

IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY

No. M92 of 2014

BETWEEN:

COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE

~~Applicant~~ *Appellant*  
and

QING ZHAO  
First Respondent  
and

XING JIN  
Second Respondent

RESPONDENTS' SUBMISSIONS



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Filed on behalf of the respondents

7 November 2014

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## Part I: Internet Publication

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

## Part II: The Issues

2. The question on appeal is whether the Court below<sup>1</sup> applied the correct test for a stay of the parties' respective forfeiture and exclusion applications<sup>2</sup> (together as the "Forfeiture Proceedings") under the *Proceeds of Crime Act 2002* (Cth) (the Act) having regard to:
  - a) the purpose and effect of the Act and in particular s 319;
  - 10 b) the decisions of this Court in *X7 v Australian Crime Commission* (2013) 248 CLR 92 (*X7*), *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082; 302 ALR 363 (*Lee (No 1)*) and *Lee v The Queen* (2014) 88 ALJR 656; 308 ALR 252 (*Lee (No 2)*);
  - c) the primary judge's decision refusing the stay; and
  - d) the particular facts of this matter.
3. The above question is ultimately directed to whether there is a real risk that Mr Jin's right to a fair trial in the criminal proceedings will be interfered with or compromised without a stay of the Forfeiture Proceedings.
4. The issues posed by the appellant make assumptions as to the relevance of  
20 distinctions the appellant draws between compulsory examinations and what it terms as 'voluntary' and '*in rem*' civil forfeiture proceedings. These distinctions do not assist in answering the questions in this appeal.

## Part III: Section 78B<sup>2</sup> of *Judiciary Act 1903* (Cth)

5. No notice pursuant to section 78B<sup>2</sup> of *Judiciary Act 1903* (Cth) is required.

## PART IV: Citation

6. The appellant's statement of citation is accepted.

<sup>1</sup> Court of Appeal of the Supreme Court of Victoria (Nettle, Tate and Beach JJA) judgment given 27 June

<sup>2</sup> The forfeiture application was made on 24 July 2013 pursuant to ss 49 and 59 of the Act. The respondents made applications on 24 September 2013 pursuant to s 31 and s 74 of the Act. Compensation is sought under s 78 of the Act in the event of forfeiture. Ms Zhao made application on 29 July 2013 to revoke the restraining order over the Donvale property pursuant to s 42 of the Act.

**PART V: The Facts**

7. Further to paragraphs 8 and 9 of the appellant's submissions it is noted that Mr Jin and his wife Ms Zhao live together with their young daughter at 90 Tunstall Road, Donvale, an eastern suburb of Melbourne. This is their family home.<sup>3</sup> It is one of the restrained assets<sup>4</sup> and is subject to a forfeiture application brought by the appellant.<sup>5</sup>

**Part VI: Statement in answer <sup>to</sup> of the Appellant**

8. When their stay applications were initially refused the respondents faced the dilemma of having to elect between:
- 10 a) conceding the forfeiture of their family home so as to preserve Mr Jin's right to a fair trial in his criminal proceedings; or
- b) asserting their interest in their Donvale and Southbank properties by giving evidence on oath and submitting to cross examination in the Forfeiture Proceedings with a consequential and very real risk of compromise to Mr Jin's defence in the criminal trial.
9. Depending upon their decision the respondents faced losing either proprietary or accusatorial rights. The fact that the respondents *must* give evidence in the Forfeiture Proceedings to defend their home necessarily brings into play considerations as to the practical effect of such evidence on the accusatorial process relevant to Mr Jin's subsequent criminal trial.
- 20 10. The appellant's distinction between compulsory examination proceedings and *in rem* civil forfeiture proceedings is premised upon its contention that the respondents are "afforded the opportunity"<sup>6</sup> to make a "voluntary decision to lead evidence in a civil trial".<sup>7</sup> This analysis ignores the fact that the respondents' family home and major assets have been restrained and are at risk of forfeiture. It ignores what is at stake for the respondents and fails to address the principal issue referred to above. It also

<sup>3</sup> Pages 23 to 25 of the Appeal Book and affidavit of Xing Jin sworn 22 November 2013 at [1], [6], [9] and [10].

