IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY No: S 313 of 2013

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

AND: **THE QUEEN**
Respondent

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AMENDED **APPELLANT'S SUBMISSIONS**

Part I: Certification

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

Part II: Issues Presented by the Appeal

2. When a person has been compulsorily examined by an investigative agency such as the New South Wales Crime Commission ("NSWCC"), and the transcript of their examination is later illegally or improperly disseminated to the prosecuting authorities (for the purpose of informing as to lines of defence in a trial), including to the prosecutor with carriage of the person's criminal
20 trial and is read by him/her, what more is necessary, if anything, to establish that a miscarriage of justice has occurred for the purposes of s6(1) *Criminal Appeal Act* 1912?

3. When a person has been examined [redacted] then produced documents under compulsion at the NSWCC [redacted] what is the consequence of those documents being: (a) served on him as part of the prosecution brief of evidence, attached to the statements of witnesses to be called in the trial, to rebut the account given under compulsion, and (b) relied on by the prosecutor to elicit a decision in relation to the person giving evidence in their defence in the trial?

30 4. Where there is a complaint about failure of the accusatorial process such as to constitute a miscarriage of justice, is such a miscarriage "*only made out where the appellant is able to*

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establish a causal connection between the irregularity and the conviction..." (CCA [30]) and/or on establishment of "*practical unfairness*" (CCA [147], [149], [161]-[164])?

Part III: Consideration of s78B Judiciary Act 1903

5. We certify that we have considered whether notices should be issued in compliance with s78B *Judiciary Act* 1903 (Cth) and s78B notices have not issued.

Part IV: Citation of the Reasons for Judgment

6. The citation of the reasons for judgment of the intermediate court is *Lee, Do Young v R; Lee, Seong Won v R* [2013] NSWCCA 68.

Part V: Narrative Statement of Facts

7. On 25 February 2009 the appellant was charged with two offences contrary to s193B(2) *Crimes Act* 1900 (dealing knowingly with the proceeds of crime), pertaining to $95 000 cash and $175 000 worth of casino chips; two offences contrary to s10 *Drug Misuse and Trafficking Act* 1985 (possess prohibited drug) and one offence contrary to s527C(1)(c) *Crimes Act* 1900 (goods in custody). These charges remain outstanding, having been stood over for mention to May 2014. The brief prepared for these matters was served as part of the brief in relation to the relevant trial matters[1].

8. On 24 August 2009, the New South Wales Crime Commission ("NSWCC") commenced an investigation ("the Swansea reference") in relation to past, present and future allegations of drug trafficking, money laundering and fraud on behalf of both the appellant, his son Seong Won Lee (the second appellant) and Brendan Pak ("the Swansea POIs").

[redacted]On 20 November 2009, the appellant was summoned to be examined in relation to suspected drug offences, money laundering and fraud[2]. On 26 November 2009, the appellant was compulsorily examined at the NSWCC[3]. At the time of his examination, charges were imminent against the appellant[4]. [redacted]

[1] Affidavit Detective Adrian Hughes, affirmed 2.11.12 para [4].
[2] Affidavit T O'Connor sworn 21.8.12, Annexure E
[3] [redacted]
[4] Evidence of T O'Connor 12/11/12 CCA T22.38-22.43

[redacted]

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10. On 1 December 2009 the appellant was again compelled to appear [redacted] The appellant was then again compulsorily examined. [redacted]

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11. On 7 December 2009, a search warrant was executed at 1501/6 Lachlan Street Waterloo. In the laundry area, a firearm with ammunition and accessories was found, as was white powder in boxes labelled 'washing powder'). In the locked main bedroom, another firearm, large bags of white powder, and cash totalling $1.147 million. There were also documents belonging to both appellants and other persons found in the bedroom, including documents in the Korean language that were almost identical to the documents [redacted] The money transfer

[redacted]

[13] Evidence of T O'Connor 12/11/12 CCA T22.40

documents were amongst a box full of documents[14]. The powder was sent for analysis. Seong Won Lee, "the second appellant", returned to the apartment during the search and admitted that he lived there.

12. On that day, the second appellant was charged with three offences contrary to s7(1) *Firearms Act* 1996 (possess prohibited firearm). On 8 December the white powder was sent with a "Drug Examination Form" for testing on suspicion that it contained drugs or drug precursors[15].

13. On 14 December 2009 the appellant was charged with two offences contrary to s7(1) *Firearms Act* 1996 and a further offence of goods in custody contrary to s527C (1)(c) *Crimes Act* 1900 ("the second money laundering charge"), relating to the $1.147 million cash found in the locked bedroom. On 16 December 2009, the second appellant was compulsorily examined by the NSWCC. As at 7 December there was a strong suspicion that drugs were in the powder[16] and police were notified as of 27/28 April when gas chromatography tests had proved positive for ephedrine[17], a further test on 29/30 April to determine purity of pseudoephedrine[18], a presumptive test on 3 May 2010 having the same result[19].

14. On 4 May 2010, the Commissioner purportedly approved dissemination of the hearing transcripts of the compulsory examinations of both appellants to NSW police *"so that the police can review them for the Swansea brief"*[20].

