IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M73 of 2012

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS (CTH)
Applicant

and

JM
Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA (INTERVENING)

PART I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

PART II: BASIS OF INTERVENTION

2. Pursuant to s 78A of the *Judiciary Act 1903* (Cth), the Attorney-General for the State of Victoria intervenes in the application by the respondent (**JM**) for special leave to cross-appeal in support of the applicant (**the DPP**).

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. In addition to the statutory provisions annexed to the respondent's submissions on notice of cross-appeal dated 25 January 2013 (**JM's cross-appeal submissions**) and the applicant's submissions in cross-appeal dated 15 February 2013 (**DPP's cross-appeal submissions**), s 306 of the *Criminal*

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Procedure Act 2009 (Vic) is relevant. At the material time,[1] it relevantly provided:

> **306 General powers of Court of Appeal on case stated**
>
> (1) The Court of Appeal may hear and finally determine a question of law set out in a case stated.
>
> (2) In the case of a question of law reserved under section 302 or 304, the Court of Appeal may remit the question and the determination of the Court of Appeal back to the court which reserved the question.

PART V: ARGUMENT

5. In summary, the Attorney-General makes the following submissions:

   (a) Section 302 of the *Criminal Procedure Act* empowered a judge of the Trial Division of the Supreme Court to reserve, and s 306 empowered the Court of Appeal to answer, the question of law answered by the Court of Appeal in this case.

   (b) The reservation and answering of that question were exercises of judicial power consistent with Ch III of the Constitution.

(a) The question answered by the Court of Appeal

(i) The issue before this Court on the application for special leave to cross-appeal

6. A majority of the Court of Appeal (Nettle and Hansen JJA, Warren CJ dissenting) declined to answer the question which had been reserved by the trial judge. Instead, the Court of Appeal ordered, pursuant to s 305(3) of the *Criminal Procedure Act*, that the case stated be returned to the trial judge for amendment.[2] The case stated was duly amended by the trial judge and the amended question of law answered by the Court of Appeal in accordance with the reasons of the majority.

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1 It was amended by s 20(2) of the *Criminal Procedure Amendment Act 2012* (Vic), from 5 September 2012, by the insertion of ", 302A" after "section 302".

2 *Director of Public Prosecutions (Cth) v JM* [2012] VSCA 21; (2012) 267 FLR 238; 90 ACSR 96.

7. The subject of the application for special leave to cross-appeal is the question of law amended in accordance with the reasons of the majority of the Court of Appeal, namely:

> a) Is the expression "artificial price" in s 1041A of the *Corporations Act 2001* (Cth) used in the sense of a term having a legal signification (as opposed to its sense in ordinary English or some non-legal technical sense); and
>
> b) If so, what is its legal signification?

8. JM contends that that question should not have been answered because the Court of Appeal could not, as a valid exercise of judicial power in federal jurisdiction, answer the question without reference to facts which had been agreed or determined. JM's submission is not that the question should not have been reserved because the trial judge could not be satisfied that it was in the interests of justice to do so (as required by s 302) or that the question should not have been answered by the Court of Appeal as a matter of that Court's discretion. The submission therefore focusses on the *power* of the Court of Appeal.

9. The DPP contends that the question was properly reserved and answered. The DPP does not contend that the questions originally stated by the trial judge ought to have been reserved or answered. It is therefore not necessary for this Court to consider that point, upon which the Court of Appeal divided. In particular, it is not necessary for this Court to consider whether the questions originally reserved by the trial judge were questions of law or questions of mixed fact and law or whether they could or should have been reserved and answered.

10. The Attorney-General submits that the questions framed by the majority of the Court of Appeal were properly asked and answered in the exercise of judicial power. That is either because, as Nettle and Hansen JJA held, the questions involved no reference to facts not agreed or determined, or because, as Warren CJ held, s 302 in any event enables the reserving and answering of questions by reference to facts that have been assumed.

(ii) The question must "arise"

11. Section 306(1) of the *Criminal Procedure Act* empowers the Court of Appeal to hear and finally determine a question of law set out in a case stated, ie a case stated in accordance with s 305(1) setting out a question of law reserved pursuant to s 302(2). A similar procedure has been available in Victoria to reserve questions of law arising before the commencement of a trial since the coming into force of the *Crimes (Criminal Trials) Act 1993* (Vic).[3] The answers given by the Court of Appeal are binding on the trial judge, either as a matter of precedent or by way of an estoppel.[4]

10 12. Section 302(2) of the *Criminal Procedure Act* empowers the reservation of "a question of law" which "arises before or during the trial" if the court "is satisfied that it is in the interests of justice to do so", having regard to various matters.

