IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **NO S29 OF 2013**

On appeal from
the Court of Appeal of New South Wales

BETWEEN: **JASON LEE (AKA DO YOUNG LEE)**
First Appellant

SEONG WON LEE
Second Appellant

AND: **NEW SOUTH WALES CRIME COMMISSION**
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

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PART I FORM OF SUBMISSIONS

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

PART II BASIS OF INTERVENTION

2. The Attorney-General of the Commonwealth (**Commonwealth**) intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the validity of s 31D of the *Criminal Assets Recovery Act 1990* (NSW) (**CAR Act or Act**).

PART III LEAVE FOR INTERVENTION

3. Not applicable.

PART IV LEGISLATIVE PROVISIONS

4. The Commonwealth adopts the appellants' and respondent's statements of relevant legislative provisions.

PART V ARGUMENT

A DIFFICULTIES IN THE FRAMING OF THE ISSUES

5. Three things need to be said about the case run by the appellants below, the construction issues that arise on the appeal and the way in which the constitutional issue is contingently framed by the appellants.

6. *First*, as correctly understood by Meagher JA in the Court of Appeal at [100], the gravamen of the appellants' case for exercising the discretion in s 31D against making an examination order involved two propositions only: there were outstanding charges against the appellants and there was a risk that answers given in the examination *might* be the source of information used in some way in relation to the subsequent trials. The appellants did not seek to identify the risk any more specifically than that.

7. The construction issue as correctly framed by Meagher JA at [101] (and the other reasons do not significantly differ save in choice of expression) was whether, in the context of the whole of the CAR Act, Parliament had placed it outside the discretion of the Court to consider whether the mere existence of some risk of this character, with nothing else proven, was a reason against making an order for examination.

8. The answer given to this question of construction by the Court of Appeal was that the CAR Act did not leave *this* choice to the Court; the combined effect of s 13A, the then s 62, s 63 and the court's inherent jurisdiction being that, if any

such risk took more specific form, then (within the limits permitted by Parliament) it could be dealt with by the court at the stage of the examination, including by non-publication orders; together with such powers as the court would have in the criminal trial itself.

9. The construction question which the appellants now frame at AS [2], in order to found the contingent constitutional question at AS [3], does not do justice to the reasons of the Court of Appeal, nor recognise the limitations in the case which the appellants ran below. The Court of Appeal was not asked to find, and did not find, that the discretion under s 31D was so confined that the court could *never* in any circumstance have regard to the capacity of the order to prejudice the fair trial of the examinee. Nor would that be the correct construction.

10. Two examples, one trite and one hopefully extreme, will demonstrate this. First, the Court could and would decline an order for examination if it were to occur at a time that precluded the examinee from being present at, or conducting necessary preparation for, the actual criminal trial.[1] Secondly, the Court could and would decline an order for examination if there were evidence that the primary or actuating purpose of the examination was to obtain answers to pass to the prosecution to give it an advantage over the accused at such a trial.

11. Accordingly, it would be open to this Court to decide this appeal on the narrow basis that the answer to the question at AS[2] is "no" and to the question at AS[3] is "does not arise".

12. *Secondly*, and more consistent with the case as run, if the construction issue were framed in the narrower sense underlined in [7] above, the contingent constitutional issue would take the same narrower shape. That is, the question would be the narrow one: whether under Ch III it would be an impairment of the institutional integrity of the Supreme Court for Parliament to confer on the court the power to make the order for examination with the discretion in this particular circumstance confined as indicated in [7] above. Any such question would need to recognise three matters: first, the legislative choice (which the Commonwealth would submit is constitutionally permissible) to abrogate the privilege against self-incrimination while providing certain replacement protections; second, that choice occurs within the context of an unchallenged ability of Parliament to create the new civil matters in the CAR Act; and third, the range of powers remaining open to the court at the subsequent stage of the examination, and later at any criminal trial itself, to be exercised consistent with that legislative choice. That narrower constitutional question if it arises should be answered "no".

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1 As noted by Beazley JA in the Court of Appeal: *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [10].

13. *Thirdly*, while the appellants and the respondent join issue within the framework of principles associated with *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (***Kable***), it should be recognised that:

13.1. the power to make an examination order pursuant to s 31D, which depends on other proceedings under the CAR Act being on foot, is at least incidental to the exercise of judicial power;[2]

13.2. in the present case this Court is exercising jurisdiction under s 73 of the Constitution in respect of an appeal from such an exercise of judicial power;[3]

13.3. the institutional interest which the appellants seek to invoke – the fairness of a current or pending criminal trial – is one which would exist equally for a federal court as a state court;

13.4. accordingly, it would be open to dispose of any constitutional question arising in this appeal by focusing on the requirements of Ch III as they apply to a Commonwealth law providing for the exercise of Commonwealth judicial power by federal or State courts, rather than via recourse to the implications drawn in *Kable* with respect to State laws and State courts alone;[4]

13.5. section 31D would be valid as a Commonwealth law.

14. As there may be debate as to the correct framing of the constitutional question, should it arise, section B of these submissions will summarise, and section C of these submissions will then develop, the range of propositions put by the Commonwealth on the scope of the institutional integrity principle, with particular, but not exclusive, reference to the line of authority beginning with *Kable*. Section D will turn specifically to s 31D of the Act.

B SUMMARY OF PROPOSITIONS ON INSTITUTIONAL INTEGRITY

15. In summary, the Commonwealth submits that:

15.1. the principle associated with *Kable* takes as its starting point the separation of powers mandated by the Constitution. That separation restricts the exercise of the judicial power of the Commonwealth to those

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2 Cf *Saraceni v Jones* (2012) 42 WAR 518.

3 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at [63] (Gaudron, Gummow and Hayne JJ).