15. On 13 May 2010 the appellant was charged with offences of supply prohibited drugs, to wit, pseudoephedrine, contrary to s25(2) *Drug Misuse and Trafficking Act* 1985 (NSW) "*DMT* Act", pertaining to the white powder in both the bedroom and the laundry. On the same day, Buddin J made orders restraining the assets of the appellant. On 17 May 2010, the second appellant was charged with a single count contrary to s25(2) *DMT* Act, pertaining to the powder in the laundry.

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[14] 02/02/11 T70, T72.22-.23, T72.40-.46.
[15] 24/02/11 T617
[16] Evidence T O'Connor 12/11/12 CCA T21.3-.6
[17] 24/02/11 T719.
[18] 25/02/11 T767.14-.26
[19] 24/02/11 T586T586.32-.49
[20] Affidavit of Dennis Miralis sworn 17 October 2012, Annexure M

16. On 1 July 2010, the DPP solicitor with carriage of the criminal prosecution of the appellants emailed the officer who had charged the appellants (the "OIC"), Detective Plummer, requesting that she see the transcripts of the compulsory examinations, *"especially if it is something that the defence are going to try to rely on- specifically that they had no knowledge that the washing powder was actually drugs..."*[21]. This communication was first disclosed to the appellant on 21 August 2012[22]. On 2 July 2010, the OIC forwarded the email to an officer of the NSWCC who in turn sent an email request on behalf of the DPP *"for copies of the hearing transcripts. They want to view them on the basis they need to know whether there is content in them the defence may rely on..."* and the Commissioner purported to approve the dissemination to the DPP one and a half hours after the request that day[23]. This email was not disclosed to the appellant until 9 August 2012[24]. The transcripts were disseminated to the DPP shortly after 1 July 2010, that is, some seven months after charge.

17. Between 27 July 2010 and 30 October 2010, statements were made by various people (Choi, Jang, Park, Song, Hwang, Lee and Rhie) who had been shown the compelled documents. In the Court of Criminal Appeal hearing it was disclosed that despite the NSW police logo appearing on some of these statements, they were all obtained by NSWCC, not NSW police, and were provided to the police to assist the prosecution in relation to the $1.147 million in the Waterloo St apartment[25]. On 28 October 2010, police served on the appellants Part 2 of the brief of evidence, which included the compulsory examinations of both the appellants and these statements, which addressed the compelled documents, [redacted]

18. The appellants were arraigned on 22 November 2010. On 23 November 2010, the first Crown prosecutor, Mr Watts, in the course of oral argument revealed that the respondent had possession of the transcripts of the appellants' compulsory interview stating that '*whilst that evidence isn't admissible in these proceedings I suppose it gives us a bit of an idea where they might be heading.....there's things said there to the Commission, which, as I say, give the Crown at a least a possible scenario for where the defence might suggest that there's some innocent explanation*

[21] Affidavit of T O'Connor sworn 21 August 2012, Annexure K
[22] Affidavit Dennis Miralis sworn 17 October 12 at para [54]
[23] Affidavit T O'Connor sworn 21 August 2012, Annexure J.
[24] Affidavit Dennis Miralis sworn 17 October 2012 at para [53]
[25] Affidavit Detective Adrian Hughes affirmed 2 November 2012, para [8].

about, not only the money in the unit, but they don't know anything about drugs' [26]. A separate trial application was granted to the appellant on the money laundering charge pertaining to the $1.147 million, however the trial judge held that in the trial on the drug and firearms counts, *"when it comes to the million dollars then the Crown is entitled to raise the question- or raise the area of funds, because then it would rebut any evidence as to the money having some bona fide or some explained basis"* (T4.24-.27, T13.29-.30). It was only the money in the company that his Honour held should be excluded from the trial (T2.22-.29, 3.22-.26, T4.29-.35).

19. In the course of legal argument on that day, the first prosecutor placed on the record of trial that he was in possession of Part 2 of the brief, had read the compelled testimony and the statements relating to the money transfers, and proposed to lead evidence in the trial to rebut the innocent explanations given under compulsion (23/11/10 T2.9-.45, T3.17-.20, 23.38-.40, 27.19-.34). Subsequent to the separate trial ruling (T8.6-.9), senior counsel for the appellant objected to the $1.147 million being admitted in the trial (23/11/10 T11.21-T12.-.25) as unless the Crown was to suggest the money was the indicia, that is the proceeds of drug offences there was no probative value, which then *"raised the very reason that your Honour says the Count should be severed"* (T12.21-.25). Senior counsel also said that there would be a dispute *"as to whether or not that is said to be the proceeds of a serious criminal offence"* (T9.40-.42), or indicia of drug supply (T12.25) and that the defence may raise the very defence disclosed to the Commission (23/11/10 T 2.48-3.12, 22.50-23.16, 23.38-.40, 24.7-24.20). The trial judge ruled that the evidence had probative value and admitted the evidence (T13.17-.30). Senior counsel later placed on the record his understanding that he had the transcripts in relation to assets confiscation proceedings and objected to the prosecutor having the material *"so that the Crown, in effect, start pre-empting what may or may not be the defence run at the criminal trial, on the basis of evidence given in secret and not meant to be disclosed"*, while admitting *"I don't know what the ramifications of all that may be..."*(T24.15-.22).

