CITATION:	*The King v MH1* [2024] NTSC 84
PARTIES:	THE KING
	v
	MH1
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	22003243
DELIVERED:	8 October 2024
HEARING DATE:	27 April 2021
JUDGMENT OF:	Blokland J

CATCHWORDS:

Voir Dire – warrant issued under *Telecommunications (Interception and Access) Act* 1979 (Cth) ('the Act') – irregularity or omission of condition precedent – classification of 'serious offence' under the Act – warrant issued for bushfire offence – whether can be considered 'serious arson' as that term is used under the Act to constitute a 'serious offence' under the Act – consequences of non-compliance with Act – under the Act, intercepted conversations not admitted – whether s 138 *Evidence (National Uniform Legislation) Act* 2011 (NT) relevant – held not applicable to the circumstances, but if an error on that basis, evidence would be admitted

Statutes:
Criminal Code 1983 (NT), ss 109, 243, 244
Police Administration Act 1978 (NT), s117
Telecommunications (Interception and Access) Act 1979 (Cth), 5D, ss 7, 46, 49, 74, 75, 77
Evidence (National Uniform Legislation) Act 2011 (NT), s138

Cases Referred
Edelsten v Investigating Committee of NSW (1986) 7 NSWLR 222; *Flanagan v Commissioner of Australian Federal Police* (1996) 60 FCR 149; *Gardenal-Williams v The Queen* (1989) 43 A Crim R 29; *Geldert v The State of Western Australia* (2012) 271 FLR 83; *George v Rockett* (1990) 170 CLR 104; *Green v The Queen* (1996) 124 FLR 423*; Ousley v The Queen* (1997) 192 CLR 69; *Questions of Law Reserved* (No 1 and 2 of 2023) [2024] SASCA 82; *Lawrie v Carey DCM & Anor* [2016] NTSC 23 *R v Deng* (1996) 136 FLR 201; *R v Solomon* [2005] SASR 131; *Stranger v The Queen* [2021] VSCA 25;*T v Medical Board (SA)* (1992) 58 SASR 382; *Taciak v Commissioner of Australian Federal Police* (1995) 59 FCR 285; *Tran Nominees Pty Ltd v Scheffler* (1986) 42 SARS 361;

REPRESENTATION:

Counsel:

Prosecution:	S. Ledek
Defence:	A. Abayasekara

Solicitors:

Prosecution:	Office of Director of Public Prosecutions
Defence:	Northern Territory Legal Aid Commission

Judgment category classification:	B
Judgment ID Number:	BLO2410
Number of pages:	26

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The King v MH1 [2024] NTSC 84
No. 22003243

BETWEEN:

THE KING
Appellant

AND:

MH1
Respondent

CORAM: BLOKLAND J

RULING

(Delivered 8 October 2024)

Background

[1] This matter was previously set for trial. The accused, MH1 was charged with attempting to pervert the course of justice pursuant to section 109 of the *Criminal Code 1983* (NT).

[2] The 'Outline of the Crown Case' can be briefly summarised as follows:

[3] The accused, MH1 is the mother of MH2. MH2 was the target of '*Operation Paringa*', which was established to investigate the deliberate lighting of bushfires in the Darwin rural area throughout 2018 and 2019.

[4] On 4 December 2019 police obtained a warrant pursuant to s 46 of the *Telecommunications (Interceptions and Access)* Act 1979 (Cth), 'the Act', for access to a service number used by the accused's son MH2. Between 4 December and 24 December 2019, investigators monitored MH2's communications.

[5] On 9 December 2019 police attended MH2's workplace and advised him that they were in possession of a search warrant issued under s 117 of the *Police Administration Act* 1978 (NT) for his Toyota Hilux. MH2 informed police that the vehicle was at his residence. Police informed MH2 that they would follow him to the residence to execute the warrant and search the vehicle.

[6] One of the specified items listed in the warrant was windproof matches, which possessed unique fire-starting properties which were not able to be obtained by the general public other than to restricted professionals such as members of the fire brigade.

[7] MH2 got into his work vehicle and proceeded to drive to the residence with police following in a separate vehicle.

[8] During this drive, MH2 used his mobile phone. The calls were being monitored by police. The calls were to the accused.

