IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M73 of 2012

BETWEEN

Director of Public Prosecutions (Cth)

Applicant

JM

Respondent

RESPONDENT'S SUBMISSIONS ON NOTICE OF CROSS-APPEAL

Part I – Certification

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

Part II – Issues

2. The issue presented by the notice of cross-appeal is whether or not the Court of Appeal of the Supreme Court of Victoria could as a valid exercise of judicial power in federal jurisdiction, consistently with s 68 of the *Judiciary Act 1903* (Cth) (***Judiciary Act***) and Ch III of the Constitution, answer a question as to the meaning of a statute without reference to facts which had been agreed or determined.

Date of document: 25 January 2013
on behalf of the respondent
Clayton Utz
Lawyers
Level 18
333 Collins Street
Melbourne VIC 3000

Solicitor Code: 8599
DX: DX 38451 333 Collins VIC
Tel: (03) 9286 6000
Fax: (03) 9629 8488
Ref: 160/80055505
Attention: Vince Annetta
Email: vannetta@claytonutz.com

Part III – Section 78B

3. In compliance with s 78B of the *Judiciary Act*, notices were given on 21 December 2012 to the Attorneys-General of the Commonwealth, States and Territories.

Part IV – Citations

4. The judgment of the Court of Appeal of the Supreme Court of Victoria given on 14 June 2012 has not been reported in the authorised reports, but has been reported in the Australian Corporations and Securities Reports. The judgment may be cited as: *Director of Public Prosecutions (Cth) v JM* (2012) 90 ACSR 96; [2012] VSCA 21 (***CA***).

10 5. The judgment at first instance has not been reported in the authorised reports or otherwise. It is not available for viewing on the internet. Its medium-neutral, restricted publication citation is [2011] VSC 527R (***J***).

Part V – Facts

6. On 2 September 2011, the respondent (***the accused***) was arraigned before Weinberg JA, sitting as a Judge of the Criminal Division of the Supreme Court of Victoria, on 39 charges of market manipulation contrary to s 1041A of the *Corporations Act 2001* (Cth) (***Corporations Act***) (charges 2 to 40) and two conspiracy charges relating to s 1041A, contrary to s 11.5(1) of the *Criminal Code Act 1995* (Cth) (charges 1 and 41). He pleaded not guilty to all charges.[1]

20 7. At earlier directions hearings, the applicant (***the Crown***) had indicated that it contended that the expression "artificial price" in s 1041A bore the meaning attributed to it by Goldberg J in *Australian Securities and Investments Commission v Soust.*[2]

8. The accused had indicated that ultimately it would be submitted that Goldberg J erred as to the proper construction of s 1041A[3] and that the approach adopted by Priestley JA (dissenting) in *Fame Decorator Agencies Pty Ltd v Jeffries Industries Ltd*[4] was correct and to be preferred.[5]

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[1] J at [2], CA at [280].

[2] (2010) 183 FCR 21 (***Soust***). See J at [4], CA at [286].

[3] Accused's outline of submissions dated 6 April 2011 (filed in connection with an application to transfer the proceeding from the County Court of Victoria to the Supreme Court) at [22]-[24].

[4] (1998) 28 ACSR 58.

[5] See the accused's Outline of Submissions dated 21 July 2011 (filed pursuant to directions made by Coghlan J (as he then was) on 30 June 2011) at [77]-[80].

9. At the hearing on 2 September 2011, the Judge raised with the parties the possibility of reserving a question of law as to the meaning of the expression "artificial price" in s 1041A of the *Corporations Act* for determination by the Court of Appeal on a case stated pursuant to ss 302 and 305 of the *Criminal Procedure Act 2009* (Vic) ***(Criminal Procedure Act)***.[6]

10. The accused objected on the basis that such a question would amount to a request for an advisory opinion.[7]

11. The Judge heard argument on 20 and 21 September 2011, and on 21 October 2011 stated a case and reserved the following three questions for determination by the Court of Appeal pursuant to s 302 of the *Criminal Procedure Act*:[8]

    1. *For the purpose of s 1041A of the Corporations Act 2001 (Cth), is the price of a share on the ASX which has been created or maintained by a transaction on the ASX that was carried out for the sole or dominant purpose of creating or maintaining a particular price for that share on the ASX an 'artificial price'?*

    2. *Was the closing price of shares in [X Ltd] on the ASX on 4 July 2006 an 'artificial price' within the meaning of s 1041A(c) of the Corporations Act 2001 (Cth)?*

    3. *Was the price of shares in [X Ltd] on the ASX on 4 July 2006 maintained at a level that was 'artificial' within the meaning of s 1041A(d) of the Act?*

12. The Judge acknowledged that, although the accused had consistently maintained his objection to the statement of a case to the Court of Appeal, the Crown and the accused at his Honour's request both made serious efforts to resolve between them most of the relevant outstanding factual issues.[9] Nevertheless, the Crown and the accused were unable to agree upon all of the facts for the purposes of the case stated and, critically, as to whether the accused and/or the accused's daughter (***Ms N***) (who was alleged to be a co-conspirator)[10] entered into the transactions in question with the sole or dominant purpose of setting or maintaining a particular price for shares in X Ltd on the ASX.[11]

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[6] J at [7].

[7] J at [7]-[8], [15]-[17].

[8] CA at [286], [287]. The questions have been reproduced here in an anonymised form, as they appear in the judgment of the Court of Appeal.

[9] J at [68].

