IN THE SUPREME COURT OF QUEENSLAND No. 366 of 1990

CIVIL JURISDICTION

BEFORE MR. JUSTICE LEE

BRISBANE, 3 MAY 1990

BETWEEN:

SANTO ANTONIO COCO Plaintiff

-and-

NOEL RONALD NEWNHAM First Defendant

-and-

RONALD JOSEPH REDMOND Second Defendant

-and-

JOHN ROBERT MUHLDORFF SHAW Third Defendant

-and-

KENNETH CHARLES SCANLAN Fourth Defendant

Mr. S. Herbert (instructed by Gilshenan & Luton), for the plaintiff.

Mr. M. Forde (instructed by the Crown Solicitor), for the first, second and fourth defendants.

Mr. C. Porritt (instructed by The Director of Public Prosecutions), for the third defendant.

MR. HERBERT: I am for the plaintiff.

MR. FORDE: I am for the first, second and fourth defendants.

MR. PORRITT: I am for the third defendant.

HIS HONOUR: During the research into this matter following the hearing it became clear to me that some matters arose which were not the subject of submissions throughout the hearing and which I now raise for the purpose of inviting further submissions, first of all, as to whether they are appropriate and if so to what extent.

The first is what is the effect of s.12 of the Australian Federal Police Act 1979 (Cth.) which provides:

> "A member is not required under, or by reason of, a law of a State or Territory - to obtain or have a licence or permission for doing any act or thing in the exercise of his powers or the performance of his duties as a member."

Are the words "licence" or "permission" synonymous with the words "approval in writing" under s.43 of the Invasion of Privacy Act 1971-6 (Fed.); if not, why not? If they are, does s.43 of the Invasion of Privacy Act apply at all to Australian Federal Police as a matter of construction?

A second point which flows from that is whether there is a question of inconsistency within the meaning of s.109 of The Commonwealth Constitution between a law of the State and a law of the Commonwealth. The question of an inconsistency seems to be recognised in the matters covered by s.43(ii) and (iii) to which reference was made during the hearing. Section 43(2)(ii) exempts an officer employed in the service of the Commonwealth in relation to customs authorised by a warrant to use a device and that is so because under The Customs Act S.219B Div.1A here is express power to authorise the use of listening devices in the course of narcotic cases. This was canvassed in Peters and

Love in the Court of Appeal in New South Wales [1988] 16 N.S.W.L.R. 24 and in the High Court (1990) 64 A.L.J.R. 175. Secondly, subpara.(iii) seems to be a recognition of what would otherwise be an inconsistency between the State Act and the Australian Security Intelligence Authorisation Act s.26. There is also a further Act, the Telecommunications Interceptions Act of 1979, which is not referred to.

Inconsistency of laws, if they arise, can arise whether or not there is an express mention in one Act of the other Act and this is how inconsistencies mostly arise. You do not often have the Commonwealth Act expressly referring to a State Act or vice versa. I think there should be submissions in relation to it. It seems to me there is authority for the notion that when one talks about inconsistency, one talks about inconsistency of laws, not powers, although powers can be relied on to show intent (Ex Parte: McLean (1930) 43 C.L.R. 431 at 472). The question then arises or may arise, and I want submissions on this, whether s.43 can impose a limitation on the powers of the Australian Federal Police or conversely can the Commonwealth Act by s.12 override s.43, or at least the alleged requirement that s.43 operate only with respect to Queensland Police.

It seems to me the Australian Federal Police Force was possibly established pursuant to ss.60 and 51(39) of The Constitution (Ex Parte: Walsh (1925) 37 C.L.R. 36 at 122).

The question is whether s.12 is a law to maintain the laws of the Commonwealth if it says in effect that the Australian Federal Police can disregard a State law regarding listening devices.

The short point is whether there is a matter arising under the Constitution and involving its interpretation and, if so, am I required to give notices to the Attorneys-General under s.78B of the Judiciary Act (Commonwealth) as apparently occurred in Peters' case in New South Wales before the Court of Appeal? In other words, is there a potential constitutional point or does it turn solely on a

question of construction? It may be that s.12 does not operate in the way postulated. I am not concluding that it does. That is why I am asking you for submissions on the point.

The other point on which I am not entirely clear - it was touched upon in some submissions - does s.43 and s.46 of the Queensland Invasion of Privacy Act apply in relation to offences against laws of the Commonwealth? See s.9 subs.2 of the Australian Federal Police Act 1979. I do not know whether there is an argument that the State Act applies to the offences in question, or whether the Judiciary Act applies in some way. Section 79 of that Act says that laws of a State or Territory etc. are binding in all courts exercising Federal jurisdiction. Section 9(2) of the Australian Federal Police Act says:

> "Where any provisions of a law of a State apply in relation to an offence against the laws of the Commonwealth."

How can a State law apply? I would like submissions of how a State Act does apply and if so by what process does it apply?

There is one other point. Can a State Act bind the Commonwealth? You have the old case of Cigamatic (1962) 108 C.L.R. 372. Also is a Commonwealth officer bound by State laws at least when his actions are related to his distinctive duties as a Commonwealth officer as opposed to when he is driving his motor car and probably subject to the Queensland Traffic Act? (See Pirrie v. McFarlane (1925) 36 C.L.R. 170.)

Finally it was submitted on behalf of the third defendant that a single judge should not question the validity of an order made by another judge and that the matter should be referred to the Full Court, as in Peters' case. I have looked at the New South Wales cases and indeed all of the cases referred to.

There was no specific argument before me as to whether or not the order under attack was truly an ex parte order. There were submissions that it was an administrative order.

Mr. Justice Dowsett in R. v. Lewis [1987] 2 Qd.R. 710 adverted to the rare occasions when the applicability of an order granted ex parte pursuant to s. 43 subs.4 could ever be tested by the adversarial process. In other words, is this order within the category of cases of ex parte orders which may be set aside if it was invalidly made by application later brought by the person affected when he has notice of it, according to the long line of cases on that point including those applying to ex parte injunctions? Some of these case are: Cozens v. North [1966] 2 Q.B. 318 at 321; Boyle v. Sacker (1888) 39 Ch.D. 249 at 251; HMS Archer (1919) P. 1 at 4; Thomas A. Edison v. Bullock (1913) 15 C.L.R. 679.

As I understand the argument it was accepted that the order was an administrative order and it may be that the notion whereby a party affected by an ex parte order can apply to have it set aside does not apply in this case. It may be that what is termed an ex parte order in this case is not in truth an ex parte order of the type above referred to which usually applies to an order affecting rights in an action or cause. I would like submissions on the point because, if the principle applies, a single judge can set aside the ex parte order. There is then no question it can apply quite regardless of whether a single judge may question the validity of an order of another single judge rather than the Full Court. I think those are the main areas on which I would require further submissions.

The main point may depend on a question of construction of s.12 of the Australian Federal Police Act 1979 and whether it overrides the Queensland Act so that in truth the Federal police officers are not obliged to have a permit at all to do what they did. That could conceivably have a consequence on I the outcome of the application. I don't say it does. I am merely inviting submissions on it

and also on the question of whether the matter should be referred to the Full Court. I request submissions as to my power to do so. There is a procedure by way of stated case but I would like submissions, if I decide to take that course, on my power and the path by which that process is achieved other than by way of appeal, of course, which the parties have as of right. The judge in Peters simply referred the matter to the Court of Appeal.

I think that covers the areas on which I require further submissions. Does anybody want to raise anything by way of clarification?

MR. FORDE: You did mention s.43 - can s.43 impose a limitation and I missed the next part of that.

HIS HONOUR: On the powers of the Australian Federal Police to perform their duties under that Act.

There is something else, you just reminded me.

Section 12(a) says, “In the exercise... as a member.” and s.9 talks about the powers and duties conferred or imposed on a constable by or under the laws of the Commonwealth. I presume there is another Act which talks about what a constable can do under the laws of the Commonwealth so if there is anything in the suggestion about s.12, one would have to be satisfied as to I what were the duties of a member in relation to s.9. I presume there is some other legislation on that point too. Perhaps the parties may have other submissions consequential upon the foregoing.

Now, when will we set this matter down? There is a difficulty with dates due to other work. I note that Monday and Tuesday, 21-22 May is preferred.

(Argument ensued).

HIS HONOUR: I will list it again for mention tomorrow at 9.30 but that is subject to any advice to the contrary.

IN THE SUPREME COURT OF QUEENSLAND No. 366 of 1990

CIVIL JURISDICTION

BEFORE MR. JUSTICE LEE

BRISBANE, 10 AUGUST 1990

BETWEEN:

SANTO ANTONIO COCO Plaintiff

-and-

NOEL RONALD NEWNHAM First Defendant

-and-

RONALD JOSEPH REDMOND Second Defendant

-and-

JOHN ROBERT MUHLDORFF SHAW Third Defendant

-and-

KENNETH CHARLES SCANLAN Fourth Defendant

JUDGMENT

HIS HONOUR: This very complex matter first came on for hearing before me in the Practice Court on 21 and 22 March of this year. I was told then that the decision was not urgent.

During research into the numerous issues raised it became apparent to me that several other significant matters had not been the subject of submissions on the first hearing and in my view submissions were necessary thereon.

On 3 May 1990 I reconvened the Court and invited the parties to make further submissions on the areas identified, including what were possible constitutional questions and questions involving an interpretation of the Australian Federal Police Act and its effect on the Invasion of Privacy Act 1971-1988, Queensland. It was not possible to reconvene the Court until 21 and 22 May 1990, when further extensive argument occurred involving numerous issues raised. These have now all been fully considered and I have completed the decision.

The areas for consideration have been distilled by me from all of the submissions into the following particular headings:

1. Should this application be entertained by the Court at all, having regard to the pendency of committal proceedings in the Magistrates Court in Brisbane?

2. If “yes” to that question, should the matter be referred to the Full Court in the first instance rather than being heard by a single judge?

   If “yes” to the first question (that is, if the Court should hear it at all) but “no” as to whether it should be referred to the Full Court, the following questions then arise:

3. Were members of the Australian Federal Police included within the term “a member of the Police Force” in s.43(2)(c)(i) of the Invasion of Privacy Act, Queensland or is the expression limited to only members of the Queensland Police Force?

4. If “no” to this question, were members of the Australian Federal Police otherwise duly authorised by the terms of the order made to use the listening device to overhear the private conversations which have now been recorded in 18 tapes, most of which have been transcribed and are the subject of this application?

5. If the members of the Australian Federal Police were not authorised, the next question is: were those members exempted from the provisions of s.43 of the Queensland Act by s.12 of the Commonwealth Act?

6. Depending on the answer to that question, i.e. if s.12 did not give exemption, were members of the Australian Federal Police otherwise excluded from the operation of s.43 of the Queensland Act based upon constitutional principles of statutory interpretation and also by reason of s.4 of the Acts Interpretation Act Queensland?

   With respect to the last two headings it was conceded by all counsel that no question arose under the Constitution or involving its interpretation within the meaning of s.78B of the Judiciary Act (Cth) but rather it involved simply the true construction of the Commonwealth Act on the one hand and the State Act on the other. Finally -

7. If members of the Australian Federal Police were not exempt by reason of s.12 or pursuant to constitutional principles, or were otherwise not duly authorised, whether the evidence contained in the tapes and transcriptions thereof is admissible in evidence in proceedings pending before the stipendiary magistrate.

First of all, it should be said that notwithstanding that it was suggested that there was a challenge to the orders made by Mr. Justice Carter in this Court, there was in fact no challenge of His Honour's orders sought in the

notice of motion and, indeed, no challenge was in fact made. What was in fact challenged was what occurred as a consequence of those orders. Mr. Justice Carter authorised Detective Inspector Scanlan of the Queensland Police to use a device in investigations specified in the orders. It is evident to me, with respect, that His Honour's orders were correctly made and within the powers of the section. My conclusions are as follows:

1. For the detailed reasons set out in s.1 of these reasons this application should, as a matter of discretion, be determined on the merits by the Court.

2. Again for the extensive reasons set out, the matter should not be referred to the Full Court in the first instance but should be heard and determined by me.

3. Again for the reasons set out, the reference to a "member of the Police Force" in s.43(2)(c)(i) of the Invasion of Privacy Act 1971-1988 does not include a member of the Australian Federal Police but is limited to a member of the Queensland Police Force.

4. Not only were members of the Australian Federal Police, who conducted this investigation to the exclusion of Queensland Police Force officers, not entitled to seek approval or authorisation within the meaning of the Act to use a listening device, they were not duly authorised by Inspector Scanlan who had not been appointed in writing by the Commissioner of Police to authorise the use of a device by police officers. Neither did His Honour by the orders made purport to authorise the use by members of the Australian Federal Police of the device to overhear, record, monitor or listen to a private conversation. His Honour, by the orders, recognised that persons who were to make use of the device must be duly authorised by others in accordance with s.43(2)(c) of the Act. It is what

occurred subsequent to His Honour's orders which contravened s.43. See Section 5 of the reasons.

5. I have concluded that s.12 of the Australian Federal Police Act 1979 does not exempt the members of the Australian Federal Police from complying with s.43 of the Queensland Act. See section 5 of the reasons.

6. Members of the Australian Police Force, for the extensive reasons set out in section 6 of the reasons as a matter of construction of s.43 in the light of the principles argued, are not excluded from its operation in the investigation and detection of offences against the laws of the Commonwealth.

7. Finally, on the question in section 7 of the reasons dealing with the admissibility of evidence, in my opinion the evidence contained in the relevant tapes and transcripts was obtained as a result, direct or indirect, of the use of a listening device used in contravention of s.43 of the Act. That evidence is accordingly totally inadmissible in any civil or criminal proceedings. No basis has been shown that by virtue of s.46(2) of the Act the evidence is otherwise admissible, nor is there any question of discretion as to whether or not the evidence should be admitted or rejected.

Accordingly, I have come to the view that the discretion in this particular case should be exercised in favour of granting appropriate relief to the plaintiff.

I will now hear submissions on the precise form and extent of the order and also on the question of costs.

I publish my reasons.

...

HIS HONOUR: By consent I adjourn the further hearing of the notice of motion to 10 a.m. on Friday, 17 August 1990. I understand that that hearing will be short.

I have indicated the orders I am prepared to make and will make, subject to some fine tuning. The parties have indicated that agreement on the form of draft order is likely after perusal of the reasons.

IN THE SUPREME COURT OF QUEENSLAND No. 366 of 1990

BETWEEN:

SANTO ANTONIO COCO Plaintiff

AND:

NOEL RONALD NEWNHAM First Defendant

AND:

RONALD JOSEPH REDMOND Second Defendant

AND:

JOHN ROBERT MUHLDORFF SHAW Third Defendant

AND:

KENNETH CHARLES SCANLAN Fourth Defendant

JUDGMENT - LEE J.

Delivered the 10th day of August, 1990

CATCHWORDS:

Declaration - Committal Proceedings Pending - Admissibility of Evidence - Mandamus and Injunction - Tapes and Transcripts obtained by means of listening device - Private

conversations - Whether obtained in contravention of Invasion of Privacy Act 1971-1988 (Qld) - Whether Australian Federal Police duly authorised to use device - Whether Australian Federal Police exempted from the Invasion of Privacy Act 1971-1988 (Qld) - Whether Court should entertain the application - Whether matter should be referred to the Full Court in first instance - Invasion of Privacy Act 1971-1988 (Qld.) ss. 43, 46; Australian Federal Police Act 1979 (Cth.) ss. 9(2), 12, 12A; Rules of the Supreme Court O. 57 r. 2.

