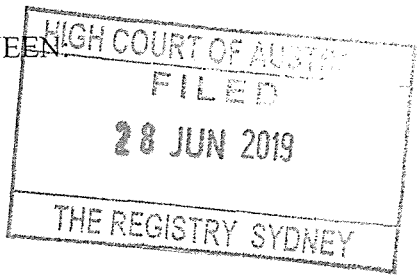
CONFIDENTIAL AND SUBJECT TO SUPRESSION ORDERS

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S123 of 2019



BETWEEN:

HT
Appellant

and

The Queen
First Respondent

Commissioner of Police, New South Wales Police Force
Second Respondent

SECOND RESPONDENT'S OUTLINE OF SUBMISSIONS

REDACTED

Part I: Certification

1. The redacted version of these submissions is in a form suitable for publication on the internet. This **unredacted version** is **highly confidential** and is not suitable for publication.

Part II: Statement of Issues

2. This appeal arises from a novel factual scenario which necessitated the exercise of an exceptional power. In this case neither the Appellant nor her legal advisers had access to an affidavit outlining the [redacted] ("**affidavit** [redacted]") despite it being in evidence during her sentencing hearing and then before the Court on the sentencing appeal. The key issue the Second Respondent ("**Commissioner**") addresses in these submissions is the source of the power to withhold the evidence from the Appellant and her legal advisers and why it was necessary to restrict the evidence in this way. The order illustrates the power of the common law to mould the court's procedures so as to achieve fairness in the circumstances of the particular case and secure the proper administration of justice. The facts which make this matter exceptional cannot

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be publicly revealed.

3. The Commissioner's submissions primarily address Ground 1 of the Notice of Appeal (Core Appeal Book ("**CAB**") at 136), which, while expressed in the broadest terms, at least involves the question of whether the New South Wales Court of Criminal Appeal ("**CCA**") had the power to direct that the affidavit [redacted] not be disclosed to the Appellant or her legal advisers. That order was made on 28 June 2017 on the application of the Commissioner ("**28 June 2017 Order**") **[CAB at 125]**.

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4. The Commissioner contends that the CCA had power to make the order on the basis of the common law principle of public interest immunity. Alternatively, the order could have been made as an exercise of inherent (or implied) power, or an exercise of power conferred by s.7 of the *Court Suppression and Non-Publication Orders Act 2010* (NSW) ("**Suppression Act**") to make a suppression order.[1] While the CCA did not advert to the order being made pursuant to these two latter powers, a mistake as to the source of power (if there was one) does not invalidate the act if another source of power is available.[2]

20 5. The Commissioner also contends that in the particular circumstances the 28 June 2017 Order did not operate to deny the Appellant procedural fairness. This is relevant to Ground 2.

Part III: Section 78B Notice

6. No notice under s.78B of the *Judiciary Act 1903* (Cth) is required to be given.

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1 The latter two sources of power are raised in a draft Amended Notice of Contention filed and served by the Commissioner on 24 June 2019. The Commissioner seeks leave to file this document.

2 *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 at 76 [175] per Crennan and Keifel JJ; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 618 per Gummow J; *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 362 [124] per Heydon J. See also *Innes v NSW Senior Deputy State Coroner; Commissioner of Police v NSW Senior Deputy State Coroner* [2007] NSWSC 1209 at [12] per Rothman J.

Part IV: Factual Matters

The Appellant's sentencing hearing in the District Court

7. Acting with the assistance of lawyers, the Appellant agreed that for the purpose of her sentencing hearing, the District Court of New South Wales ("**District Court**") could accept into evidence an affidavit [redacted] notwithstanding that neither she nor her legal advisers had seen that affidavit.

10 8. The affidavit, which was marked "**Exhibit C**", was relevant to the discount the District Court could award [redacted], a matter the sentencing court was required to consider pursuant to s.21A(3)[redacted] of the *Crimes (Sentencing Procedure) Act 1999* (NSW).[3] Among other things, in assessing that discount, [redacted] of that Act required the District Court to consider the [redacted] and the [redacted] It is readily apparent that an affidavit [redacted] may contain extremely sensitive and confidential information.

