IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No S29 of 2013

BETWEEN

JASON (AKA DO YOUNG) LEE

FIRST APPELLANT

SEONG WON LEE

SECOND APPELLANT

and

NEW SOUTH WALES CRIME COMMISSION

10 RESPONDENT

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING (ANNOTATED)

Part I Form of Submissions

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

Part II Basis of Intervention

2. The Attorney General for the State of New South Wales ("NSW Attorney") intervenes under s 78A of the Judiciary Act 1903 (Cth) in support of the respondent.

Part III Legislative Provisions

20 3. The NSW Attorney adopts the appellants' statement of legislative provisions together with the addition proposed by the respondent. Additional provisions of the Criminal Assets Recovery Act 1990 (NSW) ("CAR Act") to which the NSW Attorney makes reference (ss 3, 6, 28C, 35 and 54) are reproduced in Annexure A to these submissions.

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Part IV Issues Presented and Argument

Issues

4. These submissions address the construction of s 31D of the CAR Act before turning to the respondent's argument that s 31D is invalid. In summary the NSW Attorney submits as follows:

   (a) by contrast to the appellants' reliance on the possibility of risk to a fair trial, the Court of Appeal's construction of s 31D is consistent with authority requiring a real risk of interference with the administration of justice before a parallel administrative inquiry is required to await the outcome of criminal proceedings;

   (b) when construed in this manner, no question of the constitutional validity of s 31D arises;

   (c) even if (a) and (b) are wrong, when considered in light of the doctrines of contempt and abuse of process in relation to administrative inquiries taking place while criminal proceedings are on foot, s 31D of the CAR Act does not impair the institutional integrity of the Supreme Court and so is not invalid by application of the principle in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51.

Construction of s 31D of the CAR Act

5. As a matter of statutory construction, s 31D of the CAR Act does not require the Supreme Court to accord determinative weight to the mere possibility of adverse consequences for criminal proceedings arising from the examination of a person before the Court under that section when deciding whether to order an examination. On the other hand, contrary to the appellant's submission, the Court of Appeal's construction of the section does not preclude the Supreme Court from considering whether an examination would give rise to a real risk of interference with the administration of criminal justice when determining an application for an examination order.

6. When construing s 31D, it is relevant to consider the place of an examination order under that section in the forfeiture proceedings contemplated by the CAR Act. Consistent with the Court of Appeal's references to s 31D of the CAR Act as

providing for "ancillary" orders (Basten JA at [40], Appeal Book ("AB") 126 (McColl and Macfarlan JJA agreeing), see also Beazley JA at [9], AB 115, Meagher JA at [97], AB 146-147), the question of whether an examination order should be made pursuant to s 31D(1) arises for consideration only after the Commission has applied for a "confiscation order" (defined in s 4 as an assets forfeiture order, proceeds assessment order or unexplained wealth order). Provision is made in Divs 1, 2 and 2A of Pt 3 of the CAR Act for the Commission to apply to the Supreme Court for such orders. The subject matter of an examination under s 31D(1) is confined by s 31D(1)(a) to "the affairs of the affected person", no matter who is being examined. Whether a person falls within the definition of "affected person" in s 31D(4) turns on whether that person owns an interest in property proposed to be subject to a confiscation order, or is themselves proposed to be subject to such an order, depending on the type of confiscation order that has been sought.

7. The CAR Act, like other civil assets forfeiture legislation, does not depend upon conviction, but rather upon unlawful conduct: see International Finance Trust Co Ltd v NSW Crime Commission (2009) 240 CLR 319 ("IFTC") at 344 [26] per French CJ. There are multiple indicators in the CAR Act of the Parliament's contemplation that civil assets forfeiture might precede – or be concurrent with – criminal proceedings:

   (a) s 6(1), addressing the meaning of "serious crime related activity", makes clear that if a person has been charged with the activity in question, it does not matter whether they have been tried: see s 6(1)(a). The term "serious crime related activity" is found in the objects of the CAR Act (s 3(a), (a1) and (b)) and incorporated into the basis for seeking and making an assets forfeiture order under s 22, a proceeds assessment order under s 27 and an unexplained wealth order under s 28A;

   (b) s 13(2) (applying to examinations under ss 12 and 31D) provides that a statement or disclosure in answer to a question in an examination, or a document or other thing obtained in consequence of that statement or disclosure, is not admissible against the person in any civil or criminal proceedings other than those specified in the subsection, while s 13A(2) (which also applies to examinations under ss 12 and 31D) provides protection against the direct use in most criminal proceedings of answers given or

documents produced in examinations over an objection based on self-incrimination,

(c) s 13A(3) provides derivative material obtained as a result of an answer given or document produced in an examination "is not inadmissible in criminal proceedings" on the ground that it was compelled or might be incriminatory;

(d) s 28C(4) provides that the quashing or setting aside of a conviction for serious crime related activity does not affect the validity of a proceeds assessment order or unexplained wealth order, indicating that such an order may have been made prior to the resolution of a criminal appeal in relation to the relevant "serious crime related activity";

(e) s 35(2) provides protection against admissibility in all criminal proceedings (except for proceedings for the offence contrary to s 37 of the CAR Act) of the production or making available of a property-tracking document pursuant to a production order under s 33, or of material obtained in consequence of that production or availability, if the person objects to the production order;

(f) s 54(4) and (6) enable the Supreme Court on an application for an order under the CAR Act to have reference to transcript of, inter alia, criminal proceedings "against a person for an offence to which the application relates", whether or not those proceedings have been determined; and

(g) s 63 provides that the institution or commencement of criminal proceedings "is not a ground on which the Supreme Court may stay proceedings under this Act that are not criminal proceedings".

8. Since the commencement of proceedings for a confiscation order under the CAR Act does not depend on the institution of criminal proceedings against any person, the Supreme Court may be asked to decide an application for an examination order under s 31D in a wide variety of circumstances: before criminal proceedings have commenced, while they are on foot and after they have been determined. The nature of any criminal charges may or may not be known at that time. In the present case, so far as the NSW Attorney is aware at the time of filing these submissions, only the first appellant has a criminal trial pending, on money laundering charges.

9. Section 31D of the CAR Act does not make detailed provision for the conduct of the examination, other than to require that it is on oath, before the Supreme Court or an officer of the Court prescribed by the rules of court. In respect of matters arising when an examination is conducted, including who is present in court at the time and to whom information about the examination or its contents may be disclosed, in selecting the Supreme Court as the forum for the examination the NSW legislature should be regarded as having taken the Supreme Court as it found it, with all its incidents: cf IFTC at 360 [79] per Gummow and Bell JJ; 388 [165] per Heydon J; Mansfield v Director of Public Prosecutions (WA) (2006) 226 CLR 486 at 491 [7]. There is no basis in the CAR Act for discerning a plain legislative intendment to establish a distinct regime in respect of the conduct of an examination under s 31D. Nor is there a basis to assume the legislature intended to abrogate the court's inherent power to control abuses of its process in an examination: see Dupas v The Queen (2010) 241 CLR 237 at 243 [15].

10. Accordingly, the power to order an examination in s 31D is exercised in circumstances where upon examination, appropriate non-publication or suppression orders can be made under the Court Suppression and Non-publication Orders Act 2010 (NSW) ("CSNPO Act") (as recognised by Basten JA at [54], AB 132; [62], AB 135; Meagher JA at [99], AB 147), proceedings can be conducted in the absence of the public pursuant to s 71(b) of the Civil Procedure Act 2005 (NSW) and orders restricting the publication of evidence can also be made in the exercise of the Court's inherent jurisdiction, expressly preserved by s 4 of the CSNPO Act: see Assistant Commissioner Michael James Condon v Pompano Pty Ltd [2013] HCA 7 ("Pompano") at [46] per French CJ. Such orders could, in appropriate cases, prevent dissemination of information obtained upon examination to prosecuting authorities and their investigating officers. There is no basis to suggest that the NSW Parliament's intention in repealing s 62 of the CAR Act (with effect from 1 July 2011) was to reduce the protection available to those being examined under the CAR Act: the Agreement in Principle speech for the Court Suppression and Non-publication Orders Bill 2010 indicates that that section was among those in a variety of statutes regarded as "superseded" by the Bill: NSW Legislative Assembly, Hansard, 29 October 2010, p. 27,199 (Mr Barry Collier, Parliamentary Secretary). Furthermore, "the Court can and should be vigilant to contain the questioning within the scope of the examination

authorised under the legislation": NSW Crime Commission v Hung Sun Choi [2012] NSWSC 658 at [56] per McCallum J. If an examination is conducted by a registrar (see item 2 under the heading "Criminal Assets Recovery Act 1990" in Sch 10 to the Uniform Civil Procedure Rules 2005 (NSW) ("UCPR")), the Supreme Court's broad power of "review" on application by a party if a registrar "gives a direction or certificate, makes an order or decision or does any other act" in any proceedings, will be available: UCPR r 49.19.

