IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M174 of 2017

Between

DONALD GALLOWAY (a pseudonym)
Appellant

and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS
First Respondent

AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION
Second Respondent

EDMUND HODGES (a pseudonym)
Third Respondent

TONY STRICKLAND (a pseudonym)
Fourth Respondent

RICK TUCKER (a pseudonym)
Fifth Respondent

REDACTED

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2.1 Was it open to the learned trial judge, in the exercise of her discretion, to order a permanent stay in circumstances where the Australian Federal Police ('AFP') used the Australian Crime Commission ('ACC') as in effect a 'hearing room for hire', and in circumstances where the appellant, who was suspected of serious criminal conduct, had not responded to the AFP request for a record of interview, and where the ACC examiner failed to make orders to protect the appellant's right to a fair trial? Did the compulsory examination of the appellant in those circumstances represent a subversion of the accusatorial process?

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22 December 2017
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Part III: Section 78B of the *Judiciary Act 1903*

3.1 Consideration has been given to the question of whether notice should be given pursuant to s 78B of the *Judiciary Act 1903* (Cth). It has been concluded that notice is not necessary.

Part IV: Citations

4.1 The citation of the reasons for judgment of the Court of Appeal (Vic) is *Director of Public Prosecutions (Cth) v Donald Galloway (a pseudonym) & Ors* [2017] VSCA 120.

4.2 The citation of the reasons for judgment of the trial judge at first instance, Hollingworth J of the Supreme Court of Victoria, is *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R.

Part V: Facts

5.2 The appellant adopts the summary of facts in the submissions of Edmund Hodges ('Hodges'), the appellant in related matter M175 of 2017, at [7]-[30].

5.3 The appellant also adopts the summary of facts in the submissions of Rick Tucker ('Tucker'), the appellant in related matter M176 of 2017, at [8]-[18].

5.4 In addition, the following facts should be noted in relation to the appellant.

5.5 At the relevant times, the appellant was a [redacted].[1]

5.6 On 30 March 2010, before they had approached the appellant, the AFP submitted a briefing paper to the ACC to support an application for a summons for the appellant's examination.[2] By that date the AFP suspected the appellant was involved in [redacted] and had informed ACC staff of that fact.[3]

5.7 On 6 April 2010, the AFP first contacted the appellant and requested he participate in a voluntary police interview.[4] The appellant asked for time to consider the request.[5] Before

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[1] *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R, fn 1.
[2] Ibid, [454].
[3] Ibid.
[4] Ibid, [455].
[5] Ibid.

the appellant responded, the AFP applied for, and the ACC issued, a summons for his examination.[6] On 7 April 2010, the examiner Sage issued the summons.[7]

5.8 On 12 April 2010, the appellant was coercively examined in relation to his knowledge of the [redacted] allegations police were investigating ('the examination').[8] To questioning, the appellant said, *inter alia*, that he played a minor role in [redacted] and never saw anything to lead him to believe the allegations of [redacted].[9] However, he said he was [redacted].[10]

10 5.9 As to the allegations of [redacted], the appellant said, *inter alia*, that he never suspected any wrongdoing by the [redacted].[11] He said he did not recall seeing a particular document, "the [redacted] fax", before his examination.[12]

5.10 The appellant was not told AFP investigators were observing his ACC examination.[13]

5.11 As held by the Court of Appeal, the examination was not authorised by the *Australian Crime Commission Act* 2002 (Cth) ('the Act') and was conducted for an improper purpose, namely, to advance the AFP's investigation.[14]

5.12 The Court of Appeal also held the publication directions were unlawful because s 25(9) of the Act required the examiner to prohibit publication to protect the fair trial of the appellant.[15]

20 5.13 The appellant voluntarily participated in a police interview on 6 and 7 October 2010.[16] He was not legally represented. AFP Officer Singleton, who had observed the appellant's ACC examination, was one of the two AFP officers who conducted the interview.[17] The interview, like the appellant's ACC examination, was very lengthy and detailed.[18] The