4 Cf *Bachrach (HA) Pty Ltd v Queensland* (1998) 195 CLR 547 (***Bachrach***) at [14] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ): "If the law in question here had been a law of the Commonwealth and it would not have offended those principles, then an occasion for the application of *Kable* does not arise"; see also *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at [10] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ); *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 (***Pompano***)at [126] (Hayne, Crennan, Kiefel and Bell JJ). See also *Wainohu v New South Wales* (2011) 243 CLR 181 (***Wainohu***) at [105] (Gummow, Hayne, Crennan and Bell JJ).

bodies answering the description of "courts" identified in s 71 of the Constitution;

15.2. Chapter III of the Constitution requires that, as State courts are capable of exercising the judicial power of the Commonwealth, their institutional integrity must be maintained;

15.3. a State court's institutional integrity is impaired where legislation goes so far in its impact upon the court that it can no longer be said to exhibit the essential or defining characteristics that mark out the court from other decision-making bodies, as is evident by the use in this context of concepts of "repugnancy" and "incompatibility";

15.4. the essential or defining characteristics of a court *qua* court have as their focus the independent and impartial exercise of Commonwealth judicial power. The characteristics do not encompass the full gamut of common law principles applied by courts in the determination of disputes before them. This is so despite the fact that those principles may have been developed in order to preserve the fairness or integrity of court proceedings;

15.5. common law principles that are amenable to legislative modification without offending Ch III include the privilege against self-incrimination and associated doctrines, as well as other laws of practice and procedure, but are not limited to them;

15.6. the inherent powers of a court to prevent abuses of process and punish conduct in contempt of court do not have an immutably fixed constitutional content and are not immune from legislative modification. What is the court's process and what constitutes a contempt of court are themselves capable of change, including by legislation. The inherent powers cannot operate as an indirect means of entrenching established common law principles such as the privilege against self-incrimination;

15.7. for the same reasons, nomenclature commonly utilised in describing the purpose for which a court's inherent powers are applied – *viz* "fairness", "proper administration of justice", "integrity of process" – do not themselves operate as yardsticks of constitutional validity;

15.8. the Court should not accept so much of the appellants' submissions as seek to constitutionalise within Ch III various statements made in *Hammond v Commonwealth* (1984) 152 CLR 188 (***Hammond***).

C DETAILED SUBMISSIONS ON INSTITUTIONAL INTEGRITY PRINCIPLE

Chapter III and the judicial power of the Commonwealth

16. *Kable* takes as a key starting point the principles applicable to federal courts created under s 71 of the Constitution and to the exercise by those courts of the

judicial power of the Commonwealth.[5] Those principles are grounded in the separation of legislative, executive and judicial power under the Commonwealth Constitution.[6] At the federal level, that separation prevents:[7] (a) Commonwealth judicial power from being conferred other than on courts referred to in s 71 of the Constitution;[8] and (b) those courts from being invested by the Commonwealth Parliament with any power that is not within or incidental to Commonwealth judicial power.[9]

17. These principles both inform and delimit the implication to be drawn from Ch III as it applies to State courts. In particular, they direct attention to the preservation of *institutions* in which Commonwealth judicial power may be reposed. This should be sharply distinguished from any claimed constitutional preservation of the body of *principles* or *processes* traditionally applied by State courts in the exercise of the judicial power vested in them.

Chapter III requires continued institutional integrity of State courts

18. When the principle associated with *Kable* is sought to be invoked, the "central question" for the Court is whether the Act under challenge is repugnant to, or incompatible with, the continued institutional integrity of the applicable State court.[10] The focus on institutional integrity arises by reason of the position which State courts capable of exercising Commonwealth judicial power enjoy under Ch III of the Constitution. Because that Chapter contemplates the exercise by these courts of the judicial power of the Commonwealth, their institutional integrity must not be impaired such that they can no longer act as repositories of federal jurisdiction.[11]

19. The institutional integrity of a court is impaired where the body is so altered by legislation that it no longer exhibits the characteristics that set courts apart from other decision-making bodies.[12] Not all the characteristics of a court are protected in this way. Rather, the focus of Ch III is on those characteristics which are "essential" or "defining" in nature.[13] An identification of the essential

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5 *Bachrach* (1998) 195 CLR 547 at [14] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

6 Eg *Kable* (1996) 189 CLR 51 at 66 (Brennan CJ); see also *Attorney-General of the Commonwealth v The Queen* (1957) 95 CLR 529 at 540.

7 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2013] HCA 5 (***TCL***) at [26] (French CJ and Gageler J).

8 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

9 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

10 *Pompano* at [138] (Hayne, Crennan, Kiefel and Bell JJ).

11 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 (***Fardon***) at [15] (Gleeson CJ), [100] – [105] (Gummow J); *Pompano* at [67] (French CJ), [123] (Hayne, Crennan, Kiefel and Bell JJ).

12 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 (***Forge***) at [63] (Gummow, Hayne and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1 (***Totani***) at [70] (French CJ), [443] (Kiefel J); *Pompano* at [67] (French CJ).

13 *Forge* at [63] (Gummow, Hayne and Crennan JJ); *Totani* at [70] (French CJ), [443] (Kiefel J); *Pompano* at [67] (French CJ).

or defining characteristics of a court serves to mark out the limits that Ch III imposes on the functions which legislatures may confer upon State courts.[14]

Institutional integrity is not a mechanism for constitutionalising the body of common law principles traditionally applied by courts in the exercise of judicial power

20. While accepting that the essential or defining characteristics of a court are not capable of exhaustive identification,[15] they have been said to include:[16] (a) the reality and appearance of decisional independence and impartiality; (b) the application of rules of procedural fairness; (c) adherence as a general rule to the open court principle; and (d) the provision of reasons for the court's decisions (at least in non-jury trials).

