

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

**NO S196 OF 2019**

**BETWEEN:**

**ANNIKA SMETHURST**

First Plaintiff

**NATIONWIDE NEWS PTY LTD**

Second Plaintiff

-and-

**COMMISSIONER OF POLICE**

First Defendant

**JAMES LAWTON**

Second Defendant



**ORAL OUTLINE OF THE PLAINTIFFS**

## PART I FORM OF ORAL OUTLINE

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

## PART II ORAL OUTLINE

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### Questions 1(a) and (b), and question 4 so far as it relates to them

2. The *Crimes Act* requires a warrant to state the offence to which it relates with particularity sufficient to define the scope of the search it authorises (PS [5]-[8]). A mere reference to the provision number of the offence is insufficient (PS [7]; Reply [2]).

*New South Wales v Corbett* (2007) 230 CLR 606 at [103]-[104], [107].

*ABC v Cloran* (1984) 4 FCR 151 at 153-154.

3. Section 79 of the *Crimes Act* means what it says. There is no language in s 79 that would support an implication that it applies only to material that risks prejudice to the security or defence of the Commonwealth. Indeed, s 77(5) speaks strongly against such an implication (Reply [13]-[22]).

4. The Second Warrant failed to state the offence to which it related (PS [9]-[11]; Reply [2]).

5. The Second Warrant failed to state the offence to which it related with sufficient particularisation (PS [12]-[14]; Reply [3]-[4]).

6. The seized material should be destroyed.

(a) If the Second Warrant was invalid, the search constituted a trespass on Ms Smethurst's property and the copying of material from her phone was tortious (PS [48]).

(b) The prima facie position is that items seized pursuant to an invalid warrant should be returned (Reply [30]).

*Puglisi v Fisheries Authority* (1997) 148 ALR 393 at 403.

(c) There is no discretionary reason to refuse to require the destruction of the seized material (Reply [31]-[32]).

**Question 2, and question 4 so far as it relates to question 2**

7. An order under s 3LA of the *Crimes Act* can only be issued in respect of a specific warrant. Such an order cannot apply in aid of a warrant that has not been issued at the time of the order. The s 3LA Order here was issued in aid of the First Warrant and could not validly be relied upon in connection with the Second Warrant (PS [16]-[21])
8. The similarities between the two warrants is irrelevant. It is also irrelevant that the Magistrate may have issued an order in the same terms in respect of the Second Warrant. Even if it were relevant, that fact cannot be assumed (Reply [8]-[9]).
9. An order under s 3LA must identify the computer or data storage device to which it relates, and the assistance it requires to be provided. The s 3LA Order here did neither (PS [22]-[25]; Reply [10]-[12]).

*Luppino v Fisher (No 2)* [2019] FCA 1100 at [120]-[126], [161]-[167].

10. The s 3LA Order being invalid, the reliance on it to require the unlocking of Ms Smethurst's phone was tortious and the material seized should be destroyed (PS [48]).

**Questions 1(c) and 3, and question 4 so far as it relates to them**

11. The Commonwealth does not propose any reading down which would capture the plaintiffs' conduct so as to dispose of the case at that threshold issue (Reply [23]).
12. It is uncontroversial that s 79(3) burdens political communication (PS [27]). The burden is substantial and would remain so even on the Commonwealth's construction (Reply [24]).
13. The Commonwealth's construction should not be accepted (Reply [13]-[22]). The implication is imprecise. It would cause the operation of s 79(3) to overlap with s 79(2).
14. The purpose of s 79(3) is the protection of government secrecy as an end in itself. This is not a legitimate purpose (PS [28]-[40]; Reply [26]-[27]).
15. If the Commonwealth's contention as to the purpose of the law were correct, the section is overbroad and not suitable to achieve that purpose (PS [42]).
16. The law is not necessary for the achievement of any legitimate purpose. It was always obvious that the law could have been more targeted than it is while achieving any

legitimate purpose (PS [43]). A narrower approach has now been adopted, and narrower approaches have frequently been recommended (Reply [29]).

17. Section 79(3) imposes a much greater burden on political communication than is justified and is accordingly not adequate in its balance (PS [44]-[45]). Even on the Commissioner's construction of s 79(3), the imprecision and breadth of the implied restriction means that the law is not adequate in its balance.
18. A declaration of invalidity should be granted (PS [49]).
19. If s 79(3) is invalid, or severed or read down, or construed as subject to the Commonwealth's implied limitation, the warrant is invalid (Reply [6]-[7]).

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*R v Eid* (1999) 46 NSWLR 116 (CA) at [12]-[14]

Dated: 12 November 2019



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