HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 05 Feb 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S129/2020
File Title:	Zhang v. The Commissioner of Police & Ors
Registry:	Sydney
Document filed:	Form 27E - Reply-Plaintiff's Reply
Filing party:	Plaintiff
Date filed:	05 Feb 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No S129 of 2020

BETWEEN **JOHN SHI SHENG ZHANG**

Plaintiff

and **THE COMMISSIONER OF POLICE & ORS**

Defendants

PLAINTIFF'S REPLY SUBMISSIONS

Part I: Certification

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

Part II: Reply

Question 1(a): Misstatement of the substance of sec 92.3(2) of the *Criminal Code*

2 In the circumstances of sec 92.3(2), it was necessary for the Warrants to correctly state the elements of the offence: cf Submissions of the First Defendant and Attorney General of the Commonwealth (**Commonwealth**) (**DS**) [8]). As recognised in *Smethurst v Commissioner of Police* (2020) 94 ALJR 502; [2020] HCA 14 at 519 [39] (Kiefel CJ, Bell and Keane JJ) and at 552 [209] – [210] (Edelman J), while some offences may be shortly stated, others will require more by way of description and how they are said to arise. By reason of its multiple limbs and potential applicability to a variety of circumstances,[1] a statement of the alleged offence under sec 92.3(2) required more detail.

3 The passages of *New South Wales v Corbett* (2007) 230 CLR 606 cited as references at DS [8] do not demonstrate that it is unnecessary in all cases that the statement of the offence be framed by reference to the elements of the offence, and in part direct attention to the importance of stating the *nature* of the offence (at 631-2, [103]), reflecting an oft-stated concern by the courts.[2] In the circumstances of sec 92.3(2), the requirement to state the offence's nature required clarity as to the potential object of the influence,[3] in order to indicate the area of the search. The Warrants did not state that Mr Moselmane (or indeed, any individual) was the alleged object of influence. The misstatement of the offence in this regard failed to limit the search to material concerning potential influence upon Mr Moselmane rather than more broadly: cf DS [11].

Question 1(b), ground 1: failure to identify the target with precision

---

[1] *Smethurst* at 552 [210] (Edelman J).
[2] *Smethurst* at 517 [27], [30], [42] – [43] (Kiefel CJ, Bell and Keane JJ), Gageler J agreeing generally at [115], Nettle J agreeing generally at [142]; *Beneficial Finance v AFP* (1991) 31 FCR 523 at 543; *Caratti v Commissioner of the AFP* (2017) 257 FCR 166 at 210 [105].
[3] *Smethurst* at 552 [211] (Edelman J).

4 The submission at DS [12] assumes that the recipient of and those executing the Warrants were able to deduce from reading paras (i) and (iii) that Mr Moselmane was necessarily the target in (ii), without so stating. That is insufficient: PS [17]. The opening words of para (ii), "in doing so", did not indicate that the communications in that paragraph were limited to those with Mr Moselmane because it was unclear from para (i) whether or not Mr Moselmane's involvement was as a target or a suspected participant: cf DS [13].

Question 1(b), ground 2: failure to identify the foreign principal with precision

5 As a critical element in each of the Provisions which informed the nature of the offence, precision in the identification of a foreign principal in the Warrants was essential to their validity by reason of the foregoing. Sec 92.3(3) does not detract from this, because even if the suspected offender(s) did not have in mind a particular foreign principal, the identification of the foreign principal in the Warrants would limit the search: cf DS [14].

Questions 1(c), (d), (3) and (4): constitutional argument

6 ***Meaning of covert:*** Contrary to DS [21], the ordinary meaning of "covert" does not require that a person take action to any greater degree than is required in order to safeguard privacy. Further, the context of the term in sec 92.3(1)(d)(i) in being grouped with the words "involves deception" does not mean that the term will have the same degree of seriousness as that term: cf DS [22]. The conduct in sec 92.3(1)(d)(ii) and (iii) is "subject to the same objective standard of assessment for the purposes of the offences"[4] yet is significantly more serious than conduct involving deception. There should not be understood to be any relationship of degree or commonality of the terms in subsection (d).