Police - Use of listening devices - Private conversations - Whether lawful use - Whether Australian Federal Police authorised to use device - Whether Australian Federal Police exempted from Invasion of Privacy Act 1971-1988 (Qld.) s. 43; Australian Federal Police Act 1979, ss. 9(2), 12, 12A.

Counsel:	FIRST HEARING
	Mr. C.E.K. Hampson Q.C. with Mr. S. Herbert for applicant/plaintiff
	Mr. O'Regan Q.C. with Mr. Ford: 1st, 2nd and 4th respondents/defendants
	Mr. Rosens Q.C. with Ms. Lieder for 3rd respondent/defendant
	SECOND HEARING
	Mr. C.E.K. Hampson Q.C. with Mr. S. Herbert and Mr. H. Fraser for applicant/plaintiff
	Mr. T. Keane Q.C. with Mr. Ford: 1st, 2nd and 4th respondents/defendants
	Mr. J. Griffin Q.C. with Ms. Lieder for 3rd respondent/defendant
Solicitors:	Gilshenan and Luton for applicant/plaintiff
	K.M. O'Shea, Crown Solicitor: 1st, 2nd and 4th respondents/defendants
	Commonwealth Director of Public Prosecutions for 3rd respondent/defendant
Hearing Dates:	21st, 22nd March, 1990; 3rd, 21st, 22nd May, 1990

IN THE SUPREME COURT OF QUEENSLAND No. 366 of 1990

BETWEEN:

SANTO ANTONIO COCO — Plaintiff

AND:

NOEL RONALD NEWNHAM — First Defendant

AND:

RONALD JOSEPH REDMOND — Second Defendant

AND:

JOHN ROBERT MUHLDORFF SHAW — Third Defendant

AND:

KENNETH CHARLES SCANLAN — Fourth Defendant

JUDGMENT - LEE J.

Delivered the 10th day of August, 1990

The plaintiff by motion pursuant to O. 47 r. 2 of the Rules of the Supreme Court seeks final relief in the action against four defendants arising out of committal proceedings against him which are pending before a Stipendiary Magistrate who has commenced upon but has not yet completed the hearing of several charges of alleged offences against laws of the Commonwealth. The matter was first heard in the Practice Court over two days on 21st, 22nd March, 1990. On 3rd May, 1990 submissions were invited by me on various points not canvassed during the first hearing. As a result extensive further submissions (oral and written) were made on 21st, 22nd May, 1990 dealing with various complex issues including constitutional questions as well as questions of construction of the Australian Federal Police Act 1979 and whether or not members of the Australian Federal Police were bound by the Invasion of Privacy Act 1971 (Qld.) (“the Act”).

The notice of motion seeks the same relief as that contained in the writ issued 14th March, 1990:—

"1. An Order for a mandamus requiring the Third Defendant to deliver up for destruction all tapes and transcripts produced as a result of the use of listening devices pursuant to the orders of the Honourable Mr Justice Carter and made in this Court on the Twenty-sixth day of October, 1989 and on the Twentieth day of November, 1989;

2. An Order for a mandamus requiring the Third Defendant to direct all persons authorised pursuant to the orders of the Honourable Mr. Justice Carter aforesaid to deliver up to the Third Defendant all tapes and transcripts produced as aforesaid and in their possession and further to direct them to refrain from any publication of any matters which have come to their attention or knowledge as a result of the various listening devices installed at the Plaintiff's residence at 11 Anzac Road, Carina, and at the Plaintiff's place of business at Cosco Holdings Pty Ltd, Antimony Street, Carole Park in the State of Queensland;

3. An Order for an injunction restraining the Third Defendant from putting into evidence and attempting to put into evidence the proceeds of the use of the devices pursuant to the aforesaid orders of the Honourable Mr Justice Carter or from disseminating the said proceeds elsewhere;

4. For declarations that:—

(i) use of the listening devices which produced the tapes and transcripts and the knowledge of the persons listening thereto was not a use authorised under section 43(2) of the **Invasion of Privacy Act 1971-1988**;

(ii) authorisations purported to be granted by the Fourth Defendant were not valid authorisations within section 43(2)(c) of the **Invasion of Privacy Act 1971-1988**;

(iii) tapes and transcripts and oral evidence of their contents are inadmissible pursuant to section 46 of the **Invasion of Privacy Act 1971-1988**;

(iv) all authorisations executed after the Seventh day of December, 1989 and purporting to have been made pursuant to the orders of the Honourable Mr Justice Carter are invalid as not falling within the provisions of section 43(2)(c) of the **Invasion of Privacy Act 1971-1988**;

5. A direction that the Plaintiff by his solicitors be permitted to search the file relating to the aforesaid orders made by the Honourable Mr. Justice Carter.

6. That the time for giving of notice of the hearing of this motion be abridged.

7. Such further or other Order as to the Judge seems meet.

8. Costs.”

Mr. Hampson Q.C. with Mr. S. Herbert appeared for the applicant on both hearings (also with Mr. H. Fraser on the second hearing); Mr. R. O'Regan Q.C. and Mr. M. Ford appeared for the first, second and fourth defendants on the first hearing, (Mr. P. Keane Q.C. with Mr. Ford on the second hearing); Mr. Rosens Q.C. and Ms. Lieder of the Victorian Bar appeared for the third defendant on the first hearing, (Mr. J. Griffin Q.C. and Ms. Lieder on the second hearing). The plaintiff's outline of submissions on the first hearing is contained in a document marked “A” and on the second hearing in a folder marked “C”; the outline of submissions on behalf of the third defendant on the first hearing is contained in a document marked “B” and on the second hearing in a document marked “E”; the submissions on behalf of the first, second and fourth defendants on the first hearing were not contained in a document but on the second hearing their further submissions were outlined in a

document marked “D”. Lists of extensive authorities were provided on each occasion. All of these documents are placed with the papers. Needless to say, these submissions were supplemented by extensive oral argument.

From the numerous submissions, the major points for consideration have been distilled as falling under the following broad headings, although there is some overlapping:—

1. Should this application be entertained by the Court at all?;

2. If yes to 1, should it be referred to the Full Court and not dealt with by a single judge?;

   If yes to 1 and no to 2 -

3. Does the reference to “a member of the police force” in s. 43(2)(c)(i) include a member of the Australian Federal Police or is it limited to a member of the Queensland Police Force?

4. Were the members of the Australian Federal Police who made use of the listening device in question duly authorised to use it?

5. Does s. 12 of the Australian Federal Police Act 1979 exempt members of the Australian Federal Police from complying with s. 43?

6. Are members of the Australian Federal Police bound by s. 43 of the Act at all in investigation and detection of offences against laws of the Commonwealth?

7. What is the effect of s. 46 of the Act which on its face absolutely prohibits the giving in evidence in any civil or criminal proceeding, evidence of a private conversation which has come to the knowledge of a person by the use of a device in contravention

of s. 43 of the Act, rather than providing for a mere discretionary ground of exclusion in accordance with the principles in Bunning v. Cross (1977) 141 C.L.R. 54, of such evidence if obtained unlawfully?

It is necessary to set out the principal sections relied upon although reference was also made to other parts of the Act during argument:—

"4. 'private conversation' means any words spoken by one person to another person in circumstances that indicate that those persons desire the words to be heard or listened to only by themselves or that indicate that either of those persons desires the words to be heard or listened to only by themselves and by some other person, but does not include words spoken by one person to another person in circumstances in which either of those persons ought reasonably to expect the words may be overheard, recorded, monitored or listened to by some other person, not being a person who has the consent, express or implied, of either of those persons to do so;"

"43. Prohibition on use of listening devices.

(1) A person is guilty of an offence against this Act if he uses a listening device to overhear, record, monitor or listen to a private conversation and is liable on conviction on indictment to a penalty not exceeding $2,000 or to imprisonment for not more than two years or to both such penalty and imprisonment.

(2) Subsection (1) of this section does not apply -

(a) where the person using the listening device is a party to the private conversation;

(b) to the unintentional hearing of a private conversation by means of a telephone;

(c) to or in relation to the use of any listening device by -

(i) a member of the police force acting in the performance of his duty if he has been authorized in writing to use a listening device by—

(a) the Commissioner of Police;

(b) an Assistant Commissioner of Police; or an officer of police of or above the rank of Inspector who has been appointed in writing by the Commissioner to authorize the use of listening devices;

under and in accordance with an approval in writing given by a judge of the Supreme Court in relation to any particular matter specified in the approval;

(ii) an officer employed in the service of the Commonwealth in relation to customs authorized by a warrant under the hand of the Comptroller-General of Customs and Excise to use a listening device in the performance of his duty;

(iii) a person employed in connexion with the security of the Commonwealth when acting in the performance of his duty under an Act passed by the Parliament of the Commonwealth relating to the security of the Commonwealth.

(3) In considering any application for approval to use a listening device pursuant to subparagraph (i) of paragraph (c) of subsection (2) of this section a judge of the Supreme Court shall have regard to -

(a) the gravity of the matters being investigated;

(b) the extent to which the privacy of any person is likely to be interfered with; and

(c) the extent to which the prevention or detection of the offence in question is likely to be assisted,

and the judge may grant his approval subject to such conditions, limitations and restrictions as are specified in his approval and as are in his opinion necessary in the public interest.

(4) An application to which subsection (3) of this section relates shall be made as prescribed by Rules of Court or in so far as not so prescribed as a judge may direct, and shall be heard ex parte in the judge's chambers. No notice or report relating to the application shall be published and no record of the application or of any approval or order given or made thereon shall be available for search by any person except by direction of a judge of the Supreme Court.

(5) The Commissioner of Police shall—

(a) as soon as practicable but not later than seven days after the granting of an authorization pursuant to subparagraph (i) of paragraph (c) of subsection (2) of this section cause the Commissioner to be informed of such authorization;

(b) cause a record to be kept of all authorizations granted pursuant to subparagraph (i) of paragraph (c) of subsection (2) of this section;

(c) furnish to the Commissioner in respect of each authorization at intervals of not more than one month a report containing such particulars as the Commissioner from time to time requires of the use of any listening device by any member of the police force to overhear, record, monitor or listen to any private conversation to which the member was not a party.

(6) A person referred to in paragraph (c) of subsection (2) of this section who uses a listening device to overhear, record, monitor or listen to any private conversation to which he is not a party shall not communicate or publish the substance or meaning of that private conversation otherwise than in the performance of his duty.

(7) The court by which a person is convicted of an offence under this section may, by its conviction, order that any listening device used in the commission of the offence and described in the order shall be forfeited to Her Majesty and delivered up, within such period as may be specified in the order, by the person who has possession of the listening device to a person specified in the order.

(8) Where an order is made under subsection (7) of this section and the person who has possession of the listening device refuses or fails to deliver up the listening device in accordance with the order, he is guilty of an offence against this Act and is liable on conviction to a penalty not exceeding $1,000 and, whether or not proceedings for the offence have been commenced, any member of the police force may seize the listening device and deliver it up in accordance with the order.”

“46. Inadmissibility of evidence of private conversations when unlawfully obtained.

(1) Where a private conversation has come to the knowledge of a person as a result, direct or indirect, of the use of a listening device used in contravention of section 43 of this Act, evidence of that conversation may not be given by that person in any civil or criminal proceedings.

(2) Subsection (1) of this section does not render inadmissible—

(a) evidence of a private conversation that has, in the manner referred to in that subsection, come to the knowledge of the person called to give the evidence, if a party to the conversation consents to that person giving the evidence;

(b) evidence of a private conversation that has, otherwise than in the manner referred to in that subsection, come to the knowledge of the person called to give the evidence, notwithstanding that he also obtained knowledge of the conversation in such a manner; or

(c) in any proceedings for an offence against this Act constituted by a contravention of, or a failure to comply with, any provision of this Part, evidence of a private conversation that has in the manner referred to in that subsection come to the knowledge of the person called to give the evidence.

(3) The court before which any proceedings referred to in paragraph (c) of subsection (2) of this section are brought may, at any stage of the proceedings and from time to time, make an order forbidding publication of any evidence, or of any report of, or report of the substance meaning or purport of, any evidence referred to in that paragraph.

(4) Any person who contravenes an order made under subsection (3) of this section is guilty of an offence against this Act."

The lengthy facts are not in dispute. The plaintiff stands charged with some 11 offences against various laws of the Commonwealth. Seven of the charges are alleged against him solely whereas four charges allege that he conspired with Angelo Vasta (and in one case with diverse others) to defraud the Commonwealth contrary to s. 86A of the Crimes Act 1914; to defeat the enforcement of a law of the Commonwealth, namely s. 70(1) of the Crimes Act 1914 contrary to s. 86(1)(b) of that Act; to commit an offence

against a law of the Commonwealth, namely s. 73(3) of the Crimes Act 1914 contrary to s. 86(1)(a) of that Act; and to pervert the course of justice in relation to the judicial power of the Commonwealth contrary to s. 42 of the Crimes Act 1914. The seven charges against him solely are that he incited Commonwealth officers to divulge information respecting the income tax affairs of certain persons contrary to the provisions of the Income Tax Assessment Act (1936); that he offered a benefit in order to influence Commonwealth officers in the exercise of their duties contrary to s. 73(3) of the Crimes Act 1914; that he threatened the lives of Commonwealth officers thereby hindering them in the performance of their functions contrary to s. 76 of the Crimes Act 1914; and that in order to influence a Commonwealth officer in the exercise of his duty, he offered to confer property namely money on that officer contrary to s. 73(3) of the Crimes Act (1914) (4 charges). All of these offences are alleged to have occurred over varying periods between 1st July, 1989 and 12th December, 1989.

The hearing of those charges commenced by way of committal proceedings on 26th February, 1990 and was adjourned to 12th March, 1990. At the committal hearing the third defendant ("Shaw"), a member of the Australian Federal Police, gave evidence that, in pursuance of Orders of Carter J. dated 26th October, 1989 and 20th November, 1989, a listening device was installed at the premises of Cosco Holdings Pty. Ltd. at Carole Park in the State of Queensland, that tape recordings of conversations allegedly held between the plaintiff and other persons were monitored by the listening device as a result of which there were 18 × 12 hour reel to reel tape recordings of the conversations, a majority of which had been transcribed and which tape recordings were intended to be tendered in evidence against the plaintiff. Shaw said that only persons authorised by the fourth defendant, ("Scanlan"), an inspector in the Queensland Police Force, made use of the said listening device but not that each of the persons so authorised had made use of it. He said that apart from

Scanlan who made no use of the listening device himself, none of the recipients of authorities were members of the Queensland Police Force, that the entire operation was carried out by Commonwealth police officers and that no Queensland police officer did any listening or supplied any equipment in relation to the investigation. This is confirmed by his affidavit filed 15th March, 1990. For the purposes of this application, I accordingly find the above facts as stated by Shaw.

On 12th March, 1990 Scanlan also gave evidence. Soon thereafter, the committal proceedings were adjourned. This action and notice of motion was filed on 15th March, 1990. The committal proceedings are adjourned pending the outcome of this application. The importance of the evidence obtained is clear.

