IN THE HIGH COURT OF AUSTRALIA No M176 of 2017

MELBOURNE REGISTRY

Between **RICK TUCKER (a pseudonym)**

Appellant

and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

First Respondent

AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION

Second Respondent

DONALD GALLOWAY (a pseudonym)

Third Respondent

TONY STRICKLAND (a pseudonym)

Fourth Respondent

EDMOND HODGES (a pseudonym)

Fifth Respondent

Further redacted **APPELLANT'S SUBMISSIONS**

PART I: CERTIFICATION

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

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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:

    (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 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 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, and such notices have not been considered 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.

6. The citation of the reasons for judgement of the trial judge at first instance, Hollingworth J of the Supreme Court of Victoria, is *Commonwealth Director of Public Prosecutions v* [redacted] [2016] VSC 334R.

PART V: FACTS

7. *Background:* The position of the present appellant is identical in many relevant respects to that of Edmund Hodges, the appellant in Matter M175 of 2017. The appellant adopts the summary of facts included in the Submissions filed on behalf of Edmund Hodges, at paragraphs [7] to [35], and supplements that summary with the following matters.

8. *Relevant persons and organisations:* In [redacted], the Australian Federal Police (**AFP**) commenced an investigation, named [redacted], into allegations of bribery of foreign public officials in connection with the obtaining of overseas contracts by [redacted]. At all relevant times, the Senior Investigating Officer (**SIO**) for Operation Thuja was [redacted], who was referred to in the Court of Appeal judgement by the pseudonym Mr Schwartz. The Commonwealth Director of Public Prosecutions (**CDPP**) was involved in giving advice as the investigation progressed. The Australian Crime Commission (**ACC**), now also referred to as the Australian Criminal Intelligence Commission, was involved by providing a 'hearing room for hire', allowing the AFP to utilise the ACC's coercive powers for the AFP's own purposes.[1] The Examiner who issued each of the summonses and conducted each of the examinations in the present case was Geoffrey (Tim) Sage (**Examiner Sage**), and counsel assisting at each examination was Christopher Bonnici (**Bonnici**).

9. *The appellant:* The appellant was employed by [redacted], with responsibilities for [redacted], until he was made redundant in [redacted].

10. *The decision to charge the appellant:* By the middle of 2010, all of the relevant AFP and CDPP staff expected that the appellant would be charged in relation to [redacted]

[1] Reasons of Hollingworth J at [395], [845]. Reasons of Court of Appeal at [12]

[redacted], though the precise charges would depend on counsel's advice.[2] The Commissioner of the AFP was briefed on the position.[3] At the start of June, the appellant's solicitor wrote to [redacted] to advise that his client would make 'no comment' if interviewed, and to request that any further correspondence and communications be made via his solicitor.[4] [redacted] responded by warning that the appellant's "actions need to be addressed at some future time."[5]

11. *The decision to summons the appellant:* [redacted] considered the ACC to be a facility used by the AFP for compulsory examinations of the AFP's suspects.[6] The relevant AFP and ACC staff expected Examiner Sage to automatically approve any application for a summons that was sent to him.[7] Examiner Sage was in the habit of creating his 'reasons' by largely cutting and pasting from documents provided to him,[8] on occasions paying insufficient attention to ensure that his reasons contained only appropriate materials.[9] Examiner Sage automatically approved the application to summons the appellant that was placed before him.[10]

12. *The examination of the appellant:* The appellant was examined at length, without a lawyer present; the transcript extends to 207 pages.[11] Examiner Sage approached the examination with little regard for the requirements of the ACC Act.[12] The AFP provided the questions to be asked.[13] As at the middle of [redacted], the [redacted] team consisted of just fifteen AFP members,[14] and was stretched for resources,[15] yet six of them, including [redacted], attended the appellant's examination.[16] Their presence was concealed from the appellant.[17] Examiner 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.[18] None of the questioning of the appellant related to the ostensible purpose of the examination,

