IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M175 of 2017

BETWEEN: **EDMUND HODGES (a pseudonym)**
Appellant

and

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

FIRST RESPONDENT'S FURTHER REDACTED SUBMISSION

Part I – INTERNET PUBLICATION

1. The First Respondent certifies that this submission is in a 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. Relevant factual matters not referred to by the Appellant in identifying the issue for determination 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, nor any 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) the prosecution case is documentary and that the Appellant did not dispute that none of the documents in the brief depended, for its probative effect, on answers given in the examinations (at [274]).

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

(6) the examinations took place prior to charge.

4. The factual premise underlying the Appellant's submission (AS [2(f)]), that the examinations achieved a forensic advantage to the prosecution and disadvantage to the appellants, is inconsistent with the findings of the Court of Appeal.

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

5. 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

6. The facts and procedural history are accurately summarised in the judgment below (at [4] – [24], [236] – [247]). The Respondent adds a number of relevant matters to the factual summary (at [9] – [13] below). Also, a number of the factual assertions contained in the Appellant's summary are out of context and therefore misleading (at [14] – [22] below). Some of the matters referred to in the Appellant's summary were not in evidence before either the trial judge or the Court of Appeal (at [23] below).

7. The repeated assertion by the Appellant that the examinations were unlawful and for an improper purpose is based on the finding of the Court of Appeal. This finding says nothing about the state of mind of Sage, the examiner, or of the AFP as to the lawfulness of the conduct. As the Court below observed (at [13]), Sage gave evidence that he believed that his acts were lawful (at [13]). Both the trial judge and the Court of Appeal found that there was no evidence to suggest any awareness on his part that his acts might have been unlawful.[1] The Appellant did not suggest at first instance that Sage

[1] Trial judge e.g. at [694], [868]; CA at [73], [74], [79], [105] and [116].

was a dishonest witness. The trial judge found him to be an honest witness.[2] That finding was not challenged on appeal.

8. The prosecution team for the conduct of the trial is a team from whom all knowledge of what was said in the examinations has been quarantined (at [302], [304], [315]). Further steps to ensuring a fair trial identified by the Court are that the investigators are enjoined from disclosing the contents of the examinations; and the trial judge's ability to prohibit the Crown from leading evidence and to prohibit certain matters being referred to by investigators, if to do so, would be productive of unfairness (at [315]).

Additional matters

9. Relevant to the appeal ground is the conduct of the voir dire hearing by the appellants, which is accurately summarised in the judgment below (at [232] – [247]).

10. As the Court below concluded, the appellants'[3] argument at first instance concentrated on "*the intentional or reckless illegality*" said to have characterised the examination process, arguing that this was sufficient by itself to justify a stay of proceedings. The appellants never sought to identify any practical forensic advantage said to have derived from the examinations (at [272] – [274]).

11. The Court of Appeal held that:

(1) the appellants failed to establish any practical unfairness as a result of the examinations (at [248], [258], [266], [274], [276] – [277]);

(2) there was no practical unfairness or forensic disadvantage by reason of their examinations constraining their legitimate forensic choices in the conduct of their trials (at [278] – [301]);

(3) it was well open to the appellants to seek to prove any actual advantage (if it existed) derived by investigators from access to the material, "[t]hey simply did not attempt the task" (at [258]) – this was conceded below (at [264]) (and in this Court (AS [81]);

(4) the appellants 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

[2] Trial judge at [36].
[3] References to the appellants are to Edmund Hodges (a pseudonym), Donald Galloway (a pseudonym), Tony Strickland (a pseudonym) and Rick Tucker (a pseudonym).

taken (at [259] – [263]) and that there was no obstacle to them undertaking those types of steps (at [264]);

(5) even if the investigators had derived some assistance from the examinations in "guiding" and "refining" subsequent documentary searches, the case against the respective appellants, which rests almost entirely on documents, had not materially changed as a result of the examinations (at [266]);

(6) the appellants had not identified any evidence relied on by the prosecution which would not have been obtained but for the examinations. The prosecution would always have had to prove that the documents relied on were relevant to the prosecution case and that the appellants had seen them or were aware of their contents. The need for proof of those matters was unaffected by anything said during the examinations (at [266]);

(7) no evidence was adduced of any documentary or other evidence that was located by reason of the AFP's access to the examinations (at [253], [254], [266]);

(8) the statements of the AFP witnesses as to the lack of use of the examinations in the investigation were not challenged (e.g. at [241], [243] – [247], [268] – [270]);[4]

(9) before the examinations the AFP had obtained a large volume of evidence and intelligence which assisted them in identifying further avenues of inquiry (at [274]) (cf: AS [13]).[5] The appellants did not challenge the accuracy or significance of this "*large volume of evidence and intelligence*" nor did they dispute that none of the documents in the brief depended, for its probative effect, on answers given in the examinations (at [274]);

(10) the appellants did not identify any evidence inconsistent with the Respondent's submission that none of the answers given in the examinations gave rise to evidence which tended to disclose a defence or explanation which they may raise at trial or revealed that transactions, apparently regular on their face, in fact tended to support the prosecution case (at [275]).

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[4] And see earlier recitation of the trial judge's findings which refers to the content of the AFP statements (at [227]).
[5] This evidence is referred to in the Respondent's written submission filed before the Court of Appeal: 'Prosecution submissions on grounds of appeal relating to issues of forensic advantage and disadvantage' (written submissions) at [36] – [39].

