IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No: S 29 of 2013

BETWEEN:

JASON (A.K.A DO YOUNG) LEE
First Appellant

SEONG LEE
Second Appellant

AND

10 **NEW SOUTH WALES CRIME COMMISSION**
Respondent

APPELLANTS' REPLY

PART I: SUITABILITY FOR PUBLICATION

1. The appellant certifies that this reply is suitable for publication on the Internet.

PART II: REPLY TO ARGUMENT OF RESPONDENT AND INTERVENERS

2. Neither the respondent nor the interveners seek to defend the proposition that s31D of the *CARA*, on its proper construction, requires the Supreme Court to determine an application for an examination order without taking into account the risk that such an
20 examination may pose to the fair criminal trial of the proposed examinee. The respondent makes this concession in submitting that the Court of Appeal is to be understood as having construed s31D as allowing for consideration of fair trial considerations: RS at [34]. The Attorney General for New South Wales submits, at [18], that such considerations are within the discretion conferred by s31D. So too does the Attorney General for the Commonwealth, at [9]; and the Attorney General for Queensland, at [8]-[9]. The controversy between the respondent and the appellant then, is whether the Court of Appeal's construction of s31D is as contended for by the appellant and further, as to the content of the discretion.

3. The construction of s31D advanced by the respondent is that the Court in
30 considering an application for an examination order may take into account *"actual interference or a real risk of interference with a criminal trial and fair trial considerations"*(at [34]), but it is not a relevant matter to the exercise of the discretion to point to the possibility of prejudice to a fair criminal trial.

4. Contrary to the respondent's submission at [34], the decision of the Court of Appeal cannot be read as being based upon such a construction. The reasons of Basten JA, with which McColl JA (at [13]), Beazley JA (at [6]) and Macfarlan JA (at [84]) agreed, do not disclose analysis of s31D and s63 in such terms. To the contrary, Basten JA concluded, in relation to *CARA* that *"the risk of prejudice to a criminal proceeding"* is not an available

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ground *"for resisting or delaying an examination"* (at [47]). Rather, such proceedings *"were intended to be maintained despite the possibility of adverse consequences for criminal proceedings otherwise on foot"* (at [49]), and the structure of the *CARA* *"precluded judicial intervention to prevent such interference"* (at [56]): see also CA [72], [81]. The appellants' construction (as outlined at AS [32]-[33], [35]-[36], [47],.[53]-[54]) is for a broad discretion, not limited in content, not excluding the risk of prejudice to criminal proceedings, and not limited to consideration of *"actual"* prejudice at *"some future time"* (cf. RS [28]), *"during the course of the examination"* (cf. RS [29], NSW Attorney General [11], Basten JA [81]), once questions have been asked and answers given (cf. RS [30]).

5. There are two further reasons why it is safe to conclude that the decision of the Court is to be understood as being based upon a construction that did not take into account the risk of prejudice to the related criminal trial. First, when Basten JA, on behalf of the Court of Appeal, came to re-exercise the discretion under s31D, at [67]-[81], his Honour did not analyse or give any weight to the extent of the risk of interference to a fair criminal trial posed by the making of an order. Had his Honour done so, the fact of Jason Lee's imminent trial for money laundering would, at least, have been a matter to have been weighed in the balance. Instead, Basten JA, at [81], dismissed that as a matter to be dealt with by another process in the course of the conduct of the examination itself. It is also telling that there is no reference in his Honour's reasoning to countervailing considerations, such as any need for an urgent examination or a well founded apprehension of dissipation of assets, that outweighed any risk of prejudice. An examination of the evidence before the Court of Appeal discloses that there was no such evidence.

6. Secondly, the Court said nothing at all (and is silent) as to the criterion upon which any court should address itself to this subject when considering the exercise of the s31D discretion. If s31D is to be understood as allowing for consideration of risk of prejudice to a fair trial only if the risk is of a certain degree, that is a matter that would have been explained in the reasoning of the Court of Appeal. In the submissions of the Attorney General for the Commonwealth at [10], what is said to be a "*trite example*" of when the Court would decline to order an examination is in circumstances where this was "*to occur at a time that precluded the examinee from being present at, or conducting necessary preparation for, the actual criminal trial*". The circumstances pertaining when Hulme J declined to order examination were that the appellants were in the middle of their criminal trial before Judge Solomon QC and a jury and were remanded to appear there each day until verdicts were returned (cf. Basten JA at [56], Beazley JA at [10]-[11]). At the time that the Court of Appeal exercised its discretion, the appellants' appeals against their convictions were part-heard and the first appellant's two money laundering trials were pending. These considerations, and the fact that the respondent, had previously disseminated transcripts of the initial examinations to the prosecutors in their criminal trials, were described as not having *"any significant impact on the exercise of the power"* (Basten JA at [67], [74]); rather the power was available *"despite the possible consequences for an accused in criminal proceedings not yet completed"* (Basten JA at [72]).