13. JM submits that the amended question did not arise, because a question will arise only once the facts have first been "identified", meaning that they must be "facts which are admitted or which have been the subject of evidence open to be accepted by the jury – but not merely facts alleged by the prosecution or assumed facts".[5] That submission should be rejected.

14. Section 302, along with ss 305 and 306, do not empower the Court to give an
20 advisory opinion. There is no indication in the provisions that the legislative intention was otherwise. As such, a question cannot be said to "arise" unless

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3 *Crimes (Criminal Trials) Act 1993* (Vic), s 28, inserting s 446(2) into the *Crimes Act 1958* (Vic); see also *R v Assange* [1997] 2 VR 247 at 253 (Hayne JA); *R v Garlick* [2006] VSCA 127 at [19]–[20] (the Court). The key differences between s 302 of the *Criminal Procedure Act* and the former s 446(2) of the *Crimes Act* are that under the previous regime: a question of law could only be reserved before trial on the application of the accused (now it may be reserved on the application of either party or on the court's own motion: *Criminal Procedure Act*, s 337(1)); and previously a question of law could only be reserved if its determination "could render the conduct of the trial unnecessary" (now the question may be reserved if it is in the interests of justice). Another difference (which is not relevant to the instant proceeding) is that the trial judge under the *Criminal Procedure Act* may reserve a question of law after the jury has been empanelled.

4 *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 244–245 (Mason CJ), 279–280 (Deane, Gaudron and McHugh JJ), 302 (Dawson J); *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 303–304 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

5 JM's cross-appeal submissions at [53]–[54], n 89.

determination of that question bears on whether an accused is guilty of the charges against him or her.[6] However, determining whether that is so does not in all cases require that there be admitted facts or allegations the subject of evidence open to be accepted by the jury.

15. Thus, in the context of the power to state a case to the High Court from the Commonwealth Court of Conciliation and Arbitration, which was limited to "any question arising", Isaacs J said in *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia*:[7] " 'arising' means necessary for the decision on the ascertained *or asserted* facts of the case" (emphasis added). A question may arise, not only when facts have been found, but also where there is a "concrete question of law which must be decided" in order that the trial may be conducted in accordance with law.[8]

(iii) The way in which the question arose

16. The proper construction of "artificial price" in s 1041A of the *Corporations Act* is a matter upon which the DPP and JM are at odds. Their competing positions emerge clearly from the interlocutory steps which preceded the reservation of the questions by the trial judge.

17. Section 199 of the *Criminal Procedure Act* permits the Court at any time before trial to hear and decide any issue with respect to the trial that the Court considers appropriate, including an issue of law or procedure that arises or is anticipated to arise in the trial. *Practice Note No 4 of 2010* of the Supreme Court, provides that "cases committed to the Supreme Court for trial will

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6 In the context of s 15(2) of the *Supreme Court Act 1986* (Vic), which provided that a judge may reserve "any question in a proceeding for the consideration of the Full Court", in *Hodgson v Victoria* [1995] 2 VR 292 at 296, Tadgell J (with whom Nathan and Ashley JJ agreed), applied the approach of Brooking J in *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203 at 209 concerning a rule permitting separate determination of "any question in a proceeding". Brooking J had said: "In my opinion there is no 'question in a proceeding' to be 'tried' within the meaning of R47.04 unless the determination of that question bears on whether a party is entitled to relief which he claims in the proceeding or on the extent of that relief."

7 (1925) 36 CLR 442 at 451.

8 *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 497 (Kitto J); see also at 493 (McTiernan and Taylor JJ), 500 (Kitto J). The relevance of facts, assumed or otherwise, is dealt with further below (paragraphs 21 to 30).

commence with a Post-Committal Directions Hearing".[9] A hearing of this nature took place before Coghlan J on 2 May 2011.[10] The transcript of that hearing reveals that the issues of construction of the relevant offence provision had been flagged prior to the hearing.[11] The Federal Court authorities which bear upon the issue were referenced.[12] Coghlan J noted:[13]

> as I understood it, one of the reasons that the matter was being brought here [from the County Court] was seeking ... a ruling on the meaning of [s 1041A] of the *Corporations Act.*

Allusion was also made to the competing and contrary constructions favoured by JM and the DPP respectively, and the effect that may have on future appeals.[14]

18. A further preliminary hearing was directed and held before Coghlan J on 30 June 2011 at which time the indictment was filed.[15] The competing constructions of the expression "artificial price" in s 1041A were again canvassed.[16] The reasons of the trial judge (at [4]–[5]) summarise the competing positions on that occasion.