20. On 17 January 2011, the trial of the appellants was scheduled to commence, however more material was still being served in the matter. On 20 January 2011, the second prosecutor (Mr Barr) raised the statements pertaining to the compelled documents and the $1.147 million cash saying: *"The Crown has evidence to show that the accused were involved in false record keeping to try to legitimise cash found. It probably won't be necessary for the Crown to lead that*

[26] 23/11/10 T2.28-3.20

evidence if there is not going to be any evidence led on behalf of the accused that the money was legitimate. Until the Crown knows what the position is, then the Crown would have to lead that evidence" (20/01/11 T9.26-.34). Ultimately, the evidence was not called and the appellant did not give evidence in the trial.

21. The trial prosecutor gave evidence in Court of Criminal Appeal proceedings. He did not dispute that the essence of the Crown case was that the significant amount of money found in the locked room, said to be the appellant's money, was relied on, along with the weapons *"in support of the drug charges"*, nor that the question of the legitimacy of the money was in issue in the trial as, if there was an explanation that the money was legitimately sourced, it would undermine the Crown case in relation to the drugs and the weapons (CCA T49.34-.44, T49.50-50.5). He agreed that he proposed to lead the evidence in relation to money transfers at least in part to counter any suggestion that the money was legitimately sourced (CCA T50.34); *"we used that to demonstrate it wasn't legitimate"* (CCA T55.4). He agreed that the witnesses in relation to the money transfers were on the witness list for trial (CCA T51.3). The trial prosecutor agreed that he had read the transcripts, and had the advantage of knowing what was in the appellant's compulsorily obtained evidence and expected that was what he would probably say or what the defence case was (CCA T52.29-.31, T55.8). When asked *"...it's always helpful to know what the defence will say about a particular issue in the Crown case isn't it?"*. He replied *"It was, it was interesting to have that material"* (T55.13-.16); he found it "*informative* (T55.14-.19). He considered it '*unusual'* to have *"material which seemed to disclose their defence case"* (CCA T55.49-56.2).

22. At trial, the prosecutor in his closing address presented the case against the appellant as one of *"The drugs, the money, the guns* (T1016.27, T1029.33), his closing remarks including *"you have the money in the bag there...you have the money in the bed, and it just all fits together as being involved in a drug deal"* (T1064.10-.17). Further references relying on the cash to prove the charges are set out in the argument below.

23. On 3 March 2011 the appellant was convicted of both 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. On 6 December 2011, the appellants were sentenced for the drugs and firearms offences. On 18 April 2012 the appellants appealed their convictions to the Court of Criminal Appeal.

24. On 9 August 2012 the Court of Appeal (constituted by Beazley, McColl, Basten, Macfarlan and Meagher JJA) heard simultaneously an application for leave to appeal and appeal of the NSWCC against a judgment of Hulme J declining to make s31D *CARA* orders for the further examination of the appellants. In the course of this hearing, the email purporting to authorise disclosure to the DPP subsequent to charge, was first disclosed to the appellant[27].

25. On 21 August 2012, the email from the DPP officer requesting the transcripts, was first disclosed to the appellants in their conviction appeal proceedings[28]. On 21 August, in written submissions, the DPP conceded that *"in view of the protective purpose of s13 (9) of the NSWCC Act in relation to a fair trial, the Crown concedes that the dissemination to the DPP was unlawful, in the unusual circumstances of this case, the appellant's trial miscarried in respect of the drugs charges..."* [29]: cf. CCA [21]. The DPP defended the appellant's conviction on Count 5 (firearm) and made submissions to the effect that a new trial should be ordered on Counts 6 and 8 (drugs).

26. The appeal commenced before the CCA (constituted by Basten JA, Hall and Beech-Jones JJ) on 23 August 2012, with the Court questioning the wisdom of the concession. The hearing was not completed and was stood over to 12-13 November 2012 for further hearing. On 2 November 2012, in written submissions, the respondent adhered to his concession that the dissemination of the transcripts was unlawful in view of s13(9), however withdrew the concession that there had been a miscarriage of justice in respect of the drugs charges. The respondent conceded that the answer to whether there was a miscarriage *"should be the same in relation to both the drugs and the weapons counts"* and now relied on the proviso in the event that a miscarriage of justice was found[30]. On 12-13 November 2013, the CCA appeal continued. The respondent maintained the concession that the approval of the release of the transcripts of compelled evidence was "to assist the DPP" (CCA [26]) and that this was "an improper purpose" (CCA [130]). Evidence was read and called on the appeal. None of the appellants' witnesses were required for cross-examination. Several of the respondent's witnesses were cross-examined. There was no evidence of approval of the dissemination of the compelled documents at any stage, The CCA accepted that the

[27] Affidavit Dennis Miralis sworn 17 October 2012, para [53].
[28] Affidavit Dennis Miralis sworn 17 October 2012, para [54].
[29] Respondent's Submissions on Ground One, dated 21 August 2012, para [7].
[30] Respondent's Supplementary Submissions on Ground One, dated 2 November 2012, para [1].

documents annexed to statements served on the appellant related to money transfers *"were indeed those produced to the Commissioner under compulsion"* (CCA [98]).

