

Between

**EDMUND HODGES (a pseudonym)**  
Appellant

and

**COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS**  
First Respondent

**AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION**  
Second Respondent

**DONALD GALLOWAY (a pseudonym)**  
Third Respondent

**TONY STRICKLAND (a pseudonym)**  
Fourth Respondent

**RICK TUCKER (a pseudonym)**  
Fifth Respondent



**APPELLANT'S SUBMISSIONS IN RESPONSE TO THE SUBMISSIONS OF THE  
ACIC ON STANDING**

**Part I: Certification**

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

**Part II: Issues**

**Background**

2 The Australian Criminal Intelligence Commission (**ACIC**) was granted limited leave to intervene in the application before the trial judge, to make submissions in relation to issues affecting the ACIC and to make any objections to evidence on grounds of legal professional privilege or public interest immunity. Its application to intervene at that stage was not opposed:  
10 SC [16] {7AB 2187}.

3 The ACIC sought leave to intervene in the first respondent's interlocutory appeal to the Court of Appeal against the trial judge's orders permanently staying the proceeding. The appellants objected to the ACIC being permitted to intervene.<sup>1</sup> The Court of Appeal granted leave to the ACIC to intervene, without giving reasons or making formal orders setting out the parameters of the grant of leave.

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<sup>1</sup> See Respondents' submissions in opposition to the ACIC being given leave to intervene filed in the CA 29 August 2016; Respondents' joint submissions in response to ACIC (intervening) filed in the CA 14 November 2016, [1]-[4].

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4 The Court of Appeal upheld the Director's interlocutory appeal and overturned the trial judge's orders permanently staying the proceeding.

5 The Court of Appeal made a number of findings regarding illegal conduct on the part of the ACIC. The ACIC did not make any application for special leave to appeal against those findings.

6 The Appellants applied for and were granted special leave to appeal against the decision of the Court of Appeal. This involved no challenge to the Court of Appeal's findings of illegality regarding the conduct of the ACIC.

7 The ACIC was formally named as a respondent in the application for special leave in light of the ruling of Hayne J in *Thomas v The Queen* [2008] HCA Trans 258 (*Thomas*) at lines 710-790. In that matter, Hayne J found that rule 41.01.1 of the *High Court Rules 2004* (Cth) required an intervener to the proceedings below to be joined as a respondent to the application for special leave, however he observed that:

*"whether it is appropriate to hear the Director-General in opposition to the application for special leave is a matter to be decided by the Full Court. In particular, it will be a matter for the Full Court to determine whether, regardless of any separation of representation of the Director of Public Prosecutions and Director-General of Security, one counsel only will be heard in opposition to the application for special leave"*.

8 The ACIC filed a Notice of Contention seeking to challenge the findings of illegality made by the Court of Appeal against it. The first respondent did not file any Notice of Contention challenging the Court of Appeal's findings.<sup>2</sup>

9 The first respondent did not seek to adopt the ACIC's Notice of Contention or the arguments raised in support of it, and does not challenge the correctness of the Court of Appeal's findings of illegality and impropriety on the part of the ACIC and the Australian Federal Police (AFP).<sup>3</sup>

10 The Appellants seek no relief against the ACIC. The ACIC is not exposed to any penalty or finding of contempt in these proceedings.

### **Argument**

11 The Appellant challenged the standing of the ACIC in this proceeding at [8] of his Submissions in Response to the Submissions of the Australian Criminal Intelligence Commission, filed 8 February 2018. He refers to and relies on those submissions.

12 The ACIC argues that it is entitled to be heard on this appeal, in right of the Commonwealth, notwithstanding that the Commonwealth is already represented in the matter

<sup>2</sup> First Respondent's submission file 19 January 2018 at [78].

<sup>3</sup> *Strickland & Ors v Commonwealth Director of Public Prosecutions* [2018] HCA Trans 78 lines 3860-3880.

by the first respondent, and notwithstanding that the ACIC is at no risk of any order for relief or penalty against it. That submission runs counter to long-standing principle with regard to criminal trials.

13 This appeal arises from a criminal prosecution in which the first respondent alone represents all interests and joins issue with the accused. As observed by Mildren J in *R v GJ* at [54]:

10 *When an accused is put on his trial in accordance with the time-honoured formula repeated in every criminal trial in the presence of a jury the issues are joined between the Sovereign and the accused. It is the Sovereign which represents all of the interests of the community including the individual interests of the victims of crime and no one else. As was said in Sir William Blackstone's Commentaries on the Laws of England (1915 ed, Claitor's Publishing Division, republished 1976) Vol 1, Book 1 p 269:*

20 *All offences (sic) are either in the king's peace or his crown and dignity: and are so laid in every indictment. For though in their consequences they generally seem (except in the case of treason and a very few others) to be offences against the kingdom than the king; yet, as the public, which is an indivisible body, has delegated all its power and rights, with regard the execution the laws, to one visible magistrate, all affronts to that power and breaches of those rights are immediately offences against him to who they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eyes of the law.*

14 The ACIC argues that it is entitled to be heard in relation to matters “that concern its interests” (ACIC Submissions [6]), and that it has “special interests” in the proceeding and is entitled to be heard in relation to those interests (ACIC Submissions [9] and following).

15 In support of those propositions the ACIC argues (at [7.4]) that the case of *Thomas* is authority for the proposition that where an application relating to a criminal matter depends upon an allegation of improper behaviour by a statutory agency, that agency **may** be permitted to be heard to resist that allegation. *Thomas* is in fact authority for a much narrower proposition and one that does not advance the position of the ACIC in this proceeding.