<sup>4</sup> On 2 July 2013 the appellant obtained orders from the County Court of Victoria pursuant to s 19 of the Act restraining all of the respondents' major assets including their Donvale home and an inner city apartment in Southbank owned by Mr Jin.

<sup>5</sup> Application was made on 24 July 2013 pursuant to ss 49 and 59 of the Act.

<sup>6</sup> [31] of the appellant's submissions.

<sup>7</sup> [16] of the appellant's submissions.

ignores the fact that the respondents are not entitled under s 24(2)(ca) of the Act to have recourse to the restrained assets to raise funds to pay the legal costs of their forfeiture proceedings and this appeal.

11. The appellant's persistent characterisation of the Forfeiture Proceedings as 'voluntary'<sup>8</sup> and '*in rem*' is an unhelpful distraction. These descriptions do not inform the salient issue as to whether there is any real risk that Mr Jin will suffer prejudice in his criminal trial in circumstances where he and his wife are required to give evidence to defend their family home in civil proceedings which substantially cover the same subject matter as Mr Jin's criminal proceedings.
- 10 12. The multiple references to *in rem*<sup>9</sup> forfeiture proceedings in the appellant's submissions are also not useful because the relevant evidence required to oppose forfeiture of the respondents' assets is necessarily personal, going to the conduct of both respondents and the alleged illegal activity of Mr Jin in the criminal proceedings which are by nature *in personam*.
13. In *Lee (No 1)* the respondent NSW Crime Commission and interveners acknowledged that the accusatorial system of criminal justice "forms an important backdrop"<sup>10</sup> to the *Criminal Assets Recovery Act* 1990 (NSW) (the **CAR Act**). The appellant and the intervener make no such acknowledgment with regard to the Act despite the fact that the objects and character of both statutes are not materially
- 20 different. Instead the appellant contends in over twenty paragraphs of submissions that the Court of Appeal failed to have regard to the history of *in rem* proceedings. The appellant argues that "statutory civil forfeiture trials...have their own stream" and are separate and apart from the principles relevant to criminal justice. This reasoning ignores the forensic disadvantage placed on the respondents by having to make the invidious decision referred to above. The granting of the stay removed these concerns.
14. The bald assertion that the Forfeiture Proceedings have no bearing on Mr Jin's criminal proceedings by reference to revisionist legal history is strategic and pernicious. The Act cannot be read as suggesting that a stay of the Forfeiture

<sup>8</sup> [2], [16], [[25], [29] and [31] of the appellant's submissions.

<sup>9</sup> [2], [51(d)], [55], [57], [58], [70] and [77(b)] of the appellant's submissions.

<sup>10</sup> *Lee (No 1)* at [124] per Crennan J.

Proceedings should be refused without regard to the risk of interference to Mr Jin's criminal proceedings. The accusatorial system of criminal justice is just as relevant to the present proceedings as it is to compulsory examination procedures and the fact that the respondents are not subject to any compulsory examination order has no relevance to the issues on appeal.

15. By reason of the above the facts of this matter are not distinguishable from those in *X7, Lee (No. 1)* or *Lee (No. 2)* and it remained open for the Court of Appeal to draw inferences from these cases relevant to the Forfeiture Proceedings.<sup>11</sup>

