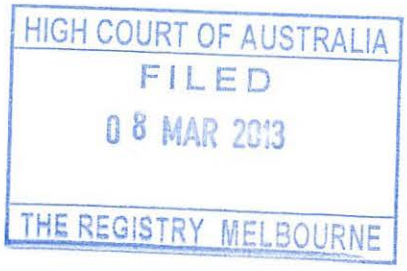
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M73 of 2012

BETWEEN



Director of Public Prosecutions (Cth)

Applicant

JM

Respondent

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RESPONDENT'S REPLY ON NOTICE OF CROSS-APPEAL

Certification

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

Reply to Crown

2. The applicant (***the Crown***) in its submissions on the cross-appeal (***Crown Submissions***) concedes the correctness of much of the argument advanced by the accused on his notice of cross-appeal. Significantly, the Crown accepts that:

   (a) A federal law will not pick up a State law regulating the procedure of a court if the State law cannot be validly applied in the exercise of federal judicial power (Crown
20 Submissions [8(3)]).

   (b) A question could not be reserved under s 302 of the *Criminal Procedure Act 2009* (Vic) (as applied by federal law) if it did not give rise to a "matter" (Crown Submissions [7(1)], [20]).

   (c) Jurisdiction under s 302 is not conferred to permit courts to offer general advisory opinions on hypothetical questions (Crown Submissions [13]; see also [10]).

   (d) A case may be described as hypothetical where the dispute is divorced from the facts (Crown Submissions [26(2)]). The main concern with this sort of hypothetical case is that there is no certainty that an answer to a general question will settle the dispute finally or lead to the settling of the dispute (Crown Submissions [27]).

30 3. The accused agrees with the Crown that ss 1338B and 1338C of the *Corporations Act 2001* (Cth) rather than s 68 of the *Judiciary Act 1903* (Cth) are the relevant provisions: see Crown Submissions [8(2)] (cf. the accused's submissions on the cross-appeal (***Accused's Submissions***) at [24]).

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4. The critical element in the Crown's argument in opposition to the cross-appeal[1] appears to be that the restated[2] question determined by the majority of the Court of Appeal was not abstract or hypothetical in any impermissible sense because it "*emerge[s] from a concrete factual background*". In that context, the Crown relies on the background facts that the accused had been charged with, and pleaded not guilty to, offences against s 1041A of the *Corporations Act* and that it was apparent that the parties took different approaches to the interpretation of that section (Crown Submissions [34]-[37]).[3]

5. That "*factual background*" is insufficient to cure the vice in the restated question and its determination by the majority of the Court of Appeal. The question was of the most generic or abstract kind.[4] The question, and the answer to it given by the majority, was divorced from relevant facts related to the accused. Indeed the reasoning of the majority in answer to the question (at [307]-[335]) made no reference to relevant facts related to the accused[5] (or to any other relevant facts). The Court of Appeal did not have a factual context in which to test competing constructions and its answer was not limited to determining whether, on certain facts, there is (or is not) an "artificial price". Where a dispute is not attached to specific facts and the question is only whether a party is generally entitled to act in a certain way, any declaration will in effect be a mere advisory opinion.[6]

6. The Crown contends that the trial could not proceed until this difference of view was resolved (Crown Submissions [38]). It is not clear why this is so. The Crown contends that evidentiary rulings could not be made – but it is not clear why such a problem would arise. If necessary, the trial judge could form a view as to the meaning of s 1041A for the purposes of ruling on an objection to admissibility. Any such ruling would be made in a factual context by reference to the evidence. Insofar as the Crown's implicit submission is that it needs to know the meaning of the section to know how to

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1 Other elements in the Crown's argument, in respect of which the accused would also join issue, do not seem clearly to be pressed by the Crown as being necessary to decide. For example, at [14]-[15] the Crown says that it is necessary to have regard to the particular statutory context, apparently suggesting that the statute might validly disclose a contrary intention somehow bringing it outside of the constitutional constraints of a matter and of advisory opinion principles. At least in the federal jurisdiction, which is presently relevant, that would not be possible (cf. Attorney-General [26(c)]). Likewise, the submission at Crown [21] (and similarly at [7(2)] and [33]) that "*there is a residual area of discretion in which a range of different exercises of discretion is permissible, before one reaches the jurisdictional requirement of a 'matter'*", if pressed, should be rejected. It is wrong to conceptualise the constitutional question of a "*matter*" as a discretionary question governed by the principles in *House v The King* (1936) 55 CLR 499 at 505 (cf. footnote 20 to Crown Submissions). The identification of a "*matter*" is not a discretionary question; it is a pre-requisite to the exercise of federal jurisdiction (as Crown [19(2)] appears to accept). There can be no "*matter*" 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: *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 458-459 [242].