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[6] Ibid, [456]-[457].
[7] Ibid, [457].
[8] Ibid, [533].
[9] Ibid, [742].
[10] Ibid, [743].
[11] Ibid, [745].
[12] Ibid, [746].
[13] Ibid, [540].
[14] *Director of Public Prosecutions (Cth) v Donald Galloway (a pseudonym) & Ors* [2017] VSCA 120, [12], [26.4] and [26.5], [189] and [211].
[15] Ibid, [26.1], [58]-[60].
[16] *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R, [760].
[17] Ibid, [761].
[18] Ibid, [760].

appellant's answers to police questioning were to the same general effect as the answers he had given at the ACC.[19]

5.14 On 1 July 2011, the appellant was charged with conspiring to commit a [redacted] offence in relation to the [redacted].[20] On 13 March 2013, the appellant was charged with conspiring to commit a [redacted] offence in relation to the [redacted] with an associated [redacted] charge.[21] On 25 November 2013 and 21 March 2014, the appellant was discharged at committal on the [redacted] charges because the learned magistrate found that the evidence was not of sufficient weight to support a conviction.[22] The first respondent determined to directly indict the appellant on both alleged conspiracies.

5.15 In relation to the factual background of the proceedings concerning the stay application in the Supreme Court of Victoria and the first respondent's appeal to the Court of Appeal, the appellant adopts the submissions of Hodges at [31]-[35].

Part VI: Argument

6.1 **The Administration of Justice was Brought into Disrepute**: The appellant adopts the submissions of Hodges at [36]-[61] on the principles regarding a permanent stay of proceedings, self-incrimination and the accusatorial process. The appellant also adopts the submissions of Tucker at [19]-[37].

6.2 As found by the learned trial judge, with the advantages of seeing and hearing the witnesses at the lengthy *voir dire*, the circumstances were exceptional.[23] In the exercise of her Honour's discretion,[24] it was held that the administration of justice was brought into disrepute given, amongst other things, the manner in which the ACC operated as a 'hearing room for hire' for the AFP at the time of the appellant's examination.[25] It is submitted that such a conclusion was well open to her Honour.

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[19] Ibid.
[20] Contrary to ss 11(1) and 70.2(1) of the *Criminal Code Act 1995* (Cth).
[21] Contrary to s 83(1)(a) of the *Crimes Act 1958* (Vic).
[22] Pursuant to s 141(4)(b) of the *Criminal Procedure Act 2009* (Vic).
[23] *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R, [883].
[24] *House v The King* (1936) 55 CLR 499, 504 (Dixon, Evatt and McTiernan JJ).
[25] *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R, [40], [845], [849]-[853].

6.3 The Court of Appeal found that the ACC had no lawful investigation on foot that would justify such a use of its exceptional powers.[26]

6.4 As submitted by the appellant before the Court of Appeal,[27] it is clear that the learned trial judge regarded what occurred as bringing the administration of justice into disrepute, and that was an independent basis to permanently stay the proceedings.[28] That is because the matter involved the deliberate coercive questioning of suspects at the ACC for the very purpose of achieving an advantage to the AFP and CDPP and a forensic disadvantage to the accused in *foreseen* future legal proceedings.[29]

6.5 As found by the Court of Appeal, the AFP sought to use the ACC's compulsory examination powers to get the appellants to make admissions and lock them into their version of events on oath,[30] and to assist the AFP in their searches for evidence in assembling the briefs for prosecution.[31] The forensic advantage was that they achieved both objectives. The appellants were compelled to answer questions, and did so, about their alleged involvement in [redacted]. Schwartz admitted the AFP used the appellant's examination material to guide selection of documents to include in the prosecution brief.[32] He further admitted, in the event an appellant had said in an ACC examination he could not remember seeing a particular document, the AFP searched for evidence to contradict him.[33]

