IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S29 of 2013

BETWEEN: **JASON (AKA DO YOUNG) LEE**
First Appellant

AND: **SEONG LEE**
Second Appellant

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AND: **NEW SOUTH WALES CRIME COMMISSION**
Respondent

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

I. CERTIFICATION

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

II. BASIS OF INTERVENTION

20 2. The Attorney-General for Queensland intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth).

III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

IV. APPLICABLE LEGISLATION

4. The applicable legislation is identified in the submissions of the appellants and the respondent.

V. ARGUMENT

5. The main issue in this appeal is whether an order for the examination of the appellants should have been made under s 31D of the *Criminal Assets Recovery*

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Act 1990 (NSW) ('CARA'). The New South Wales Court of Appeal found that it should, and reasoned that the statutory scheme of the CARA precluded the Supreme Court from refusing to make an examination order simply because there were pending charges and the answers given might tend to incriminate the proposed examinee. The members of the Court of Appeal pointed out that there were no other facts that would have justified a refusal of the examination order.[1]

6. In this Court, the appellants do not identify any additional facts that would justify a refusal to make an order under s 31D. They contend instead that s 31D of the CARA enables the Supreme Court to have regard to the capacity of the order to prejudice the fair trial of the person proposed to be examined;[2] and the mere fact of subjecting a person to a process in which he or she will be compelled to answer questions as to the circumstances of an alleged offence creates a real risk of interfering with the administration of criminal justice.[3] On those bases, they claim that the decision of Hulme J to refuse to make an examination order was correct.

7. The appellants also contend that if s 31D does not enable the Supreme Court to have regard to the capacity of an order to prejudice the fair trial of an examinee, it is invalid because it breaches principle established in *Kable v Director of Public Prosecutions (NSW)*[4] ('the *Kable* principle').[5]

8. In response to these contentions, the Attorney-General for Queensland submits that:

   (a) the Court of Appeal did not conclude that the discretion conferred by the Act did not require a consideration whether an order might prejudice a fair trial;
   (b) the *Kable* principle does not prohibit the States from modifying long-standing aspects of the accusatorial trial process or passing laws that may be thought to affect the 'fairness' of a trial or the integrity of a court's processes;
   (c) subjecting a person to a process in which he or she will be compelled to answer questions as to the circumstances of an alleged offence does not necessarily create a real risk of interfering with the administration of criminal justice; and
   (d) accordingly, the appeal should be dismissed.

Content of Discretion

9. The Court of Appeal did not decide that it was irrelevant to the exercise of the discretion whether an order would prejudice a fair trial. This is apparent, at

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1 AB 139 [74] (Basten JA), AB148 [100] (Meagher JA).
2 Appellants' submissions, paras 44-55.
3 Appellants' submissions, para 40.
4 (1996) 189 CLR 51.
5 Appellants' submissions, paras 57-69.

least, from paragraph [81] in the reasons of Basten JA.[6] The Attorney-General of Queensland adopts the submissions made on behalf or the Attorney-General for New South Wales on this issue.

Chapter III and the accusatorial process

10. The *Kable* principle invalidates State legislation that would deprive courts of their 'institutional integrity'. That term refers to those essential qualities that distinguish courts from other bodies.[7] It includes matters such as the reality and appearance of independence of independence and impartiality as well as the obligation to provide reasons.[8]

11. The *Kable* principle does not, however, preclude the States from modifying or even abolishing the various common law rules that govern the accusatorial process.[9] It is well established that legislatures may alter procedural rules applying to trials without any breach of Chapter III of the Constitution. Thus, the Court has accepted that legislation may reverse the onus of proof in certain cases;[10] it may alter the standard of proof;[11] it may abolish the privilege against self-incrimination;[12] and it may provide for pre-trial disclosure,[13] including by requiring the disclosure of alibi defences.[14]

12. Nor does the *Kable* principle invalidate State legislation merely because such legislation might be thought to affect the fairness of a criminal trial or the integrity of a court's processes. The issue is always whether the legislation deprives a Chapter III court of an essential characteristic and thereby affects its suitability as a repository of federal jurisdiction.[15] Unless it does, then it will be valid.

13. Three examples illustrate the point. In *R v PJE*[16] and in *R v Grills*,[17] the New South Wales Court of Appeal considered the effect of a provision that made

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6 AB 141.