The facts which appear hereafter are not disputed and are accepted by all parties. On 26th October, 1989 upon application by the second defendant ("Redmond"), then Acting Commissioner of Police - Qld., Carter J. granted the following approval:—

> "UPON HEARING MR. GRIFFIN of Queens Counsel and Mr. R.D. PETERSON of Counsel on behalf of the applicant and UPON READING the summons filed herein by leave the 25th day of October 1989 together with the affidavits of Kenneth Charles SCANLAN sworn the 25th day of October 1989 and the 26th October 1989, the affidavit of Ronald Joseph REDMOND sworn the 26th day of October 1989 and the affidavit of John Williams ADAMS sworn the 26th day of October 1989 all filed herein by leave I HEREBY APPROVE pursuant to Section 43 of the Invasion of Privacy Act 1971-1988, the use of listening devices in connection with the matter of police investigations relating to corruption including an offence of corruptly influencing Commonwealth Officers under Section 73(3) of the Crimes Act 1914, such approval being as follows:—
>
> 1. That Kenneth Charles SCANLAN of the Queensland Police Force by himself or by means of any other person engaged in or, assisting the investigation of the said matter, use any listening device or devices capable of recording, overhearing, monitoring or listening to a

private conversation simultaneously with its taking place, such listening device or devices to be installed in premises occupied by Santo Antonio COCO at 11 Anzac Road, Carina, and premises occupied by COSCO Holdings Pty Ltd, at corner of Antimony and Emery Streets, Carole Park in the State of Queensland.

2. That this authorisation apply until 12 noon on the 23rd day of November 1989 or until further order.

AND I DO ORDER THAT SUCH APPROVAL BE SUBJECT TO THE FOLLOWING CONDITIONS

1. That any authorised Police Officer or person engaged in, or assisting the investigation of the said offence, to enter and remain upon the said premises for the purpose of installing, maintaining, servicing and retrieving the said listening device or devices.

2. That no such listening device or devices shall be used to record any conversation between Santo Antonio COCO, and his legal advisers.

3. That no notice or report relating to this application shall be published and no record of the application, summons and affidavit, or of any approval or order given or made thereon shall be available for search by any person except by direction or order of a Judge of this Honourable Court.

4. That the intended procedures set forth in the affidavits of Kenneth Charles SCANLAN and John Williams ADAMS both sworn the 26th day of October 1989 be complied with."

On 27th October, 1989 Redmond signed the following authority:—

"I, RONALD JOSEPH REDMOND, Acting Commissioner of Police for the State of Queensland, HEREBY AUTHORISE Kenneth Charles SCANLAN, Detective Inspector of Police in the use

of listening devices under and in accordance with an approval given in writing by Mr. Justice W. CARTER, a Judge of the Supreme Court of Queensland at Brisbane on the twenty-sixth day of October, 1989, in connection with the investigation referred to in the said approval.

A copy of the said approval is attached hereto.

This authority extends as from the time and date of this Authority until the conclusion of the Investigation in connection with which the said approval has been given pursuant to the said section.

Dated at Brisbane this twenty-seventh day of October 1989.

R.J. Redmond,

Acting Commissioner of Police."

This is the only authority or document of any kind signed by Redmond in favour of Scanlan. Nevertheless on 27th October, 1989 Scanlan issued 20 documents headed "Invasion of Privacy Act 1971-1988, AUTHORITY", to 18 sworn members of the Australian Federal Police and to 2 unsworn members (Ebert and Fraser - transcribers) in the following terms:—

"I, Kenneth Charles SCANLAN, Detective Inspector of Police for the State of Queensland, being duly appointed in writing under the provisions of the Invasion of Privacy Act by Ronald Joseph REDMOND, Acting Commissioner of Police for the State of Queensland

HEREBY APPOINT Constable Keryn-Louise Elizabeth REYNOLDS

to use a listening device under and in accordance with an approval given in writing by MR JUSTICE CARTER, a Judge of the Supreme Court of Queensland at Brisbane on the 26th day of October, 1989 in connection with the investigation referred to in the said approval.

Dated at Brisbane this 27 day of October 1989.

K. Scanlan,

Detective Inspector."

Scanlan was not in fact "appointed in writing" under s. 43(2)(c)(i) of the Act to issue any such authorities but was authorised by Redmond only "in the use of listening devices". On 17th November, 1989, Scanlan issued an authority in identical terms to each of three persons who were employees of the Australian Taxation Office. They were not members of any police force. On 21st November, 1989 Scanlan issued two further identical authorities to two further members of the Australian Federal Police Force and on 22nd November, 1989 he issued a further authority to a member of the Australian Federal Police Force. On 5th December, 1989 he issued two further authorities in identical terms to a bank officer - interpreter and to an unsworn administrative staff member (para. 4 Shaw's affidavit filed 15th March, 1990).

On 2nd February, 1990, he apparently authorised Senator Tate to listen to the tapes and read the transcript of the relevant conversation (para. 6(b) of the affidavit of Michael Patrick Quinn filed 15th March, 1990 and p. 74 of Scanlan's evidence, ex. A to the affidavit of Clive William Horrick filed 20th March, 1990). Scanlan was apparently of the view that he could give an authorisation to any lay person, being any person who the investigators thought should have access to any portion of the information.

On the evidence there were in total some 29 authorities issued by Scanlan, 21 to members of the Australian Federal Police, two to transcribers, three to Taxation Office officials, one to a bank officer interpreter and one to an administrative assistant as well as one to Senator Tate. All authorities granted referred only to the approval by Carter J. dated 26th day of October, 1989.

Between about 6th November, 1989 and 9th November, 1989, a listening device was installed by members of the Australian Federal Police "authorised" by Scanlan to "use"

the device, in the premises of Cosco Holdings Pty. Ltd. together with companion electronic equipment capable of monitoring and recording the sound produced from the device. The tapes and transcripts in question are the product of that installation and use.

Some unspecified time between signing by Redmond of the authority to Scanlan on 27th October, 1989 and 20th November, 1989, Redmond retired from the Queensland Police Force. On 20th November, 1989 Carter J., on application by the first defendant ("Newnham"), Commissioner of Police Qld., made the following order headed "Extension of Approval:"

> "UPON HEARING MR GRIFFIN of Queens Counsel and Mr. R.D. PETERSON of Counsel on behalf of the applicant and UPON READING the summons filed herein by leave the 20th day of November 1989 together with the affidavits of Kenneth Charles SCANLAN sworn the 20th day of November 1989 filed herein by leave I HEREBY EXTEND THE APPROVAL given on the 26th day of October 1989 until noon on the 7th day of December 1989 or until further order and I further order that such extension of approval be subject to the conditions of the approval given on 26th day of October 1989 and upon the following further conditions:—
>
> (a) that a listening device shall not be used to overhear, record, monitor or listen to a conversation on and from 12 noon on 7th December 1989 and
>
> (b) that unless removed earlier the listening device or devices installed pursuant to the approval or extended approval be removed as soon as practicable after 12 noon on 7th December 1989."

The approval of 26th October, 1989 applied only to 23rd November, 1989 "or until further order". The approval of 20th November, 1989 extended that approval until noon 7th December, 1989 and applied the same conditions as those in the order of 26th October, 1989. No authorisations in writing to use the listening device in question have been issued by Newnham pursuant either to the order of 26th October, 1989 or the order made on his application on 20th

November, 1989. Nor has Scanlan been “appointed in writing” by him under the Act to issue authorisations to other police officers. The foregoing facts are found accordingly.

There is no dispute that all of the conversations recorded as a result of the use of the listening device were private conversations within the meaning of the definitions in s. 4 of the Act. The device was used to monitor and record conversations between the plaintiff and various people, none of whom apart from Feeley and Savatovic (employees of the Australian Taxation Office) knew or had any reason to suspect that the conversations were then monitored and recorded. In the cases of Feeley and Savatovic, they knew that the listening device was being used to record conversations they had with the plaintiff. The plaintiff makes no complaint with regard to any tape recordings of transcripts obtained as a result of the device used by the two officers of the Taxation Department who it appears were parties to the conversations which they were responsible in conducting with the plaintiff (see para. 13(b) of the plaintiff's submissions “A” and s. 43(2)(a) of the Act). I find that all of the conversations were private conversations within the meaning of s. 4 of the Act.

I proceed to deal with the various points listed above:—

1. Should this application be entertained by the Court at all?

(a) Procedure

Whilst the relief sought was strenuously opposed on behalf of all the defendants on discretionary as well as on substantive grounds, there was no procedural objection to the granting of final relief on the motion if a case was otherwise made out: Hattersley v. Reid [1969] Q.W.N. 49; McMahon v. Catanzan [1961] Q.W.N. 22; R. v. Lewis [1987] 2 Qd.R. 710. It was not suggested that the matter should go

to trial, with directions or pleadings. As indicated, all parties agreed that there was no dispute as to the facts.

(b) Mandamus

The Mandamus here sought is in the nature of a private writ, commanding the performance of some ascertained private right, a remedy closely allied to a mandatory injunction: Kerr on Injunctions 4th ed. p. 31-34. Subject to arguments as to discretion, it was not suggested that as a matter of law, the remedy of Mandamus was not available to the plaintiff if a case was made out for relief. The relief sought is expressly authorised by O. 57 r. 2 -"when the only relief claimed in the action is a Mandamus or injunction, with or without a declaration."

(c) Substantive relief sought

It was submitted for the plaintiff that the tapes of the private conversations and transcripts thereof could be the subject of an order for delivery up in the same way as if the defendants had wrongly taken private correspondence or memoranda belonging to the plaintiff which recorded such conversations: R. v. Lewis, and that it was not necessary to show, as submitted for the defendants, that the information had commercial value: see Meagher, Gummow & Lehane, Equity Doctrines and Remedies 2 ed. para. 4109, 4116, 4126.

There was no suggestion that the information contained in the tapes and transcripts was not confidential information; Ashburton v. Pope [1913] 2 Ch. 469 at 475; Coco v. A.N. Clarke (Engineers) Ltd. [1969] R.P.C. per Megarry J. at 47; Commonwealth v. John Fairfax & Sons Ltd. (1980) 147 C.L.R. 39 at 50 per Mason J. It appears to follow from the foregoing that it is not necessary to show any intrinsic value or importance in the information itself or of apprehended danger to the plaintiff by misuse thereof. Rather, equity looks to the circumstances in which the defendant obtained the information: Meagher, Gummow & Lehane para. 4109 and cases cited. Also, an order may be

founded either on the plaintiff's proprietary right in the tapes and transcripts: para. 4116, ibid; or on the basis that the Court acts on the conscience of the defendants: para. 4116, ibid; De Beer v. Graham (1891) 12 N.S.W.R. (E.) 144 per Owen C.J. in Eq. at 146; Prince Albert v. Strange (1848) 2 DeG. & SM. 652; 64 E.R. 293.

It is no defence that the plaintiff did not personally impart the information in confidence to any of the defendants or that any of the defendants got the information by their own hard work "as an industrious eavesdropper": Concrete Industries (Monier) Ltd v. Gardener Bros. and Perrett (W.A.) Pty. Ltd. S.C. Vict., 18 August, 1977 per Fullagar J. unreported; see also Franklin v. Giddins [1977] Qd.R. 72; R. v. Lewis (supra); and generally Meagher, Gummow and Lehane paras. 4109-4112. The information in question has been explicitly described so as to found an entitlement to injunctive relief if a case is otherwise made out: O'Brien v. Komesaroff (1982) 56 A.L.J.R. 681.

An order is therefore capable of being made for delivery up of the material embodying or containing what is not disputed to be confidential information: Ansell Rubber Co Pty Ltd v. Allied Rubber Industries Pty Ltd [1967] V.R. 37; British Steel Corp. v. Granada Television (1981) A.T. 1096 at 1104; and particularly if there has been an unlawful invasion of privacy: Hedges v. Grundman; Cassidy v. Bayliss (1985) 2 Qd.R. 263 per D.M. Campbell J. at 265 with whom Connolly J. agreed. There seems to be no logical difference between this case and one where private documents have been seized pursuant to an invalid search warrant. An order for delivery up can be made. In Hedges v. Grundman; Cassidy v. Bayliss the Full Court ordered that medical records seized under an invalid search warrant be delivered up to the appellants. See also the remarks of the High Court in George v. Rockett (20th June, 1990 unreported).

(d) Discretionary considerations

This topic received considerable attention on both hearings. It was submitted on behalf of all defendants that the Court should decline to embark on this hearing at all. It was said that the real relief sought was as to admissibility of evidence.

As mandamus is dependent upon appropriate declarations the grant of which are discretionary and as criminal proceedings are otherwise in train, the submission proceeded that declarations would be granted only in the most exceptional circumstances. As these proceedings arise out of part heard committal proceedings, the Court will be reluctant to interfere. The granting of remedies sought preempts a proper finding of admissibility by the Magistrate of the very evidence in respect of which the relief is sought, a matter exacerbated by the fact that the Magistrate had not yet been asked to rule on the point.

Mr. Rosens Q.C. relied on a passage by Gibbs A.C.J. in Sankey v. Whitlam (1978) 142 C.L.R. 1 at 25:—

> "But the procedure is open to abuse ... and if wrongly used can cause the very evils it is designed to avoid. Applications for declarations as to the admissibility of evidence may in some cases be made by an accused person for the purposes of delay, or by a prosecutor to impose an additional burden on the accused, but even when such an application is made without any improper motive, it is likely to be dilatory in effect, to fragment the proceedings and to detract from the efficiency of the criminal process."

He also submitted that the declarations sought would not be decisive of the outcome of the committal proceedings, a fact said to be necessary before any useful purpose would be achieved in granting relief at this stage. On the other hand, he conceded that if the tapes and transcripts were held to be inadmissible, it would conclusively dispose of one charge against the plaintiff namely conspiracy to pervert the course of justice. He further submitted that of the remaining 10 charges, three charges of conspiracy "may be made out against him on

direct and circumstantial evidence", with remaining substantive charges not depending upon the impugned evidence at all.

It was further submitted that the approval contemplated by s. 43(2) (c)(i) is an administrative act: Love v. Attorney General (1990) 64 A.L.J.R. 175 at 178 and that s. 43(4) requires in mandatory terms that the application be made "ex parte" with restrictions on publication and search except by direction of a Judge of the Supreme Court. It was said that this evinced a legislative intention inconsistent with the review of Judge's order or a review by another single judge, and that this type of case differed from ex parte orders made in circumstances where the usual rule of natural justice has not been observed for special reasons, thus giving a party affected the right to invoke the audi alterim partem rule, i.e. his right to be heard by any other judge to have the order reviewed and set aside: Cozens v. North [1966] 2 Q.B. 318 at 321; Boyle v. Sacker (1888) 39 Ch.D. 249 at 251; H.M.S. Archer (1990) P. 1 at 4; Thomas A. Eddison v. Bullock (1930) 15 C.L.R. 629; cf. R. v. Lewis.

From this, it was submitted that as a matter of discretion, the Court should merely decline to embark on this hearing at all. However at 46, Mr. Keane Q.C. conceded that an action may be brought for a declaration in appropriate circumstances.

The last submission is based on the premise that the orders of Carter J. have been attacked by the plaintiff. It is observed that no relief is claimed in the notice of motion in respect of the orders themselves. Rather, the relief sought goes to what occurred as a consequence of His Honour's order, somewhat analogous to the situation in R. v. Lewis where the order made was not attacked. As will later appear, it is apparent that the orders were, with respect, properly made and within the powers conferred by the Act and that on a true analysis, the plaintiff has not attacked them.

