IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No: S 29 of 2013

BETWEEN:

JASON (A.K.A DO YOUNG) LEE
First Appellant

SEONG LEE
Second Appellant

AND

NEW SOUTH WALES CRIME COMMISSION
Respondent

APPELLANTS' SUBMISSIONS

PART I: SUITABILITY FOR PUBLICATION

1. We certify that this submission is suitable for publication on the Internet.

PART II: CONCISE STATEMENT OF ISSUES

2. On its proper construction, does the *Criminal Assets Recovery Act* 1990 No 23 (NSW) require the Court to determine an application for an examination order under s31D without regard to the capacity of that order to prejudice the fair trial of the person proposed to be examined?

3. If so, is it constitutionally permissible for the State to confer on the Supreme Court such a power?

PART III: NOTICES UNDER S78B OF THE *JUDICIARY ACT* 1903 (CTH)

4. We certify that we have considered whether notice should be given in compliance with s78B of the *Judiciary Act 1903* (Cth) and s78B notices have issued.

Dated: 22 March 2013

Filed on behalf of the First and Second Appellants
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PART IV: CITATION OF THE REASONS FOR JUDGMENT

5. The citation of the reasons for judgment of the Court of Appeal (NSW) is *New South Wales Crime Commission v Lee and Anor* [2012] NSWCA 276.

PART V: NARRATIVE STATEMENT OF FACTS

6. On 25 February 2009 the first appellant was charged with two offences contrary to s193B(2) *Crimes Act* 1900 No 40 (NSW) (dealing knowingly with the proceeds of crime); two offences contrary to s10 *Drug Misuse and Trafficking Act* No 226 (NSW) 1985 (possess prohibited drug) and one offence contrary to s527C(1)(c) *Crimes Act* 1900 (goods in custody). On 12 May 2010 following representations made to the DPP, all charges except the possession of drugs offences were withdrawn and dismissed. On 14 March 2011 these charges were reinstated in the Local Court. On 16 February 2012, the charges were permanently stayed by Magistrate Berry. On 18 May 2012 an ex officio indictment was filed in relation to the charges of dealing knowingly with the proceeds of crime "the first money laundering charges". These charges are currently listed for trial on 17 June 2013.

7. On 26 November 2009, and again on 1 December 2009, the first appellant was compulsorily examined pursuant to the *New South Wales Crime Commission Act* 1985 No 117 (NSW) ("**NSWCC Act**").

8. On 7 December 2009 a search warrant was executed in premises in Waterloo. The second appellant was then charged with three offences contrary to s7(1) *Firearms Act* 1996 (posses prohibited firearm). On 14 December 2009 the first appellant was charged with offences related to the 7 December search, namely two offences contrary to s7(1) *Firearms Act* 1996 and an offence of goods in custody contrary to s527C (1)(c) *Crimes Act* 1900, the goods being $1.147 million cash found in the main bedroom of the apartment. This latter offence is referred to hereafter as the "second money laundering charge". .

9. On 16 December 2009, the second appellant was compulsorily examined pursuant to the *New South Wales Crime Commission Act 1985* (NSW).

10. On 13 May 2010 the first and second appellants were charged with offences of supply prohibited drugs contrary to the *Drug Misuse and Trafficking Act* 1985 (NSW) in relation to substances found during the 7 December 2009 search.

11. On 13 May 2010, Buddin J made ex parte orders restraining property of the first appellant and another person, Ms Park (as identified on four separate schedules) and made ex parte orders for examinations on oath of the first and second appellants and others. The appellants appealed these orders. The ex parte orders for examination were stayed (by agreement) pending the hearing of the appeal. The New South Wales Crime Commission ("**NSWCC**"), in the same summons, at prayer [9], made an application for an order pursuant to s27 *CARA* for a proceeds assessment order (a form of confiscation order: s4 *CARA*). The proceeds assessment order sought relates to "proceeds derived from the illegal activities of Jason Lee" (not further particularised, but presumably including the matters the subject of charge). At all relevant times, the subject matter of the money laundering charges has been restrained by order of the Supreme Court.

12. On 10 June 2010, while the appeal from the ex-parte orders made by Buddin J was pending, the NSWCC filed a notice of motion seeking, pursuant to s31D *CARA,* ancillary to the application for a confiscation order, inter-partes orders for the examination of the appellants. This motion was heard on 28 June 2010 by Hulme J. The facts sheets in relation to all charged criminal offences (including the first money laundering charges) were in evidence before Hulme J as exhibits to the affidavit of Mr Spark. There was no evidence before Hulme J of urgency or of any fear of dissipation of assets. Hulme J reserved judgment.

13. On 22 November 2010, the appellants were arraigned in the District Court at Sydney before his Honour Judge Solomon QC on a nine count indictment relating to drugs and firearms offences and the second money laundering charge. The appellants pleaded not guilty to all counts. On 23 November 2010, his Honour granted a separate trial application on the second money laundering charge, however he permitted evidence of that money to be led in support of the drugs and firearms offences. The trial of the second money laundering charge is currently listed for hearing on 6 May 2013.

14. On 31 January 2011, the trial of the appellants for offences of supply of prohibited drugs and firearms offences commenced. The cash the subject of the second money laundering charge was relied on in proof of these charges. On 28 February 2011 (while that trial was ongoing and the trial of the second money laundering charge was pending) Hulme J gave judgment declining to make the examination orders sought against the appellants "at this stage":

NSWCC v Lee and Anor [2011] NSWSC 80 at [21]. The NSWCC filed a summons on 30 May 2011seeking leave to appeal from the decision of Hulme J.

15. On 16 March 2011 the first appellant was convicted of two supply drug offences and one firearm offence and acquitted of the other firearm offences. The second appellant was convicted of firearm offences and being knowingly concerned in one of the drug offences.

16. On 21 June 2011, while the summons for leave to appeal the decision of Hulme J was pending, the NSWCC again sought s31D examination orders for the appellants before Garling J. In the course of those proceedings, counsel for the NSWCC conceded that *"the examination would be directed to [a quantity of cash] as well as other assets and matters and that cash is the subject of the outstanding money laundering charge"* (T10.8-.10). On 10 August 2011, the motion for s31D examination orders was dismissed by Garling J as an abuse of process: *NSWCC v Jason Lee* [2011] NSWSC 1037.

17. On 6 December 2011, the appellants were sentenced for the drugs and firearms offences. On 18 April 2012 the appellants appealed their convictions of these offences to the Court of Criminal Appeal.

18. On 9 August 2012 the Court of Appeal (constituted by Beazley, McColl, Basten, Macfarlan and Meagher JJA) heard simultaneously the application for leave to appeal and the appeal of the NSWCC from the decision of Hulme J of 28 February 2011 declining to make s31D (1) orders.

