IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
BETWEEN:

No. M73 of 2012

DIRECTOR OF PUBLIC PROSECUTIONS (Cth)

Applicant

and

JM

Respondent

APPLICANT'S SUBMISSIONS IN CROSS-APPEAL

Part I: Internet publication

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

Part II: Statement of issues

2. The accused has been charged with statutory offences that hinge on the concept of "artificial" price. There is a dispute between the parties, apparent from their submissions to the trial judge and the Court below, as to the meaning of this term, which would cause the parties to seek to adduce fundamentally different types of evidence. Is it impermissibly abstract or hypothetical for the Court of Appeal, before the trial, to determine the correct legal signification of "artificial price"?

Part III: Section 78B of the *Judiciary Act 1903*

3. The respondent has given notice in accordance with s 78B of the *Judiciary Act 1903* (Cth) (**Judiciary Act**). The applicant considers that no further notice is necessary.

Part IV: Factual background

4. The background is set out in Part V of the applicant's submissions in the principal appeal.

Part V: Legislative and constitutional provisions

5. In addition to the provisions referred to by the respondent, the applicant relies on ss 1338A to 1338C of the *Corporations Act 2001* (Cth) (**Corporations Act**). These provisions are set out in the attached schedule.

Date of Document: 15 February 2013
Filed on behalf of the Director of Public Prosecutions
Prepared by
Director of Public Prosecutions (Commonwealth)
15th Floor, 460 Lonsdale Street
MELBOURNE VIC 3000
Solicitor Code: 9570
DX: 446
Tel: (03) 9605 4333
Fax: (03) 9670 4295
Ref: MC08101430D

Part VI: Applicant's argument on cross-appeal

A. Introduction

6. In this cross-appeal, the respondent is contending that the Court below had no power to answer the amended question, and is seeking an order that the amended question be answered "inappropriate to answer".[1] In the principal appeal, the applicant is seeking a different answer to the amended question.[2] Neither party is seeking to maintain the original question (1) reserved by Weinberg JA.

7. Contrary to the respondent's argument, the Court below had power to determine the amended question.

(1) It is common ground that a question could not be reserved under s 302 of the *Criminal Procedure Act 2009* (Vic) (**Criminal Procedure Act**) (as applied by federal law) if that question did not give rise to a "matter" – *see section B below*

(2) Separately from the requirement for a "matter", s 302 of the Criminal Procedure Act would be interpreted to operate consistently with general law principles about declaratory relief and not providing advisory opinions. There is a residual area of discretion in which different exercises of discretion are permissible, before one reaches the jurisdictional requirement of a "matter" – *see section C below*

(3) There are a number of different senses in which a question can be "hypothetical". In this case, the issue is whether the amended question is hypothetical because it is decided without reference to facts. Courts do not provide judicial exegesis of a statutory provision unrelated to any facts; rather, it is necessary to show that the answers to questions will have foreseeable consequences for the parties and will lead to the determination of rights and liabilities – *see section D below*

(4) The amended question determined by the Court below is not abstract or hypothetical in any impermissible sense.

(a) The factual background is that the respondent has been charged with offences against s 1041A of the Corporations Act, a provision that hinges on the concept of "artificial" price. The parties' legal submissions take diametrically opposed approaches to the meaning of this concept. It is not possible for the trial to proceed without determining this issue, because otherwise the trial judge cannot rule on objections to evidence.

(b) The amended question raises a pure question of law that does not require any additional facts to determine. The resolution of this question will have a significant effect on what evidence can be led at trial, and is

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1 Respondent's cross-appeal submissions, para 61 (order (d)).

2 Applicant's principal submissions, para 95 (order (c)).

therefore an important and influential step in the judicial determination of rights and liabilities – *see section E below*

B. Requirement for a "matter"

8. The initial steps in the respondent's arguments may be accepted.

(1) The proceedings before the trial judge and the court below were both in federal jurisdiction, because the respondent was charged with offences against a federal law (s 1041A of the Corporations Act).[3]

(2) Accordingly, State laws governing the procedure of the court – such as s 302 of the Criminal Procedure Act – did not apply of their own force in these proceedings. Rather, they could only apply if picked up and applied by a federal law.[4]

Here, the relevant federal law that picked up s 302 of the Criminal Procedure Act was s 1338C of the Corporations Act (rather than s 68 of the Judiciary Act, as contended by the respondent).[5] However, nothing turns on this difference, because ss 1338B and 1338C of the Corporations Act are to the same effect as s 68 of the Judiciary Act.

(3) A federal law (whether it be s 68(1) of the Judiciary Act or s 1338C of the Corporations Act) will not pick up a State law regulating the procedure of a court, if that State law cannot be validly applied in the exercise of federal judicial power.[6]

9. In particular, federal judicial power can only be exercised with respect to a "matter".[7] The requirement for a "matter" means there must be "some immediate right, duty or liability to be established by the determination of the Court", and further that a court exercising federal jurisdiction cannot be given power to "determine abstract questions of law without the right or duty of any body or person being involved".[8]

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3 See Constitution, s 76(ii) (matters arising under a Commonwealth law) and also s 75(iii) (matters to which the Commonwealth, or a person suing on behalf of the Commonwealth, is a party). Respondent's cross-appeal submissions, para 24.