27. On 3 April 2013, the CCA delivered judgment, with Basten JA addressing Ground 1 of the appeal (Hall J agreeing at [238], Beech-Jones J agreeing at [247]). The judgment of Basten JA is hereafter referred to as that of the "CCA". The CCA accepted that *"the contents of the interviews, though not admissible in evidence, may have assisted the prosecutor"* however went on to hold that *"it is difficult to articulate any practical unfairness deriving from the disclosure of the transcripts to the prosecutor. Nothing in them was relevant to the trial as it in fact ran"* (CCA [147]) and further that *"Mr Jason Lee has not demonstrated that the release to the prosecutor of his two interviews with the Commission, or the documents produced...under compulsion, gave rise to any practical unfairness"* (CCA [149], see also [164]). The CCA held: that *"there are good reasons which favour release to the prosecution of all potentially relevant material available to the police or other investigating authorities..."* (at [162]) and that *"it would be curious if the prosecutor could not be told of the investigation which led to the Commission obtaining statements based on the produced documents"* (CCA [137]). The CCA also held that because the charge *"to which that material would have been most relevant has been severed, it is not necessary to address that issue further"* (CCA [137]), declining to further address the reliance on the $1.147 million cash in proof of the drug and firearm offences. The CCA held that the statements based on the compelled documents *"were properly included in the prosecution brief and thus properly disclosed to the appellants"* (CCA [146]). Holding that *"the high point of the case on ground 1 was that the prosecution had obtained, at their own request the transcripts of interviews which should not properly have been provided by the Commission"*, and likening this to the prosecution having in its possession evidence of a confession that had been rejected on a voir dire, the CCA concluded that the possession of the transcripts did not tend to bring the administration of justice into disrepute ([162], [164]).

Misstatement of applicant's argument below

28. The CCA incorrectly cited several of the appellants arguments, for example at [19], the argument was said to be that *"neither appellant sought to establish any demonstrable element of unfairness and, indeed, they submitted that to adopt such a course would be both unnecessary and inappropriate"*, however the appellants argument was not so limited (13/11/12 T6.14-.19, see also para [35] below). Nor was it correctly put at [28] when it was said *"the appellant Jason*

Lee did not complain about disclosure of the documents to the signatories, nor did he complain about the provision to the prosecutor of the statements obtained from the signatories". The appellant did make such complaint about the release of both the compelled documents and the statements without any approval of the Commissioner (13/11/12 T10.49-.50, T11.5-.8, T12.12-.14, 12.22-.39, Outline of further submissions dated 23 October 2013 at paras [16], [18](b) (c) and (e)-(g), unchallenged Affidavit of Dennis Miralis sworn 17 October 2012 at para [48], [94]-[97]). Nor was it correct to say (CCA [57]) that the applicant had accepted that neither s18B nor any other provision provided 'derivative use immunity' (23/8/12 T25.12-.30, T27.19-.31, T41.23-43.3, T48.45-49.32 and 12/11/12 T87.21-.44, T91.40-92.17 and 13/11/12 T44.22-.40). The CCA also held that no objection was taken to the conduct of the examinations nor to the request to produce documents (CCA at [134], [137]). This was also contrary to the evidence before the Court (see paras [9]-[10] above).

Part VI: Appellant's argument

29. The CCA erred in holding that that in discharging his onus under s6(1) *Criminal Appeal Act*, it was necessary for the appellant to demonstrate *"practical unfairness"* and that failure to do so was fatal to his appeal (at [147], [149], [163]-[164]). The correct position is that *"there is no mechanical formula or rigid test to be applied to determine whether an irregularity is of this nature; each case will depend on its own circumstances"*: *Glennon v The Queen* (1973) 179 CLR 1 at 8 per Mason CJ, Brennan and Toohey JJ. There is no mention of a test of "*practical unfairness*" in any authoritative statement of the third limb test of s6(1) *Criminal Appeal Act* 1912.

30. A trial according to law is a trial conducted in accordance with the accusatorial, adversarial criminal process. In this context Gleeson CJ held in *Nudd v The Queen* (2006) 80 ALJR 614 at [7]-[8]:

> *"[7] The concept of miscarriage of justice is as wide as the potential for error. Indeed, it is wider; for not all miscarriages involve error. Process is related to outcome, in that the object of due process is to secure a just result. Justice, however, means justice according to law, and the observance of the requirements of law according to which a criminal trial is to be conducted has a public as well as a private purpose. An unjust conviction is one form of miscarriage. Another is a failure of process of such a kind that it is impossible for an appellate court to decide whether a conviction is just. Another is a failure of process which departs from the essential requirements of a fair trial.*

> *[8] ...where a miscarriage of justice is said to arise from a failure of process, it is the process itself that is judged, not the individual performance of the participants in the process".*

31. None of these categories delineate a test of "*practical unfairness*". Nor do they call for a "*causal connection*" between the irregularity and the conviction or a "*but for*" test: cf CCA [30], [147], [149], [161]-[164]; *Baini v The Queen* (2012) 246 CLR 469 ("*Baini*") at 489 [54] per Gageler J[31] (in dissent). The possibility of the effect on the verdict was stressed in *Baini*, with probability being rejected as too high a burden on an appellant: *TKWJ v The Queen* (2002) 212 CLR 124 at 147 [73], *Baini* at [54]. This did not equate with the test required of the appellant, that of demonstrating *'practical unfairness'*.

