IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M36 OF 2018**

BETWEEN: **DANIEL TAYLOR**
Plaintiff

AND: **ATTORNEY-GENERAL OF THE COMMONWEALTH**
Defendant

ANNOTATED
PLAINTIFF'S REPLY

Filed on behalf of the Plaintiff
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PART I PUBLICATION

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

PART II SUBMISSIONS IN REPLY

QUESTION ONE - REVIEWABILITY

2. The Defendant seeks to conflate the question of susceptibility of review with whether the Plaintiff can make out his grounds. Question one asks whether the Defendant's decision is insusceptible of review under ss 75(iii) or 75(v) of the Constitution on the grounds set out in [9] to [12] of the Amended Application which, if made out, constitute jurisdictional error. The answer to question one lies in the boundaries of this Court's jurisdiction under ss 75(iii) and 75(v) and not whether those grounds are made out.

3. There is a tension between the Defendant's argument that courts should decline to review prosecutorial decisions of any kind and his concession that judicial review on limited grounds may be available [**D [21]**]. If such a decision is reviewable under ss 75(iii) or 75(v), it is irrelevant to ask whether the decision is otherwise "insusceptible" of judicial review. The first question is what are the limits of the statutory power, so as to identify whether the grounds amount to jurisdictional error. It is incorrect to say that the Plaintiff has failed to identify any relevant limit on the discretion [**D [19]**]. He has done so in questions two and three. The real issue is whether he has made good those alleged jurisdictional errors.

4. The Defendant fails to engage with the distinct nature of the Defendant's decision. Each of the authorities relied on by the Defendant [**D [12]-[16]**] considers the review of decisions to commence a prosecution (either as to the nature of the charges or consent to the charges) under challenge by the accused in the criminal proceeding in which those charges had been laid. The relevant court seized of the criminal proceeding declined to review the decision(s) that brought the proceeding before the court.

5. A substantive distinction with those cases [*cf* **D [18]**] is that the Plaintiff is not the putative accused in any criminal proceeding. The Plaintiff has no other avenue to challenge the Defendant's decision refusing consent. The Plaintiff's right to have a summons issued by the Magistrates' Court of Victoria (based on a charge which disclosed an offence known to law: s 12(4)(a) of the *Criminal Procedure Act 2008* (Vic)) is lost without any opportunity for review or redress. Reviewing this decision does not

offend the separation of power considerations [*cf* **D [22(i)]**] because it is not a decision to commence proceedings, nor does it involve the court in determining a dispute as between the parties to the criminal charges which (in this case) would involve Ms Suu Kyi and the Plaintiff initially and, if consent is granted, Ms Suu Kyi and the Defendant.

6. The Defendant points to his textually unconstrained power to give or refuse his consent. It may be accepted that there are no textual constraints, but it is well-established that there is no unconstrained statutory power known to Australian law. Every such discretion is constrained by the subject matter, scope and purpose of the statute.[1]

7. Finally, the Defendant observes that, in previous cases, powers that the Court regarded as insusceptible of review were in fact conferred by statute [**D [14]**].[2] But those statutory provisions, unlike s 268.121, each replicated common law powers, such that the Court could readily conclude there was no intention to expose their exercise to judicial review.

QUESTION TWO – CONSTRUCTIVE FAILURE/MISUNDERSTANDING OF LAW

(i) The defendant's reason for deciding

8. There is a dispute between the parties as to how to construe the Ministerial Submission and the decision made by the Defendant [**D [23]**].

9. *First*, the Court should find that the Defendant adopted, and then acted in accordance with, the recommendation in the submission. It is an agreed fact that his decision was "[i]n accordance with" the submission [**SC [12]**]. The only material put to him was the submission and the Plaintiff's briefing paper. The Defendant evidently made the decision on the very same day the submission was provided to him [**SC [11]-[13]**]. SCB-15 SCB-15

10. *Second*, the Court should construe the submission as stating to the Defendant that he was obliged by customary international law to refuse to give his consent. That is the ordinary and natural reading to give to the words: "these immunities would be breached and Australia would be in breach of its international obligations. The department therefore recommends you refuse to provide your consent to the prosecution of [Ms Suu Kyi]" (emphasis added) [**SC-3 p 24-25**]. There is nothing in the submission or in the Revised Special Case to suggest that the Defendant turned his mind to the mere possibility of breaching international obligations. Further, the submission does not refer to any other SCB 51-52

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1 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 214.

2 See s 394A of the *Crimes Act 1900* (NSW) in *Maxwell v The Queen* (1995) 184 CLR 501 and s 5 of the *Australian Courts Act 1828* (9 Geo IV c 83) in *Barton v The Queen* (1980) 147 CLR 75.

potential grounds for the decision such as Australia's national interests or foreign relations [*cf* **D [16] and [19]**]. The sole factor put before the Defendant was that to give his consent would breach the full and inviolable immunity of Ms Suu Kyi and therefore Australia's international allegations.

(ii) Jurisdictional error

11. The Defendant contends that any misunderstanding of customary international law would be an error within jurisdiction, because there was no obligation to consider it at all [**D [25]**]. That contention should be rejected.