[9] During the phone calls MH2 requested the accused go to the residence and empty out the vehicle that was to be searched as covered by the warrant

issued under the *Police Administration Act*. This included a request to get rid of windproof matches and any other items that might raise suspicions.

[10] The accused attended the residence and removed all requested items from the vehicle, including generators that MH2 had stolen.

[11] The accused took all requested items, placed them in a bag and hid them at an unknown location on her property.

[12] The essential parts of the monitored conversations set out in the 'Outline of Crown Case' are as follows:

9:50am:	[MH2 to the accused]
MH2:	Can you go down to CH's, like now and clean out my Hilux? There's coppers coming down there with a search warrant. They're probably gonna impound my fucking Hilux.
The accused:	Why?
MH2:	I don't know
The accused:	All right, see ya.

MH2 was residing at CH's residence. CH is the accused's daughter. She lived only a few kilometres from the accused.

9:52am:	[MH2 to the accused and MH2's brother]:
MH2:	Can you take everything out, condoms, fireworks, everything, all you leave in there is the Toyota manual. We're at Berrimah lights now so don't fuck around. Take everything, any matches, bullets.

It was after this communication the accused drove to CH's residence with her 14 year old son and emptied MH2's vehicle of all property, including windproof matches.

9:58am: [MH2 to the accused and his brother]

MH2: [To his brother] [I]n the shed, them generators, the red one.

MH2's brother: Where do I put them?

MH2: The accused: Take them in the car, let's go, where's the generator?

MH2: Just hide them in the scrub mate

The accused: No, we'll just take them

[The accused then placed the generators into her car].

10:12am: [The accused to MH2]

The accused: 'Hang on, I've gotta go back again'

MH2: Are you still down at CH's?

The accused: Yeah, we're just coming back for fucking boxes of matches. I've already got all the ones from the Hilux, there's nothing in there, I've emptied the whole car.

MH2: There's some in the shed.

The accused: He's already here, he's getting them. All right, we've got 10 boxes of matches.

MH2: Yep, that what they're gonna look for.

The accused: Is that it?

MH2: Yep, that should be it.

[13] The accused and her younger son returned home. She placed the matches and other items into a Coles bag which she placed in an unknown location on her 35 acre property. The generators were also stored on the property.

[14] Later the same day at 3:28pm MH2 spoke to the accused again, and said: “If they come in here and found them matches, it would’ve been all over” to which the accused replied “well they didn’t, did they?”

[15] On Tuesday 7 January 2020, a search warrant issued under s 117 of the *Police Administration Act* was executed at the property of the accused. The accused was present with three of her children.

[16] The accused was continually non-compliant with Police instructions and requests for her mobile phone, which police intended would be seized and taken into evidence. Police attempted to explain the reasons for the search warrant, but the accused kept trying to walk away from them. She continually told Police to “Get out, you're not coming in”. She screamed at Police and put the phone down into her left breast area, within her clothes, saying, “You’re not taking my fucking phone. You're not having my phone”. The accused continued with this behaviour for approximately 5 minutes before putting herself on the ground outside the front door, screaming, causing her children who were present to start crying. The accused’s children were pleading with their mother to do what Police asked.

Eventually she sat on a chair with the assistance of Police. This interaction was captured on police Body Worn Video.

[17] The accused's phone was seized and taken into evidence despite there being some resistance initially as outlined.

[18] Under police caution, the accused stated that she "didn't destroy anything".

[19] I sentenced MH2 on 19 November 2020. He was dealt with for 18 counts against s 244(1) of the *Criminal Code* for causing a bushfire when there was a substantial risk that the fire would spread to vegetation on property belonging to another person who would not be able to stop the spreading of the fire. He was also sentenced for three counts of sexual offending against his sister and one count of stealing, the latter count covered the theft of the generators mentioned above.

[20] As above, the accused challenges the validity of the warrant which purportedly authorised the interception of the calls between her and MH2.

[21] The Crown case against the accused is in part circumstantial but as may be plain from the above summary, it is substantially based on the contents of the conversations which were monitored by police.

The warrant

[22] The warrant was issued under s 46 *Telecommunications (Interception and Access) Act* 1979 (Cth) ('the Act') by a Federal Circuit Court Judge.

