IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M92 of 2014

BETWEEN **COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE**

Appellant

AND

QING ZHAO

First Respondent

XING JIN

Second Respondent

APPELLANT'S SUBMISSIONS

Filed on behalf of the appellant
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PART I INTERNET PUBLICATION

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

PART II THE ISSUES

2. In analysing the procedure for the civil forfeiture trial provided for by the *Proceeds of Crime Act* 2002 (Cth) (**the Act**), did the Court below fail to pay due regard to the distinction between the compulsory examination, whether under the Act or otherwise, of a person charged with an offence, and voluntary decisions by persons to seek to lead evidence within the *in rem* forfeiture trial; particularly so, when the Court below attached determinative significance to the Act's express abrogation of the privilege against self-incrimination in respect of the former but not the latter?

3. Did the Court below fail to apply properly the decisions of this Court in *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082; 302 ALR 363 ***(Lee (No 1))*** and *Lee v The Queen* (2014) 88 ALJR 656; 308 ALR 252 ***(Lee (No 2))***; and was it erroneous of it to hold that the latter decision required it to stay the applications of the appellant (**the Commissioner**) and the respondents under the Act for the supposed purpose of preventing any further abrogation of the privilege against self-incrimination? Was a test of mere overlap substituted for the correct test of a real risk to the administration of justice?

4. Independent of the above issues, is there any principle known to the law to support the stay granted by the Court below of the civil forfeiture proceedings under the Act, against property owned solely by the *first* respondent, who has not been charged with any offence, on the basis that any evidence she gives in those proceedings might be used against the *second* respondent in his criminal proceedings?

PART III SECTION 78B OF THE *JUDICIARY ACT* 1903 (CTH)

5. The appellant has considered whether any notice pursuant to s 78B of the *Judiciary Act* 1903 (Cth) must be given and is of the view that no such notice is required.

PART IV CITATIONS

6. As at the date of these submissions, the decision of the Court of Appeal of the Supreme Court of Victoria is not reported. Its medium neutral citation is: [2014] VSCA 137. The decision at first instance of Judge Lacava SC of the County Court of Victoria is also not reported. It has not been allocated a medium neutral citation number. It is styled as *Qing Zhao and Xing Jin v The Commissioner of the Australian Federal Police*, unreported, 3 December 2013, Lacava J.

PART V THE FACTS

7. On 2 July 2013, the second respondent was charged with the offence of aiding and abetting the dealing in proceeds of crime worth $100,000 or more, pursuant to section 400.4(1) of the *Criminal Code* (Sch 1 to the *Criminal Code Act* 1995

(Cth), by virtue of s 11.2 of the *Criminal Code Act*. The substantive offence from which the relevant proceeds are said to have been derived is living on the earnings of sex workers contrary to s 10 of the *Sex Work Act* 1994 (Vic). The Crown alleges that the second respondent is a member of a syndicate headed by his aunt, Ms Mae Ja Kim, which is involved in the recruitment and management of sex workers. It is alleged that, *inter alia*, the second respondent aided and abetted the commission of offences by dealing with cash taken from illegal workers.[1] Those allegations are denied. Following a contested committal hearing, the trial of those offences is set down for 24 August 2015 with an estimate of eight weeks. The first respondent has not been charged with any offence. The first respondent is the wife of the second respondent: (CA [2]; Statement of Facts).

8. The respondents live together at a property in Donvale, Victoria. The first respondent is the sole registered proprietor of that land. The second respondent is the sole registered proprietor of land comprising an apartment in Southbank, Victoria. He is also the director of a company that owns a Jeep motor vehicle: (CA [3]).

9. On 2 July 2013, a judge of the County Court of Victoria made orders on the application of the Commissioner restraining the disposition of the Donvale and Southbank properties and the motor vehicle, pursuant to ss 25 and 26(4) of the Act.[2] On 24 July 2013, the Commissioner filed an application pursuant to s 59 of the Act for forfeiture of the restrained property pursuant to s 49 of the Act: (CA [4]).

10. On 24 September 2013, each of the respondents filed:

    a. applications for orders for the exclusion of the Donvale property and the Southbank property from the restraining orders, pursuant to s 31 of the Act;

    b. an application for an order for exclusion of the properties from forfeiture, pursuant to s 74 of the Act; and

    c. an application for a compensation order under s 78 of the Act: (CA [5]).

11. On 25 November 2013, Lacava J of the County Court heard an application by the respondents for a stay of the forfeiture proceedings and the exclusion and compensation applications (**Forfeiture Proceedings**) until after the hearing and determination of the criminal charges pending against the second respondent.[3] In support of the application for a stay, the second respondent filed an affidavit in which he deposed, *inter alia*, to allegations by the Commissioner that investigations and a conversation between his mother and aunt had led to the

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[1] Para 13 of Statement of Facts served as part of criminal brief: Ex AMD 1 of affidavit of Anna Maria Duran of 6 February 2014 read in the Court below. The Court below at (CA [2]) erroneously records the allegation as being that the second respondent is a brothel owner. Nothing turns on this error.

[2] The Court below at (CA [4]) erroneously records cash and personal items as being the subject of restraining orders as against the respondents. Nothing turns on this error.

[3] The Court below at (CA [6]) erroneously records that the respondents filed applications pursuant to s 49 of the *County Court Act* 1958 (Vic) for a stay. There were no applications filed. An oral application was made in October 2013 and was set down for hearing on 25 November 2013. At (TJ [10]), Lacava J records the common ground that, because s 315 of the Act provides that the proceedings are civil, he has power to stay the proceedings by virtue of s 49 of the *County Court Act* and s 30 of the *Supreme Court Act* 1986 (Vic). Nothing turns on this error.

belief of the relevant federal police officer that his aunt used other people to hide her money and assets: (CA [16]). The examples given were deposits into bank accounts and a payment of a home loan account. At para 32 of his affidavit, the second respondent deposed that:

> In properly presenting my case for these proceedings I would be necessarily required to address these matters in any affidavit filed; however to do so would require me to give evidence as to the purchase of the Restrained Property or ownership of any bank accounts I hold and the source of any funds into those accounts. These matter [sic] are directly relevant to the criminal charges. If I am to depose to these matters in an affidavit in these proceedings I will, in effect, [be] waiving my right to silence. I do not wish to do so.