[10] See the amended indictment dated 29 July 2011, charges 1 and 41. Cf. CA at [284], [285].

[11] CA at [288].

13. The Judge sought to surmount the problem by making findings of fact for the limited purposes of the case stated, including as to Ms N's state of mind.[12]

14. The case stated did not include any facts linking Ms N's conduct and purpose to the conduct and purpose of the accused.[13]

15. In the Court of Appeal, the accused again contended that the questions reserved by the primary Judge were inappropriate to answer on the ground that they amounted to a request for an advisory opinion.[14]

16. By judgment given on 14 June 2012, a majority in the Court of Appeal (Nettle and Hansen JJA) decided that the questions reserved by the primary Judge were
10 inappropriate to answer in the form in which they had been reserved, on the basis that they were questions of mixed fact and law dependent upon facts not found or agreed.[15]

17. However, the majority considered that Question 1 could be restated as a "*pure question of law*" which was capable of being answered without reference to disputed facts.[16]

18. The Court of Appeal pursuant to s 305(3) of the *Criminal Procedure Act* returned the case stated to the primary Judge for amendment of Question 1 to the following form:[17]

> *(a) Is the expression 'artificial price' in s 1041A of the Corporations Act 2001 (Cth) used in the sense of a term having a legal signification (as opposed to its sense in ordinary English or some non-legal technical sense); and*
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> *(b) If so, what is its legal signification?*

20 19. Following amendment of Question 1 by the primary Judge on 20 June 2012 in accordance with the Court of Appeal's judgment, the Court of Appeal on 28 June 2012 answered the amended question as follows:[18]

> *The expression 'artificial price' in s 1041A of the Corporations Act 2001 (Cth) is used in the sense of a term having legal signification (as opposed to its ordinary English or some non-legal technical sense) and its legal signification is of market*

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[12] J at [77]-[80], CA at [289].

[13] As submitted below: see CA at [32].

[14] CA at [26]-[33], [39], [289]-[290]. The accused's submissions noted that the Court was exercising federal jurisdiction: see CA at [39].

[15] CA at [290]-[303], [342]-[343], [369]. In contrast, the Chief Justice considered the questions reserved by the primary Judge to be appropriate to be answered: see CA at [60]-[140], [276].

[16] CA at [300]-[306].

[17] CA at [304], [369].

[18] Notification of result of appeal or application dated 2 July 2012 in Supreme Court of Victoria proceedings S APCR 2011 0260, S APCR 2011 0272, S APCR 2011 0274.

manipulation by conduct of the kind typified by American jurisprudential conceptions of 'cornering' and 'squeezing'.

20. The Crown sought special leave to appeal to the High Court of Australia to contest the Court of Appeal's answer to the amended question.[19]

21. At the hearing of the application for special leave on 14 December 2012, the accused informed the Court that in the event that special leave were granted, he would seek special leave to cross-appeal on the ground that the judgment of the Court of Appeal involved the giving of an advisory opinion.[20]

22. At the conclusion of the hearing, Hayne, Heydon and Bell JJ decided that the application for special leave to appeal and any application for special leave to cross-appeal would be referred for consideration by an enlarged Bench and argument as on appeal.[21]

23. The accused has filed a summons dated 21 December 2012 seeking special leave to cross-appeal (which is returnable at the hearing before the enlarged Bench of the High Court) together with an affidavit in support exhibiting the proposed notice of cross-appeal.[22]

Part VI – Argument

Federal jurisdiction – a threshold consideration

24. It should be noted at the outset that this is a federal prosecution in a State court.[23] The accused is a person who is charged with offences against laws of the Commonwealth. Federal jurisdiction is therefore invested in the Supreme Court of Victoria by the operation of s 68(2) of the *Judiciary Act*.[24]

25. The case stated procedure provisions in ss 302 and 305 of the *Criminal Procedure Act* could not apply of their own force in proceedings involving the exercise of federal

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[19] Application for special leave to appeal filed herein on 20 July 2012.

[20] *Director of Public Prosecutions (Cth) v JM* [2012] HCATrans 347 (14 December 2012).

[21] Ibid.

[22] Exhibit VA-1 to the affidavit of Vince Annetta sworn herein on 21 December 2012.

[23] As was recognised by the primary Judge (J at [83]) and in the Court of Appeal (CA at [39]-[40]).

[24] As in *R v Bull* (1974) 131 CLR 203, it is not in this case necessary to decide whether the jurisdiction granted under s 68(2) operates cumulatively or alternatively to the general grant in s 39(2) of the *Judiciary Act*: see *R v Gee* (2003) 212 CLR 230 at 255-256 [66]-[67] per McHugh and Gummow JJ and the authorities there cited.

jurisdiction.[25] They could only have applied if and to the extent that they were "picked up" and applied as federal law by s 68(1) or s 79 of the *Judiciary Act*.[26]

26. Importantly, the provisions could only have been picked up and applied as federal law insofar as[27] such application would have been consistent with a valid exercise of judicial power in the federal jurisdiction.[28] No part of the judicial power of the Commonwealth can be conferred other than by virtue of, and in accordance with, Ch III of the Constitution and no State legislature may deny the operation of any of the provisions of Ch III.[29]

27. It is thus to constitutional principles of judicial power to which we now turn.

10 Judicial power and the requirement of a "matter"

28. Judicial power is not susceptible of identification by any single combination of necessary or sufficient factors.[30] However, the following general statement by Kitto J[31] has often been applied by this Court:[32]

> *[A] judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are,*
> 20 *followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and*

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[25] *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134 [21] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 (***Bass***) at 352 [35] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[26] *Hili v The Queen* (2010) 242 CLR 520 at 527 [21] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

[27] The State provisions are not picked up and applied without qualification. Subsection 68(1) of the *Judiciary Act* is qualified by the words "*so far as they are applicable*". Subsection 79(1) of the *Judiciary Act* contains a more express qualification in the form "*except as otherwise provided by the Constitution or the laws of the Commonwealth*". Nothing turns on the difference in form between these qualifications: see *Putland v The Queen* (2004) 218 CLR 174 at 179-180 [7] per Gleeson CJ (and see similarly at 189 [41] per Gummow and Heydon JJ).

