IN THE HIGH COURT OF AUSTRALIA No M168 of 2017
MELBOURNE REGISTRY

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

APPELLANT'S (REDACTED) SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 Where a person, whose fair trial is required to be protected by the making of directions under s 25A(9) of the *Australian Crime Commission Act* 2002 (Cth) (**the ACC Act**), is compelled to testify about their own criminality, contrary to the requirements of the ACC Act, and that examination is:

10 (a) not conducted for the purposes of an Australian Crime Commission investigation;

(b) conducted unlawfully for the improper purpose of assisting another agency, such as the Australian Federal Police;

(c) conducted deliberately because the person had exercised their right to decline a cautioned police interview;

(d) conducted in the unlawful and undisclosed presence of numerous AFP officers involved in the investigation;

(e) recorded and transcribed, and the content of the examination is disseminated widely to AFP investigators and prosecutors with carriage of the

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person's criminal investigation and trial, in accordance with unlawful directions made by the Examiner permitting that dissemination; and

(f) conducted for the purpose of causing forensic disadvantage to the person and advantage to the prosecution in foreseen legal proceedings against the person, which purpose was achieved;

what more is necessary, if anything, to enliven and exercise the court's discretion to permanently stay the prosecution of the person to prevent the person from being tried unfairly?

3 Where a person exercising a statutory power, such as an Examiner, acts unlawfully in a number of ways, and for an improper purpose, can the person be found to have been reckless as to their obligations to an unacceptable degree without proof of conscious wrongdoing or dishonesty?

Part III: Section 78B of the *Judiciary Act 1903*

4 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Citations

5 The citation of the reasons for judgement of the Court of Appeal (Vic) is *Director of Public Prosecutions (Cth) v Donald Galloway (a pseudonym) & Ors* [2017] VSCA 120. The pseudonymised nomenclature of parties and entities used in that judgment are adopted herein.

6 The citation of the reasons for judgement of the trial judge at first instance is [redacted]

Part V: Facts

7 The appellant Tony Strickland adopts the statement of facts as adumbrated in the submissions of the appellant Edmund Hodges, in proceeding M175 of 2017, and supplements those with the following matters relevant to Tony Strickland.

8 In 2009 the Australian Federal Police commenced Operation [Thuja]. By late 2009 Senior Investigating Officer [Schwartz] was appointed to lead the investigation. It was initially an investigation into [XYZ Limited], but was later expanded to include [QRS Limited], a related company. Each company was owned, at least in part, by the Reserve Bank of Australia.

9 In February of 2010 [Schwartz] confirmed in an internal AFP minute that 'The AFP has engaged the Australian Crime Commission (ACC) in relation to Operation [Thuja] to extract information and evidence from witnesses and suspects by means of the ACC's

coercive powers to conduct examinations.'[1] Schwartz considered the ACC to be a facility used by the AFP for compulsory examinations of the AFP's suspects.[2]

10 Galloway and Hodges were summoned to the ACC in April of 2010 as part of '[redacted]' Strickland and Tucker were summoned to the ACC in November of 2010 pursuant to '[redacted]. Ernest (Tim) Sage (**Sage**) was the examiner for all of the examinations. Chris Bonnici (**Bonnici**) was counsel assisting at the time of the examinations of Strickland and Tucker in November of 2010.

11 *The appellant:* Tony Strickland was the Chief Financial Officer of QRS Limited. He worked for that company between 1998 and 2003. He is now only charged in relation to the [redacted] conspiracy, as are each of the appellants. Hodges and Galloway are also charged in relation to the [redacted] conspiracy.

12 By early August of 2010 Strickland was regarded by the AFP as a person likely to be charged[3]. On 3 September Schwartz himself travelled to Strickland's home and offered him a cautioned record of interview in relation to determining his criminal involvement in the offences. The appellant refused. The following week he was offered a sentencing discount in return for his co-operation.[4]

13 As at September of 2010, the Operation Thuja team had not commenced any investigation into the [redacted] conspiracy[5]. Very little analysis of the material available to the Operation Thuja team in relation to [redacted] had taken place prior to the examinations of Strickland and Tucker. The AFP had in their possession a 'large volume of evidence and intelligence'[6], but much of it had not been searched or analysed, and specifically not in relation to [redacted].