The principle that a declaration will not be granted unless it would be decisive of the outcome of the proceedings between the parties, is well known with respect to declarations generally. See per Holland J. in ACS v. Anderson (1974) 2 N.S.W.L.R. 482 at 486. It also applies where the declaration relates only to a civil proceeding; Lewis v. Green [1985] 2 Ch. 340. However, in Bowman v. O'Connor (O.S. 235 of 1985, Full Court Qld., 9th October, 1985 unreported), Thomas J. shared the view of Lucas J. in Jones v. The Commissioner for Railways [1968] Q.W.N. 29 that the limits of the jurisdiction referred to in Lewis v. Green are too rigid i.e. that the procedure was intended to enable the Court to decide questions of construction where the decision of those questions, whichever way it may go, would settle the litigation between the parties. Thomas J., with whom Kneipp J. agreed said at 4:—

> "There may be cases where a court may properly respond to a construction summons where the determination will assist the settlement of disputes between the parties, or some of the disputes between the parties, although it will not necessarily settle all litigation between them. However, whilst the observation in Lewis v. Green is not to be treated as a rigid rule, it expresses a factor which may properly influence a court in deciding whether or not to respond to a construction summons. The point made in Lewis v. Green should be seen merely as an aspect of the court's desire to avoid multiplicity of legal proceedings."

A declaration if now made in favour of the plaintiff would conclusively determine at least one serious charge and to that extent it satisfies the test in ACS v. Anderson as well as in Lewis v. Green. It may also assist in the resolution of the dispute between the parties in other matters in the sense referred to by Thomas J. See also the remarks of Gibbs A.C.J. in Sankey v. Whitlam (1978) 142 C.L.R. 1 at 24 where His Honour said "there were good reasons for exercising the discretionary power of the court by granting a declaration" in a case where the question involved was principally one of law and the decision on

that question was determinative of whether the proceedings should continue.

The foregoing apart, it is clear from a long line of cases referred to by the parties that whilst the power exists in the Supreme Court to make a declaration with respect to a committal proceeding or a criminal trial which is in train, it is only in special circumstances that the power will be exercised: ACS v. Anderson (supra); [1975] 1 N.S.W.L.R. 212; Sankey v. Whitlam per Gibbs J. at 20, 21, 25-6; Moss v. Brown [1979] 1 N.S.W.L.R. 114 at 131-2; Lamb v. Moss (1983) 49 A.L.R. 533; Nichols v. Queensland [1983] 1 Qd.R. 580; Young v. Quinn (1984) 56 A.L.R. 168 at 171-2; Gorman and McLaurin v. Fitzpatrick and Barrett [1985] 4 N.S.W.L.R. 286; Foord v. Whiddett (1985) 60 A.L.R. 269 at 278-9; Murphy v. D.P.P. (1985) 60 A.L.R. 299 at 302-3; Peters and Love v. Attorney-General (N.S.W.) [1988] 16 N.S.W.L.R. 24 per Mahoney J.A. at 28, 19. Nevertheless, in Sankey v. Whitlam, Gibbs A.C.J. said at 25, in a passage immediately preceding the passage relied upon by the third defendant as set out above:—

> "In any case in which a declaration can be and is sought on a question of evidence or procedure, the circumstances must be most exceptional to warrant the grant of relief. The power to make declaratory orders has proved to be a valuable addition to the armoury of the law. The procedure involved is simple and free from technicalities; properly used in an appropriate case the use of the power enables the salient issue to be determined with the least possible delay and expense."

From these authorities the following principles emerge:—

1. The Court has an undoubted jurisdiction to grant a declaration and other relief in an appropriate case notwithstanding that the relief sought relates to a matter arising for decision during the course of a committal proceeding: Sankey v. Whitlam at 20-21 per Gibbs A.C.J.; Imperial Tobacco Ltd. v. A.G. [1981] A.C. 718 at 750 per Lord Lane.

2. The Court will interfere by declaration with respect to a pending committal proceeding where special circumstances are shown to exist: Sankey v. Whitlam at 25 per Gibbs A.C.J.; Lamb v. Moss at 564.

3. The principle in relation to the proper exercise of discretion applies both in relation to the review of the conduct of uncompleted proceedings as well as in relation to a review of the ultimate decision of the Magistrate to commit: Sankey v. Whitlam at 26; Lamb v. Moss; Clyne v. Director of Public Prosecutions (1984) 55 A.L.R. 9 at 10; Foord v. Whiddett at 279.

4. The Court is reluctant to interfere where the question depends upon the admissibility of evidence alone: Sankey v. Whitlam at 25 per Gibbs A.C.J., although it might be justified in doing so if it was prepared to decide the whole question of admissibility: ACS v. Anderson per Holland J. at 487-8.

5. Where a declaration is sought involving the admissibility of evidence, the importance of that evidence must be demonstrated: ACS v. Anderson per Hutley J. at 216.

6. The reluctance of the Court to interfere with committal proceedings by way of declaration may be outweighed by the desirability of a prompt and authoritative decision upon a question of law: Shapowloff v. Dunn [1973] 2 N.S.W.L.R. 468; Sankey v. Whitlam per Gibbs A.C.J. at 24; ACS v. Anderson per Holland J. at 486; Foord v. Whiddett at 279, and particularly where there is no dispute as to the facts: Dun and Bradstreet v. New York City (1937) 11 N.E. (2d) 728 at 732.

7. Where a contractual, proprietary or statutory right is asserted, the Court may be more ready to grant a declaration: ACS v. Anderson per Holland J. at 486.

8. The power may be more readily exercised where the declaration will finally dispose of the matter in dispute: ACS v. Anderson per Holland J. at 486, or at least where it disposes of some of the issues between the parties or will aid in their resolution: Bowman v. O'Connor (supra); Sankey v. Whitlam per Gibbs A.C.J. at 24.

9. The power is usually reserved for occasions where the Court can be assured that rejection of the application for a declaration will obstruct the process of justice: ACS v. Anderson per Hutley J. at 216; or where it is clear that if the power is not exercised, justice will not be done to the plaintiff: Gorman McLaurin v. Fitzpatrick and Barrett at 292.

10. Against the interest of the applicant in the result of the committal proceeding and in the conduct of that proceeding according to law must be weighed the public interest in the expeditious resolution of accusations of crime: Seymour v. Attorney-General (1984) 57 A.L.R. 68 per Jenkinson J. at 71, applied by Sheppard J. in Foord v. Whiddett (supra) at 279; see also per Gibbs A.C.J. in Sankey v. Whitlam at 26.

11. The discretion whether or not to grant a declaration is an unfettered one and must be exercised in the circumstances of a particular case: Forster v. Jododex Australia Pty. Ltd. (1972) 127 C.L.R. 421 per Gibbs J. at 437-8; Sankey v. Whitlam per Gibbs A.C.J, at 25; Lamb v. Moss at 544.

Apart from the contention on behalf of the defendants that the substance of the relief sought is a declaration concerning admissibility of evidence, the plaintiff is not claiming a mere declaration that evidence proposed to be tendered before the Stipendiary Magistrate is inadmissible. He is also claiming a proprietary or similar right in confidential information in the tapes and transcripts and

an injunction, in addition to appropriate declarations as to admissibility of the information contained therein having regard to s. 46 of the Act. The matter is obviously one of considerable importance to the parties and to the plaintiff in particular. It was conceded that if a declaration is granted it will dispose of at least one of the major charges involving the plaintiff and may assist in the disposal of at least some of the others.

I have also taken into account the submission that if the plaintiff is left to raise objection to admissibility before the Stipendiary Magistrate, or the Administrative Appeals Tribunal, or the trial Judge if the statements are admitted and he is committed for trial, or finally before the Court of Criminal Appeal, this would expose him to the risk that what is confidential now will necessarily be made public by that process, it being of no comfort to the plaintiff if in the end, he is held to have been right. If there has been an unlawful use of the listening device, there has clearly been an invasion of privacy: Hedges v. Grundman; Cassidy v. Bayliss.

Having regard to the relief sought in the notice of motion, and all of the circumstances, including the fact that the matter has been extensively argued before me over four days with attendant costs, and also to the principles which I have discerned from the foregoing authorities, it seems to me that there are special circumstances existing and good reasons why the Court in this particular case, should embark upon a consideration of the merits of the plaintiff's application for relief. Whether in the exercise of discretion, declarations will be made is another matter: Rediffusion (Hong Kong) Ltd. v. Attorney-General (Hong Kong) [1970] A.C. 1136 at 1155.

2. Should the matter be referred to the Full Court?

Mr. Rosens Q.C. made the following submissions which appear in his outline “B”.

> “Jurisdiction

(A) Although the Applicant submits that this Court is not being asked to consider the validity of the Approval granted by Carter J. on 26th October, 1989 (as extended on 20th November, 1989), but rather the proper construction of the Approvals as read in the light of s. 43-46 of the Invasion of Privacy Act 1971-1976, (the Act), analysis of the arguments demonstrates that this Court is being asked to determine whether the approval was granted intra or ultra vires the powers exercised by Carter J. pursuant to the provisions of the Act [see also para. 11 of the affidavit of Michael Quinn sworn 14th March, 1990].

(B) A single Justice of this Court cannot consider the validity of the decision made by another Justice of the same Court.

(C) If the matter is to be litigated in this Court, then it should be reserved for the consideration of the Full Court for example see Peters and Love v. Attorney-General for New South Wales [1988] 16 N.S.W.L.R. 24).”

He also submitted that it would be inappropriate for a single judge to review the decision of a brother judge of the same Court. However, Mr. Griffin Q.C. who appeared for the third defendant on the second hearing, modified this stance somewhat. In submission 17 in his outline “E” he said:—

“17. Because of the effect of the authorities dealing with non-interference in committal proceedings the declarations sought should be refused. However, if they are to be entertained, it is open to this court to refer the matter to the Full Court under O. 38 and/or s. 7 of the Judicature Act.”

Mr. Keane Q.C. who appeared for the first, second and fourth defendant on the second hearing, did not support a reference to the Full Court, his submission being that as it was inappropriate for the matter to be dealt with in collateral proceedings at all, “it makes it no better to send it to the Full Court” (see p. 50 of transcript).

The only procedure drawn to my notice is that contained in O. 38 of the Rules of the Supreme Court. There is no consent of the parties to refer the matter to the Full Court. Indeed, senior counsel for the plaintiff strongly opposed such a course, submitting that it was entirely appropriate having regard to O. 57 r. 2 for a single Judge to pronounce upon the matter with reasons so that the parties may if they wish appeal from the decision. It was further urged that the matter has occupied in all four days before me with substantive submissions made and considerable costs incurred and that the Full Court might come to a different view of the matter and could well remit it back to me for determination.

No support is obtained from the decision of Love v. Attorney-General for the proposition that the matter should go to the Full Court. In that case the plaintiff and the Solicitor General for New South Wales joined in asking the Court to deal with the proceeding on a special basis and the Court agreed to do so. It is clear from the High Court decision in that case (1990) 64 A.L.J.R. 175 at 176 that the reference to the Court of Appeal was by agreement in the first instance. Furthermore, it appears that the Court of Appeal approached the appeal on the basis that the order under challenge was a judicial order rather than an administrative act which the High Court has now determined to be its true character. In addition, it appears from the decision of Holland J. in ACS v. Anderson at 405-6 that in a case such as this involving both discretionary considerations and questions of law, it would be inappropriate to refer the matter to the Court of Appeal. I adopt with respect His Honour's observations.

It is not necessary to repeat the factors referred to in s. 1(d) above. I have considered all of the circumstances of the case, including the form of the relief sought including the fact that there is in truth no challenge to the validity of the orders of Carter J. It is appropriate that I should deal with the merits of the

application, leaving the parties to take whatever action they see fit as a consequence of this decision.

3. Does the reference to a "member of the police force" in s. 43(2)(c)(i) of the Act include a member of the Australian Federal Police?

Section 43(1) of the Act does not strike at the installation of a device but only at the use of it "to overhear, record, monitor or listen to" a private conversation. Section 43(2) then provides that s. 43(1) does not apply to three classes of persons in clearly defined circumstances and in particular s. 43(2)(c) provides that s. 43(1) does not apply to the use of any listening device by "a member of the police force acting in the performance of his duty if he has been authorised in writing" by one of the three persons named therein, under and in accordance with an approval in writing given by a Judge of the Supreme Court.

Mr. Hampson Q.C. submitted that s. 43(2)(c) authorises only members of the Queensland Police Force to make use of listening devices for several reasons:—

a. Section 43(2)(c) is structured so as to specify with particularity those people employed by the Commonwealth who might be approved, (see s. 43(2)(c)(ii) and (iii) Customs Act 1914 s. 219B, Australian Security Intelligence Organisation Act 1979 s. 26.)

b. The ranks of Assistant Commissioner of Police and Inspector of Police do not exist in the Australian Federal Police Force (see s. 6 Australian Federal Police Act (1979).

c. Were s. 43 intended to refer to members of the Australian Federal Police Force, that would be specified as it is in other legislation such as the National Crime Authority (State Provisions) Act 1985. (See a specific reference to Commonwealth

Police Force in s. 26(1)(a) of the Act, the absence of a definition of "police force" in the Act and the presence of complete definitions when more than one police force was intended to be covered, in other legislation, National Crime Authority Act 1984; Proceeds of Crime Act 1987 (Cth) s. 4; Crimes Act 1914 (Cth), s. 3.

d. The use of the word "the" introducing the expression "Commissioner of Police" and "member of the Police Force" is apt to refer to only one Police Force, and not to any Police Force. To contend that the use of the expression "a member of the Police Force" applies to members of the Australian Federal Police is to also contend that the expression applies to members of any Police Force from any other country or place. This could not have been the legislative intention.

e. Section 35 of the Acts Interpretation Act (Qld) provides that in the absence of a contrary intention, where the term "office" or "officer" is used it is to be read as a reference to office or officer in and for the State of Queensland. There is no contrary intention in the Act.

It was further submitted that the amendment to the Australian Federal Police Act 1979 in February, 1990 (Act No. 11 of 1990) to add after s. 12A a new Division 2, "Use of listening devices in relation to general offences", was consistent with the above construction in that until that amendment, the prohibition in s. 43(1) applied to members of the Australian Federal Police Force as with all "persons" except those specifically excluded by s. 43(2). After the amendment, members of the Australian Federal Police by reason of inconsistent legislation are now in the same position as other Commonwealth officers specifically excluded by s. 43(2)(c)(ii), (iii): Love v. Attorney-General. He referred also to the amendment to the Australian Federal Police Regulations by statutory rule 23

of 1990, 7th February, 1990, by which for the purposes of the new s. 12C(1) of the Act, the Listening Devices Act 1972 of South Australia appears to be the only State Act prescribed for the purposes of that section.