[28] *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 134-136 [24]-[28] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ; *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***) at 70 [100] per French CJ.

[29] *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601 at 618 [20] per Gleeson CJ, Gummow and Hayne JJ, citing *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 405 [227] per Gummow J.

[30] *South Australia v Totani* (2010) 242 CLR 1 at 86 [220] per Hayne J.

[31] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 per Kitto J.

[32] *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 577 [94] per Hayne J (Gleeson CJ agreeing at 550 [1] and Gummow J agreeing at 552 [9]) and the authorities there cited.

obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist.

29. The unique and essential function of the judicial power is the quelling of controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion.[33] Consistency with the essential character of a court and with the nature of judicial power necessitates the independent determination of a matter in controversy by application of the law to the facts determined in accordance with rules and procedures which truly permit the facts to be ascertained.[34] It is contrary to the judicial process and no part of judicial power to effect a determination of rights by applying the law to facts which are neither agreed nor determined by reference to evidence in the case.[35]

30. The content of the judicial power of the Commonwealth may be narrower still than the content of judicial power.[36] The requirement under Ch III that there be a "matter" confines the permissible exercise of the judicial power of the Commonwealth. Owen Dixon as Counsel for Victoria in *Re Judiciary and Navigation Acts*[37] submitted that the constitutional meaning of "matter" is "*a claim of right in litigation between parties, and an abstract question of law is not a 'matter'*". The majority of the Court agreed:[38]

> *[W]e do not think that the word "matter" in sec. 76 means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court. If the matter exists, the Legislature may no doubt prescribe the means by which the determination of the Court is to be obtained, and for that purpose may, we think, adopt any existing method of legal procedure or invent a new one. But it cannot authorize this Court to make a declaration of the law divorced from any attempt to administer that law. ...*
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> *[W]e can find nothing in Chapter III of the Constitution to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved.*

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[33] *Fencott v Muller* (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ; *Nicholas v The Queen* (1998) 193 CLR 173 (***Nicholas***) at 187 [19] per Brennan CJ; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 20 [43] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

[34] *Nicholas* at 208-209 [74] per Gaudron J, approved in *Bass* at 359 [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[35] *Bass* at 359 [56] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[36] *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 (***Re McBain***) at 404-405 [61] per Gaudron and Gummow JJ, citing *Gould v Brown* (1998) 193 CLR 346 at 421 [118] per McHugh J.

[37] (1921) 29 CLR 257 (***Re Judiciary and Navigation Acts***) at 258.

[38] *Re Judiciary and Navigation Acts* at 265-267 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

31. Gleeson CJ in *Re McBain*[39] described this purported empowerment of the Court to determine abstract questions of law as the "essential flaw" in the legislation held invalid in *Re Judiciary and Navigation Acts*. His Honour continued:[40]

> *Thus the Court does not pronounce, in the abstract, upon the validity or meaning of Commonwealth or State statutes. To do so would not be an exercise of judicial power conferred by or under Ch III. Such pronouncements are made in an adversarial context, where there is an issue concerning some right, duty or liability. As the majority in* North Ganalanja Aboriginal Corporation v Queensland[41] *put it, quoting from In re Judiciary and Navigation Acts:*
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> > *"The law is not judicially administered by judicial declarations of its content 'divorced from any attempt to administer that law'."*

32. In the same case, Hayne J said (footnotes omitted):[42]

> *At the heart of the constitutional conception of "matter" is a controversy about rights, duties or liabilities which will, by the application of judicial power, be quelled. The "controversy" must be real and immediate. That is why it was held, in* In re Judiciary and Navigation Acts, *that "matter" means more than legal proceeding and that "there can be no matter within the meaning of [s 76] unless there is some immediate right, duty or liability to be established by the determination of the Court". Hypothetical questions give rise to no matter. Further, it has long been recognised that an important aspect of federal judicial power is that, by its exercise, a controversy between parties about some immediate right, duty or liability is quelled.*

Impermissibility of advisory opinions

33. It is no part of the judicial power of the Commonwealth conferred by or under Ch III to deliver advisory opinions. Their delivery is beyond the constitutional competence of this Court in both its original and appellate jurisdictions.[43]

34. In *DPP v B*, this Court declined the invitation from an appellant prosecutor to express opinion upon issues sought to be agitated on a case stated. According to the joint judgment, so to do would have been to deliver an advisory opinion "*and that, of course,*

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[39] At 389 [4].

[40] *Re McBain* at 389 [5] per Gleeson CJ.

[41] (1996) 185 CLR 595 at 612.

[42] *Re McBain* at 458-459 [242] per Hayne J.