12. Further, the Court below also, *inter alia*;

(1) rejected the trial judge's approach (and the appellants' contention) that it was practically impossible to demonstrate any advantage from the examinations (at [232], [257], [258]), rather the absence of evidence was as a result of a choice made by the appellants as to the conduct of the proceedings (at [258]);

(2) found that the appellants conceded that the absence of any real pursuit of the issue of the use of the material with the witnesses made it difficult to support the trial judge's findings about practical impossibility (at [264]);

(3) found there was no evidential basis to support the inference drawn by the trial judge (based on that approach) that an unfair advantage had been obtained (at [254] – [258]);

(4) concluded there was no basis to disbelieve the evidence of the one witness cross-examined on the topic, Mr Schwartz, about the limited subsequent use of the examination material (at [255], [256]).

13. The prosecution case is documentary. The appellants, at the committal proceedings, challenged the prosecution case by lengthy cross-examination of witnesses and arguing that inferences sought to be drawn from documents were not open and that contrary inferences ought to be drawn. The appellants actively contested the committal arguing they had no case to answer.[6]

Matters referred to by the Appellant

14. The request for interviews and the conduct of the examinations (AS [11] – [21]) occurred in the following context.

15. The ACIC began investigating allegations of [redacted] against XYZ Limited ("XYZ") after receiving information from a human source in December 2008.[7] This included verifying the information provided by the human source by conducting a detailed financial analysis of [redacted] money transfers.[8] In April 2009, the ACIC referred the allegations to the AFP and said that it would be able "*to provide further support, principally through use of its coercive powers*".[9] In May 2009, the AFP

[6] Prosecution Outline of Evidence ("POE") at [707] – [714].
[7] Trial judge at [356] – [359]; POE at [48] – [56].
[8] See, eg, ECB.354, Exhibit 28 at pp 3 – 7, POE at [58].
[9] Trial judge at [361]; Exhibit 28 at p 1; POE at [57]. See also Webb at T1579.

commenced its own investigation into the allegations against XYZ Ltd, named Operation Thuja.[10] In June 2009, the ACIC advised the AFP that it had a number of sources who could provide the AFP with further information regarding the allegations against XYZ, and reiterated its offer to make its coercive powers available to the AFP to pursue "*agreed lines of enquiry*".[11] By late July 2009 the AFP had approached the ACIC, who had indicated that they would be prepared to assist the AFP in their investigation through the financial crimes determination.[12]

16. Before any summonses were issued by Sage, the AFP sought advice from the ACIC and Sage about whether suspects could be examined. On 1 April 2010, the ACIC advised that suspects could be examined, so long as no decision to charge had been made. Despite that advice the AFP did not refer its two primary suspects ([redacted] and [redacted]) to the ACIC for examination.[13] The ACIC examined 11 other employees or officers of XYZ and QRS Limited ("QRS") who were not charged with any offences in connection with Operation Thuja.[14]

17. Following recommendations by the ACIC Legal Counsel, and the Head of the relevant Determination,[15] Sage issued summonses in respect of the appellants and conducted their examinations on the following dates: Galloway on 12 April 2010; Hodges on 13 April 2010; Strickland on 24 and 29 November 2010; and Tucker on 30 November 2010.

18. The ACIC advised the AFP to approach people to see if they would give a voluntary account before they were issued with a summons to the ACIC.[16] This offer was to provide an opportunity for each person to avoid the ACIC process. Accordingly, a decision already having been made to refer the person to the ACIC, if the person wanted to voluntarily attend the AFP then the planned examination would not occur.[17]

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[10] Trial judge at [362] – [363]; CA at [154] fn 152.
[11] Trial judge at [364], CA at [154], fn 152; [156] fn 155; POE at [68] – [69].
[12] Trial judge at [366], CA at [154], fn 152.
[13] Schwartz statement at [89] (ECB.1; Exhibit 1); Schwartz at T3435, POE at [219] – [220].
[14] See, eg, Exhibit 155.
[15] Hodges see POE at [246] – [251]; Galloway at [253] – [258]; Tucker at [514] – [516], [529] – [532]; Strickland at [521] – [524], [533] – [536].
[16] Schwartz Statement at Exhibit 1, ECB.1 at [90], Schwartz at T84 and T153; Webb at T1592.
[17] [redacted] at T210.

19. During the examination the Appellant was only shown two documents both of which related to [redacted] (cf: AS [92(f)]).[18] Further, [redacted] the examination was adjourned.[19] When the AFP received further evidence (unconnected with the examination) which led them to believe it was likely that the Appellant would be charged, they advised the ACIC and the examination was terminated.[20]

20. [redacted][21]

21. Records of the appellants' examinations were only provided to CDPP counsel for the purposes of the voir dire and after it had been determined that they would not be briefed to conduct the trial (cf: AS [30]). During the committal, counsel had access to the examinations of prosecution witnesses only.

22. The Respondent takes issue with the Appellants' Chronology in that it is not an objective list of principal events leading to the litigation, rather it is selective and argumentative. The Respondent refers to the summary of procedural history in the Court below (at [6] – [15], [232] – [247]) and to the Prosecution Outline of Evidence ("POE") tendered before the trial judge and therefore before the Court of Appeal.

Matters not in evidence before the trial judge or the Court below

23. The Appellant refers to material which was not tendered before the trial judge or the Court of Appeal. This Court has no power to receive evidence which was not before the Court below.[22] In particular, the Appellant (AS [81]) refers to a spreadsheet of search terms;[23] and to an email (AS [83]) dated 14 July 2017 as to persons who had the technological ability to access the material (irrespective of whether they did, or their

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[18] [redacted]

[19] Trial judge at [653], Exhibit 3 at pp 68–69; POE at [290] – [302].