***Overlap of subject matter between proceedings***

- 10 16. The evidence given in civil forfeiture proceedings will to some extent “always encompass information about the criminal activity alleged.”<sup>12</sup> Where the subject matter of civil confiscation proceedings touches upon pending parallel criminal proceedings the accused will suffer a forensic disadvantage by having to give evidence prior to the criminal trial.<sup>13</sup> Whether such disadvantage will result in a real risk of interference with criminal justice is a matter for the Court to decide in exercising its discretion whether or not to grant a stay. The Court must have regard to judicial process and the adequacy of various powers and protective mechanisms in the exercise of its discretion.
- 20 17. In *Lee (No. 1)* it was noted that the Court of Appeal took the view that “notwithstanding a risk of potential interference with pending criminal proceedings”<sup>14</sup> there was still “not a sufficient basis for declining to make an order [for compulsory examination] because any real risk of interference...could be managed by the Supreme Court, in which examination would take place”.<sup>15</sup>
18. In *Lee (No. 1)* the majority upheld the Court of Appeal's judgment. Gageler and Keane JJ noted as part of the majority judgment that the Court of Appeal's reasons “do not suggest that the CAR Act indicates a legislative intention that the Supreme Court should allow *any proceedings under the Act to proceed* [emphasis added] if the circumstances of the case, other than the mere pendency of criminal proceedings

<sup>11</sup> [25] and [28] of the appellant's submissions.

<sup>12</sup> *Lee (No 1)* at [328] per Gageler and Keane JJ.

<sup>13</sup> *Lee (No 2)* at [54] per French CJ and *X7* at [124] per Hayne and Bell JJ.

<sup>14</sup> *Lee (No 1)* at [120] per Crennan J.

<sup>15</sup> *Ibid.*

against the examinee, were such as to reveal a real, as opposed to a speculative or theoretical, risk that the administration of justice would be adversely affected".<sup>16</sup>

19. The appellant disputed that the evidentiary subject matter of the Forfeiture Proceedings is substantially the same as in Mr Jin's criminal proceedings.<sup>17</sup> This line of argument made the existence of any overlap of subject a critical issue. In *Lee (No. 1)* this issue was not raised or contested.<sup>18</sup> Counsel for the Commissioner submitted that Mr Jin's Southbank property had been purchased "two years prior to the matters that are alleged in the charge"<sup>19</sup> and as such was not relevant to the criminal allegations. This submission was made contrary to the affidavit material<sup>20</sup> filed by the AFP. This material shows that Mr Jin's Southbank property (together with the respondents' Donvale home) is a focus of the criminal investigation against him. There is no basis for the appellant's contention that the case turned on "generalized assertions that there may be an overlap with the criminal trial"<sup>21</sup> of Mr Jin.

20. Mr Jin's affidavit sworn 22 November 2013<sup>22</sup> sets out his concern that his rights in the criminal proceeding will be prejudiced if the Forfeiture Proceedings are not stayed. This affidavit details matters of evidence in the Forfeiture Proceedings that are "directly relevant to the criminal charges"<sup>23</sup> made against Mr Jin.

21. The Court of Appeal held that the subject matter between the two proceedings was substantially similar. At the hearing of the appeal his Honour Nettle JA stated:

20 "... what is going to be said in the civil proceedings is pertinent to what will occur in the criminal proceedings... it follows as day follows night because

<sup>16</sup> *Lee (No 1)* at [337] per Gageler and Keane JJ.

<sup>17</sup> The appellant argued that Mr Jin's charges concern the handling of illegal cash receipts rather than the respondents' restrained property. See [10] of the Commissioner's outline of submissions dated 6 February "2013" (sic)

<sup>18</sup> *Lee (No 1)* at [87] per Crennan J.

<sup>19</sup> See page 126 of the Appeal Book: TS 41 lines 25-26.

<sup>20</sup> See pp42, 49 to 51 and 56 of the Appeal Book: [4], [26], [27] to [36] of the affidavit of Emily Nicholson of the AFP affirmed 1 July 2014 and filed in support of the application for the appellant's restraining orders, and [37] to [39] regarding the Donvale Property; and pp76 and 104 of the Court Book: the affidavit of Anna Duran sworn 6 February 2014 exhibiting the statement of facts forming part of the criminal brief at [133] and [135]. See also pp 23 to 28 of the Appeal Book: [21] to [22] of the affidavit of Xing Jin sworn 22 November 2013 in respect to the affidavit of Emily Nicholson of the AFP affirmed 1 July 2014.

