01/11; [2011] VSC 3

SUPREME COURT OF VICTORIA

COMM'R OF AFP v MAGISTRATES' COURT of VICTORIA & ORS

J Forrest J

25 January, 11 February 2011

ADMINISTRATIVE LAW – COMMITTAL PROCEEDING – WITNESS SUMMONS ISSUED TO COMPEL PRODUCTION OF DOCUMENTS – OBJECTION TAKEN TO PRODUCTION – MAGISTRATE ANALYSED ONE AFFIDAVIT IN SUPPORT OF WARRANT TO INTERCEPT – NO CONSIDERATION OF OTHER AFFIDAVITS IN SUPPORT – MAGISTRATE'S REFUSAL TO SET ASIDE WITNESS SUMMONS – WHETHER ERROR OF LAW ON THE FACE OF THE RECORD – JURISDICTIONAL ERROR – NO EVIDENCE TO SUPPORT DECISION – WHETHER ADEQUATE REASONS PROVIDED.

PROCEDURE – SUBPOENA – LEGITIMATE FORENSIC PURPOSE – WHETHER ON THE CARDS THAT THE RELEVANT DOCUMENTS WOULD MATERIALLY ASSIST DEFENCE CASE – RELEVANT MATTERS TO TAKE INTO ACCOUNT WHEN DETERMINING WHETHER A PERSON IS ENTITLED TO ACCESS DOCUMENTS THE SUBJECT OF A SUBPOENA: *TELECOMMUNICATIONS (INTERCEPTION AND ACCESS) ACT* 1979, SS46, 46A.

P. was charged with trafficking in a commercial quantity of a controlled drug. As part of the investigative processes, the Australian Federal Police (AFP) obtained three warrants from members of the federal Administrative Appeals Tribunal (AAT) to intercept P's telephonic transmissions. As part of the committal hearing, P. requested the Magistrate to issue a witness summons to the Commissioner of the AFP seeking production of a wide range of documents including the affidavits sworn by the AFP officers in support of the application for the telephone intercept warrants. The Commissioner submitted that the witness summons should be set aside on the grounds that there was no legitimate forensic purpose requiring their production and that the affidavits were the subject of public interest immunity. In dismissing the Commissioner's objections, the Magistrate only considered one of the affidavits in support of one warrant not the three affidavits. Also, the Magistrate concluded that it was 'on the cards' or there was a reasonable possibility that the warrants were obtained as a result of an application made in bad faith or upon misleading material. Upon appeal—

HELD: Appeal allowed. Magistrate's order quashed. Commissioner's objection to be reconsidered.
1. The following principles apply in determining whether a party is entitled to access documents the subject of a subpoena:
(a) it is necessary for the party at whose request the witness summons was issued to identify expressly and precisely the legitimate forensic purpose for which access to the documents is sought;

(b) the identification of such a legitimate forensic purpose is to be considered by the court without inspecting the documents sought to be produced;

(c) the applicant for the witness summons must also satisfy the court that it is "on the cards", or that there is a "reasonable possibility", that the documents sought under the subpoena "will materially assist the defence".

(d) a "fishing expedition" is not a legitimate forensic purpose and will not be permitted;

(e) the relevance of a document to the proceeding alone will not substantiate an assertion of legitimate forensic purpose. There is no legitimate forensic purpose if the party is seeking to obtain documents to see whether they may be of relevance or of assistance in his or her defence.

(f) a mere assertion of bad faith by an applicant or that something might be found demonstrating bad faith is not enough – the criteria set out in (c) must be satisfied.

(g) in criminal proceedings a "more liberal" view is taken by a court in respect of the application of the test. Special weight is to be given to the fact that the documents may assist the defence of the accused.

(h) where a party fails to demonstrate a legitimate forensic purpose, the court should refuse access to the documents and set aside the witness summons.

2. In relation to the submission the magistrate failed to give adequate reasons for his decision this ground of appeal cannot be sustained. The Magistrate gave detailed reasons as to why he refused to set aside the witness summons and set out the arguments of each of the parties. He stated succinctly and correctly the issue he had to resolve in relation to the first affidavit. He referred to a number of authorities relevant to the question of legitimate forensic purpose and access to documents and to the relevant provisions of the Act. He analysed the evidence before him and particularly referred to the Zuccato affidavit. He set out his conclusion in such a form that one can identify a discernible and clear path of reasoning (whether correct or incorrect is not to the point).

3. The assertion by the Commissioner – that there is an obligation upon the Magistrate to ensure that certain aspects of the reasons were "explicitly stated" was satisfied – does not reflect the law in this State. Moreover, as the authorities make clear, one has to bear in mind the circumstances in which the Magistrate was required to deliver this ruling. This was a "three-headed" committal, with a number of witnesses assembled to give evidence. His Honour was required to deliver his ruling on the admissibility of evidence within a short period of time, having heard complex and detailed arguments on a difficult aspect of law.

4. The Commissioner's objection was to each of the three affidavits. However, the Magistrate confined his analysis to the first affidavit and there was no subsequent consideration of the other two affidavits or how his conclusion as to the first affidavit could be applied to the second and third affidavit. In so doing, the Magistrate fell into error and he should be required to reconsider the Commissioner's objection in relation to the second and third affidavits.

5. It was not disputed that there was a legitimate forensic purpose for P. seeking access to the affidavits. The issue was whether there was evidence available to the magistrate which permitted the conclusion that there was a reasonable possibility, or that it was "on the cards" that the contents of the AFP affidavits could have misled the AAT member.

6. The facts relied upon by the Magistrate in the context of the requirements of s42 and s46A of the *Telecommunications (Interception and Access) Act* 1979 entitled him to infer that the details of the s46 warrants and the information obtained from their use had been placed before the AAT member – but not to go the next step namely to conclude that there was a reasonable possibility that the AAT member or members had been misled. There was nothing in the historical matters, the issuing of the s46A warrants or in the construction of the legislation which permitted the Magistrate to draw this inference.

7. In the result, there was no evidence available to the Magistrate to conclude that it was on the cards, or a reasonable possibility, that the warrants were obtained as a result of an application made in bad faith or upon misleading material. Therefore, both error of law on the face of the record and jurisdictional error are made out.

8. Further, there was no probative evidence to support the logic utilised by the Magistrate in reaching his conclusion that there was a reasonable possibility of the information provided by the AFP as being misleading or in bad faith. The ground of illogical reasoning was made out as this was, patently, a crucial determination and therefore the error goes to jurisdiction.

J FORREST J:

Introduction

1. In August 2008, Mr Antonino Di Pietro, the second defendant, was charged with trafficking in a commercial quantity of a controlled drug, MDMA.[1] He, with a number of co-accused, is presently the subject of a committal hearing in the Magistrates' Court.

2. As part of the investigative processes during 2008, the Australian Federal Police[2] obtained three warrants under the Commonwealth *Telecommunications (Interception and Access) Act* 1979[3] to intercept Mr Di Pietro's telephonic transmissions. Those intercepts are said to form a significant part of the prosecution case against him.

3. In October 2010, at Mr Di Pietro's request, the Magistrates' Court issued a witness summons to the Commissioner of the AFP,[4] seeking the production to the Magistrates' Court of a wide range of documents, including the affidavits sworn by AFP officers in support of the application for "named person" telephone intercept warrants under s46A of the Act.

4. It was not suggested by Mr Di Pietro that the warrants were, on their face, not valid. Rather it was said, by way of collateral attack, that it was reasonably possible that the Federal AAT[5] members issuing the warrants had been misled by the contents of the affidavits sworn by

the AFP officers – thus justifying their production.