19. On 2 September 2011, JM was arraigned at a further directions hearing pursuant to s 180 of the *Criminal Procedure Act*, and pleaded not guilty. The

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9 Such a hearing requires counsel retained for the committal or the trial to appear and "be in a position to address the Court on the following matters: ... 6. Any potential issues that might warrant one or more early pre-trial hearings pursuant to s 199 of the Criminal Procedure Act ... 7. The identification of any other pre-trial issues and the appropriate directions for the disposal of those pre-trial issues."

10 Transcript of Proceedings, *Director of Public Prosecutions (Cth) v [JM]* (Supreme Court of Victoria, Coghlan J, 2 May 2011) 1 (ln 12), 8 (ln 22).

11 Transcript of Proceedings, *Director of Public Prosecutions (Cth) v [JM]* (Supreme Court of Victoria, Coghlan J, 2 May 2011) 5 (ln 2-5), 14 (ln 29).

12 Transcript of Proceedings, *Director of Public Prosecutions (Cth) v [JM]* (Supreme Court of Victoria, Coghlan J, 2 May 2011) 14 (ln 29).

13 Transcript of Proceedings, *Director of Public Prosecutions (Cth) v [JM]* (Supreme Court of Victoria, Coghlan J, 2 May 2011) 13 (ln 29)-14 (ln 1).

14 Transcript of Proceedings, *Director of Public Prosecutions (Cth) v [JM]* (Supreme Court of Victoria, Coghlan J, 2 May 2011) 16 (ln 11-23).

15 DPP's submissions on appeal dated 25 Jan 2013 at [7]; Transcript of Proceedings, *Director of Public Prosecutions (Cth) v [JM]* (Supreme Court of Victoria, Coghlan J, 30 June 2011) 46 (ln 12).

16 Transcript of Proceedings, *Director of Public Prosecutions (Cth) v [JM]* (Supreme Court of Victoria, Coghlan J, 30 June 2011) 12 (ln 1-20), 14 (ln 15)-15 (ln 3), 17 (ln 1-19), 18 (ln 28)-20 (ln 25), 26 (ln 11)-37 (ln 31), 39 (ln 23)-41 (ln 1).

arraignment not having taken place in the presence of the jury panel, the trial of JM has not commenced.[17]

20. It is therefore clear that the parties joined issue on the question of the correct construction of "artificial price" well before the questions in this proceeding were asked and answered. As a matter of ordinary language, that question had "arisen" at an early point in the case. The only issue is whether, since ss 302 and 305 do not permit the giving of an advisory opinion, the question was not one that had "arisen" within the meaning of s 302. As noted above, JM submits that the question had not "arisen" because relevant facts had not been agreed or determined.

(iv) Role of facts in the reserved questions

21. The construction advanced by the DPP is, in broad terms, that "artificial price" includes a price in a trade by a trader whose purpose in conducting transactions is to set or maintain the market price. If that construction is correct, to obtain a conviction, the DPP will need to prove certain factual matters, some of which remain in dispute. For instance, certain trades the subject of the charges are alleged by the DPP to have been made by JM's daughter for the sole or dominant purpose of ensuring that the price of certain shares was above a particular level to protect her father's financial position. That allegation is disputed by JM.[18]

22. The trial judge made a finding for the purposes of the case stated upon which questions were reserved to the Court of Appeal. Warren CJ (at [62]) concluded (it is submitted correctly) that such a "finding" was in truth an assumption for the purpose of the case stated. Nettle and Hansen JJA eschewed reliance on any assumptions of fact in reframing the questions that were ultimately answered by the trial judge.[19]

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17 *Criminal Procedure Act*, ss 210 and 217.

18 [2011] VSC 527R at [69]-[70].

19 See especially at [297], [303]-[304]

23. Consistent with the approach of the majority, a question of law does not fail to arise simply because it concerns the resolution of a question of construction of a statutory provision. Such a question may be one which can conveniently be resolved without it being necessary to resolve any dispute as to facts. A convenient example was given by Brooking J in *Jacobson v Ross*:[20] whether "person" in a statutory provision includes "corporation".