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9. It is significant that the Appellant consented to this arrangement. The Appellant had been given a choice, which her counsel described as follows [**CAB 29, lines 3-7**]: the Crown Solicitor's Office "put it to me on two [bases], if I do wish to be privy to the information the information will have to be highly redacted and it would be a lot shorter. If I am not privy to the information they're going to provide a very lengthy document". This was not a "dilemma", as described in the Appellant's Submissions, [15], but an informed choice undoubtedly designed to maximise the Appellant's chances of securing a greater discount on sentence [redacted]

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[3] Equivalent provisions appear in the *Crimes (Sentencing) Act 2005* (ACT), s.36; *Crimes Act 1914* (Cth), s.16A(2)(h); *Sentencing Act 1995* (NT), s.5(2)(h); *Penalties and Sentences Act 1992* (Qld), s.9(2)(i); *Sentencing Act 2017* (SA), s.37; *Sentencing Act 1991* (Vic), s.5(2AB); *Sentencing Act 1995* (WA), s.8(5).

10. More specifically, on 2 February 2017, a solicitor in the employ of the Office of the Crown Solicitor's, the solicitor for the Commissioner, spoke to the Appellant's counsel in the sentencing proceedings about the approach proposed to be adopted by the Commissioner to the issue of the Appellant's [redacted] [redacted] Following that conversation, on 8 February 2017, the solicitor sent an email to the Appellant's then solicitor stating that the Appellant's counsel advised [redacted]

11. Sometimes it is not in the public interest for an offender to be provided with the affidavit [redacted]. Acting Assistant Commissioner John Kerlatec explained why this was so in his first confidential affidavit at [5]. However, there was a further specific reason why it was against the public interest to disclose the affidavit [redacted] to the Appellant's legal advisers. This reason was explained in detail in the second confidential affidavit of Acting Assistant Commissioner John Kerlatec. [redacted]

[4] First confidential affidavit of Acting Assistant Commissioner John Kerlatec at [4(3)] and Annexure A.

12. Exhibit C was tendered in the District Court on 10 February 2017 [**CAB 27, line 37**]. It was viewed by the Crown [**CAB 27, line 42**], but with the consent of the Appellant, was not shown to her or her legal advisers [**CAB 29 lines 1-15**].

13. The sentencing remarks indicate the Judge had regard to Exhibit C and applied a "global discount of about 35%", of which 15% represented the Appellant's plea [**CAB 70, lines 41-50**].

10 *Crown's appeal to the CCA*

14. The Crown appealed the Appellant's sentence on the ground that it was manifestly inadequate [**CAB 81, line 49**]. Notwithstanding the Appellant's earlier agreement in relation to Exhibit C, for the purpose of the appeal, the Appellant now sought access to it [**CAB 90, lines 40-41**]. The Appellant's counsel acknowledged the "novelty" of the matter in the CCA so far as the request for access was concerned [**CAB 97 at line 8**].

15. On 28 June 2017, the Commissioner appeared to oppose that application
20 [**CAB 91**] and sought orders, inter alia, that there be no disclosure of Exhibit C to the Appellant or her legal representatives [**CAB 83-84**].[5]

16. The Commissioner's application was supported by "open", "confidential" and "further confidential" affidavits sworn by an acting Assistant Commissioner of Police on 27 June 2017 [**CAB 95, lines 19-43**]. The "open" affidavit appears at **CAB 87-88**. The two confidential affidavits are in the Confidential Appeal Book. The Appellant's legal advisers viewed the first confidential affidavit but not the further confidential affidavit or Exhibit C [**CAB 95, lines 48-50**]. The Crown had been given access to Exhibit C [**CAB 98, line 43**].

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[5] An unfiled notice of motion appears at **CAB 82.** No reference was made to a notice of motion in the transcript dated 28 June 2017 [**CAB 89-121**]. There is no notice of motion on the CCA file. The Commissioner is not in position to positively assert that the notice of motion was ever handed to the Bench or filed.

17. [redacted]

(a) [redacted]

(b) [redacted]

(c) [redacted]

18. During argument, the Appellant's counsel accepted that it was open for the

Appellant to instruct him as to the content of the "factual component" of Exhibit C [**CAB 98, lines 3-6**]. All the Appellant's counsel was "actually missing" was the "evaluative component" [**CAB 98, lines 8-10**], which was addressed in the manner described in paragraph 21 below.

19. The CCA upheld the Commissioner's objection and made the following order in relation to Exhibit C:

> "The Court orders that the contents of Exh C before the sentencing judge be kept confidential on the grounds of public interest immunity and not made available to counsel for the respondent."

20. It does not appear that any specific suppression or non-publication order was made over the two confidential affidavits relied on by the Commissioner.

21. After an exchange between counsel for the Commissioner and the Court, counsel for the Commissioner wrote out a sentence of Exhibit C, being the last sentence of paragraph 34, and provided it to counsel for the parties [**CAB 100 line 6 – CAB 101, line 16**]. (The sentence is reproduced in the CCA Judgment at [74].)