14 The AFP's investigation of the appellant in relation to [redacted] was nascent, apart from one document – '[redacted]. The rest of brief of evidence was largely compiled after the appellant's examination, when an investigation into events in that country finally commenced. (Schwartz was directed to commence that investigation on 27 June 2011, 8 months after the examinations.)

15 *Summons and examination of the appellant* On 16 November 2010 an ACC fact statement was signed. It noted that the appellant had declined a 'formal interview'. On 17 November the summons for the examination was issued by Sage. His reasons for issuing the

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[1] Ruling of Hollingworth J (SC) [375]
[2] SC [388]
[3] SC [480]
[4] SC [481-483]
[5] Application transcript T3626
[6] CA [274]

summons were a 'cut and paste' of the ACC fact statement[7]. It included amongst the reasons for the issue of the summons that the appellant had 'declined a formal interview.'[8] Sage accepted in evidence that this was not a proper reason to issue a summons, and should not have been included in the statement of reasons. Sage gave no evidence of having made any enquiry as to whether the AFP intended to charge the appellant.[9] He knew that the AFP wanted to have the appellants locked into an account on oath, for use against them in relation to future prosecutions.[10]

16 Strickland was examined over two days, the 24th and 29th of November 2010.[11] At the time of the appellant's examination, Sage was well aware that the AFP had done very little by way of searching or analysing their documentary holdings[12]. Nine members of the Operation Thuja team were present for his examinations. Their presence[13] was hidden and undisclosed[14] by Sage, depriving the appellant the opportunity of challenging it[15]. Allowing their presence was contrary to what any of the cases at the time would have permitted[16]. Sage permitted these AFP members to be present without turning his mind to who they were, or what role they had or might have in the investigation and prosecution of the appellant.[17] These were all members of the investigative team, some of whom played critical roles in the investigation, in the laying of charges, and in the subsequent prosecutions[18]. They were all part of the investigative team which would later search through the vast data-holdings and select material for inclusion in the brief of evidence to be compiled in relation to the [redacted] conspiracy.

17 The state of the brief in relation to [redacted] at the time of the examinations was not appreciated by the Court of Appeal. The Court of Appeal proceeded on the assumption that the 'AFP's document-based case was largely complete at that time'[19], and that the appellants' focus in the application for stay was directed to demonstrating that fact, in order to show that there were charges pending, and thus that they should not have been examined. While that argument was later abandoned, the evidence that the appellants were suspects was of course

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[7] SC [502]
[8] SC [488]
[9] SC [593]
[10] SC [597]
[11] SC [535]
[12] SC [781]
[13] SC [560]
[14] SC [609]
[15] SC [618]
[16] SC [620]
[17] SC at [595]
[18] SC [595]
[19] Court of Appeal judgment (CA) [8]

also relevant to the extent to which the examiner was required to exercise his vigilance over the s25A(9) quarantining provisions.

18 The Court of Appeal was in error in concluding that the AFP's investigation was 'well-advanced' by the time the examinations were conducted[20].

19 An undisputed fact before Hollingworth J, and not contested or raised by any party before the Court of Appeal, was that the investigation into the [redacted] allegations had not commenced at the time of the examinations. The ACC was provided with 'briefing papers' and 'briefing packages', containing, in Strickland's case at least, no more than a handful of documents, and only one relating to [redacted].

20 It was within that factual matrix that the Court of Appeal at [273] referred to (and edited) the following exchange as 'illuminating' of the inability to demonstrate forensic disadvantage, and confirmatory of the fact that the 'brief' was already prepared prior to the examinations:

> *HER HONOUR: Are there instances of any of the ACC accused saying things and identifying documents that weren't already known to the police, because my recollection was rather contrary, they had a brief fully prepared with all the documents that they wanted to ask your clients about.*
>
> *(COUNSEL: Not the brief, but a brief, yes.*
>
> *HER HONOUR: A brief, yes.)* [omitted from the CA judgment]
>
> *COUNSEL: Your Honour is right...*[21]

21 The Court of Appeal judgment did not reproduce all of this exchange, and omitted Counsel's qualification of the nature of a 'brief'. Counsel's acknowledgment that Her Honour was right was in relation to the first part of the proposition; it could not have been understood by her Honour, on the evidence before her, as a concession that there was already a brief of evidence in existence. On the evidence, by then familiar to Her Honour, there was no suggestion that any brief of evidence was prepared or underway in relation to [redacted] at the time of the examinations, and she did not make any contrary finding.