2 The Crown is not seeking to maintain the original Question 1 reserved by Weinberg JA: Crown Submissions [6].

3 The Crown at [37] refers to Weinberg JA as the "*trial judge*". It should be noted that Weinberg JA had not (and has not) been assigned the task of being the trial judge (see T5.3-5, 18.14-16 of the transcript of the hearing before Weinberg JA on 2 September 2011).

4 Cf. *Director of Public Prosecutions, South Australia v B* (1998) 194 CLR 566 (***DPP v B***) at 576 [11]-[12], 580 [25]; *R v Assange* [1997] 2 VR 247 (***Assange***) at 254-255; and *R v Garlick* [2006] VSCA 127 (***Garlick***).

5 The reference at [321] of the majority's judgment to the accused's contention as to the proper construction of s 1041A is not a reference to a relevant fact related to the accused. The parties' submissions are not ultimate facts – this appears to be accepted in Crown Submissions footnote 54.

6 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 (***Bass***) at 356-357 [48], citing Zamir & Woolf, *The Declaratory Judgment*, 2nd Ed (1993) at p 132. See similarly 4th Ed (2011) at p 156 [4-71].

prosecute the case, it must have formed a view about what the offence entailed before it charged the accused.

7. The Crown contends that the restated question was much narrower than "what does s 1041A of the *Corporations Act* mean?" (Crown Submissions [39]). But in truth there is no difference. As the answer given by the Court of Appeal demonstrates, the question goes to the meaning and scope of the offence.

8. The assertion by the Crown (at [39]) that "*[t]here is no comparison with the questions considered in*" *DPP v B* and in *Garlick* does not withstand scrutiny. The questions considered in *DPP v B* were questions of law as to the existence and scope of a specific power of a trial judge. Gaudron, Gummow and Hayne JJ at 576 [11] observed that the questions were cast in very general terms apparently unrelated to any facts. Their Honours noted that the generality of the questions was not a defect in drafting (rather, "*a symptom of a more deep-seated problem*") and was a strong indication that the questions did not "*arise*" at any trial. The questions considered in *Garlick* were questions of law as to the elements necessary to be proven to establish an offence against a Victorian Act. They were in many respects more detailed and specific than the restated question in this case. Nevertheless, the Court of Appeal described them as generic questions not tied to ultimate facts of the case. Citing *DPP v B* and general advisory opinion principles (at [30]), the Court of Appeal refused to answer them.

9. The Crown at [17] and [39] relies on *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 (***Mellifont***) and *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232. But the questions of law in those cases were referred or stated in a concrete factual context, which is far removed from the present case. Moreover, as was said in *Mellifont* (at 303), the answers must not be given in circumstances "*divorced from an attempt to administer the law as stated by the answers*". An abstract question of law, asked without reference to any facts, is so divorced. See *DPP v B* at 576 [11]-[12]. See, further, Accused's Submissions at [37].

10. The Crown (at [41]) adopts the Court of Appeal majority's terminology of "*pure question of law*" (CA at [300], [303], [304]). This expression does not appear to have been used in any previous cases concerning advisory opinions. The cases upon which the majority below relied in this section of their judgment[7] were cases about whether particular questions were questions of law or fact. Those cases did not consider whether a question which *was* a question of law could properly be answered in the absence of any facts.

11. The basis upon which the Crown seeks to distinguish *Assange* (Crown Submissions [43]) – and upon which the majority below distinguished *Assange* (at [305]) – is too narrow. A substantial basis for the Court of Appeal's decision in *Assange* was that the generality of the question meant that the question was not one that "*arises*" but rather one that asked for "*an advisory opinion of more or less general application*".[8]

12. *Mansfield v The Queen* (2012) 293 ALR 1 is not a "*closer point of comparison*" (cf. Crown Submissions [44]). The issue in that case was not abstract or advisory as there had been a no case submission made, and ruled upon, at the close of the prosecution case. The prosecution had led evidence which showed the falsity of a statement

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7 CA at [304]; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389; *New South Wales Associated Blue-Metal Quarries Ltd v Federal Commissioner of Taxation* (1956) 94 CLR 509.

8 *Assange* at 254-255.

relevant to the insider trading alleged, whereas in the present case no evidence has yet been led.

Reply to Attorney-General for the State of Victoria intervening

13. The primary argument of the Attorney-General appears to be that the questions framed by the majority in the Court of Appeal were properly asked and answered "*because ... the questions involved no reference to facts not agreed or determined*" (Attorney-General Submissions [10]). But this highlights the vice in the majority's approach. The questions were dealt with in a factual vacuum. The submissions of the Attorney-General do not explain how it is said that the particular questions posed by the Court of Appeal majority could be answered without reference to any facts.

14. The cases referred to by the Attorney-General in footnote 6 do not assist his contentions. Apart from the differences in statutory language, the Full Court of the Supreme Court of Victoria in *Hodgson v Victoria* [1995] 2 VR 292 at 296-297 refused to answer referred questions because of the absence of facts.