22. The Crown played no role in the Commissioner's motion [**CAB 98, lines 43-44**].

The second affidavit [redacted]

23. While the Appellant's focus of attention is on her "denial of access" to Exhibit C, there was, in fact, a second affidavit [redacted] before the CCA in the determination of the appeal (CCA at [128]). It is understood that the Appellant's solicitor contacted the DPP on about 13 July 2017 to request that a further affidavit [redacted] be prepared. The CCA was provided with the further affidavit [redacted] and referred to it at [128] of its reasons.

24. It is also relevant (including in relation to the denial of procedural fairness claim) that on appeal, the CCA in fact <u>increased</u> the discount on sentence [redacted] (CCA at [128]).

Part V: Argument

The public interest in protecting informers

25. Courts have long recognised that a high premium attaches to the protection of sensitive law enforcement methodologies, capabilities, policies and procedures to ensure the ongoing supply of relevant information.[6] The rationale for such protection is to ensure that crime can be effectively investigated and prosecuted. Unless protection is provided the administration of justice will be compromised.[7]

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26. In this context, courts have repeatedly emphasised the special importance that attaches to protection of police sources. In *Jarvie v The Magistrates Court of Victoria* [1995] 1 VR 84 ("***Jarvie***") at 88, Brookings J (with whom Southwell and Teague JJ agreed) in fact identified two public interests in this regard, the first being preservation of the anonymity of informers "since otherwise these wells of information will dry up and the police will be hindered in preventing and detecting crime", and the second being the protection of their personal safety. His Honour concluded, "[t]he personal safety of the informer is both a means to an end and an end in itself".[8]

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27. To similar effect, in *Savvas* (1989) 43 A Crim R 331 at 336-7, Hunt J explained that "criminals should be encouraged to give assistance to the authorities by informing on other criminals and by giving evidence (if necessary with an immunity from prosecution) in order to secure their convictions" and said "[t]he need to protect them from reprisals so far as it is possible to do so is just as much in the public interest because it will encourage others to give similar

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6 *Jarvie v The Magistrates' Court of Victoria at Brunswick* [1995] 1 VR 84 at 88; *Arthur Stanley Smith* (1986) 86 A Crim R 308 at 311; *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667 at 675; *Cain v Glass* (1985) 3 NSWLR 230 at 233G-234A, 247C; *D v NSPCC* [1978] AC 171 at 232F-G; *R v Fandakis* [2002] NSWCCA 5 at [43]; *Conway v Rimmer* [1968] AC 910 at 965G-954A; *Young v Quinn* (1985) 59 ALR 225 at 234, 236-237; *R v Lodhi* (2006) 65 NSWLR 573 at [31].

7 *John Fairfax Group Pty Ltd (recs and mgrs apptd) v Local Court (NSW)* (1991) 26 NSWLR 131 at 161; *O'Shane v Burwood Local Court (NSW)* (2007) 178 A Crim R 392 at 404 [42].

8 See also *Arthur Stanley Smith* (1986) 86 A Crim R 308 at 311 in relation to the rationale for protecting police informers. See further *R v Hennessey* (1978) 68 Cr App R 419 at 425; *Cain v Glass (No 2)* (1985) 3 NSWLR 230 at 233-234 per Kirby P.

assistance".[9]

28. In the case of police informers, rules have developed, over many years, to protect the confidential basis upon which police deal with such informers.[10]

29. [redacted]

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30. [redacted]

Public interest immunity

31. Consistently with submissions put to the CCA by then counsel for the
20 Commissioner, the CCA identified the common law doctrine of public interest immunity as the basis for making the impugned order [T10/28-32 **CAB 99**]. Public interest immunity is a doctrine of substantive law and not merely a rule of evidence.[11] It is a fundamental rule which cannot be displaced or abrogated except in the clearest of terms.[12] The rule has existed, in the House of Lords, since at least 1822.[13]

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9 Referred to with approval recently in *R v O'Dempsey (No 3)* [2017] QSC 338 at [14]-[15]. See also *R v Quami & Ors (No 9)* [2016] NSWSC 171 at [4].

10 *R v O'Dempsey (No 3)* [2017] QSC 338 at [13], citing *Cain v Glass (No 2)* (1985) 3 NSWLR 230 at 233-234.

11 *Jacobsen v Rogers* (1995) 182 CLR 572 at 588.

12 *Jacobsen v Rogers* (1995) 182 CLR 572 at 589 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ; see also *Regina v Richard Lipton* (2011) 82 NSWLR 123 at 148 [84] per McColl JA (with whom RS Hulme and Hislop JJ agreed).