[20] POE at [338] – [343].

[21] This included a basis for rolled up charges: see e.g. ECB.294. The Appellant did not challenge the contents of the CDPP file note in relation to this.

[22] *Eastman v The Queen* (2000) 203 CLR 1 at [9], [18], [69], [111], [184], [290]; *Mickelberg v The Queen* (1989) 167 CLR 259.

[23] Trial judge at [1191]. The document is referred to by her Honour but was never tendered.

role in the proceeding; for example, it includes staff and agents who would not be involved in the trial or provide evidence).

Part V – APPLICABLE STATUTORY PROVISIONS

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

Part VI – SUMMARY OF ARGUMENT

25. The Appellant's submission, in effect, asserts that regardless of whether there is any actual prejudice established, the fact of an unlawful examination and dissemination of the transcript is sufficient, without more, to warrant a stay either on the basis that it is necessary to protect confidence in the administration of justice or because he has
10 suffered a forensic disadvantage. The forensic disadvantage relied upon is based on the statements of Hayne and Bell JJ in *X7 v The Queen (X7 (No 1))*,[24] and this Court's decision in *Lee* v *The Queen (Lee (No 2))*[25], neither of which related to an application for a stay.

26. The submission is inconsistent with well-established principles in respect to the granting of a permanent stay of proceedings and the evidence in this case. The Court of Appeal correctly applied those principles (at [215], [251] – [252]),[26] to the facts of this case. The Court correctly concluded that no basis for a stay of proceedings had been established (at [276] – [277], [286] – [289], [292] – [296], [312]).

Principles in relation to a stay of proceedings

20 27. A permanent stay of a criminal trial for abuse of process is a drastic remedy, tantamount to a continuing immunity from prosecution[27] and amounting, in effect, to a refusal by the court to exercise jurisdiction.[28] The power to grant a stay must therefore be exercised in light of the principle that conferral of jurisdiction imports a *prima facie* right in the person invoking that jurisdiction to have it exercised.[29] Such an order will only be made in extreme or exceptional circumstances[30] and the onus, which is a heavy one,[31] is on

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[24] (2013) 248 CLR 92 at [101].
[25] (2014) 253 CLR 455 at [46].
[26] And see the trial judge at [869].
[27] *R v Glennon* (1992) 173 CLR 592 at 599; *Dupas v The Queen* (2010) 241 CLR 237 at [37].
[28] *Jago v The District Court of NSW* (1989) 168 CLR 23 at 76.
[29] *Jago v The District Court of NSW* (supra) at 76.
[30] *Walton v Gardiner* (1993) 177 CLR 378 at 392; *Jago v The District Court of NSW* (supra) at 34, 60 – 61; *Dupas v The Queen* (supra) at [18], [35]; *The Queen v Edwards* (2009) 83 ALJR 717 at [23]; *Moti v The Queen* (2011) 245 CLR 456 at [15].
[31] *Williams v Spautz* (1992) 174 CLR 509 at 529; *Calleija v Regina* (2012) 233 A Crim R 391 at [44] – [49].

the applicant to establish the factual circumstances which ground the application[32] and that a stay should be granted.[33]

28. A grant of a permanent stay is not about punishment;[34] the justification for a stay is to prevent the court's processes being employed in a manner inconsistent with the recognised purpose of the administration of justice and therefore constituting an abuse of process.[35]

29. In *Dupas v The Queen*, this Court emphasised that, in considering whether to grant a stay, there is a *"need to take into account the substantial public interest of the community in having those who are charged with criminal offences brought to trial"*.[36] Fairness to an accused is not the only consideration bearing on whether a trial should proceed.[37] Therefore, regardless of the basis on which a stay is sought, before a stay will be granted the Court is required to undertake a balancing process of competing interests. The weighing process involves a variety of factors including the requirements of fairness to the accused; the substantial public interest in having those charged with criminal offences brought to trial[38] and in the conviction of those guilty of crime; as well as the need to maintain public confidence in the administration of justice.[39]

30. While it is accepted that it is not possible to describe exhaustively what will constitute an abuse of process, this Court has repeatedly recognised that many cases will exhibit at least one of three characteristics:[40] (a) the invoking of a court's processes for an illegitimate or collateral purpose; (b) the use of the court's procedures would be

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[32] *Boulos v R* [2008] NSWCCA 119 at [46]; *R v Stringer* (2000) 116 A Crim R 198 at [129] and see: *Truong v The Queen* (2004) 223 CLR 122 at [96].

[33] *Boulos v R* (supra) at [46]; *R v Stringer* (supra) at [129] where Smart J observed: "*The absence of such evidence does tend to weaken the accused's case for a permanent stay. If an accused wants the benefit of a permanent stay there is nothing unfair as a general principle, requiring him to verify his position*". See also *TS v R* [2014] NSWCCA 174 at [64]; *Holloway v R* [2015] NSWCCA 207 at [33], [34].

[34] *Rona v District Court of South Australia* (1995) 63 SASR 223 at 229; *Director of Public Prosecutions (NSW) v Rugari* [2016] NSWSC 630 at [52], [56]; *Jago v District Court of NSW* (supra) at 72 and see: *R v Ulman-Naruniec* (2003) 143 A Crim R 531 at [30], [209].

[35] *Jago v District Court of NSW* (supra) at 30 (indicating agreement with Richardson J in *Moevao v Department of Labour* [1980] 1 NZLR 464 at 482); and see *Dupas v The Queen* (supra) at [12] – [24]; *Batistatos v Roads and Traffic Authority of NSW* (2006) 266 CLR 256 at [9] – [16].