32. The case run against the appellant at trial was one of drugs, guns and money. The record of trial shows that the prosecutor submitted that the drugs, guns and cash were all interlinked, and encouraged the jury to so find:

> *"The real part of the Crown case is in effect three parts. The real part of the Crown case is what was found in the unit. The drugs, the money, the guns, and the connection to the unit by both Seong Lee and the connection to the unit by Jason Lee"* (T1016.27); *"Then you look at the drugs in the bedroom. You consider the fact also that there's weapons there...You have all of this money. You have the money in the bag there in the vacuum sealed packs, you have all of the money in the bed, and it just all fits together as being involved in a drug deal. It is impossible, I would submit to you, that some unknown person is going to surreptitiously leave the drugs, leave the money, leave the guns which is literally out in the open for somebody to be able to unknowingly take away..."* (T1064.10-.23); *"The Crown says the relevance of the money is because drugs are a valuable commodity and the person who deals in drugs would be making a lot of money. One might think that if you see a lot of money at that person's place then it would appear to be in connection with it and an explanation for him having it"* (T1032.25-.30).

33. The money referred to was the amount of $1.147 million located in the unit. The appellant's examination, some days before the money was located, at a time charges were imminent,

[redacted]

[31] The passage footnoted from *TKWJ v The Queen* (2002) 212 CLR 124 at 147 [73] footnoted by Gageler J in *Baini* at [54] was in the context of a case concerning misdirection and was followed by McHugh J's statement: *"In some undefined categories of cases, however, the irregularity may be so material that of itself it constitutes a miscarriage of justice without the need to consider its effect on the verdict"* (at [74]). *Dhanhoa* also concerned a case of misdirection at trial.

[redacted] to protect his right to a fair trial of suspected offences (as outlined in the summons). Subsequent to charges being laid and the trial process commencing in relation to the counts now before this Court, the dissemination of his interview to the prosecutors of his trial (investigating police and prosecutor) was approved, the purpose of the dissemination admittedly being to assist the trial prosecutors. As the respondent's concession acknowledged, the dissemination of the transcripts was unlawful having regard to the protective purpose in s13(9) *NSWCC Act* 1985, namely the prohibition on publication if *"failure to do so might prejudice...the fair trial of a person who has been...charged with an offence"* . At the time of the unlawful dissemination, the appellants stood charged with all of the relevant offences.

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34. As the trial prosecutor acknowledged in the appeal proceedings, the legitimacy of the money was an issue in the trial. In the trial, senior counsel for the appellant objected to the admissibility of the cash under s135 and/or s137 as *"massively prejudicial and it raises the very reason that your Honour says the count should be severed"* (23/11/10 T12). The trial judge ruled however that the evidence of this money being located in the unit was admissible in the appellant's trial, [redacted] (23/11/10 T12.11- 13.50). As previously noted, at the time of this argument, senior counsel for the appellant was apparently not aware that the appellant's compulsory examination transcripts formed part of the brief, and rather thought they were in his solicitor's possession in relation to confiscation proceedings[32].

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35. The CCA held that *"The high point of the case on ground 1 was that the prosecution had obtained, at their own request, the transcripts of interviews which should not properly have been provided by the Commission"* (at [164]). This did not accurately reflect the evidence or the arguments of the appellant below. Nor was it correct to say that the "high point" was simple possession of the transcripts. The appellant relied on several other matters including: the respondent pressing for admission of evidence of the $1.147 million in the trial in proof of the charges, over objection of trial counsel; the use of the compelled documents to influence the decision by the appellant as to whether or not to give evidence in his trial; the prosecutor's closing address encouraging the jury to rely on the money to convict the appellant of the drug and

30 firearm charges; and the prosecuting authorities investigating, preparing and serving as part of the brief both the compelled testimony and statements [redacted]

[32] 23/11/10 T22.50-T24.24, Affidavit of R Sutherland SC sworn 17 October 2012, paras [3]-[5].

[redacted][33]. The trial prosecutor's evidence in the CCA hearing that he had the unusual and interesting insight into the defence case at the time of the trial was also relied on. The compromise of the integrity of the accusatorial trial process was central to the appellant's argument below.

36. The appellant argued and maintains his submission that to focus on admission of the compelled evidence as 'use' (or 'practical unfairness' if this is what is meant by that phrase) unnecessarily narrows considerations of whether there has been a miscarriage of justice. 'Use' in the context of the consideration of miscarriage encompasses use '*as a basis for the development of strategies for the presentation of a prosecution case, such as the order in which witnesses will be called, and also the development of an appropriate plan for cross examination of an accused if they give evidence*'[34]. It includes having '*advance notice of any defence issues likely to be raised*'[35]. In the appellant's trial, the dilemma foreshadowed by Hayne and Bell JJ in *X7 v Australian Crime Commission* (2013) 248 CLR 92 (*"X7"*) at [124] came to pass:

> *"No longer could the accused person decide the course which he or she could adopt at trial, in answer to the charge, according only to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at a trial according to what answers he or she had given in the examination. The accused person is thus prejudiced in his defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge."*

The CCA erred in limiting consideration of whether there had been a miscarriage of justice to what it called *'the high point of the case on ground 1"* (CCA [164]), namely the prosecution's possession of the transcripts and the compelled documents (CCA [164], [149]).

