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Government Alert

A High Court decision on search warrants

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Background

On 29 April 2018, the Second Plaintiff, Nationwide News Pty Ltd (**Nationwide**) published articles in its newspaper and on its website of which the First Plaintiff, Ms Annika Smethurst, was the author. These articles alleged that the Department of Home Affairs and the Department of Defence were secretly discussing a proposal to extend the powers of the Australian Signals Directorate (**ASD**) so as to enable it to covertly access data located in Australia. Two of the articles published contained the image of part of a document that had been created by the ASD and bore markings indicating it, and another document attached to it, were "secret" and "top secret" respectively.

Sometime after 30 April 2018, the Australian Federal Police (**AFP**) commenced an investigation into the articles. On 31 May 2019, a member of the AFP obtained a warrant from a magistrate (**First Warrant**) under the *Crimes Act 1914* (Cth) (**Act**) to enter and search Ms Smethurst's residential premises and motor vehicle. The AFP also obtained an order pursuant to s 3LA of the Act (**3LA Order**) that Ms Smethurst assist police in accessing, copying and converting any data held on a computer or data storage device held at her home. Due to concerns about whether the contents of the First Warrant authorised a search of a specified vehicle if it was not at Ms Smethurst's premises, a member of the AFP obtained further search warrants. One warrant (**Second Warrant**) was in the same terms as the First Warrant (as so far as it concerned the search of Ms Smethurst's residence). The Second Warrant was subsequently executed on 4 June 2019 and documents were copied from Ms Smethurst's mobile phone.

The proceeding

The Plaintiffs sought relief from the Court quashing both the Second Warrant and the 3LA Order. The parties agreed on the questions of law for the opinion of the High Court. Relevantly, these questions included:

1 Is the Second Warrant invalid on the ground that:

- (a) it misstates the substance of s 79(3) of the Act?
- (b) it does not state the offence to which it relates with sufficient precision?
- (c) s 79(3) of the Act was invalid in that it infringed the implied freedom of political communication.

2 Is the s 3LA Order invalid?

The High Court unanimously held that the Second Warrant was invalid, and thus did not see it necessary to consider the issue of whether s 79(3) of the Act infringed the implied freedom of political communication.

The validity of the Second Warrant

The power to search a person's otherwise inviolable home is considered an exceptional power, to be exercised only under certain strict conditions.

Section 3E of the Act requires, amongst other things, a warrant to state the offence to which the warrant relates. The law is well settled in this regard and was neatly summarised by the Court as follows:

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. The power to issue a search warrant is given in aid of criminal investigation as well as finding evidence which will be admissible at trial.

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.[1]

It follows that 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 if fails clearly to state the nature of the offence in question to say that persons whose premises are to be searched have some ancillary information as to the offence to which the warrant is intended to relate.

Put simply, a search warrant requires a minimum level of clarity and content for the warrant to be validly enforced. The executing officer and those affected by the warrant must understand the object of the search and the limits to the scope of the search which has been authorised. The warrant should describe the nature of the offence, on its face, so as to indicate the bounds of the search. What is sufficient to be conveyed about the offence may vary with the nature of the offence. The Court highlighted that previous cases have held that a short description was sufficient.

Importantly, there is no formula, but it is necessary in each case to '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.'[2]

The offence in the Second Warrant was described 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. This offence was punishable by 2 years imprisonment."

The High Court noted that it was unclear whether the *document,* or its *communication* were "not in the interest of the Commonwealth". This confusion was further compounded by the reference to "article" in the Second Warrant. The plurality of the High Court noted that article can mean a *thing* - being the object of a search - or something *written* by a journalist. The High Court was also not convinced that "person" aptly conveyed the meaning contended by the Commonwealth, that being the Plaintiffs' readership.

Further, the High Court also stated that the Second Warrant *"substantially [misstated] the nature of [the] offence arising under it"*. The offence purported to be committed by the Plaintiffs did not hinge on "the interests of the Commonwealth", but rather, documents, articles or information being *prescribed* within the meaning of s 79(1) of the Act. A document will be prescribed in accordance with this section if for example, it deals with defence secrets. In essence, the description of the Second Warrant made the authorisation for the search appear impossibly wide.