13 *Earl v Vass* (1822) 1 Shaw's App 229, which is referred to by Viscount Simon LC in *Duncan v Camell Laird & Co* [1942] AC 624 at 630.

32. Traditionally, public interest immunity has operated as an exclusionary doctrine, and as Gibbs ACJ explained in *Sankey v Whitlam* (1978) 142 CLR 1 ("***Sankey v Whitlam***") at 38-39, "the general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it." In determining a public interest immunity claim, the Court must balance competing public interests and determine whether the public interest lies in the disclosing or withholding the document or information.[14]

33. More recently, public interest immunity has been invoked in exceptional circumstances to justify the admission of information into evidence that has not been seen by a party and his or her legal advisers. In this sense, public interest immunity operates not in an exclusionary way but in a facilitative way to permit the adduction of evidence while at the same time preserving the public interest by superimposing protections around that evidence. For example, in *Jarvie,* the Court relied upon public interest immunity to make an order that a witness give evidence under a pseudonym. Brookings J (with whom Southwell and Teague JJ agreed) said at 94-95:

> "Confusion has been caused by the suggestion in argument that a source must be found for a power in a magistrate conducting committal proceedings to order that a witness be at liberty to give evidence under a pseudonym or to make some similar order. Once it is appreciated that the question raised is one of public interest immunity, it is seen that the magistrate must be obliged to give effect to a well-found claim to public interest immunity, and so must have jurisdiction or power to make the necessary determination by performing the necessary 'balancing exercise'".

34. In *Nicopoulos v Commissioner for Corrective Services* (2004) 148 A Crim R 74, the Court relied upon public interest immunity to accept into evidence three confidential affidavits containing intelligence material that were not disclosed to the plaintiff or his counsel. Smart AJ said at 91 [83]:

> "There is a tension between the Court having all relevant material especially if it was before the decision maker and unfairness to the party adversely affected by not being told of it so that party can respond to that evidence. In

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[14] *Sankey v Whitlam* (1978) 142 CLR 1 at 38-39.

the circumstances envisaged the public interest in maintaining the secrecy or confidentiality of the material must be compelling. Of course, circumstances may vary greatly and this will affect the balancing exercise."

35. Smart AJ was satisfied that "the Court has the power in the unusual circumstances of the present case to admit the evidence contained in the confidential affidavits and not give the plaintiff access to those affidavits and the information they contain" (at 93 [92]).[15]

10 36. To like effect, it is well-established that courts may receive confidential affidavits, or confidential portions of affidavits, in support of public interest immunity claims and like applications to protect the disclosure of information.[16] This reflects the court's obligation to hear and determine such claims and applications in a way that does not defeat the very protection they seek to invoke.

37. Contrary to the Appellant's submission at [38] that the order "represented a significant departure" from public interest immunity, it was the logical application of public interest immunity appropriate to the exceptional
20 circumstances of the case. Those exceptional circumstances were:

(a) the District Court (and on appeal the CCA) was statutorily obliged to

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15 See also *Chu v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314 at 328 per Carr and Sundberg JJ; *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241 at 274-275 [139]-[140] per the Court; *Ibrahimi & Ors v Commonwealth of Australia (No 8)* [2016] NSWSC 1539 at [9]. See also *Eastman v DPP (No 2)* (2014) 9 ACTLR 178 at [167] per the Court in the context of s.130 of the *Evidence Act 2011* (ACT). See further *R v Ngo* (2003) 57 NSWLR 55 at 68 [98].

16 *Eastman v DPP (No 2)* (2014) 9 ACTLR 178 at [162]. See also, *R v Lodhi* (2006) 65 NSWLR 573 at 578 [12]; *Kamasee v Commonwealth* [2016] VSC 492 at [38]; *Parkin v O'Sullivan* (2009) 260 ALR 503 at [8] and [23]-[30] (and cases cited there); *Young v Quinn* (1984) 4 FCR 483 at 488-489; *Arthur Stanley Smith* (1996) 86 A Crim R 308 at 310; *A-G for NSW v Stuart* (1994) 34 NSWLR 667 at 681; *Alister v R* (1984) 154 CLR 404; *Commonwealth v Northern Land Council and Another* (1993) 176 CLR 604 at 620; *Regina v Bebic* (Unreported, 27 May 1982, NSWCA, Samuels JA, Nagle CJ at CL and Cantor J) at 4-5; *Jackson v Wells* (1985) 5 FCR 296 at 307; *R v Fandakis* [2002] NSWCCA 5 at [28] and [48]; *R v Francis* (2004) 145 A Crim R 233 at [12], [14], [21] and [26]; *SBEG v Secretary, Department of Immigration* (2012) 291 ALR 281 at [11]; *Attorney-General (NSW) v Lipton* (2012) 224 A Crim R 177 at 181-182 [14]-[15]; *BUSB v The Queen* (2011) 80 NSWLR 170 at [15] and [59]; *R v Baladjam & Ors (No 29)* [2008] NSWSC 1452 at [3] and [58]; *Polley v Johnson* [2013] NSWSC 543; *Gypsy Jokers Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at 595 [180]; *Attorney-General for NSW v Nationwide News Pty Ltd* (2007) 73 NSWLR 635 at [11] and [42]-[43]; *P v D1* (2010) 202 A Crim R 40 at [24].