7 *Forge v Australian Securities and Investments Commission*, (2006) 228 CLR 45 at [63] (Gummow, Hayne and Crennan JJ). See also *Wainohu v New South Wales* ('*Wainohu*') (2011) 243 CLR 181 at [44] (French CJ and Kiefel J).

8 *Wainohu* (2011) 243 CLR 181.

9 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [41] (McHugh J).

10 See, for example, the laws considered in *Commonwealth v Melbourne Harbour Trust Commissioners* (1922) 31 CLR 1; *Williamson v Ah Oh* (1926) 39 CLR 95; *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254; *Milicevic v Campbell* (1975) 132 CLR 307.

11 *Nicholas v The Queen* (1998) 193 CLR 173 ('*Nicholas*') at 190 [24] (Brennan CJ), 203 [55] (Toohey J), 234-236 [152]-[156] (Gummow J), 272-274 [234]-[238] (Hayne J); *Thomas v Mowbray* (2007) 233 CLR 307 at 355-356 [113] (Gummow and Crennan JJ).

12 *Sorby v Commonwealth* (1983) 152 CLR 281 at 308 (Mason, Wilson and Dawson JJ).

13 See, for example, *Criminal Procedure Act 1986* (NSW), ss 141-147, 151; *Criminal Code* (Qld), s 590B; *Criminal Procedure Act 2009* (Vic), ss 182-185, 189.

14 *Crimes Act 1900* (NSW), s 405A; *Criminal Code* (Qld), s 590A; *Criminal Procedure Act 2009* (Vic), s 190.

15 *Baker v The Queen* (2004) 223 CLR 513 at 534 [51] (McHugh, Gummow, Hayne and Heydon JJ).

16 Unreported, 9 October 1995.

evidence of the complainant's sexual history inadmissible. The Court of Appeal held that the inherent power to grant a stay—a power designed to prevent an abuse of process[18]—could not be exercised on the basis of a perception of unfairness resulting from the operation of the provision. The accused in each case sought special leave to appeal, but it was refused. Chief Justice Brennan stated:[19]

> The decisions below are clearly correct. To grant special leave would elevate to the level of arguability the proposition that a court may decline to exercise its jurisdiction to try a criminal case because it forms the view that a law enacted by the Parliament is unfair. That is not a view to which a court is entitled to give effect in determining whether to exercise its jurisdiction when it is properly invoked.

14. In *Nicholas v The Queen*, the Court upheld the validity of s 15X of the *Crimes Act 1914* (Cth). In simple terms, this section required a court to disregard the fact that, in the context of a controlled operation, a law enforcement officer had committed an offence in importing narcotic goods or had aided, abetted or procured their importation. It purported to remove the basis for any stay granted on the basis of the discretion in *Ridgeway v The Queen* ('*Ridgeway*').[20] The Court accepted that the *Ridgeway* discretion was concerned with protecting the integrity of the curial process. But that fact did not render s 15X invalid, since the section did not conclusively deem an element of an offence to exist and did not go to an accused's ultimate guilt or innocence.[21] As Hayne J explained:[22]

> That Parliament may make laws prescribing rules of evidence is clear and was not disputed. Plainly, Parliament may make laws (as it has) on subjects as diverse as the circumstances in which hearsay may be received or the circumstances in which confessional statements by accused persons may be admitted in evidence and it may do so to the exclusion of the previous common law rules.
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> The common law rules that were developed in these areas were often, if not always, developed with questions such as reliability of evidence *or fairness to the accused at the forefront of consideration and thus, at least to that extent, with questions of the integrity of the curial process and its results well in mind. And yet such legislation does not infringe the separation of powers.*

15. *PJE, Grills* and *Nicholas* illustrate that State legislation may modify common law rules even if they may be thought to affect the fairness of a trial or the integrity of a court's processes. It is only where legislation deprives a court of

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17 Unreported, 12 December 1995.

18 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 263-265 [5]-[8] (Gleeson CJ, Gummow, Hayne and Crennan JJ); *Dupas v The Queen* (2010) 241 CLR 237 at 243 [14] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Moti v The Queen* (2011) 245 CLR 456) at 463-464 [10]-[11] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

19 (1996) 70 ALJR 905.

20 (1995) 184 CLR 19.

