IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No. M174 of 2017

BETWEEN: **DONALD GALLOWAY (a pseudonym)**
Appellant

and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS
First Respondent
AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION
Second Respondent
EDMUND HODGES (a pseudonym)
Third Respondent
TONY STRICKLAND (a pseudonym)
Fourth Respondent
RICK TUCKER (a pseudonym)
Fifth Respondent

FIRST RESPONDENT'S REDACTED SUBMISSION

Part I – INTERNET PUBLICATION

1. The First Respondent certifies that the submission in this form suitable for publication on the internet.

Part II – STATEMENT OF ISSUES

2. Whether, on the evidence presented, a stay of these criminal proceedings on the basis that a continuation of them would be an abuse of the Court's process should have been granted. The Respondent submits the answer is "no".

3. The manner in which the Appellant describes the issue only contains selective matters of fact. For example, relevant factual matters not referred to include that:

   (1) the conduct was undertaken by the Australian Criminal Intelligence Commission ("ACIC") and the Australian Federal Police ("AFP") in the *bona fide* belief that it was lawful;

   (2) there was no practical unfairness as a result of the examinations, or forensic disadvantage by reason of the Appellant's examination constraining his legitimate forensic choices (judgment below at [278] – [301]);

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(3) the evidence of the lack of use of the examination material was not challenged in the application;

(4) prosecutors with no knowledge of the examinations will conduct the trial and the investigators are enjoined from disclosing the contents of the examinations;

(5) [redacted]

(6) [redacted]

Part III – NOTICES UNDER SECTION 78B OF THE JUDICIARY ACT

10 4. The Respondent considers that no notice is required to be given pursuant to section 78B of the *Judiciary Act 1903 (Cth).*

Part IV – FACTUAL BACKGROUND

5. The Appellant adopts the summary of fact by the Appellant Hodges (AS [5.2]) and Tucker (AS [5.3]). The Respondent relies on her submission in those matters (RHS [9] - [23], and RTS [5] – [17]), and adds the following in respect to matters raised by this Appellant.

6. The context in which the examinations were conducted is outlined in the Respondent's submission in Hodges (RHS [14] – [18]). The Appellant was examined on 12 April 2010. [redacted]

20 [redacted] As was submitted below, the Crown Opening for [redacted] has over 300 footnotes and often refers to multiple documents within those footnotes. The Summary of Facts for [redacted] has over 250 footnotes and often multiple documents are referred to in those notes.[2] The briefs of evidence/depositions contain many more documents and exhibits.

7. On 6 and 7 October 2010, the Appellant voluntarily participated in a lengthy interview with the AFP, which was tape recorded and under caution.[3] He agreed he understood

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[1] Exhibit 8.

[2] 'Prosecution submissions on grounds of appeal relating to issues of forensic advantage and disadvantage' to the Court of Appeal dated 14 October 2016 at [22].

[3] Trial Judge at [765], ECB.141; ECB.144; Prosecution Outline of Evidence ("POE") at [464] – [466]. This TROI has been said by his representatives to be entirely consistent with his ACC examination.

the caution given. [redacted]

8. [redacted] He is not constrained in the conduct of his trial by the examination.

9. [redacted]

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10. In relation to AS [5.10], at the beginning of the examination Sage, the examiner, referred to a list of people who were entitled to be present at the examination, which included relevant AFP officers.[8]

11. The Appellant relies on material that was not in evidence before the trial judge or before the Court of Appeal. In particular, the Appellant (AS [6.18] – [6.32]) refers to extracts of committal transcript, which were not tendered on the application in support of his

20 argument that the AFP used the examination material (see [27] below).[9] This Court has no power to receive evidence which was not before the Court below.[10]

Part V – APPLICABLE STATUTORY PROVISIONS

12. The Appellant's statement of the relevant provisions is correct.

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[4] Trial Judge at [760].
[5] Trial Judge at [760] and [765].
[6] Trial judge at [765], [870].
[7] Trial Judge at [762]. See also ECB.452.
[8] Trial Judge at [538]. See, POE at [267] – [278] for full details of Galloway's examination.
[9] Notably the transcript references included at the following footnotes of the Appellant's submissions were not in evidence before her Honour: 51 (Mitchell committal transcript at T1278 and T1289), 80 (Schwartz committal transcript T4289 and T5464), 82 (Schwartz committal transcript T4287), 83 (Schwartz committal transcript T4288), 84 (Schwartz committal transcript T367 and T436 – 437), 85 (Schwartz committal transcript T1429 – 1431, T7344 and T7355), 86 (Schwartz committal transcript T4282 – 4284), 87 (Schwartz committal transcript T5601, T4383), 88 (Schwartz committal transcript T5602), 89 (Schwartz committal transcript T5603) and 90 (Schwartz committal transcript T5389 and T5462 – 5463).
[10] *Eastman v The Queen* (2000) 203 CLR 1 at [9], [18], [69], [111], [184], [290]; *Mickelberg v The Queen* (1989) 167 CLR 259.

Part VI – SUMMARY OF ARGUMENT

Bringing the administration of justice into disrepute

13. The Appellant adopts the submissions filed by the Appellant Hodges (AS [6.1]) and by Tucker (AS [6.1]). The Respondent relies on her submission filed in those matters and in relation to the Appellant Strickland. The following addresses the supplementary arguments raised by this Appellant.

14. The Appellant's submission (e.g. AS [6.5]) attributes conclusions to the Court of Appeal which are in fact references by the Court below to findings of the trial judge (e.g. at [228]). Rather, the submission entirely ignores the findings of the Court of Appeal. It also makes general assertions as to conduct by the AFP, the ACIC and the Commonwealth Director of Public Prosecutions ("CDPP") not supported by any evidence or findings.

15. For example, while the submission (AS [6.5]) makes an assertion that Schwartz admitted in evidence to using the examination materials, it omits references to the evidence of what the witness actually said and the Court's conclusion as to his evidence. The general assertions do not accurately reflect the evidence given or the findings made. For example, as the Court below correctly observed (at [244]), the cross-examination of Schwartz was directed at establishing that at the time of the examinations there was already sufficient to charge the appellants with the topic of the use of the material "*barely being mentioned*". "*At no time was it put to him that any information of value had emerged from the examinations, or that he was being untruthful in saying that the examinations had been largely a waste of time*" (at [244]). The very limited nature of his evidence is apparent from the trial judge's recitation of it referred to by the Court of Appeal (at [228]). As the Court below correctly observed (at [244]), it was never suggested to Schwartz or any other AFP investigator that he had used the material more than they had admitted (at [255]). The Appellant does not challenge the accuracy of this description.

16. [redacted] As was also noted above, after considering the

issue of the voluntary disclosure the trial judge did not find that he was constrained by reason of the examination (cf. [6.8]).[11]

17. The Appellant's submission (AS [6.6], [6.7]) as to the finding of recklessness, does not address the conclusions of the Court below. It also does not address the correct legal principles as to the meaning of recklessness (and that contended for by the Appellant below, see RHS [68]), and the absence of any evidence of an awareness by Sage of any unlawfulness of his conduct. He believed it was lawful. Rather, the assertion (AS [6.6]) applies a test of recklessness different to that contended for by the Appellant below.

The actual or demonstrable unfairness

10 18. The Appellant adopts the submissions filed by the Appellants Hodges and Tucker (AS [6.11]). The Respondent relies on her submission filed in those matters and in relation to the Appellant Strickland. The following addresses the supplementary arguments raised by this Appellant.

19. [redacted]

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20. While the Appellant did attempt to suggest at the voir dire that the examination process (AS [6.15]) ff) had been used to assemble the prosecution case, in particular by reference to the conduct of Mr Singleton, neither the trial judge nor the Court below made any finding that Singleton had used the examination product or that it had influenced the witness statements of either Mr Russell or Mr Mitchell.[12]

21. As the Court below (at [268]) correctly concluded:

> *"First, Mr Mitchell was always going to be interviewed by the AFP, given his senior position at QRS Limited. Counsel for Mr Galloway properly conceded*
30 *that this was so. Secondly, it was inevitable that senior officers at QRS Limited*

[11] The passage cited by the Appellant from the judgment of the trial judge at [748] is a conclusion by the trial judge before she considers the effect of the voluntary disclosure.
[12] Trial judge at [791] – [797] (as to taking witness statements) and [798] – [800].

(including Mr Mitchell) would be asked, in detail, about the role played by Mr Galloway at the time. Thirdly, as the Director pointed out in her reply submission, Mr Mitchell's successor, Mr Russell, had given Singleton more than 100 pages of his own notes and copy documents before Galloway was examined. There was, in short, nothing to show that Singleton's presence at the Galloway examination had prompted him to make any inquiries which he would not have otherwise have made, or to ask questions which he would not otherwise have asked."

22. As is reflected by the passage quoted above, the Court recognised that there was some attempt by this Appellant to argue that some statements were influenced by the examination process (cf: AS [6.15], [6.16]). However, that attempt was limited.

23. In particular, it was never put to Singleton that the examination of the Appellant had influenced the content of witness statements taken by him (cf: AS [6.17] – [6.27]).

24. Moreover, the Appellant's argument that the statements were influenced relies on factual matters (and references) which were not in evidence before the trial judge (and therefore not relied on below). For example, his submission in AS [6.32] is, with limited exception, based on material not before the trial judge.[13] This is material which was in the possession of the Appellant but he chose not to use it in support of his application.