<sup>21</sup> [16] of the appellant's submissions.

<sup>22</sup> See pp 23 to 28 of the Appeal Book.

<sup>23</sup> See p 28 of the Appeal Book: [23] of the Jin Affidavit

what is alleged is that these assets came out of the proceeds of the crimes with which the subjects are charged.”<sup>24</sup>

22. These comments are borne out in the Court of Appeal’s finding that in defending the Forfeiture Proceedings Mr Jin and Ms Zhao will be required to give evidence that is central to the allegations made against Mr Jin in the criminal proceedings. The finding that there was substantial overlap in subject matter between the proceedings was a necessary part of the Court’s analysis as to whether there was a “significant risk that justice would be interfered with”<sup>25</sup> taking into account *all* of the circumstances relevant to Mr Jin and his wife. As such this overlap of subject matter was not the sole consideration of the Court of Appeal in deciding to grant the stay.
23. The appellant contends that the Court of Appeal failed to have regard to other judicial or statutory mechanisms that it says were available to prevent prejudice to the respondents and to ensure the fair conduct of Mr Jin’s criminal trial. This contention implicitly raises questions as to the proper exercise of the Court’s discretion<sup>26</sup> to grant the stay. Such questions should be excluded from this Appeal by reason that the Notice of Appeal does not raise improper exercise of discretion as a ground of appeal.
24. The matter is resolved in any case. The Court of Appeal had regard to judicial process as part of the proper exercise of its discretion to grant the stay. As such it considered a number of ‘mechanisms’ that might be available to deal with the risk to the respondents including the operation of s 128 of the *Evidence Act* and the use of suppression orders.

### *Judicial process*

25. The respondents accept that the power to make forfeiture orders under s 49 of the Act must be exercised judicially.<sup>27</sup> Determining the nature and extent of any prejudice to an accused consequential to the giving of evidence in forfeiture proceedings is dependent upon a variety of factors including judicial process. It is as

<sup>24</sup> See p 126 of the Appeal Book: TS 41 lines 15-22 per Nettle JA.

<sup>25</sup> *Lee No 1* at [194] per Kiefel J.

<sup>26</sup> The County Court of Victoria’s discretion pursuant to s 49 of the *County Court Act 1958* (Vic) and s 30 of the *Supreme Court Act 1986* (Vic) by inclusion.

<sup>27</sup> *Lee (No 1)* at [141] per Crennan J.

much an “important feature”<sup>28</sup> of the Act as it was found to be in relation to the CAR Act in *Lee (No. 1)*.

26. Notwithstanding the fact that “judicial sensitivity”<sup>29</sup> can inform what if any protective orders should be made to protect evidence from being misused there remains an “underlying”<sup>30</sup> issue as to whether the accusatorial process is ultimately effected where an accused faced with criminal proceedings is required to give evidence whether before the Court or otherwise in proceedings dealing with the same material as the pending criminal matter. In such circumstances the Crown can “disseminate answers to such persons as it thinks appropriate.”<sup>31</sup> The practical  
10 consequence of the giving of such evidence gives the prosecution advantages which the rules of criminal procedure would otherwise deny.<sup>32</sup> This necessarily deprives the accused of forensic choices.
27. The Court must ask whether any interference with the accusatorial process is merely “anodyne” or whether it gives rise to a real risk of interference with the administration of justice.<sup>33</sup> The Court must decide at its discretion whether to order a stay having regard to the degree of interference.<sup>34</sup>
28. In *Lee (No. 1)* the majority accepted that the making of an examination order by the Court of Appeal pursuant to s 31D of the CAR Act was ultimately part of the discretion of the Court.<sup>35</sup> There was no appeal in that case in relation to the Court’s  
20 exercise of its discretion.<sup>36</sup>
29. In *Lee (No. 1)* the Court of Appeal had regard to the possibility of risk of potential interference with pending criminal proceedings but found that this was not a sufficient basis for declining to make the order on the basis that any real risk could be managed by the Supreme Court in which examination would take place.

