

SMETHURST & ANOR v COMMISSIONER OF POLICE & ANOR **(S196/2019)**

Date application for a constitutional or other writ filed: 26 June 2019

Date special case referred to Full Court: 6 September 2019

The First Plaintiff, Ms Annika Smethurst, is a journalist employed by the Second Plaintiff, Nationwide News Pty Ltd (“Nationwide”). On 29 April 2018 Nationwide published certain articles authored by Ms Smethurst (“the Articles”) online and in The Sunday Telegraph newspaper. The Articles alleged that the Department of Home Affairs and the Department of Defence were secretly discussing a proposal to expand the powers of the Australian Signals Directorate (“ASD”) such that it could covertly access data located in Australia. Two of the Articles included an image of part of a document which had been created by the ASD. The part of the document shown in the image bore markings indicating that it, and another document attached to it, were classified as “secret” and “top secret” respectively.

The Secretary of Defence referred the publication of the Articles to the Australian Federal Police (“AFP”), which commenced an investigation in response. In furtherance of that investigation, on 31 May 2019 the AFP succeeded in having two documents issued by a magistrate under the *Crimes Act 1914* (Cth) (“the Crimes Act”). The first was a search warrant (“the First Warrant”) issued under s 3E of the Crimes Act. The second was an order, under s 3LA of the Crimes Act, requiring Ms Smethurst to assist the AFP to access and copy data on computers or data storage devices held at her home (“the s 3LA Order”). On 3 June 2019 another search warrant (“the Second Warrant”), the terms of which were almost identical to those of the First Warrant, was issued. Each warrant described the offence to which it related as follows:

“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 s 79(3) of the *Crimes Act 1914*, Official Secrets.”

Both the First Warrant and the Second Warrant authorised AFP officers to enter and search Ms Smethurst’s home and to access and copy data held on computer or storage devices found there.

On 4 June 2019 officers of the AFP executed the Second Warrant and searched Ms Smethurst’s home. After requiring Ms Smethurst to provide her passcode to access her mobile telephone, an officer copied documents from the mobile telephone on to a USB device belonging to the AFP.

In their proceedings in this Court, the Plaintiffs seek relief which includes the quashing of both the Second Warrant and the s 3LA Order. The Plaintiffs also seek that the material seized by the AFP be delivered up or be destroyed and that none of it be provided to prosecuting authorities.

The Plaintiffs and the First Defendant filed a Special Case, the questions in which Justice Bell referred for consideration by the Full Court. (The Second Defendant, the magistrate who issued the search warrants and the s 3LA Order, has filed a submitting appearance.) The Special Case states the following questions for the opinion of the Court:

- (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?

Two separate Notices of a Constitutional Matter have been filed in this matter. The Attorney-General for the State of South Australia has intervened. The Australian Human Rights Commission however, has been granted leave to appear at the hearing as *amicus curiae*.