5. The Commissioner sought that the witness summons be set aside as it related to the affidavits, arguing two points:

(a) that there was no legitimate forensic purpose requiring their production;

(b) that the affidavits were, as a class, the subject of public interest immunity.

6. The Magistrate dismissed the Commissioner's objections,[6] but stayed the production of the affidavits pending determination of this application.

7. The Commissioner now seeks judicial review of the Magistrate's decision, insofar as it is based on the conclusion that there was a legitimate forensic purpose for the production of the three affidavits arguing that:

(a) the Magistrate, in considering whether there should be production of the affidavits, posed for himself the wrong question;

(b) the Magistrate erroneously interpreted s46A of the Act;

(c) there was no probative evidence to support the inference that the AFP misled the AAT members or acted in bad faith;

(d) the Magistrate's decision was "unreasonable, irrational or illogical"; and

(e) the Magistrate's reasons were inadequate.

8. Although the grounds are widely cast, the central questions, in my view, are:

(a) was the Magistrate required to consider each affidavit separately in determining the Commissioner's objection; and

(b) whether there was evidence available to the Magistrate upon which he could conclude that there was a reasonable possibility that the AFP affidavits had misled the relevant AAT members.

The relevant provisions of the *Telecommunications (Interception and Access) Act* 1979

9. In addition to s46 (specific telephone intercept warrants) and s46A (named person telephone intercept warrants) it is necessary to set out the relevant provisions of s42 relating to an application for a named person warrant:

42 Affidavit to accompany written application

(1) A written application by an agency for a warrant shall be accompanied by an affidavit complying with this section.
(2) The affidavit shall set out the facts and other grounds on which the application is based.
(3) The affidavit shall specify the period for which it is requested that the warrant be in force and shall state why it is considered necessary for the warrant to be in force for that period.
(4)…
(4A) If the application is for a named person warrant, the affidavit must set out:
(a) the name or names by which the person is known; and
(b) details (to the extent these are known to the chief officer) sufficient to identify the telecommunications services the person is using, or is likely to use; and
(ba) if the warrant would authorise interception of communications made by means of a telecommunications device or telecommunications devices identified in the warrant—details (to the extent these are known to the chief officer) sufficient to identify the telecommunications device or telecommunications devices that the person is using, or is likely to use; and
(c) the number of previous applications (if any) for warrants that the agency has made and that related to the person or to a service that the person has used; and
(d) the number of warrants (if any) previously issued on such applications; and
(e) particulars of the use made by the agency of information obtained by interceptions under such warrants. …

46. Issue of telecommunications service warrant

(1) Where an agency applies to an eligible Judge or nominated AAT member for a warrant in respect

of a telecommunications service and the Judge or nominated AAT member is satisfied, on the basis of the information given to the Judge or nominated AAT member under this Part in connection with the application, that:
(a) Division 3 has been complied with in relation to the application; and
(b) in the case of a telephone application--because of urgent circumstances, it was necessary to make the application by telephone; and
(c) there are reasonable grounds for suspecting that a particular person is using, or is likely to use, the service; and
(d) information that would be likely to be obtained by intercepting under a warrant communications made to or from the service would be likely to assist in connection with the investigation by the agency of a serious offence, or serious offences, in which:
(i) the particular person is involved; or
(ii) another person is involved with whom the particular person is likely to communicate using the service; and
(e) having regard to the matters referred to in subsection (2), and to no other matters, the Judge or nominated AAT member should issue a warrant authorising such communications to be intercepted;
the Judge or nominated AAT member may, in his or her discretion, issue such a warrant.
(2) The matters to which the Judge or nominated AAT member shall have regard are:
(a) how much the privacy of any person or persons would be likely to be interfered with by intercepting under a warrant communications made to or from the service referred to in subsection (1); and
(b) the gravity of the conduct constituting the offence or offences being investigated; and
(c) how much the information referred to in paragraph (1)(d) would be likely to assist in connection with the investigation by the agency of the offence or offences; and
(d) to what extent methods of investigating the offence or offences that do not involve so intercepting communications have been used by, or are available to, the agency; and
(e) how much the use of such methods would be likely to assist in connection with the investigation by the agency of the offence or offences; and
(f) how much the use of such methods would be likely to prejudice the investigation by the agency of the offence or offences, whether because of delay or for any other reason; and
(g) in relation to an application by an interception agency of Queensland--any submissions made by the PIM under section 45 to the Judge or nominated AAT member.
(3) The Judge or nominated AAT member must not issue a warrant in a case in which subparagraph (1)(d)(ii) applies unless he or she is satisfied that:
(a) the agency has exhausted all other practicable methods of identifying the telecommunications services used, or likely to be used, by the person involved in the offence or offences referred to in paragraph (1)(d); or
(b) interception of communications made to or from a telecommunications service used or likely to be used by that person would not otherwise be possible.

46A Issue of named person warrant
(1) Where an agency applies to an eligible Judge or nominated AAT member for a warrant in respect of a person and the Judge or nominated AAT member is satisfied, on the basis of the information given to the Judge or nominated AAT member under this Part in connection with the application, that:
(a) Division 3 has been complied with in relation to the application; and
(b) in the case of a telephone application --because of urgent circumstances, it was necessary to make the application by telephone; and
(c) there are reasonable grounds for suspecting that a particular person is using, or is likely to use, more than one telecommunications service; and
(d) information that would be likely to be obtained by intercepting under a warrant:
(i) communications made to or from any telecommunications service that the person is using, or is likely to use; or
(ii) communications made by means of a particular telecommunications device or particular telecommunications devices that the person is using, or is likely to use;
would be likely to assist in connection with the investigation by the agency of a serious offence, or serious offences, in which the person is involved; and
(e) having regard to the matters referred to in subsection (2), and to no other matters, the Judge or nominated AAT member should issue a warrant authorising such communications to be intercepted;
the Judge or nominated AAT member may, in his or her discretion, issue such a warrant.
(2) The matters to which the Judge or nominated AAT member must have regard are:
(a) how much the privacy of any person or persons would be likely to be interfered with by intercepting under a warrant:
(i) communications made to or from any telecommunications service used, or likely to be used, by the person in respect of whom the warrant is sought; or
(ii) communications made by means of a particular telecommunications device or particular telecommunications devices used, or likely to be used, by the person in respect of whom the warrant is sought;
as the case requires; and

(b) the gravity of the conduct constituting the offence or offences being investigated; and
(c) how much the information referred to in paragraph (1)(d) would be likely to assist in connection with the investigation by the agency of the offence or offences; and
(d) to what extent methods (including the use of a warrant issued under section 46) of investigating the offence or offences that do not involve the use of a warrant issued under this section in relation to the person have been used by, or are available to, the agency; and
(e) how much the use of such methods would be likely to assist in connection with the investigation by the agency of the offence or offences; and
(f) how much the use of such methods would be likely to prejudice the investigation by the agency of the offence or offences, whether because of delay or for any other reason; and
(g) in relation to an application by an interception agency of Queensland--any submissions made by the PIM under section 45 to the Judge or nominated AAT member.
(3) The Judge or nominated AAT member must not issue a warrant that authorises interception of communications made by means of a telecommunications device or telecommunications devices identified in the warrant unless he or she is satisfied that:
(a) there are no other practicable methods available to the agency at the time of making the application to identify the telecommunications services used, or likely to be used, by the person in respect of whom the warrant would be issued; or
(b) interception of communications made to or from a telecommunications service used, or likely to be used, by that person would not otherwise be practicable."