21 (1998) 193 CLR 173 at 190 [24] (Brennan CJ), 236 [156] (Gummow J), 278 [252] (Hayne J).

22 (1998) 193 CLR 173 at 273 [235]-[236] (emphasis added).

a defining characteristic, such as independence or impartiality, that it will breach the *Kable* principle. The appellants' constitutional submissions on the right to a fair trial[23] cannot stand with these propositions.

16. In any case, for the reasons developed below, the Court of Appeal was correct to hold that an examination under s 31D would not pose a real risk of interference with the administration of justice.

No interference with the administration of justice

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17. The appellants rely on *Hammond v Commonwealth* ('*Hammond*')[24] for the proposition that subjecting a person to a process in which he or she will be compelled to answer questions as to the circumstances of an alleged offence creates a real risk of interfering with the administration of criminal justice.

18. It is respectfully submitted, however, that *Hammond* lacks a *ratio decidendi* and, in any case, aspects of the reasoning of members of the Court are unsound. Furthermore, a broad view of *Hammond* is inconsistent with later cases on the privilege against self-incrimination and with the propositions outlined above.

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19. *Hammond* concerned an application for an interlocutory injunction to restrain a Royal Commission from proceeding further with the examination of an individual against whom charges were pending. The relevant legislation[25] made a refusal to answer questions put by the Commission an offence, although it provided that the evidence given could not be used in criminal proceedings against the person who gave it. The commissioner, mindful of the fact that charges were pending, proposed to continue the examination in private; but he had permitted the police officers who had charged Mr Hammond to be present[26] and had decided to provide a transcript of the
30 examination to the prosecution.[27]

20. Judgment was pronounced in a matter of days, and without consideration of a number of cases on the privilege against self-incrimination.[28] All members of the Court granted the injunction sought. Chief Justice Gibbs (with whose reasons Mason J agreed and Murphy J generally agreed[29]) described the issue in these terms:[30]

> The ground of the application for the injunction is that the further examination of the plaintiff, and the making of the report, would constitute

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23 Appellants' submissions, para 62.
24 (1982) 152 CLR 188.
25 *Royal Commissions Act 1902* (Cth), ss 6, 6DD and 7; *Evidence Act 1958* (Vic), ss 16, 29 and 30. The commissioner had been issued with two commissions, one by the Governor-General and one by the Governor of Victoria.
26 (1982) 152 CLR 188 at 194.
27 (1982) 152 CLR 188 at 192 (Ryan QC in argument).
28 (1982) 152 CLR 188 at 198.
29 (1982) 152 CLR 188 at 199.
30 (1982) 152 CLR 188 at 196.

> a contempt of the County Court before which the criminal proceedings against the plaintiff are pending. To succeed in obtaining an injunction on that ground, the plaintiff must establish that there is a real risk, as opposed to a remote possibility, that justice will be interfered with if the Commission proceeds in accordance with its present intention. The tendency of the proposed actions to interfere with the course of justice must be a practical reality—a theoretical tendency is not enough.

21. His Honour found that the examination would be likely to prejudice Mr Hammond's defence. He said:[31]

> Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, *in the circumstances of this case*, that there is a *real risk* that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence.

22. As the references to a 'real risk' and the 'circumstances of this case' suggest, Gibbs CJ did not hold that every examination directed to the circumstances of an offence with which a person had been charged would amount to an interference with the administration of justice. His Honour is best understood as recognising that a high likelihood of prejudice arose from a combination of circumstances: a Royal Commission would ask questions designed to establish Mr Hammond's guilt; the officers who had charged Mr Hammond would continue to be present; and the prosecution would be provided with the transcript of the compulsory examination and would obtain a forensic advantage from the examination that it otherwise would not obtain.[32]

23. Justice Murphy, while agreeing with Gibbs CJ, based his reasons at least partly on s 80 of the Constitution. His Honour said:[33]

> For the purposes of this case...it is assumed that the plaintiff has no privilege against self-incrimination. He is awaiting his trial on indictment for conspiracy against the laws of the Commonwealth. He has a constitutional right to trial by jury (see Constitution, s. 80). It is inconsistent with that right that he now be subject to interrogation by the executive government or that his trial be prejudiced in any other manner.

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31 (1982) 152 CLR 188 at 198 (emphasis added). His Honour had earlier pointed out that it was common ground that if the plaintiff were examined at the inquiry 'he would be bound to answer questions designed to establish that he committed the offence' with which he had been charged: (1982) 152 CLR 188 at 197.