12. It does not follow from the fact that the Parliament has not required a particular consideration to be taken into account that decision-makers may base their decisions entirely upon a consideration that they have misunderstood. If a decision-maker decides to choose a particular pathway of reasoning and makes an error in the course of doing so, depending upon the gravity of that error it can amount to jurisdictional error if the pathway and error affect the exercise of power.[3] That is so where, as here, the Defendant should be regarded as basing his decision on a single issue that (on this hypothesis) he got wrong. To do so is to purport to exercise jurisdiction but to fail, in fact, to do so.

(iii) Customary international law (Questions 2(a), (b) and (c))

13. The Defendant's submissions confining the operation of the Rome Statute to the International Criminal Court ignore the basis on which that Court was established. The seriousness of the international crimes in the Rome Statute, the role of that Court and the duties which States adopted are matters recorded in the preamble. As a member of the international community, and as a State Party to the Rome Statute, Australia has assumed certain duties: the exercise of its domestic jurisdiction in respect of international crimes. The primacy of Australia's domestic jurisdiction was affirmed in s 268.1 [*cf* **D [32]**]. The recognition of that primacy in the Rome Statute, as set out in paragraphs 6 and 9 of the Preamble and Arts 1 and 17, is in the context of each State Party recalling that it is the **duty** of every State to exercise criminal jurisdiction over those responsible for international crimes.

14. Contrary to the Defendant's submissions [**D [36]**], the Plaintiff is not asserting the existence of a new rule of customary international law. Rather, the Plaintiff submits that

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3 *Craig v South Australia* (1995) 184 CLR 163 at 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 351 [82].

it is for the Defendant to establish any rule of customary international law on which he seeks to rely. It is for the Defendant to show a rule of customary international law that existed and subsists notwithstanding that 139 of the more than 195 States in the world[4] (ie more than 70%) have signed the Rome Statute. Nor does the Plaintiff submit that because of its obligations under the Rome Statute it has a different obligation *vis a vis* Myanmar specifically. The enactment of the Rome Statute and its widespread adoption has altered the landscape of international law generally.

15. The Defendant at times [**D [35]**] fails to recognise that under Australian law, an incumbent Minister of Foreign Affairs enjoys no immunity. He does correctly observe that there is no obligation in Australian domestic law to afford immunity to an incumbent foreign minister [**D [54]**], but this provides no warrant for the Defendant to consider himself *bound* to apply any such immunity. The Plaintiff does not submit that the Defendant is prohibited from considering international obligations that are not enacted into domestic law (or disregarding them for all purposes [*cf* **D [54]**]). However, the Plaintiff does submit the Defendant cannot ignore Australia's enacted laws when making a decision under s 268.121(1). The Defendant made that decision considering himself to be bound by his understanding of a rule of customary international law that is inconsistent with Australia's domestic laws.

16. Section 6 of the *Diplomatic Privileges and Immunities Act 1987* (Cth) excludes the operation of those laws as set out in para (a) and (b) that "deals with a matter dealt with by this Act". That Act deals with immunities afforded to persons on the basis of a particular status they hold; it is not prescriptive or limited to the immunities dealt with in terms [*cf* **D [55]**].

QUESTION THREE – PROCEDURAL FAIRNESS

17. The Defendant contends that procedural fairness is not owed because, in fact, the Plaintiff cannot commence a private prosecution under s 13 of the *Crimes Act 1901* (Cth) for an offence under Div 268 at all [**D [56]**]. That contention should be rejected. Section 268.121 does not reveal the necessary intendment required to displace s 13.[5]

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4 There are presently 193 member States of the United Nations and two observer states (the Holy See and the State of Palestine).

5 See generally *Brebner v Bruce* (1950) 82 CLR 161.

18. *First*, the text of s 268.121(1) to (3) is important. It could not be, for example, that the Defendant is the only person who could bring a prosecution, because that would render the consent requirement otiose. Once the possibility that someone else may commence the prosecution is admitted, there is nothing in s 268.121 to exclude private prosecutors.

19. *Second*, the structure of s 268.121(1) to (3) is also important. It expressly contemplates that steps will be taken in a proceeding prior to consent being given. This underscores that it may not be the Attorney-General who commences the proceeding. Otherwise, s 268.121(3) would have little or no work to do. Commencement is dealt with in s 268.121(1), subject to the carve out in s 268.121(3).

20. *Third*, the choice of the word "prosecuted", as opposed to "commenced", in s 268.121(2) is also significant. This requires that any "prosecution" of the proceeding after its commencement which, for example may be under the carve-out in s 268.121(3), be in the Defendant's name. Section 268.121(2) prescribes the mode by which the proceeding is to be prosecuted[6] [*cf* **D [56]**]. That mode does not exclude the operation of s 13.

21. The Plaintiff was not given any opportunity to address the sole basis for the recommendation in the submission as set out in [10] above. Although the Plaintiff addressed the question of immunities in his briefing paper [**SC-2**], he did not address the question whether Australia would be in breach of its international obligations if the Defendant refused to consent or whether that was a permissible basis for his decision. SCB 31-49

Dated: 3 June 2019

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[6] See *Barton v The Queen* (1980) 147 CLR 75 at 94 per Gibbs ACJ and Mason J.