

**IN THE HIGH COURT OF AUSTRALIA  
ADELAIDE REGISTRY**

**No. A5 of 2015**

**BETWEEN:**

**POLICE**  
Appellant

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**AND**



**JASON ANDREW DUNSTALL**  
Respondent

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**ANNOTATED WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL  
FOR WESTERN AUSTRALIA (INTERVENING)**

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**PART I: SUITABILITY FOR PUBLICATION**

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

**PART II: BASIS OF INTERVENTION**

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2. Section 78A of the *Judiciary Act 1903* (Cth) in support of neither party.

**PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED**

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3. Not applicable.

**PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION**

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4. See Part VII of the Appellant's submissions.

10 **PART V: SUBMISSIONS**

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5. The Attorney General for Western Australia intervenes following receipt of a notice in terms of s.78B of the *Judiciary Act 1903* (Cth) on 23 April 2015.

6. The matter the subject of the notice need not, with respect, be considered.

7. Both parties to the appeal accept the existence of the legal rule providing for 'residual discretion' to exclude lawfully obtained non-confessional evidence in a criminal trial where its admission would result in an unfair trial. This common ground is made plain at [2] of the Respondent's submissions.

- 20 8. Whether this rule is an essential incident of judicial power; or whether it doctrinally arises from a requirement for a fair trial, which is entrenched in Chapter III, does not arise. The assertion in the 78B notice that the "proper ambit and operation of" the residual discretion requires consideration of whether the source and rationale of the legal rule is entrenched in the *Constitution*, ought to be rejected. It is unnecessary to consider the question, in the sense of the term necessity explained by Hayne, Kiefel and Bell JJ in *ICM Agriculture Pty Ltd v Commonwealth*<sup>1</sup>.

9. Identification of phenomena that are inherent aspects of judicial power, such that their infraction invalidates legislation or affects the development of common law rules, involves large issues that ought only be considered when necessary for the decision.

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<sup>1</sup> *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51; (2009) 240 CLR 140 at 199 [141], citing *Chief Executive Officer of Customs v El Hajje* [2005] HCA 35; (2005) 224 CLR 159 at 171 [28]; *Lambert v Weichelt* (1954) 28 ALJ 282 at 283; *Cheng v The Queen* [2000] HCA 53; (2000) 203 CLR 248 at 270 [58]; *Re Patterson; Ex parte Taylor* [2001] HCA 51; (2001) 207 CLR 391 at 473-474 [249]-[252]; *BHP Billiton Ltd v Schultz* [2004] HCA 61; (2004) 221 CLR 400 at 443 [94] and 468 [177]. See also *Wurridjal v The Commonwealth* [2009] HCA 2; (2009) 237 CLR 309 at 437 [355]; *Williams v the Commonwealth* [2014] HCA 23; (2014) 252 CLR 416 at 457 [36].

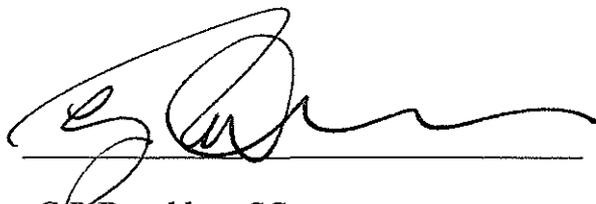
10. In *Magaming v The Queen*<sup>2</sup> French CJ, Hayne, Crennan, Kiefel and Bell JJ rejected contentions as to the 'entrenchment' in Ch III of various notions, incompatibility with which invalidated particular legislation. Among such notions were; prescription of a mandatory minimum penalty for an aggravated offence where there is no mandatory minimum penalty prescribed for the simple offence<sup>3</sup>; reasonable proportionality between sentence and the end of general deterrence<sup>4</sup> and prescription of a mandatory minimum penalty *simpliciter*<sup>5</sup>. In *Kuczborski v Queensland*<sup>6</sup> the Court declined the invitation to consider (or re-consider) whether the notion of 'equality before the law' was "fundamental to the judicial process", thereby entrenched into the *Constitution* such that legislation that (allegedly) provided for different treatment of like persons or like treatment of different persons, was invalid<sup>7</sup>. In *NuCoal Resources Limited v New South Wales*<sup>8</sup> the Court declined an invitation to consider a similar type contention in respect of the notion of 'the rule of law'.
11. Having regard to the common ground of the parties as to the legal rule, it is unnecessary to consider the question the subject of the 78B notice.

**PART VI: LENGTH OF ORAL ARGUMENT**

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12. It is not anticipated that oral submissions will be made for the Attorney General for Western Australia.

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<sup>2</sup> *Magaming v The Queen* [2013] HCA 40; 252 CLR 381.

<sup>3</sup> *Magaming v The Queen* [2013] HCA 40; 252 CLR 381 at 396 [45].

<sup>4</sup> *Magaming v The Queen* [2013] HCA 40; 252 CLR 381 at 396 [46].

<sup>5</sup> *Magaming v The Queen* [2013] HCA 40; 252 CLR 381 at 396 [46].

<sup>6</sup> *Kuczborski v Queensland* [2014] HCA 46; (2014) 89 ALJR 59.

<sup>7</sup> The contention derived from *dicta* in *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455.

<sup>8</sup> *NuCoal Resources Limited v New South Wales* [2015] HCA 13.