32 To obtain such an advantage may amount to contempt: see *Brambles Holdings Ltd v Trade Practices Commission [No 2]* (1980) 44 FLR 182 at 187-189 (Franki J); *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460 at 467-468 (Gibbs CJ); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 559 (McHugh J).

33 (1982) 152 CLR 188 at 201.

24. These comments, with respect, should not be followed. Justice Murphy cited no authority to support them, and they are contrary to authorities holding that the abrogation of the privilege against self-incrimination does not affect trial by jury.[34]

25. Furthermore, in the area where s 80 of the Constitution applies,[35] it is unclear why a compulsory examination would necessarily impede the jury's constitutional function. The jury has been described as the 'method of trial in which laymen selected by lot ascertain under the guidance of a Judge the truth in questions of fact arising either in civil litigation or in a criminal process'.[36] An examination need have no impact on the jury's capacity to consider the evidence presented at the trial and its ability to find facts. Nor need it deprive the jury of any of its essential characteristics such as unanimity.[37]

26. Justice Brennan reasoned differently again. His Honour focused on the intention of the Parliament and said:[38]

> An accused person may not be deprived of his immunity from interrogation by the exercise of the prerogative power to appoint a Commission of Inquiry and Report. Whether the Parliament could deprive him of that immunity when he stands charged with an offence against a law of the Commonwealth is a question which need not now be determined, for it is not to be thought that Parliament, in arming a Commissioner with the powers to be found in the respective Acts, intended that the power might be exercised to deny a freedom so treasured by tradition and so central to the judicial administration of criminal justice.

27. Justice Deane also took a different approach to the other members of the Court. He expressed his position in these terms:[39]

> [I]t is fundamental to the administration of criminal justice that a person who is the subject of pending criminal proceedings in a court of law should not be subjected to having his part in the matters involved in those criminal proceedings made the subject of a *parallel inquisitorial inquiry by an administrative tribunal* with powers to compel the giving of evidence and the production of documents which largely correspond (and, to some extent, exceed) the powers of the criminal court. Such an extra-curial inquisitorial investigation of the involvement of a person who has been

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34 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 358 (Griffith CJ), 375 (O'Connor J), 385-386 (Isaacs J), 418 (Higgins J); *Sorby v Commonwealth* (1983) 152 CLR 281 at 298 (Gibbs CJ), 308-309 (Mason, Wilson and Dawson JJ). See also *Hamilton v Oades* (1989) 166 CLR 486, which is discussed in paragraphs 33 to 37 below.

35 Section 80 is limited to trials on indictment for offences under Commonwealth law. It has no application to summary proceedings or to offences under State law. The appellants here have been charged with offences under State law, not Commonwealth law.

36 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375 (O'Connor J). See also *Cheatle v The Queen* (1993) 177 CLR 541 at 549 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

37 See *Cheatle v The Queen* (1993) 177 CLR 541.

38 (1982) 152 CLR 188 at 203.

39 (1982) 152 CLR 188 at 206-207 (emphasis added).

> committed for trial in the matters which form the basis of the criminal proceedings against him constitutes, in my view, an improper interference with the due administration of justice in the proceedings against him in the criminal court and contempt of court. Where a court is exercising the judicial power of the Commonwealth pursuant to s 71 of the Constitution, such interference involves a derogation of the constitutional guarantees that flow from the vesting of the judicial power of the Commonwealth in courts of law. Thus, in *Huddart, Parker & Co Pty. Ltd v Moorehead*, O'Connor J, in considering the validity of a notice given under s 15B of the *Australian Industries Preservation Act 1906* (Cth) which required that certain information be provided to the Comptroller-General of Customs, commented:
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> > When the Comptroller makes his requirement under 15B there can be no proceeding pending in a Court. He is not empowered to use the section with reference to an offence when once it has been brought within the cognizance of the Court. The power to prevent any such interference by the Executive with a case pending before the ordinary tribunals is undoubtedly vested in this Court by the Constitution.

28. Several features of this reasoning are noteworthy. First, it deals only with parallel inquisitorial inquiries by administrative tribunals.

29. Secondly, it eschews the need to find a 'real risk' to the administration of justice in the particular circumstances of the examination.[40] However, it does not explain why.