19. The appeal of the criminal convictions in the Court of Criminal Appeal (Basten JA, Hall and Beech-Jones JJ) was heard on 23 August 2012 and 12-13 November 2012. Judgment is reserved in that matter.

20. On 6 September 2012, the Court of Appeal made an order to formalise the judgment of Hulme J otherwise dismissing the notice of motion filed by the NSWCC, granted leave to appeal from that order of dismissal of the motion, allowed the appeal and set aside the order of dismissal. The Court of Appeal then ordered pursuant to s31D(1) *CARA* that both appellants be examined on oath before a registrar concerning the affairs of the first appellant, and further that the second appellant also be examined about the affairs of Ms Park.

21. In short, on 6 September 2012, the Court of Appeal made orders for examination of the appellants in relation to matters that "overlap" with the subject matter of the extant appeal, and the subject matter of two pending trials for different offences of money laundering. These orders for examination are the subject matter of the appeal to this court.

PART VI: APPELLANTS' ARGUMENT

Statutory scheme

22. The *Criminal Assets Recovery Act* 1990 No 23 (NSW) (*"**CARA**"*) commenced on 3 August 1990. The principal objects of the Act are found in s3 and generally stated are to provide for the confiscation and recovery of probable proceeds of crime. Section 4 includes definitions of "confiscation order" "dealing", "illegal activity", "effective control" and "proceeds", with ss6-9A providing further definitions such as "serious crime related activity" (s6), "interest in property" (s7) and "illegally acquired property" (s11). Section 4(5) provides that if an expression used in the Act "would ordinarily impose a duty, it is not to be construed in a particular case or particular cases as conferring a discretion".

23. The Act is then divided into Part 2, which concerns restraining orders; Part 3 which concerns confiscation proceedings; Part 4 which provides "Information gathering powers"; Part 4A which concerns Recognition of interstate instruments; and Part 5, headed "General". This appeal concerns an order made under s31D, which is in Part 3 of the Act. Section 31D(1) relevantly confers on the Supreme Court an ancillary power to make an order for examination of a person where an application is made for a confiscation order or a non-disclosure order.

24. Section 31D (1) provides:

> "**s31D Additional orders where application made for confiscation order**
>
> (1) If an application is made for a confiscation order, the Supreme Court may, on application by the Commission, where the application for the confiscation order is made or at a later time, make any one or more of the following orders:
>
> (a) an order for the examination on oath of:
>
> (i) the affected person, or
>
> (ii) another person,
>
> before the Court, or before an officer of the Court, prescribed by rules of court, concerning the affairs of the affected person, including the nature and location of any property in which the affected person has an interest,"

Neither "affairs" nor "interest" are the subject of specific definition in the Act. As stated above, "interest in property" is defined in s7, and includes a reference to the person's money (s7(2)(a)).

25. Section 12 confers an equivalent ancillary power on the Supreme Court power to make examination orders when the Court makes a restraining order or at any later time.

26. In the present case, the NSWCC made an application for a confiscation order on 13 May 2010. There is no dispute that the first appellant is an "affected person" pursuant to s31D(1)(a)(i), as defined in s31D(4)(a). The second appellant falls within the terms of s31D(1)(a)(ii).

27. Section 31D(3) provides:

> "(3) Sections 13 and 13A apply in respect of a person being examined under an order under this section in the same way as they apply in respect of a person being examined under an order under section 12(1)".

28. Sections 13 and 13A apply in terms to the circumstance of a person being examined under s12. Section 13(1) provides that a person is not excused from answering a question or producing a document on the grounds of legal professional privilege or because production of a document would be in breach of a non-disclosure obligation. Section 13(2) precludes the admission into evidence in any civil or criminal proceedings, except of certain kinds, of any statement or disclosure made by a person in the course of an examination under s12 or any document obtained as a consequence of such a statement or disclosure.

29. Section 13A(1) provides that a person is not excused from answering a question or producing a document on the ground that the answer or production might incriminate, or tend to incriminate the person or expose the person to forfeiture or penalty. Section 13A(2) precludes the admission into evidence in any criminal proceedings, except those instituted for offences under the Act or the regulations, of any answer given or document produced by an examinee if the privilege was claimed at the time of the answering the question or producing the document or the examinee was not advised of the right to object. Section 13A(3) expressly allows for derivative use. That is, further information obtained as a result of an answer being given or the production of a document under s12 is not inadmissible in criminal proceedings because there was a compulsion to give the answer or produce the

document or because the privilege against self-incrimination applied to the answer or production of the document.

30. Section 62 *CARA*, referred to by the primary judge, was subsequently repealed by the *Court Suppression and Non–publication Orders Act* 2010 No 106 (NSW), which commenced on 1 July 2011. Prior to its repeal s62 conferred on the Supreme Court a power to make orders in certain circumstances with respect to the publication of any matter arising under the *CARA*.

31. The Court of Appeal placed particular reliance on section 63, which provides:

> "**s63 Stay of Proceedings**
> The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which the Supreme Court may stay proceedings under this Act that are not criminal proceedings."

The scope of the Court's discretion under s31D of the *CARA*

32. The primary issue arising on the appeal is the proper construction of s31D of the *CARA*. That constructional issue has a constitutional dimension. If section 31D, on its proper construction, requires the Supreme Court to determine an application for an examination order without regard to the capacity of that order to prejudice the fair trial of the person proposed to be examined the provision would offend Ch III principles. The arguments in support of that proposition are developed below. The constitutional arguments also inform the construction of s31D. Where constructional choices are open, a construction that avoids constitutional invalidity must be preferred: *NSW v Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 161-162; s31(1) of the *Interpretation Act* 1987 No 15 (NSW).

33. On its proper construction s31D of the *CARA* confers on the Supreme Court a discretion the scope of which includes consideration of the capacity of an order for examination on oath (concerning the affairs of a person not limited to the nature and location of interests in property) to prejudice the fair trial of the person proposed to be examined. The Court of Appeal erred by reaching a contrary conclusion: at [49], [56], [72], [81].

34. There can be little doubt that s31D of the *CARA* confers on the Supreme Court a discretion, in the sense that the Court is not under a duty to make an examination order simply because an application for such an order has been made by the NSWCC. This much is clear from the use of the word "may" in s31D(1): see 9(1) of the *Interpretation Act 1987* (NSW). Basten

JA in the Court of Appeal at [31] preferred to describe s31D as involving an "evaluative judgment", by way of distinction from a statutory power that involves a discretionary determination about a range of possible outcomes. However, nothing turns on the distinction for present purposes. Whether the power is described as a discretionary power or as a power conditional upon the exercise of an evaluative judgment, the exercise of the power under s31D still necessarily invites the question of what factors should be brought to bear on the exercise of that discretion/judgment.