consider [redacted] the Appellant had [redacted] in determining her sentence;

(b) the material had been before the District Court at first instance and therefore needed to be considered by the CCA on appeal;

(c) the public interest against disclosure to the Appellant and her legal representatives was extremely high for reasons already canvassed in a confidential section of these submissions;

(d) the Appellant, who was at all times legally represented, had consented to her and her legal advisers not seeing the affidavit and the affidavit had been drafted in the terms it was on the basis of that agreement;

(e) the affidavit was prepared in order to assist the Appellant gain a sentencing discount; and

(f) the factual nature [redacted] the Appellant was of course known to her (and her counsel made submissions to the Court about that [redacted] [**CAB 42, lines 18-19**]), and, although this was not necessary, the CCA disclosed to her and her legal representatives the key evaluative component of the evidence.

38. The Appellant's reliance on *Al Rawi v Security Service* [2012] 1 AC 531 ("***Al Rawi***") is misplaced. That was a case where it was proposed that on the grounds of national security, substantial parts of the case, including pleadings and a large amount of the evidence, would be kept secret from the plaintiffs, who had commenced proceedings alleging unlawful detention in foreign countries. It is easy to see why public interest immunity could not justify such a stark result. In the circumstances of that case, the proposed confidentiality regime would entirely compromise common law principles of open justice, natural justice and the right to a fair hearing.

39. Lord Dyson, who delivered the leading judgment in *Al Rawi,* held that public interest immunity could not be developed so as to permit confidential pleadings and evidence (at 580 [46]). However, Lord Dyson did accept that public interest immunity had evolved to the extent that special advocates were sometimes used (at 582 [49]). In contrast, Lord Clarke, who was in dissent, said that public interest immunity could be developed to permit confidential evidence (at 610 [154], 611 [159]). Lord Clarke stated at 612 [164]:

> "In so far as such a development would be a development of the common law of PII, it would be no more than a further development of a process which, as Lord Bingham put it in 2000, has been taking place over the last quarter of a century."

40. In the first place, this Court is not bound by the decision in *Al Rawi.*[17] But more fundamentally, important hallmarks of the common law are its flexibility and capacity to develop. This is well encapsulated by Brennan J's observations in *Dietrich v R* (1992) 177 CLR 292 at 318-319 (footnotes omitted):

> "the genius of the common law system consists in the ability of the Courts to mould the law to correspond with the contemporary values of society. Had the Courts not kept the common law in serviceable condition throughout the centuries of its development, its rules would now be regarded as remnants of history which had escaped the shipwreck of time. In modern times, the function of the Courts in developing the common law has been freely acknowledged. ... Where a common law rule requires some expansion or modification in order to operate more fairly or efficiently, this Court will modify the rule provided no injustice is done thereby. ... And, in those exceptional cases where a rule of the common law produces a manifest injustice, this Court will change the rule so as to avoid perpetuating the injustice. ..."

41. There is no reason in principle why it should not be recognised that the common law doctrine of public interest immunity has developed such that it is not merely

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[17] This Court no longer "follow[s] decisions of the House of Lords, at the expense of our own opinions and cases decided here": *Parker v The Queen* (1963) 111 CLR 610 ("***Parker***") at 632 per Dixon CJ. In *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 24 [59], after referring to *Parker*, Gleeson CJ, Gummow, Hayne and Heydon JJ stated "[t]he separate development of the common law in Australia over the last 40 years, coupled with the considerable, and now profound, changes in the constitutional and other arrangements to which the United Kingdom is party, such as the various European and other international instruments to which it is, but Australia is not, a party, can only reinforce that view". See also *Paciocco v Australia and New Zealand Banking Group Limited* (2016) 258 CLR 525 at 539 [8] per French CJ.

exclusionary, but also, in appropriate circumstances, can be facilitative. The balancing test remains the same. The ultimate question remains the same, being where the ultimate public interest lies. The Court is always free to exclude the evidence that would in substance curtail natural justice to an unacceptable extent. That question will be factored into the balancing exercise under the rubric of the proper administration of justice. As far back as *Sankey v Whitlam*, Stephen J observed at 57 that:

> "Judicial descriptions of the general doctrine of Crown privilege must necessarily be affected by the facts of the case in hand; they cannot be applied to wholly unforeseen and quite different circumstances and used as rules of law governing those circumstances. Instead the principles upon which Crown privilege is founded and by reference to which it has operated must be applied to the very special circumstances of the present case."