6.6 The learned trial judge was correct to find that the examiner Sage had recklessly failed to exercise his powers *independently* and with *appropriate diligence*, with the result that both the AFP and CDPP received information which they never should have obtained when compiling the brief and when interviewing witnesses and the appellant.[34]

6.7 The examiner failed to be diffident when exercising his extraordinary powers, and as warned by Harper JA in *Major Examiner v Brown*:[35]

> ... unless those with whom power has been entrusted are as alert to the dangers of its unwarranted extension — and thus to the tendency of power to corrupt — as they are to the benefits which that exercise is designed to bring, the tendency

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[26] *Director of Public Prosecutions (Cth) v Donald Galloway (a pseudonym) & Ors* [2017] VSCA 120, [187]-[189].
[27] Appellant's Supplementary Submissions in the Court of Appeal, 14 November 2016, [37].
[28] *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R, [880].
[29] Ibid.
[30] *Director of Public Prosecutions (Cth) v Donald Galloway (a pseudonym) & Ors* [2017] VSCA 120, [208].
[31] Ibid, [228].
[32] Ibid.
[33] Ibid.
[34] *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R, [881].
[35] (2013) 44 VR 741, 742-3 [2]-[3].

towards corruption — in the limited sense about which I speak — will become its actuality.

6.8 Consistently with the reasons for judgment of Hayne and Bell JJ in *X7 v Australian Crime Commission*,[36] with whom Kiefel J (as her Honour then was) agreed,[37] the learned trial judge found that the appellant had suffered the forensic disadvantage of being denied his fundamental right to defend the charges only on the basis of putting the prosecution to its proof and testing the strength of the prosecution case.[38]

6.9 With respect, the Court of Appeal was wrong to reject the submission advanced on behalf of the appellants that in the circumstances of this case it was unnecessary for them to show any actual curtailment of their forensic choices, because the compulsory examinations constituted a clear subversion of the accusatorial process.[39] It was wrong for the Court of Appeal to conclude that 'actual unfairness' must be demonstrated if a stay application is to succeed.[40] The fact that Bathurst CJ in *X7 v The Queen*[41] ('*X7 (No 2)*')[42] considered *X7* and *Lee v The Queen*[43] and held those authorities do not *compel* the conclusion that an unauthorised examination *requires* there be a permanent stay of proceedings, does not mean that it was not open to the learned trial judge to determine, on the facts of this case and in the exercise of her discretion, that the conduct of the AFP and ACC had brought the administration of justice into disrepute such that a permanent stay should be granted.

6.10 **There is 'Actual' or 'Demonstrable' Unfairness**: In the alternative, the Court of Appeal erred in finding the appellant had not demonstrated "actual" unfairness as described by Bathurst CJ in *X7 (No 2)*.

6.11 The appellant adopts the submissions of Hodges at [65]-[80], and Tucker at [38]-[42].

6.12 As found by the learned trial judge, officers of the AFP were armed with information which they should not have been given when compiling the brief and when interviewing witnesses and questioning the appellant.[44]

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[36] (2013) 248 CLR 92 ('*X7*'), [70], [124].
[37] Ibid, [160].
[38] *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R, [748].
[39] *Director of Public Prosecutions (Cth) v Donald Galloway (a pseudonym) & Ors* [2017] VSCA 120, [287]-[288].
[40] Ibid.
[41] (2014) 292 FLR 57, [109].
[42] Ibid.
[43] (2014) 88 ALJR 656.
[44] *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R, [767]-[790] (assembling Prosecution brief and documentary searches); [791]-[797] (taking witness statements); and [798]-[800] (interaction with the appellant).

6.13 The learned trial judge found:[45]

> Having observed [the appellant's] examination, [AFP Officer Singleton] knew what [the appellant's] defences were. He had an opportunity to tailor his questions and decide which documents to show [witnesses Mitchell and Russell], using that knowledge.