30. Thirdly, and relatedly, it appears to be underpinned by an assumption that 'once the subject matter has passed into the hands of the courts it is immune from legislative and executive action'.[41] That view, however, was rejected by Gibbs CJ and Mason J in *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission*.[42] It has not been accepted since.[43]

31. As this analysis demonstrates, *Hammond* lacks a *ratio decidendi*. Aspects of the reasoning of members of the Court, particularly the reasoning of Murphy J and Deane J, are inconsistent with current authority and should not be accepted. Accordingly, there is no warrant for treating the case as standing for the broad proposition that subjecting a person to any process—even a curial process—in which the person will be compelled to answer questions as to the circumstances of an alleged offence constitutes an interference with the administration of criminal justice.

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40 (1982) 152 CLR 188 at 207 but contrast at 196 (Gibbs CJ); *Sorby v Commonwealth* (1983) 152 CLR 281 at 299 (Gibbs CJ) (explaining *Hammond* as a case in which there 'was a real possibility that if [the plaintiff] was required to answer incriminating questions the administration of justice would be interfered with').

41 *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460 at 474 (Mason J).

42 (1982) 152 CLR 460 at 466-468 (Gibbs CJ), 474 (Mason J).

43 See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 558-559 (McHugh J).

32. The contrary submission of the appellants cannot be reconciled with authorities on the privilege against self-incrimination. This Court has accepted that the Commonwealth Parliament can abrogate that privilege without breaching Chapter III of the Constitution.[44] More importantly, it has accepted that the result of such abrogation may be to require a person to answer questions about pending charges. In addition, as early as 1783 it was held that derivative evidence obtained by use of an inadmissible confession was nevertheless admissible on its own terms.[45]

10 33. In *Hamilton v Oades* ('*Hamilton*'),[46] the Court considered the effect of s 541 of the *Companies (New South Wales) Code* (NSW). This relevantly provided that a liquidator who suspected that an individual may have been guilty of fraud, negligence or other misconduct in relation about the affairs of a corporation could apply to the Supreme Court to have that individual examined. The section abrogated any right to refuse to answer questions where the answer might tend to incriminate, while providing for a use immunity. It also provided that the Supreme Court could give such directions as to the matters to be inquired into and as to procedure as it saw fit.

20 34. The respondent, Mr Oades, was charged with criminal offences arising out of the collapse of a company of which he was a director. He submitted that *Hammond* required orders to be made preventing him from being examined about matters that might tend to incriminate him, including by disclosing his defence. The New South Wales Court of Appeal had accepted those submissions, but a majority of this Court rejected them. Chief Justice Mason pointed out that to have exercised the discretion routinely so as to deny an examination would frustrate the purpose of s 541. His Honour rejected the use of the inherent power to achieve the same result, observing that the inherent power of the court was 'not a charter which enable[d] a court to turn its back on
30 the statute'.[47]

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44 *Sorby v Commonwealth* (1983) 152 CLR 281 at 298-299 (Gibbs CJ), 306-308 (Mason, Wilson and Dawson J). This must be so because it cannot be said that there is any single common law principle which defines or even informs the privilege; indeed, as Wigmore said, "...there is no 'the' privilege. It is many things in many settings.": *Wigmore on Evidence,* 1961, volume 8, at 296. Wigmore offered a number of policy justifications for the existence of the privilege: at 297-318. He concluded that the policy underpinning the privilege was anything but clear and that the privilege was used for all sorts of reasons, most of them having little or no relation to any tenable theory as to its purpose: at 318. The history of the emergence of the privilege is considered in detail in *Wigmore* at 266 to 318; see also *Oxford History of the Laws of England,* Vol.XIII, at 100 to 107; Langbein, 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law' (1993-1994) 92 *Michigan Law Review* 1047; Eben, 'Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege against Self-Incrimination' (1993-1994) 92 *Michigan Law Review* 1086.

45 *R v Warickshall* (1783) 1 Leach 263; 168 ER 234. Of course, the circumstances might give rise to a discretion to exclude such evidence in any particular case.

46 (1989) 166 CLR 486.

47 (1989) 166 CLR 486 at 499 (Mason CJ).