It was submitted on the behalf of the third defendant that the reference "to a member of the police force" in s. 43(2) (c)(i) of the Act included a reference to a member of the Australian Federal Police who was then able to apply for an approval and be authorised in the manner adopted by Scanlan. (para. 13 of submission "E", pp. 69, 71, 80-81 of transcript of second day's proceeding). This construction was said to follow by reason of the principle laid down in R. v. McDonnell, Ex parte: Attorney-General [1988] 2 Qd.R. 189 at 195 that the law of Queensland is not confined to Acts of the Parliament of Queensland but extends also to Acts of the Parliament of the Commonwealth which form part of the general law of this State by virtue of the Constitution, particularly covering cl. 5, when taken in conjunction with s.9(2) of the Australian Federal Police Act 1979. That sub-section which is identical to s. 6(4) of the Commonwealth Police Act 1957, repealed by the 1979 Act, provides as follows:—

> "Where any provisions of a law of State apply in relation to offences against the laws of the Commonwealth or of a Territory, those provisions so apply as if—
>
> (a) any reference in those provisions to a constable or to an officer of police included a reference to a member; and
>
> (b) any reference to those provisions to an officer of police of a particular rank included a reference to a member holding a rank that is, or is declared by the regulations to be, the equivalent of that rank."

Reference was also made to ss. 4(2), 23 of that Act and Regulation 4 of the Australian Federal Police Regulations as well as to s. 15AA of the Acts Interpretation Act (Cth.) which requires the Court to adopt

a construction (of a Commonwealth Act) which promotes its purpose and object.

At first sight the foregoing submission is difficult to reconcile with the submission at pp. 4 and 5 of submission "B" and in particular para. N which follows the submission in para. K that the law of Queensland is not confined to Acts of a parliament of Queensland; R. v. McDonnell. The submission ends as follows:—

> "There is nothing in the provisions of the Act to preclude Australian Federal Police Officers from so acting, providing that;
>
> (i) They do not obtain the approval;
>
> (ii) They do not thereby seek to breach Commonwealth law; see Love and Peters."

However I perceive that the latter submission was probably intended to relate more to the point that a Supreme Court Judge by his order was entitled to authorise any persons, whether a member of the Queensland Police force or not to assist in the use of devices to overhear, record, monitor or listen to a private conversation. This matter will be dealt with under para. 4 below.

It was not disputed by Mr. Hampson Q.C. that the law of Queensland is not confined to Acts of the Parliament of Queensland but also includes Acts of the Parliament of the Commonwealth. This did not mean that the reference to "the offence" in s. 43(3)(c) had the effect that s. 43 was a law which applied in relation to offences against laws of the Commonwealth within the meaning of s. 9(2). Even if a member of the Queensland Police Force may investigate a Commonwealth offence as well as a State offence, this meant no more than that that member was bound by s. 43 so that s. 43(2)(c)(i) is not thereby enlarged to include a member of the Australian Federal Police.

It was further submitted that s. 43 is a law which prohibits the use of listening devices other than in

defined circumstances. It would be expected that for a law of the State to apply in relation to offences against the laws of the Commonwealth, it would be by reason of the application of some Commonwealth law applying that law to offences against the laws of the Commonwealth.

Various examples were given. Section 68(1) of the Judiciary Act 1903 (Cth) applies so far as they are applicable to persons charged with offences against the laws of the Commonwealth, the laws of the State or Territory respecting the arrest and custody of offenders, the procedure for their summary conviction, examination and commitment for trial on indictment, the hearing and determination of appeals and matters of bail. By this process, a law of the Commonwealth "applied" certain State laws "in relation to" offences against laws of the Commonwealth within the meaning of s. 9(2). The State law could not of its own force be said to "apply" to offences against the laws of the Commonwealth.

It was next submitted that it was necessary to see which if any such laws refer to a Constable or to an Officer of Police because if they did not, their provisions cannot apply as if a reference in those provisions to a Constable or Officer of Police includes a reference to a member. Section 43 is not concerned with the subject matter included in the matters enumerated in s. 68 of the Judiciary Act and is therefore not made applicable by virtue of that Act. Section 43(2) in its terms is applicable to a State offence described in s. 43(1). There is no Commonwealth offence against that Act.

Other examples which apply in relation to offences against the laws of the Commonwealth by virtue of an enactment of the Commonwealth Parliament viz. s. 68(1) of the Judiciary Act included s. 546 of the Criminal Code (arrest without warrant generally) where a power of arrest without warrant is conferred on a police officer. See also ss. 256, 259 of the Code and s. 2 of the Bail Act 1980

(Qld.) where by a member of the Police Force was empowered to grant bail.

It seems to me that s. 9(2) of the Australian Federal Police Act assumes by some process other than by force of the sub-section itself, that provisions of the law of the State "apply in relation to offences against laws of the Commonwealth". It is one thing to say that a member of the Queensland Police Force in the course of his duty may be authorised to use a listening device for the investigation and detection of an offence against the laws of the Commonwealth, (State authorities also have the duty of enforcing Commonwealth law: Lumb and Ryan: Constitution of the Commonwealth of Australia 3d. Ed. p. 250), but quite another to say that s. 43 "applies" in relation to offences against laws of the Commonwealth within the meaning of s. 9(2). Likewise it is difficult to say that in construing the expression "a member of the Police Force" in s. 43(2)(c)(i) of the Act, reference may be made to an Act of the Commonwealth which in some way affects the meaning of that expression.

In addition to officers of the Commonwealth specifically excluded from the operation of s. 43: s. 43(2)(c)(ii) and (iii), reference should be made to s. 26 of the Act which specifically excludes the numerous persons including the Crown in right of the Commonwealth, numerous Commonwealth officers and any member of the Commonwealth Police Force within the meaning of the Commonwealth Police Act 1957 (repealed by s. 3 of the Australian Federal Police Act 1979) from the operation of the whole of Part 3 (ss. 8-40). Whilst this is not within Part 4 dealing with listening devices, it may be thought that the draftsman of the Act had clearly in mind who precisely was intended to fall within the scope of the expression "a member of the Police Force" in s. 43(2)(c) of the Act.

Accordingly, I accept the submissions of Mr. Hampson Q.C. and conclude that a "member of the Police Force" in the subsection does not include a member of the Australian

Federal Police Force. Even if this conclusion is incorrect, it was submitted by Mr. Hampson Q.C. and indeed conceded by Mr. Keane Q.C. (p. 42) that if the submissions for the plaintiff are correct as to matters of substantiation, s. 9(2) of the Australian Federal Police Act would not give another string to the defendants' bow. To rely on s. 9(2) the defendants would have to comply with s. 43 in any event. This does not mean that it was conceded that there was a breach of the Act or that the evidence was not otherwise admissible. These matters are dealt with below.

4. Were members of the Australian Federal Police duly authorised to use a listening device?

The argument was put on two bases:—

(a) On the assumption that members of the Australian Federal Police are included within the expression “a member of the Police Force” in s. 43(2)(c)(i) and were capable of being authorised; or

(b) His Honour's order was sufficient to empower members of the Australian Federal Police to assist in the use of a listening device whether or not they fell within the above expression.

As held in s. 3 hereof submissions based on sub-para, (a) must accordingly fail. Submission (b) received considerable attention.

It is clear that there could not be a lawful use of a listening device to overhear, record, monitor or listen to a private conversation unless the following conditions are satisfied:—

(a) The use must be by a member of the police force acting in the performance of his duty; and

(b) That member must have been authorised in writing to use the device by either the Commissioner of Police, an Assistant Commissioner of Police, or an officer

of police of or above the rank of Inspector who has been appointed in writing by the Commissioner to authorise the use of listening devices;

(c) the use must be "under and in accordance with an approval in writing given by a Judge of the Supreme Court in relation to any particular matter specified in the approval".

Section 43(2)(c) confers a power on a Judge of the Supreme Court to grant an approval in writing in specified circumstances. This is an administrative act: Love v. Attorney-General (1990) 64 A.L.J.R. 175 at 179. In considering the application for approval the Judge shall have regard to the matters set out in s. 43(3) and having done so, he may grant his approval subject to such conditions, limitations and restrictions as are specified in his approval and as are in his opinion necessary in the public interest.

The section imposes no power on the Judge to authorise in writing a member of the Police Force to use a listening device. This is specifically reserved for one of the three persons referred to in s. 43(2)(c). The approval of the Judge is merely the warrant or a fulfilment of the statutory requirement or precondition for the use at all of a listening device in relation to a particular investigation, having considered the matters in s. 43(3) and having balanced the interests of the community against the interests of the individual or individuals concerned, and for the consequent issue of authorities by the Commissioner, or Assistant Commissioner or Inspector duly appointed in writing by the Commissioner to authorise the use of listening devices by "a member of the police force".

Scanlan, an Officer of the Queensland Police Force of or above the rank of Inspector, was never appointed in writing by the Commissioner to so authorise the use of listening devices by other persons. The only document issued to him was the authority granted by Redmond on 27th October, 1989 by which he was merely authorised "in the use

of listening devices under and in accordance with an approval given by Mr. Justice W. Carter ... on 26th October, 1989". All of the authorities issued by Scanlan were not authorities which he was empowered to give pursuant to s. 43(2)(c) simply because he had never been appointed in writing by the Commissioner to authorise the use by others of listening devices. Furthermore, he could not lawfully issue authorities to members of the Australian Federal Police.

It was next argued for the defendants that Carter J. expressly authorised members of the Australian Federal Police Force to use the device either directly or by reference to conditions 1 and 4 of the order of 26th October, 1989. Mr. Rosens Q.C. in para. J. of submission "B" said:—

> "An Approval was obtained by Redmond, authorising Scanlan, both Queensland Police Officers, in relation to a breach of Commonwealth law in accordance with section 43(2) of the Act; Terms and conditions were imposed by Carter J. in accordance with the provisions of sub-section (3) including the employment of 'such other persons' as Scanlan might require to carry out his duties; Carter J. expressly approved the use of the device by Scanlan and by Australian Federal Police Officers for the purpose of investigating a breach of Commonwealth law."

He further submitted in para. "M" that pursuant to this I approval, and having regard to R. v. McDonnell, other persons, including Officers of the Australian Federal Police, assisted in the monitoring and recording process and in para. "N", that there is nothing in the provisions of the Act to preclude members of the Australian Federal Police from so acting providing they do not obtain the approval. Reference was again made to Love v. Attorney-General.

This submission was in substance supported by Mr. O'Regan Q.C. on the first hearing. He referred (inter alia) to the extended meaning of the word "use" in the section,

citing F.E. Charman Ltd. v. Clow [1974] 1 W.L.R. 1384 and Gallagher v. Wimpey & Co. Ltd. (1951) Scots L.T.R. 377. This point was taken further by Mr. Keane Q.C. on the second hearing who referred to the judgment of the High Court in Love v. Attorney-General at 176 as follows:—

> "The warrants authorise the use of listening devices by a named State Police Officer and 'on his behalf' named State and Federal Police Officers 'to record, or listen to the private conversations 'of certain persons', including the appellants, and authorised the installation of devices on and their retrieval from specified premises and entry onto those premises for those purposes. Each warrant fixed a period during which it was to remain in force."

It was submitted from this passage that the High Court found no difficulty with the form of the order made viz. that something could be done on behalf of someone else. However, care must be taken to read the decision of the Court of Appeal and the High Court in Love v. Attorney-General in the context of the New South Wales legislation there under consideration and which is materially different from the Queensland Act. As this case was referred to on several aspects of the argument for the defendants, it is convenient to deal with it now.

Privacy or listening device legislation by whatever name called throughout various States of the Commonwealth is by no means uniform. The Listening Devices Act 1972 (S.A.), s. 6(1) merely requires that the person concerned should be acting in the performance of his duty, without distinguishing between Commonwealth Officers and other persons. This Act I was told is the only State legislation declared by Australian Federal Police Regulations (Statutory Rules 23 of 1990) to be a prescribed law pursuant to s. 12C of the Australian Federal Police Act as inserted as part of the new Division 2 "Use of listening devices in relation to general offences" inserted in February, 1990. That sub-section provides:—

> "Nothing in this Division applies in relation to the use, in circumstances prescribed for the purposes of this subsection, of a listening device under a warrant issued under a law of a State or Territory being a law prescribed for the purposes of this subsection."

The Queensland Act: s. 43(2) (iii) as well as the Listening Devices Act 1969 (Vic.), s. 4(3)(a)(3) and the Listening Devices Act 1978 (W.A.), s. 4(3)(a)(iii), permit the use of a listening device by a person employed in connection with the security of the Commonwealth when acting in the performance of his duty: see also s. 43(2) (ii) of the Act in relation to an officer authorised by warrant in relation to a Customs matter: Customs Act s. 219B. The former New South Wales Act (Listening Devices Act 1969) required that the person have an authorisation under that Act or from a Commonwealth Minister responsible for the administration of the relevant Commonwealth Act.

The current Listening Devices Act 1984 (N.S.W.) with which Love v. Attorney-General was concerned draws no distinction between police officers of New South Wales or Australian Federal police officers or indeed any police officers for that matter. Section 5 prohibits "a person" from using or causing to be used a listening device to record a private conversation to which the person is not a party or to which he is a party. Section 5(2) states that s. 5(1) does not apply to the use of a listening device pursuant to a warrant granted under para. 4 or to the use of a listening device pursuant to an authority granted by or under the Telecommunications (Interception) Act 1979 of the Commonwealth or any other law of the Commonwealth, or to the use of a listening device to obtain evidence or information in connection with—

(i) an imminent threat of serious violence to persons or of substantial damage to property; or

(ii) a serious narcotics offence, if it is necessary to use the device immediately to obtain that evidence

or information. There are other exceptions not relevant.

Various sections 6, 7, 8, 9, 10, 11 and 16 refer only to "a person". Section 13 deals with inadmissibility of evidence when unlawfully obtained. That section is materially different to s. 46 of the Act as are various other provisions. Of importance is Part 4 dealing with warrants. The Court means the Supreme Court of New South Wales. By s. 16, the Court may if satisfied that there are reasonable grounds for the suspicion or belief by a person that a prescribed offence has been, is about to be or is likely to be committed, authorise by warrant the use of a listening device. A prescribed offence is an offence against both Federal and State laws: see McHugh J.A., Love v. Attorney-General at p. 33. By s. 16(2) the Court is required to have regard to various matters. By s. 16(3) the Court shall by warrant specify various matters including that contained in sub-s. (d) thereof—

> "(d) The name of any person who may use a listening device pursuant to the warrant and the persons who may use the device on behalf of that person."

There is no reference to "a member of the police force" so that any "person" can apply and s. 16(4)(d) gives the Court a general power to include the name of any person who may use the device pursuant to the warrant "and the persons who may use the device on behalf of that person". There seems to be no reason why, apart from the provisions of the Customs Act s. 219B, members of the Australian Federal Police could not either be authorised or be named in accordance with s. 16(4)(d). See per Mahoney J.A. [1988] 16 N.S.W.L.R. 28 at 29F.

In that case a joint task force of State and Australian Federal Police jointly investigated drug offences against both State and Commonwealth law. A Judge purported to authorise members of the Australian Federal Police to use a device in the investigation of narcotic offences against laws both of the Commonwealth and of the

State. Included in the warrant was an authority also for State police officers to investigate the offences. Because in respect of the Commonwealth offences which fell within the scope of the Customs Act s. 219B which prohibited the use of a listening device by members of the Australian Federal Police without a warrant issued pursuant to that section, the approval granted by the Judge could not operate to authorise the use of a device by members of the Australian Federal Police with respect to the Commonwealth offences. There were inconsistent provisions in the Customs Act s. 219B which bound members of the Australian Federal Police investigating narcotic offences referred to in the Customs Act. The Judge had no power to issue any warrant to those members in respect of those offences so that the approval was construed or read down so as to validly operate with respect to the use by State police officers of a listening device with respect to the investigation and detection of State offences. There seems no reason why the warrants which were issued on the application of the New South Wales Commissioner of Police could not operate to authorise members of the Australian Federal Police to use the device in their assisting with the investigation of a purely State offence. See e.g. the judgment of the High Court at 178 (col. 1) B-C.