35. The primary judge took the view that it was within the scope of his discretion in considering an application under s31D to assess the risk such an examination would pose to the fair trial of the proposed examinees. His Honour held in relation to the proposed examination and the subject matter of the pending criminal trials that "my consideration of the documents tendered by the Plaintiff in support of its application certainly suggests that the scope for self incrimination is wide" (Hulme J at [21]). The documents referred to included facts sheets of the allegations in both pending money laundering trials and the trial then proceeding. His Honour held that "the circumstances here are governed by the decision in *Hammond v Commonwealth of Australia* rather than by *ACC v OK*" (Hulme J at [20], referring to *Hammond v The Commonwealth* (1984) 152 CLR 188 "***Hammond***" and *Australian Crime Commission v OK* (2010) 185 FCR 258 "***OK***"). His Honour, was, with respect correct, in the circumstances then prevailing, to equate the circumstance of the application for an ancillary order to examine the appellants on oath, including as to the subject matter of then proceeding and pending criminal charges, currently before the Court, with *Hammond.* The respondent did not submit to Hulme J that orders could be made "without breaching the principle in *Hammond*" (Hulme J at [21]).

36. In the Court of Appeal Basten JA (with whose reasons Beazley, McColl and McFarlan JJA agreed) held that Hulme J was in error in his construction of s31D and in his application of *Hammond.* Basten JA held that Hulme J had "failed to consider the extent to which the Recovery Act permitted a degree of potential interference with a criminal trial and precluded judicial intervention to prevent such interference" (CA [56]). It is submitted that the judicial discretion in s31D is not so constrained, nor is interference or a real risk of such interference with a criminal trial sanctioned by the Act.

37. In reaching these conclusions Basten JA held that *Hammond* was "not a case which lends itself to the extraction of principle" (at [26]). His Honour fell into error in that regard. *Hammond* has been considered and/or applied in several case including *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564 ***('De Vonk')*** at 569-571, *OK* at 276-277 [105]-[107], *ABC v Sage* (2009) 175 FCR 319 at 331 [29]-[31], *R v CB; MP v R* [2011] NSWCCA 264 at [74]-[80]; *R v Sellar* [2013] NSWCCA 42 at [77]; *Chapman v DPP (WA)* (2009) 194 A Crim R 323. It does lend itself to the extraction of principle and such principle was relevant to the determination of the primary judge and the Court of Appeal.

38. Gibbs CJ held in *Hammond* (at 198) that:

> "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 answer 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."

39. As the reasoning in this passage makes clear, a statutory restriction on the use of evidence contained under compulsion does not provide a sound answer to concerns about the risks to a fair trial arising from a compulsory examination. Mason J agreed with Gibbs CJ that to continue with the inquiry would amount to an abuse of process "and that the proper course would be to adjourn the inquiry until the disposal of the criminal proceedings". Deane J held (at 206) that:

> "It is fundamental to the administration of criminal justice that a person who is 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 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."

Murphy J held that it was inconsistent with a constitutional right to trial by jury that the plaintiff be subjected to interrogation by the executive government or that his trial be

prejudiced in any other manner, whether or not there was a privilege against self incrimination (at 201).

40. *Hammond* is authority for the principle 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 the subject of criminal proceedings creates a real risk that the administration of justice will be interfered with. The reasoning in *Hammond* makes clear that the availability of a procedure involving examination does not preclude consideration of the fair trial consequences of the procedure being applied at a particular time. In *Hammond,* a real risk of interference with administration of justice in the accusatorial trial process was seen as arising notwithstanding the examination was private and the answers given could not be used at the criminal trial. These considerations go to the heart of the accusatorial system of criminal justice and have a direct bearing on the construction of the *CARA* and the application to Hulme J.

41. *Hamilton v Oades* (1989) 166 CLR 486 *("**Hamilton**")* is not authority to the contrary of *Hammond*. In *De Vonk, Hamilton* was reviewed, with Foster J concluding that none of the judgments in that case suggested that considerations relating to contempt of parallel criminal proceedings were necessarily excluded from consideration. Hill and Lindgren JJ agreed with Foster J (at 589), also holding that the legislation there under consideration, (the *Income Tax Assessment Act* 1956 (Cth)) did not authorise compulsory interrogation "where to do so might constitute an interference with the administration of justice, civil or criminal".

42. In *Hamilton* at 495, Mason CJ referred to the company provisions considered by this Court in *Mortimer v Brown* (1970) 122 CLR 493 (s250 *The Companies Act* 1961 (Qld)) and held that "[t]he provision contained in the form of a judicial discretion, an adequate safeguard against any infringement of individual rights and any injustice or oppression which might be caused by the provision" (emphasis added). Mason CJ also accepted that the company code under consideration in *Hamilton* (s541 *Companies (New South Wales) Code*), gave the judge "a wide statutory discretion" (at 496), in the exercise of which the judge "is bound to take into account the interests of the witness" (at 497) as well as the competing public interest in examination (at 496-7). Considerations taken into account in the exercise of the court's inherent power were "the very considerations that need to be balanced when the discretion is applied" (p.499).

43. *Hamilton* is not to be understood as authority for the proposition that fair trial considerations are irrelevant to the exercise of a power such as s31D of *CARA*. Additionally, Basten JA was in error in holding that the points of distinction between the legislation considered in *Hamilton* and *CARA* were not significant: CA [33], see also Meagher JA at CA [92]. The legislation under consideration in *Hamilton* concerned the powers to order examination of company officers in relation to the affairs of the company. Liquidator's examinations have a different history, purpose, scope and procedure from the kind of examination contemplated by *CARA*: *Mortimer v Brown*; *Rees v Kratzmann* (1965) 114 CLR 63; *Hamilton* at 492-3, 495.

10 44. Where persons have been charged with criminal offences, which are pending before a court of law, protection of the individual's right to a fair trial is a relevant consideration to be taken into account in the exercise of the discretion under s31D *CARA*. In *ACC v OK*, the Full Court of the Federal Court of Australia considered whether an examiner conducting an examination under the *Australian Crime Commission Act* 2002 (Cth) ("*ACC Act*") was permitted to ask questions related directly to matters the subject of criminal charges laid in a State criminal court. The plurality (Emmett and Jacobsen JJ) recognised that "[t]he question involves a possible conflict between the provision of the *Commission Act* requiring the Commission and its officers to disclose information to the prosecuting authorities, on the one hand and the protection of the rights of persons charged with offences to have a fair trial of those offences,
20 on the other" (*OK* at [65]). The plurality held that "a statute expressed in general terms should not ordinarily be construed so as to authorise the doing of an act that amounts to a contempt of court. A provision, cast in general terms, which does not address itself to the question of contempt of court, should not be read as authorising action that would amount to such a contempt" (*OK* at [104]). The appellant submits that this, with respect, is a correct approach to construction of a general provision and is contrary to the approach taken by the Court of Appeal in the present case.