The factual background to the issuing of the warrants and the subpoena

10. In July 2007, as a result of a request by an officer of the AFP, warrants were issued by a nominated member of the Federal AAT for the interception of two telephone services registered in the business name of Di Pietro Transport. These warrants were issued pursuant to s46 of the Act.[7]

11. In 2008, officers of the AFP made three separate applications for named person warrants pursuant to s46A of the Act.

12. On 25 January 2008, Mr Handley, a nominated AAT member, issued a warrant in relation to the communication services of Mr Di Pietro which remained in force until 23 April 2008.[8]

13. On 14 April 2008, Ms Forgie, a nominated AAT member, issued a warrant in relation to Mr Di Pietro's telecommunications services which remained in force until 12 July 2008.[9]

14. On 10 July 2008, Mr Friedman, a nominated AAT member, issued a warrant in relation to Mr Di Pietro's telecommunication services which remained in force until 7 October 2008.[10]

15. Each of the warrants state, on their face, that the issuing AAT member was satisfied that the statutory requirements of s46A had been met.[11]

16. On 8 August 2008, Mr Di Pietro was charged on summons. Subsequently, on 15 November 2010, at the commencement of the committal hearing, the charge was amended to read that between 24 January 2008 and 26 June 2008, he trafficked a commercial quantity of MDMA.[12]

17. Since March 2009, the Magistrate, Mr Garnett, has managed pre-committal procedures of the charges against Mr Di Pietro, amongst others. His Honour ordered the provision of particulars of the prosecution case against Mr Di Pietro. This document was filed by the prosecutor and, according to Mr Di Pietro's solicitor, was in his Honour's possession for a "considerable period of time".[13]

18. Between November 2009 and May 2010, a voluminous amount of material[14] was provided by the prosecution to Mr Di Pietro's solicitors, which included the transcript of telephone intercepts obtained pursuant to the warrants issued by the AAT members.

19. On 29 October 2010, at Mr Di Pietro's request, the Magistrates' Court issued a witness summons to the Commissioner under r24 of the *Magistrates' Court Criminal Procedure Rules* returnable on 15 November 2010 seeking production of a number of documents, including the following:

1. The application and supporting affidavit or affidavits for warrant number A5734/00/00

(being a section 46A named person warrant for Antonino Di Pietro) issued by nominated AAT member John Handley on 25 January 2008;

2. The application and supporting affidavit or affidavits for warrant number A5734/01/00 (being a section 46A named person warrant for Antonino Di Pietro) issued by nominated AAT Member Stephanie Ann Forgie on 14 April 2008;

3. The application and supporting affidavit or affidavits for warrant number A5734/02/00 (being a section 46A named person warrant for Antonino Di Pietro) issued by nominated AAT member Graham David Friedman on 10 July 2008.[15]

The Magistrate's hearing

20. The committal of Mr Di Pietro and two co-accused commenced on 15 November 2010 before his Honour Magistrate Garnett. The Commissioner and Mr Di Pietro were each represented by counsel. Over the first two days of the hearing, there was discussion and argument concerning various aspects of the witness summons. A number of the documents sought were produced (some in a redacted form) and others were agreed to be outside the ambit of a legitimate request. There remained for his Honour's consideration the question of whether the supporting affidavits for the three warrants should be produced by the Commissioner.

21. His Honour was provided with written submissions by both counsel for the Commissioner and for Mr Di Pietro and heard oral argument, which concluded on the 16th. In the course of argument on that day, counsel for the Commissioner filed an affidavit sworn by Assistant Commissioner Kevin Zuccato of the AFP[16] which primarily supported the claim for public interest immunity privilege over the affidavits, but also dealt with aspects of the validity of the warrants.[17]

22. On the following day, the 17th, his Honour dismissed the application to "set aside in part, the witness summons"[18] concluding that Mr Di Pietro had demonstrated a legitimate forensic purpose in seeking production of the documents.[19]

23. Having delivered his ruling in relation to the legitimate forensic purpose argument, his Honour went on to hear submissions concerning the alternative argument put by the Commissioner that the three affidavits were of a class of document covered by public interest immunity. His Honour then heard evidence on the committal for the balance of the hearing on the 17th.

24. On the 18th, his Honour ruled against the Commissioner's class claim for public interest immunity, but the contents claim by the Commissioner remains to be determined.

The reasons of the Magistrate

25. His Honour's reasons for rejecting the Commissioner's objection on the basis that no legitimate forensic purpose had been established, occupy some six pages of transcript. His Honour set out the arguments of the parties, the relevant principles to be applied in the determination of the application and then his conclusion as to the Commissioner's objection.

26. I have extracted below the relevant parts of his Honour's ruling as directed to the specific arguments placed before him by the parties:

> Obviously, on the material supplied by affidavit, the AAT member was satisfied that the statutory requirements had been complied with. *The issue raised by Mr Di Pietro is whether there is a reasonable possibility that the applicant for the s46A warrant issued on 25 January 2008 involved bad faith or whether the tribunal member was misled as to the basis for the application. ...*
>
> The first s46A named person warrant was granted on 25 January 2008. Mr Di Pietro queries how the AAT member could have been satisfied that the use of the s46A warrant, rather than a s46 warrant, telecommunications warrant, was appropriate, given the background circumstances of the case.
>
> It is submitted that there is a reasonable possibility that the AAT member was misled on the information given to him in the affidavit or that the applicant acted in bad faith. Reference is also made to the Ma Diana phone related to Mr Bran and the Susan Phillips phone related to Ms Ropa, and the basis for any suspicion or belief held by AFP justifying the issue of warrants, namely, Mr Di Pietro.

> The question to be answered is whether Mr Di Pietro has demonstrated a legitimate forensic purpose, thereby requiring the production of the affidavit material. (Emphasis added)[20]

27. After his review of the relevant authorities, his Honour reached the following conclusion:

> It is not contended that the warrant is not valid on its face. *Mr Di Pietro raises the issue that it is reasonably possible he was misled as to the need for the warrant under that section.*
>
> It appears to me, based on the facts as set out in Mr Di Pietro's written submission concerning his two registered phone services, for which a s46 warrant had previously been obtained, and the lack of evidence of him using other phones at the time the warrant was issued, the request for the affidavit material in support of the s46A warrant, has merit and is for a legitimate forensic purpose. It takes the request for provision of this material beyond a mere fishing expedition.
>
> I have also noted the affidavit of Assistant Commissioner Zuccato of the Australian Federal Police, affirmed on 16 November 2010, principally in support of the AFP's claim for public interest immunity and at paragraphs 22 and 23 that the evidence discloses that Mr Di Pietro was likely to use more than one telecommunication service and that as at 25 January 2008 there was clear and unequivocal evidence that his alleged criminal associates used this process to avoid detection.
>
> In relation to the date of issue of the second and third warrants, he proposes that Mr Di Pietro did in fact use telephone services obtained in false names.
>
> *After applying the low threshold test, as outlined in the cases above, I find that there is a real possibility that the document sought would be (indistinct) assistance for Mr Di Pietro's defence.* The affidavit material which laid the foundation for the warrant being issued and the obtaining of some of the evidence on which the case against Mr Di Pietro is based is relevant to him and may assist his defence to the charge that he trafficked a commercial quantity of MDMA between 24 January 2008 and 26 June 2008.[21] (Emphasis added.)