That case was concerned with a question of inconsistency between two laws in accordance with s. 109 of the Constitution. The present case is totally different. There is no question of the operation of the Customs Act s. 219B or any other Commonwealth law in relation to the use of listening devices. The proceedings are concerned with Commonwealth offences only not in any way dealt with by legislation as might now be the case had the amendment to the Australian Federal Police Act effected by Act No. 11 of 1990 been then in force. Furthermore, in Love v. Attorney-General, it is clear that members of the Australian Federal Police and indeed any person were entitled to apply under the State legislation for a warrant or were entitled to be included within the scope of s. 16(4)(b) providing what they were authorised to do did not conflict with the

provisions of an inconsistent Federal Act, namely the Customs Act s. 219B.

Accordingly, Love v. Attorney-General provides no basis for the submission that a Judge of the Supreme Court of Queensland either did in this case or had the power to add the names of any other persons or any class of persons other than those provided for by s. 43(2) in such a way which authorised their inclusion amongst the persons who could lawfully use the device or assist in using it. That case if anything, assists the plaintiff.

Quite apart from the foregoing, it is clear that Carter J. did not purport to authorise the use of a listening device by members of the Australian Federal Police or indeed any person. This appears from the terms of the orders themselves and indeed by reference to the two affidavits referred to in condition 4 of the order of 26th October, 1989 on which the third defendant heavily relied. After recital of the summons and supporting affidavits His Honour “approved” the use of listening devices in connection with the investigations therein referred to and in para. 1 he approved that Scanlan of the Queensland Police Force by himself or by means of any other person engaged in, or assisting the investigation of the said matter, use any listening device or devices capable of recording, overhearing, monitoring or listening to a private conversation.

Scanlan was not then authorised by one of the three persons mentioned in s. 43(2)(c)(i), nor was there then an appointment in writing to authorise other State police officers to use the devices. Scanlan's only authorisation to use the device came next day when Redmond signed the authority on 27th October, 1989, following the Judge's “approval” or precondition for its use generally with respect to the investigations named therein by State police officers who would be lawfully authorised in accordance with s. 43(2)(c)(i).

Reliance was then placed upon conditions 1 and 4 of the order of 26th October, 1989. Condition 1 by its reference to "any authorised police officer or person engaged in or assisting the investigation" takes the matter no further. It again contemplates that any such person would be duly authorised by some other person or authority. It assumes compliance with the law. It was argued before the Stipendiary Magistrate that there was no power in the Act to authorise entry into premises to install, maintain, or remove devices, as is expressly given in parallel legislation e.g. Drugs Misuse Act 1986, s. 27; Australian Security Intelligence Organisation Act 1979, s. 26(3), Customs Act 1901, s. 209B(5). The submission was that either the approval or at least that condition was invalid: see p. 77-8 ex. "A" to the affidavit of Clive William Porritt filed 20th March, 1990. No such point was argued before me. It may be that the view has since been taken that the power of entry is within the expression "subject to such conditions, limitations and restrictions ..." in s. 43(3).

Condition 4 was said to amount to an express approval by Carter J. of the use of the device by members of the Australian Federal Police because it provided that the intended procedures set forth in the affidavits of Scanlan and Adams both sworn 26th October, 1989 be complied with. A reading of those affidavits (exs. B and F to the affidavit of Michael Patrick Quinn, filed 15th March, 1990) show that His Honour did nothing of the sort.

In para. 2, Scanlan said that subject to an approval being granted he would be involved in supervising installation of the listening devices and the monitoring of conversations. As already found and indeed conceded by all parties, Scanlan took no part in the installation and use of the devices. This was undertaken solely by members of the Australian Federal Police. In para. 3, he stated that certain members of the Australian Federal Police Technical Unit "authorised in writing by me will assist in the installation of the listening devices ...". Authorities had

not then been granted to the three members therein named. These were granted on 27th October, 1989 following the “approval” of Carter J. to generally use the device in the relevant investigation (by duly authorised persons).

Paragraph 4 refers to various persons who “will be authorised in writing by me to monitor the listening devices and to listen and record and to act on information relevant to the investigation ... “. He referred to the proposed appointment of “additional persons” as may be necessary. The names of some 15 police officers were set out, only one of whom was identified as a member of the Australian Federal Police. Two transcribers were also named. All authorisations to those persons and others were subsequently issued by Scanlan.

Accordingly, everything in relation to authorisation pointed to the future. His Honour did not purport to authorise any particular individual to use the devices. It was Scanlan who said that he would authorise in writing the persons referred to and any other persons considered necessary. His Honour simply left the due authorisation of individual personnel to be effected by others as the Act required.

No comfort can be gained by the reference to “intended procedures set forth in the affidavits ...”. This refers to procedural matters only and not to any appointments or authorisations which His Honour had no power to grant and did not in fact grant. These procedures relate to technical matters, monitoring, locations, use, custody of the tapes and information, destruction of certain materials, to whom the material may be divulged, and the lodgment with the Judge's Associate of a copy of all recordings. See Scanlan's affidavit from about para. 7 and Adam's affidavit paras. 6 to 12 dealing with similar truly procedural matters. It cannot be said that the reference in paras. 5 and 6 of Scanlan's affidavit to the period of time involved to instal and use the device amounted to a matter of procedure. Those statements were no doubt taken into

account by para. 2 of His Honour's order which limited the authorisation (meaning the approval) to 12 noon on 23rd November, 1989 or until further ordered.

Properly construed, His Honour granted a general approval on Redmond's application that Scanlan himself or by means of any other (duly authorised) persons engaged in or assisting with the investigation, use any such device in accordance with the terms of the approval. Not only were members of the Australian Federal Police not capable of applying for an approval and were not capable of being authorised to use a device, none were in fact authorised by His Honour's approval or indeed by Scanlan. As indicated, Scanlan was not appointed in writing by the Commissioner to grant authorisations to others in any event.

Proceedings of this nature, as with search warrants, must be strictly complied with: Hedges v. Grindman; Cassidy v. Bayliss; see in particular the judgment of the High Court in George v. Rockett (20th June, 1990, unreported) dealing with the necessity for strict compliance with the conditions governing the issue of a search warrant and the common law's long-standing jealousy of the prima facie immunity from seizure of papers and possessions historically justified based upon rights of private property, the justification shifting in modern times to protection of privacy. There is no reason why these principles are not equally apposite in a case of the present kind. See also R. v. Lewis.

Accordingly the answer to this question is “No” and this is so whether or not a member of the Australian Federal Police is included within the expression “a member of the Police Force” in s. 43(2)(c)(i) of the Act.

The use by those members of the device to overhear, record, monitor or listen to the private conversations in question, was a use in contravention of s. 43 unless there is some other principle which excludes them from the strictures imposed by s. 43. These matters are now considered.

5. Does s. 12 of the Australian Federal Police Act 1979 exempt members of the Australian Federal Police from complying with s. 43?

On the second hearing, it was submitted by Mr. Griffin Q.C.:—

> "So, our fundamental submission is that no matter how the question is approached no relevant restriction applied to the actions of the Federal police officers by virtue of ss. 43 and 46 of the Invasion of Privacy Act; that s. 43 should be interpreted in the light of constitutional principle as not applying to the A.F.P. at all, but if, on the other hand, it does apply to the A.F.P., then the effect of s. 12 of the A.F.P. Act is to exempt A.F.P. officers from the requirement of obtaining approval, and on the latter point that is the position no matter how the interpretation of s. 12 is approached."

Section 12 will be considered in this section leaving the other submission to be dealt with in section 6 of this judgment. It was agreed by all counsel that no question arose within the meaning of s. 78B of the Judiciary Act. What was involved was merely a question of interpretation of a Commonwealth Act on the one hand and a State Act on the other: Pirrie v. McFarlane (1925) 36 C.L.R. 170 per Higgins J. at 217, per Starke J. 225; ex parte: Williams (1934) 51 C.L.R. 545 per Starke J. at 548, per Evett J. at 552. (See also s. 78B(2)(c)).

On first impression, s. 12 appears to impose a considerable obstacle in the way of the plaintiff. It is placed under the heading "Immunities from certain State and Territory laws". The only sections at relevant times dealing with immunities from such laws are s. 12 and s. 12A, apart from s. 26 in Part 3 which excludes a wide range of persons including members of the Commonwealth Police Force from the operation of that Part (ss. 8-40 of the Act). Section 12 provides:—

> "A member is not required under, or by reason of, a law of a State or Territory—

(a) to obtain or have a licence or permission for doing any act or thing in the exercise of his powers or the performance of his duties as a member; or

(b) to register any vehicle, vessel, animal or article belonging to the Commonwealth."

Section 12A provides for immunity from State and Territory laws in relation to entry of police dogs on certain premises. As indicated, the situation has now changed by enactment of the Law and Justice Legislation Amendment Act 1989 (No. 11 of 1990) assented 17th January, 1990. It inserts a new Division 2 "Use of listening devices in relation to general offences". It was not suggested that this legislation is retrospective.

From this submission it is conceded that members of the Australian Federal Police are "persons" otherwise caught within the scope of the prohibition in s. 43(1). It was then submitted that the opening words of s. 12A "A member is not required ..." should be read as meaning "A member may not be required . . .". This was said to meet the submission for the plaintiff that s. 12 has no operation because a State Act must first require the member of the Australian Federal Police to have a licence or permission before being exempted by force of s. 12.

It was also submitted that the word "permission" in s. 12 is broad enough to cover the word "approval" which is the approval granted by a Supreme Court Judge pursuant to s. 43 of the Act. Thus, so the argument ran, if s. 43 applies so as to otherwise prevent members of the Australian Federal Police from using a listening device, s. 12 of the Australian Federal Police Act means that those members do not have to obtain an "approval" from a Judge of the Supreme Court or any authorisation from one of the three named police officers referred to in s. 43(2)(c)(i) of the Act.

Mr. Hampson Q.C. submitted that the words "licence or permission" were not synonymous with "approval in writing"

in s. 43 of the Act, because the permission under s. 12 is for a Federal police officer to do something in the course of his duties or power. It was said that if s. 43(2)(c)(i) extended to a Federal police officer at all, (I have held to the contrary), the authorisation by the Commissioner of Police (or by a duly appointed inspector) mentioned in s. 43(2)(c)(i) was closer to being a "licence or permission" to engage in conduct of that kind: see Federal Commissioner of Taxation v. United Aircraft Corporation (1944) 68 C.L.R. 525 at 533. However, a Supreme Court Judge's approval under the section did not licence or permit any activity of a kind which a Federal police officer might lawfully engage in. This was so because such approval only fulfilled a statutory requirement for the issue by the Commissioner or a duly appointed inspector of a licence or authorisation.

It was further submitted for the plaintiff that the relevant effect of s. 12 was to render inapplicable to a Federal police officer a State law which would otherwise require him to obtain a licence to do something in the performance of his duty. Section 12 contemplated a law of the State which provides that a licence or permission must first be obtained before a specified act or thing may be done. For example, a law which stated that no person shall carry in Queensland a concealable firearm without a licence or that no person shall enter the State Executive Building without the permission of the Under Secretary first obtained. In the exercise of his duty a member pursuing into Queensland a suspected offender against the laws of the Commonwealth, may be exempted from the requirement of having a Queensland licence to carry his revolver or from getting prior permission of the Under Secretary if he pursues a suspect into the State Executive Building. Section 12 appears now to expressly deal with such cases adverted to by Isaacs J. in Pirrie v. McFarlane at 207.

Particular reference was made to s. 8(2) and s. 26(1)(a) of the Act as showing the type of provision of which s. 12 would apply. If the words in s. 8(2) "Subject to ss. 26 and 27" were absent, s. 8(2) would amount to a State law

which required a member of a Federal Police Force to obtain a licence to carry out the performance of his duty viz. i.e. to act as a private enquiry agent, having regard to the wide definition of private enquiry agent in s. 4 which extends to all “persons” who must have a licence. S. 8(2) prohibits a person acting as a private enquiry agent unless he is the holder of a private enquiry agent's license. S. 26 specifically excludes a member of the Commonwealth Police Force (now a member of the Australian Federal Police Force - s. 3 of the Australian Federal Police Act 1979) from the operation of s. 8(2) so that he is not required to hold a private enquiry agent's licence in the exercise of his functions as such a member.

Accordingly, it was submitted that the words “licence or permission” in s. 12 of the Australian Federal Police Act could not be construed as rendering inapplicable any State law which absolutely prohibits persons, including Federal police officers from engaging in particular conduct. It is only when a Federal police officer is required by a State law to obtain a licence to engage in particular conduct that s. 12 has application. It was said that this was the natural construction, that s. 12(a) and (b) provided only two specific exemptions to the applicability of State laws to Federal police officers, and that had it been intended to exempt Federal police officers from the requirements of this particular law which provided for no possibility of a licence being granted to Federal police officers, that would have been stated as in s. 43(2)(c)(ii), (iii); see also s. 26.

Section 43(1) prohibits all persons including members of the Queensland Police Force, members of the Australian Federal Police, members of the Police Forces of other places within Australia or elsewhere, those engaged in industrial espionage, snoopers, criminals, ordinary citizens and visitors from using a listening device to overhear, record, monitor or listen to a private conversation. It is a criminal offence attracting a penalty not exceeding $2,000 or imprisonment for not more than two

years or both. Section 44 provides for a further offence if a person communicates or publishes to any person a private conversation or a report of or the substance of, meaning or purport of a private conversation that has come to his knowledge as a result, direct or indirect, of the use of a listening device used in contravention of s. 43. See also the further offence provided in s. 45. For a reference to "person", see per Higgins J. in Pirrie v. McFarlane at 219 where His Honour said that "as a matter of ordinary grammatical construction, it is impossible to find in this universal negative, 'no person,' any exception in favour of Federal servants. The intention of the Victorian Legislature is clear; and that intention must be carried out unless and until the Commonwealth Parliament say not."

Section 43 does not allow, let alone "require" within the meaning of s. 12 of the Australian Federal Police Act, any person, including members of the Australian Federal Police, to obtain any licence or permission to use a listening device to overhear, record, monitor or listen to a private conversation. Section 43 is not couched in terms similar to s. 8(2). Had it provided that "no person shall use a listening device in Queensland to overhear etc. a private conversation unless he first has obtained a licence or permission of the Commissioner of Police" or some other named authority, the situation might well be different. In such a case, use of a device without a licence or permission which is otherwise attainable, would be unlawful, but if obtained it would be lawful. It would then be arguable that s. 12 of the Australian Federal Police Act would apply providing the use of the device was the "doing any act or thing in the exercise of his powers or the performance of his duties as a member". It could not then be argued that providing the member was using that device in the investigation and detection of an offence against a law of the Commonwealth, he would not be exercising his powers or performing his duties as a member; see The Queen v. Curran & Torney [1983] 2 V.R. 133 at 143.