22 Strickland's examination covered a wide-range of topics, and focussed specifically on the allegations of foreign bribery[22].

23 The appellant's examination transcripts and summaries were subsequently published to the AFP and CDPP.

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[20] CA [15]
[21] Application Transcript T3994.7
[22] SC [734-739]

24 Schwartz considered the ACC to be a facility used by the AFP for compulsory examinations of the AFP's suspects.[23] He acknowledged that the AFP was assisted in the task of obtaining evidence against the appellants because their accounts on oath allowed the AFP "to push forward with [their] evidence gathering with more confidence that [they] were on the right track and with the knowledge that further examination of the electronic data could identify sufficient evidence to sustain a prosecution."[24] Schwartz agreed that the examinations of the appellant and his co-appellants were used to "refine and define" the searches of the electronic data, and to guide their selection of the documents included in the prosecution brief of evidence.[25]

10 **25** That evidence stood unqualified, uncontradicted and undisputed in the hearing before Hollingworth J.[26]

26 The appellant was charged in relation to [redacted] on the 13th of March 2013. He was discharged at committal, but was directly indicted by the CDPP. He applied for a permanent stay, which was granted on 27 July 2016.

27 The CDPP appealed the orders by way of interlocutory appeal under s 295 of the *Criminal Procedure Act* 2009 (Vic). The ACC was granted leave to intervene in the appeal, over the appellants' objection. The Court of Appeal upheld the appellants' contentions that the ACC was not conducting any investigation, but instead made its coercive powers available to the AFP for the AFP's own purposes.[27] The examination of the appellant was not
20 authorised by the *Australian Crime Commission Act* 2002 (Cth) (**the ACC Act**), and was conducted for an improper purpose.[28] Moreover, the dissemination of the appellant's examination was in breach of the constraints of the ACC Act, and was unlawful.[29] However, the Court of Appeal held that it was not open to Hollingworth J to conclude that the illegal examination and dissemination had resulted in any incurable unfairness in the appellant's trial, or gave rise to any other basis for a stay.[30]

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[23] SC [388]
[24] Schwartz' statement (Exhibit 1) at [94](d)
[25] SC at [783]
[26] Each AFP officer included a standard clause disavowing any use of the examination material in making the decision to charge the appellants, but none made any attempt to disavow what Pike said about the use of the examination material.
[27] CA at [12], [209]
[28] CA at [12], [211],
[29] CA at [12]
[30] CA at [276] – [277], [300], [313] and [314]

Part VI: Argument

28 The arguments of the appellants Edmund Hodges and Rick Tucker are adopted and relied on herein. The appellant makes the following supplementary submissions by way of emphasis.

29 The 'fundamental principle' of criminal justice does not fade by its repetition: the prosecution must discharge the onus of proof and cannot compel the accused to give evidence for it. The principle extends to the criminal trial's antecedent investigative processes, because the entire process of criminal investigation and prosecution is accusatorial[31]. The principle is the bedrock of the system of criminal justice, and while the executive may permit some lawful erosion at its edges, the fundament cannot be moved.

30 With the authorities in relation to that principle carefully considered, her Honour exercised her discretion to order a permanent stay, balancing the unfair consequences for the appellant's trial along with the interests of the administration of justice[32]. That discretion was exercised after hearing 30 days of evidence, and with the benefit of comprehensive submissions, a task of 'great difficulty'[33]. The exercise of her Honour's discretion necessarily involved weighing her findings of fact as part of a synthesis of relevant factors.

31 Hollingworth J found that the appellant could not receive a fair trial, because the appellant had suffered an incurable forensic disadvantage, and the investigators and prosecutors had obtained an incurable unfair forensic advantage; and that the AFP and ACC had deliberately procured that outcome. In those circumstances the grant of a permanent stay was open and justified.

32 The Court of Appeal went further than Hollingworth J in finding that the examinations were not authorised by the Act, were conducted for an improper purpose[34], and that the dissemination of their product was in breach of the Act[35], accruing to the unlawfulness of the conduct of agencies of the executive, and adding to the extent to which confidence in the administration of justice would be affected.

