IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY 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

FIRST RESPONDENT'S 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. The Appellant's description is the same as that advanced by the Appellant Hodges. The Respondent relies on her submission filed in that matter (RHS [2] – [4]).

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

3. 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

4. The Appellant adopts the factual background in the submissions by the Appellant Hodges (AS [7]) and supplements that submission. Consequently, the Respondent relies on her submission in that matter (RHS [9] – [23]), and adds the following in respect to matters

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raised by this Appellant. The Respondent also relies on her submissions in relation to the Appellants Galloway and Strickland.

5. In relation to AS [16], the submission that Sage was well aware that the Australian Federal Police ("AFP") had done very little by way of searching or analysing their documentary holdings, references for its source a passage from the findings of the trial judge.[1] That reference relates to the trial judge's finding at the time of the Hodges and Galloway examinations in April 2010, not November 2010 (when the Appellant was examined).

6. However, before any of the appellants were examined at the Australia Criminal Intelligence Commission ("ACIC"), the AFP had obtained a large volume of evidence and intelligence which assisted them in identifying further avenues of inquiry (judgment below at [274]). The accuracy and significance of that evidence and intelligence, which was referred to in the written submission of the Respondent before the Court of Appeal, was not challenged by the appellants (at [274]).

7. As the Court of Appeal concluded (at [266]):

> *"In short, even if the investigators had derived some assistance from the examinations in 'guiding' and 'refining' subsequent documentary searches, the case against the respective respondents — which rests almost entirely on documents — had not materially changed as a result of the examinations. Nothing emerged during the stay application which supported a contrary conclusion or permitted the drawing of a contrary inference. As we have said, the respondents failed to identify any evidence relied on by the prosecution which would not have been obtained but for the examinations. At trial, the prosecution would always have had to prove that the documents relied on were relevant to the prosecution case and that the respondents had seen them or were aware of their contents. The need for proof of those matters was unaffected by anything said by the respondents during their examinations, about whether they could recall seeing such documents."*

8. Also in relation to AS [16], Sage did refer to a list of people who were entitled to be present at the examination, which included the relevant AFP officers.[2] No finding of unlawfulness was made about this procedure.

9. In relation to AS [17] – [18], the Court did not misapprehend the state of the brief. As the Court correctly recognised (at [235], [248]) the appellants concentrated their cross-

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[1] The passage reference is to the trial judge's judgment at [781].
[2] Trial Judge at [538]. See, POE at [553] and following for full details of Strickland's examination.

examinations of the ACIC and AFP witnesses on how far advanced the development of the case against each was at the time of the examinations. The appellants "*put to Mr Schwartz more than once that [at the time of the examinations] the AFP already had everything it needed*" (at [244] and see [293]).[3]

10. In relation to AS [19], while the formal investigation into [redacted] had not commenced at the time of the Appellant's examination, the AFP had already gathered vast quantities of intelligence and evidence (even if not admissible form) in relation to the allegations (at [274]). For example, the intelligence report prepared in May 2010 by an AFP analyst details, amongst other things, the use of agents in [redacted], the relevant financial transactions, and identifies what would later become key pieces of evidence in the Crown case relating to [redacted].[4]

11. In relation to AS [24] – [25], the circumstances in which the examinations took place is outlined in the Respondent's submission in respect to the Appellant Hodges (RHS [14] – [18]).

12. While the Appellant relies on the evidence of Schwartz (AS [24]), the findings of the trial judge in relation to the use of the examination material was not based on that evidence. That evidence, even on her Honour's findings, was insufficient to establish relevant use of the examination. Rather, her findings involved inferring that the AFP used the material more than what they had given evidence about (at [227] – [230], [269]).[5] The Court properly found that that conclusion was not open (at [276]).

13. None of the evidence of Schwartz as to the lack of use of the examination material was challenged. As the Court below correctly concluded (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 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]). It was never suggested to

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[3] The written submission by the appellants in the Court of Appeal stated that the AFP already had "*a solid base of evidentiary material...sufficient for them to regard [the appellants] as suspects*": 'Respondents' joint submissions in relation to grounds 3, 4, 5, 6, 7 & 8' (written submissions) dated 14 November 2016 at [53](e). They sought to demonstrate that the examinations confirmed the prosecution case which had been developed on the basis of the documents already assembled (at [293]).

[4] ECB.196.

[5] Trial judge at [769] – [775].

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.

14. As the Court observed (at [263]), the only other occasion on which it appears that the Appellant raised the topic of use of the examination was during cross-examination of Ms Webb. However, when the Appellant asked Ms Webb whether the examination had in fact generated any such further avenues of inquiry, she responded: "*No, not to my recollection, no*". The Appellant did not challenge that, or pursue the matter any further.

15. As to the suggestion of a standard clause being in the statements of the AFP witnesses (AS [25] fn 26), the AFP were ordered by the trial judge to answer specific questions posed by the appellants in correspondence.[6] Accordingly, it is unsurprising that the AFP statements adopt similar language. The correctness of their evidence was not challenged (at [269] – [271]). The Court described the circumstances by which the statements arose (at [242]). As the Court correctly concluded, there was no basis to reject the unchallenged evidence (at [269], [276]). The onus was on the Appellant to establish the factual foundation for the grant of a stay (cf: AS [25] fn 26).

16. The Court of Appeal correctly found that the appellants had not established that the prosecution had been materially advantaged in preparing its cases against the appellant(s) by having access to the examination material (at [248]).