12. The evidence the second respondent is contemplating giving in the civil forfeiture proceedings will be given voluntarily; no compulsory powers of examination have been exercised in this case against anyone.

13. There was no evidence by the first respondent as to how she would be prejudiced if the Forfeiture Proceedings were not stayed: (CA [6]).

14. Judge Lacava SC refused the stay on the basis that a stay would be likely to frustrate the clear intention of the Act, particularly having regard to s 319 of the Act and the decision in *Lee (No 1)*. His Honour also said that there was no evidence as to how the respondents giving evidence in the forfeiture proceedings might give rise to a real risk of prejudice in the criminal proceedings: (CA [7]-[11]).

15. The Court below reversed the decision and granted a stay to both respondents.

PART VI ARGUMENT

Summary of the appellant's argument

16. This case involved no compulsory examination of any person. Instead, it involved a foreshadowed voluntary decision to lead evidence in a civil trial. That trial has now been stayed without the civil court having anything more before it than generalised assertions that there may be overlap with the criminal trial of one of the two applicants for the stay, and without the civil court ever considering whether any of its powers could be used to alleviate any real risk to the criminal trial.

17. The decision below frustrates the civil forfeiture regime under the Act. It creates a situation where, despite s 319 of the Act, an applicant will almost automatically obtain a stay of the civil proceedings merely by deposing, in the most general of terms, to overlap between the evidence which might be led in the forfeiture proceeding and the likely issues in a criminal trial.

18. Moreover, it authorises a stay of civil forfeiture proceedings against owners of property, who have not been charged and depose to no prejudice of their own, purely on the basis that their potential evidence in the civil trial may incriminate a third person who has been charged. That is unprecedented.

19. The decision wrongly conflates considerations arising from the accusatorial system of criminal justice relevant to compulsory examination, whether under the Act or otherwise, with the conduct of civil forfeiture proceedings in which no compulsory power of examination is being exercised.

20. Civil proceedings of the present type have a continuous history of over 350 years in our law operating side by side with the criminal law. They involve a federal Court, or a State court invested with federal jurisdiction, with all its incidents and inherent or implied powers to supervise and control its own processes in conducting the civil trial in respect of the status of particular property, and with all powers sufficient to diminish or prevent any identified and relevant prejudice to a relevant criminal trial.

21. Mere overlap of potential evidence or issues does not support the immediate cessation of civil forfeiture proceedings.

10 22. The reasoning of the Court below allows no place for efficacious protective orders that the judge hearing the civil trial may make in the case where a real threat to a criminal trial arises. It substitutes an overlap of subject matter test, leading to a mandatory stay, for the correct test of whether there is a real risk to the administration of justice that cannot be alleviated by any order short of a stay of the civil proceedings.

The central reasoning of the Court below

23. The Court of Appeal initially commenced (at CA [43]-[49]) on the correct path. It said that "*each of the central aspects of the majority's reasoning in* [Lee (No 1)] *is applicable to the POC Act*" (at CA [43]), including that s 319, like s 63 of
20 *Criminal Assets Recovery Act* 1990 (NSW) (**the CAR Act**), "*...reinforces the conclusion that Parliament intended that forfeiture proceedings may continue against a person charged with a serious criminal offence whether or not the person has yet been tried for the offence*" (at CA [45]).

24. At that point in the reasoning, one might have thought the Court would have declined to grant the stay, or at least would have considered whether, if there was any real risk to the administration of justice in the second respondent's criminal trial, beyond generalised assertions, there were measures available to the Court to alleviate that risk and at the same time accommodate the evident intent of the Act that the civil proceedings not be delayed until after any criminal
30 trial was concluded. However, the Court then set *Lee No (1)* aside as overtaken. The Court said at (CA [50]) that *"more recently, however, the High Court has spoken unanimously in* [Lee (No 2)] *in terms which imply that, where the subject matter of forfeiture proceedings is substantially the same as the subject matter of criminal proceedings, unless the forfeiture proceedings are stayed until completion of the criminal proceedings, the Crown may be advantaged in a manner which fundamentally alters its position vis-à-vis the accused and therefore renders the trial of the criminal proceedings unfair*".

25. No such implication could be drawn. The Court simply overlooked that *Lee (No 2)* was a case with three features critically different to the present: first, *Lee*
40 *(No 2)* involved a compulsory examination before an administrative body, as opposed to the voluntary giving of evidence within a civil trial; secondly, *Lee (No 2)* involved the unlawful communication to the prosecution for use in the criminal trial of the answers given in the compulsory examination, in breach of directions given to protect the integrity of that criminal trial; and thirdly, *Lee (No 2)* was considering, after the event, whether there had been a miscarriage of justice in the criminal trial as a result of the unlawful breach of those directions, rather than the question in advance whether a civil trial could

proceed, with the assistance of directions or otherwise, in a manner that would not interfere with a parallel criminal trial.

26. That failure to appreciate the very different issues in *Lee (No 2)* then led the Court wrongly to pose the critical question in the case as being "*...whether s 319 of the POC Act abrogates the privilege against self-incrimination to the extent of taking away the right of the accused to require the Crown to prove its case without the accused's assistance*": at (CA [57]). That question was irrelevant to the inquiry before the Court. *Lee (No 2)* does not gainsay the important role protective directions have to play in the inquiry. At no point did this Court question the utility of those important judicial tools.

27. The error was compounded when the Court went on to say (at CA [58]) "*...it follows from the logic of* [Lee (No 2)] *that the court is bound to do what it can to protect the accused's right to require the Crown to prove its case without the accused's assistance. And, if the facts are such that the only way in which that can be achieved is by staying forfeiture proceedings until after the related criminal proceedings have been heard and determined, the court is bound to adopt that course*".