Inherent and implied power

42. In any event, the impugned order could have been made in the exercise of the CCA's inherent power. The Appellant's submission at [50] that the CCA does not have inherent power should not be accepted. The CCA is the Supreme Court and is constituted by Supreme Court judges acting in their capacity as judges. The CCA is not "created" by statute. Rather, s.3 of the *Criminal Appeal Act 1912* (NSW) requires that the Supreme Court act as the CCA. Section 12 of that statute enables the CCA to exercise all of the powers of the Supreme Court. Accordingly, the CCA is able to exercise the powers of a superior court of record.[18]

43. That said, in the event that the CCA does not have an inherent power, it does have implied power, which for present purposes is co-extensive with the inherent power. A statutory court has such powers that are conferred expressly or are necessarily to be implied from the express conferral of powers.[19] In *John*

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[18] *R v Jones; R v Hili (No 2)* (2010) 79 NSWLR 143 at 145-146 [9]-[18] and [26] per Rothman J (with whom McLellan CJ at CL agreed). See also *R v WRC* (2003) 59 NSWLR 273 at 280-281 [47], [49] and [50] per Spigelman CJ.

[19] *Grassby* at 16; *John Fairfax v District Court (NSW)* (2004) 61 NSWLR 344 ("***District Court (NSW)***") at 357-358 [45]-[49]; *BUSB v The Queen* (2011) 80 NSWLR 70 ("***BUSB***") at 175-177 [24]-[41].

Fairfax Group Pty Ltd (recs and mgrs apptd) v Local Court (NSW) (1991) 26 NSWLR 131 orders were made that the names and details of victims as well as details of the charges not be published. These orders were said to be a product of implied power. At 161, Mahoney JA explained that "the basis of the implication is that if the kind of order proposed is not made, the result will be - or at least will be assumed to be - that particular consequences will flow, that those consequences are unacceptable, and that therefore the power to make orders which will prevent them is to be implied as necessary to the proper function of the court".[20]

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44. In *Byrnes v The Queen* (1999) 199 CLR 1 at [32], Gaudron, McHugh, Gummow and Callinan JJ referred to *Grassby v The Queen* (1989) 168 CLR 1 ("***Grassby***") and *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 ("***Pelechowski***") in support of the proposition that "a grant of power [to the District Court] carries with it everything necessary for its exercise".[21] Their Honours also approved (see footnote 50) a passage from *Pelechowski*,[22] in which Gaudron, Gummow and Callinan JJ said that "[i]n this setting, the term 'necessary' does not have the meaning of 'essential'; rather it is to be 'subject to the touchstone of reasonableness'".

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45. In a court of limited jurisdiction it may be said that a "double-necessity" test applies. As stated by Spigelman CJ in *District Court (NSW)* at 356 [38] (emphasis in original):

> "Much of the relevant case law on non-publication orders is concerned with courts which have an inherent jurisdiction. In such a case a test of necessity is applied to the *exercise* of the power to make an order, as distinct from determining the *existence* of the power. In the context of an implied power, the two levels are analytically distinct but, as a practical matter, there will

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20 This statement was adopted by Bathurst CJ in considering the meaning of '*necessary*' in s 8 of the *Court Suppression and Non Publication Orders Act 2010* (NSW), in *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at 56-57 [8]. Also in that context, Bathurst CJ considered the test of necessity should not be given a narrow construction. See also *Hamzy v R* [2013] NSWCCA 156 at [39]-[40].

21 See also *BUSB* at 175-176 [25]-[33] per Spigelman CJ.

22 *Pelechowski* was applied by the Court of Appeal in *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 63 NSWLR 512 at 523 in the context of considering the Local Court's power to permit access to its court file.

rarely be any need to differentiate between the two levels. Cases which apply a test of necessity to the exercise of an inherent jurisdiction or of an express statutory power will guide the determination of whether a power arises by way of implication for a statutory court."