45. Emmett and Jacobsen JJ went on to consider *Hammond* and held that the significant difference in the case before them was that under the *ACC Act*, in particular s25A, "the risk of prejudice to a fair trial is to be managed by confining the persons to whom answers given
30 by a witness can be disclosed, not by confining the questions that might be put to the witness...the *Commission Act* permits an examination to continue on a subject matter

directly related to a pending charge so long as the protective provisions contemplated by s25A (3) and (9) have been put in place" (*OK* at [107], see also [109]). It is only when assured on the basis of appropriate evidence that "appropriate safeguards were in place, to ensure that the investigating and prosecuting teams in the relevant agencies dealing with pending charges could not be given that information" that information gathered at such an examination could be disseminated by the ACC "without risk to a fair trial" (at [111]). The interpretation by the plurality of the Full Court of the ACC legislation recognised and protected the signal position occupied by fair trial considerations.

46. On the construction given to *CARA* by the Court of Appeal, no such protective provisions are available, relevant or invoked. Instead, it is said that examination on matters the direct subject of pending charge "were intended to be maintained despite the possibility of adverse consequences for criminal proceedings otherwise on foot" (CA [49]) and that this was not only "permitted" by *CARA,* but additionally the Act "precluded judicial intervention to prevent such interference" (CA [56]). The construction given to *CARA* by the Court of Appeal is to the effect that examinations may be ordered by the Supreme Court, without corresponding orders protecting against the involvement of particular people or the publication of evidence on such examination, and on the basis that the Act itself precludes exercise of the statutory discretion or inherent powers to protect the accusatorial trial process.

47. This involves a misconstruction of the *CARA*. Section 31D itself contains no text that suggests a construction along the lines adopted by the Court of Appeal. The provision confers a discretion without any textual limitation on the facts that may be taken into account in the exercise of that discretion. Given the fundamental nature of the right to a fair trial, it would only be in a clear case that would one infer from the subject matter, scope and purpose of the Act an implied restriction on the discretion in s31D to the effect that no regard can be had to the risk that an examination may pose to the integrity of a fair trial as a consequence.

48. The features of the statutory scheme referred to in the Court of Appeal do not support the conclusion that it was implicit in the scheme that fair trial considerations were intended to be excluded from consideration under s31D. Basten JA emphasised two sections – ss13A and 63. Section 13A, as described above, provides a limited use immunity in respect of answers

given and products produced at an examination, where privilege has been asserted. Section 13A(3) makes clear that there is no derivative use immunity. Basten JA held that, having regard to s13A, that the legislature had considered and specifically rejected immunity from derivative use of answers given under compulsion: CA [43]-[44], see also Meagher JA at CA [99]. However, s13A(3) says nothing about interference with the accusatorial criminal trial process. It says even less about the nature of the discretion to be exercised by the Court in s31D *CARA*.

49. Section 13A(3) of the *CARA* does not amount to a legislative warrant to interfere with basic principles of the accusatorial system of criminal justice. Contrary to the reasoning of Basten JA at CA [55], s13A cannot be read as indicating a legislative intention to displace fundamental features of a criminal trial and to "authorise" conduct that constitutes a risk of prejudice to a fair trial. Those risks go beyond simply the prospect of the admission of evidence obtained as a result of an examination (being the matter addressed in s13A(3)) and the risk of prejudice in the minds of potential jurors (as was apparently contemplated by Beazley JA at [9]-[11]).

50. As noted above, the reasoning of the Court in *Hammond* makes clear that a risk to a fair trial arising from a compulsory examination may exist notwithstanding statutory restrictions on the use of evidence obtained at such an examination. Likewise in *Sorby v Commonwealth* (1983) 152 CLR 281 at 294 Gibbs CJ observed that if a witness is compelled to answer questions which may show that he has committed a crime with which he may be charged "his answers place him in real and appreciable danger of conviction, notwithstanding that the answers themselves may not be given in evidence. The traditional objection that exists to allowing the executive to compel a man to convict himself out of his own mouth applies even when the words of the witness may not be used as an admission."

51. The reasoning highlights that the ultimate use in evidence at a criminal trial of material obtained at or as a result of a compulsory examination is but one aspect of the risk to a fair trial which can arise from such an examination. Once that is understood, there is no basis for concluding from a provision such as s13A that the legislature has considered all potential fair trial risks associated with an examination and chosen to enact a scheme that is intended to operate without discretionary regard to such risks.

52. The Court of Criminal Appeal recently considered in *R v Sellar* [2013] NSWCCA 42 the different types of risk to fair trial arising from a compulsory examination. One such risk is the risk that investigators of the criminal proceedings and trial prosecutor have fore-knowledge of "defences or explanations of transactions by the accused which he or she may raise at trial, and possibly evidence or information which would tend to show that documents or transactions apparently regular on their face in fact tend to support the proposed charges ... To provide prosecutorial authorities material compulsorily obtained relating to such matters could compromise a fair trial in accordance with these principles": per Bathurst CJ at [104] (McClellan CJ at CL and Rotham J agreeing). The risks to a fair trial which could arise from a compulsory examination and which are not dealt with by a statutory regime governing use (such as ss13 and 13A of *CARA*) also include "the use of compulsorily obtained evidence as the basis for the development of strategies for the presentation of the prosecution case, such as the order in which witnesses will be called, and also the development of an appropriate plan for the cross examination of an accused if they give evidence. It includes the use of that evidence...in the course of, or else in the preparation of...statements. It would also cover the use of the material to make an assessment of the likely strength of the defence case and to have advance notice of any defence issues likely to be raised": per Garling J in *R v Sellar* [2012] NSWSC 934 at [243].

53. The Court of Appeal's reliance on s63 of *CARA* as bearing on the construction of s31D is misplaced. Basten JA at [47] held that s63 revealed a broader "statutory purpose" the consequences of which extend beyond the situation where a stay is sought. His Honour reasoned that if the fact of criminal proceedings is not a ground to stay an examination under s31D, it was not an available ground "for resisting or delaying examination on any other procedural basis. Further, the purpose is not avoided by arguing that the real ground is the risk of prejudice to a criminal proceeding, rather than the fact that such a proceeding is on foot. The latter should be understood to encompass the former and any variation on it": [47]. His Honour appears to have accepted, in substance, the submission of senior counsel for the NSWCC that the refusal of orders under s31D amounts to a "de facto stay": [47].

54. This reasoning involves drawing a significant and unjustified implication from s63. That section is directed to a very narrow proposition. It provides that the fact that criminal proceedings have been instituted or have commenced is "not a ground on which the Supreme

Court may stay proceedings under this Act that are not criminal proceedings". Section 63 thus deals with a specific scenario and does no more than preclude the Court from relying on the specified ground as a reason for staying proceedings under *CARA*. That specific stipulation does not manifest a general legislative intention that the various powers conferred under the *CARA*, including s31D, are to be conferred without regard to the impact of the exercise of those powers on criminal proceedings in respect of related subject matter. When dealing with such a legislative incursion on fundamental rights and the ordinary administration of justice, clear words are necessary: *Bropho v State of Western Australia* (1990) 171 CLR 1 at 18; *Coco v The Queen* (1994) 179 CLR 427 at 437.