28. Finally, the Court further confused the issues by considering it determinative that on the facts of *Lee (No 1)*, which concerned a compulsory examination, the privilege against self-incrimination had been abrogated, but that such abrogation did not apply to the civil forfeiture trial (CA [9]) and that "*... in this case the best the court can do to prevent abrogation of the privilege any further than it has been abrogated by statute is to stay the forfeiture proceedings until the hearing and determination of the criminal charges*": (CA [63]).

Isolating the key errors in the Court below

29. As submitted above, the Court posed the wrong question by trying to ascertain the effect of s 319 of the Act on the privilege against self-incrimination in the context of the voluntary giving of evidence in the civil proceedings under the Act. That error pervades the judgment.

30. There are, in addition, further specific errors that require more attention. Those errors may be teased out as follows, although they clearly overlap as a result of the melding of disparate issues by the Court below:

    a) the Court failed to conduct the requisite assessment of whether the continuation of the civil forfeiture proceedings in a timely manner would pose a real risk to the second respondent's criminal trial and, if so, whether there were measures available to the court to address that risk. The Court instead wrongly substituted a test that the criminal accused will gain a stay of parallel civil proceedings – in this case civil forfeiture proceedings, but the same approach would extend to other civil proceedings – whenever he or she can point to an overlap in the issues or likely evidence between the two sets of proceedings ***(see paras 33 to 44 below)***;

    b) the Court failed to properly understand *Lee (No 2)* ***(see paras 45 to 50 below)***;

    c) the Court more generally misunderstood the scope and operation of civil forfeiture proceedings and the voluntary giving of evidence within

them, as compared to the correct role for the right to silence as required to protect the accusatorial system of criminal justice in circumstances where a compulsory power of examination is being called in aid ***(see paras 51 to 71 below)***;

d) Finally, the Court erroneously granted a stay of proceedings in relation to property owned by the first respondent, who had not been charged with any offence and had no relevant privilege upon which she could rely to ground her stay application ***(see paras 72 to 76 below).***

31. More generally, it may be observed that this case concerns one person charged with an offence and one person who has not been charged with any offence, each being afforded the opportunity to give evidence in civil proceedings to show that they have a legitimately acquired interest in property. The continuation of those civil proceedings in those circumstances has long been sanctioned by the law. The present facts are distinguishable in varying degrees from *X7 v Australian Crime Commission* (2013) 248 CLR 92 (***X7***), *Lee (No 1),* and most of all, *Lee (No 2)*. The submissions below will variously explain how the present case relates to and is distinguishable from each of these three recent decisions of the Court in some further detail, and how the principles of law established in each and all of those decisions of this Court plainly support the appellant.

32. Finally, the correct approach to the grant of a stay in a case like the present will also be affirmatively stated and applied below ***(see para 76 below***)

The Court wrongly substituted a test of "mere overlap" for the correct test of real risk to the criminal trial not capable of alleviation by any measures short of a stay

33. **First**, the Court in exercising the power to stay the forfeiture proceedings failed to conduct the requisite analysis where a stay is sought on the basis that the remedy is necessary to avoid prejudice to a pending criminal trial.[4]

34. The Court below wrongly applied a test turning on the bare *possibility* of prejudice. It said (CA [65]) that "*the court should be hesitant to make any order which* could *prejudice [an accused's right to require the Crown to prove its case without the accused's assistance] until it becomes clear that the risk of prejudice is unfounded*" [emphasis added]. The Court here wrongly regarded the fact that the civil applicant could not, at the time the stay application was heard, exclude the *possibility* of overlap between the subject matter or evidence of the forfeiture proceedings and the criminal charges as sufficient to justify the granting of the stay (CA [65]).

35. Far from the correct test of a real risk of prejudice to the criminal proceedings, incapable of alleviation short of a stay, the test the Court applied was one that a stay follows as a matter of course once there is a potential overlap between the subject matter of the civil and criminal proceedings.[5] This test made the result of the stay application almost inevitable. For the reasons set out by Gageler and Keane JJ in a similar context in *Lee (No 1)*, a mere overlap in subject

[4] See the explanation for the basis of the stay in *Lee v Director of Public Prosecutions (Cth)* (2009) 75 NSWLR 581 at 591 [38] (Basten JA, Macfarlan JA and Sackville AJA).

[5] The same type of approach was again erroneously adopted in *Director of Public Prosecutions (Cth) v Jo* (2007) 176 A Crim R 17 (***Jo***) (Wilson J, McMurdo P and Lyons J agreeing).

matter between civil forfeiture and criminal proceedings "*does not rise to the level of a real risk*".[6]

36. In one sense it may have been appropriate for the Court of Appeal to criticise the judge at first instance (at CA [16]) for saying that there was *no* evidence of a real risk of prejudice adduced by the second respondent. But the trial judge did not err if he is understood as meaning there was no *sufficient* evidence of real risk of prejudice. This was so because the evidence led was of the non-specific and generic kind that most applicants for a stay could always allege; and it would establish a potential overlap in issues and topics for evidence; but no more.

37. The question should not be determined in advance on the basis of *mere possibility* of prejudice, in the manner chosen by the Court of Appeal. That approach leaves no room whatsoever for nuance in circumstances or response. Rather, it should be a matter for the trial judge for the conduct of the forfeiture proceedings, as the circumstances develop and present themselves to that judge. Otherwise, the same error is made as that identified by Gageler and Keane JJ in *Lee (No 1)* at [322], which is to assume that there is a real risk to the administration of justice simply by the overlap with the criminal proceedings.