21. Each of these characteristics reflects the independence and impartiality required to be enjoyed by all courts in the Australian judicial system.[17] Moreover, they reflect what are properly described as the "general features" of the judicial process identified by Gaudron J in *Re Nolan; ex parte Young*.[18]

> open and public enquiry (subject to limited exceptions), the application of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts.

22. It would be an error, however, to equate the essential or defining characteristics of a court *qua* court with the gamut of *principles* traditionally developed and applied by courts in the exercise of judicial power. Put another way, the focus of the institutional integrity principle is on the "attributes"[19] or functions *of* a court, not the content of the principles applied *by* the court in the carrying out of its functions.

23. Common law rules of evidence are a relevant illustration of the distinction drawn in the preceding paragraph. For example, the fact that hearsay evidence is not admissible in many but not all circumstances at common law is not a characteristic of a court, let alone a defining or essential characteristic, but rather a principle traditionally applied by courts. As a result, the principle is amenable to legislative abrogation or modification without offending Ch III.[20]

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14 *Pompano* at [68] (French CJ); *Fardon* at [15] (Gleeson CJ).

15 *Forge* at [64] (Gummow, Hayne and Crennan JJ); *Pompano* at [124] (Hayne, Crennan, Kiefel and Bell JJ), [188] (Gageler J).

16 *Pompano* at [67] (French CJ) and the authorities cited therein.

17 Cf *Pompano* at [125] (Hayne, Crennan, Kiefel and Bell JJ).

18 (1991) 172 CLR 460 at 496; see also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Pompano* at [142] (Hayne, Crennan, Kiefel and Bell JJ).

19 Cf *Pompano* at [41], [68] (French CJ), [156] (Hayne, Crennan, Kiefel and Bell JJ).

20 *Nicholas v The Queen* (1998) 193 CLR 173 (***Nicholas***) at [236] (Hayne J); see also *Williams v Ah On* (1926) 39 CLR 95 at 122 (Higgins J). The *Evidence Act 1995* (Cth) is a clear example of statutory modification of common law rules of evidence; see also *Native Title Act 1993* (Cth), s 82(1), which

24. Similarly, it cannot be said that the privilege against self-incrimination is a characteristic of a court, let alone a defining or essential characteristic. As a result, it too is liable to legislative abrogation or modification without offending Ch III.

25. Thus, in *Mortimer v Brown* (1970) 122 CLR 493 (***Mortimer***), the Court accepted that Parliament may authorise the compulsory questioning of an examinee, even though the legislation in issue expressly permitted the examinee's answers to be "used in evidence in any legal proceedings against him".[21] Barwick CJ observed (at 495):[22]

> The Parliament has made it abundantly clear that the so-called right to be silent which the common law sought to protect was not to be available to the examinee ... [t]he common law cannot maintain a right in the citizen to refuse to make incriminating answers in the face of a statute which by its expression clearly intends, as does the present, that all questions allowed to be put shall be answered.

26. In *Sorby v Commonwealth* (1983) 152 CLR 281 (***Sorby***) at 308, Mason, Wilson and Dawson JJ said, with express reference to Ch III:[23]

> [T]he privilege against self-incrimination is not an integral element in the exercise of the judicial power reposed in the courts by Ch III of the Constitution. ... No doubt, like other features of our system of criminal justice, it has a long history and confers a very valuable protection. But it is quite another thing to say that it is an immutable characteristic of the exercise of judicial power.

27. In *Hamilton v Oades* (1989) 166 CLR 486 (***Hamilton***), the Court accepted that Parliament may also authorise compulsory questioning of a person both before and after charges had been laid against them.[24] The fact that such legislation might place an examinee in a real and appreciable danger of conviction did not render the legislation invalid.[25] So too, the fact that an examination might "amount to an interference with the administration of criminal justice" was not to the point.[26] This was because Parliament was able to "interfere" with established common law protections.[27] The appellants do not challenge the correctness of the decisions in *Mortimer*, *Sorby* and *Hamilton* in these proceedings, although they seek to place some limits on the principles for which they stand.[28]

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provides that the Federal Court is bound by the rules of evidence "except to the extent that the Court otherwise orders".

21 The legislation is set out at (1970) 122 CLR at 498.

22 Approved in *Hamilton* at 515 (Toohey J); see also *Rees v Kratzmann* (1965) 114 CLR 63 at 80 (Windeyer J): "If the legislature thinks that in this field the public interest overcomes some of the common law's traditional consideration for the individual, then effect must be given to the statute which embodies this policy."

23 See also at 298-299 (Gibbs CJ).

24 At 508 (Dawson J), 516-7 (Toohey J); see also at 499 (Mason CJ).

25 *Hamilton* at 496-7 (Mason CJ); see also *Sorby* at 294 (Gibbs CJ).

26 *Hamilton* at 494 (Mason CJ).

27 *Hamilton* at 494 (Mason CJ).

28 AS at [64].

28. An analogous approach has been adopted with respect to other common law principles of practice and procedure.[29] Parliament may alter standards of proof in civil and criminal proceedings,[30] and reverse the onus of proof, without offending Ch III.[31] Parliament may also abrogate or modify common law principles governing the discretionary exclusion of evidence sought to be tendered before a court,[32] the need for corroboration of the evidence of a victim of a crime,[33] and the availability of legal professional privilege.[34]

29. That Parliament has the ability to abrogate or modify common law principles of practice and procedure (including evidence) is unsurprising. Those principles are instruments of investigation, not ends in themselves.[35] More generally, the legislative ability to abrogate or modify common law principles exists because "very few common law rules were the manifestation of some fundamental characteristic of judicial power."[36]

30. Importantly for the present case, the mere fact that a common law principle has been developed in an effort to promote "fairness" or maintain the "integrity of the curial process" does not affect its amenability to legislative abrogation or modification.[37] Nor does the fact that the rule might confer a valuable protection on one or more parties to proceedings;[38] or might historically have been seen as desirable to protect the proper administration of justice.[39] Rather, what must be demonstrated is that the common law principle inures to the court *qua* court as a defining or essential characteristic of that body.