4 Respondent's cross-appeal submissions, para 25.

5 See Corporations Act, s 1338A(1): "This Division provides in relation to the jurisdiction of courts in respect of criminal matters arising under the Corporations legislation and so provides to the exclusion of sections 68, 70 and 70A of the Judiciary Act 1903" (emphasis added). Contra respondent's cross-appeal submissions, paras 24 and 25.

6 Like s 68 of the Judiciary Act, s 1338C of the Corporations Act is not expressly made subject to the Constitution (cf Judiciary Act, s 79(1)). However, s 1338C would be interpreted as far as possible to operate consistently with constitutional requirements: *Acts Interpretation Act 1901* (Cth), s 15A. See respondent's cross-appeal submissions, para 26.

7 A Commonwealth law can only invest a State court with jurisdiction with respect to a "matter": Constitution, s 77(iii) ("With respect to any of the matters mentioned in [ss 75 and 76] the Parliament may make laws … investing any court of a State with federal jurisdiction").

8 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265, 267 (Knox CJ, Gavan Duffy J, Powers, Rich and Starke JJ).

10. Thus it is common ground that s 302 of the Criminal Procedure Act (as applied by federal law) could not authorize the court below to determine a question that was abstract or hypothetical in the relevant sense. (The different senses in which a question can be abstract or hypothetical are analysed in section D below.)

C. Other constraints – question must "arise" before or during trial; nature of judicial power

11. In addition to the requirement for a "matter", there are two other constraints that bear on the scope of s 302 of the Criminal Procedure Act.

12. *Question must "arise" before or during trial:* First, a question reserved under s 302 must be one that "arises" before or during a trial.

13. It may be accepted that this jurisdiction is not conferred to permit courts to offer general advisory opinions on hypothetical questions.[9] The power to answer questions reserved – like the jurisdiction to grant declaratory relief – "is confined by the considerations which mark out the boundaries of judicial power".[10]

14. At the same time, it is necessary to have regard to the particular statutory context. Here, s 302 of the Criminal Procedure Act provides for questions to be reserved "before or during" the trial. The facility to reserve questions "before" a trial may bear on what sort of factual background is required before a question can be reserved.

15. *Nature of judicial power:* The second constraint derives from the nature of judicial power. As just noted, a provision such as s 302 of the Criminal Procedure Act will (subject to a contrary intention) be interpreted to operate consistently with general law principles relating to advisory opinions and declaratory relief.

16. It is well settled that declaratory relief "must be directed to the determination of legal controversies and not to answering questions about abstract or hypothetical questions".[11] Thus courts will not answer preliminary questions "when the answers

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9 *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566 at 576 [11] (Gaudron, Gummow and Hayne JJ). See also *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia* (1925) 36 CLR 442 at 450-452 (Isaacs J); *R v Assange* [1997] 2 VR 247 at 254 (Hayne JA, with Vincent and Coldrey AJJA agreeing); *DPP Reference No 2 of 1996* [1998] 3 VR 241 at 250 (Brooking JA, with Winneke P and Tadgell JA agreeing).

10 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (***Ainsworth***) at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ), discussing the availability of declaratory relief. *Ainsworth* was cited in *Director of Public Prosecutions (SA) v B* to support the proposition that the jurisdiction to answer questions reserved did not permit the courts to provide advisory opinions: (1998) 194 CLR 566 at 576 [11] (n 46).

The link between the availability of declaratory relief and the power to answer preliminary questions also appears from *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 (***Bass***) at 356 [47], 357 [49] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

11 *Ainsworth* (1992) 175 CLR 564 at 582 (Mason CJ, Dawson, Toohey and Gaudron JJ).

will neither determine the rights of the parties nor necessarily lead to the final determination of their rights".[12]

17. However, there is no requirement that the answers to preliminary questions must, of themselves, finally determine the rights of the parties – there will still be an exercise of judicial power if the answers to the questions are "an important and influential, if not decisive, step in the judicial determination of the rights and liabilities in issue".[13] In other words, it is necessary to show that a declaration has foreseeable consequences for the parties[14] (which may include practical consequences).[15]

18. It is therefore open to a court to reserve a pure question of law[16] (as did the Court below), provided the answer to that question will be a step in the final determination of those rights. In particular, to reserve a pure question of law does not run counter to statements that judicial power involves finding facts, and applying the law to those facts[17] – those statements are intended as general descriptions of what is involved in the making of final orders.

19. *Relationship between judicial power constraint and "matter":* It is necessary to examine the relationship between the requirements of a "matter" and the requirements of judicial power, to the extent that they both prohibit a court from providing advisory opinions.

    (1) Any constraints on providing advisory opinions deriving from the nature of judicial power would apply equally to proceedings in federal and State jurisdiction.[18]

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12 *Bass* (1999) 198 CLR 334 at 357 [49] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

13 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 (***Mellifont***) at 303 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ), 325 (Toohey J); *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 244 (Mason CJ), 283 (Deane, Gaudron and McHugh JJ), 302 (Dawson J, with Toohey J agreeing). It is submitted that the constitutional requirement is that answer to the question must be a "step" in determining legal rights and liabilities: see *Bass* (1999) 198 CLR 334 at 357 [49]. Whether an answer will be an "important or influential" step goes to the proper exercise of discretion.

14 See *Aussie Airlines v Australian Airlines* (1996) 68 FCR 406 at 414 (Lockhart J, with Spender and Cooper JJ agreeing). See also *Edwards v Santos* (2011) 242 CLR 421 at 436 [38] (Heydon J, with French CJ, Gummow, Crennan, Kiefel and Bell JJ, and Hayne J, agreeing on this point).