7. The proposition that s31D is to be construed as allowing for consideration of the risk of prejudice to a criminal trial, but only if the risk reaches a certain threshold (whether described as "real" or otherwise) involves an unlikely constraint on the discretion conferred by s31D. It finds no support in text, context or purpose. Assessing the nature and extent of the risk to fair trial considerations posed by the making of an examination order, and weighing that risk against other factors such as the need for an urgent examination, is the

essence of the discretionary exercise. The *CARA* should not be read as imposing a preordained minimum standard before a consideration is given weight in the exercise of the discretion. Different risks may be given varying weight in differing circumstances. If there is an artificial "cut off" point for any factor then there is a danger of erroneous exclusion from consideration of that factor. In the absence of clear words in the *CARA* compelling such a conclusion, the legislature should be taken to have intended that these matters be left to the determination of the Court. In the analogous context of an application to stay civil proceedings because of a pending criminal trial, it is established that while there is no right to a stay based on the mere existence of pending or possible criminal proceedings, the court's task is one of the balancing of justice between the parties, taking account of all relevant factors: *McMahon v Gould* (1982) 7 ACLR 202 at 206. Such discretionary exercises call for a determination on the merits of each case and are not amenable to abstract fixed criteria: *Jefferson Limited v Bhetcha* [1979] 1 WLR 898 at 904-5. Section 63 *CARA* is drafted in terms that should be construed coherently with these authorities (cf. RS [33]).

8. Turning to the broader issues of construction, the respondent at RS [24]-[29], repeats the error of the Court of Appeal by placing determinative weight on ss13A and 63 of the *CARA*. For the reasons set out in AS [48]-[54], those provisions do not have the interpretative significance which the respondent seeks to give them. While provisions such as s13A may inform "considerations" under s31D they neither define nor confine them: *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564 at 576. Nor does s13A(3) provide a complete legislative identifier of potential uses of compelled testimony: *R v Sellar* [2013] NSWCCA 42 at [104]; *R v Sellar* [2012] NSWSC 934 at [234] (see AS [52]).

9. It is not to the point to consider in general terms the powers of the legislature to abrogate the privilege against self-incrimination, as the respondent does at RS [11]-[23]. The appellants do not challenge the proposition that the legislature can abrogate the privilege against self-incrimination. It is clear that the privilege has been abrogated in s13A of the *CARA*, on terms that limit the use of evidence obtained at an examination.

10. The respondent submits, at RS [29], that any "real risk" of prejudice to a criminal trial is to be dealt with through procedures available outside the *CARA* relating to the conduct of the examination itself. The fact that the judicial officer who presides over an examination has power to control questioning or its timing (RS [28]) says little about the discretion which resides in s31D. Section 31D is not limited in the manner suggested by the respondent at RS [28]-[32], with considerations such as the content of the examination, its timing or protections relegated to consideration subsequent to the exercise of the discretion in favour of ordering examination. Nor does the legislative scheme of the *CARA* (and in particular s63) directly address the significance of *"related"* criminal proceedings in the context of s31D. In *Hamilton v Oades*, Mason CJ was directing his comments to the approach that *"must be taken by the court when it makes orders or gives directions in relation to an examination in progress"* (*Hamilton* at 497, emphasis added). The controversy between the parties in *Hamilton* arose at the subsequent stage, when, in the course of the examination, questions were put that were relevant both to criminal proceedings then on foot and the ordered examination. There was no dispute between the parties as to the correctness of the order for examination having been made. The sole challenge was to limitations the Court of Appeal had held should be subsequently imposed on the scope of the examination. It was this later discretion that was under consideration in *Hamilton*, not the anterior step of whether the exercise of the discretion to order the examination had miscarried.

11. The suggestion that orders might be made at a later time under s7 of the *Courts Suppression and Non Publication Order Act* (or formally under s62 of CARA) is of limited significance. Provisions such as those in s7 of the *Courts Suppression and Non Publication Order Act* exist in the context of a curial process where there is a presumption of "open justice" (s6). They are concerned with the kinds of considerations to which Beazley JA alluded in her Honour's judgment, such as publicity in the face of an ongoing trial (at [10]). They are not equivalent to the protective regimes applying specifically to the examination regime, as considered in cases such as *ACC v OK* (2010) 185 FCR 258.