31. There are further difficulties in any attempt to constitutionalise common law principles traditionally applied by judges in the determination of civil and criminal proceedings. First, many principles that are characterised as established principles of the common law are in fact the result of extensive

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29 See eg *Nicholas* at [20] (Brennan CJ); *Williamson v Ah On* (1926) 39 CLR 95 at 122 (Higgins J), 127 (Rich and Starke JJ).

30 *Thomas v Mowbray* (2007) 233 CLR 307 at [113] (Gummow and Crennan J).

31 *Nicholas* at [24] (Brennan CJ), [123] (McHugh J), [152] – [154] (Gummow J); *Milicevic v Campbell* (1975) 132 CLR 307 at 316-7 (Gibbs J), 318-319 (Mason J), 321 (Jacobs J); *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254 at 263 (Dixon J).

32 *Nicholas* (1998) 193 CLR 173.

33 *Rodway v The Queen* (1990) 169 CLR 515 at 521; *Nicholas* at [25] (Brennan CJ).

34 Cf *Daniels Corporation v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

35 John Wigmore, "New Trials for Erroneous Rulings on Evidence; A Practical Problem for American Justice" (1903) 3 *Colombia Law Review* 433 at 438; *Nicholas* at [23] (Brennan CJ): "The rules of evidence have traditionally been recognised as being an appropriate subject of statutory prescription."

36 *TCL* at [35] (French CJ and Gageler J).

37 *Nicholas* at [236] (Hayne J).

38 *Sorby* at 306-308 (Mason, Wilson and Dawson JJ).

39 *Hamilton* at 494 (Mason CJ); *Nicholas* at [37] (Brennan CJ) (read with the reference at [33] to *Pollard v The Queen* (1992) 176 CLR 177 at 202-3).

changes made by English statutes in the 18th and 19th centuries.[40] Secondly, common law principles have been applied by courts with varying degrees of enthusiasm in different criminal and civil jurisdictions. Thirdly, the mere status of a rule as the product of the common law does not mean that it is somehow deserving of protection: "[n]ot every common law rule reflected well on common law courts."[41] The privilege against self-incrimination is an example of a principle affected, in one way or other, by each of these historical experiences.[42]

32. For the reasons set out above, the mere fact that Commonwealth or State legislation abrogates or modifies particular common law rules utilised in the conduct of civil and criminal trials – even in ways that are potentially very significant and far-reaching – will not, without more, offend the institutional integrity principle.[43]

The content of the courts' inherent powers may be modified by Parliament

33. In the present case, the appellants place particular reliance on what they contend is a defining characteristic of a court being "the ability to protect the integrity of its own processes".[44] The appellants proceed to equate that characteristic with the need to "ensure": (a) the "fairness" of current or pending criminal trials; and (which may the same thing) (b) the determination of guilt or innocence by means of a "fair trial according to law".[45] The appellants' submissions overstate the true position in several important respects.

34. First, there is a danger in seeking to identify essential or defining characteristics of a court at too high a level of generality. To do so may be to mask assumptions about the constitutional immutability of what are really non-protected *principles* or *processes*, as opposed to protected attributes or functions.

35. Accordingly, to frame an essential or defining characteristic of a court in terms of "the ability to protect the integrity of its processes" only conceals questions as to *which processes* and *what abilities*. If one descends to the necessary level of greater specificity, the Court has, however, suggested without final determination that two elements of the inherent power may enjoy that description – namely, the power to stay proceedings constituting an abuse of process[46] and the associated power to punish conduct that constitutes a

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40 *Nicholas* at [143] (Gummow J).

41 *TCL* at [35] (French CJ and Gageler J).

42 As recognised by Windeyer J in *Rees v Kratzmann* (1965) 114 CLR 63 at 80 and McHugh J in *Azzopardi v The Queen* (2001) 205 CLR 50 at [119] – [124].

43 *Fardon* (2004) 223 CLR 575 at [41] (McHugh J).

44 AS at [62].

45 AS at [62].

46 *Dupas v The Queen* (2010) 241 CLR 237 at [15] (cited in *Hogan v Hinch* (2011) 243 CLR 506 at [86] (Gummow, Hayne, Heydon, Kiefel and Bell JJ)). The point was not finally determined in that case.

contempt of court.[47] (That should not be taken to mean that all aspects of those powers must be essential or defining characteristics of every court on which Commonwealth judicial power may be conferred.[48])

36. Let it be accepted for the purposes of this appeal that Ch III would prohibit a statute which in terms said a court is not permitted to stay proceedings which are an abuse of its process, or a statute which said that a court has no power to punish conduct which is a contempt of the court. However, it is wrong to use this as a premise to constitutionalise the general language used to describe the circumstances in which these powers can be exercised (*viz* "integrity of process", "fairness", "proper administration of justice") and to proceed from there to the position that Parliament is unable to enact legislation which might be argued to in any way impinge upon those concepts.[49]

37. It is also wrong to proceed, as the appellants appear to do,[50] on the basis that the Court's inherent powers to control abuses of process and punish contempts have an immutably fixed content. Rather, as is the position with procedural fairness,[51] the content of those powers may properly be informed by legislative choices made in areas to which the twin powers have potential application. As French CJ recognised in *Pompano*, "the defining characteristics of courts are not and cannot be absolutes."[52]

38. The decisions of the Court in *Hamilton* and *Nicholas* make these propositions good.

39. In *Hamilton*, the Court rejected the contention that the inherent power of a court to protect its processes permitted the Court to act in the face of a statute and stay an examination on the ground that it would incriminate the person being examined. According to Mason CJ, "[t]he inherent power is not a charter which enables a court to turn its back on the statute."[53] To similar effect was Dawson J's recognition that the inherent power of the Supreme Court to protect its own process is "subject to validly enacted legislation and contains no warrant

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Compare *Campbell's Cash & Carry v Fostif Pty Ltd* (2006) 229 CLR 386 at 468 [205] (Kirby J) (who declined to constitutionalise remedies for abuse of process).