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[2] Reasons of Hollingworth J at [469]
[3] Reasons of Hollingworth J at [526]
[4] Exhibit 157 on the application before Hollingworth J
[5] Exhibit 158 on the application before Hollingworth J
[6] Reasons of Hollingworth J [388]
[7] Reasons of Hollingworth J at [509]
[8] Reasons of Hollingworth J at [502], [508]
[9] Reasons of Hollingworth J at [503]
[10] Reasons of Hollingworth J at [509]
[11] Reasons of Hollingworth J at [536]
[12] Reasons of Hollingworth J at [583]
[13] Reasons of Hollingworth J at [537]
[14] Reasons of Hollingworth J at [570]
[15] Reasons of Hollingworth J at [571]
[16] Reasons of Hollingworth J at [540]
[17] Reasons of Hollingworth J at [609]
[18] Reasons of Hollingworth J at [595]

namely investigating money laundering.[19] Instead, it was directed to the subject matter of the AFP investigation.[20] The AFP wanted to compel the appellant to confess on oath, and thus to 'lock him in' to that version.[21] Examiner Sage knew that the AFP wanted to have the appellant locked in to his account on oath, in order to assist in the investigation and prosecution of the appellant.[22] During the examination, [redacted] sought tactical advice from a senior solicitor at the CDPP in relation to whether it was possible to take advantage of the unrepresented appellant having brought certain notes to the hearing, so as to make those notes admissible in the appellant's trial.[23]

13. *The purpose of the appellant's examination:* The examination power was "used for the very purpose of achieving forensic disadvantage to the [appellant], and advantage to the prosecution, in foreseen future criminal proceedings."[24]

14. *The dissemination of the appellant's examination material:* Examiner Sage's practice was to automatically allow dissemination of examination material to prosecuting authorities, for them to use in prosecuting the examinee over the events the subject of the examination.[25] That approach was apparently long-standing, because long before Examiner Sage had even summoned the appellant, ACC staff had assured the AFP they would have access to the appellant's examination.[26] Consistently with Examiner Sage's approach, at the conclusion of the appellant's examination, it was made clear that the AFP would have access to the examination because it was investigating the allegations against the appellant, and the CDPP would have access because it needed to have "all information" in order to assess the allegations.[27] A summary of the appellant's examination was provided to the AFP that very day,[28] and an audio recording was later provided to the CDPP.[29] Even after a directive to CDPP staff in August 2012 that they were no longer to access ACC examinations of accused persons,[30] solicitors and Senior Counsel retained by the CDPP continued to have

[19] Reasons of Hollingworth J at [622] – [623]
[20] Reasons of Hollingworth J at [622]
[21] Reasons of Court of Appeal at [208]
[22] Reasons of Hollingworth J at [597]
[23] Reasons of Hollingworth J at [697]
[24] Reasons of Hollingworth J at [880]
[25] Reasons of Hollingworth J at [686], [709]
[26] Reasons of Hollingworth J at [650] – [651]
[27] Reasons of Hollingworth J at [671]
[28] Reasons of Hollingworth J at [672]
[29] Reasons of Hollingworth J at [673]
[30] Reasons of Hollingworth J at [678]

access to examination material, and Senior Counsel sought to obtain it in 'electronic searchable' form.[31]

15. *The appellant's forensic choices have been constrained*: The appellant was compelled by vigorous cross-examination to confess whole swathes of the prosecution case against him.[32] That has severely, if not completely, curtailed the capacity of his counsel to test the strength of the prosecution case, and to call evidence (including character evidence).[33]

16. *The AFP utilised the Appellant's examination to prepare the case against him:* The appellant is charged with a single offence, which alleges [redacted]. The AFP did not begin preparing the brief against the appellant in relation to that charge until after he had been examined.[34] [redacted] "oversaw and directed all enquiries made by the AFP from [redacted]".[35] As he was a witness who set out to advocate for the prosecution rather than to merely truthfully recount events,[36] his concessions were especially telling. [redacted] made it clear that the AFP was assisted in the task of obtaining evidence against the appellant by knowing "that there were no innocent explanations", because this allowed them "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."[37] [redacted] accepted, too, 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 the AFP's selection of the documents included in the prosecution brief of evidence.[38] That evidence stood unqualified and uncontradicted; though each AFP officer included a standard clause disavowing any use of the examination material in making the decision to charge the appellants, none made any attempt to disavow what [redacted] said about the use of the examination material.