38. Given that civil forfeiture proceedings will be conducted in accordance with the judicial process, in assessing the degree of the risk of prejudice to the criminal proceedings and before granting the stay remedy – which even if temporary amounts to an interference with a plaintiff's prima facie entitlement to have his cause of action tried in the ordinary course – it is necessary for the court to consider the steps that are available to the court in both the civil and criminal proceedings in order to address any prima facie risk to the administration of justice identified.[7]

39. Taking first the powers available to the *civil* court, as with the examination in aid of forfeiture proceedings in issue in *Lee (No 1)*, the respondents' civil forfeiture trial will be subject to judicial control and discretion throughout, attracting the power of the County Court under s 49 of the *County Court Act* 1958 (Vic) to make any order that could be made by the Supreme Court in a like case. Such power will be exercised with judicial sensitivity to any real impact of the proceedings on the accusatorial character of the second respondent's criminal trial.[8]

40. Steps that would be available to the County Court in the conduct of the civil forfeiture proceedings to protect against any unfair prejudice to the second respondent's criminal trial would include the power to impose suppression orders and non-publication orders in respect of evidence adduced at the hearing;[9] the power to conduct proceedings in closed court; as well as the various evidentiary discretions conferred under the *Evidence Act* 2008 (Vic), including particularly the protection offered by s 128 of that Act.

41. The civil court could, for example, ensure the matter progressed through full preparation for trial, with orders limiting who could see the potential evidence,

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[6] (2013) 87 ALJR 1082 at 1158 [339]-[340].
[7] See, analogously, *Lee (No 1)* (2013) 87 ALJR 1082 at 1120 [141] (Crennan J), 1158 (Gageler and Keane JJ).
[8] Cf *Lee (No 1)* (2013) 87 ALJR 1082 at 1104 [49] per French CJ.
[9] Under the *Open Courts Act* 2013 (Vic).

and then decide when to list the trial for final hearing. It would, in this way, be far better apprised of whether there was a real risk to the criminal trial than simply by adopting the rule at the outset: "nothing is to happen in the civil trial until the criminal trial is over because of the possibility that evidence and issues may overlap".

42. Turning then to the powers available to the *criminal* court, the court presiding over the criminal trial could exercise its discretion to exclude prejudicial evidence under the *Evidence Act* applicable to criminal proceedings.[10] Other statutory, inherent or implied powers to make orders ensuring the fairness of the trial[11] would also be available.[12]

43. The Court below, because of its erroneous self-direction on s 319, considered itself not at liberty to consider the powers reserved to the court(s) hearing the civil and criminal proceedings (and the corresponding protections for an accused person). It relied instead conclusively on the affidavit evidence of the second respondent's general concern about addressing certain matters in an affidavit (or being cross-examined about them)[13] that are "*directly relevant to the criminal charges*"[14] in order to properly present his case. Dismissing the protection offered by a non-publication order on the basis of a misdirected consideration of the effect of s 319 of the Act on the second respondent's privilege against self-incrimination (at [61]-[62]), the Court assumed that the "*only way*" (at [58]) to protect the second respondent's right to silence in the criminal proceedings was by granting a stay.

44. In summary, the Court:

    a) did not apply the "real risk of prejudice to the criminal trial" test;

    b) substituted a "mere overlap" test;

    c) wrongly failed to consider the raft of measures which would be available to each of the civil and criminal courts to address any real risk that might otherwise arise.

***The Court misapprehended the relevant "principle" established by* Lee (No 2)**

45. **Secondly**, a civil court's task within a stay application in assessing *prospectively* the likelihood of prejudice to a parallel criminal trial differs fundamentally from a criminal appellate assessment *after* the event of whether a miscarriage of justice has occurred within a criminal trial by reason of a departure from the essential requirements of the law,[15] such that the conviction cannot stand. It was an exercise of the latter type that was being conducted in *Lee (No 2)*. The distinction between a purely prospective assessment of

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[10] In particular s 137.
[11] *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 46-47 (Brennan J), 56 (Deane J), 74-75 (Gaudron J).
[12] As the trial judge correctly recognised: see CA at [10].
[13] CA at [6].
[14] Paragraph 32 of the second respondent's affidavit, extracted CA at [16].
[15] *Wilde v The Queen* (1988) 164 CLR 365 at 372-373, quoted in *Lee (No 2)* at [47].

prejudice and one conducted by an appellate court after a trial[16] was recognised as being "*of present relevance*" in *Dupas v The Queen.*[17]

46. When the Court expressly adopted "*the logic of* Lee No 2" (CA [58]) and suggested the court was precluded from granting a stay in that case by the terms of the CAR Act (CA at [62]), the Court confused the legislation, character and role of the court in relation to the examination in issue in *Lee (No 2)*, as well as the issue before this Court in that case.

47. In any event, "*the logic of* Lee (No 2)" did not dictate the result of the present respondents' stay application. First, *Lee (No 2)* was decided against the background of a different balance between accused and prosecution to that applicable in civil forfeiture proceedings. Secondly, that balance had been altered in a fundamental respect.[18] Non-publication orders had been made to protect evidence compulsorily given by the appellant without the benefit of the self-incrimination privilege. Those orders were subsequently breached: evidence given at the compulsory examinations was unlawfully given to the Crown Prosecutor, who gave evidence that the transcripts of evidence were "*interesting*" and "*informative*".[19] What had occurred in *Lee (No 2)* could not be remedied, by virtue of the issue arising for determination in the context of an appeal. The "logic" of the decision was that of a criminal appeal, retrospectively concerned with the balance of individual and state interests in a criminal trial, in circumstances were prejudice had unquestionably been established. It could not simply be applied to a prospective stay application made in proceedings in which there had been no compulsory examination at all,[20] there was minimal, generic evidence of any prejudice, and the prejudice relied upon by the respondents arose from their desire to give evidence voluntarily.

48. The decision below acts as if the directions given in *Lee (No 2)* would invariably be breached. No such conclusion should be drawn. *Lee (No 2)* did not turn on the presently relevant question, namely whether orders could be made in respect of the voluntary provision of evidence within the civil trial which would be sufficient to protect any real risk to the criminal trial or whether the only way to afford that protection is through a stay. The Court of Appeal simply stopped short of addressing the key question whether there was any need for non-publication orders and, if so, would they be sufficient (if complied with) to protect the fair trial of the appellant.

49. In *Lee (No 2)*, the conditions were originally imposed to avoid a real risk to the administration of justice. When those conditions were breached, the protection that had been imposed was nullified. Adherence to the conditions would have prevented the corruption of the accusatorial system of justice.