17. As to the suggestion that the CDPP conceded that there was investigative advantage (AS [36]), the prosecution maintained throughout that it had not been shown that the answers given in any of the examinations had materially affected the assembly of the prosecution case or that the conduct of their defences had been constrained (at [233]).

18. The prosecution contended (at [253]), and the Court accepted as correct, that neither the appellants in their submissions or the trial judge in her reasons had identified a single piece of evidence that was obtained as a result of the ACIC examinations. The appellants conceded as much (at [254]).

19. On 15 April 2010, (prior to his examination in November 2010) the Appellant voluntarily spoke with the AFP about the matters under investigation.[7] [redacted]

[6] ECB.2 at [2], Exhibit 114.
[7] See Prosecution Outline of Evidence at [309] – [312] for the details of this conversation.

20. In the Appellant's examination in November 2010, he was shown only one document that related to QRS's dealings in [redacted]. The remainder of the documents shown to him related to [redacted] or his personal relationship with another suspect.[8] The Appellant is now only facing charges in relation to [redacted].

21. The Appellant at his committal challenged the case against him and argued that he had no case to answer.[9]

Part V – APPPLICABLE STATUTORY PROVISIONS

10 22. The Respondent has nothing to add.

Part VI – SUMMARY OF ARGUMENT

23. The Appellant adopts the arguments of the Appellants Hodges and Tucker, and supplements those submissions (AS [28]). The Respondent relies on her submission in respect to each of the appellants Hodges, Tucker and Galloway and addresses the supplementary submission below.

24. The Appellant's submission, as with the other appellants, is based on an argument that the mere fact of the examination (irrespective of the content) gives rise to an unfair trial (AS [29] – [33], [38] – [40]) warranting a stay of proceedings. For the reasons given by the Respondent in her submissions in relation to the other appellants, that submission is
20 incorrect.

25. In addition, the Appellant's reference (AS [31]) to the outcome being deliberately procured by the AFP and the ACIC, is out of context. The Court below concluded that the conduct of the ACIC was unlawful and improper because the examinations were only for the purpose of assisting the AFP in its investigation (at [209], [313]), which was not authorised by the *Australian Crime Commission Act 2002* (Cth). 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

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[8] Exhibit 137.
[9] POE at [713]; trial judge at [10].

have been unlawful.[10] The Appellant did not suggest at first instance that Sage was a dishonest witness. The trial judge found him to be an honest witness.[11] That finding was not challenged on appeal.

26. Moreover, the AFP sought advice from the ACIC and Sage about whether suspects could be examined, and were advised they could be provided no decision to charge had been made (RHS [15]).

27. Contrary to the Appellant's contention (AS [36]), there was no misapprehension of the evidence by the Court below. This submission ignores the conduct of the application by the Appellant at first instance, and on appeal. Making general assertions about guiding the selection of documents without considering the context, and limited nature of the answers (which was not challenged), does not advance the Appellant's argument. Nor is the submission supported by the approach of the Respondent below (see [17] above).

28. The submission also does not address the Court's conclusion, referred to in the passage cited above (see [7] above), that even if there was some assistance from the examinations in "*guiding*" and "*refining*" subsequent documentary searches, the case against the appellants had not materially changed. It rests almost entirely on documents. There is no basis in the evidence to conclude otherwise.

29. Contrary to the Appellant's contention (AS [37]), the issue in relation to Sage's conduct is not simply about a description or word describing his conduct. The Appellant argued below that his conduct involved intentional or reckless illegality (at [272]). They contended that the test of recklessness in *Director of Public Prosecutions v Marijancevic*[12] was the correct legal test to be applied.[13] Satisfying that test involves advertence to the possibility of the unlawfulness. There was no evidence suggesting the possibility of the awareness of the unlawfulness of the conduct (see RHS [7], [72]). The unchallenged evidence was that Sage believed his acts were lawful (at [13]).

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[10] Trial judge e.g. at [694], [868]; CA at [73], [74], [79], [105] and [116].
[11] Trial judge at [36].
[12] (2011) 33 VR 440.
[13] 'Respondents' joint submissions in reply to ACIC' (written submissions) dated 14 November 2016 at [7] and [15]. 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 at 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 T188 (21 February 2017); Tucker T188 (21 February 2017); Galloway did not make oral submissions as to recklessness.

30. Moreover, the Appellant's submission reflects a misapprehension about the rationale behind the Court's power to order a stay of proceedings (see RHS [27] – [34]). It is not about punishment. The issue is not whether the proceedings should be stayed so as to express curial disapproval of the conduct by the ACIC (cf: AS [37]).

31. As noted above the Appellant actively participated in his committal proceedings, cross-examining and arguing no case to answer. [redacted]

32. 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 by reason of his examination (cf: AS [38] – [40]). 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]).

33. That the Appellant *might* be deprived of a forensic choice does not warrant a stay of proceedings (cf: AS [39]). The test is whether the continuation of the proceedings *would*, not *could*, involve unacceptable unfairness. The Court correctly concluded that the appellants failed to establish any practical unfairness as a result of the examinations (at [248], [258], [266], [274], [276] – [277], [300]).

34. It follows that the Appellant's submission (AS [40]) that the improper purpose was achieved is inconsistent with the findings of the Court of Appeal.

Part VII – NOTICE OF CONTENTION OR CROSS APPEAL

35. Not relevant.

Part VIII – TIME ESTIMATE

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

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