17. *The proceedings before Hollingworth J:* The appellant was charged on [redacted]. He was discharged at committal, but was directly indicted by the CDPP. He

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[31] Reasons of Hollingworth J at [679] – [681]
[32] Reasons of Hollingworth J at [728]
[33] Reasons of Hollingworth J at [726] – [727], [733]
[34] The Court of Appeal decision turned to a considerable extent on the proposition that a brief had been prepared prior to the appellant's examination. That was wrong. The AFP commenced compiling the brief only after the appellant's examination: [redacted] statement (Exhibit 1 on the application before Hollingworth J) at [117]
[35] [redacted] statement (Exhibit 1 on the application before Hollingworth J) at [3]
[36] Reasons of Hollingworth J at [29]
[37] [redacted] statement (Exhibit 1 on the application before Hollingworth J) at [94](d)
[38] Reasons of Hollingworth J at [783]

then applied for a permanent stay of his trial. That relief was granted by Orders made on 27 July 2016.

18. *The proceedings before Court of Appeal:* The CDPP appealed against the orders by way of interlocutory appeal pursuant to s 295 of the *Criminal Procedure Act* 2009 (Vic). The ACC was granted leave to intervene in the appeal, over the appellant's objection.[39] The Court of Appeal held that the ACC was not conducting any investigation, but rather made its coercive powers available to the AFP for the AFP's own purposes.[40] The examination of the appellant was not authorised by the ACC Act, and was conducted for an improper purpose.[41] Moreover, the dissemination of the appellant's examination was in breach of the constraints of the ACC Act, and was unlawful.[42] 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.[43]

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[39] The parties to an interlocutory appeal pursuant to s 295 of the *Criminal Procedure Act* 2009 are restricted to the parties to the criminal prosecution (*Watkins & Mann v Commissioner for AFP and DPP* [2015] VSCA 321 at [15] per Osborn and Priest JJA). The appellant objected to the ACC being joined as an intervenor on several bases, most pertinently that the issues in a criminal proceeding are joined between the Sovereign and the accused, with the Sovereign representing the interests of the community, so that the ACC had no sufficient interest to intervene (citing *R v GJ* (2005) 196 FLR 233 at [54] per Mildren J).

[40] Reasons of Court of Appeal at [12], [209]

[41] Reasons of Court of Appeal at [12], [211]

[42] Reasons of Court of Appeal at [12]

[43] Reasons of Court of Appeal at [276] – [277], [300], [313] and [314]

PART VI: ARGUMENT

Summary of the issues

19. Hollingworth J permanently stayed the appellant's trial because the appellant had suffered an incurable unfair forensic disadvantage, the investigators and prosecutors had obtained an incurable unfair forensic advantage, and the conduct of those involved in deliberately procuring that outcome was such as to require a stay to protect confidence in the administration of justice.[44] There was an entirely satisfactory basis for each finding. There was uncontradicted evidence that the appellant's examination assisted the AFP in the ways identified above at [16]. There was uncontradicted evidence that the appellant's examination impacted the appellant's ability to defend himself at trial in the way identified above at [15]. Hollingworth J's specific adverse findings in respect of Examiner Sage's conduct, some of which are set out above at [11] to [14], were not challenged in the Court of Appeal; the Court of Appeal derogated from Hollingworth J's findings in respect of Examiner Sage's conduct only in that the Court of Appeal found he was ignorant of the requirements governing his conduct of examinations[45] (a proposition entirely consistent with Hollingworth J's findings that Examiner Sage failed to properly appreciate those requirements[46]), and therefore could not have been 'reckless'. That being the case, three sub-issues fall for determination within the single ground of appeal.

20. *First*, is a fair criminal trial still possible if the accused has been deliberately and unlawfully deprived of the capacity to challenge the prosecution case against him? The appellant's submissions focus on this issue, which is dealt with below at [23] to [37].

21. *Secondly*, was the Court of Appeal wrong to conclude that it was not open to Hollingworth J to find that the prosecution had obtained an unfair forensic advantage? The appellant adopts the submissions of Edmund Hodges at [67] – [83] on this issue, and makes some brief supplementary submissions below at [38] to [42].

