IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY No M176 of 2017

Between **RICK TUCKER (a pseudonym)**

Appellant

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

First Respondent

AUSTRALIAN CRIMINAL INTELLIGENCE COMISSION

Second Respondent

DONALD GALLOWAY (a pseudonym)

Third Respond

10 **TONY STRICKLAND (a pseudonym)**

Fourth Respondent

EDMOND HODGES (a pseudonym)

Fifth Respondent

PART 1: CERTIFICATION REDACTED

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

APPELLANT'S REPLY TO FIRST RESPONDENT'S SUBMISSION

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1. The unchallenged finding of the Court of Appeal was that the coercive powers of the Australian Crime Commission (**ACC**), conferred on the Commission in order for it to pursue its own investigative purposes, were enlisted by and for the benefit of the Australian Federal Police (**AFP**), solely in order to enable that separate statutory agency to pursue its own investigative purposes. It was never contemplated that the examination product would be used by the ACC itself, and it was not used.[1] The unlawful hearings were clearly held for the improper purpose of causing forensic advantage to the AFP and forensic disadvantage to the appellants in foreseen criminal proceedings. And the Court of Appeal so held.[2]

2. The finding by Hollingworth J that the appellant had admitted "whole swaths of the prosecution case" was not challenged in the Court of Appeal. The appellant admitted authorship of the [redacted] fax, a document which Schwartz deposed had been significant in changing his views as to the appellant's criminality. The appellant admitted that he knew that the [redacted] agent was to provide incentives to people in the [redacted] bank, who could help QRS Ltd to secure the [redacted] contract. [3] The appellant said that allocating money to "others" meant allocating it to those who were being "incentivized".[4] The appellant admitted that the "additional amount" referred to in the [redacted] fax was to allow for the provision of "incentives" to others.[5] He said he was uncomfortable with business being done in this way. [6]

3. These admissions were made after the appellant had exercised his right to silence in the sense that he had declined to be interviewed in a cautioned record of interview. And as Hollingworth J observed, this case involves the deliberate coercive questioning of suspects, *because* they had exercised their rights to decline a cautioned police interview.[7] (our emphasis).

4. There is nothing in the first respondent's contention at [7] of its Submission that the letter of Schwartz to the appellant's solicitor in August 2010 was not a "warning".[8] Hollingworth J found that Schwartz's evidence as to his belief of the appellant's status in mid-2010 to be "confusing and at times contradictory".[9] She found that it was clear that by 9 July 2010, Schwartz regarded it as so likely that the appellant would be charged that he briefed the AFP Commissioner to that effect. These findings were not challenged in the Court of Appeal.

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[1] *DPP (Cth) v. Galloway & Ors. and ACIC* [2017] VSCA 120 (Court of Appeal Judgment) at [209].
[2] Court of Appeal Judgment at [12] [207]-[211].
[3] *CDPP v Brady & Ors* [2016] VSC 334R (Hollingworth J Judgment) at [730].
[4] Hollingworth J Judgment at [731].
[5] Hollingworth J Judgment at [731].
[6] Hollingworth J Judgment at [732].
[7] Hollingworth J Judgment at [880].
[8] The letter was Exhibit 158 on the application before Hollingworth J. It was in response to a letter from the appellant's solicitor (Exhibit 157) to the effect that the appellant would make "no comment" if interviewed.
[9] Hollingworth J Judgment at [526].

5. It is incorrect for the first respondent, at [13] of her Submission, to state that there is no evidence that any such admissions by the appellant led the AFP to make any enquiries that would not otherwise have been made or to identify evidence that would not otherwise have been found. Such a statement ignores the evidence of Schwartz – and not challenged by the first respondent in the Court of Appeal – that the AFP were assisted in the task of obtaining evidence against the appellant by "knowing that there were no innocent explanations", because this allowed them "to push forward with [their] evidence gathering with more confidence that [they] were on the right track and with the knowledge that further examination of the electronic data could identify sufficient evidence to sustain a prosecution".[10] Such a statement also ignores the findings that Hollingworth J made at [767] to [775] as to the use by the AFP of examination material to assemble the prosecution case; the findings by Her Honour at [776] to [790] as to the use of that material for documentary searches; and the findings by Her Honour at [808] to [817] of her judgment as to the use of that material in the assembly of the prosecution brief.

6. It is not to the point that the trial judge did not find Sage to be a dishonest witness. Her Honour's finding as to Sage being "reckless as to his various obligations to an unacceptable degree" was irresistible. [11] It does not mean that Her Honour necessarily meant "reckless" in the strict legal sense. As Her Honour explained, had Sage exercised his powers independently and with appropriate diligence, those responsible for investigating the ACC accused and preparing the brief would never have received the information which they in fact obtained. She found that he "demonstrated an extraordinary approach to the protective provisions of ss 25A(3) and 25A(7), one which completely disregarded his obligations towards the protections towards a person being examined under the Act."[12]This was simply one factor which led Her Honour to stay the proceedings in the circumstances of this case.

7. Application of the *Hammond* principle is at the heart of this appeal. The principles stated by the appellant at [31] to [33] are not in doubt. As Bell J explained in *Lee v. NSW Crime Commission* compelling an accused to give an account of circumstances of alleged wrongdoing may substantially reduce the areas in which the prosecution case may be tested in accordance with counsel's obligations.[13] That is not to condone the proof of falsehood. As Her Honour said, " To characterize it in that way risks inverting the assumption upon which our adversarial system of criminal justice proceeds, which is to say that the accused is entitled to be acquitted of criminal wrongdoing unless *unaided by him or her* the prosecution proves guilt."[14] In this case, Hollingworth J found that the appellant's forensic choices on trial were seriously constrained. The actual giving of evidence was not a viable option. The appellant would have to consider what plea to enter, what evidence to challenge, what evidence (including character evidence) to lead at trial, according to the answers he gave at the compulsory examination about the subject

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[10] Schwartz Affidavit being Exhibit 1 before Hollingworth J
[11] Hollingworth J Judgment at [881].
[12] Hollingworth J Judgment at [616].
[13] *Lee v. NSW Crime Commission* (2013) 251 CLR 196 at [265].
[14] At [266] of *Lee.*

matter of the charges he faces. [15] These are not "presumptive" prejudices as the first
10 respondent asserts at [29] of its submission. They are practical forensic disadvantages in the conduct of his trial, of the type referred to in *X7 v. Australian Crime Commission.*[16]

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[15] Hollingworth J Judgment at [733] [726] and [727].

[16] (2013) 248 CLR 92 per Hayne and Bell JJ at [124] and Keifel J at [160].