47 *Re Colina; ex parte Torney* (1999) 200 CLR 386 at [15] – [25] (Gleeson CJ and Gummow J), at [113] (Hayne J); *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 (***Batistatos***) at [13] (Gleeson CJ, Gummow, Hayne and Crennan JJ).;.

48 For example, at common law, inferior courts have no power to deal with contempts other than in the face of the court: Campbell, E 1997 'Inferior and Superior Courts and Courts of Record' 6 *Journal of Judicial Administration* 249, 251-252.

49 Cf AS at [66].

50 AS at [61], [62].

51 *Pompano* at [68] (French CJ), at [156] (Hayne, Crennan, Kiefel and Bell JJ), at [192] (Gageler J).

52 [2013] HCA 7 at [68].

53 (1989) 166 CLR 486 at 499.

for the disregard of a clearly expressed legislative intent."[54] The remaining member of the majority (Toohey J) said:[55]

> [I]n the face of a clear statutory abrogation of the privilege against self-incrimination, it is asking too much of the inherent jurisdiction of the court to treat it as justifying a power to reject a question in examination merely because the answer may tend to incriminate the person being examined.

40. In *Nicholas*, a majority of the Court upheld the validity of legislation that modified a common law discretion to exclude evidence of an offence that was illegally or improperly procured by a law enforcement official – a discretion that had been recognised by the Court in the earlier case of *Ridgeway v The Queen*.[56] The majority in *Nicholas* reached this conclusion despite the fact that the *Ridgeway* discretion had been grounded in the "inherent or implied powers of our courts to protect the integrity of their processes."[57]

41. As Hayne J recognised:[58]

> It may be accepted that the discretion to reject evidence of illegally procured offences is a discretion stemming from "the inherent powers of the courts to protect the integrity of their own processes". But the fact that the discretion is based in the inherent powers of the courts does not take the discretion beyond the reach of legislative change.

42. Gummow J observed, to similar effect, that:[59]

> Section 15X is part of a legislative scheme designed to strike a balance between competing interests and to give effect with respect to these prosecutions to a perception of the public interest which differs from that expressed in the common law in Australia. That is a matter for the Parliament. ... For the legislature to prefer one such view to another is not, of itself, to undermine, in a constitutionally impermissible manner, the integrity of the judicial process in the exercise of the judicial power of the Commonwealth.

43. In the same case, Brennan CJ explained in more detail why the inherent power of the court to protect its integrity could not function as a criterion for constitutional validity:[60]

> To suggest that the statutory will of Parliament is to be held invalid because its application would impair the integrity of the court's processes or bring the administration of criminal justice into disrepute is, in my respectful opinion, to misconceive both the duty of a court and the factors which contribute to public confidence in the administration of criminal justice by the courts. It is for the Parliament to prescribe the law to be applied by a court and, if the law is otherwise

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54 (1989) 166 CLR 486 at 510.

55 (1989) 166 CLR 486 at 516.

56 (1995) 184 CLR 19 (***Ridgeway***).

57 *Ridgeway* (1995) 184 CLR 19 at 31 (Mason CJ, Deane and Dawson JJ).

58 (1998) 193 CLR 173 at [242]; see also [232] – [234].

59 (1998) 193 CLR 173 at [164], [167].

60 (1998) 193 CLR 173 at [37]; see also at [160] (Gummow J).

valid, the court's opinion as to the justice, propriety or utility of the law is immaterial. Integrity is the fidelity to legal duty, not a refusal to accept as binding a law which the court takes to be contrary to its opinion as to the proper balance to be struck between competing interests.

44. The reasoning in *Hamilton* and *Nicholas* has particular force in the context of an abrogation or modification of the privilege against self-incrimination. Abrogation or modification results in no reduction in the ability of a court to determine guilt or innocence on the basis of facts found. Indeed, the abrogation or modification of the privilege may expand, rather than contract, the avenues from which evidence of material facts can be sourced in aid of correct fact finding.[61] The fact that abrogation or modification may make the case for the accused more difficult than it would otherwise have been says nothing about the integrity of the court's processes or the due administration of justice.[62]

45. The appellants' submissions at AS [66]-[68] are inconsistent with the authorities summarised above. In those paragraphs, the appellants set out certain generalised descriptions of the content of the court's inherent powers and then seek to invalidate the CAR Act on the basis that it is inconsistent with the descriptions. That approach reverses the proper order of inquiry. While the appellants' submissions draw some support from the reasons of Deane J in *Hammond*,[63] his Honour's twin conclusions – that (a) an *extra-curial* or *administrative* inquisitorial investigation of the involvement of a person committed to trial in relation to the same circumstances necessarily constitutes an improper interference in the administration of justice and (b) s 71 of the Constitution prohibits such legislative interference – were not shared by a majority of the Court in that case, are contrary to the later decision in *Hamilton*, do not reflect the law as it presently stands and in any event are distinguishable in terms of the nature of the body conducting the inquisition.

46. The appellants' reliance on remarks of Gaudron J in *Nicholas*[64] is also misplaced. Those remarks were *obiter*.[65] To the extent that they involve the proposition that a Ch III court cannot be required to proceed in a manner "which involves an abuse of process", they were directed at a category of abuses identified in the strict terms that they render a court's proceedings "inefficacious". Further, her Honour's remarks are not inconsistent with the contention put forward in these submissions – namely, that the circumstances which constitute an abuse of process may be the subject of legislative

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61 Cf *Nicholas v The Queen* (1998) 193 CLR 173 at [22] (Brennan J).