Given this, the High Court deemed the Second Warrant invalid. As such, the entry, search and seizure were not authorised by the Act and were therefore unlawful.

Relief

The Plaintiffs sought the following relief:

1 a mandatory injunction requiring the destruction or delivery up of information taken from the First Plaintiff's phone; or in the alternative

2 an injunction restraining the first defendant from making that information available to the prosecuting authority.

[1] Paragraph 28.
[2] Paragraph 31.

Unlike the question of the Second Warrant, the High Court was split with respect to the question of relief.

The plurality considered whether there was a statutory basis for an injunction or if the consequences of the AFP's trespass on the Ms Smethurst's property gave rise to a basis for injunction.

The Plaintiffs argument for a statutory injunction relied on the contention that the Act impliedly prohibits the use of information obtained pursuant to a warrant for any other purpose other than those permitted by the Act. This was not the case in this matter. The plurality determined that the use to which the information taken from Ms Smethurst's phone was to be put was the further investigation of an offence. That purpose was expressly authorised under the Act.

The seizure of property under an invalid warrant constitutes a trespass. Given this, the Plaintiffs contended that had they been privy to the Second Warrant prior to its execution, they would have been able to apply to the Court for a prohibitive injunction in order to prevent the threatened tort. In order for the High Court to grant an interlocutory injunction – as would have been the case - the Plaintiffs were required to identify a legal right capable of being subject to the court's protection. The Plaintiffs were unable to identify any purported right which recognised their interest in not being investigated in relation to an offence.

The plurality then considered the application of s 75(v) of the Constitution owing to the fact that the matter was brought in the original jurisdiction of the High Court. This section confers power on the High Court to grant an injunction where one is sought against an officer of the Commonwealth. The plurality noted that the critical question in determining if such a remedy could be granted was the effect that the conduct had on the plaintiff, as well as if there were any discretionary considerations to be weighed. The plurality stated that strong policy considerations weighed against the granting of an injunction noting that the courts will refuse to exercise their jurisdiction where doing so would prevent the disclosure of criminality that it is in the public interest to reveal. On the facts, the Court held that the prospect of criminal conduct was a sufficient reason in order to decline the granting of a constitutional injunction.

With each of these avenues to injunctive relief being closed, the plurality determined that an order for certiorari quashing the search warrant be granted. Nettle J agreed with this order, albeit reached by different reasoning.

Gageler J, Gordon J, Edelman J

On the issue of what relief to issue, Gageler J, Gordon J and Edelman J reached a different conclusion to the plurality, and Nettle J. In doing so, their Honours all saw fit to issue a mandatory injunction that would require the Commissioner of Police to deliver up to Ms Smethurst the USB drive upon which the data from her phone was copied.

Gordon J determined that a mandatory injunction should issue requiring the Commissioner of Police to hand over the USB drive to Ms Smethurst. Her Honour noted that the issue of certiorari would not address the consequences of the unlawful conduct of the executing officer. Rather, her Honour determined that Ms Smethurst had standing to complain about the excess of power exercised by the executing officer. The imposition of a mandatory injunction would restore Ms Smethurst to the position she would have been in but for the unlawful search warrant having been executed.

Edelman J stated that such an order would ameliorate the consequences of the trespass, whilst also intruding to the minimum degree possible on the Commissioner's ability to act lawfully to obtain the information so desired. Edelman J rejected the Commissioner's contention that the mandatory injunction should be refused on public interest grounds. As such, he too preferred an order that the USB device be delivered up to Ms Smethurst by virtue of a mandatory injunction.

Conclusion

Despite the views of the minority, the majority of the Court declined to grant the injunctive relief sought by the Plaintiffs on the basis the plaintiffs' inability to identify a sufficient right or interest that required protection. Given the data from Ms Smethurst's phone remains with the AFP, it is possible that it may be used as

evidence in future proceedings related to the case. For now, the AFP will act in accordance with the ruling. Nonetheless, the case serves as a reminder for law enforcement officers to carefully draft search warrants so as to ensure the collection of any purported evidence is lawful.