46. It has long been accepted that courts and tribunals of limited jurisdiction in New South Wales (and in other States) have an implied power to make orders prohibiting the publication of information and evidence where such orders are necessary to secure the proper administration of justice, including where such orders are necessary to protect confidential sources of information.[23]

47. Whether such an approach is to be adopted depends upon whether "it is necessary to do so to secure the proper administration of justice".[24] The concept of the administration of justice "is not confined to the determination of the particular case".[25] Rather, it is a broad concept that directs attention to the "consequences not just for the present case but for future cases".[26] In *Attorney-General for NSW v Nationwide News Pty Ltd* (2007) 73 NSWLR 635 at 642 [38], Hodgson JA (with whom Hislop and Latham JJ agreed) was "prepared to hold that the 'administration of justice' can extend to the investigation and detection of crime, and the obtaining of evidence against suspects".

48. While it is now somewhat commonplace for statutes to make provision for the receipt of confidential evidence,[27] such frameworks should not be seen to limit the powers of the court, in the exercise of implied or inherent jurisdiction, to make orders such as those made by the District Court and the CCA in the present proceedings. Examples include[28] closing the court,[29] using ciphers or

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23 *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 477A-B; *R v Kwok* (2005) 64 NSWLR 335 at [12]-[14]; *DPP v Arthur Stanley Smith* (1996) 86 A Crim R 308.

24 *Commissioner of Police (NSW) v Nationwide News Pty Ltd* (2007) 70 NSWLR 643 at 648 [32].

25 *BUSB* at [28].

26 *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at 66 [48]. See also *P v D1* (2010) 202 A Crim R 40 at 48 [20]; *Collard v Western Australia [No 3]* [2013] WASC 70 at [10].

27 See the legislation considered in, eg, *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR38; *Wainohu v New South Wales* (2011) 243 CLR 181; *Totani v South Australia* (2010) 242 CLR 1.

28 A useful analysis of the types of orders that may be made appears in *J v L & A Services (No 2)* [1995] 2 Qd R 10 at 44.

29 See eg, *R v Lodhi* (2006) 65 NSWLR 573.

pseudonyms,[30] screening witnesses,[31] and making non-publication orders.[32]

49. In the context of trade secrets, the inherent and implied powers have also been invoked to make "protective orders".[33] In *Portal Software v Bodsworth* [2005] NSWSC 1115 at [45], Brereton J found that the effect of the trade secrets authorities was "best encapsulated" by the judgment of Aldous J in *Roussel Uclaf v Imperial Chemicals plc* [1990] FSR 25 at 29-30:

> "Each case has to be decided on its own facts and the broad principle must be that the Court has the task of deciding how justice can be achieved taking into account the rights and needs of the parties. The object to be achieved is that the applicant should have as full a degree of disclosure as would be consistent with adequate protection of the secret. In so doing, the Court will be careful not to expose a party to any unnecessary risk of its trade secrets leaking to or being used by competitors. What is necessary or unnecessary will depend upon the nature of the secret, the position of the parties and the extent of the disclosure ordered."

The Suppression Act

50. The 28 June 2017 Order could also be supported by s.8 of the Suppression Act (although it is accepted that the terms of the order did not comply with the requirements of s.8(2) of that statute in terms of specifying the grounds on which the order was made).[34]

51. Section 3 of the Suppression Act defines a suppression order as "an order that prohibits or restricts the disclosure of information (by publication or otherwise)". Section 7 expressly confirms that a suppression order may "prohibit or restrict the publication or other disclosure" (emphasis added) of "information that comprises evidence ... given in proceedings before the court." It could not be clearer that a suppression order can restrict the disclosure of evidence in a manner other than those which involve publication, that is, dissemination of

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30 See eg, *Arthur Stanley Smith* (1996) 86 A Crim R 308.
31 See eg, *R v Ngo* (2003) 57 NSWLR 55.
32 See eg, *R v Lodhi* (2006) 65 NSWLR 573.
33 See the discussion in *Portal Software v Bodsworth* [2005] NSWSC 1115 at [41]-[45].
34 The Suppression Act enacts the model law endorsed by the Standing Committee of Attorneys-General Working Group in May 2010. The Commonwealth implemented the model through Schedule 2 of the *Access to Justice (Federal Jurisdiction) Amendment Act 2011* (Cth).

information to the "public".[35] And in this regard, publication is to be construed broadly.[36] That is, a suppression order can restrict the disclosure of evidence to a party.[37]

52. In any event, the very idea of suppression involves a withholding from. The Macquarie Dictionary defines "suppression" as "the act of suppressing or the state of being suppressed".[38] Viewed that way, "suppression is the noun form of the verb "suppress". The Macquarie Dictionary defines "suppress"[39] as "to withhold from disclosure or publication (truth, evidence, a book, names, etc)".[40]