24. The questions posed by the majority do not seek a "dissertation" upon the meaning of "artificial price" without reference to any facts,[21] or a "mere judicial exegesis unrelated to any facts".[22] They were asked as part of a stated case which involved extensive facts "found or agreed either finally or provisionally".[23]

25. Nor does the question of law stated by the majority fail to arise because it was not expressly linked to the competing constructions put forward by the parties.[24] In any case where a court is called upon to construe a statutory provision, there will often be two or more competing constructions put forward by the parties. But the court is not bound to choose one of those constructions.[25] The task of statutory construction is therefore informed by, but not confined to, the competing constructions put forward by the parties. The question at issue here thus could not properly be stated by reference to the competing constructions put forward by the parties because that would foreclose the prospect that the Court of Appeal may properly decline to accept

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20 [1995] 1 VR 337.

21 *Pearce v Federal Commissioner of Taxation* (1978) 37 FLR 296 at 298 (Bowen CJ), 301 (Deane J).

22 *Pearce v Federal Commissioner of Taxation* (1978) 37 FLR 296 at 300 (Brennan J), 301 (Deane J).

23 *Pearce v Federal Commissioner of Taxation* (1978) 37 FLR 296 at 298 (Bowen CJ), 301 (Deane J).

24 It may be noted that the first question stated by the trial judge was framed more closely around the DPP's case: "For the purpose of s 1041A of the *Corporations Act 2001* (Cth), is the price of a share on the ASX which has been created or maintained by a transaction on the ASX that was carried out for the sole or dominant purpose of creating or maintaining a particular price for that share on the ASX an 'artificial price'?" Warren CJ considered that that was a question of law which arose: at [53]–[55], [117]–[137].

25 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [13] (Brennan CJ); *Coleman v Power* (2004) 220 CLR 1 at [243] (Kirby J); *Trust Co of Australia Ltd v Valuer-General (NSW)* (2007) 154 LGERA 437 at [11] (Campbell JA). See also *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 212 (Lord Wilberforce).

either. No doubt questions of statutory construction may sometimes be resolved, narrowly, by considering only whether the particular facts proved fall within a particular statutory provision. But often, before applying a particular statutory provision to the proven facts, a court must construe the provision more generally. The question stated by the majority was directed precisely to that process.

(v) Section 302 permits questions based on assumed facts

26. Alternatively, if it is correct to regard the questions asked by the majority as depending on assumed facts, this did not involve the giving of any advisory opinion in any event. Warren CJ held that it is possible to reserve a question of law under s 302 whose relevance is contingent on disputed facts. Her Honour's analysis of this point at [63]–[116] was correct. In summary:

(a) As a matter of logic, a question of law may arise on disputed facts: at [65]–[68].

(b) Authority does not suggest to the contrary: at [69]–[108]. In particular, the requirement that facts be "identified", stated in *R v Assange*,[26] does not require that the facts be proved or agreed. *Bass v Permanent Trustee Co Ltd*[27] supports the proposition that a question of law can be decided upon the basis of assumed facts if the facts assumed are alleged by a party, with sufficient specificity and precision, and they exhaust the universe of relevant factual material. The Full Court of the Supreme Court of South Australia was wrong to hold to the contrary in *Question of Law Reserved by Trial Judge (No 3 of 2010)*.[28]

(c) To the extent that limitations on the power to reserve questions of law are derived from the case stated procedure, the scheme of the *Criminal Procedure Act* operates more widely to permit the resolution of questions of law on disputed facts: at [109]–[113].

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26 [1997] 2 VR 247.

27 (1999) 198 CLR 334; see also *Pearce v Federal Commissioner of Taxation* (1978) 37 FLR 296 at 298 (Bowen CJ), 301 (Deane J).

28 [2010] SASCFC 77.

27. A question of law, which may ultimately be unnecessary to answer if disputed facts were resolved in a particular way, may be presented in any case where a point of law is the subject of determination prior to determination of the facts, for instance by way of demurrer in civil[29] or criminal[30] proceedings, or preliminary determination of a separate question of law. Such a question is not divorced from the facts with which the court is concerned, which may be identified from pleadings or an indictment, or such other material as states the parties' respective cases.

28. So, in *Williams v O'Keefe*,[31] cited by Isaacs J in *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia*, in the context of a demurrer, the Privy Council declined to consider a question not raised by the pleadings which had arisen during argument in the Supreme Court and had been answered by that Court. The Board described the question as "an abstract point of law". But the Board had no difficulty resolving the point raised by the demurrer, which proceeded upon the asserted facts of the case.[32]

29. The fact that, if all the facts were found, the question may be unnecessary to answer (for instance because the facts necessary to raise the legal point are not proved) does not mean that the question fails to arise *before* the facts are found. That is clearly so in the context of a jury trial, for the reasons given by

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29 See eg *Wurridjal v The Commonwealth* (2009) 237 CLR 309; *JT International SA v The Commonwealth* (2012) 86 ALJR 1297; 291 ALR 669.

30 See eg *R v Boston* (1923) 33 CLR 386; *R v Glynn* (1994) 33 NSWLR 139; *Einfeld v The Queen* (2008) 71 NSWLR 31; *R v Brownlow* (1839) 11 Ad & El 119 [113 ER 358]; *R v Inner London Quarter Sessions; Ex parte Commissioner of Police of the Metropolis* [1970] 2 QB 80.

31 [1910] AC 186 (PC).

32 That is not to say that it will always be appropriate, as a matter of discretion, for a question of law which arises to be determined separately to and before determination of the facts. That is, in part, the explanation of *Stephenson, Blake & Co v Grant, Legros & Co* (1917) 86 LJ Ch 439, cited by Isaacs J in *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia*. The Court of Appeal considered that the trial judge had been wrong to answer certain questions of law prior to trial of the action for infringement of copyright and designs. Among them were the questions "Whether a design for a fount of type was properly the subject-matter of registration as a design?" and "Whether, assuming a design for a fount of type to be so registrable, what the defendants were alleged to have done constituted an infringement of the registered design?" (The questions may be seen in the judgment of the primary judge which is reported as *Stephenson, Blake & Co v Grant, Legros & Co* (1916) 86 LJ Ch 93.) The first ought not to have been separately determined because whether the design propounded by the plaintiff was registrable depended on the precise nature of the design in all the circumstances. The second, while capable of being answered on the pleadings, ought not to have been answered as a matter of discretion having regard to its limited utility.

Warren CJ at [65]. But it is equally true outside the context of a jury trial. Where a party alleges the existence of facts and submits that they have a legal consequence, an opposing party may deny both the alleged facts and the submitted legal consequence. At that point, there arises at least a question of fact — are the facts as alleged? — and a question of law — is the legal consequence of those facts as submitted? A negative answer to either question, even in the absence of an answer to the other, will immediately dispose of the claim that the legal consequence follows. The question of law arises as surely as does the question of fact.

10 30. The focus of s 302 upon a question which arises in the trial in the proceeding in the sense just explained is evidenced by other aspects of the provision. Although the power to reserve a question is no longer conditioned on the court's determination that the answer to the question of law "could render the conduct of the trial unnecessary" (as it was under the former provisions),[33] it is clear that the condition that the trial judge be "satisfied that it is in the interests of justice" to reserve the question is informed by cognate considerations. Factors which are required by the *Criminal Procedure Act* to be considered in weighing that satisfaction are directed at avoiding the need for a trial,[34] substantially reducing the time required for a trial,[35] facilitating the proper
20 conduct of the trial,[36] or avoiding a mistrial.[37] Regard is also to be had to the disruption or delay to the trial process.[38] These are all considerations whose explicit concern is the trial at hand, but often well before any fact-finding has occurred.

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33 See n 3 above.

34 *Criminal Procedure Act*, s 302(2)(b)(i).

35 *Criminal Procedure Act*, s 302(2)(b)(ii).

36 *Criminal Procedure Act*, s 302(2)(b)(iii).

37 *Criminal Procedure Act*, s 302(2)(b)(iv).

38 *Criminal Procedure Act*, s 302(2)(a).

(b) No constitutional difficulty

(i) Federal jurisdiction

31. The power exercised by the Supreme Court in the hearing and determination of the charges against JM for contravention of s 1041A of the *Corporations Act* and s 11.5(1) of the *Criminal Code* (Cth) is the judicial power of the Commonwealth. The hearing and determination is in federal jurisdiction. It forms part of a "matter" within the meaning of (relevantly) ss 76 and 77 of the Constitution.[39]

32. Where a trial judge in a State criminal prosecution reserves a question of State law under s 302 of the *Criminal Procedure Act*, and the Court of Appeal answers it under s 306, both are exercising jurisdiction "with respect to ... the trial and conviction on indictment ... of ... persons charged with offences against the laws of the State". It follows that the trial judge in reserving the questions in the instant case, and the Court of Appeal in answering them, were exercising "equivalent jurisdiction with respect to" the "trial and conviction on indictment" of a person "charged with offences against the Corporations legislation", within the meaning of those terms in s 1338B of the *Corporations Act*.[40]

33. This is so notwithstanding the fact that, in Victoria, a trial does not begin until "the accused pleads not guilty on arraignment in the presence of the jury panel",[41] which has not yet occurred here. For the purposes of s 1338B of the *Corporations Act*, "trial" encompasses judicial processes occurring before the empanelling of a jury, including the "pre-trial" reservation of questions of law.[42] Any more restrictive interpretation would be contrary to the purpose

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39 *R v Murphy* (1985) 158 CLR 596 at 614, 617 (the Court); *R v Gee* (2003) 212 CLR 230 at [37] (McHugh and Gummow JJ).

40 *R v Gee* (2003) 212 CLR 230 at [38] (McHugh and Gummow JJ).

41 *Criminal Procedure Act*, s 210.

42 *R v Gee* (2003) 212 CLR 230 at [43]–[44] (McHugh and Gummow JJ).

and context of the abovementioned statutory provisions which contemplate "curial continuity without fragmentation of federal jurisdiction".[43]

34. Accordingly, prima facie ss 302, 305 and 306 of the *Criminal Procedure Act* were "picked up" and applied by s 1338C of the *Corporations Act*. They are "laws of a State ... respecting ... criminal procedure", where "criminal procedure" means *inter alia* the procedure for "the trial and conviction on indictment". Having regard to the limitations of s 302 and 306, in particular that the question reserved must "arise", and the reserved question at issue in this case, there is no reason why those provisions are not capable of being picked up in this way. The exercise of those powers was capable of forming part of the matter to be resolved by exercise of the judicial power of the Commonwealth.[44]

(ii) Answering the question formed part of the matter

35. As this Court stated in *Mellifont v Attorney-General (Qld)*:[45]

> In *O'Toole* [*v Charles David Pty Ltd* (1991) 171 CLR 232 at 244-245, 258-259, 279-285, 300-302], it was explicitly recognized that answers given by the full court of a court to questions reserved for its consideration in the course of proceedings in a "matter" pending in that court do not constitute an advisory opinion or abstract declaration of the kind dealt with in *In re Judiciary and Navigation Acts* whether or not those answers, of themselves, determine the rights of the parties. Such answers are not given in circumstances divorced from an attempt to administer the law as stated by the answers; they are given as an integral part of the process of determining the rights and obligations of the parties which are at stake in the proceedings in which the questions are reserved. Once this is accepted, as indeed it must be, it follows inevitably that the giving of the answers is an exercise of judicial power because the seeking and the giving of the answers constitutes an important and influential, if not decisive, step in the judicial determination of the rights and liabilities in issue in the litigation.

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43 *R v Gee* (2003) 212 CLR 230 at [44] (McHugh and Gummow JJ).

44 Accordingly, no issue arises as to the extent of the power of a State Parliament to confer a truly advisory jurisdiction upon the Supreme Court of the State or the way in which ss 302, 305 and 306 could operate in the event that they were not capable of being exercised as part of the judicial power of the Commonwealth. See also *Momcilovic v The Queen* (2011) 245 CLR 1 at [98]–[101] (French CJ); *H Ltd v J* (2010) 107 SASR 352 at [11] (Kourakis J).

45 (1991) 173 CLR 289 at 303 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

The reservation of questions of law and the answering of them by the court are "elements in the adjudication of the one matter", that is, are an extension of, and remain a part of, the same "matter" which remains on foot.[46]

36. Once it is recognised that ss 302 and 306 of the *Criminal Procedure Act* are limited to questions which arise, and it is concluded that the question of construction the subject of the questions posed by the majority of the Court of Appeal did arise, it follows that reserving and answering those questions formed part of the matter comprising the prosecution of JM. In answering those questions the Court was exercising the judicial power of the Commonwealth under Ch III of the Constitution.

PART VI: ESTIMATE OF TIME FOR ORAL ARGUMENT

37. It is estimated that approximately 20 minutes will be needed for the presentation of oral argument on behalf of the Attorney-General.

Dated: 1 March 2013

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46 *R v Gee* (2003) 212 CLR 230 at [69] (McHugh and Gummow JJ).