IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

ON APPEAL FROM THE SUPREME COURT OF VICTORIA COURT OF APPEAL

No. M174 of 2017

BETWEEN: **DONALD GALLOWAY (a pseudonym)**
Appellant

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and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS
Respondents

No. M175 of 2017

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

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and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS
Respondents

No. M176 of 2017

BETWEEN: **RICK TUCKER (a pseudonym)**
Appellant

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and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS
Respondents

No. M168 of 2017

BETWEEN: **TONY STRICKLAND (a pseudonym)**
Appellant

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and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS
Respondents

SUBMISSIONS OF THE SECOND RESPONDENT ON STANDING

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PART I INTRODUCTION

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

PART II ACC'S STANDING

2. These submissions are filed pursuant to leave given on 9 May 2018,[1] and address the objection that has been raised to the "standing" of the Second Respondent (**ACC**) to address the issues that are raised in its notices of contention. These submissions adopt the same abbreviations as in the ACC's principal submissions.

The ACC is a party to the appeal

3. The ACC was joined as an intervener both before the trial judge and the Court of Appeal.

   3.1. The ACC was granted leave to intervene before the trial judge, without opposition, to make submissions in relation to issues affecting the ACC, and to make any objections to evidence on grounds of legal professional privilege or public interest immunity.[2]

   3.2. The ACC was also granted leave to intervene before the Court of Appeal.[3] In granting that leave (over opposition), the Court of Appeal implicitly found that the ACC had a sufficient interest to be joined as an intervener.[4] Having been granted leave to intervene, the ACC acquired all the rights of a party.[5] On the hearing of the appeal, it made submissions concerning the proper construction of the ACC Act, and the lawfulness of the actions of the Examiner and members of the staff of the ACC.

4. The Appellants correctly accepted that, the ACC having been granted leave to intervene in the Court of Appeal, they were required to join the ACC as a respondent in the special leave application to this Court[6] and, special leave having been granted, as a respondent to the appeal. They did not object to that course, including when the

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1 *Strickland v Director of Public Prosecutions (Cth)* [2018] HCA Trans 78 (***Strickland (Day 2)***) at p 130 (lines 5511-5516).

2 Trial judge reasons, [16]. **AB7: 2187**

3 Reasons below, [6] (footnote 9). **AB15: 4821**

4 On the test for whether leave to intervene should be granted, see eg *Levy v Victoria* (1997) 189 CLR 579 at 601-603 (Brennan CJ).

5 *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 at 396 (Hutley JA, with Reynolds and Glass JJA agreeing); *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520 at 534-535 (the Court); *Forestry Tasmania v Brown (No 2)* (2005) 159 FCR 467 (Black CJ); *Priest v West* (2011) 35 VR 225 at [30] (the Court).

6 *High Court Rules 2004* (Cth) (**Rules**), r 41.01.1.

ACC foreshadowed an intention to file, and then filed, a Notice of Contention in each appeal.

5. None of the Appellants sought special leave to appeal from the decision to permit the ACC to intervene in the Court of Appeal. Nor did they seek any orders from this Court *removing* the ACC as a party.[7]

6. In those circumstances, the ACC should not now be treated differently from any other respondent. There is no principle of law that require a respondent to have standing to make arguments in response to submissions that concern its interests. To the contrary, under the Rules of this Court, a respondent is entitled (without needing leave) to raise any ground by way of notice of contention that supports the decision under appeal.[8]

7. *Thomas v The Queen* does not suggest differently.[9]

   7.1. In that matter, the Victorian Court of Appeal was asked to re-open an earlier order that there be a new trial of the appellant. That application was based on the assertion that certain matters were known to ASIO, and that they should therefore be regarded as known to the DPP and should have been disclosed, with the result that the Court of Appeal had been misled in ordering the re-trial. The Director-General for Security was granted leave to intervene to defend the allegation that ASIO's conduct had caused the Court of Appeal to be misled. Having considered evidence and submissions on behalf of the Director-General on that topic, the Court of Appeal refused to re-open its earlier order.