50. In summary, the Court misconstrued *Lee (No 2)* on the grounds that:

    a) that case involved a breach of protective non-publication orders that resulted in irremediable prejudice;

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[16] Drawn in *R v Glennon* (1992) 173 CLR 592 at 605-606.
[17] (2010) 241 CLR 237 at 245 [18]-[19] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
[18] (2014) 88 ALJR 656 at [43].
[19] (2014) 88 ALJR 656 at [15].
[20] CA at [27].

b) that case did not gainsay the utility of making protective orders to protect the accusatorial system of justice.

The Court misunderstood the civil forfeiture trial and the distinct role of the right to silence under the accusatorial system of criminal justice

51. **Thirdly,** the Court below, despite initially correctly recognising the applicability of the principles in *Lee (No 1)* (see para 23 above), always noting that case involved compulsory examination, then cast that analysis aside because *Lee (No 2)* was more "recent". The misapplication of *Lee (No 2)*, as has been explained above, meant that the Court gave insufficient weight to the numerous indicators of the consistent purpose and operation of the Act in relation to proceedings for an order under s 49, whether or not criminal proceedings against a person whose property is the subject of the order have commenced or have been completed. Thus:

a. The Act's primary purpose is the taking of property.[21] The first of the principal objects of the Act, set out in s 5(1)(a), is relevantly to deprive persons of the proceeds of offences against the laws of the Commonwealth. The principal objects of the Act also include punishing and deterring persons from breaching such laws (s 5(1)(c)).

b. The Act expressly refers to persons not convicted or not yet convicted. Its structure reflects its express provision in relation to the property of such persons.[22] It operates in relation to both offences and a person's conviction of an offence (s 14). Section 46, outlining the provisions of Pt 2-2 in relation to forfeiture orders, states that such orders can be made if certain offences have been committed, adding "*[i]t is not always a requirement that a person has been convicted of such an offence*". The same formulation is found in s 16 in respect of Pt 2-1 (dealing with restraining orders). Section 49(2) provides that a court can reach the requisite state of satisfaction for the purposes of a forfeiture order without making findings that a particular person committed an offence, or that a particular offence was committed at all (providing the court is satisfied that "*some offence or other*" of the specified kind was committed). By operation of s 51, acquittals do not affect forfeitures under ss 47 or 49.

c. The Act makes separate provision for criminal forfeiture. There is automatic forfeiture on conviction of a serious offence under Pt 2-3.

d. Section 319, an identically-worded provision to s 63 of the CAR Act considered in *Lee (No 1)*,[23] assumes the potential for proceedings under the Act, including forfeiture proceedings under s 49, to be on foot at the same time as criminal proceedings concerning the same subject matter and indicates the legislature's attention to the possibility of such concurrent proceedings. This construction is consistent with the objects of the Act, applies to civil forfeiture trials generally, but applies with particular force to *in rem* proceedings.

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[21] *Lee v Director of Public Prosecutions (Cth)* (2009) 75 NSWLR 581 at 587 [21] (Basten JA, Macfarlan JA and Sackville AJA).

[22] See *Lee v Director of Public Prosecutions (Cth)* (2009) 75 NSWLR 581 at 597 [67].

[23] (2013) 87 ALJR 1082 at 1090 [7] (French CJ), 1120-1121 [142]-[143] (Crennan J), 1157 [332] (Gageler and Keane JJ); cf 1108 [76] (Hayne J), 1137 [236] (Kiefel J, Bell J agreeing).

e. Proceedings under s 49 are judicial and subject to the supervision of a federal court, or a State court exercising federal jurisdiction, throughout. The court conducting the proceedings maintains its discretion to make orders to protect against unfair prejudice to a person's criminal trial.[24]

52. In the criminal justice system, as Hayne and Bell JJ pointed out in *X7*, "*the whole of the process for the investigation, prosecution and trial of an indictable Commonwealth offence is accusatorial*", such that "*an accused person need never make any answer to any allegation of wrong-doing*".[25] This Court noted in *Lee (No 2)* (at [32]) that the common law principle that the prosecution must prove guilt beyond reasonable doubt is a reflection of the balance struck between the power of the state and an accused person. Equally, as the plurality recognised in *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522; 307 ALR 174 (***Emmerson***) (at [19]), the rationales for civil forfeiture legislation "*include both strong deterrence and the protection of society*",[26] reflecting what French CJ described in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 (at 345 [29]) as "*widespread acceptance by governments around the world and within Australia of the utility of civil assets forfeiture laws as a means of deterring serious criminal activity*". Those objectives are pursued by striking a different balance[27] between the State and proprietary interests than is established between the State and a criminal accused.

53. The present question is concerned with identifying what the relationship is between these differing objectives and whether the objectives collide. They do not relevantly do so. On the analysis of both the majority and dissentients in *X7*, and the majority and dissentients in *Lee (No 1)*, the Court below was wrong to grant any stay.

54. In acting somehow as if one result would be required by *Lee (No 1)*, but that *Lee (No 2)* dictated a different result for the present case, the Court below generated a truly incongruous result. How, it may be asked, can compulsory examination of an accused under directly analogous legislation be countenanced as it was in *Lee (No 1)* with appropriate protective conditions, but a civil forfeiture of property trial be prevented from proceeding as a matter of course without allowing the trial judge to consider the same appropriate protective conditions? What can the abrogation of privilege in respect of compulsory examinations possibly have to do with the non-abrogation of privilege in the opportunity provided for evidence in the civil forfeiture trial?