<sup>28</sup> *Lee (No 1)* at [40] and [49] per French CJ.

<sup>29</sup> *Lee (No 1)* at [49] per French CJ

<sup>30</sup> *Ibid.*

<sup>31</sup> *Lee (No 1)* at [285] per Gageler and Keane JJ.

<sup>32</sup> *Lee (No 1)* at [322] per Gageler and Keane JJ and X7 at [36] per French CJ and Crennan J.

<sup>33</sup> *Lee (No 1)* at [324] per Gageler and Keane JJ.

<sup>34</sup> *Lee (No 1)* at [55] per French CJ.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Lee (No 1)* at [120] per Crennan J.

30. In the present matter the Court of Appeal was cognisant of the same principles but found that there was a real risk as opposed to any “speculative or theoretical risk”<sup>37</sup> that the administration of justice will be adversely affected without the stay.
31. Contrary to what is asserted by the appellant<sup>38</sup> the Court of Appeal gave lengthy consideration as to whether, apart from the stay order, there were any other judicial or statutory powers available to alleviate any real risk to the criminal trial. At the hearing before the Court of Appeal the best protection that Counsel for the appellant could offer were “Chinese walls”<sup>39</sup> between the prosecution wing of the AFP and its confiscation section.
- 10 32. Ultimately it is the Court’s duty to protect its own process. The Court of Appeal held that suppression orders and Chinese walls were insufficient having regard to the circumstances of this case, the principles and matters at stake and the decision and facts in *Lee (No. 2)*.

### ***Section 319***

33. The scope of s 319 of the Act is an additional consideration to whether there is any overlap of subject matter between the forfeiture proceedings and the criminal proceedings.<sup>40</sup>
34. Although s 319 of the Act has not itself been considered by this Court the decision in *Lee (No. 1)* offers sufficient guidance on the subject notwithstanding the fact that the case concerned an order for compulsory examination under s 31D of the CAR Act.<sup>41</sup> This authority together with this Court’s decisions in *EPA v Caltex*<sup>42</sup>, *X7* and *Lee (No. 2)*, provide detailed instruction as to why the granting of the stay in the present circumstances is appropriate.
- 20 35. Section 319 of the Act like s 63 of the CAR Act has a narrow operation. It is a clear statutory abrogation of the rule in *Smith v Selwyn*.<sup>43</sup> Section 319 of the Act does not entitle the respondents to have the Forfeiture Proceedings stayed *as a matter of right*

<sup>37</sup> *Lee (No 1)* at [335] and [337] per Gageler and Keane JJ.

<sup>38</sup> [16], [22] and [24] of the appellant’s submissions.

<sup>39</sup> See pp 139 and 144 to 145 of the Appeal Book: TS 139 line 29, TS 61 lines 16 to 31 and TS 62 lines 1 to 8.

<sup>40</sup> *Lee (No.1)* at [339] per Gageler and Keane JJ.

<sup>41</sup> *Lee (No.1)* deals with s 63 of the CAR Act which is worded identically to s 319 of the Act.

<sup>42</sup> *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 (*EPA v Caltex*).

<sup>43</sup> [1914] 3 KB 98 as referred to in *Lee (No.1)* at [142] per Crennan J.

solely because of the existence of Mr Jin's criminal proceedings.<sup>44</sup> However s 319 does not restrict the Court's inherent jurisdiction to grant a stay where a failure to do so would result in an unfair trial.<sup>45</sup> The provision is directory and enabling.<sup>46</sup>

36. Section 319 does not contain any express abrogation of either the privilege against self-incrimination *or* the fundamental principles relevant to the accusatorial process in criminal proceedings. It should not be interpreted as doing so since general statutory words cannot be construed as altering the accusatorial process of criminal justice.<sup>47</sup>

10 37. Judges today are often required to "view the legislative command through a perspective of human rights law or equivalent principle"<sup>48</sup>. The Court of Appeal had regard to the respondents' common law rights in interpreting the Act and exercising the Court's discretion to grant the stay.