55. Where, as in the appellants' case, the subject of the proposed examination on oath is admittedly the very subject of extant criminal proceedings, the risk of prejudice to the adversarial trial process is a matter deserving of consideration before an order under s31D is made, and a court is not precluded from declining to make an order, or granting an adjournment of the application having taken into account such considerations. The primary judge was correct to hold that *Hammond* was relevant to the determination he was called upon to make.

56. Finally, the discretion conferred on the Supreme Court in s31D is not limited by what is said to be an alternative discretion possibly available for exercise by a Registrar at some time in the future, subsequent to an examination being ordered by a judge of the Court: cf. CA at [62]. The *CARA* discloses no such dependency. Moreover, the judgment of the Court of Appeal has the effect that there is little prospect of any effective orders being obtained at an examination under s31D to limit the risks to a fair trial, given the indication by Basten JA at [81] that a registrar asked to make such orders would need to take into account "the prejudice authorised by the *CARA*.

<u>If s31D of the *CARA* does not allow for consideration of risks to a fair trial it is invalid?</u>

57. If, contrary to the submissions above, s31D is to be understood as requiring that the Supreme Court determine an application for an examination order without regard to the consequences of that order in prejudicing the fair trial of the person proposed to be examined, then the provision is invalid. To construe the *CARA* in such a way would mean that s31D confers a constitutionally impermissible function on the Supreme Court. This constitutional

consequence is an additional reason to adopt the construction of s31D advanced by the appellants. If that construction is not open, then s31D is invalid.

58. The applicants accept that they did not in the courts below raise any issue as to the validity of s31D or submit that there were constitutional dimensions bearing on the issues of construction. The constitutional issue now sought to be agitated is an important one involving pure questions of law. It is expedient in the interests of justice for the High Court to consider the issue: see *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [30]-[34] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. The point is not one that could have been met by evidence had it been raised at first instance or in the Court of Appeal: see *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438.

59. A State cannot confer upon its Supreme Court a function that would substantially impair the Court's institutional integrity and which is therefore incompatible with the role of the Court as a repository of federal jurisdiction: *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 at [182]-[185], *South Australia v Totani* (2010) 242 CLR 1 at 47, citing *Kable v DPP (NSW)* (1996) 189 CLR 51 at 96, 103, 116-119, 127-128; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591.

60. The institutional integrity of a State Supreme Court is impaired if the court is required or empowered to do something which is substantially inconsistent or incompatible with the continuing subsistence, in every aspect of its judicial role, of its defining characteristics as a court: *Totani* at 48 per French CJ; *Wainohu v New South Wales* (2011) 243 CLR 181 at 208 per French CJ and Kiefel J; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 per Gummow, Hayne and Crennan JJ.

61. In *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7 at [187] Gageler J observed that procedural fairness is central to the concept of the institutional integrity of Ch III courts. A related aspect of institutional integrity identified by his Honour, with reference to *Walton v Gardiner* (1993) 177 CLR 378 at 393, is the inherent jurisdiction of a superior court to prevent abuse of its own processes. His Honour referred with approval to the principle identified in *Walton v Gardiner* at 393 that the inherent jurisdiction extends to "all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments

of injustice or unfairness." This accords with the unanimous observation of the Court in *Dupas v The Queen* (2009) 241 CLR 237 at 243, [15] that "there is much to be said for the view that in Australia the inherent power to control abuse of process should be seen, along with the contempt power, as an attribute of the judicial power provided for in Ch III of the *Constitution."*

62. It is apparent from these passages that one of the defining characteristics of a Supreme Court is the ability to protect the integrity of its own processes. In relation to the administration of criminal justice, that necessarily includes ensuring the fairness of a current or pending criminal trial. The determination of guilt or innocence by means of a fair trial according to law is an essential characteristic of a court exercising judicial power: *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209 per Gaudron J in *Nicholas* (a passage cited with approval in *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Dietrich v The Queen* (1992) 177 CLR 292 at 362 per Gaudron J. In *Dietrich* at 298 Mason CJ and McHugh J described the right of an accused to a fair trial as a "central pillar of our criminal justice system".

63. Fundamental to the criminal law administered by Chapter III courts is the notion that the onus of proving a criminal offence lies upon the prosecution and that in discharging that onus, it cannot compel the accused to assist it in any way: see *EPA v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 *"EPA"* at 527-528 per Deane, Dawson and Gaudron JJ. The onus of proof and the accusatorial system underpin what was described by Mason CJ and Toohey J in *EPA* at 501 as an "elementary principle that no accused person can be compelled by process of law to admit the offence with which he or she is charged" which was settled as early as the eighteenth century, and before extension to a privilege against self-incrimination. See also in relation to the accusatorial process and the balance between law enforcement and the individual: *EPA* per Brennan J at 514, 516-7; per McHugh J at 544-6; *RPS v The Queen* (2000) 199 CLR 620 per Gaudron ACJ, Gummow, Kirby and Hayne JJ at 630 [22], 633 [28], 637 [41], per McHugh J at 643 [61]-[62], per Callinan J at 653-654 [101].

64. It may be accepted that the privilege against self-incrimination is a common law right that, outside the setting of a criminal trial, is susceptible to legislative interference: *Hammond* at 197-198, 200; *Sorby* at 289-290, 294-295, 309, 311; *Hamilton* at 495, 500-501, 509.

Critically, if the legislature chooses to abrogate the privilege for the purposes of a parallel inquiry separate from a criminal trial, the Supreme Court retains the power to protect the integrity of its own processes and the fairness of any current or pending criminal trial.

65. That institutional characteristic is manifested in the power of a Supreme Court to restrain actions which jeopardise a fair trial and which may constitute contempt of court. For example, the Supreme Court has inherent jurisdiction to restrict the publication of proceedings which occur in open court, where such a restriction is necessary in the interests of the administration of justice: *Hogan v Hinch* (2011) 243 CLR 506 at 534 per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

10 66. A further example is the power of a Supreme Court to grant an injunction to restrain an executive process that jeopardises a fair trial. The continuation of an executive commission of inquiry in circumstances where there is a real risk of interference with the administration of justice constitutes contempt of court: *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1981) 152 CLR 25 at 54 per Gibbs CJ; *OK* (2010) 185 FCR 258. A fair trial may be vitiated by compulsory interrogation on matters relevant to upcoming criminal trial: *Hammond* at 202-203, 206. In *Huddart, Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330 at 379-380 O'Connor J considered that it is part of the inherent jurisdiction of High Court to prevent an executive inquiry involving powers to compel a person to provide information from proceeding in circumstances where there are
20 pending criminal proceedings in respect of the same subject matter. The comments were endorsed in *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 346 per Barton J and in *Hammond* at 207 by Deane J. Deane J, at 206, described as "fundamental to the administration of criminal justice" the proposition that a person facing pending criminal proceedings should not be subjected to "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.