Principles relevant to the production of the documents by a witness pursuant to a subpoena

28. The following principles apply in determining whether a party is entitled to access documents the subject of a subpoena:

(a) it is necessary for the party at whose request the witness summons was issued to identify expressly and precisely the legitimate forensic purpose for which access to the documents is sought;[22]
(b) the identification of such a legitimate forensic purpose is to be considered by the court without inspecting the documents sought to be produced;[23]
(c) the applicant for the witness summons must also satisfy the court that it is "on the cards",[24] or that there is a "reasonable possibility",[25] that the documents sought under the subpoena "will materially assist the defence".[26]
(d) a "fishing expedition" is not a legitimate forensic purpose and will not be permitted;[27]
(e) the relevance of a document to the proceeding alone will not substantiate an assertion of legitimate forensic purpose.[28] There is no legitimate forensic purpose if the party is seeking to obtain documents to see whether they may be of relevance or of assistance in his or her defence.[29]
(f) a mere assertion of bad faith by an applicant or that something might be found demonstrating bad faith is not enough – the criteria set out in (c) must be satisfied.
(g) in criminal proceedings a "more liberal" view is taken by a court in respect of the application of the test. Special weight is to be given to the fact that the documents may assist the defence of the accused.[30]
(h) where a party fails to demonstrate a legitimate forensic purpose, the court should refuse access to the documents and set aside the witness summons.[31]

Principles relevant to a collateral attack upon a warrant

29. In determining whether there was a legitimate forensic purpose for the production of documents related to the issue of a warrant, it was necessary for the Magistrate to consider the manner by which a party in criminal proceedings can impugn the validity of a warrant.

30. A warrant is not susceptible to collateral attack where it is said the material before the appropriate authority was inadequate or insufficient.[32] In *Murphy v R*[33] the High Court said:

> The question is whether the presumption of validity could be displaced by a collateral attack upon

> the warrant founded on an alleged insufficiency of the materials placed before the Supreme Court by the applicant for the warrant. There was no challenge to the jurisdiction of the Supreme Court to grant a warrant; counsel sought to challenge the sufficiency of the grounds on which the warrant had been granted. This attack on the warrant was misconceived. The admissibility of the evidence of Miss X depended on the existence of the warrant, not on the sufficiency of the grounds for granting it.[34]

Subsequently, in *Ousley v R*,[35] another warrant validity case, Gummow J said:

> The more appropriate principle is that the validity of an administrative act or decision and the legality of steps taken pursuant to it are presumed valid until the act or decision is set aside in appropriate proceedings. Where "acts are of an official nature ... everything is presumed to be rightly and duly performed until the contrary is shown".[36]

31. This case, however, does not call for an analysis of the validity of the warrant. Rather, as Mr Di Pietro's argument was formulated by counsel before the Magistrate, it was a collateral attack asserting that it was "on the cards" or reasonably possible that the three warrants were issued in bad faith that the Magistrate was required to consider. This is an accepted exception to the principle preventing a collateral attack on the validity of a warrant.[37]

In *Price v Elder*[38] the Full Court of the Federal Court said:

> A warrant issued as a result of fraud or misrepresentation by an applicant is liable to be set aside. Further, an applicant for a warrant must act in good faith. A statement that is a half-truth, and thus misleading, may be treated as a misrepresentation such as to affect the validity of a warrant issued on the basis of that misrepresentation: *Lego Australia Pty Ltd v Paraggio Puglisi v Australian Fisheries Management Authority*. However, nothing has been advanced that would justify a finding that there has been fraud or misrepresentation in the present matters.[39] (citations omitted)

Analysis of the Commissioner's grounds of review

Were the Magistrate's reasons inadequate?

32. It is appropriate to deal initially with this ground expressed as follows:

> The Magistrate gave no reasons or alternatively gave inadequate reasons for refusing to set aside the witness summons.

33. In *Shire of Wakool v Walters*,[40] Nettle JA said as follows as to the adequacy of reasons in the judicial setting:

> The degree of detailed reasoning required to be provided in support of a determination depends upon the nature of the determination, the complexity of the issues, whether the issues are of fact or law or mixed fact and law and the function to be served by giving reasons, namely, that the parties may know the basis on which the matter has been decided and to enable a court of appeal to determine whether there has been error. In a simple case like this there is not a great deal which is required.[41]

34. Subsequently, in *Intertransport International Private Ltd v Donaldson,*[42] Chernov JA (with whom Eames and Ashley JJA agreed) said as follows:

> It is well-settled that, ordinarily, a judicial officer is under an obligation to explain, however briefly, why he or she came to the conclusion that is sought to be challenged – the reasoning process by which the impugned conclusion was reached must be apparent. While, as Buchanan, JA pointed out in *Perkins v County Court of Victoria,* "[t]here is no general principle that a court's failure to give reasons is an error of law which vitiates the court's decision", the giving of reasons is a normal incident of the judicial process: see *Public Service Board of New South Wales v Osmond* and *Sun Alliance v Massoud*. As Samuels, JA explained in *NRMA Insurance Ltd v Tatt,* where there are issues of fact necessarily posed for judicial decision, or where the resolution of a substantial principle of law depends on findings of fact, "...the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for that purpose." A principal justification for this requirement is obvious enough – the parties, particularly the losing parties, are entitled to know the basis on which the judge came to the impugned conclusion so that proper consideration can be given whether it might be properly challenged on appeal. Moreover, reasons for the decision should be set out so as to enable an appellate court to determine if there was relevant error. As Gray, J said in *Sun Alliance Insurance v Massoud,* reasons for judgment will be inadequate if "the appeal court is unable to ascertain the reasoning upon which the decision is based [or if] justice is not seen to have been done." Furthermore, an adequate statement of the reasons provides

> "the foundation for the acceptability of the decision by the parties and the public [as well as fostering judicial accountability]."[43] (citations omitted)

His Honour then went on to say, in relation to reasons which may be criticised for their brevity:

> But reasons will be adequate notwithstanding that they are brief if they reveal the steps in the thinking process of the court by which it reached its decision: see *Kiama Construction Pty Ltd v Davey*. It may be that the basis for the decision can be inferred from the whole of the reasons for judgment, having regard to the circumstances of the case. As Gray, J. explained in *Sun Alliance,*
>
> > "The simplicity of the context of the case or the state of the evidence may be such that a mere statement of the judge's conclusion will sufficiently indicate the basis of a decision. ... In such cases, the foundation for the judge's conclusion will be indicated as a matter of necessary inference."
>
> Whether a judgment sufficiently indicates the basis of the decision depends, as I have said, on the circumstances of the case, including how the case was conducted by the parties and, relevantly for present purposes, what were the principal issues in dispute between them.[44] (citations omitted)

35. In my view, this ground cannot be sustained. The Magistrate gave detailed reasons as to why he refused to set aside the witness summons. His Honour set out the arguments of each of the parties. He stated succinctly, and in my view correctly, the issue he had to resolve in relation to the first affidavit. He referred to a number of authorities relevant to the question of legitimate forensic purpose and access to documents. He referred to the relevant provisions of the Act. He analysed the evidence before him and particularly referred to the Zuccato affidavit. He set out his conclusion in such a form that one can identify a discernible and clear path of reasoning (whether correct or incorrect is not to the point).

36. The assertion by the Commissioner – that there is an obligation upon the Magistrate to ensure that certain aspects of the reasons were "explicitly stated" was satisfied – does not reflect the law in this State. Moreover, as the authorities make clear, one has to bear in mind the circumstances in which the Magistrate was required to deliver this ruling. This was a "three-headed" committal, with a number of witnesses assembled to give evidence. His Honour was required to deliver his ruling on the admissibility of evidence within a short period of time, having heard complex and detailed arguments on a difficult aspect of law.