15. The Attorney-General (at [15]) refers to the judgment of Isaacs J in *Australian Commonwealth Shipping Board v Federated Seamen's Union of Australasia* (1925) 36 CLR 442. That judgment is squarely against the position adopted by the Attorney-General (and the Crown) on the cross-appeal. The Court in that case declined to answer several questions on a case stated because there was nothing in the case stated to show the question had arisen in the proceeding below. Isaacs J emphasised four principles which are apposite to the present case. First, his Honour cautioned against "*expressions of legal opinion, before the person entrusted with confidence and responsibility has made up his mind as to the facts*" (at 449). Second, his Honour said that stating a case involves stating ultimate facts "*requiring only the certainty of some point of law applied to those facts to determine either the whole case or some particular stage of it*" (at 450). Third, that "*[r]emote or merely possible relation of the question of law to the facts is not enough to make the question 'arise' in a legal sense*" (at 450). Fourth, that "*[i]t is abundantly established by cases of the highest authority that a Court does not give judgments on hypothetical facts*" (at 451).

16. The Attorney-General (at [17]) seeks to introduce facts relating to a directions hearing before Coghlan J. The references to the transcript of that hearing are selective and do not convey the fact that the accused submitted that hypothetical or advisory questions as to the meaning of s 1041A, not based on agreed facts, were incapable of determination.[9] The difference of opinion between the Crown and the accused did not constitute a real or immediate controversy requiring, or capable of, determination (see the Accused's Submissions, footnote 69 and [32]).

17. The question of whether a person includes a corporation (see *Jacobson v Ross* [1995] 1 VR 337, referred to by the Attorney-General at [23]) is very different to the question in this case. It is a narrow question of construction of one word, rather than a question (as in the present case) which in effect requires determination of the scope and meaning of the whole provision. The Attorney-General does not explain how this restated question is comparable to the question referred to in *Jacobson v Ross*.

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9 See T12.13-15.19 of the transcript on the hearing before Coghlan J (2 May 2011). The accused also made that submission at other interlocutory hearings: see the accused's written submissions referred to in the Accused's Submissions, footnote 97.

18. The assertion (Attorney-General Submissions [24]) that the questions posed by the majority "*do not seek a 'dissertation' upon the meaning of 'artificial price' without reference to any facts*" is incorrect. No reasoning is provided as to why this is not appropriately described as a dissertation. As to the last part, it is clear that the majority *did* ask and answer the questions without reference to any facts.[10] The further statement that the restated questions do not seek a "*mere judicial exegesis unrelated to any facts*" is subject to the same criticisms. The statement (Attorney-General Submissions [24]) that the restated questions were "*asked as part of a stated case which involved extensive facts 'found or agreed either finally or provisionally'*" is factually inaccurate if it is intended to describe the majority's approach. To the contrary, the majority eschewed reliance upon the facts found (on a limited or provisional basis) by the primary judge.

19. The Attorney-General's alternative submission (at [26]-[30]) that s 302 permits questions based on assumed facts should be rejected.[11] The vice of the approach adopted by the primary judge, supported by Warren CJ in the Court of Appeal, is that answers to questions based on assumed facts are necessarily hypothetical. Such a question essentially asks whether there *would* be an artificial price *if* certain facts *were* ultimately found. As the majority below recognised, that is impermissible.[12]

20. The Attorney-General contends (at [26(c)] that the scheme of the *Criminal Procedure Act* operates more widely than its predecessors, to permit the resolution of questions of law on disputed facts. That proposition was rightly rejected by the majority below.[13]

21. The references by the Attorney-General (at [27], [28]) to demurrers are inapposite. This Court in *Bass* distinguished the demurrer procedure from an advisory opinion, on the basis that the former involves the assumption of the truth of a particular set of identified (pleaded) facts.[14] Nor does the reference to *Williams v O'Keefe* [1910] AC 186 assist the Attorney-General. The Privy Council in that case (at 190) warned of the undesirability of an appellate court expressing opinion upon an abstract point of law without any knowledge of the actual facts, notwithstanding a desire to help the parties to an end of their disputes.

22. As to *Mellifont* (relied on by the Attorney-General at [35]), see paragraph 9 above.

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10 See the Accused's Submissions, footnote 91.

11 There is a tension between the Attorney-General's submission that it is not necessary to consider whether the original questions ought to have been reserved by the primary judge (Attorney-General Submissions [9]) and the submission (albeit in the alternative) that Warren CJ was correct to hold that s 302 enables the reserving and answering of questions by reference to assumed facts (Attorney-General Submissions [10], [26]-[30]). They raise essentially the same issue.

12 See the Accused's Submissions at [47]-[48], CA [290]-[303].

13 See the Accused's Submissions at [49(c), (d), (e)], CA [293]-[295], [297], [298].

14 At 357 [50] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.