[43] *Re Judiciary and Navigation Acts*; *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 (***Mellifont***) at 300-303 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ and at 315-319 per Brennan J; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 612 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ and at 642 per McHugh J; *Director of Public Prosecutions, South Australia v B* (1998) 194 CLR 566 (***DPP v B***) at 576 [12] and 580 [25] per Gaudron, Gummow and Hayne JJ.

is beyond the power of this Court whether in its appellate or its original jurisdiction".[44] The joint judgment explained (footnotes omitted):[45]

> *The questions reserved in this case were cast in very general terms, apparently unrelated to any facts, not even the facts in the case stated. That the questions were so general is, itself, a strong indication that they did not arise at any trial... The failure to connect the questions with the facts stated in the case might be seen as some drafting defect that should not be permitted to impede the resolution of the questions. But the generality of the questions that were referred is not simply a defect in drafting. It is a symptom of a more deep-seated problem.*
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> *The difficulties in the case stated procedure, whether the case is stated in a criminal or civil matter or, if in a criminal matter, whether stated at the instance of the prosecution or defence, are well known. At least some of those difficulties stem from a failure to recognise that the jurisdiction is not conferred to permit courts to offer general advisory opinions on hypothetical questions. The questions reserved in this matter appear to invite such an opinion.*

35. Similarly, in *Bass*, the Court decided that several of the questions referred on a case stated were inappropriate to answer, as no findings of fact had been made and there was no agreed statement of facts. The majority emphasised that a judicial determination includes "*a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy*"[46] and that, "*[b]ecause the object of the judicial process is the final determination of the rights of the parties to an action, courts have traditionally refused to provide answers to hypothetical questions or to give advisory opinions*".[47] An advisory opinion was distinguished from a declaratory judgment on the basis that the former is not founded on a concrete situation and does not amount to a binding decision raising a res judicata between parties: "*where the dispute is divorced from the facts it is considered hypothetical and not suitable for judicial resolution by way of declaration or otherwise*".[48] The demurrer procedure was also distinguished, on the basis that it involves the assumption of the truth of a particular set of identified (pleaded) facts.[49] With regard to the questions referred in *Bass*, their Honours said:[50]

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[44] *DPP v B* at 580 [25] per Gaudron, Gummow and Hayne JJ.

[45] *DPP v B* at 576 [11]-[12] per Gaudron, Gummow and Hayne JJ.

[46] *Bass* at 355 [45] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[47] *Bass* at 355-356 [47] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, cited in *Momcilovic* at 95 [180] per Gummow J (with Hayne J agreeing at 123 [280]).

[48] *Bass* at 356-357 [48] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, citing Zamir & Woolf, *The Declaratory Judgment*, 2nd ed (1993) at p 132. See, similarly, H Irving, 'Advisory Opinions, the Rule of Law and the Separation of Power' (2004) 4 *Macquarie Law Journal* 105 at 128.

[49] *Bass* at 357 [50] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[50] *Bass* at 357-358 [49]-[51] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. See also *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 230 [202] per Gummow J and the authorities there cited.

> *As the answers given by the Full Court and the declaration it made were not based on facts, found or agreed, they were purely hypothetical... Since the relevant facts are not identified and the existence of some of them is apparently in dispute, the answers given by the Full Court may be of no use at all to the parties and may even mislead them as to their rights. Courts have traditionally declined to state - let alone answer - preliminary questions when the answers will neither determine the rights of the parties nor necessarily lead to the final determination of their rights. The efficient administration of the business of courts is incompatible with answering hypothetical questions which frequently require considerable time and cause considerable expense to the parties, expense which may eventually be seen to be unnecessarily incurred...*
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> *It cannot be doubted that in many cases the formulation of specific questions to be tried separately from and in advance of other issues will assist in the more efficient resolution of the matters in issue. However, that will be so only if the questions are capable of final answer and are capable of being answered in accordance with the judicial process.*

36. As was recognised, in appropriate circumstances, referred questions are capable of being answered, and declaratory relief is capable of being given, in accordance with the judicial process.

37. In *Mellifont*, for example, a point of law arising in a criminal trial was referred under the *Criminal Code* (Qld) to the Court of Criminal Appeal for consideration and opinion. The questions referred all related to the correctness of a ruling by the trial judge. For that reason, the reference was found to have been made with respect to a matter and the questions were not hypothetical or abstract or divorced from the ordinary administration of the law.[51] The "fundamental" point distinguishing *Mellifont* from *Re Judiciary and Navigation Acts* (and the present case) was that the reference in *Mellifont* enabled the Court of Criminal Appeal to correct an error of law at trial.[52]

38. *Croome v Tasmania*[53] is also to be distinguished. The plaintiffs in that case sought a declaration of constitutional invalidity of a provision of the *Criminal Code* (Tas). They pleaded that they had engaged in conduct in contravention of the impugned provision which, if the provision was valid and operative, would have rendered them liable to conviction. In those circumstances, the question of constitutional validity was not abstract or hypothetical; there was a "matter" and the law being administered was the Constitution.[54]

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[51] *Mellifont* at 304-305 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ; *Momcilovic* at 63 [85]-[86] per French CJ and at 223 [588] per Crennan and Kiefel JJ.

[52] Ibid.

[53] (1997) 191 CLR 119 (***Croome***).

[54] *Croome* at 124-128 per Brennan CJ, Dawson and Toohey JJ. See similarly at 132-139 per Gaudron, McHugh and Gummow JJ.