[36] *Dupas v The Queen* (supra) at [37].

[37] *Dupas v The Queen* (supra) at [37]; *Jago v The District Court of NSW* (supra) at 33.

[38] *Jago v The District Court of NSW* (supra) at 33; *R v Glennon* (supra) at 598; *Dupas v The Queen* (supra) at [37].

[39] *Walton v Gardiner* (supra) at 396; *Jago v District Court of NSW* (supra) at 33 – 34; *Batistatos v RTA* supra) at [8]; *Dupas v The Queen* (supra) at [16].

[40] *Batistatos v RTA* (supra) at [15]; *Rogers v The Queen* (1994) 181 CLR 251 at 286; *PNJ v The Queen* (2009) 83 ALJR 384 at [3].

unjustifiably oppressive to a party; or (c) the use of the court's procedures would bring the administration of justice into disrepute.

31. Where the basis for a stay application is an alleged fundamental defect in a trial, a court must be satisfied that the continuation of proceedings would involve unacceptable injustice or unfairness, or would be so unfairly and unjustifiably oppressive, as to constitute an abuse of process.[41] A court also must be satisfied that there are no other available means of bringing about a fair trial.[42] This requires consideration of steps that could be taken to relieve against unfair consequences of the apprehended defect. It has been recognised that it is a rare case in which unfair consequences cannot be relieved by taking such steps in the course of the trial.[43] Relevantly such steps may include the exclusion of particular evidence;[44] the exclusion of a specified prosecutor from a trial;[45] and the provision of undertakings by the Crown that the trial prosecutor and instructing solicitors will have no knowledge of particular material.[46]

32. Where the application for a stay is on the basis that the use of the court's procedures would bring the administration of justice into disrepute, this necessarily involves the identification of action demonstrably connected to the invocation of, or use of, the court's procedures.[47] This is because the inherent power to stay proceedings stems from the court protecting its own processes from being abused. It is about the court protecting its ability to function as a court of law.[48] The focus is on the misuse of the court's process.[49]

33. Regardless of the basis on which a stay of proceedings is sought, the Court has always considered the facts (including the consequences thereof) to determine whether the conduct amounts to an abuse of process such as to justify a permanent stay.[50]

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[41] *The Queen v Edwards* (supra) at [23].
[42] *Williams v Spautz* (supra) at 518 – 519.
[43] *Dupas v The Queen* (supra) at [35]. *Moti v The Queen* (supra) provides an example of such a case.
[44] *Jago v The District Court of NSW* (supra) at 47; *R v Seller* (2013) 273 FLR 155 at [115], [126]; *Bartlett v The Queen (No 6)* (2013) 237 A Crim R 452 at [41].
[45] *R v MG* (2007) 69 NSWLR 20 at 41 – 48.
[46] *JSM v R* [2010] NSWCCA 255 at [54].
[47] See for example: *Ridgeway v The Queen* (1995) 184 CLR 19 at 40, 62, 63; *Moti v The Queen* (supra).
[48] *Moti v The Queen* (supra) at [57].
[49] *Jago* (supra) at 30, citing *Moevao v Department of Labour* (supra).
[50] See for example: *R v Glennon* (supra) at 605 – 606; *Dupas v The Queen* (supra) at [18] see also: *Island Maritime v Filipowski* (2006) 226 CLR 328, in which the Applicant sought a stay on the basis of oppression in circumstances where at the end of the prosecution case the accused had submitted there was no case to answer. The court upheld that submission; the offence had been charged under the incorrect provision. The prosecution filed a new summons alleging the correct offence. The High Court rejected an argument that was oppressive. Relevantly the Applicant

34. The principles referred to above are the basis on which the Appellant's argument is to be considered. As noted above, the Appellant puts the argument on two bases, that there has been a forensic disadvantage, or that a stay is necessary for the protection of the administration of justice. It was common ground before the Court below and at first instance that unlawfulness alone could not justify a stay (at [14]). Each basis is considered separately below.

First basis relied on by the Appellant – forensic disadvantage

35. The Appellant's primary argument is that the fact of being compulsorily examined about conduct with which he was later charged has fundamentally altered the trial process and therefore it has given rise to forensic disadvantage such that the trial ought to be stayed (AS [60], [66], [74]). The argument is based on statements made in *Hammond*, *X7 (No 1)* and *Lee (No 2)*[51] without regard to the contents of this examination. The submission that those statements, without more, compel the conclusion that a stay is necessary, is incorrect (AS [60], [66], [67]).

36. First, this appeal falls to be determined by the application of the principles relevant to a stay of proceedings based on an abuse of the Court's process (summarised above) which are well-established. The Appellant's submission does not address, or apply these principles. Rather, the submission is inconsistent with the proper application of them.

37. Second, *Hammond*, *X7 (No 1)* and *Lee (No 2)* did not concern an application for a stay of proceeding. Nothing in those judgments addressed, or altered, the principles in relation to what must be established to warrant a stay of proceedings. As was made plain in *X7 v The Queen (X7 (No 2)*[52] and later authority, those principles have not changed as a result of *X7 (No 1)* or *Lee (No 2)*. The Appellant does not address this issue.

38. *X7 (No 1)* ultimately concerned questions of the statutory construction of the *ACC Act*.[53] The decision involved whether the legislation permitted a person being compulsorily

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had been unable to point to actual prejudice: at [31]. In those circumstances while the history of the matter was considered regrettable, it was not an abuse of the Court's process.

