IN THE HIGH COURT OF AUSTRALIA No M168 of 2017

Between **TONY STRICKLAND (a pseudonym)**
Appellant

and

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

OUTLINE OF APPELLANT'S ORAL SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Outline of Argument

2 **Background re Strickland** There was no challenge to Her Honour's findings of fact. Prior to his examination in November of 2010 the applicant was approached by the AFP, who regarded him as a 'main suspect' (SC[480];7AB 2291) in relation to the only allegation he now faces (SC[524];7AB 2298), and offered him a sentencing discount for his co-operation with them. He made few relevant voluntary disclosures (SC[757-759];7AB 2343). The Examiner, who was aware that he had declined a formal record of interview, summonsed him to the ACC at the request of the AFP (SC[488];7AB 2293). The Examiner was aware that the AFP wanted to have the appellant locked into an account on oath for use against him in future prosecutions (SC[597];7AB 2312). The appellant was regarded by the AFP, to the knowledge of the Examiner, as a person who 'may be charged' (SC[594][644];7AB 2311, 2322). The appellant was examined over 2 days in the undisclosed presence of nine members of the AFP, representing more than half of the Operation Thuja investigative team (SC[569-570];7AB 2306-2307). He was not examined about the subject matter specified on the summons, but rather about foreign bribery.

3. In this factual matrix there was an accretion of wrongs: the examinations were not authorised by the Act; they were conducted for an improper purpose; and the dissemination of their product was unlawful (CA [12];15 AB 4823). Her Honour found that they were conducted for the very purpose of achieving forensic disadvantage to the appellants, and forensic advantage to the prosecution in foreseen future legal proceedings. (SC [880]; CA[19];15AB 4825).

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4. **'Recklessness'** The Court of Appeal accepted that the Examiner, the gatekeeper of this extraordinary power: (i) was exercising it for examinations not authorised by the Act; (ii) did not make the inquiries which the protective provisions required; (iii) did not seek to make an independent judgment about whether any of the examinees 'may be charged'; and (iv) did not take reasonable care to understand his obligations (CA [116];15AB 4865). Many of these findings resonate with those made by her Honour, whose unfavourable findings about the Examiner (whom she had observed) were more detailed, and remained undisturbed on appeal. The Court of Appeal, however, rejected the designation of this conduct as 'reckless', because that phrase imported a level of consciousness to the Examiner's conduct, which he had denied.

10 **5.** The trial Judge was entitled to order a permanent stay of the appellant's trial to protect confidence in the administration of justice. However the conduct of the AFP, the ACC, and the Examiner is described, its factual basis is not in dispute. It was described by the trial Judge and accepted and expanded by the Court of Appeal. It is an aggregation of conduct by those bodies and their agents, in pursuit of the appellants' investigation and prosecution which subverted the accusatorial process.

6. **Forensic Advantage to the Prosecution** At the time of his examination there was no investigation into the specific country and allegation the appellant now faces. There was no brief of evidence in respect of that allegation, which investigation only commenced in July of 2011, 8 months after the examination. The AFP members who secretly observed the appellants' respective
20 examinations remained part of the Operation Thuja team, which compiled the brief of evidence into that allegation. It took until 6 September 2011 for that brief of evidence to be completed (11AB 3677). It necessarily required a search by the investigators through millions of documents for relevant evidence. In the Court of Appeal the CDPP conceded a forensic advantage to the investigators (who would remain involved in any trial).

7. The Court of Appeal's determination that the 'AFP's document based case was largely complete' at the time of the examinations, was a factual error underpinning its rejection of the trial Judge's finding, and its own conclusion, that there could not be any forensic advantage for the prosecution, or disadvantage to the appellant. The Court of Appeal was correct to find that the AFP had obtained a large volume of evidence and intelligence that 'assisted them in identifying
30 further avenues of inquiry'. That material included hard-drives and data-bases containing between 40 and 80 million documents, a resource so vast its number could not be accurately estimated. The fundamental point, not appreciated by the Court of Appeal, was that those vast data-holdings were in large part unmined, and certainly not searched and analysed at the time of his examination *for evidence specific to this appellant and this allegation.*

8. Accordingly, it was an error for the Court of Appeal to find that the case against the 'respective [appellants] had not materially changed as a result of the examinations' (CA [266];15AB 4924). On the contrary, and plain to the trial Judge who was familiar with the detail of the evidence, there was as yet *no case* against the appellant in the present allegation. It was never put to Schwartz that 'the AFP already had everything it needed' (CA [244],[293];15AB 4917) at the time of the examinations in relation to this appellant and this allegation. On the contrary, and well known to the trial Judge, only one document specific to this appellant and this allegation had been identified by the AFP at that time. (It *was* put to the AFP and the ACC more than once that they had sufficient material to identify the appellants *as suspects* in foreign bribery *generally,* such that the protective provisions of the Act should be invoked.)These factual errors and their consequences for conclusions of law is demonstrative of the twin propositions - that a trial Judge is in the best position to assess the evidence and exercise a discretion, and that an appellate Court should be slow to overturn it.

9. **Unfair consequences for his trial** The appellant has been *unlawfully* compelled to answer questions on oath about the subject matter of the allegations against him, *because* he was a suspect and had refused to participate in a record of interview. The accusatorial process has been subverted, the balance has shifted, and the trial he would have had is not one according to law.

10. More specifically, his unlawfully procured account on oath was extracted over many hours, and two separate sitting days. As her Honour found (SC [734-740];7AB 2338), it involved a detailed inquiry about the hierarchy within XYZ Limited, the appellant's responsibilities and his knowledge and suspicions about foreign bribery and commission levels for agents, both generally and in relation to the allegation he now faces. He denied any criminality, but made admissions.

11. His forensic choices at any trial are necessarily constrained. Notwithstanding his denials, he was locked into a detailed account on oath, without any knowledge of the case against him. After that account was given in the undisclosed presence of his investigators (and then disseminated to them), those investigators searched for evidence from millions of documents and compiled a brief of evidence which purports to prove, in effect, that those denials were lies.

12. On the evidence before her Honour, and correctly applying the law to her findings of fact, a permanent stay of the appellant's trial was necessary and appropriate.

Colin Mandy

Counsel for Strickland Stawell Chambers 7th May 2018