15 See eg *CTC Resources* (1994) 48 FCR 397 at 430 (Hill J), citing *Ainsworth* (1992) 175 CLR 564 at 582.

16 *Bass* (1999) 198 CLR 334 at 358 [52] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

17 Cf respondent's cross-appeal submissions, para 29.

18 The principles in *Bass* have been applied many times in State courts exercising State jurisdiction: see eg *Chapman v Queensland* [2012] QCA 134 at [38]-[41] (Muir JA, with Fraser JA and Martin J agreeing); *Insurance Australia Ltd t/as NRMA Insurance v Zizovski* [2012] NSWCA 246 at [21] (Beazley and Basten JJA); *Mobileworld Operating Pty Ltd v Telstra Corporation Ltd* [2006] VSC 164 at [80] (Whelan J).

(2) By contrast, constraints deriving from the requirement for a "matter" only apply to federal proceedings. These constraints go to a court's jurisdiction, not merely to the proper exercise of discretion.

20. In this respect the requirements of a "matter" and the nature of judicial power reinforce each other to a large extent. As Isaacs J stated in *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia*:[19]

> It is abundantly established by cases of the highest authority that a Court does not give judgments on hypothetical facts. That is fundamentally not the function of any ordinary Court. Of this Court, resting on a statutory basis (the Constitution), that is so in a special degree, as is seen by the decision in *In re Judiciary and Navigation Acts* [(1921) 29 CLR 257, esp at 265]. But quite apart from that special position, the ordinary jurisdiction of a Court does not extend to answering questions as problems of law dependent on facts yet unascertained. (emphasis added)

21. However, it is submitted, there is a residual area of discretion in which a range of different exercises of discretion is permissible, before one reaches the jurisdictional requirement of a "matter".[20] As Tracey and McKerracher JJ held in *Allphones Retail Pty Ltd v Weimann*,[21] there is a distinction between the proper exercise of the Federal Court's discretion to grant declaratory relief, and its jurisdiction to grant that relief.

(1) This result is suggested by the discretionary nature of the principles governing the grant of declaratory relief and in reserving preliminary questions. In deciding whether to reserve preliminary questions, the ultimate issue is whether, in the exercise of the court's discretion, it is an appropriate case for the departure from the ordinary course that all issues of fact and law should be determined at the one time, on the basis that it is just and convenient for the order to be made.[22] It is unlikely that this sort of balancing exercise would in all cases yield a single, correct result, which would then have constitutional status through the concept of a "matter".

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19 (1925) 36 CLR 442 at 451. This passage was referred to with approval in *Bass* (1999) 198 CLR 334 at 356 [47] (n 101).

20 In this context, a "discretionary" decision is one in which no one consideration and no combination of considerations is necessarily determinative of the result, such that a decision-maker is allowed some latitude as to the choice of decision to be made. On appeal, the correctness of the decision can only be challenged by showing error in the decision-making process, in the case of judicial discretion along the lines of *House v The King* (1936) 55 CLR 499 at 505: see *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 204-205 [19]-[21] (Gleeson CJ, Gaudron and Hayne JJ).

21 [2009] FCAFC 135 (***Allphones Retail***) at [78].

22 *Fleming's Nurseries Pty Ltd v Hannaford* [2008] FCA 591 at [17] (Kenny J). In forming this judgment, there are a number of competing factors to be considered: see eg *Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 217 ALR 495 at 499 [8] (points (f) and (g)) (Branson J); *Olbers v Commonwealth of Australia (No 3)* [2003] FCA 651 at [7] (French J).

(2) The need for evaluative judgment is apparent in decisions considering whether an appeal has been rendered moot.[23] For example, the presence of a contradictor is an important factor in ensuring that a declaratory judgment is not merely advisory.[24] However, in *Attorney-General (Cth) v Alinta Ltd*,[25] this Court held that an appeal to this Court by the Commonwealth Attorney-General (who had intervened in the Full Court of the Federal Court) was not rendered moot by the fact that the named respondent no longer wished to contest the issue.

22. There is no reason to suppose that the constitutional requirement for a "matter" would impose any more onerous requirements in relation to advisory opinions than the general law principles for granting declaratory relief. It is true that *In re Judiciary and Navigation Acts* held that an advisory opinion was a judicial function, but not within the judicial power of the Commonwealth.[26] However, that passage was answering the argument that an opinion sought under the relevant Commonwealth provisions was not binding – the majority of this Court responded that the provisions purported to allow the Parliament to obtain an "authoritative declaration of the law", which could only be obtained through the exercise of judicial power.[27] Certainly this passage was not concerned with the principles governing the availability of declaratory relief.

23. At the very least, it would ordinarily be appropriate for a court to consider first whether reserving a preliminary question came within the proper exercise of discretion, before deciding whether there was or was not a "matter". This follows from the general principle that courts do not decide constitutional issues unless it is necessary to do so.[28] Consistently with this submission, the Full Court of the Federal

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23 Even at trial, whether or not there is a real controversy is a question of judgment: see *Australian Gas Light Company v Australian Competition and Consumer Commission (No 2)* [2003] FCA 1229 at [40] (French J), on whether to grant a declaration that proposed conduct would not be in breach of the law.

24 *CTC Resources* (1994) 48 FCR 397 at 407 (Gummow J): a declaratory judgment still requires a controversy and a contradictor; see also *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448 (Lord Dunedin); Stephen Crawshaw, "The High Court of Australia and Advisory Opinions" (1977) 51 *Australian Law Journal* 112 at 114. Another crucial difference is that an advisory opinion is not based on a concrete situation and does not create a res judicata between the parties: *Bass* (1999) 198 CLR 334 at 356 [48] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

25 (2008) 233 CLR 542 at 567-568 [65]-[68] (Hayne J, with Gleeson CJ and Gummow J agreeing on this point), 580 [103]-[104] (Heydon J), 591-592 [149]-[150] (Crennan and Kiefel JJ, with Gummow J also agreeing on this point); cf 558-559 [30]-[33] (Kirby J). Intermediate courts of appeal have on rare occasions continued with an appeal, even if that particular dispute is spent, if the court's decision is likely to affect other cases: see eg *D'Anastasi v Environment, Climate Change and Water (NSW)* (2011) 81 NSWLR 82 at 86-87 [25]-[28] (Young JA, with Campbell JA and Sackville AJA agreeing).

26 (1921) 29 CLR 257 at 264 (Knox CJ, Gavan Duffy J, Powers, Rich and Starke JJ). Cf respondent's cross-appeal submissions, para 30.

27 See *Momcilovic v The Queen* (2011) 245 CLR 1 at 62 [82] (French CJ).

28 See eg *Chief Executive Officer of Customs v El Hajje* (2005) 218 ALR 457 at 464 [28] (McHugh, Gummow, Hayne and Heydon JJ).

Court held in *Re Tooth & Co Ltd*[29] that a declaration should not be made in the circumstances of that case, and did not determine whether or not there was a "matter". Brennan J expressly left open whether the jurisdictional criteria (a "matter") might in some cases compel the refusal of a declaration that would otherwise be granted.[30]

24. On this approach, the requirement for a "matter" (to the extent that it prohibits advisory opinions) would be most relevant as an independent requirement when a statute attempted to confer special advisory jurisdiction on a court.[31] In other cases, the need for a "matter" would only reinforce general law principles that prohibit a court from providing advisory opinions.

D. Different senses in which a question can be abstract or hypothetical

25. It is useful to clarify the different senses in which a question can be "abstract" or "hypothetical". These different senses raise different considerations, particularly in how much factual background is necessary to ensure that a question is not abstract or hypothetical.

26. *Different classes of hypothetical cases:* A leading text on declaratory judgments divides hypothetical cases into 4 classes:[32]

(1) Where there is no dispute in existence [for example, *In re Judiciary and Navigation Acts*[33]];

(2) Where the dispute is divorced from the facts;

(3) Where the dispute is based on hypothetical facts [for example, *Bass v Permanent Trustee Co Ltd*[34]]; and

(4) Where the dispute has ceased to be of procedural significance [for example, *Re McBain; Ex parte Australian Catholic Bishops Conference*[35]].

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29 (1977) 31 FLR 314 at 327 (Bowen CJ and Franki J), 334 (Brennan J).

30 *Re Tooth & Co Ltd* (1977) 31 FLR 314 at 330-331. See also *CTC Resources NL v Commissioner of Taxation* (1994) 48 FCR 397 (***CTC Resources***) at 428 (Hill J).

31 Cf the discussion of the power in s 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to declare that legislation is incompatible with human rights in *Momcilovic v The Queen* (2011) 245 CLR 1 at 60-65 [80]-[89] (French CJ, with Bell J agreeing on this point), 93-97 [172]-[189] (Gummow J, with Hayne J agreeing on this point), 185 [457] (Heydon J), 221-229 [582]-[605] (Crennan and Kiefel JJ).

32 Rt Hon Lord Woolf and Jeremy Woolf, *Zamir and Woolf: The Declaratory Judgment* (4th ed 2011) at 151-152. This classification was adopted in *Galaxy Communications Pty Ltd v Paramount Films* (NSW Court of Appeal, unreported, 24 February 1998 at [32] (Stein JA with Meagher JA agreeing), which in turn is cited in *Allphones Retail* [2009] FCAFC 135 at [81] (Tracey and McKerracher JJ).

33 (1921) 29 CLR 257. Another example of class (1) is *Croome v Tasmania* (1997) 191 CLR 119, although the dispute was found not to be hypothetical. This Court held that the plaintiffs could still challenge the validity of a State law even though they had not been charged with offences under those laws.

34 (1999) 198 CLR 334.

27. The potentially relevant class with the amended question is class (2) – the issue is whether the amended question answered by the Court below was impermissibly divorced from the facts.[36] The main concern with this sort of hypothetical case is that there is no certainty that an answer to a general question will settle the dispute finally, or lead to the settling of the dispute.[37]

28. It is possible to reserve a pure question of law that does not depend on facts.[38] *Blurton v Minister for Aboriginal Affairs*[39] provides an example. However, it must be accepted that courts do not provide "a mere judicial exegesis of a statutory provision unrelated to any facts", where all that is involved is "devis[ing] precise synonyms for the statutory language".[40] To similar effect, Hayne JA stated in *R v Assange*[41] that the court cannot answer a question to the effect of "What does a particular section of the Commonwealth Crimes Act mean?", because the answer would be "no more than an advisory opinion of more or less general application". (As explained in section E below, the questions reserved in *Assange* are distinguishable from the question answered by the Court below.)

29. *Reasons for not providing advisory opinions:* In considering the reach of these principles, it is helpful to examine the underlying reasons for courts not providing advisory opinions.

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35 (2002) 209 CLR 372 (***Re McBain***). In *Re McBain*, the Catholic Bishops (relying on a fiat from the Attorney-General of the Commonwealth) were seeking to re-open in this Court a dispute that had been settled by the judgment of Sundberg J, to which neither the Bishops nor the Commonwealth Attorney-General was a party.

Another example of class (4) is *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, although the dispute was found not to be hypothetical. In *Mellifont*, this Court held that an appeal on a question reserved came within the appellate jurisdiction in s 73 of the Constitution, even though the answer given to that question did not disturb the acquittal in that case.

36 Although these different classes of hypothetical case are not hermetically sealed, the difference between class (2) and (3) is as follows: in class (2) the dispute is not attached to specific facts, whereas in class (3) the dispute is attached to specific facts, but those facts have not occurred and might never occur at all: *Zamir and Woolf: The Declaratory Judgment* (4th ed 2011) at 159.

37 *Zamir and Woolf: The Declaratory Judgment* (4th ed 2011) at 156; see also *Australian Institute of Private Detectives Ltd v Privacy Commissioner* (2004) 139 FCR 394 at 402 [31] (Sackville J). As noted, it is not necessary that the answer to a preliminary question settle the dispute finally; it is sufficient if the answer is an important and influential, if not decisive, step in the judicial determination of the rights and liabilities in issue: see para 17 above.

38 *Bass* (1999) 198 CLR 334 at 358 [52] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ): "Some questions of law can be decided without any reference to the facts". Indeed, in *Bass* itself, this Court was able to determine whether New South Wales was bound by the *Trade Practices Act 1974* (Cth) (see 343 [6], 353 [38]).

39 (1991) 29 FCR 442 at 449 (French J): "The preliminary issue in this case does not depend on any question which would require evidence to be adduced. It is simply a matter of the proper construction of the Act." The preliminary issue was whether a claim that elections were held in breach of s 109 of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) was a "question respecting ... the qualifications of a member of a Regional Council" that could be referred to the Federal Court under s 17(1)(a) of that Act: at 445.

40 *Pearce v Federal Commissioner of Taxation* (1978) 20 ALR 354 at 357 (Brennan J).

41 [1997] 2 VR 247 at 254 (with Vincent and Coldrey AJJA agreeing).

30. Historically, there was a concern about advisory opinions undermining the independence of the judiciary from the executive.[42] A similar concern may explain the result in *Re Judiciary and Navigation Acts*, particularly as it is the role of courts exercising federal jurisdiction to maintain the federal division of power under the Constitution.[43] These concerns are not present, however, when questions are sought to be reserved in the context of a specific dispute (as is the case here).[44]

31. The major argument against advisory opinions (particularly in the constitutional context) is that court processes are designed to answer questions in the context of a particular dispute.[45] However, this is not an absolute feature of the judicial process– although judicial reasoning works best in concrete situations,[46] this Court has also on occasion given declaratory judgments about the validity of legislation even before that legislation was proclaimed.[47] In that situation, there could not by definition be any information about how the law operated in practice.[48] Although that was a case about constitutional validity, a necessary step in determining validity is to construe the legislation in question.[49]

32. It should also be noted that, although there are some judicial statements that doubt whether reserving preliminary questions will assist the speedy resolution of a dispute,[50] in other cases the courts have acknowledged that reserving preliminary

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42 See the history set out in *Zamir and Woolf: The Declaratory Judgment* (4th ed 2011) at 145-146.

43 The negative effect of advisory opinions on judicial independence is noted in *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529 at 541 (PC). Indeed, the *Boilermakers* doctrine is best understood as designed to maintain the separation of judicial power and uphold the effective working of the Constitution: see Leslie Zines, *The High Court and the Constitution* (5th ed 2008) at 217.

44 See *Zamir and Woolf: The Declaratory Judgment* (4th ed 2011) at 147: in modern times, the objection to advisory opinions "can hardly be based on fear of the Executive trying unduly to influence the opinion of the judges".

45 Professor Zines states that the strongest argument against advisory opinions (and declaratory judgments obtained by an Attorney-General) is that "the courts are deprived of developed facts and experience of how the legislation has operated for the purpose of determining validity": Leslie Zines, "Advisory Opinions and Declaratory Judgments at the Suit of Governments" (2010) 22.3 *Bond Law Review* 156 at 164.

46 Leslie Zines, *The High Court and the Constitution* (5th ed 2008) at 257, cited in respondent's cross-appeal submissions, para 55. Professor Zines was considering in that passage the role of "policy" in judicial power. He has stated elsewhere that there are no good reasons based on principle, policy or textual provisions for the prohibition on advisory opinions in *Re Judiciary and Navigation Acts*: Leslie Zines, "Advisory Opinions and Declaratory Judgments at the Suit of Governments" (2010) 22.3 *Bond Law Review* 156 at 168.

47 See *Attorney-General (Vic) v The Commonwealth (The Pharmaceutical Benefits Case)* (1945) 71 CLR 237 at 278 (Williams J). See generally Maxwell E Foster, *The Declaratory Judgment in Australia and the United States* (1958) 1 *Melbourne University Law Review* 347 at 373-381, especially 380: the High Court has decided issues without any detailed set of facts.

48 Cf respondent's submissions on cross-appeal, para 55.

49 On the need to begin with the construction of the impugned legislation, see eg *K-Generation v Liquor Licensing Court (SA)* (2009) 237 CLR 501 at 519 [45] (French CJ).

50 See eg *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1 at 55 [168]-[170] (Kirby and Callinan JJ, dissenting in the result).

questions can greatly assist the resolution of disputes. In *R v Wei Tang*,[51] the Victorian Court of Appeal stated that the procedural history of that matter:

> ... highlights the need to ensure, so far as practicable, that critical legal questions affecting a criminal trial are adjudicated upon before the trial commences, rather than at its conclusion. In this case, it was not until after two lengthy trials of the applicant on the slavery counts that this Court was asked to rule on fundamental threshold questions regarding the slavery provisions – whether they were constitutionally valid and, if so, how they were to be interpreted. Those same questions were, in turn, ruled on by a seven-member bench of the High Court.
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> As Eames JA noted in *R v Wei Tang*, the task facing the trial judge and trial counsel was one of considerable difficulty, there being no guiding case law on the elements of the offences or on the meaning to be attributed to the statutory language. It is to be hoped that the new provisions of the *Criminal Procedure Act 2009* (Vic), introducing interlocutory appeals [s 295] and greatly expanding the case stated procedure [Div 7] will enable questions of fundamental importance to a trial to be decided – and, where necessary, considered by this Court – before the trial begins.

33. Of course, mere convenience cannot prevail over constitutional requirements[52] – however, it is submitted, it is permissible to have regard to the alternative consequences of different constitutional interpretations.[53] It should also be remembered that there is a residual area of discretion in determining whether to reserve questions of law in which a range of different exercises of discretion is permissible, before the jurisdictional requirement of "matter" is reached: see para 21 above.

E. Amended question answered by Court below is not abstract or hypothetical

34. The amended question answered by the Court below can be considered in the light of these principles. For the reasons that follow, that question is not abstract or hypothetical in any impermissible sense.

35. *There is a concrete factual background:* The amended question reserved by the Court below asks: (a) is the term "artificial price" in s 1041A of the Corporations Act used in the sense of a term having a legal signification; and (b) if yes, what is its legal signification?

36. These questions emerge from a concrete factual background. The facts stated by Weinberg JA establish that the respondent has been charged with offences against s 1041A of the Corporations Act, and that he has pleaded "Not Guilty" (Annexure B,

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51 (2009) 23 VR 332 at 333 [4]-[5] (emphasis added, footnotes omitted).

52 See eg *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 540 [2] (Gleeson CJ), 548 [34] (McHugh J), 569 [94] (Gummow and Hayne JJ).

53 See for example *Abebe v The Commonwealth* (1999) 197 CLR 510 at 532 [44] (Gleeson CJ and McHugh J): Ch III does not impose "rigid and impractical" choices on Parliament; *Re Governor, Goulburn CC; Ex parte Eastman* (1999) 200 CLR 322 at 332 [9] (Gleeson CJ, McHugh and Callinan J): their Honours' interpretation "is open on the language, and produces a sensible result, which pays due regard to the practical considerations arising from the varied nature and circumstances of territories".

[1] and [2]). The offence in s 1041A hinges on the concept of an "artificial" price (s 1041A(c) and (d)).

37. It was apparent from the legal submissions put to the Court of Appeal that the parties took diametrically different approaches to the interpretation of the concept "artificial" price (Reasons below, [176]-[177] (Warren CJ). (As an aside, these legal submissions were not part of the "circumstances" that were required by s 305 of the Criminal Procedure Act to be set out in the case stated.[54]) The dispute between the parties as to the meaning of "artificial price" had previously arisen before the trial judge ([2011] VSC 527R at [4]-[5]).[55]

10 38. The trial of the offence could not proceed until this difference of view on the interpretation of "artificial price" was resolved. Until the proper meaning was determined, it would not be possible for the trial judge to rule on what evidence was relevant, or whether certain evidence was more prejudicial than probative (Reasons below, [120] (Warren CJ)).

(1) The question is no more hypothetical here than if the trial judge had determined the meaning of "artificial price" in ruling on whether a piece of evidence was admissible. That ruling could, subject to leave, have been appealed to the Court of Appeal (Criminal Procedure Act, s 295).

(2) However, as the trial would have already commenced, an interlocutory appeal
20 would only be available if it could be certified that the issue was not reasonably able to be identified before trial, or the party was not at fault in failing to identify the issue (s 295(3)(c)).

39. Accordingly, the question reserved is much narrower than asking "what does s 1041A of the Corporations Act mean?".[56] Rather, the question addresses a point of central legal divergence between the parties, which will have a significant effect on what evidence can be led at trial. Thus the answer to this question will be "an important and influential, if not decisive, step in the judicial determination of the

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54 By analogy, the general position was that a case stated must contain ultimate facts, and not evidence, and that the appeal court could not go beyond these ultimate facts: see eg *Furze v Nixon* (2000) 2 VR 503 at 506-508 [5]-[8] (the Court). The parties' submissions are not ultimate facts.