[51] (2014) 253 CLR 455.

[52] *X7 v The Queen* (2014) 292 FLR 57 (*X7 (No 2)*) (supra) at [83] – [110].

[53] *Lee (No 2)* (supra) at [46].

examined who had been charged with an offence, and was therefore already subject to the accusatorial process.[54]

39. *Lee (No 2)* was an appeal against conviction in which the issue was whether a miscarriage of justice had occurred as a result of the prosecution being in possession of the transcripts of compulsory examinations. The Court's conclusion was based on the fact that the prosecution counsel was armed with the evidence of an accused person obtained under compulsion concerning matters the subject of the charges. *Lee (No 2)* does not stand for the proposition that a compulsory examination is a fundamental departure from the accusatorial system such as to necessarily warrant a stay of any future criminal proceedings (cf: AS [46], [47]). Nor does it stand for the proposition that, for the purposes of an application to stay proceedings, it is unnecessary in those circumstances to establish actual unfairness. The conclusion of the Court (at [305]) that this case is of a different character than *Lee (No 2)*, is clearly correct (cf: AS [68]).

40. Moreover, the Appellant's submission fails to recognise that in *Lee (No 2)* this Court said that the appropriate course to be followed when the prosecutor became aware that he had possession of the examination transcripts was that the trial should have been stayed while another prosecutor (not privy to the examination material) was briefed.[55] In similar circumstances, the engagement of 'untainted' prosecutors was sufficient to enable the prosecution to proceed in *Seller (No 3)*.[56] Consistent with that, in this case, an undertaking was given that a new team of prosecutors, who are not privy to the evidence, will have conduct of the trial.

41. Third, the Appellant's submission (AS [67]) that this decision of the Court of Appeal and those by the NSWCCA in *X7 (No 2)* and *Seller (No 3)* are inconsistent with *X7 (No 1)* and *Lee (No 2)* is incorrect. The argument is not supported by a proper consideration of the relevant authorities and has been repeatedly rejected.[57]

42. The submission is also inconsistent with his conduct of the matter below where there was no challenge to the correctness of *X7 (No 2)* or *Seller (No 3)*. Rather, the Appellant

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[54] *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459 at [41].
[55] *Lee (No 2)* at [44].
[56] *R v Seller (No 3); R v McCarthy (No 3)* (2015) 89 NSWLR 155 at [149] – [151], [202] and [208].
[57] *X7 (No 2)* (special leave refused: [2015] HCA Trans 109); *Seller (No 3)* (special leave refused: [2015] HCA Trans 175); redacted judgment [2015] NSWCCA 281; *Maitland and McDonald* (2016) 93 NSWLR 736; *R v X* [2014] NSWCCA 168 and see: *R v Seller and McCarthy* (2013) 232 A Crim R 249 (special leave refused: [2013] HCA Trans 204) ("*Seller (No 2)*"); *CB v R* (2011) 291 FLR 113 (special leave filed after *X7 (No 1)* refused: [2013] HCA Trans 277); *R v Elfar, Golding and Sander* (2017) 322 FLR 113 (Sander is currently the subject of an application for special leave).

accepted that *X7 (No 2)* set out the correct principles to be applied but submitted that this case was factually distinguishable.[58] He argued that the trial judge correctly applied the principles in *X7 (No 2)*.[59]

43. As the Court concluded in *X7 (No 2)*,[60] neither *X7 (No 1)* nor *Lee (No 2)* compels the conclusion that the fact of an unauthorised examination (or its dissemination), on its own, requires an order that there be a permanent stay of the related criminal proceedings. To grant a stay in such a case would be to grant one without regard to the nature and extent of the unfairness which results. To do so would fail to take into account the interests of the community in the prosecution of serious criminal offences. As the Court observed, if in fact the examination was productive of actual unfairness the person affected would be able to establish that fact without suffering further unfairness or injustice.

44. Apart from asserting that *X7 (No 1)* and *Lee (No 2)* are determinative of their stay application, the Appellant does not identify any errors in the reasoning in *X7 (No 2)* or *Seller (No 3)*. Given that this basis of the Appellant's argument does not rely on the content of the examination, just the fact of being asked questions about conduct which was the subject of a later charge, those cases are not relevantly distinguishable.

45. Fourth, the Appellant's contention (AS [71]) that the onus should be on the prosecution to prove that there is no unfair forensic disadvantage was not raised below. It is plainly incorrect. As noted above, it is well-established that the onus is on the applicant to establish the factual foundation, and that on those facts a stay should be granted. That was accepted by the Appellant below.[61] This submission appears to be based on the proposition (AS [70]) that it was impossible for him to undertake the task of identifying documents or evidence obtained, which was correctly rejected by the Court below (at [272] – [274]). Indeed, the Appellant conceded in the Court below, the absence of any real pursuit with the witnesses of the use of the examination material made it difficult to support the trial judge's finding of practical impossibility (at [264]).[62]

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[58] 'Respondents' joint submissions in relation to grounds 3, 4, 5, 6, 7 & 8' (written submissions) dated 14 November 2016 at [10] – [17]; oral argument at Court of Appeal T168 – T169 (21 February 2017).
[59] 'Respondents' joint submissions in relation to grounds 3, 4, 5, 6, 7 & 8' (written submissions) dated 14 November 2016 at [17].
[60] *X7 (No 2)* (supra) at [109], [110]; and see Redacted judgment [2015] NSWCCA 281 at [108].
[61] 'Respondents' joint submissions in relation to grounds 3, 4, 5, 6, 7 & 8' (written submissions) dated 14 November 2016 at [10].
[62] Court of Appeal T137 – T138 (21 February 2017). The Appellant "sidelined" what he referred to as the trial judge's awkward remarks (i.e. "*practical impossibility*" "*very difficult*") for the purposes of his argument.