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53. A court may make a suppression order on one or more of the grounds set out in s.8 of the Suppression Act. Each of those imports a test of "necessity". What is necessary in any given case will depend on the surrounding context, including "the particular grounds in s.8 of the Suppression Orders Act relied upon and the factual circumstances said to give rise to the order".[41]

No procedural unfairness in the circumstances

54. Any claim of procedural unfairness must be evaluated against the circumstance
20 that the Appellant elected to receive a more fulsome affidavit [redacted]. This was an informed choice with the benefit of legal advice. Indeed, the Appellant

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35 Section 3 of the Suppression Act provides that "publish" means "disseminate or provide access to the public or a section of the public by any means, including by:
(a) publication in a book, newspaper, magazine or other written publication, or
(b) broadcast by radio or television, or
(c) public exhibition, or
(d) broadcast or publication by means of the Internet."

36 *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at [43] per Basten JA.

37 For example see, *Cyclopet Pty Ltd v Australian Nuclear Science and Technology Org* [2012] FCA 1326 at [7]-[8]; *R v Quami & Ors (No 9)* [2016] NSWSC 171.

38 Macquarie Dictionary, Online Edition, 2019, accessed 27 June 2019.

39 Macquarie Dictionary, Online Edition, 2019, accessed 27 June 2019, definition 4.

40 Where a phrase in a statutory defined term has an ordinary meaning, it is generally to be approached "bearing in mind and coloured by the normal meaning of the phrase": *Heffernan v Comcare* (2014) 218 FCR 1 at 9-10 [46] per Allsop CJ. Moreover, "a definition will not usually be construed without regard to the normal meaning of the word defined": *Hastings Co-operative Ltd v Port Macquarie Hastings Council* (2009) 171 LGERA 152 at 157 [17] (Basten JA; Allsop P agreeing at 154 [1] and Handley AJA agreeing at 162 [41]).

41 *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52 at 56-57 [8] per Bathurst CJ, at 65 [46] per Basten JA.

later requested that the CCA be provided with a second affidavit [redacted].

55. In any event, a fair trial does not mean a perfect trial "free from possible detriment or disadvantage of any kind or degree to the accused".[42] The circumstances identified in paragraph 37 above illustrate there was no denial of procedural fairness here. The observations of Gageler J in *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 109 [192] are apposite:

> "There are then cases, of which claims for the protection of some intellectual property or for the determination of client legal privilege or public interest immunity are examples, where the usual practices of courts are adjusted to protect confidentiality at the heart of a right or interest in issue which would be destroyed were confidential information to be disclosed in the curial process. There are also instances in which specific evidence given to a court is withheld from a party to protect commercial confidentiality, to protect the safety of a witness or an informant, or for some other reason sufficiently supported by the interests of justice. All are examples of modifications or adjustments to ordinary procedures, invariably within an overall process that, viewed in its entirety, entails procedural fairness."

56. To the extent that the Appellant appears to suggest that the Crown and the Commissioner acted in concert in this matter to deny procedural fairness, the following is noted. At common law, a public interest immunity claim may be made by any person, including a person not party to the proceedings.[43] As a matter of practice, the claim is ordinarily made by the executive agency which is custodian of the information. In all cases, it is the duty of the court to protect the information and not the "privilege" of any executive agency to withhold the information.

57. In the circumstances of the Crown's appeal to the CCA, it fell to the Commissioner to make an application for an order in relation to the non-disclosure of Exhibit C. The order was necessary to protect an undoubtedly important public interest, [redacted].

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42 *Jarvie* at 90 per Brooking J; approved in *R v Ngo* (2003) 57 NSWLR 55 at 68 [99]. See also *Jago v District Court* (1989) 168 CLR 23.

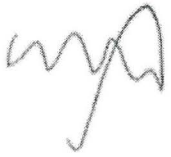
43 *Young v Quin* (1985) 4 FCR 483 at 485 per Bowen CJ; *Attorney General for NSW v Stuart* (1994) 34 NSWLR 667 at 690.

58. The Crown, although another emanation of "the executive", had a decidedly different role to play in the sentencing proceedings. This much was evident from the approach taken by the Crown in the CCA. The Crown commenced its sentence appeal prior to the Commissioner making an application in respect of Exhibit C.

Part VI: Oral presentation

10 59. The Second Respondent estimates that up to 1.5 hours will be required for the Second Respondent's argument.

Dated **28 June 2019**



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