6.14 The Court of Appeal observed that it was 'undoubtedly correct' that it was impossible to know how access to the examination material might have affected the thought processes of the relevant AFP investigator.[46]

6.15 However, the Court of Appeal was wrong to observe that no attempt was made by the appellants to substantiate the submission that the unlawful examination process had been used to assemble the prosecution case beyond reference to Schwartz's concession that the knowledge gained from the examinations was used to guide the selection of documents.[47]

6.16 As submitted by the appellant before the Court of Appeal,[48] AFP Officer Singleton, who compiled the [redacted] brief of evidence, obtained important statements from, amongst others, Mr Mitchell and Mr Russell, who were former [redacted].[49]

6.17 Singleton had observed the appellant's examination on 12 April 2010 and knew the appellant's defences before he took their statements.[50]

6.18 The inference Singleton was influenced by his knowledge of the appellant's examination in taking the statements of Mitchell and Russell is irresistible due to the evidence of:

(1) Singleton's proactive involvement in compilation of the statements; he drafted them and selected the documents each witness refers to in them;[51]

(2) The extraordinary length of time Singleton spent with the witnesses compiling their statements; six days with Mitchell,[52] and six days with Russell;[53]

(3) The statements of each witness containing assertions to rebut answers the appellant gave at his ACC examination; and

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[45] Ibid, [795].
[46] *Director of Public Prosecutions (Cth) v Donald Galloway (a pseudonym) & Ors* [2017] VSCA 120, [246].
[47] Ibid.
[48] Appellant's Supplementary Submissions to the Court of Appeal, 14 November 2016, [2]-[23].
[49] *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R, [792]-[793].
[50] Ibid, [795].
[51] Mitchell, committal transcript at T1278.29 and T1289.25, and Singleton at T903.6.
[52] *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R, [793].
[53] Singleton, committal transcript at T902.11.

(4) The belief of Singleton and other investigators they were entitled to use ACC examination information in their investigations.[54]

6.19 On 12 April 2010, after he left the appellant's examination, Singleton questioned Mitchell and spent a five further days with him compiling his statement until 4 August 2010 when Mitchell eventually signed it.[55]

6.20 At his examination, the appellant had said that he played only a minor role in [redacted] and had no knowledge of the terms of appointment of [redacted].[56]

6.21 Mitchell was [redacted] for only six months from 14 July 2003. He had limited dealings with the appellant who was working in a [redacted]. Nonetheless, in rebuttal of what the appellant had told the ACC, Mitchell's statement contains assertions that the appellant was responsible for [redacted], and was involved in [redacted].

6.22 Senior Investigative Officer ('SIO') Schwartz was the first police officer to speak with Russell. On 16 March 2010, he met Russell with an Australian Federal Police ('AFP') intelligence analyst, who took notes (five pages) of what Russell said. At that interview, Russell said very little about the appellant. His concerns involved the conduct of [redacted].

6.23 Singleton first spoke to Russell on 22 March 2010 in company with Schwartz.[57] He met Russell again on 30 March[58] and 9 April 2010.[59]

6.24 After he attended the appellant's examination on 12 April 2010, Singleton met with Russell on 16 April 2010 from 8:00am to 7:30pm,[60] on 29 April 2010 from 2:30pm to 6:30pm,[61] on 5 May 2010 for four hours,[62] and on 28 May 2010 from 8:00am until 1:05pm, when Russell finally signed his statement.[63]

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[54] *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R, [873].
[55] Ibid, [793].
[56] Ibid, [742].
[57] Singleton, committal transcript T897.10.
[58] Ibid, T897.25.
[59] Ibid, T898.14.
[60] Ibid, T898.16.
[61] Ibid, T899.7.
[62] Ibid, T899.19.
[63] Ibid, T901.23.

6.25 In addition to the time Singleton spent with Russell compiling Russell's statement:

(1) On 22 April 2010, Singleton made 'alterations to Russell's statement at request of SIO (Schwartz)';[64]

(2) On 30 April 2010, Singleton spent two and a half hours completing alterations to Russell's statement;[65]

(3) On 5 May 2010, Singleton worked on a 'tidy up' of Russell's statement;[66]

(4) On 7 May 2010, Singleton met with Schwartz and a CDPP solicitor advising the AFP, for one hour to discuss Russell's statement;[67] and

(5) On 10 May 2010, Singleton worked on Russell's statement.[68]

10 6.26 Singleton acknowledged that each of Schwartz,[69] the CDPP solicitor[70] and himself[71] added to Russell's statement before he signed it.