46. Fifth, the Appellant's argument (AS [60] – [65]) is akin to that of presumptive prejudice. *X7 (No 2)*, consistent with previous authorities concerning stay applications, makes clear that without irremediably prejudicial consequences in the subsequent criminal trial an unlawful examination or dissemination alone will not justify a stay.[63] Presumptive prejudice is insufficient to justify the grant of a stay.[64]

47. As noted above (at [311]) where, as here, the basis for a stay application is an alleged fundamental defect in a trial, the court must be satisfied that the continuation of the proceedings *would*, not *could*, involve unacceptable injustice or unfairness. As noted above (at [43]), the Court in *X7 (No 2)* correctly stated, that to grant a stay based on the fact of an examination would be to grant one without regard to the nature and extent of the unfairness which results. This approach would fail to take into account the interests of the community in the prosecution of serious criminal offences.

48. The Appellant conceded [redacted] the Court must proceed on the assumption that an examinee would give truthful instructions to his counsel, who would be obliged to conduct the trial accordingly (at [297], [298]). Not surprisingly the Court concluded that this concession was properly made.

49. Contrary to the Appellant's contention (AS [61]), the Court below did not rely on the observations of Gageler and Keane JJ in *Lee (No 1)* to support this finding. Rather, the Court expressly stated that it did not rely on those comments and consequently it was unnecessary to address the debate as to their status (at [299]). The Court correctly recorded the concession. The Court does not suggest that the concession was as to the correctness of the observations of Gageler and Keane JJ in *Lee (No 1)*, rather, the concession as to instructions accords with the notions referred to in the debated passage (cf: AS [62]).

50. Irrespective of any issue about the making of a concession, a court is entitled to act on the assumption that an accused gives truthful instructions to his lawyer (at [297]). [redacted] If it is to be assumed that the instructions he has provided are truthful, it is that which prevents a different

[63] *X7 (No 2)* (supra) at [108] – [111], [115].
[64] *Jago v District Court of NSW* (supra) at 33 per Mason CJ, at 72 per Toohey J, at 78 per Gaudron J; and see *The Queen v Edwards* (supra) at [22] – [24].

approach being adopted. There was no evidence before the Court that, in light of any instructions he has provided, the Appellant is actually inhibited in his forensic choices [redacted]. As counsel accepted below, their argument was not based on the notion that people should be allowed to cheat by lying to their counsel (at [298]).[65]

51. That the Appellant *might* be prevented from adopting a contrary position at trial in these circumstances is not a deprivation of a legitimate forensic choice such as to warrant a stay of proceedings (cf: AS [65]).

52. In any event, the Court found if, contrary to their view, there were some particular lines of questioning that may be inhibited, the trial judge, properly informed, has ample powers to deal with it (at [301]).[66]

53. The Appellant's alternative argument, that if actual prejudice is required it has been established, is also incorrect (AS [72] – [83]). This argument simply equates presumed prejudice to actual prejudice. As noted above, there was no evidence before the Court that his forensic choices have actually been inhibited. [redacted]

54. Contrary to the Appellant's contention (AS [75] – [83]), the Court below did not err in concluding that there was no sufficient forensic disadvantage established such as to require a stay of proceedings. The factual findings underpinning that conclusion were clearly open. There was no misunderstanding of the evidence or incorrect legal approach applied by the Court below (cf: AS [76]).

55. This aspect of the Appellant's submission must be considered in the context that in the Court of Appeal the appellants 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

[65] Court of Appeal T160 (21 February 2017).
[66] See: *Seller (No 3)* (supra) at [80], [115], [123].

steps (at [264]). The suggestion otherwise which is now made (AS [81]) is without foundation.

56. Similarly, the Appellant's submission (AS [81]) as to a possible reason why he did not explore establishing actual prejudice is pure speculation and should be ignored. Moreover, the submission referred to related to a suggestion by the prosecution, prior to the voir dire commencing, of a way the hearing might be able to be conducted without the prosecutors needing to know the contents of the examinations. The suggestion was rejected. While the appellants raised the submission in the Court below, they disavowed the suggestion it was the reason they did not seek to establish derivative use of the examinations.[67] There was no relevant concession. The Respondent always maintained that the appellants had failed to establish any fundamental defect and unfair consequences which they said arose from the examinations.

57. Put simply, as the Court correctly observed, at no stage did the Appellant seek to identify any practical forensic advantage obtained as a result of the examinations. The Appellant had made a considered forensic choice not to lead evidence where the onus was on him to establish the factual foundation for the stay. The Appellant concedes that he made no such attempt (AS [81]).

58. The Appellant's submission (AS [81]) that the Court misunderstood the state of the evidence is incorrect. For example, in relation to the spreadsheet, while the appellants had the spreadsheet (and the fact of it was before the Court) the spreadsheet itself was not before the trial judge as they chose not to use it on the application (see [23] above).[68] Moreover, the Appellant's reference to the Court's suggestions of the steps that could have been taken, omits that they could have cross-examined the 12 AFP witnesses, at length if necessary, to explore what, if any, documents or other evidence had been located as a result of the examinations (at [260]).