[23] Section 46 requires first that the Judge, who must be an 'eligible Judge' under the Act, be satisfied that Division 3 of the Act has been complied with. Division 3 provides that an agency may apply for a warrant, which includes a state police force. By s 51(1) this includes Northern Territory Police. The application for the warrant is to include the agency and the name of the applicant and is to be accompanied by an affidavit setting out the information required by ss 42-44.

[24] The Judge who was an 'eligible Judge' within the meaning of the Act, authorised the interception from MH2's phone and in so doing confirmed that he was satisfied Division 3 of the Act had been complied with.[1] He certified he was satisfied there were reasonable grounds for suspecting that the 'particular person' (MH2) was likely to use the service and that the information likely obtained would be likely to assist in connection with the investigation. It may be acknowledged here that the accused was not the target of the investigation at that stage. Plainly the target was her son, MH2, although in my view this has little to no bearing on the question of admissibility.

[25] The part of the warrant which is called into question is the certification that the information would likely assist in the investigation of MH2 of a 'serious

1 A copy of the warrant dated 4 December 2019 was annexed to the defence submissions and was referred to by consent throughout the voir dire proceedings.

offence' within the meaning of s 5D(2)(a) and (b)(iiia) of the Act. The 'serious offence' purportedly relied on was 'Bushfires', contrary to s 244 of the *Criminal Code Act 1983* (NT). 'Bushfires' contemplates conduct which involves a substantial risk of the intentional spread of fire to vegetation on property and is punishable by imprisonment for a period of at least 15 years. Section 5D(2)(a) and (b)(iiia) provides that a 'serious offence' is an offence punishable by a maximum period of at least 7 years *and* under (b)(iiia) includes 'serious arson'. Neither 'arson' nor 'serious arson' were stated to be the offences to be investigated.

[26] The *Criminal Code* (NT) distinguishes between 'arson' and 'bushfires'. Section 243 covers arson which is the intentional use of fire to cause damage to a *building* or *conveyance* being intentional or reckless as to causing damage. 'Bushfires' under s 244 is the intentional or reckless causing of fire which has a risk of spreading to vegetation on property. The fault elements are recklessness as to the risk of fire spreading. The offence 'arson' is defined as follows:

> **243 Arson**
>
> (1) A person is guilty of an offence if the person causes damage to a building or conveyance by using fire or an explosive substance. Fault elements:
>
> The person:
>
> (a) intentionally uses fire or an explosive substance; and
>
> (b) intentionally causes, or is reckless as to causing, damage to a building or conveyance.
>
> Maximum penalty: Imprisonment for life.

(2) A person who is convicted of the offence of attempting to commit an offence against subsection (1) is punishable by imprisonment not exceeding 14 years.

Note for subsection (2) For the offence of attempting to commit the offence, see section 43BF.

(3) A person is guilty of an offence if the person makes a threat to another person to use fire or an explosive substance to cause damage to a building or conveyance.

Fault elements:

The person:

(a) intentionally makes a threat to another person to use fire or an explosive substance to cause damage to a building or conveyance; and

(b) intends to cause, or is reckless as to causing, another person to fear that the threat will be carried out.

Maximum penalty: Imprisonment for 7 years.

(4) For subsection (3):

(a) it is not necessary to prove that the threatened person actually feared that the threat would be carried out; and

(b) a threat may be made by any conduct, and may be explicit or implicit and may be conditional or unconditional; and

(c) a threat to a person includes a threat to a group of persons; and

(d) fear that a threat will be carried out includes apprehension that the threat will be carried out.

(5) In this section:

building includes:

(a) a part of a building; and

(b) all or part of any other structure or thing (whether or not moveable) that is used, designed or adapted for residential purposes (for example, a caravan).

conveyance means an aircraft, vessel, train, motor vehicle or trailer attached to a motor vehicle.

[27] 'Bushfires' under s 244 of the *Criminal Code* is directed to setting fire to vegetation and is defined as follows:

244 Bushfires

(1) A person is guilty of an offence if:

(a) the person causes a fire; and

(b) there is a substantial risk that:

(i) the fire would spread to vegetation on property belonging to another person; and

(ii) the person would not be able to stop the spreading of the fire.

Fault elements:

The person:

(a) intentionally causes the fire or is reckless as to causing the fire; and

(b) is reckless as to the risk.

Maximum penalty: Imprisonment for 15 years.