55. The law has always recognised that civil forfeiture proceedings can be conducted in parallel with criminal proceedings. In this Court, it is well established that the *in rem* character of forfeiture is demonstrated by the fact that the property may be forfeited even in the hands of an owner who is innocent of any involvement in the unlawful or prohibited activities. Cases in

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[24] See above at [20].
[25] (2013) 248 CLR 92 at [101] and [104].
[26] See also *Lee (No 1)* (2013) 87 ALJR 1082 at 1117 [129] (Crennan J), pointing out that such deterrence is "*in addition to, or instead of, the deterrence presented by the possibility of a jail sentence.*"
[27] See *Lee (No 1)* (2013) 87 ALJR 1082 at 1117 [126], 1121 [143] (Crennan J).

this Court such as *Burton v Honan* (1952) 86 CLR 169 and *Re Director of Public Prosecutions; ex parte Lawler* (1994) 179 CLR 270 illustrate the operation of laws which provided for the forfeiture of property involved in unlawful or prohibited activities – in the traditional areas of customs and fisheries legislation – notwithstanding the effect of the forfeiture on an innocent owner of the property.

56. To suggest that legislation that gives owners of property an opportunity to establish a defence of innocently acquired property invariably or ordinarily compromises related criminal proceedings, so that the civil forfeiture proceedings must be stayed, is a fundamentally erroneous conclusion to draw.

57. Even in the United States, where all the key hallmarks of the accusatorial system of justice are constitutionally entrenched in the Bill of Rights, such an argument is not accepted. In *United States v Ursery* 518 US 267 (1996) at 274, in delivering the opinion of the Court concerning the Double Jeopardy Clause, Rehnquist CJ said "*[s]ince the earliest years of this Nation, Congress has authorised the Government to seek parallel* in rem *civil forfeiture actions and criminal prosecutions based upon the same underlying events*".

58. So much has been true in English law since at least the Navigation Acts of 1660 created the *in rem* admiralty jurisdiction. No less an authority than Story J, delivering the opinion of the Court in *The Palmyra* 25 US 1 (1827), said at 14-15:

> It is well known that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the Crown. The forfeiture did not, strictly speaking, attach *in rem,* but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the Crown by the mere commission of the offense, but the right attached only by the conviction of the offender. The necessary result was that in every case where the Crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not devested until the conviction. But this doctrine never was applied to seizures and forfeitures created by statute, *in rem,* cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing, and this whether the offense be *malum prohibitum* or *malum in se.* The same principle applies to proceedings *in rem* on seizures in the admiralty. Many cases exist where the forfeiture for acts done attaches solely *in rem* and there is no accompanying penalty *in personam.* Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independent of and wholly unaffected by any criminal proceeding *in personam.* This doctrine is deduced from a fair interpretation of the legislative intention apparent upon its enactments. Both in England and America, the jurisdiction over proceedings *in rem* is usually vested in different courts from those exercising criminal jurisdiction.

59. The long history of the statutory forfeiture on the revenue side of the Exchequer was recognised by this Court in *Emmerson* at [15]-[21]. In the United States, the matter has been addressed by statute to give either the government or the person charged in the parallel criminal proceedings the right to apply for a stay (18 USC §981(g)). In Australia, s 319 of the Act compels the conclusion that such a stay is not to be granted on the basis of the existence simply of the parallel criminal proceedings, as the analogous provision in the NSW Act considered by this Court in *Lee (No 1)* provides. That result is consistent with the long history of civil forfeiture regimes, as well as with the practical observations of Gageler and Keane JJ in *Lee (No 1)* at [324].

60. This continuous history demonstrates that alongside the developments in the criminal trial process as explained by Hayne and Bell JJ in *X7* at 135 [100], the "general system of law" has, before and after *Woolmington v Director v of Public Prosecutions,* [28] seen nothing inimical in an accusatorial process of investigation, prosecution and trial of indictable offence taking place at the same time as the forfeiture of the civil property of the accused. Rather than departing from the "general system of law", the provisions in the Act providing for civil forfeiture proceedings reflect it: cf *X7* at 131-132 [86]-[87] per Hayne and Bell JJ. The law has not identified a relevant conflict, generating a right in the accused to stay the proceedings, between the mere conduct of the civil forfeiture proceedings before criminal trial and the requirement expressed in *Hammond v The Commonwealth* (1982) 152 CLR 188 that the accused be permitted to determine the course he or she would follow at the criminal trial so as to not prejudice his or her defence.

61. In this respect, the decisions of the NSW Court of Appeal in *Lee v DPP* and the Queensland Court of Appeal in *Jo* provide different solutions to the problem posed by parallel criminal and civil trials absent compulsory examination. The former decision should be preferred.

62. The NSW Court of Appeal in *Lee v DPP* was right to criticise *Jo* for not sufficiently recognising the structure of the Act with respect to civil forfeiture proceedings (at 597 [67]). Consistent with the authorities in this Court, it should be up to the Court hearing the civil trial to determine the appropriate safeguards to put in place to protect the criminal trial.

63. The Court below (at CA [29]-[30]) was wrong to prefer *Jo*, which fails to accord due consideration to the legislative scheme. The vice of *Jo*, and the decision below, is that pointing to a potential overlap of subject matter becomes the de facto test for granting a stay and compels its own conclusion. When the observations in *Lee (No 1)* are translated to the present situation of the voluntary giving of evidence, the court should give effect to the Act's purpose in facilitating parallel proceedings by asking whether there is a real risk to the administration of justice and, if so, can the risk be adequately avoided or mitigated by protective orders. Only if the risk cannot be so avoided or mitigated, should a stay be granted.

64. Like s 31D of the CAR Act considered in *Lee (No 1)*, s 49 of the Act is part of a "*carefully integrated and elaborate legislative design*"[29] which deliberately does

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[28] [1935] AC 462

[29] (2013) 87 ALJR 1082 at 1157 [333] (Gageler and Keane JJ).

not distinguish between circumstances where criminal proceedings against a person whose property is the subject of an application for a forfeiture order have been instituted and circumstances where they have not. The Court below discounted the features of this scheme in favour of attributing primary significance to the failure of s 319 to abrogate an accused person's right to silence, a "failure" which is logical in the context of the legislative scheme for the reasons given in dealing with the following identified error.