33 There is a sound basis for her Honour's findings. A fair trial is a trial according to law, one which is governed by the fundamental principles of the accusatorial system. For the appellants' trials that balance has shifted, and could not be restored.

34 The Crown conceded in the Court of Appeal that theirs was an appeal in the 'strict

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[31] *X7 v Australian Crime Commission* (2013) 248 CLR 92 (**X7**) at [101] per Hayne and Bell JJ; at [160] per Kiefel J.
[32] SC [883]
[33] CA [6]
[34] CA [12]
[35] CA [60]

sense' and that their burden was to show that 'it was not open to her Honour to have come to the evaluative conclusion that she came to, or a particular finding of fact'[36].

35 The Court of Appeal found that her Honour had erred in two respects: first, that there was no demonstrated incurable unfairness for the appellant's trial; and secondly, that a finding of recklessness as to the examiner was not open.

36 As to the first, the appellant adopts the submissions filed on behalf of Edmund Hodges at [60] to [83] and Tucker at [23] to [43]. It is noted that the CDPP conceded in the Court of Appeal that having access to the examinations of the appellants at the ACC conferred a 'substantial investigative advantage' to the Prosecution,[37] and that her Honour's finding that the forensic advantage to the prosecution in guiding the selection of documents was open. The Court of Appeal's consideration of this issue, addressed at [17] to [21] above, appears to have proceeded on a misapprehension of the evidence.

37 As to the second, the 'recklessness finding', the appellant adopts the submissions of Hodges at [84] to [100]. Her Honour's findings as to the conduct of Examiner Sage were not challenged in the Court of Appeal; the challenge in the Court of Appeal was to the word and phrase her Honour used to describe that conduct, and the effect on the administration of justice if the examiner's abject failures were conscious or unconscious. An Examiner is an independent and quasi-judicial gatekeeper of a significant power to compel testimony. An executive agency should not escape the consequences of its conduct by appointing officers who do not, or will not, turn their mind to their duties, and fail utterly in the exercise of their powers.

Conclusion

38 The appellant was unlawfully compelled to give an account in relation to the subject matter of the allegations he now faces. Whatever the answer, and regardless of whether the answer is kept secret, a compulsion to answer questions prejudices an accused person's defence of his or her criminal trial.[38]

39 As Hayne J noted[39]:

> 'The asking of questions and the compelling of answers about the pending charge inevitably interfere with the conduct of an accusatorial trial and embarrass the defence of the accused. The answers the accused has been compelled to give to the questions asked deprive the accused of forensic choices that otherwise would be legitimately

[36] CA Transcripts 27.2.17 T11.27
[37] CA Transcripts 20.2.17 T22.15
[38] *X7* per Hayne and Bell JJ at [71];
[39] *Lee v New South Wales Crime Commission (2013) 251 CLR 196*, per Hayne J at [79].

open at trial to test the case which the prosecution advances. That is, the asking of questions about the pending charge and the compelling of answers to those questions work a fundamental alteration to the accusatorial process of criminal justice.'

40 In this case that compulsion was unlawful, and for an improper purpose, which purpose was achieved. In the exceptional circumstances of this case Hollingworth J's exercise of discretion to order a permanent stay was open, and appropriate.

Part VII: Legislation

41 The applicable legislation is attached to the submissions filed on behalf of Edmund Hodges.

Part VIII: Orders sought

42 The appellant seeks orders that:

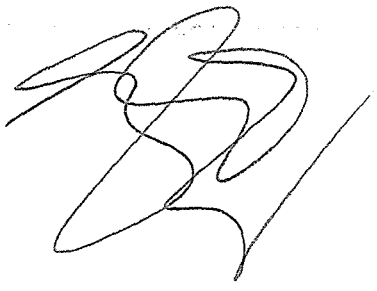
(1) The orders made by the Court of Appeal on 25 May 2017 are set aside;

(2) Order 1 of her Honour Justice Hollingworth made on 27 July 2016 be reinstated.

Part IX: Time estimate

43 The appellant would seek no more than 2 hours for the presentation of the appellant's oral argument.

22 December 2017



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