7 ***The fault element attaching to covert:*** The fault element applicable to sec 92.3(1)(d) is recklessness, not intent, consistently with the Revised Explanatory Memorandum to the Bill: cf DS [24]. The matters in sec 92.3(1)(d) are properly characterised as circumstances rather than "states of affair[s]" or "act[s]",[5] and therefore recklessness is the applicable fault element under sec 5.6(2). There is no inconsistency in this position, as conduct may be intentionally engaged in by a person while that person is reckless as to some of its features. The matters contained in sec 92.3(1)(b) are expressly identified as "circumstances" and therefore carry the fault element of recklessness, yet relate to the same conduct as that in (a).

8 ***The construction of "on behalf of":*** The Commonwealth's reliance on *R v Toohey; ex parte Attorney-General (NT)* (1980) 145 CLR 374 at DS [25] emphasises the breadth of the term "on behalf of" in different contexts. This Court held in that case that the phrase *"bears*

[4] *Monis v The Queen* (2013) 249 CLR 92 at 202-3 [310] (Crennan, Kiefel and Bell JJ).
[5] *Criminal Code,* sec 4(1), definition of "conduct".

no single and constant significance" and that it may be used in conjunction with a wide range of relationships.[6] The context of the term is suggestive of a broad meaning. The example cited at DS [25] satisfies the element of the conduct being "directed" by a foreign principal in sec 92.3(1)(b)(ii) or 92.3(2)(b)(ii). A narrow construction of the term "on behalf of" leaves it with no work to do and is therefore to be avoided.[7] Its context as part of a criminal statute does not alter that meaning, as apparent ambiguity is resolved through textual examination.[8]

9 ***Burden:*** The submissions by the Commonwealth and the Attorney-General for New South Wales (**NSW**) that any burden on the implied freedom is limited should be rejected. The Provisions proscribe communication by individuals or organisations on their own behalf if those communications are made in collaboration with a foreign principal: cf DS [27], NSW [26]. The operation of sec 92.3 is not easily avoided: cf DS [27], NSW [19]. In respect of sec 92.3(1), avoiding covertness as to any part of the conduct is not easy. While disclosure by a person of the relationship to the foreign principal avoids sec 92.3(2), the person need not believe in the existence of that relationship[9] (but need only be reckless as to that fact)[10] and need not have any foreign principal in mind in order to contravene the provision.

10 While it is accepted that some communications caught by sec 92.3(1) and (2) will not be protected by the implied freedom by reason of their manner or nature, many other political communications proscribed by the Provisions will be protected. Unsuccessful attempts at foreign interference by a foreign principal cannot be inherently harmful: cf DS [31], and in any event the operation of the Provisions extends well beyond attempts by a foreign principal to exert foreign interference: PS [51] – [52].

11 ***Legitimacy of purpose:*** The purpose advanced by the Commonwealth and NSW directs attention to the meaning of the term "foreign interference". In the *Criminal Code,* the term refers to an offence against a provision of Subdivision B of Division 92: sec 92.4. Its meaning differs in part from that used by ASIO,[11] and thus caution is required before ascribing relevance from statements from ASIO and other sources regarding foreign interference generally to the purpose of the Provisions: cf DS [34] and NSW [21].

12 Insofar as it is contended that the purpose is to reduce the risk of foreign interference as proscribed within the Provisions, it is not legitimate. The submissions in support of that

---

[6] *R v Toohey; ex parte A-G (NT)* (1980) 145 CLR 374 at 386 (Stephen, Mason, Murphy and Aickin JJ).
[7] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 509-10 [90] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
[8] *Aubrey v R* (2017) 260 CLR 305 at 325-6 [39] (Kiefel CJ, Keane, Nettle and Edelman JJ); *R v Lavender* (2005) 222 CLR 67 at 96-97 [93] (Kirby J) and the cases there cited.
[9] *Criminal Code,* sec 5.2(2).
[10] *Criminal Code,* sec 5.6(2).

purpose proceed from the premise that foreign interference (as distinct from foreign influence) is inherently harmful: NSW [22], DS [37]. It is accepted that many forms of foreign interference will have harmful effects[12] (particularly where the conduct involves threats and demands with menaces) but these effects may not necessarily arise from foreign influence involving conduct which is covert in part, or which is undisclosed.