55 The dispute between the parties on the meaning of "artificial price" had arisen even prior to the hearing of argument before the trial judge on 2 September 2011. The accused stated, in support of the application to transfer the proceedings to the Supreme Court, that he would ultimately submit that Goldberg J in *Soust* erred as to the proper construction of s 1041A: Outline of Submissions dated 6 April 2011, paras [22]-[24]. [**AB**]

Moreover, the difference emerges from the submissions filed by the parties pursuant to orders by Coghlan J (as he then was) on 30 June 2011 for a hearing on 2 September 2011 on the interpretation of s 1041A: Outline of Submissions of Accused dated 21 July 2011, para 2 [**AB**]; Outline of Crown Submissions dated 28 July 2011, paras 4 and 9 [**AB**]. See also affidavit of Andrew Burnett sworn on 16 September 2011, Exhibit 3 at para 9 [**AB**].

56 Cf respondent's cross-appeal submissions, para 54, referring to *Assange* [1997] 2 VR 247 at 254.

rights and liabilities in issue".[57] There is no comparison with the questions considered in *Director of Public Prosecutions (SA) v B*,[58] or in *R v Garlick*.[59]

40. As a matter of principle, a question of law is not hypothetical merely because it is broad. For example:

(1) This Court's decision in *Peters v The Queen*[60] sets out the usual meaning of "dishonest", but noted that a particular statutory provision might use the term "in some special sense".[61] In *SAJ v The Queen*,[62] the Victorian Court of Appeal determined a preliminary legal issue of whether s 184(2) of the Corporations Act used the word "dishonestly" in a special sense.

(2) In *Screen Australia v EME Productions No 1 Pty Ltd*,[63] the Full Court of the Federal Court considered a number of questions of law in an appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth). These questions concerned the interpretation of the word "documentary" in the *Income Tax Assessment Act 1997* (Cth), and included: "(a) Whether the reference to *documentary* in [the relevant provision] is to be construed by reference to the statutory context and the relevant Explanatory Memorandum".[64]

The Full Court of the Federal Court rejected an argument that these questions were too general to be a question of law within s 44 – the Court held that these questions "are directed, with appropriate specificity, to the steps in the legal process of construction and to the material errors in that process as purportedly carried out by the Tribunal".[65]

41. *Question reserved does not require any additional (unproved) facts:* Moreover, the questions posed by the Court below are pure questions of law. Unlike the questions

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57 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 303 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ), 325 (Toohey J): see para 17 above. By contrast, in *Bass* (1999) 198 CLR 334 at 359 [57], the joint judgment stated that the answers to questions 2 and 3 in that case (which depended on hypothetical facts) "are more likely to impede than to facilitate the future course of the litigation".

58 (1998) 194 CLR 566; contra respondent's cross-appeal submissions, para 52. In *B*, the first question was so broad "as to be devoid of practical utility", and the second was irrelevant to the circumstances of that trial: at 577 [13] (Gaudron, Gummow and Hayne JJ).

59 [2006] VSCA 127; contra respondent's cross-appeal submissions, para 42. In *Garlick*, the case stated purported to raise a series of generic questions about a provision, unconnected to the ultimate facts of that particular case: at [30] (the Court). It appears that the judge had attempted to have the Court of Appeal canvass as many questions as possible about the operation of the relevant provision: at [25].

60 (1998) 192 CLR 493.

61 *Peters* (1998) 192 CLR 493 at 504 [18] (Toohey and Gaudron JJ), see also 531 [86] (McHugh J); *Macleod v The Queen* (2003) 214 CLR 230 at 242 [36]-[38] (Gleeson CJ, Gummow and Hayne JJ), 256 [99] (McHugh J), 264-265 [130] (Callinan J).

62 [2012] VSCA 243.

63 (2012) 200 FCR 282.

64 See (2012) 200 FCR 282 at 288 [21].

65 (2012) 200 FCR 282 at 289 [24] (the Court).

considered in *Bass*,[66] the amended questions reserved by the Court below do not require any additional, unproved facts.

42. The question whether a word in a statute is to be given its ordinary meaning or a technical or defined meaning is a question of law[67] (question 1(a): Reasons below, [302] (Nettle and Hansen JJA)). Moreover, the content of any legal meaning is also a question of law (question 1(b): Reasons below, [302]).[68] In other words, no additional facts are required to answer the amended question – the areas of factual dispute in the facts stated by the trial judge do not and could not affect the legal meaning of "artificial price".[69]

10 43. This case is therefore different from *Assange*, where one of the questions asked whether certain words had a common English or a technical meaning.[70] Determining the common English meaning or a non-legal technical meaning is a question of fact,[71] and there was nothing in the case stated that went to those questions of fact.[72] By contrast, here the question asked only whether there was a technical legal meaning, which is a question of law (Court below, [305] (Nettle and Hansen JJA)).

44. A closer point of comparison is *Mansfield v The Queen*,[73] where this Court held that the word "information" in Pt 7.10 of the Corporations Act could include material that was false. The accused in that case made a successful no case submission at trial, and had been acquitted at the end of the prosecution case.[74] It was possible for this
20 Court to determine this question, simply by reference to the allegations made by the prosecution – the joint judgment stated: "If the alleged conversations took place, each appellant possessed information about [the relevant company] that was not available".[75] In *Mansfield*, like this case, it was possible to resolve the legal dispute about the meaning of a statutory phrase without entering into disputed areas of fact.