22. *Thirdly*, assuming a particular mental state is required before a judicial officer may utilise the word "reckless" in describing the actions of a statutory office holder, could Examiner Sage's abject failure to have regard to the conditions regulating his power

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[44] Reasons of Hollingworth J at [879] – [880], [883]
[45] Reasons of Court of Appeal at [108] – [109]
[46] Reasons of Hollingworth J at [853], [868], [882]

suffice? On this issue, the appellant adopts the submissions of the appellant Edmund Hodges at [84] – [98].

Is a fair criminal trial still possible if the accused has been deliberately and unlawfully deprived of the capacity to challenge the prosecution case against him?

23. Whether a criminal trial is 'fair' must be evaluated in light of the fundamental precepts that govern a criminal trial. That is so for two reasons. First, a 'fair' trial requires a trial conducted according to law.[47] Secondly, the fundamental precepts that govern a criminal trial determine the balance of power in that trial, and a trial in which that balance shifts is not a fair trial.[48] In the present case, it was the fundamental precepts that define and maintain the accusatorial nature of a criminal trial that fell for consideration on the stay application, for it was those precepts that were unlawfully affected in the present case. Therefore, it was by reference to the accusatorial nature of a criminal trial that the question posed by the application for a permanent stay was to be determined.

24. On the approach of the Court of Appeal, there is no unfairness in an unlawful interference with the accused's ability to defend himself or herself, so long as the accused is in fact guilty. That is the corollary of the Court of Appeal's conclusion that the unlawful compulsion to confess 'whole swathes of the prosecution case',[49] which would prevent the accused adopting a contrary position at trial,[50] "could not be regarded as an unfair constraint".[51]

25. That approach fails to pay proper regard to the accusatorial nature of a criminal trial. Unlawfully and deliberately constraining the accused's opportunity to secure an acquittal *is* unfair. To make good that point requires more detailed consideration of the accusatorial nature of a criminal trial, of the consequences of a compulsion to answer, and of the power to permanently stay a criminal trial, before turning to the particular facts of this case.

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[47] *Dietrich v R* (1992) 177 CLR 292 at 326 per Deane J, *X7 v Australian Crime Commission & Anor (X7)* (2013) 248 CLR 92 at [38] per French CJ and Crennan J

[48] *Dietrich v R* (1992) 177 CLR at 335 per Deane J, *X7* at [53], see also *Lee v New South Wales Crime Commission (Lee v NSWCC)* (2013) 251 CLR 196 at [188] – [190] per Kiefel J

[49] Reasons of Hollingworth J at 728], [730]

[50] Reasons of Court of Appeal at [297]

[51] Reasons of Court of Appeal at [297] – [298]

The accusatorial nature of a criminal trial

26. A criminal trial is an accusatorial process.[52] The prosecution bears the onus of proof.[53] This is referred to as the fundamental principle.[54] It is "an essential aspect of the criminal trial in our system of criminal justice."[55]

27. A necessary corollary of the accusatorial nature of a criminal trial is that the prosecution cannot compel the accused to assist it in establishing the accused's guilt.[56] This is referred to as the companion rule.[57] This has been described as "perhaps the single most important organising principle in the criminal law."[58]

28. Not only a criminal trial, but the entire process of criminal investigation and prosecution, is accusatorial in nature.[59] The accusatorial nature of the process is supported by the common law immunity which permits a suspect to remain silent in response to questioning by persons in authority.[60] That immunity is essential to the common law principle that a suspect's 'fault is not to be wrung out of himself, but rather to be discovered by other means, and other men'.[61]

29. These principles – the fundamental principle, the companion rule, and the right of a suspect to remain silent in response to official questioning – reflect a balance struck between the power of the State and the power of the individual who stands accused.[62] It is only by adherence to these principles that the balance between the power of the State and the individual accused in a criminal trial is maintained.