38. The Court of Appeal was satisfied that there was sufficient material to show that the refusal of the stay application presented a real risk of interference with Mr Jin's criminal proceedings having regard to Mr Jin's affidavit material as well as the specific facts of the case. It was pertinent that the statement of Crown opening<sup>49</sup> for Mr Jin's criminal proceedings had not been provided. Mr Jin could not know with real certainty what the Crown case was against him. The Court of Appeal also recognised that the AFP is the prosecuting authority or "protagonist"<sup>50</sup> in the  
20 Forfeiture Proceedings and the criminal proceedings and as such took account of the facts in *Lee (No. 2)*.

***Why the stay does not frustrate the intention of the Act***

39. No proper legislative intent can be served by ordering the Forfeiture Proceedings on at the expense of Mr Jin or Ms Zhao's rights. Where the purpose of the Act is to

<sup>44</sup> *Lee (No. 1)* at [288] per Gageler and Keane JJ.

<sup>45</sup> *Lee (No. 1)* at [142] to [143] per Crennan J.

<sup>46</sup> *Lee (No. 1)* at [76] per French CJ

<sup>47</sup> *Hammond v Commonwealth* (1982) 152 CLR 188 as endorsed in *X7* and *Lee (No. 1)*.

<sup>48</sup> See *Daniels Corporation v Australian Competition and Consumer Commission* (2002) 77 ALJR 40, per Gleeson CJ, Gaudron, Gummow and Hayne J.J., at 43; per McHugh J., at 49; per Kirby J., at 57; 192 ALR 561 at 565, 573, 584-585 as referred to in M.D. Kirby, *Judicial Activism* (Hamlyn Lectures, 2003) Sweet & Maxwell, London, 2004 p 34.

<sup>49</sup> As required under s182 of the *Criminal Procedure Act 2009* (Cth)

<sup>50</sup> See p 139 of the Appeal Book: TS 54 line 27.

achieve restraint and forfeiture of assets suspected of being the proceeds of crime, such a purpose is not to be achieved at all costs.<sup>51</sup>

40. Compared to what is at stake for the respondents there is no real prejudice to the appellant.<sup>52</sup> There is no urgency in the Commissioner’s forfeiture application.<sup>53</sup> All of the respondents’ major assets have been identified and frozen. There is no risk of dissipation of the restrained assets. There is no risk of “mischief”<sup>54</sup> being committed towards the purposes and object of the Act.

### *Ms Zhao*

- 10 41. The Court of Appeal accepted that the various applications made by both the respondents pursuant to the Act are “inter-related” and referred to them together as the “forfeiture proceedings”.<sup>55</sup>
42. The Court of Appeal understood that Ms Zhao has not been charged with any criminal activity but granted a stay of all of the interrelated Forfeiture Proceedings “to avoid a multiplicity of proceedings”.<sup>56</sup> Ms Zhao is the respondent’s wife and the owner of their Donvale home. Her application in the Forfeiture Proceedings cannot be separated from Mr Jin’s without realising the very prejudice the Court of Appeal saw fit to avoid. Clearly the Court recognised that it was more than likely that Ms Zhao’s evidence would cover the same subject matter as in Mr Jin’s criminal proceedings.<sup>57</sup>

### 20 *The Court of Appeal’s decision*

43. The Court of Appeal’s decision to grant a stay of the Forfeiture Proceedings pending the determination of Mr Jin’s criminal trial corrects a fundamental miscarriage of justice in the exercise of the Court’s inherent discretion.<sup>58</sup> It corrects clear errors of law and fact<sup>59</sup> in the primary judge’s decision and effectively preserves the integrity

<sup>51</sup> *Hammond v The Commonwealth* (1982) 152 CLR 188 per Gibbs CJ.