39. In contradistinction, an appellate court answering a question:

(a) which essentially asks - what does a statutory provision mean?; or

(b) which is based on disputed facts or facts only provisionally agreed,

risks the impermissible delivery of an advisory opinion.

40. In *R v Assange*,[55] two questions of law were reserved by the Chief Judge of the County Court of Victoria on a case stated under s 446(2) of the *Crimes Act 1958* (Vic) for the consideration of the Court of Appeal of the Supreme Court of Victoria.[56] That subsection provided for the reservation of questions, and their consideration and determination by the Court of Appeal, "*if on the trial of an accused person in the Supreme Court or the County Court, a question of difficulty in point of law arises before a jury is empanelled*".[57] The accused had been charged with offences against provisions of Pt VIA of the *Crimes Act 1914* (Cth) relating to unauthorised computer use.[58] The first reserved question asked, in effect, whether a person obtains access to data if the person has the ability to "view" the data but has not viewed it or attempted to view it.[59] The second question asked whether certain words used in the legislation under which the accused had been charged were words of common English usage or words which needed to be interpreted according to a technical meaning. There was nothing in the case stated showing whether any of the words mentioned had a technical meaning or what that technical meaning might be.[60] The Court of Appeal concluded that the County Court had no power to reserve the questions because they were not questions of law which had *arisen* on the trial of the accused and that the Court of Appeal should not determine the questions as it was being asked to give no more than an advisory opinion.[61] Hayne JA (as his Honour then was), with whom Vincent and Coldrey AJJA agreed, said:[62]

> *For present purposes it is sufficient if I say that it seems to me that, at least in this case, a question of the generality which is presented for us, a question which is, in effect, "What does a particular section of the Commonwealth Crimes Act mean?", is not a question that arises on the trial of the accused. The particular question, whether the relevant sections apply to facts that may be admitted or proved in evidence, no doubt will arise but it will arise only once the facts have first been*

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[55] [1997] 2 VR 247 (*Assange*).

[56] *Assange* at 249 per Hayne JA.

[57] *Assange* at 253 per Hayne JA.

[58] *Assange* at 248 per Hayne JA.

[59] *Assange* at 251 per Hayne JA.

[60] *Assange* at 252 per Hayne JA.

[61] *Assange* at 254-255.

[62] *Assange* at 254.

> *identified. Where, as here, the parties do not and cannot bind themselves to offer no further factual material than is set out in the statement of agreed facts, it is not possible to say what point of law either will arise on the trial of the accused or has now arisen before a jury is empanelled. Until the particular facts are known the court is asked to give no more than an advisory opinion of more or less general application. The perils of that course are well known and need not be repeated. (See e.g.* AMP Insurance Co Ltd v Dixon *[1982] VR 833 at 837;* Swift Australian Co (Pty Ltd) v South British Insurance Co Ltd *[1970] VR 368 at 370;* Sumner v William Henderson & Sons Ltd *[1963] 1 WLR 823.) If anything, those perils are greater when the opinion is sought about a question of construction of a penal statute.*

41. The significance and force of this reasoning is not diminished by the fact that the current statutory provisions in Victoria (ss 302, 305 of the *Criminal Procedure Act*) now allow for reservation of a question of law if it arises "*before or during the trial*" (cf. "*on the trial*"). The requirement remains for a question to *arise* or have *arisen*. It may be observed that the difficulty in *Assange* was not that the legislation did not contemplate the reservation of questions *before trial*; it was the generic nature of the questions themselves which led to the conclusion that they had not arisen. The considerations which led to that conclusion continue to be applicable under the current case stated provisions.

42. Generic questions as to the meaning of a penal statute were again refused to be answered by the Court of Appeal of the Supreme Court of Victoria in *R v Garlick.*[63] The Court of Appeal noted that it had been asked generic questions not tied to ultimate facts of the case and, citing *DPP v B*, said that "*a case stated is not to be used to facilitate the offering of general advisory opinions on hypothetical facts*".[64]

43. Similarly, the Court of Criminal Appeal of the Supreme Court of South Australia in *Question of Law Reserved by Trial Judge (No 3 of 2010)*[65] declined to answer a question of interpretation of a penal provision reserved on a case stated which included assumed facts (not admitted) as to the defendant's state of mind. The Court of Criminal Appeal said that the question appeared to be hypothetical, as the evidence at trial could depart from that assumed on the case stated and the charges themselves might even be amended. The Court of Criminal Appeal declined to answer the question as it considered that doing so risked giving an advisory opinion.[66]

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[63] [2006] VSCA 127 (***Garlick***).

[64] *Garlick* at [30] per Vincent, Ashley and Redlich JJA.

[65] *Question of Law Reserved by Trial Judge (No 3 of 2010)* [2010] SASCFC 77.

[66] Ibid at [5] per Vanstone, David and Peek JJ.

44. The Full Court of the Federal Court of Australia in *Harts Australia Ltd v Commissioner of Taxation*[67] likewise considered that questions of contractual construction should not be determined as a preliminary issue on the basis of limited facts agreed provisionally (only for the purpose of determining the preliminary issue and not agreed for the purposes of the trial). The Full Court said that "*[t]he utility of questions being answered as a preliminary issue is lost if the facts upon which those questions are to be answered might ultimately be found to be different at trial. In such circumstances there is a real danger of the Court providing answers to hypothetical questions or giving no more than an advisory opinion on assumed facts*".[68]

10 Errors below

45. The primary Judge should not have stated a case and reserved the three questions for determination by the Court of Appeal pursuant to s 302 of the *Criminal Procedure Act* in circumstances where the relevant facts had not been found or agreed.

46. The difference of opinion referred to in paragraphs 7-8 above, did not constitute a real or immediate controversy requiring, or capable of, determination.[69]

47. The findings of fact as to Ms N's state of mind made for the limited purposes of the case stated did not cause the questions to "*arise*". They remained hypothetical, in the sense that the findings ultimately made at any trial could depart from the findings made for the limited purpose of the case stated. Further, the questions reserved on the case
20 stated were divorced from an attempt to administer the law. The findings of fact for the purposes of the case stated were findings as to Ms N's state of mind without any (even limited) findings of fact linking Ms N's conduct and purpose to the conduct and purpose of the accused. By contrast to *Mellifont*, there had in the present case been no ruling by the primary Judge to which the reserved questions could refer.

48. The questions originally reserved by the primary Judge thus called for an advisory opinion on hypothetical facts, contrary in particular to the principles articulated in *Bass* and *Nicholas*.[70]

49. The majority of the Court of Appeal accepted the submissions of the accused that the questions reserved by the primary Judge were inappropriate to answer,[71] but considered

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[67] (2001) 109 FCR 405.

[68] *Harts Australia Ltd v Commissioner of Taxation* (2001) 109 FCR 405 at 414 [24] per Merkel J (with whom Lee and Finn JJ agreed at 406 [1]).

[69] See *Re Judiciary and Navigation Acts*, quoted in paragraph 30 above ("*immediate right, duty or liability to be established*"); and *Re McBain* per Hayne J, quoted in paragraph 32 above ("*The 'controversy' must be real and immediate*").

[70] See paragraphs 29 and 35 above. See also paragraphs 33, 43 and 44 above. For the same reasons, it is submitted, with respect, that the reasons of the Chief Justice at CA [60]-[140] were not correct.

[71] See CA at [290]-[303].

that it was possible to state a different question, which they considered to be a "*pure question of law capable of being answered without reference to disputed facts*".[72] The reasoning of the majority may relevantly be summarised as follows:

(a) A finding of fact for the limited purposes of a case stated is no more than an assumption even if it appears to be firmly grounded in evidence and an answer to a case stated which depends on an assumption as to a party's state of mind is no more than an advisory opinion.[73]

(b) In a criminal proceeding in which the facts are disputed, it cannot be appropriate to employ the case stated procedure for the purposes of obtaining an advisory opinion.[74]

(c) The conclusions of the primary Judge, that the introduction of s 302 of the *Criminal Procedure Act* had wrought radical changes to criminal procedure affording such greater flexibility as to permit findings of fact to be made for the limited purposes of a reference, cannot be accepted in the broad terms in which they were stated.[75]

(d) The inherent limitations of the case stated procedure are plainly established by authority and were well understood at the time of enactment of the *Criminal Procedure Act*.[76]

(e) There is no reason to suppose that Parliament intended by unstated and unheralded implication to infuse the case stated procedure with features radically different to those which have long been understood.[77]

(f) So to conclude does not deny s 302 of the *Criminal Procedure Act* of utility. It remains capable of application where facts are established or agreed.[78]

(g) Section 302 also has work to do in a case where a question of law is capable of resolution without reference to disputed facts.[79]

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[72] CA at [300]. See also CA at [299], [304]-[306], [335]-[336].

[73] CA at [292] per Nettle and Hansen JJA, citing *R v Rigby* (1956) 100 CLR 146; *Industrial Equity Ltd v Commissioner for Corporate Affairs* [1990] VR 780; *Garlick*; and *Assange* at 254 per Hayne JA.

[74] CA at [292] per Nettle and Hansen JJA, citing *Bass*.

[75] CA at [293]-[295] per Nettle and Hansen JJA. As their Honours noted at [295], the only essential respects in which the case stated scheme provided in the *Criminal Procedure Act* departs from the scheme under the previous s 446(2) of the *Crimes Act 1958* (Vic) are that the new scheme enables the Crown or the court of its own motion (as well as an accused) to move to have a case stated and that it removes the right of an accused to apply to have a case stated following conviction.

[76] CA at [297] per Nettle and Hansen JJA.

[77] CA at [298] per Nettle and Hansen JJA.

[78] CA at [299] per Nettle and Hansen JJA.

(h) The question of whether words used in legislation have a legal signification and, if so, the determination of that legal meaning, is not attended by the difficulties identified in *Assange* because it is a "*pure question of law*".[80]

50. The elements of the reasoning summarised in subparagraphs 49(a) to 49(f) above were correct.[81]

51. The element summarised in subparagraph 49(g) above may in some circumstances be correct but requires qualification or at least elaboration. In support of their approach, their Honours apparently relied[82] upon the dictum in *Bass* at 358 [52] that "*[s]ome questions of law can be decided without any reference to the facts*". But that dictum should not have been interpreted as a general statement to the effect that any question of law may be decided on a case stated without reference to facts agreed or determined. It was of course qualified in its terms ("*some questions of law*"). Moreover, it was immediately preceded by the following caution:[83]

> *It cannot be doubted that in many cases the formulation of specific questions to be tried separately from and in advance of other issues will assist in the more efficient resolution of the matters in issue. However, that will be so only if the questions are capable of final answer and are capable of being answered in accordance with the judicial process.*

52. The critical error in the reasoning of the majority, with respect, is manifest in the final element (summarised in subparagraph 49(h) above). Plainly enough, not all questions of law are capable of being answered in accordance with the judicial process, particularly where the court is exercising federal jurisdiction. The questions in *Re Judiciary and Navigation Acts* and in *DPP v B* might be described as questions of law. That did not obviate the risk of them being hypothetical, abstract and divorced from facts and from an attempt to administer the law. To the contrary, generic or abstract questions as to the meaning or validity of a statutory provision are particularly divorced and cannot be answered in an exercise of judicial power conferred by or under Ch III.[84] It was the generality of the questions referred in *DPP v B* that was symptomatic of the "*deep-seated problem*".[85]

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[79] Ibid, citing *Bass* at 358 [52].

[80] CA at [300], [304]-[305] per Nettle and Hansen JJA.

[81] However, to the element of reasoning by the majority summarised in subparagraph 49(e) above, it might be added that it is doubtful that Parliament could validly have infused the case stated procedure with such features, at least for the purposes of the federal jurisdiction, even if it had so intended.

[82] See CA at [299], fn 231.

[83] *Bass* at 357-358 [51] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[84] See *Re McBain* at 389 [4] per Gleeson CJ, extracted in paragraph 31 above. See also *Garlick*, cited in paragraph 42 above.

[85] *DPP v B* at 576 [11]-[12] per Gaudron, Gummow and Hayne JJ, reproduced in paragraph 34 above.

53. The same point was made in *Assange*. The generality of the question—which asked, in effect, what a particular section of a Commonwealth Act meant—led the Court of Appeal to conclude that the question was not one that "*arises*" but rather one that asked for "*an advisory opinion of more or less general application*".[86]

54. The restated question in the present case suffers from precisely the same vice. It asked, in effect—what is the meaning of s 1041A of the *Corporations Act*? It was a general or abstract question of law, divorced from relevant facts relating it to the accused.[87] It was inconsistent with the statement in *Assange* that "*a question which is, in effect, 'What does a particular section of the Commonwealth Crimes Act mean?' is not a question that arises on the trial of the accused*".[88] The particular question, whether the relevant section applies to facts that may be admitted or proved in evidence, will arise only once the facts have first been identified.[89] In circumstances where the particular facts were not yet known, the restated question sought no more than an advisory opinion of more or less general application[90] and was not a question that had *arisen* before or during the trial of the accused within the meaning of ss 302 and 305 of the *Criminal Procedure Act*.

55. The perils of determining a difficult question of statutory construction in the absence of any facts[91] are evident on the face of the majority judgment. In the absence of a factual context, it was not possible to test the operation and consequences of competing constructions.[92] Rather than deciding that a particular set of facts falls within, or outside, the terms of a provision, the majority provided an interpretation of a statutory provision capable of application in future cases generally. This approach runs the risk of deciding more than necessary for the purposes of the particular case, and of overlooking possible pitfalls with the chosen construction. As Professor Zines has noted, judicial reasoning "*works best in concrete situations. In the common law and in the areas of equity and statutory interpretation, the rules and principles evolved by the courts have been rooted in the facts of particular cases. It is the facts that bring to light*

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[86] *Assange* at 254-255 per Hayne JA, extracted in paragraph 40 above. See also paragraph 41 above.

[87] Cf. *Re McBain* at 389 [5] per Gleeson CJ, quoted in paragraph 31 above.

[88] See *Assange* at 254 per Hayne JA, Vincent and Coldrey AJJA agreeing, quoted in paragraph 40 above.

[89] See *Assange* at 254 per Hayne JA, quoted in paragraph 40 above. Identified facts in this context include facts which are admitted or which have been the subject of evidence open to be accepted by the jury – but not merely facts alleged by the prosecution or assumed facts, cf. CA at [71]-[75] per Warren CJ.

[90] See *Assange* at 254 per Hayne JA, quoted in paragraph 40 above.

[91] The restated question was answered by the majority in the Court of Appeal without reference to any facts. Although the 'facts' set out in Annexure B to the judgment of the primary Judge (including as to disputed matters) remained in place following the restatement of the question, it is apparent from their judgment that the majority did not have regard to any facts in answering the restated question: see CA at [300], [304], [335]-[336].

[92] The operation and consequences of competing constructions in a particular case are relevant to consider according to the approach to statutory interpretation described in *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297 at 320-321 per Mason and Wilson JJ and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 per McHugh, Gummow, Kirby and Hayne JJ.

the issues, the possibilities open to the court, the conflicting interests or principles involved, the need for qualification or limitation of principles earlier enunciated and, generally, the matters that need to be taken into account in elucidating and applying a broad statutory standard".[93]

56. These problems are accentuated in a case, such as the present, where it is the meaning of a penal statute that is raised on a case stated.[94]

57. In the absence of relevant facts linking the question to the accused, the restated question was abstract and advisory. It was not capable of being answered in an exercise of judicial power conferred by or under Ch III.

Special leave to cross-appeal

58. The issue raised by the notice of cross-appeal (see paragraph 2 above) is one of general public importance[95] concerning the circumstances in which an appellate court may answer questions reserved by way of case stated in a criminal trial in federal jurisdiction. Accordingly, a grant of special leave to cross-appeal is appropriate.