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66 (1999) 198 CLR 334 at 357 [49] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). This also provides a point of distinction from *Question of Law Reserved by Trial Judge (No 3 of 2010)* [2010] SASCFC 77 at [4]-[5] (the Court) and *Harts Australia Ltd v Commissioner of Taxation* (2001) 109 FCR 405 at 413 [20]-[21] (Merkel J, with Lee and Finn JJ agreeing); cf respondent's cross-appeal submissions, paras 43 and 44.

67 See *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 (***Agfa-Gevaert***) at 395 (the Court), referring to the first proposition in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287.

68 *Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395 (the Court), referring to the third proposition in *Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287.

69 Cf respondent's cross-appeal submissions, paras 12-14, 47.

70 See [1997] 2 VR 247 at 249.

71 *Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395 (the Court), referring to the second proposition in *Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287.

72 *Assange* [1997] 2 VR 247 at 252.

73 (2012) 293 ALR 1.

74 See (2012) 293 ALR 1 at 4 [12]-[13] (Hayne, Crennan, Kiefel and Bell JJ).

75 (2012) 293 ALR 1 at 3 [7] (Hayne, Crennan, Kiefel and Bell JJ).

45. *There is a "controversy" between the parties:* Finally, there is a clear and ongoing controversy between the parties – namely, the proceeding seeks to vindicate and enforce the duty or liability of the respondent to observe the law of the Commonwealth.[76]

46. Adopting the "tripartite inquiry" from *Re McBain*,[77] (i) the subject-matter of the s 302 proceeding is the answer to the questions reserved; (ii) the right, duty or liability is the respondent's duty or liability to observe the law of the Commonwealth; and (iii) these answers will be applied at the trial of the offence, which demonstrates the existence of a continuing controversy between the parties. Thus this case is far removed from *In re Judiciary and Navigation Acts*,[78] where the relevant Commonwealth law purported to confer jurisdiction on this court to give binding opinions on the validity of an Act, divorced from any attempt to administer the law.

F. Special leave in cross-appeal and costs

47. If the applicant is granted special leave in the principal appeal, then special leave should also be granted in the cross-appeal. However, if the cross-appeal is allowed, costs should not be awarded. There is no reason to depart from the usual position.

Part VIII: Estimate of time of argument

48. The applicant's estimate of 2 to 3 hours in the submissions in the principal appeal included time for oral submissions in the cross-appeal.

Dated: 15 February 2013

JEREMY W RAPKE QC
T (03) 9225 6292
F (03) 9225 8450
jeremyrapke@vicbar.com.au

CHRIS WINNEKE
T (03) 9225 8551
F (03) 9225 8895
cwinneke@vicbar.com.au

GRAEME HILL
T (03) 9225 6701
F (03) 9640 3108
graeme.hill@vicbar.com.au

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76 See *Re McBain* (2002) 209 CLR 372 at 407 [67] (Gaudron and Gummow JJ).

77 *Re McBain* (2002) 209 CLR 372 at 405-406 [62] (Gaudron and Gummow JJ).

78 (1921) 29 CLR 257. Contra respondent's cross-appeal submissions, para 52.

Additional relevant legislative provisions

Corporations Act 2001 (Cth), Pt 9.6A, Div 2 (at all relevant times)

1338A Operation of Division

(1) This Division provides in relation to the jurisdiction of courts in respect of criminal matters arising under the Corporations legislation and so provides to the exclusion of sections 68, 70 and 70A of the *Judiciary Act 1903*.

(2) This Division does not limit the operation of the provisions of the *Judiciary Act 1903* other than sections 68, 70 and 70A.

(3) Without limiting subsection (2), this Division does not limit the operation of subsection 39(2) of the *Judiciary Act 1903* in relation to criminal matters arising under the Corporations legislation.

1338B Jurisdiction of courts

(1) Subject to this section, the several courts of each State, the Capital Territory and the Northern Territory exercising jurisdiction:

(a) with respect to:

(i) the summary conviction; or

(ii) the examination and commitment for trial on indictment; or

(iii) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State, the Capital Territory or the Northern Territory, and with respect to:

(iv) their sentencing, punishment and release; or

(v) their liability to make reparation in connection with their offences; or

(vi) the forfeiture of property in connection with their offences; or

(vii) the proceeds of their crimes; and

(b) with respect to the hearing and determination of:

(i) proceedings connected with; or

(ii) appeals arising out of; or

(iii) appeals arising out of proceedings connected with;

any such trial or conviction or any matter of a kind referred to in subparagraph (a)(iv), (v), (vi) or (vii);

have the equivalent jurisdiction with respect to offenders or persons charged with offences against the Corporations legislation.

(2) The jurisdiction conferred by subsection (1) is not to be exercised with respect to the summary conviction, or examination and commitment for trial, of any person except by a magistrate.

...

1338C Laws to be applied

(1) Subject to this Division, the laws of a State, the Capital Territory or the Northern Territory respecting:

(a) the arrest and custody in the State or Territory of offenders or persons charged with offences; and

(b) criminal procedure in the State or Territory in relation to such persons; and

(c) the rules of evidence applied in criminal procedure in the State or Territory in relation to such persons;

apply in the State or Territory, so far as they are applicable, to persons who are charged with offences against the Corporations legislation.

(2) In this section:

criminal procedure means the procedure for:

(a) the summary conviction; and

(b) the examination and commitment for trial on indictment; and

(c) the trial and conviction on indictment; and

(d) the hearing and determination of appeals arising out of any such trial or conviction or out of any related proceedings;

10 of offenders or persons charged with offences, and includes the procedure for holding accused persons to bail.