37. In oral argument, counsel for the Commissioner focused on the failure of the Magistrate to provide reasons in relation to the production of the affidavits supporting the second and third warrants. It seems clear that his Honour focused solely on the objection to the production of the first affidavit, presumably assuming that disposition of this argument would resolve the question of the production of the other two affidavits. To my mind, this is not an instance of inadequate provision of reasons but rather the absence of reference to the other two affidavits may lead to a conclusion that his Honour fell into error by failing to analyse discretely the issues relevant to the production of these two affidavits.

38. In summary, I reject this ground.

Did the Magistrate ask the wrong question?

39. This ground was set out by the Commissioner as follows:-

> The Magistrate asked the wrong question, in that he asked whether there was a "reasonable possibility" that the documents sought pursuant to the witness summary "may" assist the second defendant's defence, when he should have asked whether it was "on the cards" that the supporting affidavits "would materially assist" that defence.

As I shall subsequently explain this ground, in written and oral submissions, took on a different guise, no doubt because the Magistrate's reasons made it clear that he was alive to either version of the test.

40. In relation to jurisdictional error the starting point is the decision of the High Court in *Craig v South Australia,*[45] and the end point (for now) is the decision of the High Court last year in *Kirk v Industrial Relations Commission of New South Wales.*[46]

41. In *Craig*, the High Court delineated the ambit of jurisdictional error in relation to asserted errors on the part of an inferior Court:[47]

> Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers. An inferior court would, for example, act wholly outside the general area of its jurisdiction in that sense if, having jurisdiction strictly limited to civil matters, it purported to hear and determine a criminal charge. Such a court would act partly outside the general area of its jurisdiction if, in a matter coming within the categories of civil cases which it had authority to hear and determine, it purported to make an order of a kind which it lacked power to make, such as an order for specific performance of a contract when its remedial powers were strictly limited to awarding damages for breach. Less obviously, an inferior court can, while acting wholly within the general area of its jurisdiction, fall into jurisdictional error by doing something which it lacks authority to do. If, for example, it is an essential condition of the existence of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied, as distinct from the inferior court's own conclusion that it has, there will be jurisdictional error if the court or tribunal purports to act in circumstances where that event has not in fact occurred or that requirement has not in fact been satisfied even though the matter is the kind of matter which the court has jurisdiction to entertain.

42. The Court subsequently said of the differing positions of an administrative tribunal and a court:[48]

> At least in the absence of a contrary intent in the statute or other instrument which established it, an administrative tribunal lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law ...
>
> In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error.

43. In *Kirk*, the Court said as follows of the decision in *Craig* as it related to a decision of an inferior court:[49]

> First, the court stated, as a general description of what is jurisdictional error by an inferior court, that an inferior court falls into jurisdictional error 'if it mistakenly asserts or denies the existence of jurisdiction or if it *misapprehends* or disregards the nature or *limits* of its *functions or powers* in a case where it correctly recognises that jurisdiction does exist' (emphasis added). ... [T]he Court amplified what was said about an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or power by giving three examples: (a) the absence of a jurisdictional fact; (b) disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and (c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case. The Court said of this last example that 'the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern' ...

And then went on to say:[50]

> It is important to recognise that the reasoning in *Craig* that has just been summarised is not to be seen as providing a rigid taxonomy of jurisdictional error. The three examples given in further explanation of the ambit of jurisdictional error by an inferior court are just that – examples.

44. The scope for judicial review of an inferior court on the basis of jurisdictional error is, therefore, limited: Where an inferior court poses the correct question or applicable test in relation

to the relevant issue, notwithstanding error in relation to either the application of the law or its analysis of the facts, it will not be amenable to judicial review on this basis. As was said recently by the Full Court of the South Australian Supreme Court in *Barrett v Coroner's Court of South Australia*:[51]

> Having correctly formulated the test, it is my view that even if his Honour then went on to err in his analysis of the evidence, or in the application of the correct test to the evidence before him, such later error would not be a jurisdictional error and would not be amenable to judicial review on that or on any other basis.[52]

45. This is consistent with what was said by Lord Reid in *Armah v Government of Ghana*:[53] If a magistrate or any other tribunal has jurisdiction to enter on the inquiry and to decide a particular issue, and there is no irregularity in the procedure, *he does not destroy his jurisdiction by reaching a wrong decision. If he has jurisdiction to go right he has jurisdiction to go wrong.* Neither an error in fact nor an error in law will destroy his jurisdiction. (emphasis added)[54]

46. It follows that where an error is identified (be it of law or fact) it still remains necessary for the applicant to establish that such an error is truly jurisdictional.[55]

47. Turning now to the Commissioner's alternative contention, *certiorari* against an inferior court will run where an error of law on the face of the record is demonstrated.[56] In this case the record by reason of s10 of the *Administrative Law Act* incorporates the reasons of the Magistrate.[57] Accordingly, and putting to one side jurisdictional error, if it is shown by an examination of the Magistrate's reasons that there is a demonstrable error of law then an order in the nature of *certiorari* may be made.

48. At the hearing, the primary complaint by the Commissioner was that in his Honour's conclusion in dismissing the objection, the affidavit material was described as being "relevant to him [Mr Di Pietro] and may assist his defence to the charge."[58] Counsel for the Commissioner, correctly, pointed out that if his Honour applied this test then it was the wrong test as has been seen.[59]

49. I do not accept this submission. It demonstrates, as counsel for Mr Di Pietro argued, the problem with taking one sentence out of context in a lengthy and comprehensible judgment. One only need go to the Magistrate's succinct identification of the issue at the commencement of his analysis to see that that his Honour did not ask himself the wrong question:

> The issue raised by Mr Di Pietro is whether there is a reasonably possibility that the applicant for the s46A warrant issued on 25 January 2008 involved bad faith or whether the Tribunal member was misled as to the basis for the application.[60]

And again:

> And finally the Court must be satisfied that is on the cards, according to *Alister's* case in *Saleam* and *Tighe*, more than there is a reasonable chance according to *Connelly's* case, give rise to a possibility, *Fellici's* case, or a reasonable possibility, according to *Selway* and *Ragg*, that the documents sought would materially assist the accused in his defence.[61]

50. I think it clear that the Magistrate was alive to the proper test and notwithstanding what might have been said relating to relevance, his Honour addressed the correct legal issue; any argument based on an asserted failure to do so must fail.

51. The secondary argument mounted by the Commissioner is not so easy to determine. Although not directly formulated as part of the grounds for seeking *certiorari*, no objection was taken to it and if there had been I would have permitted amendment. Essentially, it is as follows – the Magistrate only addressed the question of the Commissioner's objection to the affidavit supporting the first warrant and gave no attention to the remaining two affidavits and whether they individually were amendable to collateral attack.[62] The Magistrate said as follows:

> In conclusion, it is apparent that the Tribunal member was satisfied on the material placed before him that it was appropriate to issue the warrant on 25 January 2008, pursuant to s46A.

52. Whilst I have observed that his Honour posed the correct question, it appears to be confined to an analysis relevant to the first affidavit. There is no subsequent consideration of the other two affidavits or how his Honour's conclusion as to the first affidavit could be applied to the second and third affidavits.