59. The Appellant's criticism of the Court's findings (AS [77] – [80]) are also incorrect.

60. The Court of Appeal comprehensively reviewed the evidence (e.g. [232] – [275]). This includes the evidence of Mr Schwartz relied on by the Appellant (AS [79] and see [241] – [246]). Indeed, the passages of his evidence from the judgment at first instance which are relied on by the Appellant are recited by the Court of Appeal (at [228]). This extract

[67] Court of Appeal T131 (21 February 2017).
[68] And see the trial judge at [1191].

highlights the very limited nature of his evidence. 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 evidence to charge the appellants with the topic of the use of the material "*barely 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]). It was never suggested to Schwartz or any other AFP investigator that they had used the material more than they had admitted (at [255]). The Appellant does not challenge the accuracy of this description.

10 61. No evidence was adduced by the Appellant of any documentary or other evidence that was located by reason of the AFP's access to the examinations. The evidence of the investigating police as to the lack of use of any ACIC examination material was not challenged (at [241] – [247], [253] – [275]).

62. Contrary to the Appellant's contention (AS [79], [80]) a *Browne v Dunn* issue did arise. This was not used to support the prosecution argument, rather the Court found that as the Appellant had not challenged the evidence as to the use of the examination (including that of Schwartz) there was no foundation for the trial judge to reject the evidence and infer greater use than that admitted (at [269] – [271]). The Court was correct in that approach.

20 63. Given the findings of the Court below, the Appellant's submission (AS [83]) that replacing the prosecution team is insufficient to overcome any unfairness because "*information obtained from the examinations had been used to compile the prosecution brief and obtain evidence against the appellants*" has no factual foundation.

64. Moreover, the submission that there is inevitable unfairness because of the ongoing involvement of AFP witnesses with knowledge of the examinations is to be considered in the context where the prosecution case is based essentially on documents where it was not disputed that none of the documents in the brief depended, for its probative effect, on the examinations (at [274] – [275]). In light of the findings as to the lack of the actual use of the examination, the reference to the number of agents who potentially
30 had access to the examination is of little assistance. Such a general submission also ignores the undertakings given and the orders in place to prevent dissemination of any information. As noted above (at [233]), the email relied upon was not in evidence before the trial judge or the Court of Appeal.

Second basis relied on by the Appellant – bringing the administration of justice into disrepute

65. The finding of recklessness underpinned the trial judge's conclusion that a stay was to be granted on the basis that the trial would bring the administration of justice into disrepute.

66. While the significance of this recklessness finding by the trial judge is now being downplayed (e.g. AS [92], [98]), the finding is relevant because it underpinned her Honour's finding that a stay be granted. Moreover, the Appellant conceded at first instance that there would need to be a finding of intention or recklessness to succeed for a stay to be granted on this basis.[69] Moreover, the bona fides of the persons involved in the unlawful conduct is clearly a relevant factor in granting a stay.[70]

67. The Court below correctly concluded that the finding of recklessness was not open on the evidence (at [108], [109]). The Court applied the test in *DPP v Marijancevic*[71] to the issue of whether the finding of recklessness, made by the trial judge in respect to Sage, was open (at [109]). It necessarily followed that, as her Honour's factual finding was erroneous, the stay order on which it was based fell away. The Court correctly concluded that there was no basis sufficient to bring this case into the exceptional category where a stay is necessary, absent any unfairness, in order to protect the administration of justice (at [312]). The Appellant's submission to the contrary (AS [98]) is without foundation.

68. First, the Appellant accepted in the Court below (both in written submissions[72] and orally)[73] that *Marijancevic*[74] represented the correct legal test for recklessness and

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[69] "*...I think we would probably have to concede, Your Honour, that it would require – for the extreme measure of granting a stay, albeit in combination with the other factors which we say demand a stay, we would submit that a finding of reckless or intentional illegality would be the requirement, rather than negligence*": T3944. Cf: AS [87] in relation to the reliance on a statement of Kirby J in *Truong v The Queen* (supra). The passage cited by the Appellant is not adopted by other members of the Court. *Truong* is cited in *Moti* (supra) at [59], but no reference is made to this passage. Rather, the majority quoted from Gummow and Callinan JJ who spoke of the test in relation to a stay in the circumstances as requiring proof of "*a deliberate disregard*" by the authorities.

[70] See, for example, *X7 (No 2)* (supra) at [111]; *Moti v The Queen* (supra) at [53].

[71] (2011) 33 VR 440.

[72] 'Respondents' joint submissions in reply to ACIC (intervening)' dated 14 November 2016 at [7] and [15].

[73] Before the Court of Appeal counsel for both the ACIC and Hodges referred to the *Marijancevic* test – viz. on 29 November 2016 counsel for the ACIC T258, and counsel for Hodges at T237 – T238. Consistent with the joint position advanced in writing, none of the counsel for the other appellants demurred – adopting the submission by Hodges: Strickland at T188 (21 February 2017); Tucker at T188 (21 February 2017). Galloway did not make oral submissions as to recklessness.

[74] *Marijancevic* (supra).

argued that the trial judge applied that test in making the finding she did.[75] That it was the appropriate test was not the subject of any dispute on appeal. The Appellant's reference to *Aubrey*[76] (AS [90]) does not assist him.

69. Second, the Court correctly recognised, as the authorities make clear, that a finding of reckless disregard of the law could only be made if it has been established that the person was aware at least of the possibility that there was some illegality or impropriety. There was no such evidence in this case.