30. The legislature might alter these principles, and thus alter the balance within the criminal justice system.[63] However, this case is not concerned with such a situation,

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[52] *RPS v R* (2000) 199 CLR 620 at [22] per Gaudron ACJ, Gummow, Kirby and Hayne JJ, *Azzopardi v R* (2001) 205 CLR 50 at [34] per Gaudron, Gummow, Kirby and Hayne JJ

[53] *EPA v Caltex* (193) 178 CLR 477 at 503 per Mason CJ and Toohey J, *CFMEU v Boral Resources* (2016) 256 CLR 375 at [36] per French CJ, Kiefel, Bell, Gageler and Keane JJ

[54] See, eg, *EPA v Caltex* at 503 per Mason CJ and Toohey J, *Lee v NSWCC* at [176] per Kiefel J, *CFMEU v Boral Resources* at [61] per Nettle J

[55] *Lee v NSWCC* at [176] per Kiefel J, see also at [193] per Kiefel J

[56] *Sorby v Commonwealth* (1983) 152 CLR 281 at 294 per Gibbs CJ, *EPA v Caltex* at 501, 503 per Mason CJ and Toohey J, at 526 per Deane, Dawson and Gaudron JJ, *X7* at [159] per Kiefel J, *CFMEU v Boral Resources* at [36]

[57] See, eg, *X7* at [46] per French CJ and Crennan J, at [102] per Hayne and Bell JJ, *CFMEU v Boral Resources* at [61] per Nettle J

[58] *R v P(MB)* [1994] 1 SCR 555 at 577 per Lamer CJ, delivering the judgment of Lamer CJ, Sopinka, Cory, Iacobucci and Major JJ

[59] *X7* at [101] per Hayne and Bell, at [160] per Kiefel J

[60] *Petty v R* (1991) 173 CLR 95 at 99 per Mason CJ, Deane, Toohey and McHugh JJ, at 106 per Brennan J, at 118 per Dawson J, *X7* at [102], *Lee v NSWCC* at [24] per French CJ

[61] *Petty v R* at 107 per Brennan J, and see also at 128-9 per Gaudron J

[62] *Lee v NSWCC* at [74] per Hayne J, at [182] per Kiefel J, *Lee v R* (2014) 253 CLR 455 at [32], *Hammond v R* (1983) 152 CLR 188 at 200 – 201 per Murphy J

[63] *X7* at [48], noting that no question of the limits of such legislative power arises in the present case

for there was no legislative warrant for what took place in this case. The examination of the appellant, and its dissemination and use to assist the prosecution, were not sanctioned by statute.

The consequences for a criminal trial of an accused being compelled to answer the prosecution case

31. 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.[64] It 'immeasurably lightens' the burden of proof on the prosecution.[65] Even answers that are kept from investigators and prosecutors, and cannot be used in any way, impede the accused from challenging aspects of the prosecution case, which radically alters the accusatorial nature of a criminal trial.[66] No question of the legitimacy of the accused challenging those aspects of the prosecution case arises; the opportunity to do so is a necessary incident of the accusatorial nature of a criminal trial.[67] These propositions were expressed in this way by Hayne J in *Lee v NSWCC*:

> The answers the accused has been compelled to give to the questions asked deprive the accused of forensic choices that otherwise would be legitimately 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.
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> ...
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> To suggest that preserving the legitimate forensic choices that are open to an accused at a criminal trial would permit, let alone encourage, the pursuit of falsehood misstates the fundamental character of a criminal trial. Reference to the pursuit of falsehood may suggest that a criminal trial is an inquisition into the truth of the allegation made. It is not. Subject to the rules of evidence, fairness and admissibility, each of the prosecution and the accused is free to decide the ground on which to contest the issue, the evidence to be called and

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[64] *Hammond v R* at 198 per Gibbs CJ, *Sorby v The Commonwealth* at 294 per Gibbs CJ, *X7* per Hayne and Bell JJ at [71]
[65] *EPA v Caltex* at 551 per McHugh J
[66] *X7* per Hayne and Bell JJ at [71], [124], Kiefel J agreeing at [157], *Lee v NSWSC* at [47] and [54] per French CJ, at [152] per Crennan J, at
[67] *X7* per Hayne and Bell JJ at [71], [136], Kiefel J agreeing at [157], *Lee v NSWSC* at [54] per French CJ, at [77], [82] per Hayne J, at [212] per Kiefel J, at [264] per Bell J, cf at [323] – [324] per Gageler and Keane JJ

the questions to be asked. Reference to the pursuit of falsehood may suggest that legitimately testing the strength of the prosecution's proof is somehow dishonest. It is not.[68]