The argument for the third defendant may be understandable in cases where State legislation purports to impose an obligation upon members of the Australian Federal Police to obtain an authorisation before they may lawfully use a listening device to overhear etc. a private conversation. Without such an authorisation under legislation where it is possible for it to be obtained (and apart from the situations covered by the Customs Act s. 219B and the Australian Security Intelligence Organisation Act s. 26), use of a device for that purpose would be unlawful. Depending upon how the particular State legislation was worded, that legislation would appear to be inoperative by reason of s. 109 of the Constitution, if any authorisation obtainable under it could be characterised as a "licence or permission" under s. 12 of the Australian Federal Police Act; see Love v. Attorney-General.

But as indicated, s. 43 does not purport to impose an obligation upon members of the Australian Federal Police to obtain an authorisation or a licence or permission to use a listening device. It absolutely prohibits the use of a device by all persons except those particularly referred to in s. 43(2) in the same way as the criminal law prohibits the unlawful use of a motor vehicle or a breaking and entering by Commonwealth officers in the course of their duties: A. v. Hayden (1984) 156 C.L.R. 532, or the assault by a Commonwealth officer upon individuals eg. the forced taking of blood samples to aid the detection of a Commonwealth drug offence unless authorised by legislation. See Pirrie v. McFarlane where Starke J. at 227 said that "if he commits an offence against the ordinary criminal law, he can be tried and punished as if he were a civilian."

Many State laws impose absolute prohibition against certain types of conduct without providing for an escape (other than for "defences" recognised by the criminal law). Section 43 appears to be another example of such a law. It seeks to provide a total protection to the privacy of persons by forbidding the use of a device in the

circumstances set out, except within the very narrow confines provided for in s. 43(2). The submission as to the amendment to the Australian Federal Police Act by the insertion of the new Division 2 by Act No. 11 of 1990 ("Use of listening device by members of the Australian Federal Police") should not be taken too far. At best it is consistent with the foregoing interpretation of s. 12 viz that members of the Australian Federal Police are not required under or by reason of s. 43 to obtain a licence or permission to use a listening device which is otherwise absolutely prohibited. That amendment now allows members of the Australian Federal Police in the circumstances there provided for, to obtain a warrant to use a listening device with respect to certain Commonwealth offences. To this extent, they would now fall within the same category of the exceptions provided for in the Customs Act s. 219B and in the Australian Security Intelligence Organisation Act s. 26. Such officers are specifically excluded: ss. 43(2)(c)(ii),(iii) as well as those wide range of officers excluded by s. 26 from the operation of the whole of part III (ss. 8-40).

It seems to me also that whilst the word "licence" may be more readily interpreted as being synonymous with "authority": Federal Commissioner of Taxation v. United Aircraft Corporation at 533, the word "approval" referred to in s. 43(2) (c) and s. 43(3) being the approval which a Judge of the Supreme Court may grant as a condition precedent to the (lawful) use of a device in specified investigations, is of a different character and does not fall within the expression "licence" or "permission" (in s. 12 of the Australian Federal Police Act 1979).

In the results whether s. 12 of the Australian Federal Police Act 1979 is read in precisely the way in which it appears viz. "a member is not required ...", or as submitted on behalf of the third defendant that - "a member may not be required ...", I conclude that the submissions by Mr. Hampson Q.C. are probably correct. On its true construction, s. 12 did not at the time the device was

used, allow members of the Australian Federal Police to escape the strictures imposed by s. 43(1) of the Act which provides for only a limited class of exceptions thereto.

6. Are members of the Australian Federal Police bound by s. 43 of the Act at all in investigation and detection of offences against laws of the Commonwealth?

The submissions by Mr. Griffin Q.C. were based upon the premise that, contrary to his submissions, it is held that ss. 9(2), 12 of the Australian Federal Police Act 1979 have no relevant operation in relation to s. 43 of the Act. It was said that s. 43 must be interpreted in the light of constitutional principles as an exercise of State legislative power to see whether it purports to affect the operations of the Australian Federal Police Force at all. Again, it was conceded by all counsel that no constitutional question within the meaning of s. 78B of the Judiciary Act is raised by these propositions, the matter simply involving the proper construction of the State Act; ex parte: Williams; Green v. Jones (1979) 39 F.L.R. 428 at 434; see also s. 78B(2)(c).

The submission proceeded along the following lines. Section 4 of the Acts Interpretation Acts 1954 (Qld) required Acts of a Queensland Parliament to be construed so as not to exceed the legislative power of the State and to the extent that an Act exceeded that power, it shall be regarded as a valid enactment to the extent to which it is not in excess of that power. Members of the Australian Federal Police exercised the executive power of the Commonwealth pursuant to a combination of s. 61 and s. 51 (XXXIX) of the Commonwealth Constitution: ex parte Walsh and Johnson in re Yates (1925) 37 C.L.R. 36 at 122. As such a power is exclusive to the Commonwealth, a State may not restrict the operation of that power in any way. A State therefore has no power to prohibit members of the Australian Federal Police from utilising a listening device in the execution of their duty. Further, that if apart from ss. 9(2) and 12 of the Australian Federal Police Act, s.

43(1) of the Act did apply to a member of the Australian Federal Police as a "person", it is an Act which discriminates against the Commonwealth by permitting only State Police Officers to obtain an approval and authorisation to use a device.

Also, to rule that members of the Australian Federal Police were bound by varying State legislation would involve them being faced with different laws and different procedures according to the State or territory where they were carrying out their duties. In some places there was no relevant legislation at all. In addition, the absence of any restriction before State legislation was introduced when members of the Australian Federal Police or their predecessors the Commonwealth Police could presumably have used a listening device, supports the view that members of the Australian Federal Police cannot now be curtailed in the way sought by the plaintiff.

After referring to the powers, functions and duties of the Australian Federal Police set out in the Australian Federal Police Act, Mr. Griffin Q.C. relied on the dissenting judgment of Isaac J. in Pirrie v. McFarlane at 189 where the question was whether ss. 6, 24 of the Motor Vehicles Act 1915 (Vic.) should be read as including Commonwealth military officers (a situation apparently now expressly provided otherwise by regulations under the Defence Act; Lumb and Ryan: Constitution of the Commonwealth of Australia 3d Ed. 367). His Honour said that where a State Parliament has no power to control Commonwealth military operations, the relevant words of the section should be constructively read down to meaning only the Crown services controllable by the State Legislature. It was said that this occurred in Love v. Attorney-General. Considerable reliance was placed upon extracts from the work by Zines: the High Court and the Constitution (1987) 315-319.

Reference was made to many cases cited in those pages including Commonwealth v. Bogle (1953) 89 C.L.R. 229 per

Fullagar J. at 259-60 (Webb, and Kitto JJ. concurring) - a State Parliament has no power to bind the Crown in right of the Commonwealth; Commonwealth v. Cigamatic Pty Ltd (1962) 108 C.L.R. 372 - Commonwealth not bound by the Companies Act of New South Wales which, on a winding up, prescribed an order of priority of payment of debts incompatible with the prerogative right claimed by the Commonwealth; The Payroll Tax case (1969) 122 C.L.R. 353 per Barwick C.J. at 373 - State had no power to bind the Commonwealth; Uther v. Federal Commissioner of Taxation (1947) 74 C.L.R. 508, the dissenting judgment of Dixon J. at 529-530 (a State has no power to regulate the legal relations of the Commonwealth with its subjects), a view later accepted by the majority in Commonwealth v. Cigamatic Pty. Ltd. Numerous other authorities were referred to. All of the foregoing were said to be encapsulated in the following statement in Zines at 319:—

> "On this reasoning, the decision in Pirrie v. McFarlane (1925) 36 C.L.R. 170 is doubtful. The court there did not rely on any provision of the Judiciary Act, and it is hard to see how for present purposes any distinction could be made between the Crown and the servants of the Crown carrying out their duties to the Crown. If the Crown in the right of the Commonwealth is not bound by an Act, the normal principle is that neither are its servants or agents or instrumentalities that come within its shield. This includes Crown servants acting in the course of their duty: Hogg, Liability of the Crown (1971) 174-5. There has been no suggestion that a different rule applies in the circumstances under discussion. Nor does it seem credible that the court would create a principle in order to allow it, in many circumstances, to be easily subverted. If, for example, State law could not invalidate a sale by the Commonwealth that did not comply with prescribed maximum prices, it could hardly be argued that it could make it an offence for the Crown's servant to receive payment, even if the law did not discriminate against Commonwealth servants. From the reverse viewpoint, if the court in Pirrie v. McFarlane had regarded the State Act as not intended to bind the Commonwealth it would have followed that the airman could not have been convicted."

Mr. Hampson Q.C. submitted that most of the cases referred to dealt with the prerogative of the Crown in right of the Commonwealth, immunity of the State from laws of the Commonwealth and vice versa, executive power and discriminative legislation by one organ of government against the other, rather than with the question of whether or not police officers as individuals may be bound by State legislation. He referred to articles expressing a contrary view to that of Zines and submitted that the Court was bound to follow the majority decision in Pirrie v. McFarlane which has not been overruled. Indeed, it has been cited without disapproval in subsequent cases. See for example re Tracey, ex parte: Ryan (1988) 166 C.L.R. 519 in the joint judgment of Mason C.J., Wilson, Dawson JJ. at 547 and per Deane J. at 584. He also relied on West v. Commissioner of Taxation (N.S.W.) (1936) 56 C.L.R. 657.

It was said that no reason was shown why, as a matter of construction, members of the Australian Federal Police are not bound by this law, as by any other criminal law such as the law which prohibits the unlawful use of a motor vehicle or a break and enter in the course of their duties A. v. Hayden, or an unlawful assault on a person in the exercise of their duties, unless expressly provided for by legislation.

Mr. Keane Q.C. for the first, second and fourth defendants supported some of these submissions. See “D” para. 5. He submitted that absent inconsistency within the meaning of s. 109 of the Constitution, a State Act may regulate the conduct of Commonwealth officers: Pirrie v. McFarlane at 181, 185, 212-214, 217, 227-228; Melbourne Corporation v. The Commonwealth (1947) 74 C.L.R. 31 at 61, 82, and that no question of Crown prerogative arises in relation to the performance by Federal police officers of their duty. In any event, he submitted that Federal police officers act on their own responsibility under the law, rather than pursuant to Crown prerogative: Enever v. The King (1906) 3 C.L.R. 969, 979, 983, 986, 994.

What then was the position before the Act came into force?

Some forms of interference with privacy have existed for centuries, such as spying and prying, or attacks on someone's honour and reputation, while other forms developed following introduction of modern technology rendering interference more easily effected. Watching or listening into the affairs of others can now be performed with greater effect by utilising modern devices such as cameras, videos, microphones, listening devices, radio transmitters, laser equipment etc. Wire tapping and electronic surveillance by law enforcement agencies has no doubt been going on for a considerable time. The only protection afforded to the individual was that provided by the common law which was not always effective.

Violation of privacy by means of electronic surveillance whether by law enforcement agencies or otherwise was made worse because improper use of information so obtained is facilitated and made more harmful due to the potentially wide dissemination in the press and electronic media which developed since World War II. Freedom from surveillance and from interception of one's communications (Communications and surveillance privacy), has received much attention since. It was referred to in the Atlantic Charter as one of the four basic interests or one of the “four freedoms”. Legislative intervention was called for at various conventions and in publications in order that a “right” to privacy should be legally recognised. At the same time, it was necessary to balance on the one hand the individual's right to privacy so that use of electronic surveillance did not lead into a “big brother” society and on the other hand the interests of the State in protecting its citizens from criminals and criminal activity. See e.g. (1986-7) Dalhousie Law Journal Vol. 10 p. 141, an analysis of Canadian wire tapping law (MacDonald).

In Australia, until the advent of State legislation referred to in section 4 above, commencing in 1969, dealing with listening devices and privacy, the use of such devices appears to have been unrestricted by statute law. There was no general right to privacy as such under Australian law: Victoria Park Racing and Recreation Co. Ltd. v. Taylor (1937) 58 C.L.R. 479, 496. The common law gave limited protection against what may be termed invasions of privacy, including surveillance e.g. by actions in trespass and nuisance: Victoria Park Racing and Recreation Co. Ltd. v. Taylor at 493 per Latham C.J., at 503 per Rich J., at 513, 515 per Evatt J. See also George v. Rockett (High Court, 20th June, 1990, unreported).

Commonwealth statute law was also totally silent on the subject until 1979 when limited legislation commenced: Australian Security Intelligence Organisation Act 1979, s. 26; Customs Act 1901, s. 219B introduced in 1979 (Act No. 92); Telecommunications (Interception) Act 1979, ss. 7, 20, 21, 22 (there may be a doubt whether such interception relates to the use of a listening device: R. v. Curran & Torney [1983] 2 V.R. 133 per McGarvie J. at 153). The Commonwealth has now in February 1990 substantially enlarged its legislative coverage by the insertion of Division 2 in the Australian Federal Police Act: “Use of listening devices in relation to general offences”.

Prior to the introduction of Commonwealth legislation, the field with respect to the protection of privacy by use of listening devices to overhear, record, monitor or listen to a private conversation was comprehensively covered in Australia by legislation in most States even though it was not uniform: see Love v. Attorney-General as to New South Wales and R. v. Curran and Torney as to Victoria. It appears that the law was then silent in some Territories and in Tasmania, and that such devices may probably be lawfully used in places where there is no legislation, subject to the common law and perhaps particular criminal offences which may be prescribed e.g. entry on enclosed lands. This was probably the position in Australia

generally before State legislation was enacted in 1969 and in the early 1970s.

The question therefore is whether, after the introduction of State legislation such as s. 43 of the Act, and prior to the amendment to the Australian Federal Police Act in 1990 in the circumstances there provided for, Commonwealth officials and in particular members of the Australian Federal Police other than those already covered by the circumstances set out in the Customs Act s. 219B or the Australian Security Intelligence Organisation Act s. 26, were bound by State legislation when prior thereto there had been no legislative restriction and presumably they could have used such devices subject only to the common law and perhaps any restriction against entry on another person's land if indeed entry was necessary.

The fact that at one time the use of devices to overhear private conversations may have been unrestricted affords no good reason why that use may not be subsequently prohibited or controlled by legislation which recognises the right to privacy in respect of private conversations. This is so with many laws introduced which render previous practices unlawful or which seek to regulate and control such practices. It is also difficult to see as compelling the submission that members of the Australian Federal Police should not be faced with a different situation in the various States and Territories where the laws might change from time to time or, in some cases, where there are no such laws at all. Laws differ from place to place in any event as State legislation throughout Australia demonstrates. New laws are introduced from time to time. If a new criminal offence is created, and providing it is within the legislative power of the Parliament concerned, all persons affected by it must adjust their conduct accordingly.

An effective way to deal with this situation from the point of view of members of the Australian Federal Police in order to provide some uniformity across Australia is

that already adopted to a limited extent in the three areas referred to viz the Customs Act s. 219B, the Australian Security Intelligence Organisation Act s. 26, and in the recent amendments to the Australian Federal Police Act (1990). This also appears to have been the course taken to overcome the decision in Pirrie v. McFarlane by amendments to the regulations under the Defence Act: Lumb and Ryan at p. 367.

Insofar as it was contended that s. 43 restricts the executive functions of government officials, reference may usefully be made to the dictum of Dixon C.J. in F.C.T. v. Official Liquidator of E.O. Farley Limited (In Liguidation) (1940) 63 C.L.R. 278 at 308:—

> "In the practical administration of the law, the decision on questions of that sort depends less upon constitutional analysis than on sec. 80 and perhaps sec. 79 of the Judiciary Act 1903-1939. There is, however, a clear distinction between the general law, the content or condition of which, though a matter for the legislatures of the States, may incidentally affect Commonwealth administrative action, and, on the other hand, governmental rights and powers belonging to the Federal executive as such."