13 While the significance of transparency to Australia's system of representative and responsible government may be accepted at a level of generality, that significance is lessened when attached to matters of potential influence upon a range of processes or the exercise of a range of rights or duties, or upon a person with respect to the same: cf submissions of the Attorney-General for South Australia (**SA**) [5], [15]. The Provisions are distinguishable from those under consideration in the cases cited by SA at [19] – [27] as the legislation the subject of each of those decisions was directed to prohibitions upon political donations or funding, advertising or propaganda rather than the more nebulous concept of "influence" upon the matters set out in the Provisions.

14 ***Proportionality:*** Accepting that the Court may be assisted by a consideration in the proportionality analysis of alternative means of achieving the same end sought by Parliament,[13] the alternatives proposed by the plaintiff at PS [53] are expounded as follows. To the extent that the Court determines that the purpose advanced by the Commonwealth and NSW is the purpose of the Provisions and is legitimate, these alternatives achieve that purpose, and significantly lessen the burden.

15 The first proposed alternative is the removal of the Provisions in their entirety. Offences of intentional foreign interference appear in sec 92.2, and reflect the legislature's apparent concern to criminalise the behaviour of those who seek to interfere in Australian democracy.[14] Persons who have no intention of enabling or assisting foreign interference are unlikely to be deterred by a prohibition upon reckless conduct: cf DS [42]. Additionally, sec 92.3(2) is unnecessary to the achievement of the legislative object, as to the extent that the influence is sought to be exerted through illegitimate means, sec 92.3(1) will proscribe the conduct. To the extent that the legislative purpose is directed towards ensuring transparency, it is secured through the *Foreign Influence Transparency Scheme Act 2018* (Cth).

16 A proposed alternative formulation of sec 92.3(1) includes the following changes: (i) the deletion of subsec (1)(b)(i), (ii) the insertion of the words "or otherwise controlled" after

---

[11] PS [39]; SCB 54 [38].
[12] SCB 53 [37], 57 [47].
[13] *McCloy v New South Wales* (2015) 257 CLR 178 at 285 [328] (Gordon J).
[14] Revised Explanatory Memorandum at 3 [9], 22-23 [98].

the word "supervised" in (1)(b)(ii)), (iii) the deletion of subsec (1)(c)(ii) (noting that these matters are not referred to in the advanced purpose), (iv) the deletion of the term "covert" in subsec (1)(d)(i), and (v) the introduction of additional alternatives in (d) providing that a person commits an offence if any part of the conduct involves unconscionable conduct or the use of undue influence. A second alternative formulation of sec 92.3(1) would contain the changes at (i) to (iv) but provide that an offence is only committed if the person's conduct *in fact* has the effect set out in (c)(i) in a way which prejudices or causes harm to those processes. Either formulation would entail a significantly lesser burden on the freedom by limiting the communications caught by it, and be equally capable of fulfilling the legislative purpose to the same, or similar, extent.[15]

17 It is not to the point that these alternatives have not been selected by any other legislature, in circumstances where the Provisions themselves have seemingly not been selected by any other legislature: cf DS [41]. These proposed alternatives would fulfil Parliament's purposes to the same, or similar, extent.

18 ***Declaratory relief:*** Should the Court answer "yes" to Questions 1(a) or (b), it should proceed to answer questions 3 and 4, for the reasons set out at PS [59] (cf DS [47]). While the plaintiff has not yet been charged with an offence under the Provisions (and may never be) the continuing investigation means that a declaration of invalidity of the Provisions would produce a foreseeable consequence for the parties,[16] being the end of that investigation (at least as it pertains to possible offences under the Provisions).

19 The plurality's comment in *Brown v Tasmania* (2017) 261 CLR 328 at 343 [17] relied upon at PS [59] remains apposite: cf DS [47]. There is no meaningful impact upon standing where charges are withdrawn after proceedings are commenced as compared with charges not having been laid at all, and the independent basis for the plaintiffs' standing in *Brown* should be understood as providing an additional basis for standing, rather than the sole basis.

5th February 2021

Bret Walker
Phone (02) 8257 2527
Email maggie.dalton@stjames.net.au

Victoria Brigden
Phone (02) 9994 0398
Email vbrigden@eightselborne.com.au

Counsel for the plaintiff

[15] *Clubb v Edwards* (2019) 93 ALJR 448 at 548 [479] (Edelman J).
[16] *Ainsworth v Criminal Justice Commission* (1992) 175 CR 564 at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ).