IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No. M176 of 2017

BETWEEN: **RICK TUCKER (a pseudonym)**
Appellant

and

10 **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
EDMUND HODGES (a pseudonym)
Fifth Respondent

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FIRST RESPONDENT'S REDACTED SUBMISSION

Part I – INTERNET PUBLICATION

1. The First Respondent certifies that this submission is in a form suitable for publication on the internet.

Part II – STATEMENT OF ISSUES

2. The Appellant's description is the same as that advanced by the Appellant Hodges. The Respondent relies on her submission filed in that matter (RHS [2] – [4]).

Part III – NOTICES UNDER SECTION 78B OF THE JUDICIARY ACT

3. The Respondent considers that no notice is required to be given pursuant to section 78B
30 of the *Judiciary Act 1903 (Cth)*.

Part IV – FACTUAL BACKGROUND

4. The factual background is in some respects the same as that in the submissions by the Appellant Hodges. The Respondent relies on her submission in that matter (RHS [6] – [23]), and adds the following in respect to matters raised by this Appellant.

Date of Document: 19 January 2018
Filed on behalf of the Respondent the Commonwealth Director of Public Prosecutions
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5. The Appellant's recitation of the facts is largely aspects of findings of the trial judge. The Appellant fails to refer to any of the conclusions of the Court below or the concessions made by him during the conduct of the appeal.

6. In relation to AS [8], the role of the Australian Criminal Intelligence Commission ("ACIC") is more accurately described in the Respondent's written submission in relation to the Appellant Hodges (RHS [15] – [18]).

7. In relation to AS [10], the full content of the letter from Schwartz in August 2010, one phrase of which is referred to by the Appellant, reflects that it was not a "*warning*".[1] Rather, Schwartz was reiterating the Australian Federal Police's ("AFP") view of the position of the Appellant in the investigation, stating *"It is our view that [Tucker]could provide valuable assistance to our investigation. As a person not involved in the senior management of the company or over an elongated period of service at [QRS Limited ("QRS")], he is well placed to reap any legislative benefits that his assistance may provide... We appreciate that your client does not want to be involved in this matter anymore than is necessary. Unfortunately, his actions need to be addressed at some future time and we repeat that we would welcome any information he is willing to provide."*

8. In relation to AS [11] – [12], the context in which the summons for the examinations were issued is outlined in the written submission in relation to the Appellant Hodges (RHS [14] – [18]). While the Appellant submits it was the habit of Mr Sage, the examiner, to create his reasons by largely cutting and pasting from documents provided to him, none of the examples relied on were of any great significance.[2] Moreover, the statement that Sage automatically approved the applications must be considered in the context where: he had provided advice as to who could be examined;[3] was aware of the background to the examination; and had already issued summonses and examined a number of people relevant to the investigation.[4]

9. The submission that the questioning was not directed towards the ostensible purpose of the examination (AS [12]) is incorrect. As her Honour recognised, money laundering is dependent on the establishment of a predicate offence which in this case was [redacted]

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[1] Exhibit 158.
[2] Trial judge at [503].
[3] POE [215]; ECB.10; ECB.170.
[4] Trial judge at [500].

[redacted].[5] Despite the Appellant's criticism, he did not suggest, at first instance, that Sage was acting for an improper purpose in examining him about the predicate offence or that he was acting in bad faith because he never intended to conduct examinations in relation to money laundering.[6] The ACIC and the AFP were already aware of the financial transactions relevant to the charges,[7] asking questions about the relevant predicate offence was therefore within the scope of the summons.

10. In relation to the "*tactical advice*" sought by Schwartz (AS [12]), the evidence was that once Schwartz was advised that it would not be possible to use those documents he made no attempt to do so. He followed the legal advice given.[8]

10 11. In relation to AS [13], the Appellant refers to a finding by the trial judge.[9] The Court of Appeal did not make that finding. Moreover, whatever the purpose, the Court below found that the appellants had failed to establish that the examinations achieved a practical advantage to the prosecution or a forensic disadvantage to them (at [248], [258], [266], [274], [276] – [277], [296], [300]). The Court concluded there was no basis for the trial judge to conclude otherwise.

12. In relation to AS [14], the Appellant's examinations were only provided to the CDPP's counsel for the purposes of the voir dire and after it had been determined that they would not be briefed to conduct the trial (cf: AS [30]). During the committal, counsel had access to the examinations of prosecution witnesses only.

20 13. In relation to AS [15] and the "*whole swathes*" of the prosecution case, apart from some materials the Appellant brought to the examination, he was shown only two documents from the briefs of evidence during his examination.[10] One of those related to events [redacted] with which the Appellant is not charged. Moreover, there is no evidence that any such admissions led the AFP to make any enquiries that would not otherwise have been made or to identify evidence that would not otherwise have been found. To the contrary, as was accepted by the Court below (at [274]), the AFP had already obtained a large volume of evidence and intelligence in advance of any of the examinations.

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[5] Trial judge at [399].
[6] Trial judge at [399].
[7] See, for example, ECB.166 and ECB.196.
[8] POE at [592] – [593]; Kirne at T2199 – T2200.
[9] Trial judge at [880]
[10] Exhibit 147.

14. As to his forensic choices being constrained (AS [15]), the Appellant omits that the prosecution case is documentary and that the Appellant did not dispute that none of the documents in the brief depended, for its probative effect, on answers given in the examinations (at [274]). The Appellant did not dispute the proposition that as the case is documentary,[11] nothing said in the examination would inhibit him in challenging the construction the prosecution places on the documents (at [294]). Moreover, contrary to his submission, the Appellant at the committal proceedings challenged the prosecution case, arguing that inferences sought to be drawn from documents were not open and that contrary inferences ought to be drawn. He actively contested the committal, arguing they had no case to answer.[12]

15. As was correctly held by the Court below (e.g. [263], [265], [266], [274]), the Appellant's assertion (AS [16]) that the AFP used his examination to prepare the case against him is unsupported by any evidence.

16. In relation to AS [16], the Court correctly concluded (at [266]) that even *if* the investigators had derived some assistance from the examinations in "*guiding*" and "*refining*" subsequent documentary searches, the case against the appellants, which rests almost entirely on documents, had not materially changed as a result. The appellants had failed to identify any evidence which would not have been obtained but for the examinations. As the Court further observed, the prosecution at trial would always need to prove the documents were relevant and that the appellants had seen or were aware of their contents. The need for proof was unaffected by the examinations.

17. As to the "*standard clause*" (AS [16]), the AFP were ordered by the trial judge to answer specific questions posed by the appellants in correspondence.[13] Accordingly, it is unsurprising that the AFP statements adopt similar language. The correctness of their evidence was not challenged (at [269] – [271]). The Court described the circumstances by which the statements arose (at [242]). As the Court correctly concluded, there was no basis to reject the unchallenged evidence (at [269], [276]). The onus was on the Appellant to establish the factual foundation for the grant of a stay (cf: AS [16]).

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[11] The Crown opening for [redacted] (with which the appellant is not charged) and the statement of facts for [redacted] demonstrate the nature of the documents relied on (e.g. correspondence, emails, file notes, contracts etc). No police officer is referred to as a witness in either. Apart from the interview between the AFP and Galloway, any police witnesses will essentially give evidence as to production of documents and continuity.
[12] POE at [174]; trial judge at [10].
[13] ECB.2 at [2]; Exhibit 114.

Part V – APPLICABLE STATUTORY PROVISIONS

18. The Appellant's statement of the relevant provisions is correct.

Part VI – SUMMARY OF ARGUMENT

19. The Appellant adopts the submissions filed by the Appellant Hodges. The Respondent relies on her submission filed in that matter (RHS [25] – [77]), and in relation to the appellants Galloway and Strickland.

20. The following addresses the supplementary arguments raised by this Appellant which principally relates to the issue of a fair trial (AS [20], [23] – [37]) and forensic advantage (AS [21], [38] – [41]).

10 **Fair trial**

21. The Appellant's argument is based on the contention that the fact of the examination in relation to conduct with which he was later charged (irrespective of answers given) necessarily means he can no longer have a fair trial and a stay of process is warranted (AS [37]). This submission, which is based on statements in particular judgments in various cases from *Sorby v Commonwealth*[14] to *Lee v The Queen (Lee (No 2))*[15] (AS [31] – [33]) is misconceived and should be rejected.

22. First, the Appellant's repeated assertion on which this argument is based, that the Appellant has been deliberately and unlawfully deprived of the capacity to challenge the prosecution case (e.g. at AS [20], [25]), is misleading. As noted above, the Appellant
20 was questioned before he was charged with any offence. The examination was unlawful because, as the Court below found, despite the ACIC believing the conduct was lawful it was not permitted by the *Australian Crime Commission Act 2002* (Cth) (*ACC Act*). The improper purpose was that the examination was to further the AFP investigation. The conduct by the authorities, while unlawful, was not (as appears to be suggested by the Appellant) deliberately so.

23. That the examinations were unlawful and for an improper purpose is based on the finding of the Court of Appeal which says nothing about the state of mind of Sage, the examiner, or of the AFP as to the lawfulness of the conduct. The Court concluded that the conduct of the ACIC was unlawful and improper because the examinations were

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[14] (1983) 152 CLR 281.
[15] (2014) 253 CLR 455.

only for the purpose of assisting the AFP in its investigation (at [209], [313]), which was not authorised by the *ACC Act*. As the Court observed, Sage gave evidence that he believed that his acts were lawful (at [13]). Both the trial judge and the Court of Appeal found that there was no evidence to suggest any awareness on his part that his acts might have been unlawful.[16] The Appellant did not suggest, at first instance, that Sage was a dishonest witness. The trial judge found him to be an honest witness.[17] That finding was not challenged on appeal.

24. Second, the argument is premised on the proposition that the companion rule has been infringed (AS [29] – [32]). However, as this Court in *R v Independent Broad-Based Anti-Corruption Commissioner ("IBAC")*[18] reiterated, the application of the companion principle depends on the judicial process having been engaged.[19] It protects "*a person charged with, but not yet tried for*"[20] a criminal offence. This examination was conducted before the Appellant had been charged with any offence. The companion principle was not engaged; there was no judicial process on foot.

25. The Appellant does not refer to *IBAC*. Nor does the Appellant, while relying on various statements in *X7 v The Queen (X7 (No 1))*,[21] *Lee (No 2), Lee v New South Wales Crime Commission*[22] and others (AS [31] – [33]), recognise the issues which were for determination in each of those cases or that they related to post-charge questioning.

26. Third, as repeatedly recognised, "*[a] fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused*".[23] In *R v Wilkie*,[24] Howie J observed that in assessing a fair trial "*the court is concerned with whether the trial will be rendered unfair 'when judged by reference to accepted standards of justice': Barton v The Queen [1980] HCA 48; (1980) 147 CLR 75 at 79. The 'accepted standards of justice' take into account other interests and considerations that arise in respect of a prosecution of serious criminal offence,*

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[16] Trial judge e.g. at [694], [868]; CA at [73], [74], [79], [105] and [116].
[17] Trial judge at [36].
[18] (2016) 256 CLR 459.
[19] IBAC (supra) at [43] – [47].
[20] X7 v Australian Crime Commission (X7 (No 1)) (2013) 248 CLR 92 at [70].
[21] (2013) 248 CLR 92.
[22] (2013) 251 CLR 196.
[23] *Jarvie v Magistrates Court (Vic)* (1995) 1 VR 84 per Brooking J at 90; *R v Ngo* (2003) 57 NSWLR 55 quoting Brooking J at [99]; *R v Lodhi* (2006) 199 FLR 270 at [58].
[24] [2005] NSWSC 794, (2005) 193 FLR 29.

including the interests of the public generally, and witnesses and victims in particular."[25] A fair trial is one that is fair to the accused but also to the Crown.[26]

27. Fourth, while the Appellant purports to refer to the principles in relation to a stay of proceedings (AS [34] – [36]), he omits reference to important considerations. For example, the submission makes no reference to the weighing or balancing process of competing interests, or the "*...need to take into account the substantial public interest of the community in having those who are charged with criminal offences brought to trial ... as a permanent stay is tantamount to a continuing immunity from prosecution*".[27] Nor does the submission recognise that fairness to an accused is not the only consideration bearing on whether a trial should proceed.[28]

28. Fifth, the Appellant does not address the authorities including *X7 v The Queen (X7 (No 2))*,[29] in which the approach he contends for was rejected. *X7 (No 2)* and later authority, including *R v Seller (Seller (No 3))*[30] refer to and apply the well-established principles in relation to a stay of proceedings (referred to in the First Respondent's submission in relation to Hodges). The Appellant does not identify any error in the application of principles in those cases. Given that this aspect of the Appellant's argument is based on the fact of the examination and not the answers given, his position is not relevantly different to the applicants in those cases.

29. As Bathurst CJ observed in *X7 (No 2)*, to grant a stay based on the fact of an examination would be to grant one without regard to the nature and extent of the unfairness which results.[31] To do so would fail to take into account the interests of the community in the prosecution of serious criminal offences. As the Court observed, if in fact the examination was productive of actual unfairness the person affected would be able to establish that fact without suffering further unfairness or injustice.

30. The Appellant's submission is akin to presumptive prejudice because it is based on the mere fact of the examination, irrespective of the answers. This court has repeatedly stated that is insufficient to warrant the grant of a stay of proceedings (see RHS [46]).

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[25] And see also: a fair trial does not mean a perfect trial: *Jago v District Court of NSW* (1989) 168 CLR 23; *R v Glennon* (1992) 173 CLR 592; *Dietrich v The Queen* (1992) 177 CLR 292 at 365.
[26] *McKinney v The Queen* (1991) 171 CLR 468 at 488 per Dawson J; *R v Lowe* (1997) 98 A Crim R 300 at 318 – 319.
[27] *Dupas v The Queen* (2010) 241 CLR 237 at [37].
[28] *Dupas v The Queen* (supra) at [37]; *Jago v The District Court of NSW* (supra) at 33.
[29] (2014) 292 FLR 57.
[30] *R v Seller (No 3); R v McCarthy (No 3)* (2015) 89 NSWLR 155.
[31] *X7 (No 2)* at [109], [110].

31. Sixth, the Appellant's characterisation of the decision of the Court of Appeal (AS [24]) is incorrect. The Court concluded, applying the principles relevant to a stay of proceedings as an abuse of process, that the Appellant had not established that there was any proper basis for a stay of proceedings to be granted.

32. Moreover, the Appellant adopted the concession made in oral argument by counsel for the Appellant Hodges; that no unfair constraint arises by reason of admissions made by the Appellant in his examination evidence because the Court must proceed on the assumption that an examinee would give truthful instructions to his counsel who would be obliged to conduct the trial accordingly (at [297] – [298]).[32]

10 33. Irrespective of any issue about the making of a concession, a court is entitled to act on the assumption that an accused gives truthful instructions to his lawyer (at [297]). There is no evidence that he did otherwise here. [redacted] If it is to be assumed that the instructions he has provided are truthful, it is that which prevents a different approach being adopted. As with the other Appellants there was no evidence before the Court that, in light of any instructions he has provided, this Appellant is actually inhibited in his forensic choices by reason of the examination. As counsel accepted below, their argument was not based on the notion that people should be allowed to cheat by lying to their counsel (at [298]).

20 34. That the Appellant *might* be prevented from adopting a contrary position at trial in these circumstances is not a deprivation of a legitimate forensic choice such as to warrant a stay of proceedings.

The prosecution was improperly advantaged

35. There were no factual misconceptions, or misconceptions about the issues in dispute, by the Court of Appeal (AS [38] – [42]).

36. To suggest (AS [39]) that there was no real issue at first instance that the AFP had used the examinations is plainly incorrect. The evidence of the AFP (which is accurately summarised by the Court below at [240] – [244], [263], [264]), was to the contrary.

37. Moreover, the submission ignores that the onus was on the Appellant to establish the
30 factual foundation of the basis of the stay application. The Appellant chose not to pursue

[32] Counsel for Tucker adopted the oral submissions of Hodge's counsel – see Court of Appeal transcript (21 February 2017) T188.23 – T188.25.

attempting to establish a forensic advantage obtained by the AFP (at [258], [272], [292]). So much was conceded in the Court below (at [259], [264]). The Appellant also conceded that when the voir dire commenced he had all the information he needed to explore with investigators what use they had made of the material (at [259]), that there were straightforward steps which could be taken (at [259] – [263]) and that there was no obstacle to them undertaking those types of steps (at [264]).

38. The submission (AS [16], [19], [39], [41]) also elevates the evidence of Schwartz to a level it does not have. The Court of Appeal comprehensively reviewed the evidence (see, for example, [232] – [275]) and the trial judge's findings in relation to it (see, for example, [228]) which includes the evidence of Mr Schwartz ([241] – [246]). This extract of her Honour's findings in relation to the evidence of Schwartz highlights the very limited nature of his evidence.

39. As the Court below correctly observed (at [244]), the cross-examination of Schwartz was directed at establishing that at the time of the examinations there was already sufficient to charge the appellants with the topic of the use of the material "*barely being mentioned*". "*At no time was it put to him that any information of value had emerged from the examinations, or that he was being untruthful in saying that the examinations had been largely a waste of time*" (at [244]). It was never suggested to Schwartz, or any other AFP investigator, that they had used the material more than they had admitted (at [256]). The Appellant does not challenge the accuracy of this description.

40. Before any of the appellants were examined at the ACIC, the AFP had obtained a large volume of evidence and intelligence which assisted them in identifying further avenues of inquiry (at [274]). That evidence and intelligence was referred to in the written submission of the Respondent before the Court of Appeal. The appellants did not challenge the accuracy of that compilation, or its significance to the case against them (at [274]).

41. The Court did not misapprehend the state of the brief (AS [40] – [42]). Indeed, the Appellant put to the ACIC in cross-examination that "*the case against [Tucker] was overwhelming*" at the time of the examination.[33] This is consistent with the approach taken by the other appellants. Indeed, as the Court correctly recognised (at [235], [248]) the appellants concentrated their cross-examinations of the ACIC and AFP witnesses on

[33] Pre-trial transcript (19 February 2015) at T3159.2 – T3159.4 and T3212.23 – T3212.31.

how far advanced the development of the case against each was at the time of the examinations. The appellants "*put to Mr Schwartz more than once that [at the time of the examinations] the AFP already had everything it needed*" (at [244] and see [293]).[34]

Part VII – NOTICE OF CONTENTION

42. Not relevant.

PART VIII – TIME ESTIMATE

43. The Respondent estimates that the oral argument will take approximately 2.5 hours (for all appellants).

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[34] The written submission by the appellants in the Court of Appeal stated that the AFP already had "*a solid base of evidentiary material...sufficient for them to regard [the appellants] as suspects*". Respondents' joint written submissions in relation to grounds 3, 4, 5, 6, 7 and 8 dated 14 November 2016 at p. 14. They sought to demonstrate that the examinations confirmed the prosecution case which had been developed on the basis of the documents already assembled (at [293]).