(2) Subsection (1) does not apply to a person who caused a fire for the purposes of fire management or land management (or both):

(a) in accordance with a law in force in the Territory (including, for example, the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth), the Bushfires Management Act 2016 and the Fire and Emergency Act) 1996; or

(b) in accordance with an agreement entered into by the Territory.

Example for subsection (2)(a)

A person who caused a fire in the course of carrying out fire management activities such as hazard reduction activities under

the Fire and Emergency Act 1996.

Example for subsection (2)(b)

A person who caused a fire in the course of carrying out fire management and land management activities under an agreement between the Territory and a private company established for the reduction of greenhouse gas emissions.

(3) For this section, a person causes a fire if the person:

(a) lights a fire; or

(b) maintains a fire.

[28] The maximum penalties between the two offences differ. 'Arson' attracts a maximum of life imprisonment and the 'bushfires' offence, a maximum of imprisonment for 15 years. Both penalties reach the threshold of a maximum of seven years as required by s 5D(2)(a). While 'arson' clearly meets the additional criteria under s 5D(2)(b)(iiia), 'bushfires' can only be regarded as partially fulfilling the requirements of a 'serious offence' for the purposes of the Act in the sense that the seven year maximum penalty is only one part of the criteria. The warrant states 'Bushfires', rather than an arson offence. As above, 'bushfires' has a particular definition and particular maximum penalty, as does 'arson'. The warrant states 'Bushfires' was a 'serious offence' as defined by s 5D(2)(a) and (b)(iiia) of the Act. Although the bushfire offence shares some obvious similarities with 'arson' or 'serious arson', they are clearly different offences with different characteristics or elements. It is not simply the technical legal definition which is of significance, but it is whether the threshold 'serious offence' as defined by

the Act has been met. Meeting that requirement is a significant pre-condition to the issue of the warrant.

Submissions on behalf of the Crown

[29] Counsel for the Crown contended that the nature of a bushfire offence is serious and is theoretically the same as an arson charge, on the basis of the commonalities between ss 244 and 243 of the *Criminal Code*. Both offences incorporate the element of the intentional use of fire to damage property.

[30] Counsel provided a copy of the explanatory memorandum for amendments made to the Act in 2006 when the term 'serious arson' was inserted into section 5D. The relevant explanatory memorandum stated that:

> The amendment will therefore enable intercepting agencies to seek interception warrants in connection with the investigation of serious arson offences however described in relevant legislation, and including serious damage to property by fire.

[31] It was contended that the term 'however described' implied that the assessment of each circumstance of offending is to be assessed 'under the mantle' of serious arson. It was suggested that this broad definition implied in the explanatory memorandum allows the Court to consider 'property' broadly. On this basis it was argued that property should not be restricted to only dwelling houses and physical buildings or conveyances. Ultimately the Crown argued the legislative intent was that 'property' would include vegetation on property, particularly in this case where vast amounts of local flora and fauna were lost over the period of offending.

[32] Counsel for the Crown acknowledged the Act does not define 'arson'. In those circumstances, it was argued the default position should be to resort to the ordinary English meaning. It was submitted 'arson' invariably refers to damage to property. Further, that 'vegetation on property' would ordinarily be included within the definition of 'property'.

Consideration of the Crown's arguments

[33] As mentioned, 'arson' is not defined under the Act. 'Arson' has a particular meaning under the *Criminal Code*, but the meaning of 'arson' for these purposes is not confined to the Northern Territory statutory definition. The Act is Commonwealth legislation and is intended to cover a range of offences, however described that meet the description 'serious arson'. The Northern Territory legislative provisions are not finally conclusive but have weight in terms of accepted definitions. 'Serious arson' is not defined under the Act, nor in the *Criminal Code*. 'Serious arson' presumably refers to setting fire to buildings or conveyances but excluding cases where the damage is minimal.

[34] The Crown is hard pressed to find examples of 'arson' being used to describe bushfires. Reference was made to *Stranger v The Queen*[2] where in a sentencing appeal for bushfire offending, occasional reference was made to comparative and other arson offending. Reference was also made to the lack of arson offences on the appellant's criminal record. There are some similarities between the two offences and some useful comparison can no

2 [2021] VSCA 25.

doubt be made for sentencing purposes but that does not detract from the fundamental differences.