65. Whilst what is said above is sufficient to dispel the notion that there was a basis for a stay, it is important to understand the error below in the general relationship that was claimed between "practical compulsion", the "right to silence" and the consequent inversion of s 319 of the Act. The Court erred in regarding the absence of a generally applicable abrogation of an accused person's right to silence in civil forfeiture proceedings as decisive. This point is related to the above analysis; however, it is convenient to separately describe why their Honours mistook the scope and operation of that right as applied by this Court in *X7* and *Lee (No 2)*.

66. In *X7*, Hayne and Bell JJ and Kiefel J identified the relevant common law principles as being that "*an accused person cannot be required to testify to the commission of the offence charged*" (at [102], [159])[30] and "*an accused person need never make any answer to any allegation of wrong-doing*" (at [104]). The case contains no hint of the right to silence having a broader operation than that (cf CA at [27]). In *Lee (No 2)*, the Court (at [33]) described the companion rule to the fundamental principle that the prosecution must prove guilt as being "*[t]he prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof*". An element of compulsion or requirement is common to these descriptions, which this Court has not extended to include the accused person's perceived forensic interests. Instead, the notion of compellability gives sense to the use of the words "*require*" and "*need*". The privilege or immunity operates against compulsion – any voluntary assistance by an accused person in relation to his or her prosecution (other than as a witness for the prosecution, in which role the accused is not competent under s 17 of the *Evidence Act*) falls outside its scope.

67. Consistent with the allocation of the onus in criminal proceedings, an accused may require the prosecution in such proceedings to prove guilt without his or her assistance.[31] But the corollary of that principle is not, as the Court of Appeal assumed "*perforce of the principle of legality*" (CA at [53]), that the right to silence must be expressly abrogated in order for a hearing to proceed in every instance where a party to civil proceedings who is also a criminal accused wishes to give evidence voluntarily in the civil proceedings about potentially overlapping subject matter. If there is no legal compulsion operating on an accused person, there is no need to abrogate the right to silence in order to overcome the effect of the compulsion. The Court fell into error in attempting (at [54]-[55]) to reconcile its analysis of *Lee (No 2)* with *Lee (No 1)* on the assumption that the right to silence extended so broadly.

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[30] Quoting *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 503 (Mason CJ and Toohey J).

[31] See eg *X7* (2013) 248 CLR 92 at [57] (French CJ and Crennan J).

68. A comparable requirement of compulsion has been suggested in construing the word "objects" in s 128 of the *Evidence Act*. In *obiter* remarks in *Cornwell v The Queen* (2007) 231 CLR 260, the plurality[32] questioned why an accused person, whether giving evidence of a fact in issue or otherwise, would ever be able to rely on the terms of s 128(1) of the *Evidence Act* in circumstances where he or she wanted to give evidence and sought the protection of a certificate during evidence in chief. Their Honours observed (at 301 [106]): "*... his claim of privilege was arguably not a means by which he 'objected', but was an attempt to ensure that s. 128 protected him from some potentially adverse consequences of evidence which he did not 'object' to giving, but strongly wanted to give.*" Without finally determining the question, their Honours noted further (at 302-303 [112]) that the accused's claim of privilege "*strains the words 'objects' in s 128(1) and the word 'require' in s 128(5) ... for how can it be said that a defendant-witness is being 'required' to give some evidence when his counsel has laid the ground for manoeuvres to ensure that the defendant-witness's desire to give the evidence is fulfilled?*"[33]

69. In the context of the Act, the exclusion order provisions give holders of interests in property the opportunity to explain that their interests are not, relevantly, proceeds of unlawful activity.[34] No abrogation of the right to silence is required, because any evidence given by the applicant for an exclusion order is not in the face of compulsion (by contrast to evidence given in an examination under Pt 3-1, to which a direct use immunity applies). If an applicant does "object" during a hearing in the sense that that word is used in s 128 of the *Evidence Act* (for example, under cross-examination), he or she will be able to take advantage of the certification mechanism in that section.

70. Section 319 of the Act must be understood in light of this Court's long acceptance of the parallel conduct of civil forfeiture trials with "overlapping" criminal proceedings. Indeed, in dealing with the authority of *McMahon v Gould* (1982) 7 ACLR 202, the Court below should have recognised that that case dealt with general considerations relevant to the conduct of all civil trials in parallel to criminal trials. Rather than developments since that case diminishing that authority, the Court below failed to appreciate that statutory civil forfeiture trials are not pebbles swept up in the general current, but instead have their own stream. There has never been a "lively debate" about whether the pendency of criminal charges permitted an order staying *in rem* proceedings because the same issues may be touched upon in both proceedings.[35]

71. In short, the Court misunderstood the civil forfeiture trial, in that:

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[32] Gleeson CJ, Gummow, Heydon and Crennan JJ.

[33] See also, in relation to "objects" in s 128, *Song v Ying* (2010) 79 NSWLR 442 and *Kaddour v R* [2013] NSWCCA 243 (special leave refused: [2014] HCA Trans 114); cf *Ferrall and McTaggart as Trustees for the Sapphire Trust v Blyton* [2000] FamCA 1442.

[34] See *Lee v Director of Public Prosecutions (Cth)* (2009) 75 NSWLR 581 at 594 [54].

[35] In respect of the observations in *Lee (No 1)* of Hayne J at 393 [76], and of Crennan J at 409-410 [142]-[143], concerning the work that s 63 of the NSW CAR Act had to do, like s 319 of the Act, those matters, discussed in *Smith v Selwyn* [1914] 3 KB 98 and the like cases referred to by Hayne J, were pertinent to any common law civil case of an ordinary litigant that were instituted and would compete with the *deodand* or common law forfeiture, but they never applied to civil cases commenced by the Crown pursuant to a statutory right of forfeiture.

a) the law recognises no prima facie injustice in the parallel operation of a civil forfeiture trial with the criminal process;

b) there is no relevant compulsion operating on the respondents that requires clear legislative sanction.