6.27 Not surprisingly, what Russell had told Schwartz on 16 March 2010 (before the appellant's ACC examination) was, as Singleton volunteered, 'completely different'[72] to the contents of Russell's 43-page statement. Singleton said he read the intelligence officer's notes but did not use them to prepare Russell's statement.[73]

6.28 As was put to Singleton on the voir dire, "[t]he question is, Mr [Singleton], isn't it, how much of the content of Mr [Russell]'s statement is his and how much is yours?" Singleton's answer was "It's all his."[74]

6.29 As the learned trial judge noted, it was not possible to test, with specificity, to what extent
20 Singleton was influenced in his investigations by the information he obtained from the appellant's examination in taking the statements of these two important witnesses.[75]

6.30 However, it is submitted the evidence of the circumstances of the compiling of the statements, and the contents of the statements, together with the evidence of the investigators' belief they could use information from the examinations in their

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[64] Ibid, T898.29.
[65] Ibid, T899.15.
[66] Ibid, T899.19.
[67] Ibid, T900.7.
[68] Ibid, T900.28.
[69] Ibid, T901.6.
[70] Ibid, T901.9.
[71] Ibid, T901.4.
[72] Ibid, T903.15.
[73] Ibid, T952.28.
[74] Singleton, committal transcript T902.31.
[75] *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R, [797].

investigations, all of which her Honour did refer to,[76] supports the finding that on balance it could be inferred that Singleton was influenced by information given by the appellant at his coercive examination in obtaining evidence from two important witnesses, Mitchell and Russell.

6.31 The Court of Appeal was wrong to conclude that the finding above at [6.13] was not open to her Honour,[77] especially where the Court of Appeal had accepted that it was impossible to know how access to the examination material might have affected the thought processes of a relevant AFP investigator.[78] It is unreasonable to expect the appellants to 'unscramble the egg' in such a manner.

10 6.32 **Approach to the Investigation by Senior Investigative Officer Schwartz**: The approach of the AFP to the ACC examinations, and the subsequent enquiries conducted by the AFP with knowledge of the content of those examinations, cannot be divorced from the attitude and approach of SIO Schwartz to the investigation:

(1) At committal, Schwartz was cautioned by the learned magistrate that he could refuse to answer questions on the basis of the privilege against self-incrimination on the basis that his answers may have incriminated him for the offence of attempting to pervert the course of justice;[79]

(2) Schwartz gave evidence that witnesses were shown 'statement guides' prepared by the AFP which contained the AFP view of the case;[80]

20 (3) Schwartz gave evidence that he saw nothing wrong with informing a witness, or allowing them to believe, that the AFP had a particular view or theory about the matters that were being asked about;[81]

(4) Schwartz agreed that significant aspects of statements were worded by police, not the witness;[82]

(5) Schwartz described the process of taking a statement as a 'process of negotiation' with suggestions offered by the police and the witness.[83] For example, a witness gave evidence that parts of his statement contained AFP

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[76] *Director of Public Prosecutions (Cth) v Donald Galloway (a pseudonym) & Ors* [2017] VSCA 120, [246].
[77] Ibid, [268], [276].
[78] Ibid, [246].
[79] Schwartz, committal transcript at T4284-5.
[80] Ibid, T4289-91, T5464-6.
[81] Ibid, T4283.
[82] Ibid, T4287.
[83] Ibid, T4288.

theories that were not his theories, that he had been provided drafts of statements that contained suggested answers, that parts of his statement were drafted by the AFP, that sometimes he resisted the overtures of the AFP and sometimes he did not, and that there were times when his will was overborne.[84] Similar evidence was given by two other witnesses;[85]