   7.2. The Appellant sought special leave to appeal, but in doing so did not name the Director-General of Security as a respondent. The Director-General sought an order that he be added as a party to the special leave application, on the basis that, under the High Court rules, he should have been named as a respondent (as the Appellants correctly recognised in this case).

   7.3. Without deciding whether the Director-General had a right to be named as a respondent, Hayne J ultimately directed that the Director-General be added as a respondent.[10] At the hearing of the special leave application, the Director-

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7 Such an order may have been available under rule 21.05.1(a), applied by rule 40.02.

8 Rules, r 42.08.05; *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 at [81] (Heydon J, dissenting in the result).

9 [2008] HCA Trans 258 (***Thomas***), referred to at *Strickland (Day 2)* [2018] HCA Trans 78 at p 137 (lines 5833-5845) (Walker SC).

10 See *Thomas* [2008] HCA Trans 258 at p 18 (line 773)-p 19 (line 796).

General was called upon, but elected simply to rely on his written submissions.[11]

7.4. *Thomas* therefore does not support the proposition that, in a matter that relates to a criminal proceeding, all arguments must be advanced by the Director of Public Prosecutions. To the contrary, it illustrates that, where an application relating to a criminal matter depends on an allegation of improper behaviour by a statutory agency, that agency may be permitted to be heard to resist that allegation. That is what occurred in this case.

8. Of course, as in the *Thomas* matter, if the Appellants are ultimately tried, at their trial they will face only one accuser, being the Director of Public Prosecutions.

The ACC's special interests

9. If it is necessary for the ACC to establish that it has "standing" to participate in the appeal, the ACC advances the following submissions.

10. The ACC does not, and has never sought to, participate in these proceedings as an additional accuser. Its submissions do not concern whether the prosecutions should be permanently stayed, let alone whether the Appellants are guilty of any crime. Indeed, far from the ACC making allegations against the Appellants, the reverse is true. It is the Appellants who allege that the ACC acted unlawfully.

11. In developing that allegation, the Appellants have advanced arguments concerning the proper construction of the ACC Act, and the propriety of actions of an Examiner and members of the staff of the ACC. Arguments of the later kind directly engage the reputational interest of the ACC, which in itself justifies its participation in the proceedings.[12]

12. More importantly, however, the Appellants' arguments concerning the construction of the ACC Act have a direct effect on the ACC's interests, because any conclusions expressed by this Court (or, indeed, by the Court of Appeal) as to the proper interpretation of the ACC Act will have direct consequences both for the legality of past actions of the ACC, and also for the manner in which the ACC must discharge its statutory functions into the future.

13. In those circumstances, it is true, but not to the point, that the ACC has no interest in whether or not the trial of the Appellants is to proceed. It is not to the point because, irrespective of the conclusion the Court reaches on the stay question, the ACC will

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11 See *Thomas v The Queen* [2008] HCA Trans 273 at p 11 (lines 400-402).

12 See, in relation to interest in reputation, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 577-578 (Mason CJ, Dawson, Toohey and Gaudron JJ), 592 (Brennan J).

be required to conduct itself in accordance with the law as declared by the Court.[13] For that reason, once the Appellants chose to allege that the ACC acted unlawfully, the ACC was entitled to participate to defend that allegation.

14. At least in proceedings before a judge, it would be wrong for the Court to allow a criminal defendant to make serious allegations against a statutory authority without that authority having any capacity to answer those allegations. As Dixon CJ and Webb J said in *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396:

> [I]t is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard ... The general principle has been restated in this court ... It is hardly necessary to add that its application to proceedings in the established courts is a matter of course.