35. His Honour then said:[48]

> The privilege against self-incrimination would not ordinarily protect a person against disclosure of his defence to a criminal charge. The so-called right not to disclose a defence is the result merely of the absence in ordinary circumstances of any statutory requirement that defences be revealed. In some instances there is such a specific requirement, for example, in relation to alibi defences. And there is implicit in the general words of s.541 such a general requirement. The possibility of disclosure of a defence is, accordingly, not a matter in respect of which a witness needs to be protected, except perhaps in the most exceptional circumstances. The second matter to be mentioned is [the] reference to the fact that an accused person is not required ordinarily to submit to pre-trial discovery. Granted that this is so, it is a consideration which must yield to the statutory abrogation of the privilege unless the circumstances of the particular case are so compelling as to call for an exercise of the statutory discretion.

36. The reasoning of Dawson J[49] and Toohey J[50] was like that of Mason CJ. Justice Toohey opined that the law would have developed in an 'unfortunate way' if a persons could be asked any questions, no matter how incriminating, before charges were laid but once charges were pending, an incriminating question could not be asked no matter how important it was to an examination and even if any harm to the person examined was minimal.[51] His Honour stated that the inherent jurisdiction did not allow a court to 'set at naught' a clear statutory provision; however, unfairness in the particular case could be dealt with by the Supreme Court using its discretion under s 541.[52]

37. *Hamilton* demonstrates that an examination directed to an offence with which a person has been charged will not, as the appellants contend, necessarily amount to an interference with the administration of justice. Indeed, it demonstrates that there need be no risk of interference with the administration of justice if a court may order an examination and the court can control how it is to be carried out.

38. In this case, the CARA and other legislation give the Supreme Court control over the manner in which the examination is to be conducted and what may be done with the answers provided at the examination. Although (as the Court of Appeal correctly found) the scheme of the CARA does not allow an examination to be refused simply because answering the questions may incriminate a person in pending criminal proceedings, the statute does not abolish all the inherent powers of the Supreme Court to ensure a fair trial.[53] By reason of those powers, the Supreme Court could order an examination to be in private.[54] It could place limits on the persons to whom the information at an

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48 (1989) 166 CLR 486 at 499-500 (Mason CJ).
49 (1989) 166 CLR 486 at 508-511.
50 (1989) 166 CLR 486 at 515-516.
51 (1989) 166 CLR 486 at 516. For a similar sentiment, see at 508 (Dawson J).
52 (1989) 166 CLR 486 at 516-517.
53 Compare *Hamilton* (1989) 166 CLR 486 at 498-499 (Mason CJ).
54 *Hamilton* (1989) 166 CLR 486 at 499 (Mason CJ); AB 132 [53] (Basten JA).

examination could be disclosed or published.[55] It could also decide to adjourn an examination for a period to allow the criminal trial to take place. In appropriate cases, it could even dismiss the application.[56]

39. Furthermore, the Supreme Court could exercise the powers conferred by s 7 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) to prohibit disclosure to the prosecution of information concerning the appellants. If it did so, there would be no real risk of the examination interfering with the administration of justice.[57] Justice Hulme, at first instance, did not consider whether to exercise that power or the equivalent under s 62 of the CARA.

40. The appellants' attempt to distinguish *Hamilton* on the basis that it involved a liquidator's examination should be rejected. No reason exists for considering that the discretion given to the Supreme Court in an examination under s 31D of the CARA should be markedly more limited than that given to the same court in examinations under s 541 of the *Companies (New South Wales) Code* (NSW). Nor is there any reason to ignore the express powers to limit disclosure conferred by s 7 of the *Court Suppression and Non-publication Orders Act 2010* (NSW).

41. Given the control that the Supreme Court will exercise over an examination and the powers available to restrict disclosure of information to the prosecution, there is no real risk that an examination would interfere with the administration of justice. Any risk of interference is speculative.[58]

42. Accordingly, the appeal should be dismissed.

VI. ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

43. The Attorney-General estimates that 25 minutes should be sufficient to present his oral argument.

Dated: 23 April 2013

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55 AB 147 [99] (Meagher JA).
56 AB 115 [10] (Beazley JA).
57 *Australian Crime Commission v OK* (2010) 185 FCR 258 at [107] (Emmett and Jacobson JJ); *R v CB* [2011] NSWCCA 264 at [100], [111] (McClellan CJ at CL).
58 See AB 141 [81] (Basten JA).