53. It is true, as counsel for Mr Di Pietro pointed out, that there was little if any differentiation between the various affidavits in the course of oral argument before the Magistrate by either counsel for the Commissioner or counsel for Mr Di Pietro. Indeed, in the written submissions filed on behalf of Mr Di Pietro, the following was said:

> The question which is ultimately sought to be pursued is whether there is a reasonable possibility that the application for the warrant on 25 January 2008 involved either bad faith on the part of the applicant for the warrant or, alternatively whether the relevant AAT member was misled as to the basis for the application or as to the facts as they then existed.[63]

The Commissioner's written submissions did not make the point in terms that each affidavit would require separate consideration.

54. On the other hand, those submissions made it clear that the objection was to production of each of the three affidavits. Significantly, in my view, the affidavit of Assistant Commissioner Zuccato also asserted that there was evidence that by the time of the second and third warrants, Mr Di Pietro had been using other telephone services and in contact with Mr Barbaro, said to be the principal in the drug distribution ring.

55. I do not accept the submission on behalf of Mr Di Pietro that if there was a reasonable possibility of bad faith associated with the first affidavit, then it necessarily infected the other two. Fundamental to the Magistrate's task, each objection had to be considered on the material adduced and by his Honour posing the same question as he posed in relation to the first affidavit. This he did not do.

56. I am of the view that the Magistrate fell into error. That error, I think, is demonstrated both on the record as well as constituting jurisdictional error. On this ground alone the Magistrate should be required to reconsider the Commissioner's objection in relation to the second and third affidavits. I do not accept the submission made on behalf of Mr Di Pietro that *certiorari* should be refused on a discretionary basis.

Did the Magistrate erroneously interpret s46A of the Act?

57. This ground was set out by the Commissioner as follows:

> The first defendant's ruling involved an erroneous interpretation of s46A of the *Telecommunications (Interception and Access) Act* 1979 (Cth), in that the first defendant based his conclusion that the witness summons had a legitimate forensic purpose on the lack of evidence that the second defendant had used more than two phones at the time that the first warrant was issued, which he implied may render warrants issued under s46A open to challenge, yet properly construed s46A authorised the issuance of the warrants whether or not more than two telephones had been used by the second defendant prior to the issuance of the first warrant.

58. This is not a case in which the Commissioner asserts that the Magistrate wrongly identified the source of power or jurisdiction by the misapplication of the terms of a statutory provision. Rather, it is argued by the Commissioner that the Magistrate, in determining whether there was evidence available to him of the reasonable possibility of misleading conduct or bad faith, erroneously construed the effect of s46 and s46A as part of that process.

59. It follows, I think, that this contention is best resolved in the consideration of whether there was evidence available to the Magistrate permitting him to set aside the Commissioner's objection.

Did the Magistrate fail to make a critical finding?

60. This ground was set out by the Commissioner as follows:

> It was not open to the Magistrate to find that the documents sought pursuant to the witness summons would materially assist the second defendant's defence unless he found that there was

> at least a reasonable possibility that the Australian Federal Police either misled the members of the Administrative Appeals Tribunal who issued the warrants or otherwise acted in bad faith, and no such finding was made.

It was said by the Commissioner that the Magistrate failed to make, in terms, a finding that there was a reasonable possibility that the AFP misled the AAT members or acted in bad faith.

61. Whilst the Magistrate did not in specifically make such a finding it is, in my view, abundantly clear that he reached such a conclusion. As I have already said, his Honour set out the test correctly on several occasions and addressed the evidence relevant to that test. In determining to dismiss the Commissioner's objection it is, in my view, beyond argument that he concluded (whether rightly or wrongly is another point) that there was a reasonable possibility that the member had been misled. It did not need to be spelt out, given the steps taken by the Magistrate in the course of his reasoning.

Was it open to the Magistrate to conclude that there was a reasonable possibility that the AFP misled the AAT member or acted in bad faith?
Was the Magistrate's decision unreasonable, irrational or illogical?

62. The Commissioner's grounds are as follows:

> Further or alternatively, if the Magistrate inferred there was a reasonable possibility that the Australian Federal Police either misled the members of the Administrative Appeals Tribunal who issued the warrants or otherwise acted in bad faith:
>
> (i) there was no evidence or no probative evidence to support any such inference;
>
> (ii) the drawing of such an inference was so unreasonable that no reasonable Magistrate could properly have drawn it; or
>
> (iii) the drawing of such an inference was irrational, illogical and not based on findings or inferences of fact supported by logical grounds.

63. Each of the grounds to a large extent overlap. It is appropriate to deal with them jointly as the central allegation is that there was no evidence to support the Magistrate's conclusion which is then said to be "unreasonable" or "illogical".

64. In *SZNKV v The Minister for Immigration and Citizenship*,[64] Kenny J said:

> Jurisdictional error may lie where the Tribunal "makes a finding and that finding is a critical step in its ultimate conclusion and there is no evidence to support that finding."

Such an error will also constitute an error of law.

65. Last year in *Minister for Immigration and Citizenship v SZMDS*,[65] Crennan and Bell JJ considered the question of sufficiency of evidence and the process of logical reasoning when discussing the development and scope of the concepts of "illogicality" and "irrationality" in a judicial review setting.

66. Their Honours said as follows:

> Judicial review has commonly been relied on to set aside a discretionary decision which "is so unreasonable that no reasonable authority could ever have come to it" or decisions "which are unjust or otherwise inappropriate, but only when the purported exercise of power is excessive or otherwise unlawful". As remarked by Gaudron J in *Abebe v The Commonwealth*:
>
> > [I]t is difficult to see why, if a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should not be construed so that it is an essential condition of the exercise of that power that it be exercised reasonably, at least in the sense that it not be exercised in a way that no reasonable person could exercise it."
>
> This Court has observed with reference to s75(v) of the *Constitution* and jurisdictional error that where a statutory power is conferred the legislature is taken to intend that the discretion is to be exercised reasonably and justly.[66]

Then after consideration of the authorities in this country and the United Kingdom, their Honours said:

> In the context of the Tribunal's decision here, "illogicality" or "irrationality" sufficient to give rise to jurisdictional error must mean the decision to which the Tribunal came, in relation to the state of satisfaction required under s65, is one at which no rational or logical decision maker could arrive on the same evidence. In other words, accepting, for the sake of argument, that an allegation of illogicality or irrationality provides some distinct basis for seeking judicial review of a decision as to a jurisdictional fact, it is nevertheless an allegation of the same order as a complaint that a decision is "clearly unjust" or "arbitrary" or "capricious" or "unreasonable" in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person. The same applies in the case of an opinion that a mandated state of satisfaction has not been reached. *Not every lapse in logic will give rise to jurisdictional error. A court should be slow, although not unwilling, to interfere in an appropriate case.*[67] (emphasis added)

Finally, on this issue, the note of caution just mentioned was reiterated; it is not the Court's task to choose between different processes of reasoning available to the decision maker on the evidence adduced:

> *What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions.* The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.[68] (emphasis added)

67. I return now to the Magistrate's reasoning, bearing in mind these statements of principle; I am particularly conscious that in answering this question a court must not stray into merits review. It was not disputed that there was a legitimate forensic purpose for Mr Di Pietro seeking access to the affidavits. The issue is whether there was evidence available to his Honour which permitted the conclusion that there was a reasonable possibility, or that it was "on the cards" that the contents of the AFP affidavits could have misled the AAT member – not whether this Court would have reached that conclusion.