67. The State could not validly legislate to remove from the Supreme Court such inherent powers to protect the integrity of the administration of justice. To do so would be to remove one of the institutionally defining characteristics of the Supreme Court. It must follow that
30 the State cannot legislate to confer on the Supreme Court a power to compel examination of

a person in circumstances that may present a threat to the administration of criminal justice, but without the Court being able to take account of such a threat in making a determination under a provision such as s31D. To require the Court to shut its eyes to the consequences of its own order for the fairness of a pending criminal trial is effectively to deprive the Court of the power to protect the integrity of the administration of justice.

68. Such a legislative scheme suffers from the further flaw of making the Court, upon the application of the executive, a party to the creation of a prejudice against the fair trial of an accused. This undermines the independence and impartiality of the Court. One of the essential characteristics required of all courts exercising federal jurisdiction is that they be, and appear to be, independent and impartial tribunals: *North Australian Aboriginal Legal Services Inc v Bradley* (2004) 218 CLR 146 at 163 per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ. A Chapter III court cannot be required or authorised to act in a manner which involves an abuse of process or which brings or tends to bring the administration of justice into disrepute: Gaudron J in *Nicholas* at 209. In *Nicholas* at 226 McHugh described the capacity of the federal courts to protect themselves from abuse of their processes has been described as a matter of the "highest constitutional importance".

69. On the Court of Appeal's construction, s31D authorises the making of examination orders that, in circumstances where the examination of a person facing criminal charges is liable to traverse the subject matter of those charges, must have one of two consequences. If the trial of such charges is to proceed regardless of the risk of prejudice, on the basis that the prejudice thereby created is authorised by the *CARA*, then the scheme produces a fundamental change in the nature of a criminal trial. Alternatively, the exercise of the power may have the effect of making it impossible to proceed with the trial of such charges because of the irremediable prejudice. In either case, the scheme as so construed undermines the administration of criminal justice in a way which is incompatible with the institutional integrity and defining characteristics of the Supreme Court.

PART VII: APPLICABLE LEGISLATION

70. The Constitution Chapter III, particularly ss71 and 80. Annexure "A" to this submission is an extract of the relevant provisions of *CARA* (NSW) (s12-13A, 31D, 62 and 63) and the *Courts Suppression and Non-publication Orders Act* 2010 (NSW) (s3-8 Schedules 1.2 and 2.2).

PART VIII: ORDERS SOUGHT

71. The appellants seek orders that:

(1) the appeal is allowed;

(2) the orders made by the Court of Appeal on 6 September 2012 are set aside;

(3) the appeal to the Court of Appeal is dismissed;

(4) in the alternative to (3), an order remitting the matter to the Court of Appeal for reconsideration of the discretion in accordance with law;

(5) in the alternative to (4), a declaration that s31D of the *CARA* is invalid;

10 (6) such further or other orders as the Court thinks fit;

(7) costs.

PART IX: ESTIMATE OF LENGTH OF ORAL ARGUMENT

72. The appellants estimate that their oral argument will be presented within two hours.

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Counsel for the appellant

Gabrielle Bashir

Stephen Free

Dated: 22 March 2013

IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY No. S29 of 2013

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

SEONG LEE
Second Appellant

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

ANNEXURE "A" LEGISLATION

1.	*Criminal Assets Recovery Act* 1990 (NSW), No. 23 (Historical Version for 10 September 2010 to 30 June 2011)	As at 28.02.2011 Still in Force as at 22.03.2013*°	ss12 – 13A, 31D, 62, 63
2.	*Court Suppression and Non-Publication Orders Act* 2010 (NSW), No. 106 (Historical Version for 2 July 2011 to date)	As at 06.09.2012 Still in Force as at 22.03.2013	ss3 – 8, Sch 1.2, 2.2

(All legislation sourced from: www.legislation.nsw.gov.au and www.comlaw.gov.au.)

*Section 31D was amended by the *Crime Commission Act 2012*, No. 66 Sch 5.2 [10]-[12]. These amendments commenced on 5 October 2012.

°Section 62 was repealed by Sch 2.2 of the *Court Suppression and Non-Publication Orders Act 2010* (NSW), No. 106, which commenced on 1 July 2011. Schedule 1.2 contains transitional provisions.

Note: Amending provisions are subject to automatic repeal pursuant to s30C of the *Interpretation Act 1987* (NSW), No. 15 once amendments have taken effect.

Filed on behalf of the First and Second Appellants
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Dated 22 March 2013

Criminal Assets Recovery Act 1990 No 23

12 Supreme Court may make further orders

(1) The Supreme Court may, when it makes a restraining order or at any later time, make any ancillary orders (whether or not affecting a person whose interests in property are subject to the restraining order) that the Court considers appropriate and, without limiting the generality of this, the Court may make any one or more of the following orders:

(a) an order varying the interests in property to which the restraining order relates,

(b) an order for the examination on oath of:

(i) the owner of an interest in property that is subject to the restraining order, or

(ii) another person,

before the Court, or before an officer of the Court prescribed by rules of court, concerning the affairs of the owner, including the nature and location of any property in which the owner has an interest,

(b1) an order for the examination on oath of a person who is the spouse or a de facto partner of the owner of an interest in property that is subject to the restraining order, before the Court or before an officer of the Court prescribed by the rules of court, concerning the affairs of the person, including the nature and location of any property in which the person or that owner has an interest,

(c) an order with respect to the carrying out of any undertaking with respect to the payment of damages or costs given on behalf of the State in connection with the making of the restraining order,

(c1) an order directing a person who is or was the owner of an interest in property that is subject to the restraining order or, if the owner is or was a body corporate, a director of the body corporate specified by the Court, to furnish to the Commission or NSW Trustee and Guardian, within a period specified in the order, a statement, verified by the oath of the person making the statement, setting out such particulars of the property, or dealings with the property, in which the owner has or had an interest as the Court thinks proper,

(d) if the restraining order requires the NSW Trustee and Guardian to take control of an interest in property:

(i) an order regulating the manner in which the NSW Trustee and Guardian may exercise functions under the restraining order, or

(ii) an order determining any question relating to the interest, including any question affecting the liabilities of the owner of the interest or the functions of the NSW Trustee and Guardian, or

(iii) (Repealed)

(e) an order requiring or authorising the seizure or taking possession of property.

Note. "De facto partner" is defined in section 21C of the *Interpretation Act 1987*.

(2) An order under subsection (1) may be made on application:

(a) by the Commission, or

(b) by the owner, or

(c) if the restraining order directed the NSW Trustee and Guardian to take control of an interest in property—by the NSW Trustee and Guardian, or

(d) with the leave of the Supreme Court—by any other person.