37. This Court's judgments in *X7* and *Lee v NSWCC* (2013) 87 ALJR 1082 (*"Lee"*) were delivered following the decision of the CCA in this case. *X7* affirmed (per Hayne and Bell JJ at [98]) that: *"The trial process is adversarial in the sense described by Barwick CJ in Ratten v The Queen*: *"...Each is free to decide the ground on which it or he will contest the issue, the evidence*

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[33] Outline of Further Submissions Filed on behalf of the Appellant dated 23.10.12 paras [18], [36]-[38].
[34] *R v Sellar* [2012] NSWSC 934 at [243] per Garling J
[35] *R v Sellar* [2012] NSWSC 934 at [243] per Garling J.

which it or he will call, and what questions in chief or cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility" and further that *"the whole process of criminal justice, commencing with the investigation of crime and culminating in the trial...is accusatorial"* (at [99], see also [118]). Hayne and Bell JJ held in *X7* that if the *Australian Crime Commission Act* 2002 ("*ACC* Act") provisions there under consideration (in particular s.25A *ACC Act*) *"were to permit the compulsory examination of a person charged with an offence about the subject matter of the pending charge, they would effect a fundamental alteration to the process of criminal justice"* (at [118]). Kiefel J agreed, describing *"the common law principle"* as *"fundamental to the system of criminal justice administered by courts in Australia, which as Hayne and Bell JJ explain, is adversarial and accusatorial in nature. The accusatorial nature of the system of criminal justice involves not only the trial itself, but also pre-trial inquiries and investigations"* (at [160]). The common law principle incorporated both:

> *"The fundamental principle- that the onus of proof rests upon the prosecution'* and *'its companion rule- that an accused person cannot be required to testify to the commission of the offence charged. The prosecution in the discharge of its onus, cannot compel the accused to assist it"* (at [159]).

38. At the time of the unlawful dissemination of the transcripts to the respondent and use of the compelled testimony and documents for the compilation of statements to rebut a possible line of defence in the relevant trial, the appellant did stand charged with the relevant offences. The fair trial of the appellant and the accusatorial system was put at real risk at this point in time. The respondent's concession acknowledges as much. The prosecutors did not, at that stage, simply put the material to one side and let it play no part in the proceedings. As set out above, it formed part of the Crown case as the accusatorial process unfolded, being served as part of the brief of evidence (as opposed to a disclosure brief)[36] and was used by the prosecutor in the proceedings in the manner set out in paras [18]-[22], [35] above. That the prosecution accepted [redacted] is apparent from the trial prosecutor's concession [redacted].

39. French CJ and Crennan J (in dissent) in *X7* considered that the power to vary or revoke a non publication direction given under s25A *ACC* Act must not be exercised if that *"might...prejudice the fair trial of a person who has been or may be charged with an offence"* (*X7* at [26], *ACC* Act

[36] Affidavit of Dennis Miralis sworn 17.10.12 at [99], Affidavit of Det Plummer sworn 18.09.12, para [6].

s25A(11))[37]. French CJ and Crennan J (at [30]) accepted that the provisions safeguarding a fair trial were additional to those preventing use of compelled testimony and documents in the trial: *"the interest in that person being tried openly and fairly is protected by the prohibition on direct use of answers given, or documents or things produced and by the provisions safeguarding the fair trial of that person"* (emphasis added). The provisions were also held to protect against *"indirect use, at trial of material obtained in a compulsory examination"* (*X7* at [55]), and against *"a compulsory examination ...occasioning an unfair burden on the examinee when defending criminal charges"*. There were further observations about derivative evidence made at *X7* [58]. The *ACC* provisions considered in *X7* are similar, if not identical to the equivalent *NSWCC* Act 1985 provisions in force at the time, in particular ss6, 7, 13(9) and 18B *NSWCC* Act 1985.

40. While *X7* was concerned with statutory interpretation, and there were differing opinions on that question, the statements of the fundamental principles of the criminal law here applicable were not in dispute. In subsequent reasons in *Lee,* French CJ affirmed that the 'cardinal principle' and the privilege which supports it *"are central to, although not exhaustive of, the accusatorial character of criminal proceedings as described in X7"* (at [37]). The concession in the appellant's appeal was significant, accepting as it did that there had been a risk to the 'fair trial' of the appellant by dissemination of the compelled transcripts. That 'fair trial' is one in which the fundamental accusatorial principles are observed and applied. There was no suggestion in *X7* or *Lee* that the prejudice to fair trial contemplated in like provisions in the *ACC* Act was limited to considerations of publicity: cf CCA at [54].

41. In *R v Seller* (2013) 273 FLR 155 (*"Sellar"*) at [104], Bathurst CJ acknowledged that the mere provision of such material would be contrary to these fundamental principles:

> *"the provision of the material in question discloses defences or explanations of transactions by the accused which he or she may raise at a 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...would be contrary to the principles stated by Gibbs CJ in Sorby supra, and by Deane, Dawson and Gaudron JJ in Caltex supra, that the onus is on the Crown to prove its case and that the prosecution must prove it without reliance on incriminating answers. To provide to prosecutorial authorities material compulsorily obtained relating to such matters could compromise a fair trial in accordance with these principles".*

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[37] *X7* per French CJ and Crennan J at [26] in relation to *ACC* Act s25A (11), the equivalent of s13 (9) *NSWCC* Act 1985.