[35] My own researches reveal the Cambridge Dictionary refers to 'arson' as 'the crime of intentionally starting a fire in order to damage or destroy something, especially a building.' The Macquarie Dictionary (1984) has the following entry: 'arson, *n* the malicious burning of a house or out building belonging to another, or (as fixed by statute) the burning of any building (including one's own).' While those and other dictionary definitions are not finally determinative, they do not support the Crown's argument that 'ordinary words' would assimilate 'Bushfires' referring to intentional burning of vegetation to 'Serious Arson'. Further, the elements of 'arson' at common law consisted of the wilful and malicious burning of a dwelling house.[3] It seems to have taken statutory intervention to create offences that extend criminal responsibility to damage to vegetation by fire. I have some significant sympathy for the Crown's argument. Damage to vegetation and generally the natural environment by deliberate or reckless use of fire may well be regarded as morally serious and in a category which is the same or similar to arson. But 'arson' has particular attributes which 'bushfires' do not.

[36] As I sentenced MH2, I am aware that his offending was very serious. Further, within the facts of the many and varied bushfire offences, there was

---

3 *Gardenal-Williams v The Queen* (1989) 43 A Crim R 29 at 36.

some damage to equipment and farm buildings. However, that was a minor part of the overall offending. There was no charge of 'arson', nor 'serious arson', the latter of course not being a separate offence under the *Criminal Code*. There was no doubt that the 'bushfire' offences were, in common parlance serious offences. However, 'bushfire' offences do not on the face of it appear to meet the criteria required for the issue of a warrant under the Act in terms of the statutory definition of 'serious offence'.

[37] Counsel for the Crown relied heavily on the reasoning in *R v Solomon*[4] which involved a somewhat similar characterisation problem. However, there was a clear path to the resolution of the issue in *Solomon* which favoured the validity of the warrant which is discussed further below.

Defence Submissions

[38] On behalf of MH1, it was argued the recorded conversations should not be admitted because the warrant is invalid and there was no other basis for admission of the conversation. It should be noted here that s 7(1) of the Act generally prohibits the interception of communications in a telecommunications system which in turn is subject to a number of exemptions, including when the intervention is authorised by warrant (s 7(2)(b)).

[39] In brief, it was submitted that the irregularity already described discloses that an essential precondition was not satisfied and should be properly

4 [2005] SASR 331.

characterised as a substantial defect or irregularity when viewed against 49 (7) of the Act. Section 49(7) requires that ‘short particulars of each serious offence’ be set out. Compliance with 49(7) effectively enables the reader of the warrant to perceive whether the offence is of the kind included in the definition ‘serious offence’. Counsel for the accused submitted the warrant was possessed of sufficient irregularity to distinguish it from other cases which relate to the incomplete particularisation of an offence; or that have involved typographical error and that therefore in this instant the warrant falls short of the statutory framework.

[40] It was submitted that the irregularities in the warrant are not capable of being disregarded due to the strict approach that is taken with the construction and form of warrants. The irregularities, it was argued, could not be disregarded under 75(1) (b) of the Act. Section 75(1) essentially provides that evidence may be given of the communication, even if in contravention of s 7(1), if a court is satisfied that (a) but for the irregularity the interception would not have constituted a contravention of s 7(1) and should be disregarded. Section 75(2) provides that an irregularity does not include a ‘substantial defect or irregularity.’

[41] It was submitted that the Court could not be satisfied of a principal condition for admission under section 75(1) (a) of the Act, specifically that but for the irregularity, the interception would not have constituted a contravention of s 7(1) of the Act.

[42] Counsel for the accused emphasized that an offence under s 244, namely the 'bushfire offence' under the *Criminal Code* is not classified as a 'serious offence' as that term is defined in section 5D(2)(a) and (b)(iiia) of the Act. Consequently the warrant does not reveal how the specified offence fulfilled the criteria of a serious offence. It was argued that the Court would be required to substitute a new offence to regard the warrant valid. Further, it was pointed out that the warrant does not comply with s 49(7) as it does not disclose short particulars of any serious offence in relation to which the Judge who issued the warrant was satisfied.