(3) The applicant for an order under subsection (1) must give notice of the order:

(a) if the applicant is a person referred to in subsection (2) (a), (b) or (c)—to the other persons referred to in those paragraphs, or

(b) if the applicant is a person referred to in subsection (2) (d)—to the persons referred to in subsection (2) (a)–(c).

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Criminal Assets Recovery Act 1990 No 23

Historical version for 10 September 2010 to 30 June 2011 (accessed 19 March 2013 at 17:38)
Current version

13 Privilege

(1) A person being examined under section 12 is not excused from answering any question, or from producing any document or other thing, on the ground that:

(a) (Repealed)

(b) production of the document would be in breach of an obligation (whether imposed by an enactment or otherwise) of the person not to disclose the existence or contents of the document, or

(c) the answer or production would disclose information that is the subject of legal professional privilege.

(2) A statement or disclosure made by a person in answer to a question put in the course of an examination under section 12, or any document or other thing obtained as a consequence of the statement or disclosure, is not admissible against the person in any civil or criminal proceedings except proceedings that comprise:

(a) proceedings in respect of the false or misleading nature of a statement or disclosure made under this Act, or

(b) proceedings on an application under this Act, or

(c) proceedings ancillary to an application under this Act, or

(d) proceedings for enforcement of a confiscation order, or

(e) in the case of a document or other thing—civil proceedings for or in respect of a right or liability it confers or imposes.

(3), (4) (Repealed)

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Criminal Assets Recovery Act 1990 No 23

Historical version for 10 September 2010 to 30 June 2011 (accessed 19 March 2013 at 17:39)
Current version

13A Privilege against self-incrimination

(1) A person being examined under section 12 is not excused from answering any question, or from producing any document or other thing, on the ground that the answer or production might incriminate, or tend to incriminate, the person or make the person liable to forfeiture or penalty.

(2) However, any answer given or document produced by a natural person being examined under section 12 is not admissible in criminal proceedings (except proceedings for an offence under this Act or the regulations) if:

(a) the person objected at the time of answering the question or producing the document on the ground that the answer or document might incriminate the person, or

(b) the person was not advised that the person might object on the ground that the answer or document might incriminate the person.

(3) Further information obtained as a result of an answer being given or the production of a document in an examination under section 12 is not inadmissible in criminal proceedings on the ground:

(a) that the answer had to be given or the document had to be produced, or

(b) that the answer given or document produced might incriminate the person.

(4) A person directed by an order under section 12 to furnish a statement to the NSW Trustee and Guardian or the Commission is not excused from:

(a) furnishing the statement, or

(b) setting out particulars in the statement,

on the ground that the statement or particulars might incriminate, or tend to incriminate, the person or make the person liable to forfeiture or penalty.

(5) If a person furnishes a statement to the NSW Trustee and Guardian or the Commission in accordance with an order under section 12, the statement is not admissible against the person in any criminal proceedings except proceedings in respect of the false or misleading nature of the statement.

Criminal Assets Recovery Act 1990 No 23

Historical version for 10 September 2010 to 30 June 2011 (accessed 19 March 2013 at 17:39)
Current version

31D Additional orders where application made for confiscation order

(1) If an application is made for a confiscation order, the Supreme Court may, on application by the Commission, when the application for the confiscation order is made or at a later time, make any one or more of the following orders:

(a) an order for the examination on oath of:

(i) the affected person, or

(ii) another person,

before the Court, or before an officer of the Court prescribed by rules of court, concerning the affairs of the affected person, including the nature and location of any property in which the affected person has an interest,

(b) an order for the examination on oath of a person who is the spouse or a de facto partner of the affected person, before the Court or before an officer of the Court prescribed by rules of court, concerning the affairs of the person, including the nature and location of any property in which the person or that affected person has an interest,

(c) an order directing a person who is or was an affected person or, if the affected person is or was a body corporate, a director of the body corporate specified by the Court, to furnish to the Commission, within a period specified in the order, a statement, verified by the oath of the person making the statement, setting out such particulars of the property, or dealings with the property, in which the affected person has or had an interest as the Court thinks proper.

(2) The Commission must give notice of an application for an order under this section to the affected person.

(3) Sections 13 and 13A apply in respect of a person being examined under an order under this section in the same way as they apply in respect of a person being examined under an order under section 12 (1).

(4) In this section:

affected person means:

(a) in the case of an application for an assets forfeiture order, the owner of an interest in property that is proposed to be subject to the order, or

(b) in the case of an application for a proceeds assessment order or unexplained wealth order, the person who is proposed to be subject to the order.

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Criminal Assets Recovery Act 1990 No 23

Historical version for 10 September 2010 to 30 June 2011 (accessed 19 March 2013 at 17:39)
Current version

62 Publication of proceedings

If:

(a) a person has been charged with an offence in relation to a serious crime related activity and proceedings on the charge have not commenced or, if the proceedings have commenced, they have not been completed, and

(b) proceedings are instituted under this Act for a restraining order, or an assets forfeiture order, affecting an interest of the person in property, or for a proceeds assessment order or unexplained wealth order against the person,

the Supreme Court may make such orders as it thinks fit with respect to the publication of any matter arising under this Act.

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Criminal Assets Recovery Act 1990 No 23

63 Stay of proceedings

The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which the Supreme Court may stay proceedings under this Act that are not criminal proceedings.

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Court Suppression and Non-publication Orders Act 2010 No 106

3 Definitions

In this Act:

court means:

(a) the Supreme Court, Land and Environment Court, Industrial Court, District Court, Local Court or Children's Court, or

(b) any other court or tribunal, or a person or body having power to act judicially, prescribed by the regulations as a court for the purposes of this Act.

information includes any document.

news media organisation means a commercial enterprise that engages in the business of broadcasting or publishing news or a public broadcasting service that engages in the dissemination of news through a public news medium.

non-publication order means an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information).

party to proceedings includes the complainant or victim (or alleged victim) in criminal proceedings and any person named in evidence given in proceedings and, in relation to proceedings that have concluded, means a person who was a party to the proceedings before the proceedings concluded.

proceedings means civil or criminal proceedings.

publish means disseminate or provide access to the public or a section of the public by any means, including by:

(a) publication in a book, newspaper, magazine or other written publication, or

(b) broadcast by radio or television, or

(c) public exhibition, or

(d) broadcast or publication by means of the Internet.

suppression order means an order that prohibits or restricts the disclosure of information (by publication or otherwise).

Court Suppression and Non-publication Orders Act 2010 No 106

4 Inherent jurisdiction and powers of courts not affected

This Act does not limit or otherwise affect any inherent jurisdiction or any powers that a court has apart from this Act to regulate its proceedings or to deal with a contempt of the court.

