IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M 36 of 2018**

BETWEEN: **Daniel Taylor**
Plaintiff

Attorney-General of the Commonwealth
Defendant

THE PLANTIFF'S OUTLINE OF ORAL ARGUMENT

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PART I: INTERNET PUBLICATION

1. The Plaintiff certifies that the submission in this form is suitable for publication on the internet.

PART II: OUTLINE OF PROPOSITIONS

Q1: The Defendant's decision is susceptible to review

2. Question 1 raises the constitutional dimension referred to in *Elias* at 497 [33] (**JBA 1 / 476**) stemming from the recognition of the separation of prosecutorial and judicial functions, which in Australia has resulted in Courts treating decisions made in the prosecutorial process as ordinarily insusceptible of judicial review. In *Likiardopoulos* at [4] (**JBA 2 / 595-596,** endorsed in *Magaming* fn 23: **JBA 2 / 621**), French CJ specifically raised the question as to whether the
20 exercise of a statutory power or discretion by a prosecutor is immune from review for jurisdictional error under s 75(v).

3. The decision sought to be reviewed is distinguishable from previous "prosecutorial" decisions treated as being insusceptible of review. Those decisions are decision to proceed or how to proceed in a particular prosecution, see *Barton*: **JBA 1 / 255**, *Maxwell* **JBA 2/647**, *DPP (SA) v B* (1998) CLR 566, *Likiardopoulos*: **JBA 2 / 591** and *Whitehorn v R* (1983) 152 CLR 657 and are usually brought by the criminal defendant (or putative defendant).

4. ***First***, The Defendant was under a duty to consider and determine his request for consent in accordance with law. The present case is analogous to *Murphyores* (**PSM Tab 2** at **17/18** per Mason J). A prosecutor is under no equivalent duty to exercise his or her discretion.

30 5. ***Secondly***, the decision does not relate to any existing or possible judicial process in which there might arise a question as to the reality or perception of the Court's impartiality: there is no contemplated criminal proceeding as between the Defendant (or the CDPP on the Defendant's behalf) and the Plaintiff, *cf Likiardopoulos* at [2] **JBA 2 / 595-596**. The question of consent is one step removed from the commencement of proceedings. The decision is a refusal to consent, not a decision to institute proceedings or lay a particular charge (or charges).

6. ***Thirdly***, the Plaintiff has no other opportunity to review the decision, see **PS [19] fn 14**, and *R v DPP Ex Parte C*: **JBA 2 / 992**.

7. It should not be a question of restricting this Court's wide jurisdiction under s 75(v) but rather it ought to relate to the discretionary factors weighing against exercising that jurisdiction: *Maxwell*

JBA 2 / 680. The only justification for the carve out from s 75(v) sought by the Defendant is a competing constitutional imperative arising when a review compromises or is inconsistent with the separation of powers. No such compromise or inconsistency exists in this case.

Q2(a): Customary international law does not recognise the immunity in the present context

8. This submission is in two parts: ***first*** customary international law (**CIL**) has not recognised *ratione personae* in a national court exercising primary jurisdiction under the Rome Statute and ***second*** by basing his decision on an obligation that has not been recognised to exist, the Defendant fell into jurisdictional error.

9. The present case is distinguishable from the *Arrest Warrant* case because it relates to the prosecution of a Rome State crime under the primary jurisdiction of a state party.

10. The Rome Statute establishes and imposes obligations on State parties in respect of both the primary jurisdiction exercised by them, and the complimentary jurisdiction of the ICC. Australia gave effect to its Rome Statute obligations by the *International Criminal Court (Consequential Amendments) Act 2002* (inserting Div 268 into the *Criminal Code* **JBA 1 / 10**) and the *International Criminal Court Act 2002* (Cth) (**JBA 1 / 256**).

11. The issue is whether, in light of the *Al-Bashir Appeal* (**PSM Tab 1**), courts exercising the primary jurisdiction under the Rome Statute are exercising the equivalent of an international jurisdiction. See: *Joint Concurring Opinion* at [413] (**PSM Tab 1**). The *Al-Bashir Appeal* confirmed that:

    (a) Neither of the immunities applies before an international court or tribunal; Art 27 reflects customary international law (**CIL**): *Appeal judgment* at [1], [103], [113] and *Joint Concurring Opinion* at [186], [249]-[252], [408], [429], [446].

    (b) The *Arrest Warrant Case* is limited to its facts, "the operation of the idea of immunity *ratione personae* [domestically] must be confined to the exercise of criminal jurisdiction by *national courts* **without more**" (bold added): *Joint Concurring Opinion* (**PSM Tab 1** at [185]).

12. In prosecuting Rome Statute crimes, Australia is not exercising national jurisdiction but is acting as an international court, ie, the "more". That jurisdiction meets the four characteristics of international Courts or Tribunals identified by the Appeals Chamber:

    (a) They exercise jurisdiction on behalf of the international community: *Appeal judgment* at [115], *Joint Concurring Opinion* at [53];

    (b) They exercise jurisdiction for the benefit of the international community; as opposed to national courts that exercise jurisdiction to apply laws made by one sovereign for his or her own exclusive benefit and domestic interests: *Joint Concurring Opinion* at [54];

    (c) The source of jurisdiction is the ultimate element in determining whether a court or tribunal is international: *Joint Concurring Opinion* at [56] and [58];

    (d) The jurisdiction may be conferred by treaty or instrument of promulgation or referral: *Joint Concurring Opinion* at [56].

13. The Defendant made his decision in accordance with the Ministerial Submission (**RSC [12]**), which stated that the Defendant is **obliged** by CIL to refuse his consent.

14. That error is an error of law and therefore a jurisdictional error: *Hossain* at [19] (**PSM Tab 3**). Further and alternatively, the Defendant failed to exercise jurisdiction because it was done on a false footing: *SZTMA* at [81]-[82] (**PSM Tab 4**).

15. CIL does not provide for the immunity sought to be relied on where a court is exercising international jurisdiction. The Defendant misunderstood the law when he made the decision and thereby fell into jurisdictional error: **PS 26.**

Q2(c): The failure to apply the domestic immunities is a jurisdictional error

16. The applicable immunities are found in the *Diplomatic Privileges and Immunities Act 1987* (Cth) (**JBA 1 / 120**) and the *Foreign State Immunities Act 1985* (Cth) (**JBA 1 / 215**). In enacting those laws the legislature was incorporating international law and practice into domestic law. Those Acts do not afford immunity to an incumbent Foreign Minister. Further, s 6 of the *Diplomatic Privileges and Immunities Act 1987* (**JBA 1 / 126-127**) operates to exclude the common law and therefore any rule of CIL.

17. The Defendant cannot dispense with the applicable law and rely on some other immunity.

18. Question 2(c) should be answered "Yes".

Q3: There was a denial of procedural fairness

19. The Plaintiff's right or interest is his entitlement to bring a charge pursuant to s 13(a) of the *Crimes Act 1901* (Cth), together with ss 268.121(3) and 268.120: [*Cf* **DS 56, Reply 17-19**]. The Defendant's decision affects the Plaintiff's interest in pursuing that right: *SZSSJ* (**JBA 2 / 684**).

20. The Plaintiff did not address the question of immunities as a rule of CIL and was not put on notice it would be the basis of the Defendant's decision.

Q4: Relief

21. Declaratory relief and either prohibition or *mandamus* together with *certiorari* are appropriate because the Defendant's decision continues to have operative effect: **RSC [15]-[16]**. There is no discretionary reason to refuse consent. See: *M68* **JBA 2 / 787**.

Dated: 18 June 2019

Ron Merkel QC Raelene Sharp Marion Isobel