Lumb and Ryan at p. 368 state:—

> "This dictum holds the key to the answer to the question. It suggests a distinction between the federal government acting as a 'citizen' within the territorial boundaries of a State and therefore impliedly accepting the general code of law in force in the State, and on the other hand, acting as the national government in the performance of the functions appropriate to that status. Consequently in relation to the activities of its servants it may become subject to the general law of contract or of tort (although not in respect of its occupation of land required by it). On the other hand, where rights and interests are involved which are peculiar to government or are essential to the maintenance of its status (as distinct from being rights or interests which are shared by ordinary members of the community) the Commonwealth's immunity from the operation of State law which would impinge on those rights and interests comes into play."

The lawful use of listening devices is a valuable tool in police investigation of possible offences but it is only one means which has come into play in recent years by the development of modern technology. The restriction in s. 43 upon the powers of members of the Australian Federal Police may at best be characterised as incidentally affecting their functions, a consequence flowing from the general law of the State which has been accepted by the Commonwealth in its operations in Queensland. Indeed, that law appears to have been accepted in this case by members of the Australian Federal Police who sought the "approval" through a Queensland Police Inspector from Carter J.

Section 43 recognises a general right to privacy with respect to private conversations. The prohibition in s. 43(1) does not prevent members of the Australian Federal Police from otherwise proceeding about their duties in enforcing the laws of the Commonwealth. If use of a device is needed with respect to investigation in Queensland of a Commonwealth offence, State police officers who have a duty of enforcing Commonwealth laws (Lumb and Ryan at p. 250; R. v. McDonnell, ex parte: Attorney General) may, upon approval of a Supreme Court Judge and due authorisation under s. 43(2), use a device for such a purpose in aid of members of the Australian Federal Police which seems to be what was attempted by Scanlan in this case at least to the first stage of obtaining the approval of Carter J.

The question of discriminatory legislation is often referred to in the authorities dealing with immunity and also with inconsistency pursuant to s. 109. It was dealt with in Melbourne Corporation v. The Commonwealth. At 61, Latham C.J. said:—

> "In my opinion the reason why such legislation is invalid is that what is called 'discrimination' shows that the legislation is really legislation by the Commonwealth with respect to a State or State functions as such and not with respect to the subject in respect of which it is sought to bind the State or, in the case of a State law specifically dealing with and seeking to control Commonwealth functions, that the State parliament is

> really endeavouring to make laws with respect to the Commonwealth or Commonwealth functions as such. The Commonwealth Parliament has no power to make laws with respect to State governmental functions as such, and the State Parliaments have no power to make laws with respect to Commonwealth governmental functions as such. It is upon this ground, in my opinion, that what is called 'discriminatory' legislation may properly be held to be invalid."

Dixon J. at 81-82 said:—

> "I do not think that either under the Constitution of the United States or The British North America Act or the Commonwealth Constitution has countenance been given to the notion that the legislative powers of one government in the system can be used in order directly to deprive another government of powers or authority committed to it or restrict that government in their exercise, notwithstanding the complete overthrow of the general doctrine of reciprocal immunity of government agencies and the discrediting of the reasoning used in its justification. For that reason the distinction has been constantly drawn between a law of general application and a provision singling out governments and placing special burdens upon the exercise of powers or the fulfilment of functions constitutionally belonging to them. ..."

This case has received much later consideration e.g. Queensland Industrial Commission v. The Commonwealth (1985) 159 C.L.R. 192. Many of the cases referred to dealt with inconsistency of laws pursuant to s. 109 and do not assist. I am unable to conclude from the authorities cited that s. 43 of the Act is discriminatory in the sense contended for on behalf of the third defendant. It cannot be said that s. 43 deals with or controls Commonwealth government functions as such. It is a law of general application with respect to the protection of privacy by preventing the use of listening devices to overhear private conversations. All persons are bound by it, whether members of the State police, Commonwealth police, police forces from elsewhere and all others alike. It does not single out anyone including members of the Australian Federal Police.

It was not suggested that s. 43 it is not a law for the peace, order and good government of Queensland. Nor was it suggested that the law as to privacy or the law with respect to use of listening devices is within the exclusive power of the Commonwealth. There is no intention expressed in the Australian Federal Police Act that members of the Australian Federal Police should not comply with ordinary State law, the only relevant immunity being provided for by ss. 12, 12A, 26. There is no prerogative power in the Commonwealth to exempt its officers from the operation of State criminal law: A. v. Hayden. No question of inconsistency between laws has been suggested.

Whilst at first glance it appears strange that only members of the Queensland police force have a "window" through which they may be able, with approval of a Judge of the Supreme Court and due authorisation, to use a listening device in circumstances which would otherwise amount to an unlawful invasion of privacy, the answer, in the absence of amendment to the Act, appears to lie in the powers of the Commonwealth to legislate as it has done e.g. in the Customs Act, s. 219B, sub-s. (4) which expressly provides that the use of a listening device, in accordance with a warrant issued under Division 1A by a member of the Australian Federal Police or a person acting by arrangement with such a member is not unlawful, notwithstanding any law of a State or Territory. So also with the other legislation referred to. As pointed out in Love v. Attorney-General, s. 109 of the Commonwealth Constitution then comes into play in the circumstances dealt with by the Commonwealth legislation.

To accept the submissions for the third defendant would, as senior counsel for the plaintiff contends, means that members of the Australian Federal Police would be generally exempt from the criminal law of this State, providing that their conduct engaged in at the time, was conduct in the exercise of their powers and their duties and in this respect, the investigation of offences against laws of the Commonwealth. Examples given by senior counsel

for the plaintiff demonstrate the consequences of such a general exemption, indicating that this could not have been the legislative intention in enacting s. 43. Further, s. 43 does not restrict the powers of Commonwealth police officers because those powers should not be construed so as to authorise breaches of the law, whether State or Commonwealth.

As the foundation of the argument by Mr. Griffin Q.C. was based upon the passage in Zines quoted above at p. 319, it is appropriate to note that in the pages following the author discussed the various arguments for or against that proposition and concluded the discussion on the topic with the following statement at 322:—

> "But however the justification for Commonwealth immunity may be put, it is submitted that it is neither an inevitable nor a desirable doctrine. It leads to difficult distinctions as to whether the Commonwealth is merely using State law for its purposes and when it is being 'bound'. But, above all, it is not necessary to maintain the Commonwealth's position as either a federal or a national government. Decisions such as Pirrie v. McFarlane and Uther's case put the onus where it belongs, namely, on the Commonwealth, to consider why it should not be treated as subject to the appropriate law like everyone else. If the national interest is affected, it will act soon enough and obtain the benefits supported by s. 109 - the safeguard emphasised in the Engineer's case. This issue, it is suggested, should not be determined by contemplating the supposed nature of a 'Commonwealth' or of 'nationhood' and then treating the matter as one of logical deduction from the premise introduced by such contemplation. The Constitution is designed for the practical affairs of government and society. The fact is that the Federal government is a large factor in many areas of economic and social activity. To exclude it automatically from the operation of all State legislation can have a serious impact on the effectiveness of that legislation. It may be that this effect will be more serious in some cases than others. It may be that there are valid countervailing arguments of public interest, in some cases, which require the Commonwealth not to be bound. But these matters are better determined by the Commonwealth itself. It is more likely to do so if the

> Commonwealth is treated as bound until, by legislation, it determines otherwise."

As already indicated, the Commonwealth has now determined otherwise to the extent provided by the amendments effected to the Australian Federal Police Act in February 1990 and in other specific legislation covering areas of its choice. The State Act in its present form cannot be construed as not to apply to members of the Australian Federal Police. Nor can it be read down in the manner dealt with in Love v. Attorney-General which provides no assistance in the resolution of this problem.

Section 43 applies to all persons, subject to strict conditions. Where it was intended in the State legislation that Commonwealth officers be excluded, this has been expressly provided for: ss. 43(2)(c)(ii), (iii) and s. 26. This is supported by the clear statement in Lumb and Ryan at p. 367. No authority has been cited to the contrary.

Accordingly, members of the Australian Federal Police are bound by the prohibitions in s. 43(1) of the Act.

7. What is the effect of s. 46 of the Act on admissibility of the evidence obtained?

Section 46(1) renders inadmissible in any civil or criminal proceedings, evidence of a private conversation which has come to the knowledge of a person as a result, direct or indirect of the use of a listening device used in contravention of s. 43. Such evidence simply cannot be given: Miller v. Miller (1978) 141 C.L.R. 269 pre Gibbs J. at 277; see also 30 F.L.R. 552. This section applies to the committal proceedings where the Stipendiary Magistrate is exercising Federal jurisdiction as he is in this case. See the Judiciary Act ss. 68, 69: Lamb v. Moss; R. v. Drury [1984] 1 Qd.R. 356. If the evidence sought to be tendered has come to the knowledge of a person as a result, direct or indirect, of the use of a listening device used in contravention of s. 43, there seems to be no question as to whether or not there is merely a discretion to exclude the

evidence in accordance with the principles in Bunning v. Cross, as occurred in R. v. Curran & Torney on different legislation there under consideration.

Section 46(2) provides for three sets of circumstances in which s. 46(1) does not render such evidence inadmissible. Mr. Rosens Q.C. submitted that the effect of s. 46(2)(b) meant that for evidence to be inadmissible pursuant to s. 46(1), the private conversation must have come to the knowledge of a person proposing to give evidence solely as a result, direct or indirect, of the use of a listening device used in contravention of s. 43. It was argued that if the person proposing to give evidence acquired knowledge of that conversation by merely listening to the tapes or from information given by others derived from the tapes, the evidence was not thereby rendered inadmissible.

Section 46(2)(b) relates to a situation, for example, where a person proposing to give evidence acquired knowledge of the private conversation in the manner referred to in s. 46(1) i.e. as a result, direct or indirect, of the use of a listening device used in contravention of s. 43 and also by some other means. This could include a situation where the person actually overheard the conversation and later acquired knowledge as a result of hearing the tapes. The above submission is rejected.

The approvals of Carter J. were not approvals or authorisations to the Australian Federal police officers to use the listening device in the way in which they did. Nor did the authorisations by Scanlan comply with s. 43 of the Act. Further, members of the Australian Federal Police, along with all persons were simply prohibited by the Act from using a device in the way they did. It is therefore not possible to conclude that the expression “in contravention of s. 43 of this Act” in s. 46 meant only “without an approval in writing given by a Judge of the Supreme Court”.

Mr. Keane Q.C. relied on s. 46(2)(a). He submitted that s.12 of the Australian Federal Police Act operated in this instance to dispense with the need for the consent contemplated by that subparagraph as a condition for a member of the Australian Federal Police giving evidence of the relevant conversation. He submitted that even if it was found that there was a contravention of s. 43, s. 12(a) of the Australian Federal Police Act authorised the giving of evidence by a member of the Australian Federal Police Force if it can be said that he was acting in the course of his duties by so giving evidence. It was said that there was no warrant for reading down s. 12(a) and that such a member did not need to obtain the consent of any party to the private conversation in order for the evidence to be admissible. It was submitted that even if there was thereby a breach of s. 43, it would then be a matter for the Magistrate to determine whether the evidence should be admitted or otherwise in accordance with the principles in Bunning v. Cross.

Mr. Hampson Q.C. submitted that s. 12 can have no relevant application to s. 46(1), the latter being a general statement which prohibits the giving of any evidence obtained directly or indirectly in contravention of s. 43. Section 46(2) cannot be characterised as a State law requiring a Federal police officer to obtain a license or permission to do something in the course of his duty. It merely sets out circumstances in which certain evidence is not inadmissible.

It was further submitted that the consent referred to in s. 46(2)(a) would require the consent to be conveyed to the Court by the party to the conversation (in this case the plaintiff). It was not something that could otherwise be obtained by the police officer concerned as such. In other words, the consent referred to in s. 46(2)(a) could not be a license or permission which is obtained by a Federal police officer to engage in certain conduct. The licenses and permissions in s. 12 were licenses or permissions in a public sense which are required by an Act

or Regulation and not some private consent. Various examples were given which need not be set out.

Mr. Hampson Q.C. further submitted that the mere giving of evidence by a member of the Australian Federal Police Force is not, within the meaning of s. 12(a), the doing of any act or thing in the exercise of his power or the performance of his duty as a member. He would merely be acting as a witness as would any other witness who might have observed something. It cannot be said that merely because he was being paid as a servant whilst giving evidence, he was thereby performing his duties as a member of the Australian Federal Police.

I have concluded that the submissions by Mr. Hampson Q.C. are correct. As a matter of construction of s. 46(2), the consent therein referred to does not fall within the meaning of the terms “licence” or “permission” within the meaning of s. 12(a) of the Australian Federal Police Act. Accordingly this argument fails.

It cannot therefore be said that evidence of private conversations recorded and transcribed did not come to the knowledge of any person who might be called to give evidence, otherwise than as a result, direct or indirect, of the use of a listening device used in contravention of s. 43. In the result, any evidence of those private conversations is prohibited by the Act. There seems to be no ground for the exercise of any discretion whether to admit or reject such evidence.

Summary

There was no challenge in the notice of motion and no challenge in fact to the orders made by Mr. Justice Carter who authorised Detective Inspector Scanlan to use a device in the investigations specified in His Honour's orders. What was challenged was what occurred as a consequence of those orders. It is otherwise evident that His Honour's orders were correctly made. I conclude as follows:—

1. This application should, as a matter of discretion, be determined on the merits by the Court.

2. The matter should not be referred to the Full Court in the first instance but should be heard and determined by me.

3. The reference to “a member of the police force” in s. 43(2)(c)(i) of the Invasion of Privacy Act 1971-1988 does not include a member of the Australian Federal Police but is limited to a member of the Queensland Police Force.

4. Not only were members of the Australian Federal Police not entitled to seek an approval or authorisation within the meaning of the Act to use a listening device, they were not duly authorised by Scanlan who had not been appointed in writing by the Commissioner of Police to authorise the use of a device by the police officers. Neither did His Honour by the orders made purport to authorise the use by members of the Australian Federal Police of the device to overhear, record, monitor or listen to a private conversation. His Honour, by the orders, recognised that persons who were to make use of the device must be duly authorised in accordance with s. 43(2)(c) of the Act. It is what occurred subsequent to His Honour's orders which contravened s. 43.

5. Section 12 of the Australian Federal Police Act 1979 does not exempt members of the Australian Federal Police from complying with s. 43.

6. Members of the Australian Federal Police, as a matter of construction of s. 43 in the light of the principles argued, are not excluded from its operation in the investigation and detection of offences against laws of the Commonwealth.

7. The evidence contained in the relevant tapes and transcripts was obtained as a result, direct or

> indirect, of the use of a listening device used in contravention of s. 43 of the Act. That evidence is accordingly totally inadmissible in any civil or criminal proceedings. No basis has been shown that by virtue of s. 46(2) the evidence is otherwise admissible, nor is there any question of discretion as to whether or not the evidence should be admitted or rejected.

Accordingly, I have come to the view that the discretion in this particular case should be exercised in favour of granting appropriate relief to the plaintiff. I will now hear submissions on the precise form and extent of the order, and also on the question of costs.