12. Sections 7 and 8 of the *Courts Suppression and Non Publication Order Act* are not apt to operate as providing a protective regime to deal with an overlap between civil and criminal proceedings, behind each of which lies the same criminal conduct and in respect of one (the civil one), the defendant is compellable at the behest of (and to be examined by), the plaintiff.

13. Moreover, on the reasoning of the Court of Appeal there is little or nothing to protect, because (subject only to s13A(2)), there is nothing wrong with possession and use of a defendant's examination by investigators and prosecutors. This is consistent with the approach taken by both the Court of Appeal in *SD v New South Wales Crime Commission* [2013] NSWCA 48 (see particularly at [29]) and the Court of Criminal Appeal in *Lee v R* [2013] NSWCCA 68 (at [160]), each judgment delivered subsequently to that now under consideration. Any future application for an order of the kind contemplated by the respondent would have to take account of the reasoning of Basten JA at [55]-[56] that the *CARA* should be understood as authorising judicial conduct that impinges of future criminal proceedings, permitting a degree of potential interference with a criminal trial and precluding judicial intervention to prevent such interference. To the same effect, his Honour concluded at [49] that, having regard to the statutory purposes revealed by the *CARA*, the legislature must be taken to have intended that examinations be "maintained despite the possibility of adverse consequences for criminal proceedings otherwise on foot". Having regard to that direction from the Court of Appeal, a Registrar faced with an application for an order under the *Suppression Act* may well conclude that making any such order would run counter to the intended operation of the *CARA*. An examinee will therefore face significant difficulties in demonstrating that an order is "necessary to prevent prejudice to the proper administration of justice", as required under s8 of the *Suppression Act*.

The constitutional issue does not arise having regard to the constructional choices before the Court

14. On the construction of the *CARA* by the respondent (at [33]-[34]) and each of the interveners (NSW AG at [5]-[6], [12], [17]-[18]; Cth AG at [9], [68], [71]; Qld AG at [8](a)), the constitutional issue as framed by the appellants does not arise. That is, neither the respondent nor the interveners submit that s31D of the *CARA* requires the Supreme Court to determine an application for an examination order without regard to the capacity of that order to prejudice the fair trial of the person proposed to be examined: AS [32]. Only if it is correct to say that fair trial considerations are precluded from consideration does a constitutional question arise as to whether the court can validly be precluded from taking into account those considerations.

15. It is sufficient to make a number of observations about the constitutional arguments as advanced. The proposition developed in the submissions of the respondent and the interveners that it is within the legislative competence of a State to vary the rules governing the conduct of a criminal trial is not a sound response to the argument advanced by the

appellants. Section 31D of the *CARA* does not itself seek to vary the manner in which a criminal trial is conducted. The constitutional vice identified by the appellants (on the postulated construction) is in effectively precluding a Ch III court from protecting the integrity of its existing processes for the administration of criminal justice. That is the defining institutional characteristic that would be impaired on the postulated construction of s31D.

16. The purpose of the *CARA* does not fall *"within the larger province of the criminal law"*, nor is it part of *"the criminal law viewed in its broadest sense"* (cf. Attorney General for the Commonwealth at [58]-[62]). *CARA* is not an amendment of criminal procedure. It rests in the province of civil laws for the restraint, forfeiture and confiscation of tainted assets. The present case is not concerned with legislative alterations to trial processes but with the impact of civil processes on the administration of criminal justice according to existing adversarial, accusatorial processes.

17. It is therefore not necessary or appropriate to seek to define the constitutional limits of the power to alter by legislation the processes of a criminal trial. However, it is not consistent with recent Ch III authorities to suggest, as the Commonwealth Attorney General does at [37] and the Queensland Attorney General does at [15], that in constitutional terms a fair trial according to law means nothing more than the law as defined by parliament from time to time: see *inter alia, Nicholas v The Queen* (1998) 193 CLR 173 at 208-9 per Gaudron J (a passage cited with approval in *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Dietrich v The Queen* (1992) 177 CLR 292 at 298, 299-300, 326-329, 362-365; *Dupas v The Queen* (2010) 241 CLR 237 at 243-245 [12]-[17]; *International Finance Trust Company Limited and Another v New South Wales Crime Commission and Others* (2009) 240 CLR 319 at 354-355 [55]-[56], 366-7 [97]-[98], 386 [159]-[160]; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 471 [41], 477 [68], 491 [140]-[142], 494 [156]-[157], 497-501 [180]-[198].

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