Further consideration

[43] The statutory scheme, with immaterial differences in earlier versions of the Act, is described in *Flanagan v Commissioner of Australian Federal Police*.[5] The Act involves a balancing of conflicting interests, namely the need to ensure that the privacy of individuals is protected from unwarranted intrusions and the need to provide security and law enforcement agencies with an important additional tool of interception and access powers for use in the investigation and prosecution of serious offences.[6]

[44] The guiding principles concerning construction of the Act in the context of an application installed on encrypted communications were considered in *Questions of Law Reserved (No 1 and 2 of 2023)*.[7] The South Australian

---

5 (1996) 60 FCR 149.

6 *Flanagan* at 182-186; *Geldert v The State of Western Australia* (2012) 271 FLR 83 at 85, [9].

7 [2024] SASCA 82 at [140]-[155] Livesey ACJ, Doyle and David JJ.

Court of Appeal made the following points. The privacy of users has been emphasized in a number of authorities, noting the general prohibition against the interception of communications under the Act.[8] Importantly, however, the Act does not seek to impose, and is not premised upon, a general or blanket right of privacy in relation to communications of users of a telecommunications system. 'Consistent with the understanding that legislation rarely pursues its purposes or objectives at all costs, the protection that is provided represents an attempt to balance users' interest in privacy against the public interest in data or information for national security and law enforcement purposes'.[9]

[45] This is not a case which involves a fine balancing of interests. However, Parliament meant to limit the use of this investigative tool to the carefully defined circumstances of a 'serious offence' as defined by the Act. At its core the question here is whether there has been non-compliance with a requirement or condition precedent to the issue of the warrant and whether the Act would permit any failure to comply with the condition precedent to be excused or disregarded.[10]

---

8 *Edelsten v Investigating Committee of NSW* (1986) 7 NSWLR 222; *T v Medical Board (SA)* (1992) 58 SASR 382; *Taciak v Commissioner of Australian Federal Police* (1995) 59 FCR 285; *Green v The Queen* (1996) 124 FLR 423.

9 *Questions of Law Reserved (No 1 and 2 of 2023)* at [144].

10 As determined through the operation of ss 74, 75 and 77 of the Act.

[46] The warrant refers to a singular offence as the relevant serious offence.[11] The short particulars of the serious offence in purported compliance with the Act are set out in the warrant:

> Bushfires, contrary to section 244, *Criminal Code Act* (sic) 1983 (NT), being conduct that involves substantial risk from the intentional spread of fire to vegetation on property and is punishable by imprisonment for a period of at least 15 years, a serious offence within the meaning of section 5D(2)(a) and (b)(iiia) of the Act.

[47] Aside the obvious mistake on the face of the warrant referring to the *Criminal Code 'Act'*,[12] plainly the issuing Judge would have had no difficulty determining that this was an offence against s 244. As discussed, there are clear differences between 'bushfires' and 'arson'. The 'bushfires' offence plainly does not contemplate actual damage to buildings and conveyances. As pointed out by counsel for the accused, the definition of 'arson' in the *Criminal Code* is similar in its terms to definitions in other jurisdictions.[13] As with the Northern Territory, other jurisdictions have relatively recently enacted separate and discrete bushfire offences.[14]

[48] A 'bushfire' does not involve an 'arson' as that latter term is understood, whether that meaning is understood through ordinary usage of the words or through how the terms are dealt with distinctly by statute. The conclusion

---

11 Warrant B_19-016-00 at 2(d), 2(e)(ii), 2(e)(iii), 2(e)(iv), 2(e)(v), 2(e)(vi).

12 Section 244 is in the *Criminal Code*, not the *Criminal Code 'Act'*.

13 *Crimes Act 1900* (Act), s 117; *Crimes Act 1900* (NSW), ss 195-197; *Criminal Code* (Qld), s 461; *Criminal Law Consolidation Act 1983* (SA), s 85; *Criminal Code* (Tas), s 268; *Crimes Act 1958* (Vic), s 197(6); *Criminal Code* (WA), s 444.

14 For example, *Crimes Act 1900* (NSW), s 203E; *Criminal Code* (Qld), s 463; *Criminal Law Consolidation Act* 1935, s 85B; *Crimes Act 1958* (Vic), s 201A.

here is that 'bushfire' cannot be readily assimilated to 'arson' and therefore cannot be considered a 'serious offence' within the meaning of s 5D of the Act. The issuing Judge was considering an offence in a less serious category than 'serious arson'.