<sup>52</sup> *Lee (No 1)* at [13] per French CJ

<sup>53</sup> *Lee (No 1)* at [224] per Kiefel J.

<sup>54</sup> *Lee (No 1)* at [129] and [131] per Crennan J.

<sup>55</sup> See p150 of the Appeal Book: [6] of the Court of Appeal’s reasons dated 27 June 2014.

<sup>56</sup> See p178 of the Appeal Book: [67] of the Court of Appeal’s reasons dated 27 June 2014.

<sup>57</sup> TS 51 lines 7-9 per Beach JA.

<sup>58</sup> The County Court of Victoria’s discretion pursuant to s 49 of the *County Court Act 1958* (Vic) and s 30 of the *Supreme Court Act 1986* (Vic) by inclusion.

<sup>59</sup> See p 154 of the Appeal Book: [16] of Reasons of the Court of Appeal. The judge erred in fact in failing to consider four paragraphs in Mr Jin’s affidavit relevant to his concerns as to prejudice. The primary judge

of the accusatorial nature of Mr Jin’s criminal trial.<sup>60</sup> The Court of Appeal found that the test in *House v R*<sup>61</sup> was satisfied and that the primary judge erred in the exercise of discretion in refusing to stay the Forfeiture Proceedings.

44. The primary judge was wrong to rely on *Lee No 1* as dictating that s 319 abrogates the privilege against self-incrimination or that the “clear intention”<sup>62</sup> of the Act is against the grant of stay.<sup>63</sup> The primary judge also erroneously gave weight to s 128 of the *Evidence Act 2008 (Vic)*<sup>64</sup> in circumstances where the provision is limited to cross-examination and offers no protection to the respondents in respect to the subsequent use of their affidavit material in the subsequent criminal proceedings.
- 10 45. The Court of Appeal concluded that the judge applied the wrong test.<sup>65</sup> The judge misdirected himself as to the reach of s 319 of the Act by finding that the provision impacts upon the Court’s discretion to grant the stay. The appellant says nothing about the fact that the primary judge overstated the relevant test by concluding at [20] of his Reasons: “I am not convinced that a failure to stay the applications will cause an interference with the administration of criminal justice...”.<sup>66</sup> His Honour ought to have asked whether a failure to stay will result in a real risk of an interference with criminal justice.<sup>67</sup>
46. The question posed by the Court of Appeal as to whether s 319 of the Act “abrogates the privilege against self-incrimination to the extent of taking away the right of the accused to require the Crown to prove its case without the accused’s assistance”<sup>68</sup> was not irrelevant to the questions on appeal.
- 20 47. The appellant’s concern that the decision creates a precedent whereby applicants might seek a virtually automatic stay of all civil forfeiture proceedings is unwarranted. Relevantly the contention that the Court of Appeal’s decision will

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found that there was “no evidence” before the Court as to how the giving of evidence by Mr Jin and his wife in the Forfeiture Proceedings might give rise to a real risk of prejudice in the criminal proceedings: see also p 4 of the Appeal Book: [8] of Reasons dated 3 December 2013.

<sup>60</sup> *Lee No 2* [32]; *X7* at 119-120 [46], 136 [101]-[102], 142-143 [124] and 153 [159]-[160].

<sup>61</sup> [1936] HCA 40; (1936) 55 CLR 499 (17 August 1936).

<sup>62</sup> See p 5 of the Appeal Book: [12] of the Reasons dated 3 December 2013.

<sup>63</sup> See p155 of the Appeal Book: [17] of the Court of Appeal’s Reasons 27 June 2014.

<sup>64</sup> Reasons dated 3 December 2013 as [19].

<sup>65</sup> Court of Appeal’s written reasons [11] and [20].

<sup>66</sup> See p 8 of the Appeal Book.

<sup>67</sup> See p 153 of the Appeal Book: [11] of the Court of Appeal’s Reasons 27 June 2014.