70. In *Marijancevic* the Victorian Court of Appeal stated:

> *"[Recklessness] must involve as a minimum some advertence to the possibility of, or breach of, some obligation, duty or standard of proprietary, or of some relevant Australian law or obligation and a conscious decision to proceed regardless or alternatively, a 'don't care' attitude, generally."* [77]

71. The "*don't care attitude*" in the passage cited means "*that the person in question recognised that the conduct might be improper but determined to engage in it not caring whether it was or was not.*"[78] The Appellant's contention otherwise (AS [97(e)]), that is, that a "*don't care*" attitude is by itself sufficient, is incorrect. The submission is directly inconsistent with *Marijancevic*[79] and later authority.[80] The quotation (AS [91]) from *Marijancevic* omits reference to that aspect of the judgment.[81] It is also contrary to the Appellant's submission below.[82] Consequently, the Appellant's argument which purports to identify errors in the Court's conclusion (AS [97]) is based on a legal position which is not borne out by authority and was not advocated for below.

72. Third, the Court correctly applied the relevant legal principles to the evidence (at [108], [109]). As the Court stated, the issue of recklessness turned on Sage's state of mind (at [108]). There was no evidence suggesting awareness of the possibility of the unlawfulness of the conduct. Both the trial judge and the Court of Appeal found that to be so.[83] Sage gave evidence that he believed that his acts were lawful (at [13]). The

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[75] 'Respondents' joint submissions in reply to ACIC (intervening)' (written submissions) dated 14 November 2016 at [15].
[76] *Aubrey v The Queen* (2017) HCA 18. AS [90] refers to [43] of the judgment.
[77] *Marijancevic* (supra) at [84].
[78] *Gedeon v R* (2013) 237 A Crim R 326 at [210], citing *Marijancevic* (supra) at [85].
[79] *Marijancevic* (supra) at [85].
[80] For example, *Gedeon v R* (supra) at [210].
[81] *Marijancevic* (supra) at [85].
[82] In his written submission, the Appellant argued that the trial judge applied *Marijancevic* and that her Honour found that Sage was aware or had foresight of the requirement for a direction: 'Respondents' joint submissions in reply to ACIC (intervening)' (written submissions) dated 14 November 2016 at [16], [23].
[83] Trial judge e.g. at [868], [694]; Court of Appeal at [73], [74], [79], [105] and [116].

Appellant did not suggest at first instance that Sage was a dishonest witness. The trial judge found him to be an honest witness.[84] That finding was not challenged on appeal. There was no finding of *mala fides*. That a Court concludes that Sage's conduct was unlawful or improper does not render his actions reckless. It says nothing about his state of mind.

73. The Appellant's submission that the Court ignored the objective capacity of the evidence to found an inference of recklessness (AS [97(c)]) fails to recognise that a finding of recklessness would necessarily involve a finding that Sage was dishonest, a proposition not advanced below.

10 74. Fourth, as the Court observed, the Appellant's argument that a stay was necessary in order to protect confidence in the administration of justice was founded on the assertion that the conduct was reckless (at [310]). That was the basis of the trial judge's finding. Contrary to the Appellant's contention (AS [98]) that the recklessness finding was not necessary, this basis for the stay fell way when the Court concluded that the finding was not open (at [314]). The Court exercising its discretion concluded that the findings of unlawfulness did not warrant a stay (at [312], [314]).

75. Fifth, in any event, there is no basis for a stay. The Appellant's reliance on *Moti v The Queen* below is misplaced. *Moti* does not alleviate the need to consider the facts and consequences in the given case. Regardless of the basis on which the stay of
20 proceedings is argued, the Court has always looked to the facts and circumstances (including the consequences thereof) as to whether the conduct amounts to an abuse of process such as to justify a permanent stay.[85] A grant of a permanent stay of criminal proceedings is not about punishment; the justification for a stay is to prevent the court's processes being employed in a manner inconsistent with the recognised purpose of the administration of justice and therefore constituting an abuse of process.[86]

76. This case is clearly distinguishable from *Moti* which involved conduct to bring Mr Moti into the jurisdiction which the Australian officials knew was unlawful, in circumstances where there were no extradition proceedings. The Appellant relies on *Moti* without a consideration of the clear factual distinctions. Mr Moti's trial was permanently stayed

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[84] Trial judge at [36].
[85] For example: *R v Glennon* (supra) at 605 – 606; *Dupas v The Queen* (supra) at [18].
[86] *Jago v District Court of NSW* (supra) at 30 (indicating agreement with Richardson J in *Moevao v Department of Labour* (supra) at 482); and see *Dupas v The Queen* (supra) at [12] – [24]; *Batistatos v RTA* (supra) at [9] – [16].

in circumstances where he was deported from the Solomon Islands without his consent where there had been no extradition proceedings and where Australian officials *knew* that the deportation was *unlawful*. The Court observed that the fact that the deportation was unlawful was a necessary but not sufficient step towards granting a stay.[87] The Court considered the circumstances in which the deportation was unlawful, which included that what was done by the Australian officials not only facilitated the appellant's deportation but was done by them at a time they believed that it was unlawful.[88] There was no practical way for a trial judge to relieve the unfair consequences of his deportation; but for the unlawful act the appellant would not be in Australia to face trial. The Court's jurisdiction would never have been invoked. This case is factually far removed from *Moti*.

77. The Court correctly rejected the trial judge's finding that this case is different from other cases of illegality or impropriety where stays have been refused (at [312], [313] cf: AS [99]).

Part VII – NOTICE OF CONTENTION OR CROSS APPEAL

78. Not relevant.

Part VIII – TIME ESTIMATE

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

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[87] *Moti v The Queen* (supra) at [53].
[88] *Moti v The Queen* (supra) at [65].