IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M168,174,175 and 176 of 2017**

BETWEEN: **TONY STRICKLAND (a pseudonym)**
Appellant
DONALD GALLOWAY (a pseudonym)
Appellant
EDMUND HODGES (a pseudonym)
Appellant
RICK TUCKER (a pseudonym)
Appellant

and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS
First Respondent
AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION
Second Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I – INTERNET PUBLICATION

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

Part II – OUTLINE OF PROPOSITIONS

2. The Court below correctly concluded that the trial judge erred in her findings and that no basis for a stay of proceedings had been established by the appellants: CA [314] AB15:4938.

3. The argument is in the following context:

   (1) The examinations took place prior to charge and prior to *X7*.

   (2) 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. Investigators are enjoined from disclosing the contents of the examinations: CA [302], [304], [315] AB15:4935, 4938. Other measures are available if necessary: CA [315] AB 15:4938-4939.

   (3) The conduct of the matter below including (1) concessions by the appellants that they did not attempt to demonstrate use of the examination material: RHS [11], [12] AB14:4721-4722 and that there was no evidence justifying the trial judge's finding of impossibility: AB 14:4714, CA [264] AB15:4923-24. The first basis of the trial judge's finding was based on a proposition not put to the witnesses, and not advanced by the appellants: CA

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[272] AB15:4926. The alternative basis of the trial judge's finding as to protection of the administration of justice, which was based on a finding of recklessness, was contrary to the unchallenged evidence: CA [108], [109] AB15:4863 (2) the voluntary conduct of the appellants: RHS [13], [20], RGS [6]-[9] AB9:2980-81ff, RTS [13]-[14], RSS [19]-[20], POE AB6:2002-2016 and (3) the reliance on general assertions.

(4) The implication underpinning the argument, that the conduct was deliberately unlawful and improper, is inconsistent with the CA (and first instance) judgment: RHS [7] (cf: HRS [13]). The repeated assertion that the conduct was unlawful and for an improper purpose is based on a finding by the CA, which says nothing about the state of mind of Sage: RHS [7]. The conduct was undertaken by the ACIC: RHS [7] and the AFP in the honest belief that it was lawful – which was unchallenged: RHS [15]-[18] (cf: HRS [2]-[3] the appellants' submission taking issue with this is inaccurate).

4. The appeal is to be determined by the principles applicable to determining whether to grant a stay of criminal proceedings as an abuse of the court's process, which are well established: RHS [27] – [34]. *X7(No 1)*, *Lee (No 2)* and *Hammond* do not change those principles: RHS [37] – [41].

5. The appellants' arguments on both bases for a stay of proceedings, are factually and legally flawed. Some are inconsistent with the conduct of the matter at first instance and in the CA. The arguments are based on general assertions.

Unfair advantage/forensic constraint

6. *X7(No 2)* correctly states the principles in relation to a stay of proceedings: *X7(No 2)* at [91]-[93], [109]-[110]. The CA correctly applied those principles: CA [251]-[252], [288] AB15:4919-4920, 4930 cf: HRS [10]. The appellants' interpretation of that decision: HRS [6]-[10], is plainly incorrect: and see: RHS [41]-[44], *X7 (No 2)* at [108]-[109]. The assertion that the case falls within *Sellers (No 2)* at [104]: HRS [8] ignores the CA finding at CA [275] AB14:4927.

7. The court must be satisfied that the continuation of the proceedings *would* (not could) involve unacceptable injustice or unfairness. There must be no other means available to relieve any unfairness: RHS [31].

8. As to the purported use of the examinations, the CA correctly concluded that the appellants failed to establish any practical unfairness as a result of the examinations: [248], [258], [266], [274], [276], [277] AB15:4918-4924, 4927.

9. The CA summary of the relevant evidence and conclusions therefrom is correct: CA [232]-[247] AB15:4914-4918, [266] AB15:4924, [272] AB15:4926, [276] AB15:4927.

10. The trial judge's conclusions as to use, which is a basis of the stay, was based on a topic of evidence (the use of the material) which was not the subject of cross-examination nor advanced by the appellants in submissions: CA [272] AB15:4926.

The appellants did not challenge the evidence of the lack of use of the examinations: CA [266], [269]-[274] AB15:4924-4927.