(6) Schwartz gave evidence that it was not wrong to obtain a witnesses' cooperation by telling them or allowing them to think that they might be in trouble if they did not provide incriminating information, and it was not wrong to say to a person that they will either be a witness or they will be charged;[86]

(7) Schwartz gave evidence that he would cross-examine a witness to see if he could get to the truth, and would put propositions (including false propositions) to witnesses to test their veracity;[87]

(8) Schwartz put pressure on witnesses by accusing them of lying,[88] or by threatening to take them to the ACC if the witness failed to answer his questions;[89] and

(9) Schwartz gave evidence that he did not think it necessary to take statements from people who could not substantially add to the case (it is submitted meaning to assist in the prosecution of the accused).[90]

6.33 The learned trial judge observed Schwartz was a "very unsatisfactory witness".[91] Her Honour had the considerable advantage over the Court of Appeal in assessing Schwartz give evidence over several days.

6.34 The fact that the appellant participated in a record of interview with the AFP does not remedy the unfairness caused by AFP using the ACC as a 'hearing room for hire' and the fact that the AFP was armed with information from the examinations when making further enquiries. Nor should it be surprising that a person such as the appellant, without legal

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[84] T367, T436-437.
[85] T1429-1431, T7344, T7355.
[86] Schwartz, T4282-4.
[87] Ibid, T5601, T4283.
[88] Ibid, T5602.
[89] Ibid, T5603.
[90] Ibid, T5389. See for example his approach with another witness, T5462-5463.
[91] *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R, [29]. See further [30]-[34].

representation, would agree to participate in a record of interview with the AFP given it had already availed itself of the ACC's powers of compulsion.

6.35 **The Relevance of the Conspiracy Charges**: The prosecution case is one of *conspiracy* to [redacted].[92] As submitted by the appellant in the Court of Appeal,[93] a forensic disadvantage to one accused because of the examination procedure is necessarily a disadvantage to all accused insofar as it relates to the existence, nature and scope of the purported conspiracy.

6.36 For example, in relation to the alleged [redacted], the Crown case is that the conspiracy was in existence between 1 October 2001 and 24 December 2003. It is alleged that from the outset of that period Edmund Hodges, amongst others, had knowledge of [redacted].[94] The prosecution case is that, by November 2001, the agent, as authorised by the alleged conspirators, [redacted].[95] However, the appellant was not brought in to the [redacted] for another 18 months, in June 2003.[96]

6.37 In those circumstances, it is clear that any case against the appellant will depend, to a significant degree, on events that preceded his involvement, including matters that were addressed in the compulsory examination of Hodges and where Hodges made purported admissions. Evidence derived from that examination, and the forensic disadvantage to Hodges, cannot somehow be quarantined from the appellant's trial.

6.38 **The Finding of Recklessness**: The appellant adopts the submissions of Hodges at [81]-[97] on the finding by the learned trial judge that the examiner Sage was reckless.

6.39 A permanent stay was open to the learned trial judge, regardless of whether Sage's conduct is properly regarded as "deliberate, reckless or seriously negligent".[97]

Part VII: Legislation

7.1 The applicable legislation is attached to the submissions filed on behalf of Hodges.

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[92] Contrary to ss 11.5(1) and 70.2(1) of the *Criminal Code Act 1995* (Cth).
[93] Appellant's Supplementary Submissions, 14 November 2016, [33]-[35].
[94] Summary of Prosecution Opening, 13 June 2014, [78].
[95] Ibid, [85]-[87].
[96] Ibid, [180].
[97] *Truong v The Queen* (2004) 223 CLR 122, [135] (Kirby J).

Part VIII: Orders sought

8.1 The appellant seeks orders that:

(1) The orders made by the Court of Appeal on 25 May 2017 are set aside;

(2) The appeal to the Court of Appeal be dismissed.

Part IX: Time estimate

9.1 The appellant would seek no more than 30 minutes for the presentation of his oral argument.

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