68. In concluding that there was a reasonable possibility that the AAT member (or members) had been misled, the Magistrate relied upon the following matters:

> (a) the issuing of s46 warrants in July 2007 in relation to two mobile telephone services of Mr Di Petro (registered to Di Pietro Transport).
>
> (b) that there was no allegation at the time of the issuing of the s46 warrants that Mr Di Pietro has possessed or used phones other than those registered to his business;
>
> (c) that there was no evidence that Mr Di Pietro had used telephone services other than the two which were the subject of the s46 warrants prior to the issue of the s46A warrant;[69]
>
> (d) the issue of the s46A warrant;
>
> (e) that s46A(2)(d) of the Act obliged the AAT member to consider the efficacy of the s46 warrants.

69. Section 46A, as recognised by his Honour, required the AFP officer to satisfy the AAT member that there were reasonable grounds for suspecting that a particular person "is using or is likely to use, more than one telecommunication service",[70] taking into account "information that would be likely to be obtained by intercepting under warrant ... communicating to or from any telecommunication service that a person is using, or is likely to use".[71]

70. It follows that the grounds relied upon by the applicants for the warrants were not necessarily confined to historical matters but may also have been founded on matters relevant to the prospective use of telecommunication services. Indeed, there may be a number of other

matters which one could reasonably anticipate would support the issue of a warrant by the AAT member – as is made clear by the terms of s46A(2) which requires consideration of:

> (a) aspects of privacy;
>
> (b) the gravity of the conduct constituting the offence;
>
> (c) the likely benefit of information contained under a telephone intercept warrant in relation to serious offences;
>
> (d) methods utilised in the past including the use of a s46 warrant; and
>
> (e) the likely benefit to the relevant agency in the investigation of the alleged offences.

As can be seen, only one of the criteria relates specifically to historical matters – namely the efficacy of previous investigatory methods including a s46 warrant.

71. Moreover, consistent with the criteria in s46A, the "information, facts and other grounds" required for a named person warrant are not limited to matters of historical fact: s42(2) and (4)(A). Section 42(4A)(c), (d) and (e) obliged the deponent to set out details of previous warrants and the use made by the AFP of the information obtained. But as s42(2) makes clear there was no restriction on the grounds that could be relied upon in the affidavit.

72. The terms of s46A(2)(d) relating to previous methods of investigating potential offences does not assist in inferring the possible existence of misleading information or bad faith by the deponents of the affidavit. That provision is directed to matters which the AAT member must consider in determining whether to issue a s46A warrant. Because a member must consider the previous use of a s46 warrant says nothing about the existence of other material which may satisfy the member to issue the warrant – such as is envisaged by, for example, s46A(2)(a), (b), (c) and (e).

73. It is also to be noted that s46A and s46 are not interdependent; the two are discrete provisions with their only relationship being that an AAT member in considering the issue of a s46A warrant is required to take into account, amongst other considerations, the effectiveness of any s46 warrant. The explanatory memorandum (accompanying the introduction of s46A into the Act) relied upon by counsel for Mr Di Pietro does not, in my view, assist in the analysis of the clear wording of the section. The legislature did not make the issue of a s46A warrant conditional, in any way, upon the efficacy of a s46 warrant. Accordingly, the argument on behalf of Mr Di Pietro that there was a "ramping up" by the issue of a s46A warrant in the context of the previous s46 warrants goes nowhere. The s46A warrants could have been issued at any time with or without a previous s46 warrant.

74. In addition to these matters, there was also the Zuccato affidavit to which the Magistrate adverted in his reasons; its contents made it clear that there were other matters (such as Mr Di Pietro's alleged association with others engaged in drug trafficking and the modus operandi of the group) that supported the proposition that the issues considered by the AAT members were not confined to an historical analysis of Mr Di Pietro's use of the s46 intercepted telephone services.

75. At the heart of the matter is whether it was open to the Magistrate to infer that it was reasonably possible that misleading information was placed before the AAT member (or members). In my view, at best, the facts relied upon by the Magistrate in the context of the requirements of s42 and s46A entitled him to infer that the details of the s46 warrants and the information obtained from their use had been placed before the AAT member – but not to go the next step namely to conclude that there was a reasonable possibility that the AAT member or members had been misled. There was nothing in the historical matters, the issuing of the s46A warrants or in the construction of the legislation which permitted his Honour to draw this inference.

76. In the result I am satisfied that there was no evidence available to the Magistrate to conclude that it was on the cards, or a reasonable possibility, that the warrants were obtained as a result of an application made in bad faith or upon misleading material. Therefore, both error of law on the face of the record and jurisdictional error is made out.

77 . am also of the view that there was no probative evidence to support the logic utilised by the Magistrate in reaching his conclusion that there was a reasonable possibility of the information provided by the AFP as being misleading or in bad faith. The ground of illogical reasoning is made out as this was, patently, a crucial determination and therefore the error goes to jurisdiction. It is not necessary to consider this issue further, nor to determine where the boundaries of the *Wednesbury* unreasonableness test and the "irrationality" ground of review lie.

78. Out of deference to the arguments raised by the parties, I should refer to one other matter. Counsel for the Commissioner argued that, in relation to his argument based on jurisdictional error, it was open to the Court to have regard to the summary of evidence which had been filed with the Magistrates' Court and had been available to the Magistrate prior to hearing the argument in this case.[72] He contended that this summary demonstrated that in respect of the second and third warrants there was positive evidence available to the Magistrate that shortly after 25 January Mr Di Pietro had been in contact on multiple occasions with Mr Barbaro, an alleged king pin in the provision of MDMA and that subsequently he used at least one telephone service registered under a false name and not the subject of the s46 warrant. Counsel also referred to a passage in the transcript of the proceedings on 16 November in which the prosecutor, Mr Young after an infelicitous exchange with counsel for Mr Di Pietro, referred the Magistrate to the fact that the first warrant was issued one day after Mr Barbaro came off the farm harvesting, drove to Shepparton and then met Mr Di Pietro who had driven up from Melbourne.[73] It was said that in accordance with what was said in *Craig*[74], this was material "placed before" the Magistrate and therefore is relevant to whether jurisdictional error has been demonstrated.

79. Counsel for Mr Di Pietro contended that given that counsel for the Commissioner did not refer to this evidence in her submissions to the Magistrate and that his Honour had made no reference in his reasons to this material, it was irrelevant to a consideration of this issue.

80. The Magistrate had for many months managed this proceeding and other related proceedings and the summary had been filed with the Court and was part of the material before him for Mr Di Pietro's committal. In my view, the summary was part of the relevant material placed before his Honour. If I am correct, then this also counts against his Honour's finding being open on the evidence in respect of the second and third warrants.

Conclusion

81. The decision of the Magistrate in refusing to set aside those parts of the witness summons directed to the three affidavits was, in my view, lacking in evidentiary foundation and illogical. It should, both on grounds of jurisdictional error and error of law on the face of the record, be quashed.

82. In addition in relation to the second and third affidavits, the Magistrate was in error in not analysing the issues relevant to those affidavits separately.

83. The question of the Commissioner's objection to the production of each of the three affidavits should be reconsidered by his Honour in the light of these reasons. I see no need, at the present time, to make an order in the form of mandamus. I shall however reserve liberty to the Commissioner to apply.

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[1] Methylenedioxymethamphetamine – commonly known as ecstasy.
[2] Referred to as "the AFP".
[3] Referred to as "the Act".
[4] Referred to as "the Commissioner".
[5] "AAT" refers to the federal Administrative Appeals Tribunal – a nominated member of the AAT may issue certain warrants under the Act: s6DA.
[6] The question of contents public interest immunity has been deferred pending this application.
[7] CB 54 – this assertion was not in issue.
[8] CB 66-67.
[9] CB 68-69.
[10] CB 70-71.
[11] See for example the first warrant, CB 61.
[12] CB 165.
[13] CB 166.
[14] 321 lever arch volumes. CB 165.