25. It also relies on placing an interpretation on some of the evidence, which is incorrect.

26. For example:

(1) In relation to AS [6.18], there is no finding by the trial judge (or the Court of Appeal) that Singleton was influenced by the examination.[14] Indeed, as the Court observed (at [268]) there is no evidence that he had been influenced (at [269]), and as noted above, it was never put to Singleton that the examination did influence him;

(2) In relation to AS [6.21], there is no finding (or evidence) that this material was in Mitchell's statement as a result of what the Appellant had said in his

[13] The material referred to in footnotes 80, 82, 85, 86, 87, 88, 89 and 90 was not before the trial judge. The material in relation to Mitchell in footnote 51 was also not before the trial judge. Of the nine subparagraphs in AS [6.32] only subparagraphs (1), (3) and the second sentence of (5) are supported by evidence before the trial judge.

[14] As stated in AS [6.22] – [6.24], Russell had already met with the AFP on 4 occasions (16 March, 22 March, 23 March and 9 April 2010) prior to the Appellant's examination on 12 April 2010. On the second of those occasions he provided extensive contemporaneous file notes to Singleton. Mitchell said very little about the Appellant.

examination. The submission also ignores the finding of the Court (at [268]) referred to above. The accuracy of that passage is not challenged.

(3) In relation to AS [6.24] – [6.26], while Singleton agreed that he spent that time working on the Russell statement, he rejected the proposition that he had in any way influenced the content or substance of the witness' statement.[15] Again, as noted above, her Honour made no finding that Singleton had in any way influenced the content of Russell's statement. The input of the CDPP solicitor (AS [6.26]) was about using exhibit numbers.[16] There is no evidence that the statement was amended in any way to alter the witness' evidence.[17] The implication otherwise is without foundation.

(4) In relation to AS [6.27]) Singleton did not agree that what Russell told Schwartz on 16 March 2010 was "*completely different*". Rather he said that the witness statement was a completely different *document* to the notes taken by Bartlett on 16 March 2010.[18] The evidence was not, as suggested by the Appellant, to the effect that the witness's story had changed over time or that Singleton had in anyway influenced Russell's evidence. Singleton strongly rejected this suggestion.[19] Again, there is no finding to support any use of ACC materials in the witness statement taking process.

(5) In relation to AS [6.32(1)], a caution was given by the Magistrate to Schwartz but only as a result of a suggestion by the then defence counsel and Schwartz refused to claim any privilege against self-incrimination.[20] The trial judge did not make any findings of unlawfulness or dishonesty on the part of Schwartz.

27. The Appellant's submission (AS [6.31]) the Court was in error to overturn her Honour's finding that it was impossible to determine what from the examination was used, is incorrect.

28. As the Court concluded, and as was conceded by the appellants (at [259]),[21] it was well open to the appellants to seek to prove any actual advantage (if it existed) derived by

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[15] See Singleton at T902 – 905.
[16] Singleton at T901.
[17] To the contrary, see, for example, T780 – 781, T899 – 900.
[18] Singleton at T903.
[19] See especially re-examination of Singleton at T947 – T957.
[20] ECB.449. T4284.3 to 4285.25
[21] In the Court below the Appellants filed joint written submissions on the issue of forensic disadvantage – see 'Respondents' joint submissions in relation to grounds 3, 4, 5, 6, 7 & 8' dated 14 November 2016. A total of three additional written submissions on this issue were filed by Galloway and Tucker (all dated 14 November 2016) and

investigators from access to the material, "*they simply did not attempt the task*" (at [258]). It was also conceded that when the voir dire commenced they had all the information they needed to explore with investigators what use they had made of the material (at [259]), that there were straightforward steps which could be taken (at [259] – [263]) and that there was no obstacle to them undertaking those types of steps (at [264]). The onus was on the Appellant to establish the factual basis for the stay (cf: [6.31]).

29. The fact that the charge is one of conspiracy (AS [6.35] – [6.37])[22] does not assist the Appellant as no forensic disadvantage has been established in respect of each appellant. Contrary to the Appellant's contention (AS [6.37]), proof of facts in relation to what occurred in the conspiracy before his involvement will not depend on anything said in the examination [redacted]. It will be necessary to establish the existence and nature of the conspiracy. However, in this case that will be proved by inferences drawn from the documents.[23]

Part VII – NOTICE OF CONTENTION

30. Not relevant.

PART VIII – TIME ESTIMATE

31. The Respondent estimates that the oral argument will take approximately 2.5 hours (for all appellants).

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all specifically adopted the written submissions "of the other respondents". On the hearing of the appeal oral submissions on behalf of all the then respondents were made by counsel for Hodges (see Court of Appeal Transcript 28 November 2016 at T4.14 to T4.19; 29 November 2016 at T243.5 to T243.12 and T264.29; in addition, on 21 February 2017 at T188.19 to T188.22 (Strickland adopting Hodges submissions) and T189.30 to T190.1 (Tucker adopting Hodges submissions). Galloway made short oral submissions on 29 November 2016 at T241 and 21 February 20117 at T175 but did not demur from Hodge's oral submissions on either occasion.

[22] The trial judge in respect to this argument noted that it was "*not really elaborated on*" at [716].

[23] *Ahern v The Queen* (1988) 165 CLR 87.