32. Kiefel J made the point equally firmly in the same case:

> What was identified in *Hammond* was not the loss of some forensic advantage in an accused person. In any event, to describe the effects of an examination for an accused person in this way tends to trivialise both them and the fundamental principle in its practical operation. The choices open to an accused person with respect to the conduct of that person's defence result from the requirement of the fundamental principle that the prosecution prove its case. It is therefore not correct to cast doubt upon the importance of those choices or whether the accused should be entitled to them. Neither *Hammond* nor the cases preceding it considered the prejudice occasioned to an accused to be insubstantial.[69]

33. These propositions are well-established. They were stated by Gibbs CJ in *Hammond v R*[70] and in *Sorby v The Commonwealth.*[71] They were applied by this Court in *X7.*[72] They were accepted again by at least four members of this Court in *Lee v NSWCC.*[73] Hayne and Bell JJ's recitation of them in *X7* was cited, with approval, by the entire Court in *Lee v R.*[74] Fidelity to precedent, as well as to principle, requires that these propositions be applied in this case. From *Hammond v R* to *Lee v R*, an unbroken line of authority demonstrates that an accused person who has been unlawfully compelled to testify on oath to the veracity of the prosecution case is improperly constrained in the subsequent conduct of his or her defence.

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[68] Supra at [79], [82]
[69] *Lee v NSWCC* at [212]
[70] Supra at 198
[71] Supra at 294
[72] Supra at [71], [124] per Hayne and Bell JJ, Kiefel J substantially agreeing at [157]
[73] Supra at [54] per French CJ, at [79] – [83] per Hayne J, at [210]-[212] per Kiefel J, at [252], per Bell J at [264] – [266], and see also at [152] per Crennan J, where her Honour apparently accepts the proposition
[74] *Lee v R* at [41]

The power to permanently stay a criminal trial

34. An accused person is entitled not to be subjected to an unfair trial,[75] though the entitlement may be more conveniently stated in positive terms as a right to a fair trial.[76] A superior court has inherent power to ensure a fair trial, and thus to stay a trial that would be unfair "when judged by reference to accepted standards of justice".[77] The power to stay extends to "all those categories of case in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness".[78] The power to stay may be exercised upon satisfaction that a trial would involve unacceptable injustice or unfairness,[79] and that no other measure can be taken to bring about a fair trial.[80] That assessment involves a large element of intuitive judgment.[81]

35. The categories of abuse of process are not closed,[82] however "compulsion upon an accused to incriminate himself or herself" and "the exaction of involuntary confessions or admissions" are examples of the types of unfairness that might justify the exercise of the power to permanently stay proceedings.[83] A court must also protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike, lest public confidence be eroded.[84]

36. As observed above at [23], a fair trial requires a trial conducted according to law. The duty of the Court to conduct a trial according to law "requires, at a minimum, that it be conducted in accordance with the fundamental principle and the requirements that flow from it".[85] For this reason, a trial in which the companion rule is infringed involves a "departure in a fundamental respect from a criminal trial which the system of criminal justice requires an accused person to have".[86]

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[75] *Jago v District Court* (1989) 168 CLR 23 at 56-57 per Deane J
[76] *Dietrich v R* (1992) 177 CLR at 299 per Mason CJ, McHugh J
[77] *Barton v R* (1980) 147 CLR 75 at 95-96 per Gibbs ACJ and Mason J
[78] *Walton v Gardiner* (1993) 177 CLR 378 at 392 – 393 per Mason CJ, Deane and Dawson JJ
[79] *R v Edwards* (2009) 83 ALJR 717 at [23] – [24] per the Court
[80] *Williams v Spautz* (1992) 174 CLR 509 at 519 per Mason CJ, Dawson, Toohey and McHugh JJ
[81] *Subramaniam v R* (2004) 79 ALJR 116 at [27] per the Court
[82] *Subramaniam v R* at [26] per the Court
[83] *Subramaniam v R* at [27] per the Court
[84] *Williams v Spautz* at 520 per Mason CJ, Dawson, Toohey and McHugh JJ
[85] *Lee v NSWCC* at [188] per Kiefel J
[86] *Lee v R* at [46], see also *X7* at [104] per Hayne and Bell JJ