[49] As above, the Crown relied on *R v Solomon*.[15] In *Solomon* the South Australian Court of Criminal Appeal dealt with an argument on the validity of a warrant under the Act which concerned a listed 'class 2 offence' under s 5D(2)(b)(iv) involving 'trafficking in prescribed substances'. It was submitted on behalf of the appellant in *Solomon* that the *Controlled Substance Act* 1984 (SA) did not in terms create an offence of trafficking in drugs and that taking part in the sale of cocaine was not necessarily 'trafficking'. The warrant also referred to offences involving sale or supply, and that at least supply did not involve 'trafficking'. Chief Justice Doyle held that it was not necessary for the offence in question to be an offence which must include the word 'trafficking'. His Honour said 'It is sufficient that the offence in question amounts to trafficking.'[16] Further, he said (at [22]): 'If, as a matter of law, an offence against s 32(1)(d) of the *Controlled Substances Act* could not amount to "trafficking", Mr Herchliffe's submission might yet be made good. But the repeated sale or supply of a drug can amount to trafficking in its ordinary meaning: see *R v Deng*.[17] A

15 (2005) 92 SASR 331.

16 *Solomon* at [21].

17 (1996) 136 FLR 201 at 218.

single sale or supply might be part of a course of conduct that is "trafficking"'.

[50] The authority of *R v Solomon* is accepted here. However, in *Solomon* there was a clear a path to acceptance of the proposition that the ordinary meaning of 'trafficking' embraced 'sale' or 'supply'. The same cannot be said of the ordinary meaning of 'arson' or 'serious arson' readily incorporating 'bushfires' because of the particular elements of intentionally damaging buildings or conveyances that is relevant to 'arson'. That meaning is relevant to both the ordinary usage of the word 'arson' and the generally accepted legal meaning both at common law and under a multitude of statutes.

[51] That being the case, and following the line of authority from *George v Rockett*,[18] strict compliance with the statute authorising the warrant must be observed. This does not include minor irregularities. For example, erroneous reference to the *Criminal Code 'Act'* would not be regarded an irregularity of any significance. However, conditions precedent must be met to avoid invalidity or a finding of a serious defect.[19]

[52] The Act's machinery dealing with irregularities is largely reflective of the approach taken in the cases concerning warrants in any event. The warrant is invalid for failure to satisfy a necessary pre-condition, necessary for

---

18 (1990) 170 CLR 104 at 110-111; *Lawrie v Carey DCM & Anor* [2016] NTSC 23 at [18].

19 *Tran Nominees Pty Ltd v Scheffler* (1986) 42 SASR 361 at 390; *Ousley v The Queen* (1997) 192 CLR 69 at 88, per Gaudron J.

exercise of jurisdiction. Given it was not made out that the information that would likely be obtained would likely assist in the investigation of a 'serious offence', s 46(1)(d)) was not made out. The warrant does not disclose short particulars of any 'serious offence' within the meaning of s 5D, (s 49(7)).

[53] Section 75(1) does allow admission of an intercepted conversation in circumstances where but for the irregularity the interception would not have constituted a contravention of s 7(1) and in all the circumstances that irregularity should be disregarded. Section 75(2) provides a 'defect' or 'irregularity' does not refer to a 'substantial' 'defect' or 'irregularity. The non-satisfaction of a condition precedent should be characterised as a substantial matter.[20] It went to whether the Judge could be satisfied that the information obtained would assist in the investigation of a 'serious offence' as defined by the Act. It was not a minor matter or minor defect. It was not the type of irregularity that can be disregarded under s 75.

[54] A fundamental precondition was not complied with and in accordance with the machinery of the Act (s 75(1)(2)) the intercepted conversation cannot be admitted as it cannot be exempted under s 7(1). Applying the legislative machinery to this issue produces a similar result as would be expected in compliance with the line of cases starting from *George v Rockett*.

[55] The evidence of the conversations will not be admitted.

---

20 *Tran Nominee Pty Ltd v Scheffler* (1986) 42 SASR 361.

[56] An interesting question arises on whether notwithstanding the exclusion of evidence under the Act on the basis of non-compliance with an essential pre-condition, the conversations could nevertheless be admitted in exercise of the discretion under s 138 of the *Evidence (National Uniform Legislation) Act* 2011 (NT) ('ENULA').