<sup>68</sup> See p 175 of the Appeal Book: [57] of the Court of Appeal’s Reasons 27 June 2014.

impact on all of the AFP's forfeiture proceedings must be incorrect given the fact that forfeiture applications are also made by the Commissioner under ss 47 and 48 of the Act.<sup>69</sup>

### Conclusion

48. The accusatorial process of the criminal justice system compels the prosecution to prove its case beyond a reasonable doubt *without any* assistance from the accused.<sup>70</sup> This is a fundamental or "cardinal"<sup>71</sup> principle. It remains a "golden thread"<sup>72</sup> of the common law. Although it is an old idea it has not "outlived" its usefulness,<sup>73</sup> even if it may cause irritation to the appellant. As Glanville Williams states in *The Proof of Guilt: A Study of the English Criminal Trial*, 3<sup>rd</sup> ed (1963):

"The principles of criminal procedure are not the product of scientific observation, but embody a system of values. These values do not necessarily have to be changed with the march of knowledge of the material world. A good illustration is the rule conferring upon an accused person the right not to be questioned, which may be a good or a bad rule but has certainly not been made better or worse by the invention of the aeroplane or telephone."

49. An accused person has a right as part of the privilege against self-incrimination to require the Crown to observe the above principle. Even where the privilege is lost the principle remains.<sup>74</sup> This Court unanimously held in *Lee (No 2)* that the "companion rule to [this] fundamental principle is that an accused cannot be required to testify".<sup>75</sup> It follows that the privilege against self-incrimination is an accepted part of the 'bundle' of rights that are available to an accused to ensure the conduct of

<sup>69</sup> The same Court of Appeal also granted a stay of forfeiture proceedings brought under section 47 of the Act in *Wayne Jackson v AFP* (No S APCI 2013 0192). This case was heard together with the present matter. The primary judge heard Mr Jackson's stay application at the same time as the respondents' application and refused both. The applicant has not sought leave to appeal the stay of Mr Jackson's s 47 forfeiture proceedings.

<sup>70</sup> *X7 v. Australian Crime Commission* (2013) 87 ALJR 858; 298 ALR 570; [2013] HCA 29 (26 June 2013) at 119-120 [46], 136 [101]-[102], 142-143 [124], 153 [159]; *Lee v. The NSW Crime Commission* (2013) 87 ALJR 1082 at 1126 [176], 1154 [318]; 302 ALR 363 at 417, 453-454; [2013] HCA 39

<sup>71</sup> *Sorby v Commonwealth* (1983) 152 CLR 281 at 294 per Gibbs CJ as quoted by French CJ at [24] in *Lee No. 1* and Deane, Dawson and Gaudron JJ in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 527.

<sup>72</sup> *Wolimington v The Director of Public Prosecutions* [1935] AC 462 at 481-482 as quoted at [100] of *X7*

<sup>73</sup> See M.D. Kirby, *Judicial Activism* (Hamlyn Lectures, 2003) Sweet & Maxwell, London, 2004 p87; see also W. O. Douglas, "Stare Decisis" (1949) 49 Columbia Law Review 735, p 735.

<sup>74</sup> *Lee v The Queen* (2014) 308 ALR 252 (*Lee No. 2*) [32]; *Lee No. 1* [182]; 302 ALR 363 at 419

<sup>75</sup> *Lee No. 2* [2014] HCA 20 at 11 [33] and *EPA v Caltex* 503, 550.

a fair trial. It is the whole risk to the accusatorial process of criminal procedure that must be examined.<sup>76</sup>

50. All of these matters underpin the unanimous and fully reasoned judgment of the Court of Appeal. The relevance of the above principle to the scope of the Act and in particular s 319 explains why the Court of Appeal's decision is correct.

**Part VII: Estimate of Oral Argument**

51. It is estimated that one hour will be required for the respondents' oral argument.

Dated: 7 November 2014

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<sup>76</sup> *Hammond v The Commonwealth* (1982) 152 CLR 188 per Gibbs CJ.