62 *Nicholas* at [162] (Gummow J); *Pompano* [at [86] (French CJ); see also *Gumana v Northern Territory* (2005) 141 FCR 457 at [164] (Selway J).

63 (1982) 152 CLR 188 at 206.

64 (1998) 193 CLR 173 at [74]: see AS at [68].

65 Cf the reference to "abuse of process" in [74] with the arguments made by the appellants (summarised at [75]) and her Honour's determination at [80], [81].

modification. After all, the very reason that her Honour had earlier recognised the *Ridgeway* discretion was that to do otherwise would effect an "abuse of process".[66] Yet, despite that conclusion, her Honour in *Nicholas* accepted the validity of legislation that modified that very discretion. Gaudron J's decision is thus a useful example of the manner in which categories of abuse of process may be modified by Parliament. So far as Gaudron J's reference to a tendency to bring the administration of justice into disrepute is concerned, a majority of the Court did not accept that concept as an operative test of constitutional validity.[67]

47. The same construction should be given to McHugh J's remarks (in dissent) in *Nicholas*[68] relied upon by the appellants at AS [68]. Those remarks are not authority for a constitutional entrenchment of each category of abuse of process known to the common law at any relevant date – such as Federation or the present.

48. Ultimately, the content of the inherent powers to prevent abuses of process and punish contempt must reflect Parliament's well-established ability to strike a balance between a range of competing interests in fixing principles applied by courts in the exercise of judicial power. Within the criminal law, rules of evidence, practice and procedure, burdens of proof, and the scope of privileges are classic examples of circumstances in which the interests of the Crown, accused and victim (to mention just three) will diverge. Once Parliament has struck a balance, it would involve error for a court to make orders in reliance on its inherent powers that undermined or reversed the operation of the applicable statute.

No constitutional right to a "fair trial"

49. The appellants' submissions[69] may go so far to assert that Ch III of the Constitution entrenches some freestanding right on the part of an accused to a "fair trial". That is not correct as a matter of authority.[70] Nor, for reasons already outlined, does Ch III confer on courts an inherent power – of immutable content – to ensure that a "fair trial" occurs. Rather, a wide range of statutory powers, inherent powers and common law principles may be exercised and applied by a court where the fairness of a trial is at risk. Importantly, however, the circumstances in which these powers and principles are enlivened will be informed by choices made by applicable legislatures.

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66 *Ridgeway* at 78.

67 See also 193 CLR 173 at [37] (Brennan CJ), at [242] (Hayne J).

68 (1998) 193 CLR 173 at [127].

69 AS at [62], [65], [68].

70 *Lodhi v The Queen* (2007) 179 A Crim R 470 at [74] (Spigelman CJ); cf *Frugtniet v Victoria* (1997) 71 ALJR 1598; 148 ALR 320 at 325-6 (Kirby J).

50. So much was recognised in *Hamilton* itself, where the respondent's reliance on an asserted "right to a fair trial" and "due process of law" were rejected as bases for declining to permit an examination to occur.[71] As Dawson J stated (in terms consistent with the balance of the majority):[72]

> [D]ue process of law, as we know it in this country, is a concept which derives its meaning only from the law, whether common or statute law, as it exists from time to time. It is not, as in the United States, a concept with a content of its own, procedural or substantive, against which the constitutional validity of particular laws may be tested.

Institutional integrity requires a holistic analysis

51. Even if the analysis reaches the point of identifying a defining or essential characteristic of a Ch III court and discerning that it has been impacted on in some way by Commonwealth or State legislation, that does not necessarily render the legislation invalid. To conclude otherwise would be to ignore the fact that a determination of invalidity in this context involves an "evaluative process" which may require consideration of a number of factors before a conclusion can be drawn as to the validity of impugned legislation.[73]

52. Relevant factors will include a close analysis of the statutory scheme,[74] an identification of circumstances that may counterbalance any impact on an essential or defining characteristic, and a holistic assessment of the extent to which the applicable court retains sufficient characteristics to answer the description of a court in which federal jurisdiction may be reposed.[75] Where, as here, criticism is made of one stage in a process (the granting of an examination order) by reference to one consideration (the privilege against self-incrimination) that has particular relevance in the context of a potential criminal trial, it will be important to have regard to the "processes of the court, viewed as a whole".[76]

53. That Chapter III is focused upon judicial processes viewed as a whole, rather than upon each "step in the practice and procedure which governs the exercise of judicial power"[77], reinforces the conclusions drawn earlier in these

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71 *Hamilton* at 489 (argument), 508-9 (Dawson J).

72 At 509. See *Fardon* at [14] (Gleeson CJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [111] (Gummow and Crennan J); *International Finance Trust Company* at [52] (French CJ).

73 *K Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 (***K-Generation***) at [90] (French CJ).

74 As the plurality in *Pompano* recognised at [129], "the conclusion in *Kable* proceeded from consideration of the whole of the Act in question and all of the features which it presented."

75 *Fardon* at [105] (Gummow J); *K-Generation* at [90] (French CJ); *Pompano* at [129] (Hayne, Crennan, Kiefel and Bell JJ).

76 Cf *Pompano* at [193] (Gageler J).

77 *Nicholas* at [22] (Brennan CJ).

submissions regarding the non-entrenchment of particular common law rules of practice and procedure.[78]

54. Finally in this context, the need for a holistic analysis is an inevitable consequence of the Court's observation that "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes".[79] That observation sits uneasily with any attempt to constitutionalise specific principles of law applied by courts in the exercise of judicial power.

D SECTION 31D OF THE CAR ACT IS NOT INVALID

10 55. For the reasons which follow, the Commonwealth submits:

55.1. there is no challenge to the Act creating a new series of civil matters to vindicate certain purposes of the criminal law;

55.2. within that context, the Act as a whole makes a series of legislative choices as to the manner in which the privilege against self-incrimination should operate;

55.3. the interests of an examinee are protected, in various ways, through varying court processes within the limits of these Parliamentary choices;

55.4. viewed holistically, no essential or defining attribute or function of the court has been interfered with by the Act, let alone interfered with to a
20 degree that warrants a label of repugnancy or incompatibility.