[57] It seems to me that the Act has set out its own machinery for determining admissibility in the face of irregularity or non-compliance. The balancing exercise required under s 138 of *ENULA* is not required under the Act. The Act does not, for example, require the nature of the relevant offence to be taken into account and the importance of the evidence to the proceedings. That is because the Act specifies the criteria for the warrant and specifies that the intercepted conversations cannot be the subject of evidence unless they are exempted (by warrant), with any irregularities to be considered according to whether they are minor or substantial. There is little room for weighing the types of factors relevant to s 138. Discretionary considerations under the Act are of far narrower compass. As the Act sets out in some detail what the consequences on admissibility are, it should be regarded as covering the field. That is in keeping with the strict approach to warrants taken by the authorities as opposed to other forms of obtaining evidence, save that s 138 may well be relevant to evidence subsequently derived from evidence obtained that does not comply with the Act. Exclusion of evidence of that kind is not dealt with under the Act. Such evidence would be regarded as being 'obtained in consequence' for s 138 purposes. Hence

evidence subsequently derived from the intercepted conversations may be subject to the s 138 discretion.

[58] If I am wrong in that conclusion and if s 138 *does* apply to the intercepted conversations, then in my view the evidence against the accused *would* be admissible as the desirability of admitting it would outweigh the undesirability of admitting it.

[59] First, the evidence can be regarded as being obtained in contravention of Australian law, namely s 5D of the Act by issuing a warrant which does not conform with a condition precedent in the terms which have been outlined above. The evidence was not exempt from exclusion under s 7(2)(b) of the Act.

[60] In terms of the probative value of the evidence (s 138(a)), the evidence is highly probative of the offence that the accused is charged with, being attempting to pervert the course of justice. The conversations appear to be the only direct evidence of the offence. The evidence was also highly probative of the bushfire offences being investigated at the time. The evidence is important for the same reasons (s 138(b)). Although there is some circumstantial evidence, the evidence of the intercepted conversations possess significant weight. The conversations were not as important to the bushfire offences. There was other direct evidence. In terms of s 138(c), the offence of attempting to pervert the course of justice is a serious offence with a maximum penalty of imprisonment for 15 years. Offending of that

kind is regarded as striking at the heart of the justice system, here at the investigation stage of the bushfire offences. The bushfire offences which were the offences being investigated at the time were serious. Each count was subject to a maximum term of imprisonment for 15 years. Each count involved grave, widespread damage to vegetation including the natural environment. Both types of offending are in a serious category.

[61] In terms of gravity of the contravention and whether the contravention was deliberate or reckless (s 138(3)(d)(e)), plainly the contravention was not deliberate and not reckless. It was a mistake. However, it was a mistake of significance under the Act given that the offence relevant to the issue of the warrant must be a 'serious offence' strictly as defined by the Act. The mistake took the evidence out of the exemptions given to the intercepted conversations under the Act. Whatever the reason for the mistake, which has consequences under the Act, this is far removed from intentional or reckless non-compliance.

[62] The contravention may be inconsistent with Article 17 of the International Covenant on Civil and Political Rights, the right not to be subject to arbitrary or unlawful interference privacy (s 138(3)(f)). However, in this instance, the protection given by the Covenant does not offer additional protection beyond the statute in the sense that the Covenant recognises there may be lawful interference with privacy. Here the non-compliance with the Act deprived the interception of its lawfulness, however once the basis of

the non-compliance is understood, the inconsistency with a right to privacy does not add significant weight to the gravity of the non-compliance.

[63] Section 138(3)(g) would not appear to be relevant in terms of 'other proceedings' relevant to the contravention. The evidence of the intercepted conversations would be difficult if not impossible to obtain without the interception (s 138(3)(h)).

[64] The conclusions here are that the intercepted conversations are not admissible under the Act. Section 138 of *ENULA* does not apply. If that latter conclusion is wrong and s 138 does apply, the evidence of the conversations should be admitted as being more desirable than not admitting them. The apparent inconsistency between those conclusions is explicable by virtue of the stricter legislative provisions of the Act when compared with the broad discretion under s 138.

[65] The matter will be listed for mention at a date convenient to all parties. A letter in respect of delay of the reasons will be forwarded to counsel. The names have been anonymised in this ruling as publishing the names of MH1 and MH2 may expose the identity of a victim of sexual offences in related proceedings.