15. In *R v CB*,[14] where the accused applied for a permanent stay based on the fact of a post-charge ACC examination, the New South Wales Court of Appeal relied on the above passage in holding that the ACC was entitled to advance submissions on an appeal in that Court, at least as a respondent,[15] in circumstances where it had been granted leave to intervene in the Court below.[16]

16. Similarly, in *Hughes v R*,[17] which was an appeal concerning a prosecution in New South Wales, this Court granted leave to the Victorian Director of Public Prosecutions to intervene to make submissions concerning the interpretation of a provision found in the Evidence Acts of both New South Wales and Victoria. That illustrates that an agency's interest in the interpretation of the law may justify its participation in criminal proceedings in this Court, even if it has no interest in the underlying question concerning the disposition of the criminal proceeding.

17. In this appeal the ACC directed its written and oral submissions only to questions concerning the interpretation of the ACC Act, and to the purposes for which the Examiner exercised his powers. In doing so, it sought to answer serious allegations that are made against it. It ought not be deprived of the right to answer those allegations by reason only of the fact that they were made in criminal proceedings.

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13 See, e.g., *Federal Commissioner of Taxation v Indooroopilly Children Services (Qld) Pty Ltd* (2007) 158 FCR 325 at [3]-[5].

14 (2011) 291 FLR 113 (NSWCCA) (***CB***).

15 See *CB* (2011) 291 FLR 113 at [15].

16 See *CB* (2011) 291 FLR 113 at [1]-[4] (McLellan CJ at CL, with Buddin and Johnson JJ agreeing). See also *R v Will* [2017] ACTSC 356 at [175] (Refshauge J), albeit the Commonwealth was joined with the consent of the parties.

17 [2017] HCATrans 016.

18. The fact that the CDPP is a party to the appeal is no answer to the ACC's participation. The CDPP is an independent office. It is no part of its functions to represent the ACC, let alone to do so on the instructions of the ACC.

19. In oral submissions, Mr Tehan QC sought to diminish the ACC's interest in the questions concerning the interpretation of the ACC Act by pointing to amendments made to that Act since the holding of the relevant examinations.[18] However, those amendments do not reduce the ACC's interest in this proceeding, as the ACC Act continues to use the key concept of "prejudice" to a person's fair trial.[19] The meaning of that concept was the major focus of the ACC's oral submissions.

10 20. Finally, this case is very different from *R v GJ*,[20] cited in the Appellants' reply, [8]. In *GJ*, the Human Rights and Equal Opportunity Commission (**HREOC**) sought to intervene to put submissions on international law in a Crown appeal against sentence. Mildren J's comments about intervention in criminal proceedings[21] were not necessary for the decision. Further, HREOC could not point to any legal interest affected that would justify intervention under ordinary principles.[22] Indeed, HREOC's proposed submissions did not even provide sufficient assistance to justify being joined as an amicus curiae.[23]

Dated: 16 May 2018

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18 *Strickland (Day 2)* [2018] HCA Trans 78 at p 144 (line 6188)-p 145 (line 6191) (Tehan QC).

19 Cf Following its amendment in 2015, s 25A(9A) of the ACC Act now provides that an examiner must give a non-publication direction if "the failure to do so: … (b) would reasonably be expected to prejudice the examinee's fair trial, if the examinee has been charged with a related offence or such a charge is imminent."

20 (2005) 196 FLR 233 (***GJ***). There is no comparison with *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372 at [23] (cited in the Appellants' Reply fn 4), where Gleeson CJ stated that a decision by a judge in a proceeding brought by one taxpayer did not create a justiciable issue between the judge and a second taxpayer sufficient to enable the second taxpayer to appeal.

21 *GJ* (2005) 196 FLR 233 at [54] (Mildren J, with Riley J agreeing).

22 *GJ* (2005) 196 FLR 233 at [56] (Mildren J, with Riley J agreeing).

23 *GJ* (2005) 196 FLR 233 at [65] (Mildren J, with Riley J agreeing), [68] (Southwood J). By contrast, in *Karim v The Queen* (2013) 83 NSWLR 268 at [36] and [39], the NSW Court of Criminal Appeal allowed the HREOC to may submissions as an amicus, over the objection of the Crown.