The first respondent was for additional independent reasons not entitled to a stay

72. The Court of Appeal erred in granting a stay to the proceedings in respect of the property of the first respondent (including the Donvale property of which she was the sole registered proprietor: CA at [3]), who has not been charged with any offence and did not provide any evidence of prejudice: the only affidavit evidence concerned prejudice to the second respondent (CA at [16]). The same order seems to have been made in respect of both respondents' matters "*in the interests of avoiding a multiplicity of proceedings*" (CA at [67]), but this was not a principled or sufficient basis for granting the first respondent a stay in view of the appellant's entitlement, having engaged the jurisdiction and processes of the court, to have his application for a forfeiture order determined in the ordinary course. Each stay application must be examined on its own facts.

73. The Court below has created an extraordinary precedent for the grant of a stay of civil forfeiture proceedings to strangers to the criminal trial. In granting a stay to the first respondent, the Court presumably accepted the submission (made by counsel for both respondents, who were not separately represented) that "*the [respondents] will be confronted with the invidious choice of either giving evidence in the forfeiture proceedings without the benefits of any statutory protection against direct or derivative use of their evidence in the criminal proceedings, and thereby exposing themselves to the risk of their evidence later being used against [the second respondent] in the criminal proceedings, or, alternatively, preserving [the second respondent's] right to silence by not giving evidence in the forfeiture proceedings*" (CA at [14]).[36]

74. This submission conflates the position of both respondents with respect to the criminal proceedings against the second respondent. Yet the positions of the two respondents were entirely different. There was no such thing as "*their [collective] evidence*". The first respondent had no "right to silence" in respect of criminal proceedings against the second respondent. In those proceedings, the first respondent would, but the second respondent would not, be a competent witness. The second respondent could object to being compelled to give evidence in the criminal proceedings against her husband, pursuant to s 18 of the *Evidence Act*, but as for the civil proceedings, not only does the *Evidence Act* dictate generally that she is competent and compellable, there is no role for the "principle of legality" as the common law of Australia does not recognise a privilege against spousal incrimination: *Australian Crime Commission v Stoddart* (2011) 244 CLR 554.

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[36] A similar type of imprecise argument (the compulsory examination of a wife who had not been charged may prejudice her husband's defence of criminal charges) appears to have been accepted by the Queensland Court of Appeal in *Jo* (2007) 176 A Crim R 17 at 24 [20] (Wilson J, McMurdo P and Lyons J agreeing). The present case goes even further than that erroneous holding, as there is no compulsion present here.

75. The law does not recognise any other form of privilege against incriminating a third person upon which the first respondent could rely, the risk of prejudice to which could ground a stay application. The overlap between the subject matter of evidence to be given in civil proceedings and the subject matter of a third party's criminal trial – even if the third party is a person's spouse or someone otherwise entitled to apply under s 18 of the *Evidence Act* – has not been recognised in the authorities as the basis for a stay. Such an overlap will be commonplace where a series of indictable offences is alleged to have yielded significant proceeds, converted over time into assets in which multiple persons claim interests. The objects of the Act – which as noted above include deprivation, punishment and deterrence – would be frustrated if the potential for those witnesses, who have not been charged with any offence, to give any incriminating evidence against another person provided grounds for a stay of forfeiture proceedings under s 49.

76. In short, the Court erred in granting the first respondent a stay, when she:

    a. had no "right" to silence; nor

    b. any "right" or "privilege" to not incriminate her husband in civil proceedings.

Finally, the correct legal analysis

77. The correct legal analysis for the Court below to have conducted in respect of the applications of the respondents should have been:

    a. The effect of the Act is that Parliament has contemplated that the forfeiture action may and usually will proceed notwithstanding a criminal trial is on foot, including against the same person.

    b. Such an approach, in the particular instance of the *in rem* proceeding under s 49 of the Act, applies with additional force given that courts have long accepted that to be the general position. No relevant "principle of legality" is in operation where the common law had long recognised the parallel exercise of civil forfeiture and criminal trials, particularly so where the compulsory power of examination is not being deployed as an ancillary aspect of the civil forfeiture process.

    c. Nothing in the Act prevents a court from fulfilling its duty, in respect for the fundamental accusatorial nature of the criminal justice system, to conduct the civil proceedings in a manner that avoids unfairness in the related criminal trial.

    d. A witness in a civil forfeiture action who seeks the last resort or ultimate order of a stay pending a criminal trial must make out a case on evidence to show that defending the forfeiture action has a real likelihood of requiring him or her to reveal a defence to the criminal trial or otherwise suffer an undermining of the accusatorial nature of the criminal trial.

e. Even where the necessary evidence is led, a stay does not follow without more. The civil court conducting the forfeiture proceedings must be satisfied that it is unable, through its various other powers, to address the risk in (d) above, in a manner sufficient to protect the accusatorial nature of the criminal trial, including by accepting undertakings by the Commissioner not to transmit any information or material to the prosecuting authorities. That is, the court must be satisfied that it cannot address the possible prejudice through any means short of granting a stay. Mere overlap in evidence or issues does not establish a real risk to the administration of justice.

f. Applying these principles, the second respondent did not satisfy the correct test for a stay (real risk of prejudice to his trial not capable of alleviation by measures short of a stay). The first respondent did not negotiate the first hurdle, as she was not charged and lead no evidence of any prejudice to her.

PART VII LEGISLATIVE MATERIALS

78. *Proceeds of Crime Act* 2002 (Cth), esp ss 49, 59 and 319. There has been no Reprint of the Act. Although the question of whether a stay persists is to be assessed on an ongoing basis having regard to any legislation as is then in force, there have been no relevant amendments to the Act since the trial judge heard and determined the proceedings so that the current electronic compilation of the Act is suitable for all present purposes.

PART VIII ORDERS SOUGHT

79. The orders sought by the appellant are:

a. Appeal allowed with costs;

b. Set aside orders 3, 4, 5, and 6 of the Court of Appeal of the Supreme Court of Victoria made on 27 June 2014 and, in their place, order that the appeal to that Court be dismissed with costs.

PART IX ESTIMATE OF ORAL ARGUMENT

80. It is estimated that two hours will be required for the presentation of the appellant's oral argument in chief.

Dated: 17 October 2014

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