42. The CCA accepted that a close analysis of the content of the interview and the conduct of the trial was inappropriate: [158]. The CCA also held that advice given to the appellants or the circumstances which influenced strategic decisions made were *"arguably irrelevant"*, instead: *"The possibility of unfairness should be determined objectively"* [158]. However the *"possibility of unfairness"* was not the test applied. The CCA had accepted that the transcripts of the interviews *"would have revealed a possible defence to an inference that the money found in the locked bedroom constituted the proceeds of drug dealing, as the prosecutor correctly noted before Solomon DCJ"* ([147]); and that *"The contents of the interviews, though not admissible in evidence, may have assisted the prosecutor to understand the nature and intended purpose of the documents, which would, presumably have been tendered by the defence"*: [147]. However despite this, the CCA held: *"It is difficult to articulate any practical unfairness deriving from disclosure of the transcripts to the prosecutor. Nothing in them was relevant to the trial as it in fact ran"* [147], see also [149]. It is submitted that this was not an analysis of the *"possibility of unfairness"*. The trial *"as it in fact ran"* may have had little to say about the failure of process as a miscarriage.

43. In circumstances where the prosecution, including the prosecutor at trial has been provided with compelled testimony or compelled documents relevant to a defence at trial as a result of an improper request or improper dissemination of the material and the material has been read, there is a fundamental breakdown of the accusatorial criminal trial system. The prosecution is at an advantage, being forewarned of the accused's defence (as asserted out of his own mouth under oath and under compulsion). Looking at the trial *"as it in fact ran"* (including the appellant's election not to give evidence) may say nothing about the failure of the process. The record of trial is full of unknowns, such as why an accused person did not give evidence, what effect the possession and prosecutor's use of the transcripts had on the appellant or the advice he was given in the course of the trial. In order to have evidence before the Court of actual advice given and decisions made in the trial, an appellant would have to waive privilege. This dilemma is one reason why *"a close analysis of the conduct of the trial was inappropriate"* [158]. Yet, the CCA having accepted this, and that *the possibility* of unfairness should be determined objectively, the appellant was said to have failed a much higher and different test.

44. The question of whether there had been a miscarriage of justice in the appellant's trial was closely related to considerations of abuse of process. Ensuring that the court's processes *'are used fairly by the State an citizen alike'* and the *'integrity and fairness'* of the process is central to the 'right' to a fair trial[38]. All justices in *X7* accepted that this right *"extends to the whole course of the criminal process"*[39]. A consideration of process is not limited to the record of trial: *Jago v District Court of NSW* (1989) 168 CLR 23, *Subramaniam v The Queen* (2004) 79 ALJR 116, *Rogers v R* (1994) 181 CLR 251. To focus on admission of evidence in the trial as 'use' or 'practical unfairness' is to unduly narrow fair trial considerations. As McClellan CJ at CL acknowledged in *R v CB* [2011] NSWCCA 264[40] in the context of a stay application, in order to ensure a fair trial, compelled evidence given in a commission of inquiry, should not be published to the trial prosecutors. Both *X7* and *Lee* (per French CJ, Hayne, Crennan, Bell and Kiefel JJ) implicitly support such a protection being in place to ensure the integrity of the accusatorial system of justice in related criminal proceedings.

45. Gageler and Keane JJ in *Lee* recognised that *"a real risk to the administration of justice can arise where there is a real risk that the practical consequence of an exercise of a coercive statutory power would be to give the prosecution in criminal proceedings 'advantages which the rules of procedure would otherwise deny'"*[41]. At the time of the appellant's trial, no statute required or permitted the prosecution to have notice of the appellant's defence to issues in the trial. Their Honours held that the critical point in *Hammond* had been that *"the prosecution was to have access to evidence and information compulsorily obtained which could establish guilt of the offences, and which was subject only to a direct use immunity"* (*Lee* at [322], applying French CJ and Crennan J in *X7*). This was said by their Honours to be "illustrative" of a real risk to the administration of justice. It is submitted that even on the CCA's analysis the appellants' case fell within this category: cf. CCA [85]-[86], [164]. It was neither correct to say that the extant charges were irrelevant to the subject matter of the examination, directed as it was to Mr Lee's substantial cash reserves, nor apposite to distinguish the appellant's case from *Hammond* on the basis that charges had not yet been laid, given they were "*imminent*" at the time of examination and

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[38] *X7* per French CJ and Crennan J at [37]-[38] and Mason and McHugh J in *Dietrich v The Queen* (1992) 177 CLR 292 at 299 found it appropriate to refer to the right to a fair and impartial trial according to law as "an accused's positive right to a fair trial".

[39] *X7* per French CJ and Crennan J at [38] applying, *Jago* (1989) 168 CLR 23 at 29 per Mason J. See also *X7* per Hayne and Bell JJ at [99], [101], Kiefel J agreeing at [160].

[40] *R v CB* [2011] NSWCCA 264 at [111] (reading "will" as "could", as to which see *Sellar* at [120]) and [128].

[41] *Lee v NSWCC* (2013) 87 ALJR 1082 per Gageler and Keane JJ at [322]

additionally given the relevance of the time of unlawful dissemination. [redacted] If the point of unlawful dissemination, rather than the point of charge, was the relevant consideration in the appellant's case, this did not make the principles in *Hammond* and *CB* otiose, given that at the time of dissemination, the appellants had been charged and the accusatorial process was underway. They informed consideration of the fairness of the process and therefore miscarriage.