The Act's place within the broader criminal law

56. The principal objects of the CAR Act are set out in s 3. Of particular relevance to the present case is sub-para (c), which provides that a principal object of the CAR Act is to enable law enforcement authorities effectively to identify and recover property.

57. The CAR Act creates, within state jurisdiction, a series of matters and then vests jurisdiction in the Supreme Court to hear and determine those matters. For example, s 22 creates a matter being an entitlement to an asset forfeiture order. The entitlement to an order for examination under s 31D is an exercise of
30 judicial power incidental to substantive provisions such as s 22.

58. These matters are to be determined on the civil standard. Their purpose, however, can be described as broadly falling within the larger province of the criminal law.

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78 Cf *Pompano* at [86] (French CJ), [195] (Gageler J).

79 See eg *Pompano* at [124] (Hayne, Crennan, Kiefel and Bell JJ).

59. The criminal law is applied, per exemplar, in the conduct of the criminal trial in which guilt or otherwise is determined beyond reasonable doubt. The purposes of the criminal trial include the public determination and declaration of guilt, punishment and general and specific deterrence.

60. The CAR Act is an additional means chosen by Parliament to vindicate the larger purposes of the criminal law, particularly restorative justice and other ways of achieving deterrence.

61. There is no challenge, per se, to the legislative ability of Parliament to create these additional matters, and vest jurisdiction in the court in respect to them, even on a civil standard, to complement the role of the criminal trial itself.

62. Parliament then had a range of legitimate legislative choices, in the task of balancing the range of interests and principles which underlie the criminal law viewed in its broadest sense, in producing the rules to govern how the privilege against self-incrimination (and any associated common law doctrines[80]) are to operate in the context of the various matters in which the Court may find itself with jurisdiction.

The nature of the legislative choice made

63. The essence of the choice made by Parliament reduces to the following.

64. First, section 13A(1) abrogates the privilege which would otherwise exist at common law against answering questions or producing documents that might incriminate the examinee or expose the examinee to a forfeiture or penalty – that is, the abrogation occurs in respect to the full width of the privilege at common law.

65. Secondly, with respect to the civil proceedings contemplated by the Act and criminal proceedings for an offence against the Act, no corresponding protection is given back to the examinee: see ss 13(2) and 13A(2).

66. Thus, one clear aspect of the legislative intent in abrogation is that the answers or documents should be available to be used to assist the Crime Commission in its task of seeking orders, such as asset forfeiture orders, under the Act.

67. Thirdly, the protection which the Act gives back is in respect of criminal proceedings not under the Act, and has three aspects: (a) s 13A(2) provides for what is commonly known as "use immunity" by rendering inadmissible in criminal proceedings any answer given or document produced[81]; (b) on the other hand, s 13A(3) expressly rejects what is commonly known as "derivative use immunity" by providing that "further information" obtained as a result of an

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80 See AS [63].

81 Provided that the person objected at the time of answering the question or producing the document on the ground that the answer or document might incriminate the person, or the person was not advised that he or she might so object: s 13A(2)(a) and (b).

answer given or document produced is not thereby inadmissible in criminal proceedings; (c) finally, the risk that the answers or documents might be given to the investigation or prosecution team in the criminal trial is dealt with by a separate power to the Court: s 62 of the CAR Act (now embodied in separate legislation) empowered the Court to make "such orders as it thinks fit with respect to the publication" of any matter arising under the Act. The existence of that power mirrored the court's inherent power to order that an examination be held in private and/or that the publication of certain evidence given during the examination be restricted.[82] By this means, the court could, if it considered it appropriate, keep from the investigation or prosecution team the information compulsorily obtained.

68. Fourthly, s 63 provided that the fact that criminal proceedings had been instituted or had commenced was not a ground on which the Court might stay proceedings under the Act that were not criminal proceedings. For reasons expanded upon by the respondent, s 63 makes express a proposition accepted by the majority in *Hamilton* – namely, that Parliament's decision to modify the privilege against self-incrimination would be set at nought if the mere fact that criminal proceedings were in existence could be relied upon to refuse to make an examination order.[83]

69. Fifthly, the Act does not take away the full range of powers the Court will have in the conduct of the examination, and does not impinge on the powers the Court will have in the criminal trial itself, if it occurs, save to remove a claim of derivative use immunity.

70. In addition, no provision of the CAR Act alters the principle that an accused may not be made to testify at his or her own criminal trial. The accused's rights and privileges at the trial are preserved.[84]

71. The result as a matter of construction as the Court of Appeal correctly held (see [6]-[8] above) is: (a) the proposed examinee cannot invoke the court's discretion under s 31D to refuse the order merely because of the existence of actual or pending criminal proceedings and a risk that answers *might* be the source of information used in some way in relation to the subsequent trial; however, (b) the Act expressly preserves one mechanism to address this risk (the making of a s 62 non-publication order) and otherwise did not seek to interfere with the court's powers at the stage of the actual examination, or the criminal trial (save in respect to derivative use immunity).

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82 As recognised in *Hamilton* at 498-9 (Mason CJ), 502 (Deane and Gaudron JJ), 516 (Toohey J).

