s 3E(5)(a).

5. As to the first argument, the question is not whether the Warrants misstated an element of the s 92.3(2) offence. It is whether the Warrants sufficiently indicated the area of the search (CS [10]-[11]). They did so.

6. As to the second argument, even if the Warrants failed to expressly identify the target of the s 92.3(2) offence, that would not of itself be a ground of invalidity (CS [12]). In any case, the target of the alleged s 92.3(2) offence was plainly Mr Moselmane. The absence of express reference to Mr Moselmane in para (ii) could not have led to the search being any broader than it otherwise would have been (CS [12]-[13]; cf PS [16]-[18]).
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Facts

7. Foreign interference, of its nature, impairs free and informed electoral choice, and is otherwise detrimental to Australia's interests (CS [37]; SC [37]-[39], [41.2], [44]-[50]).

Proper construction of s 92.3(1) and (2) of the *Criminal Code* (CS [18]-[25])

8. The plaintiff's construction is overbroad in three respects.
9. First, both text and context indicate that "covert" in s 92.3(1)(d) requires the taking of some action to conceal, hide, keep secret or disguise (CS [21]-[23]). It does not extend to conduct that is merely "private" or "not openly acknowledged" (cf PS [38]; PR [6]).

- *Monis* (2013) 249 CLR 92, [309]-[310] (Pt C, V4, T22); *Coleman* (2004) 220 CLR 1, [191]-[192], [224] (Pt C, V2, T13); Revised EM to EFI Bill, [925] (Pt E, V1, T56)

10. Second, while not determinative of validity, the fault element that attaches to the conduct referred to in s 92.3(1)(d) is intention, not recklessness (CS [24]; cf PS [42], PR [7]).

9. Third, the phrase "on behalf of" in s 92.3(1)(b)(i) and (2)(b)(i) does not capture conduct merely engaged in "in support of, or in the interests of", a foreign principal; it connotes a circumstance where a person acts at their request or as their representative (CS [25], cf PS [51]; PR [8]).

- Revised EM to EFI Bill, [915] (Pt E, V1, T56)

Implied freedom of political communication (CS [26]-[44])

11. **Burden:** The communication burdened by the provisions is overwhelmingly of a kind that the implied freedom does not protect, as it is inimical to the system of representative and responsible government (CS [28]-[31]; NSW [19]; PR [10]). Alternatively, any burden on political communication is slight and easily avoided (CS [27]).

- *Unions (No 2)* (2019) 264 CLR 595, [163] (Pt C, V5, T34); *APLA* (2005) 224 CLR 322, [27], [66] (Pt C, V1, T9)

12. **Purpose:** The purpose of the provisions is to protect Australia's sovereignty by reducing the risk of foreign interference in Australia's political or governmental processes (CS [33]). That purpose is not only compatible with maintenance of the system of representative and responsible government, but is protective of the nation within which that system functions (CS [36]); SC [37]-[39], [41.2], [44]-[50]).

- 2R Speeches for EFI Bill: 7 Dec 2017, 13145-13148 (Pt E, V1, T52), 26 Jun 2018, 6352, 6398 (Pt E, V1, T53); Revised EM to EFI Bill, [4], [9], [31], [42]-[44] (Pt E, V1, T56); Hope Royal Commission Report, [3.43] (Pt E, V1, T57)

13. **Suitability:** The provisions have a rational connection to the above purpose, as they reduce the likelihood that people will engage in the criminalised conduct (CS [39]).
14. **Necessity:** The purported alternatives identified by the plaintiff are not obvious and compelling alternatives which are equally practicable and available and would result in a significantly lesser burden on the freedom (CS [40]-[42]; cf PR [15]-[16]).
- *Banerji* (2019) 267 CLR 373, [35] (Pt D, V1, T41); *McCloy* (2015) 257 CLR 178, [59], [61], [331] (Pt C, V3, T21); *Tajjour* (2014) 254 CLR 508, [89]-[90], [114]-[115] (Pt C, V5, T32)
15. **Adequacy of balance:** The purpose the provisions seek to achieve is not “manifestly outweighed by [their] adverse effect on the implied freedom”. Foreign interference poses a serious threat to Australia’s political and governmental processes, and s 92.3 places (at most) a slight burden on the freedom (CS [43]).
- *Banerji* (2019) 267 CLR 373, [38], [205] (Pt D, V1, T41)

Relief (CS [45]-[50])

16. If the Court quashes the Warrants for non-constitutional reasons, it should not proceed to consider the validity of the provisions (CS [47]): *Smethurst* (2020) 94 ALJR 502 at [105]-[107], [117], [140], [163], [198], [280] (Pt D, V3, T50).
17. Even if the Warrants are wholly invalid and are quashed, the Court should decline to grant any mandatory injunction as a matter of discretion, given: the policy of the law to refuse equitable relief when to grant such relief would prevent the disclosure of criminality; the fact that the officers believed their actions to be authorised; the relevance of the seized material to the investigation and the AFP’s continued use of that material; and the plaintiff’s delay in seeking an injunction (CS [49]-[50]; SC [26], [29], [31]-[33], [36]).
- *Smethurst* (2020) 94 ALJR 502, [99]-[104], [136]-[137], [160], [192], [267] (Pt D, V3, T50); *Day* (1981) 148 CLR 289, 302 (Pt C, V2, T14)
18. Insofar as the plaintiff seeks an injunction in relation to copied data, there is no basis for such an injunction to issue (CS [48]; cf PS [60]-[61]).
- *Smethurst* (2020) 94 ALJR 502, [67]-[85], [91]-[98], [143]-[146], [154]-[161], [229]-[233], cf [123], [130], [183], [186] (Pt D, V3, T50)


Stephen Donaghue

Perry Herzfeld

Date: 7 April 2021

Sarah Zeleznikow