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Court Suppression and Non-publication Orders Act 2010 No 106

5 Other laws not affected

This Act does not limit or otherwise affect the operation of a provision made by or under any other Act that prohibits or restricts, or authorises a court to prohibit or restrict, the publication or other disclosure of information in connection with proceedings.

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Court Suppression and Non-publication Orders Act 2010 No 106

6 Safeguarding public interest in open justice

In deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

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Court Suppression and Non-publication Orders Act 2010 No 106

7 Power to make orders

A court may, by making a suppression order or non-publication order on grounds permitted by this Act, prohibit or restrict the publication or other disclosure of:

(a) information tending to reveal the identity of or otherwise concerning any party to or witness in proceedings before the court or any person who is related to or otherwise associated with any party to or witness in proceedings before the court, or

(b) information that comprises evidence, or information about evidence, given in proceedings before the court.

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Court Suppression and Non-publication Orders Act 2010 No 106

8 Grounds for making an order

(1) A court may make a suppression order or non-publication order on one or more of the following grounds:

(a) the order is necessary to prevent prejudice to the proper administration of justice,

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,

(c) the order is necessary to protect the safety of any person,

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency),

(e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

(2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

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Court Suppression and Non-publication Orders Act 2010 No 106

Historical version for 29 November 2010 to 1 July 2011 (accessed 22 March 2013 at 10:39)
Current version
Schedule 1

Schedule 1 Savings, transitional and other provisions

Part 1 Preliminary

1 Regulations

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

this Act

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:

(a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

(b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provision consequent on enactment of this Act

2 Savings for repeals

A provision of an Act repealed by Schedule 2 continues to apply (as if it had not been repealed) to and in respect of an order, prohibition or direction in force under the provision immediately before its repeal.

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Court Suppression and Non-publication Orders Act 2010 No 106

Schedule 2 **Amendment of Acts**

2.1 **Civil Procedure Act 2005 No 28**

Section 72 Court may prohibit disclosure of information

Omit the section.

2.2 **Criminal Assets Recovery Act 1990 No 23**

Section 62 Publication of proceedings

Omit the section.

2.3 **Criminal Procedure Act 1986 No 209**

[1] Section 292 Publication of evidence may be forbidden in certain cases

Omit the section.

[2] Section 302 Ancillary orders

Omit ", and" from section 302 (1) (b).

[3] Section 302 (1) (c) and (d) and (3)

Omit the paragraphs and subsection.

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Crime Commission Act 2012 No 66

Schedule 5 Amendments of Acts and regulations

5.1 Crimes Act 1900 No 40

Section 60AA Meaning of "law enforcement officer"

Omit "*New South Wales Crime Commission Act 1985*" from paragraph (g) of the definition of ***law enforcement officer***.

Insert instead "*Crime Commission Act 2012*".

5.2 Criminal Assets Recovery Act 1990 No 23

[1] Section 4 Definitions

Omit paragraph (a) of the definition of ***authorised officer*** from section 4 (1).

Insert instead:

(a) the Commissioner for the New South Wales Crime Commission, or

(a1) an Assistant Commissioner for the New South Wales Crime Commission, or

[2] Section 4 (1), definition of "Commission"

Omit the definition. Insert instead:

Commission means the New South Wales Crime Commission constituted under the *Crime Commission Act 2012*.

[3] Section 10B Contents and effect of restraining orders

Insert after section 10B (3):

(3A) The Supreme Court may direct the NSW Trustee and Guardian to pay legal expenses with respect to which provision is made under this section in stages out of some or all

of the property to which the restraining order applies that is under the control of the NSW Trustee and Guardian if the Supreme Court:

(a) is satisfied (by a bill of costs in assessable form or other evidence acceptable to the Supreme Court) that the reasonable legal expenses incurred at the time the direction is made exceed the amount prescribed by the regulations and that further expenses will be incurred, and

(b) it considers the circumstances so require.

(3B) Before making a direction under subsection (3A), the Supreme Court may refer the matter to a costs assessor (within the meaning of Part 3.2 of the *Legal Profession Act 2004*) for inquiry and report.

(3C) For the purpose of enabling the NSW Trustee and Guardian to comply with a direction under subsection (3A), the Supreme Court may order it to sell or otherwise dispose of any interest in the property concerned.

[4] Section 14 Supreme Court may order sale

Omit "an assets forfeiture order" from section 14 (1).

Insert instead "a confiscation order".

[5] Section 14 (1)

Omit "the application for the assets forfeiture order".

Insert instead "the restraining order".

[6] Section 14 (1) (b)

Omit "assets forfeiture order". Insert instead "restraining order".

[7] Section 16A Restrictions on payment of legal expenses from restrained property

Insert after section 16A (1):

(1A) This section does not apply to or in respect of a provision of a restraining order made under section 10B (3) (b), with the consent of each person whose interests in property are subject to the restraining order, that is in the terms of an agreement negotiated between a person whose interests are subject to the restraining order and the Commission.

[8] Section 31A Assets forfeiture orders after interests in property not disclosed

Insert "application for an" after "an" in section 31A (1) (a).

[9] Section 31B Proceeds assessment orders or unexplained wealth orders after interests in property not disclosed

Insert "application for an" after "an" in section 31B (1) (a).

[10] Section 31D Additional orders where application made for confiscation order

or order relating to evidence, warranty or representation made in proceedings for confiscation order

Insert "or an order under section 31A (2) or 31B (2) (a ***non-disclosure order***)" after "a confiscation order" in section 31D (1).

[11] Section 31D (1)

Insert "or non-disclosure order" after "the confiscation order".

[12] Section 31D (4)

Insert at the end of paragraph (b) of the definition of ***affected person***:

, or

(c) in the case of a non-disclosure order—the defendant whose interest in property is proposed to be subject to the order.

[13] Section 62

Insert after section 61:

62 Orders made by consent

(1) The Supreme Court may, on the application of the Commission and with the consent of all persons whose interest in property will be subject to an order under this Act, make that order by an order under this section (a ***consent order***) that gives effect to the terms of an agreement negotiated between the Commission and any one or more persons whose interest in property will be subject to the order under this Act.

(2) A consent order may be made by the Supreme Court without consideration of the matters that the Supreme Court would otherwise consider before making the order.

(3) In particular, and without limiting subsection (2), the Supreme Court is not required to consider the matters set out in section 16A in making a restraining order by consent order that makes provision of the kind referred to in section 10B (3) (b).

(4) A confiscation order may only be made by consent order if the Commissioner for the Commission certifies that any guidelines with respect to the negotiation of the terms of agreements with respect to the making of consent orders given under section 57 (Directions and guidelines to Commission) of the *Crime Commission Act 2012* have been fully complied with.

5.3 Criminal Records Regulation 2004

Clause 9 Exclusion of applicants for employment with New South Wales Crime Commission from consequences of conviction being spent

Omit "*New South Wales Crime Commission Act 1985*" wherever occurring.

Insert instead "*Crime Commission Act 2012*".