83 At 497, 499 (Mason CJ), at 509-10 (Dawson J), 515-7 (Toohey J).

84 Cf *R v CB* [2011] NSWCCA 264 at [100].

Protections afforded to examinee

72. In considering the appellants' submissions on invalidity, it is appropriate to elaborate on the protections identified in summary form in [69] and [71] above.[85] Those protections exist at each stage between the making of an examination order and the conduct of an examination:

72.1. the application for an examination order is required to be determined by a Court;

72.2. the Court before which an application for an examination order was made enjoyed the power to make "such orders as it thinks fit with respect to the publication" of any matter arising under the Act: CAR Act, s 62;[86]

72.3. the Court retains a discretion as to the date on which an examination is to occur;

72.4. the CAR Act requires an examination to be conducted before the Court or an officer of the Court prescribed by rules of court: s 31D(1)(a);

72.5. the Court retains an inherent power to require any examination to be held in private and/or that the publication of names or evidence be restricted;[87]

72.6. the Court retains an inherent power to disallow individual questions or lines of inquiry during the conduct of the examination;[88] and

72.7. a decision by the Court to make an examination order is subject to appellate review.[89] A refusal by the Court to make confidentiality orders, orders to hold an examination in private, and to disallow certain questions or lines of inquiry will also be subject to appeal.

73. The protections enjoyed by an examinee extend to any subsequent criminal trial of the accused. A judge presiding at that trial will possess a range of inherent and statutory powers to exclude particular material sought to be relied upon by the Crown that may have been obtained with the benefit of information provided at an examination.[90] Those powers will include the ability to stay the trial in appropriate circumstances.

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85 The need for a consideration of the practical operation of the impugned scheme has been emphasised by the Court: *Wainohu* at [107] (Gummow, Hayne, Crennan and Bell JJ).

86 Section 62 was subsequently repealed in conjunction with the introduction of the *Courts Suppression and Non-publication Orders Act 2010* (NSW), which contains analogous powers: see s 8. The Court's inherent powers to make suppression and non-disclosure orders are unaffected: see s 4.

87 *Hamilton* at 498-9 (Mason CJ), 502 (Deane and Gaudron JJ), 516 (Toohey J); Court of Appeal (Meagher JA) at [96].

88 *Hamilton* at 499 (Mason CJ); Court of Appeal (Basten JA) at [51].

89 Following a grant of leave to appeal. See s 101 of the *Supreme Court Act 1970* (NSW).

90 *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 25-6 (Mason CJ), 46-7 (Brennan J), 46 (Deane J), 74-5 (Gaudron J); *Batistatos* (2006) 226 CLR 256 at [8] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

Overall submission

74. The requirement of institutional integrity is assessed in light of the overall judicial process to which an aggrieved person is or may be subjected. Regard must be had not only to the limits placed on the court's discretion in deciding whether to make the examination order, but also to the protections afforded to an examinee at the time that the examination occurs, and in an actual criminal trial.[91] Taken as a whole, no essential or defining attribute or function of the court has been interfered with by the Act, let alone interfered with to a degree that warrants a label of repugnancy or inconsistency. At most, within the context of the creation of new matters to vindicate on a civil standard some of the broader purposes of the criminal law, common law principles or processes that might otherwise have been applied in the criminal trial itself have received some legislative modification.

Specific responses to appellants' contentions on invalidity as they apply to the CAR Act

75. The core of the appellants' submissions on invalidity is that the State "cannot legislate to confer on the Supreme Court a power to compel examination of a person in circumstances that may present a threat to the administration of criminal justice, but without the Court being able to take account of such a threat in making a determination under a provision such as s 31D."[92]

76. This contention fails at several levels.

77. *First*, the contention is premised on the twin assumptions that: (a) an essential or defining characteristic of a Ch III court may be identified at the high level of generality as its inherent power to "protect the integrity of the administration of justice";[93] and (b) the content of that power may not be modified by legislation. For the reasons set out in section C above,[94] those assumptions are wrong as a matter of principle and contrary to prior authority.

78. The contention also assumes that the "administration of criminal justice" is a constitutionally entrenched criterion against which the validity of legislation may be assessed for compliance. As already demonstrated, that assumption is contrary to authority and wrong.[95]

79. *Secondly*, the contention - and the appellants' related reference to the court being required to 'shut its eyes'[96] to the consequences of an examination order for the fairness of a criminal trial – glosses over a number of matters: a wrong

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91 *Nicholas* at [26], read with [22] (Brennan CJ); at [71] (Gaudron J).

92 AS at [67].

93 AS at [67].

94 Paragraphs 33-47 above.

95 Paragraphs 27, 30 above.

96 AS at [67].

construction being put on the extent of the legislative confining of the discretion under s 31D[97]; a failure to recognise Parliament's determination that the abrogation of the privilege against self-incrimination with partial replacement protections is appropriate[98]; and a failure to look holistically at the powers still reserved to the court at the stage of examination and in the criminal trial, and the corresponding protections thereby provided to the person.[99]

80. *Finally*, the alternative "consequences" identified at AS [69] misstate the effect of the CAR Act and highlight the artificiality of the appellants' allegation of invalidity.

81. So far as the first "consequence" is concerned, the CAR Act is relevantly directed at the making and conduct of examinations. The Act is not directed at the conduct of criminal trials in which information obtained with the benefit of an examination is sought to be adduced into evidence.[100] In no sense could this Court conclude that the CAR Act "authorises" a trial to proceed "regardless of the risk of prejudice" to an accused.

82. So far as the second "consequence" is concerned, the appellants repeat their earlier error by assuming that "prejudice" has an immutable content unaffected by Commonwealth or State legislation. Ultimately, however, whether or not a trial may need to be stayed through irremediable prejudice is a matter for the judge presiding at that trial. Neither that issue, nor the extent to which the existence of s 13A might inform the trial judge's discretion in that regard, fall for consideration in the present case.

PART VI ESTIMATED LENGTH OF ORAL ARGUMENT

It is estimated that no more than 30 minutes will be required for the presentation of the oral argument of the Commonwealth.

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97 Paragraphs 6-10 above.

98 Paragraphs 63-71 above.

99 Paragraphs 72-73.

100 Eg, s 63 of the CAR Act is limited to civil proceedings that are instituted under that Act.