11. It was conceded by the appellants, amongst other things, they did not attempt to demonstrate use of the examination material, and the appellants conceded that to be so: RHS [11], [12], [57]. The appellants conceded in the CA that it was well open to them 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*": RHS [11], HS [81] CA [258] AB15:4922. The appellants conceded they had all the material necessary to do so, there were straightforward steps which could be taken and that there was no obstacle to them undertaking those types of steps: CA [259]-[264] AB 15:4922-4923.

12. The appellants conceded in the CA that there was no evidence justifying the trial judge's finding of impossibility: AB 14:4714, and conceded that absence of pursuit by them made it difficult to defend that finding: AB14:4721-4722; CA [264] AB15:4923-4924. The CA correctly concluded (as conceded by the appellants) that the trial judge's finding as to impossibility was an error: CA [232] AB15:4913-4914, [257]-[258], AB15:4921-4922. The appellants' reliance now on that finding of impossibility is inconsistent with their concession below.

13. As to the purported constraint on the appellants, no evidence was led or adduced by any appellant in support of the proposition that they actually had been constrained: RHS [50]-[54]. A concession was made by the appellants that the Court should assume that the examinee would give truthful instructions to lawyers: RHS [48]-[50]; AB14:4737-4738 & 4740-4741. Irrespective, there is no evidence that in light of their instructions the appellants are actually inhibited in their forensic choices: RHS [50]. The appellants' argument was correctly rejected by the CA: [290]- [305] AB 15:4931-4936.

14. The conduct of the proceedings to date, by each appellant, belies the submission: e.g. RHS [13]. And see CA [294]-[295] AB15:4932-4933.

15. Relevant is the conduct by the appellants including voluntary statements, very active (and extensive) participation in the committal proceedings (cross-examination and arguing no case to answer): RHS [13], [20], RGS [6]-[9] AB9:2980-81ff, RTS [13]-[14], RSS [19]-[20], POE AB6:2002-2016.

16. The appellants' argument is akin to presumptive prejudice, which has been rejected as a basis sufficient to grant a stay: RHS [46]. An examination may give rise to a forensic advantage or a constraint, whether it does will depend on the evidence in a given case. The mere fact of questioning prior to charging on matters with which a person is later charged, does not, without more, warrant a stay: *X7(No 2)* at [108]-[111], [115]. The conduct of the examination may have different consequences depending on its nature and extent in any given case: *X7 (No 2)* [108] and see *Lee v NSWCC* at [313] per Gageler and Keane JJ.

17. The repeated contention that the very purpose of the unlawful examinations was to achieve a forensic advantage to the prosecution and disadvantage to the appellants, which was achieved: e.g. HRS [13] is incorrect. It conflates a number of separate concepts. It is based on findings of the trial judge, overturned on appeal.

18. The appellants failed to establish any practical unfairness or forensic disadvantage by reason of the examination constraining their legitimate forensics choices:

Administration of justice

19. 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: RHS [65], [74]. The appellants' submission to the contrary, which attempts to downplay the significance of the finding: AHS [92], [98], HRS [14], [15], TRS [6] is incorrect. The appellants at first instance conceded that proof of recklessness or intentional illegality would be a necessary requirement for a stay to be established on this basis: AB4:1381 (cf: HRS [14]).

20. Recklessness involves advertence to the possibility of unlawfulness: *Marijancevic* at [84], RHS [70]-[71].

21. The appellants contended below that *Marijancevic* was the correct test for recklessness, and that the trial judge was satisfied of that test: RHS [68]-[71] cf: TRS [6].

22. The CA interpretation of the test is correct: RHS [69], and the appellants' submission to the contrary: AHS [97] is incorrect. It is inconsistent with the submission below: RHS [71].

23. The CA (as did the trial judge) found there was no evidence of awareness by Sage. It follows that there was no evidence to support a finding of recklessness. Sage believed that what he was doing was lawful. That was not challenged: RHS [72].

24. The appellants' reliance on *Moti* is misplaced. The submission: HRS [3] fails to refer to the fact that the conduct in *Moti* was unlawful was not sufficient to warrant a stay. The conduct was done by the authorities knowing it was unlawful: RHS [75]-[76].

25. There is no such finding in this case. The conduct, albeit unlawful, was done in the *bona fide* belief that it was lawful.

26. A stay is not about punishment of the authorities: RHS [28].

27. CA correctly concluded that neither the trial judge's findings of unlawfulness, nor the additional grounds upheld by the CA, absent any unfairness, is sufficient to warrant a stay to preserve public confidence in the administration of justice: CA [312] AB15:4938. The appellants have not established any error.

Dated: 9/5/18

Wendy Abraham QC