10 46. The CCA held at [161] (albeit under the heading of Seong Won Lee) that there was no miscarriage of justice in the trial for three reasons. Firstly, *"there is no authority for the proposition that merely because the prosecution has obtained inadmissible material potentially relevant to the defence of the accused, the trial will therefore be unfair"*. So much may be accepted. However this was no answer to the particulars of the appellant's case on his appeal. The broad category of "inadmissible material" did not address compelled material disclosing defences unlawfully disseminated to trial prosecutors, read by them and used to prepare a case. The CCA was wrong to hold, without exception, that *"all potentially relevant material"* should be released to the prosecution, particularly given the nature of the concession. Despite the concession, the Court held that derivative use could not have given rise to unfairness (at [160]):
20 *cf. Sellar* at [104].

47. The second reason given by the CCA was that (despite Rule 4 not applying ([146]) and the appellants being unaware of the circumstances in which the transcripts had been released ([140], [163])), because there was no objection at trial, that absent *'practical unfairness'* this was *"itself fatal to the present ground of appeal"*. This does not accord with authority. In *TKWJ* (at [28]), Gaudron J considered that:

> *"if there is a defect or irregularity in the trial, the fact that counsel's conduct is explicable on the basis that it resulted or could have resulted in a forensic advantage is not necessarily determinative of the question whether there has been a miscarriage of*
30 *justice. It may be that, in the circumstances, the forensic advantage is slight in comparison with the importance to be attached to the defect or irregularity in question. If so, the fact that counsel's conduct is explicable on the basis of forensic advantage will not preclude a court from holding that, nevertheless, there was a miscarriage of justice".*

The CCA presumably did not take into account the unchallenged evidence of Mr Sutherland SC (at para [6]) or Mr Miralis (at paras [88]-[100]) on this point, holding that *"statements as to counsel's beliefs are of doubtful relevance"* [139]: *cf. TKWJ* at [25], [28]. This evidence did not support a conclusion that the appellant's legal representatives had determined that no 'practical' unfairness had arisen or was anticipated: cf. [163], see also [146].

48. Whether substantially similar money transfer documents were found at the unit upon its search or not did not address the fact that the relevance of these documents [redacted]. Nor did it address the related fact that the documents were used to compile statements [redacted]. The CCA were presumably of the view that (despite the concession), the compelled interviews and documents could be properly used to assist the trial prosecutors even after charge: cf. [160] (in relation to the interview of Seong Lee). While it is true that in the appellant's case the derivative evidence was ultimately not tendered or called, it is clear from the record that of trial that it was used to influence the appellant's decision as to whether to give evidence in the trial to answer the prosecution assertions [redacted].

49. There was a *"miscarriage of justice"* in the appellant's trial as *"some failure has occurred in observing conditions which...are essential to a satisfactory trial"*: *Davies and Cody v The King* (1937) 57 CLR 170 at 180 per Latham CJ, Rich, Dixon, Evatt and McTiernan JJ. As their Honour's there held, *"From the beginning, [the English Court of Criminal Appeal] has acted upon no narrow view of the cases covered by its duty to quash a conviction when it thinks that on any ground there was a miscarriage of justice"*. It is submitted that the requirement for a casual connection and demonstration of practical unfairness on an appellant before a miscarriage of justice is established is an error of law in the application of the third limb of s6(1) *Criminal Appeal Act* 1912.

50. His Honour appears to have equated 'practical unfairness' with the question of 'whether there has been a substantial miscarriage of justice' (CCA [63]). While the decision of *Baini v The Queen* (2012) 246 CLR 469 concerned the Victorian appeal provisions where this onus, equivalent to the 'proviso', is cast on an appellant, in NSW it is the prosecution who must satisfy the Court that there has been no substantial miscarriage of justice: s6(1) *Criminal Appeal Act*

1912. If this be correct, the appellants' appeal was dismissed by finding that the appellant had failed to discharge an onus which lay on the respondent. The irregularity in the appellant's trial, being an irregularity as to an *'essential presupposition of a trial'*, and keeping in mind *'the natural limitations'* of the record of trial, it was inapposite to apply the proviso: *Weiss v The Queen* (2005) 224 CLR 300 at [46], *Cesan v The Queen* (2008) 236 CLR 358 per French CJ at [81]-[89], Gummow J at [101], [107], Hayne, Crennan, Kiefel JJ at [128]; *Nudd* per Gleeson CJ at [6]. As French CJ held in *Cesan* at [97]: *"The Court of Criminal Appeal was in no position to assess... imponderables"*. In *Weiss* (at 317 [43]) this Court unanimously held that when considering the proviso: *"...it is necessary to always keep two matters at the forefront of consideration: the accusatorial character of criminal trials...and that the standard of proof is beyond reasonable doubt"*. The application of the proviso did not arise in circumstances where there was a denial of procedural fairness in the trial and a departure from the essential requirements of the law: *Wilde* (1988) 1634 CLR 365 at 373; *Weiss* at 317 [45].

Part VII: Applicable Legislation

51. The applicable legislation is set out in the joint list of authorities.

Part VIII: Orders Sought

1. The orders made by the Court of Criminal Appeal on 3 April 2013 are set aside;
2. The appeal to the Court of Criminal Appeal is upheld;
3. The convictions are quashed;
4. A new trial is ordered; or alternatively
5. The matter is remitted to the Court of Criminal Appeal to be determined in accordance with law.

Part IX: Time Estimate

52. The appellant estimates that no more than 1 hour will be required to put his argument.

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