30 16 During the course of argument in *Thomas*, Hayne J asked the question:

*“What is it that the Director-General wants to achieve in relation to the disposition of that application concerning the conduct of a criminal trial in which the power of the polity is ordinarily regarded as sufficiently represented and completely represented by the Director of Public Prosecutions?”* (emphasis added)

17 The general proposition inherent in the question was not disputed. It was argued on behalf of the Director General that ASIO was uniquely in possession of relevant information that needed to be put before the court to determine the issue raised:

“...we say that the Director-General is the only person who has access to the factual information that is necessary in order to give an informed answer to the questions that the applicant raised.

... That was the submission that was put before the Court of Appeal and accepted there where the DPP said by its counsel, “We are not in a position to answer those questions. We do not have the information that is required”. So we do not seek to inject ourselves into the main criminal law issues, but to the extent that the applicant says that this Court should not allow those processes to continue because of things that ASIO did, or because of things that ASIO knew, we submit that, as was submitted below...”

10           18       The circumstances in *Thomas* are further edified by the following exchange:

**HIS HONOUR:** *No, just so. You were not party to that appeal, nor should you have been a party to that appeal. The power of the State arrayed against the accused person was personified in the Director of Public Prosecutions.*

20           **MR DONAGHUE:** *Yes, your Honour, and we accepted that and we did not attend and we did not seek to be heard and the Court of Appeal decided to order the retrial. So at that stage we regarded ourselves as having no interest. The point at which the Director-General regarded himself as having an interest is when it was said that that order was wrong because the Court of Appeal had been misled and they had been misled because of ASIO. So their argument for the reopening turned directly, and really on nothing else, upon things that they said ASIO knew and should have done or be deemed to have done as a result. That was why we played the major role that we did in relation to Thomas (No 4) because the argument really related to nothing other than what we knew and what the consequences of that knowledge were. That is the subject matter of the judgment that is now made the subject of special leave application M46.*

19       The prosecutor made the following submission:

30           **MR ROBINSON:** *The Director, your Honour, supports the application in relation to M46 essentially on the basis that the factual matter which was relied upon in support of the notice of motion was within the knowledge of the Director-General only and not within the knowledge of the Director of Public Prosecutions or the Australian Federal Police...”*

20       It is immediately apparent that the situation in *Thomas* is a very long way from the instant case. In this case, the general rule should apply and the Commonwealth be represented fully and completely by the first respondent. In this case – in contrast to *Thomas* – evidence was led by the first respondent from relevant ACIC and AFP witnesses on the *voir dire* before the trial judge. The factual basis for the determination of relevant legal issues was laid out in the evidence given and documents tendered. There is no suggestion that the position of the ACIC in this case resembles in any way the position of the Director General in *Thomas*.

21       The first respondent was equally able to file a Notice of Contention challenging the Court of Appeal’s findings of illegality and impropriety. It made a forensic decision not to do

so. It has accepted the correctness of those findings in its defence of the Court of Appeal's decision in its favour on the question of a stay. That forensic decision ought bind the Commonwealth in all its manifestations.

**22** The ACIC calls into aid the decision of *CB* (2011) 291 FLR 113 (NSWCCA) (*CB*). It is of no assistance to it. In *CB*, the ACC was granted leave to intervene without objection because a declaration was being sought that it was in contempt of court (*CB* [12] and following). Plainly, a person against whom a finding of contempt is sought is entitled to be heard in respect of it.

**23** The ACIC's reliance on *Hughes v R* [2017] HCA Trans 16 is also misplaced. In that case the Victorian Director of Public Prosecutions was granted leave (without objection) to intervene in the proceeding in relation to ground 2 of the application only. That ground concerned the general application of the tendency rules under the *Evidence Act 1995* (NSW). There was no discussion regarding the basis for the Victorian Director's participation; it was simply accepted.

**24** In this case, the ACIC has not identified any legal interest of the kind described in *Levy v Victoria* (1997) 189 CLR 579 at 601-603 warranting leave to intervene. The Appeal seeks orders to permanently stay the criminal proceedings. That decision does not affect any of the legal interests of the ACIC.

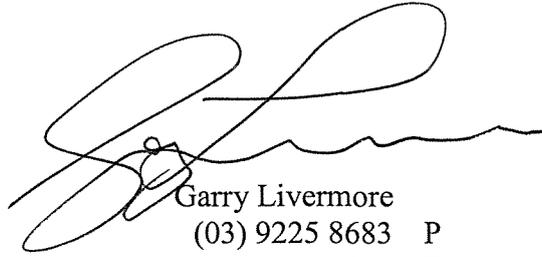
**25** Findings as to the conduct of members of staff of the ACIC does not provide the requisite direct impact on a legal interest of the ACIC. Courts make findings every day in criminal proceedings regarding the conduct and credit of witnesses that may be said to be "adverse". Those witnesses are not entitled to be represented unless relief of some sort is sought against them. Likewise, resolution of a question of statutory interpretation in relation to the *Australian Crime Commission Act 2002* (Cth) (**ACC Act**) would not provide the direct impact required to justify participation, particularly given that the ACC Act has been radically amended so that any such interpretations are of very limited ongoing impact: *Re McBain; ex p Catholic Bishops* (2002) 209 CLR 372 at 395 per Gleeson CJ.

**26** The ACIC has therefore identified no authority that supports its asserted standing to be heard in these proceedings.

**27** Contrary to its submission at [17], the ACIC has not confined its submissions in this matter to questions of interpretation of the ACC Act or examiner's powers. Rather, it has

actively sought to join issue on the question of whether a stay should be granted, and has urged this Court to find that there is no basis to grant a stay.<sup>4</sup>

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<sup>4</sup> ACIC submissions filed 19 January 2018 at [1], [2], [13], [14] and [46] footnote 90.