[15] CB 22.
[16] CB 31-39, subsequently referred to as "the Zuccato affidavit".
[17] Paras 20 – 26 of the Zuccato affidavit CB 36-38.
[18] CB 145.
[19] CB 265.
[20] CB 262-263.
[21] CB 265-266.
[22] *R v Saleam* (1989) 16 NSWLR 14, 18; 39 A Crim R 406; *R v Mokbel* (Ruling No 1) [2005] VSC 410, [45]; *Principal Registrar of the Supreme Court of New South Wales v Tastan* (1994) 75 A Crim R 498, 504; *R v Sergi* [1998] 1 Qd R 536; *NSW Commissioner of Police v Tuxford* [2002] NSWCA 139, [22]; *Re Don* [2006] NSWSC 1125, [26].
[23] *Attorney-General for NSW v Stuart* (1994) 34 NSWLR 667, 681; (1994) 75 A Crim R 8.
[24] *Alister v R* [1984] HCA 85; (1984) 154 CLR 404, 414; (1983) 50 ALR 41; (1984) 58 ALJR 97.
[25] *DPP v Selway* (Ruling No 2) [2007] VSC 244, [10]; (2007) 16 VR 508; (2007) 212 FLR 243; (2007) 172 A Crim R 359; *Ragg v Magistrates' Court of Victoria* [2008] VSC 1; (2008) 18 VR 300, [96]; (2008) 179 A Crim R 568.
[26] *Attorney-General (NSW) v Chidgey* [2008] NSWCCA 65; (2008) 182 A Crim R 536, [5], [62], [64]; *R v Mokbel* (Ruling No 1) [2005] VSC 410, [45]; *R v Saleam* [1999] NSWCCA 86, [11]; *Alister v R* [1984] HCA 85; (1984) 154 CLR 404, 414; (1983) 50 ALR 41; (1984) 58 ALJR 97; *R v Saleam* (1989) 16 NSWLR 14, 18.
[27] *Alister v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97*; R v Saleam* (1989) 16 NSWLR 14, 17; 39 A Crim R 406, 414; *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564, 575; 55 WN (NSW) 215; *Re Don* [2006] NSWSC 1125, [26].
[28] *Attorney-General (New South Wales) v Chidgey* [2008] NSWCCA 65; (2008) 182 A Crim R 536 [59].
[29] *Carroll v Attorney-General (NSW)* (1993) 70 A Crim R 162, 181.
[30] *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1, 42, 62; 21 ALR 505; 53 ALJR 11; 37 ALT 122; *Alister v R* [1984] HCA 85; (1984) 154 CLR 404, 414, 454-456; (1983) 50 ALR 41; (1984) 58 ALJR 97; *R v Saleam* (1989) 16 NSWLR 14, 17; 39 A Crim R 406; *R v Mokbel (Ruling No 1)* (2005) VSC 410, [40].
[31] *R v Saleam* (1989) 16 NSWLR 14, 18; 39 A Crim R 406. See also *R v Sergi* [1998] 1 Qd R 536; *R v Saleam* [1999] NSWCCA 86, [11].
[32] *R v Robinson* [1998] 1 VR 570, 586.
[33] [1989] HCA 28; (1989) 167 CLR 94; 86 ALR 35; (1989) 63 ALJR 422; 40 A Crim R 361.
[34] Ibid, 105. See also *McArthur v Williams* [1936] HCA 10; (1936) 55 CLR 324; [1936] ALR 239; *Murdoch, Murphy, Murphy & Murphy v R* (1987) 37 A Crim R 118.
[35] [1997] HCA 49; (1997) 192 CLR 69; (1997) 148 ALR 510; (1997) 71 ALJR 1548.
[36] Ibid [130]-[131]. In *Gedeon v Commissioner of New South Wales Crime Commission* [2008] HCA 43; (2008) 236 CLR 120, [22]; (2008) 249 ALR 398; (2008) 82 ALJR 1465; (2008) 187 A Crim R 398, the High Court suggested that there was, at least, some scope for challenge to the validity of administrative acts in the course of criminal proceedings.
[37] *Ousley v R* (1997) 192 CLR 69, 87; (1997) 148 ALR 510; (1997) 71 ALJR 1548.
[38] (2000) A Crim R 11.
[39] Ibid, [12]. See also *Flanagan v Commissioner of Australian Federal Police* (1996) 60 FCR 149; (1996) 134 ALR 495, 544; (1995) 40 ALD 385.
[40] [2005] VSCA 216.
[41] Ibid [35]. See also *Soulemezis v Dudley Holdings Pty Ltd* (1987) 10 NSWLR 247 at 270; *Perkins v County Court of Victoria* [2000] VSCA 171; (2000) 2 VR 246 at 272 [62]–[69]; (2000) 115 A Crim R 528; *Wiki v Atlantis Relocations (NSW) Pty Ltd* [2004] NSWCA 174; (2004) 60 NSWLR 127 at 135-136 [58] and 137 [62]; (2004) 1 DDCR 554.
[42] [2005] VSCA 303.
[43] Ibid, [18]. See also *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd (No 2)* [2002] VSCA 189; (2002) 6 VR 1, 30-32; *Sun Alliance Insurance v Massoud* [1989] VicRp 2; [1989] VR 8, 18-19; *Pettitt v Dunkley* 38 FLR 199; [1971] 1 NSWLR 376, 382 and 387-8; 5 Fam LR 137; *De Iacovo v Lacanale* [1957] VicRp 78; [1957] VR 553, 557-559.
[44] Ibid, [19].
[45] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359, referred to as "*Craig*".
[46] [2010] HCA 1; (2010) 239 CLR 531; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437, referred to as "*Kirk*".
[47] *Craig* [12].
[48] Ibid, [14]-[15].
[49] *Kirk* [72].
[50] *Kirk* [73].
[51] [2010] SASCFC 70.
[52] Ibid [147].
[53] [1968] AC 192.
[54] Ibid, 234.
[55] *Kirk,* [71]. See also *Director of Public Prosecutions & Anor v His Honour Judge Fricke* [1993] VicRp 27; [1993] 1 VR 369, 376; *Returned & Services League of Australia Inc v Liquor Licensing Commission* [1999]

VSCA 37; [1999] 2 VR 203, [19]-[29]; 15 VAR 96.
[56] *Craig*, 176.
[57] *Returned & Services League of Australia Inc v Liquor Licensing Commission* [1999] 2 VR 203, [12]; 15 VAR 96. Compare the position at common law: *Public Services Board (NSW) v Osmond* (1986) CLR 656, 667.
[58] See [27] above.
[59] CB 277.
[60] See [26] above.
[61] CB 263-264.
[62] CB 280.
[63] CB 53.
[64] [2010] FCA 56; See also *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231; (2003) 77 ALD 402, [19], *SZJRU v Minister for Immigration and Citizenship* [2009] FCA 315; (2009) 108 ALD 515, [53] – [54].
[65] [2010] HCA 16; (2010) 240 CLR 611; (2010) 266 ALR 367; (2010) 84 ALJR 369; (2010) 115 ALD 248.
[66] Ibid [123].
[67] Ibid [130].
[68] Ibid [131].
[69] CB 265.
[70] S46A(1)(c).
[71] S46A(1)(d)(i).
[72] CB 238-253.
[73] CB 227.
[74] *Craig*, 176.

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