Costs

59. In the event that the cross-appeal is allowed, the accused seeks an order for costs both in this Court and below. Although this is a criminal proceeding, the case is exceptional because the Court of Appeal did not have jurisdiction to entertain the reserved questions or the restated question.[96] Both in the Trial Division and in the Court of Appeal, the accused opposed the reservation of questions on a case stated, on the basis that this would amount to seeking an advisory opinion, noting that the court was exercising federal jurisdiction.[97]

Part VII – Applicable provisions

60. See the annexure hereto.

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[93] L Zines, *The High Court and the Constitution*, 5th ed (2008) at pp 257-258. See also S Crawshaw, 'The High Court of Australia and Advisory Opinions' (1977) 51 *Australian Law Journal* 112 at 121-122.

[94] See *Assange* at 254 per Hayne JA, quoted in paragraph 40 above.

[95] See *Judiciary Act*, s 35A.

[96] Cf. *McAlister v The Queen* (1990) 169 CLR 324 at 330; *R v Whitworth* (1988) 164 CLR 500 at 501.

[97] See Outline of Submissions dated 21 July 2011 at [15]-[58]; Supplementary Outline of Submissions dated 12 August 2011 at [16]-[17]; Further Supplementary Outline of Submissions dated 31 August 2011 at [3]-[6]; Applicant's Summary of Contentions dated 17 November 2011 at [10]-[45].

Part VIII – Orders

61. The orders sought by the accused on the notice of cross-appeal are as follows:

(a) Special leave granted to the respondent to cross-appeal from the whole of the judgment of the Court of Appeal of the Supreme Court of Victoria given on 14 and 28 June 2012.

(b) Cross-appeal allowed.

(c) Set aside orders (1) and (2) of the Court of Appeal of the Supreme Court of Victoria made on 14 June 2012 and in lieu thereof order that:

> *The questions stated for decision on 21 October 2011 are answered as follows:*
>
> *Question 1: Inappropriate to answer.*
>
> *Question 2: Inappropriate to answer.*
>
> *Question 3: Inappropriate to answer.*

(d) Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 28 June 2012 (set out in the notification of result of appeal or application dated 2 July 2012) and in lieu thereof order that:

> *The amended question stated for decision on 20 June 2012 is answered as follows:*
>
> *Question 1: Inappropriate to answer.*

(e) The applicant to pay the costs of the respondent in this Court and in the Supreme Court of Victoria.

Part IX – Estimate

62. The estimate of the number of hours required for the presentation of the accused's argument on the notice of cross-appeal is two hours.

Dated: 25 January 2013

M. K. Moshinsky SC
(03) 9225 7328
m.moshinsky@vicbar.com.au

M. I. Borsky
(03) 9225 8737
mborsky@vicbar.com.au

ANNEXURE – APPLICABLE PROVISIONS

Sections 302 and 305 of the *Criminal Procedure Act 2009* (Vic) are relevant to the argument on the notice of cross-appeal. They appear below in the form which they took at the time of the hearing and decision below. At the date of these submissions, they remain in force, in materially the same form.[98]

302 Reservation of question of law

(1) This section applies to a proceeding in the County Court or the Trial Division of the Supreme Court for the prosecution of an indictable offence.

(2) In a proceeding referred to in subsection (1), if a question of law arises before or during the trial, the court may reserve the question for determination by the Court of Appeal if the court is satisfied that it is in the interests of justice to do so, having regard to—

(a) the extent of any disruption or delay to the trial process that may arise if the question of law is reserved; and

(b) whether the determination of the question of law may—

(i) render the trial unnecessary; or

(ii) substantially reduce the time required for the trial; or

(iii) resolve a novel question of law that is necessary for the proper conduct of the trial; or

(iv) reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial.

(3) The court must not reserve a question of law after the trial has commenced, unless the reasons for doing so clearly outweigh any disruption to the trial.

305 Case to be stated if question of law reserved

(1) If a court reserves a question of law under section 302 or 304, it must state a case, setting out the question and the circumstances in which the question has arisen.

(2) The court must sign the case stated and transmit it within a reasonable time to the Court of Appeal.

(3) The Court of Appeal may return a case stated transmitted to it under subsection (2) for amendment and the court that stated the case must amend it as required.

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[98] Subsection 305(1) was amended by s 20(2) of the *Criminal Procedure Amendment Act 2012* (Vic). The amendment, which took effect from 5 September 2012, consisted only of the insertion of ", 302A" after the words "section 302".

Sub-sections (1) and (2) of section 68 of the *Judiciary Act 1903* (Cth) are also relevant. They appear below in their current form, which is the same as the form they took at the time of the hearing and decision below.

> ***68 Jurisdiction of State and Territory courts in criminal cases***
>
> *(1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:*
> *(a) their summary conviction; and*
> *(b) their examination and commitment for trial on indictment; and*
> *(c) their trial and conviction on indictment; and*
> *(d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;*
> *and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.*
>
> *(2) The several Courts of a State or Territory exercising jurisdiction with respect to:*
> *(a) the summary conviction; or*
> *(b) the examination and commitment for trial on indictment; or*
> *(c) the trial and conviction on indictment;*
> *of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.*

Section 1041A of the *Corporations Act 2001* (Cth) at the times of the alleged offences provided (and continues to provide) as follows:

> ***1041A Market manipulation***
>
> *A person must not take part in, or carry out (whether directly or indirectly and whether in this jurisdiction or elsewhere):*
> *(a) a transaction that has or is likely to have; or*
> *(b) 2 or more transactions that have or are likely to have;*
> *the effect of:*
> *(c) creating an artificial price for trading in financial products on a financial market operated in this jurisdiction; or*
> *(d) maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on a financial market operated in this jurisdiction.*