The application of the principles to the present case

37. As identified above at [15], the appellant was unlawfully compelled to answer, on oath, the prosecution case against him. Being forced to do so radically altered the balance of power in his criminal trial. It dramatically curtailed his ability to challenge the prosecution case. It denied him the ability to contest the charge made against him. Moreover, the AFP investigators sought that outcome, knew they had achieved it, and pursued the case against the appellant secure in that knowledge.[87] None of these facts was doubted by the Court of Appeal. In those circumstances, the correct application of the principles stated above inexorably leads to the conclusion that the balance of the trial has so shifted that a fair trial is no longer possible. The appellant can no longer receive a fair trial, because any trial would be lacking the accusatorial character that marks such a trial.

The prosecution was improperly advantaged by its unlawful use of the examination

38. The Appellant adopts the submissions of Edmund Hodges at [67] to [83] in relation to this issue. The appellant makes the following two points, by way of emphasis, in supplementation of the submissions of Edmund Hodges.

39. There was no real or genuine issue before Hollingworth J as to the fact that the AFP had utilised the appellant's examination to further its investigation, in the way described above at [16]. [redacted] expressly said so, and no AFP officer gave evidence to the contrary. In those circumstances, it is far from perspicuous why the Court of Appeal thought that 'fairness' required the appellant to 'challenge' the AFP witnesses on the issue.[88] The Court of Appeal's conclusion on this issue rested on a basic misunderstanding of the evidence, for the Court explained its approach thus:

> The issue of forensic advantage not having been explored, and the AFP officers' denials not having been challenged, her Honour was not in a position to doubt the veracity of the AFP officers' evidence or to draw the inference which she did.[89]

40. This error was underpinned by a second basic factual misconception. The Court of Appeal stated that:

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[87] See above at [13] to [16]
[88] Reasons of Court of Appeal at [270], [271]
[89] Reasons of Court of Appeal at [276]

> The brief, we were told, contained approximately 360 documents... It would have been a straightforward exercise to identify any document which had been added to the brief after the examinations.[90]

41. The Court of Appeal disregarded the fact that the appellant was charged only with offending [redacted]. The AFP only commenced the process of preparing the brief in [redacted], *after* the appellant's examination had, as [redacted] said, given them the advantage of knowing that they would be able to establish a case against the appellant, which he would be unable to challenge, and had assisted them in searching for the documents that they knew would be able to establish their case against the appellant.[91]

42. The Court of Appeal misapprehended both the evidence, and the issues genuinely in dispute, in the proceedings before Hollingworth J. That error demonstrates the wisdom of observations in this Court requiring appellate courts to pay particular deference to factual findings in lengthy and complex matters, especially when the appellate court has reviewed only certain aspects of the evidence.[92] These errors were at the heart of the Court of Appeal's conclusion on this issue. That conclusion ought not be allowed to stand unaffected by the exposure of errors that fundamentally underpinned the Court of Appeal's reasoning.

Conclusion

43. The Court of Appeal was wrong to find error in Hollingworth J's decision to permanently stay the appellant's trial. In doing so, the Court of Appeal misapprehended and misapplied the principles governing the accusatorial character of a criminal trial, and misunderstood the evidence. For those reasons, and for the reasons advanced in the submissions of Edmund Hodges, the appeal ought be allowed.

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[90] Reasons of Court of Appeal at [259]
[91] As to which, see above at [16]
[92] *Fox v Percy* (2003) 214 CLR 118 at [23] per Gleeson CJ, Gummow and Kirby JJ, *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 160 ALR 588 at [90] per Kirby J

PART VII: LEGISLATION

44. The applicable legislation is set out in the joint list of authorities.

PART VIII: ORDERS SOUGHT

45. The appellant seeks Orders that:

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

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

PART IX: TIME ESTIMATE

46. The appellant estimates that the presentation of the appellant's oral argument will occupy no more than 45 minutes.

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21 December 2017