11. Contrary to the appellants' submission (Appellants' Submissions ("AS") at [56]), the issue is not one of "dependency" on the exercise of alternative discretions: a judge making an order for examination under s 31D simply does so in the context that there are various powers – both statutory and inherent – available to the judge or registrar presiding at the examination to control it. Nothing in Basten JA's reasons (at [81], AB 141-142) reduces the prospect of obtaining effective orders to prevent a real risk of prejudice to the first appellant's trial materialising in the course of an examination, especially when the reference in that paragraph to the "prejudice authorised by the [CAR Act]" is read in light of his Honour's earlier description of such prejudice as amounting to no more than "the possibility of adverse consequences for criminal proceedings otherwise on foot" (at [49], AB 131) and "a degree of potential interference with a criminal trial": at [56], AB 133. His Honour's concern, as demonstrated in those passages, was with consideration of the mere possibility of interference.

12. Accepting the propositions that legislation should be construed, where possible, to avoid constitutional invalidity (NSW v Commonwealth (Work Choices Case) (2006) 229 CLR 1 at 161-162) and that a general power should not ordinarily be construed to authorise a contempt (Pioneer Concrete (Vic) Pty Limited v Trade Practices Commission (1982) 152 CLR 460 at 473 per Mason J; Environment Protection Authority v Caltex Refining Co Pty Limited (1993) 178 CLR 477 ("Caltex") at 558 per McHugh J; Australian Crime Commission v OK (2010) 185 FCR 258 ("OK") at 276 [104]), s 31D does not require a Supreme Court judge exercising the power under this provision to ignore a real risk of prejudice to a fair trial before ordering an examination, or reveal error in the Court of Appeal's construction of s 31D: cf AS at [44].

13. Legislation permitting the compulsory examination of a person who has been charged with an offence on the subject matter of the offence charged does not, of itself, authorise conduct that would constitute contempt of court or abuse of process: Hamilton v Oades (1989) 166 CLR 486 at 494 per Mason CJ, at 509 per Dawson J and at 515-516 per Toohey J; Pioneer Concrete at 468 per Gibbs CJ (with whom Brennan J agreed) and Mason J at 474; Caltex at 558-559 per McHugh J (cf Deane J in Hammond v Commonwealth (1982) 152 CLR 188 at 206). In Hamilton v Oades, both Dawson J (at 508-509) and Toohey J (at 515-516) did not accept that Hammond was authority to the contrary. In order to constitute a contempt or abuse of process, the conduct of an inquiry into facts that are the subject of pending proceedings must be shown to create a "substantial risk of serious injustice" or a "real risk" that justice will be interfered with: Hammond at 196 per Gibbs CJ (with whom Mason J agreed at 199) and Victoria v Australian Building and Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25 at 56 per Gibbs CJ, 98, 99 per Mason J and 137 per Wilson J. That is to be determined by reference to matters of practical reality, not theoretical tendency: Hammond at 196.

14. A contempt may arise where the exercise of the relevant power confers upon a party to litigation "advantages which the rules of procedure would otherwise deny him", if the power is exercised in such a way as to interfere with the course of justice: Pioneer Concrete at 468 per Gibbs CJ; Caltex at 559 per McHugh J.

15. Although not clearly emerging from the reasons in Hammond (which may be unsurprising given the time constraints referred to by Gibbs CJ at 198), it is properly seen as an example of a case of this type. The emphasis placed by Gibbs CJ on the "circumstances of this case" giving rise to a real risk that the administration of justice would be interfered with (at 198) should be understood to refer, in particular, to the matter to which his Honour earlier referred (at 194): ie, that the police officers who had investigated the matters upon which the plaintiff was to be examined were permitted to be present during that part of the examination which was held in private and were presumably free to attend earlier parts of the examination held in public. It may also be seen to be a reference to the fact (identified in argument, at 192) that the Commission had decided to permit the transcript of the examination to be made available to the prosecution, in circumstances where the plaintiff would be "bound to

answer questions designed to establish that he was guilty of the offence with which he was charged": at 198 [emphasis added]. Those were matters which stood to confer upon the prosecution advantages of the type referred to by Gibbs CJ in Pioneer Concrete. Although Deane J expressed a broader view (at 206; his Honour's view is inconsistent with subsequent authority: see above at [13]), he too appears to have placed some weight upon the close relationship between the participants in the inquiry and the prosecuting authorities: at 207.

16. Determining whether the exercise of a power of compulsory examination authorises action amounting to contempt or abuse of process requires consideration of statutory scheme for control of the conduct in question, as well as the extent to which the court – if chosen as the forum for the examination – retains its inherent powers in relation to such conduct: see Hamilton v Oades at 498-499 per Mason CJ, 510 per Dawson J, 515 per Toohey J; OK at 278-279 [113] per Emmett and Jacobson JJ. Chief Justice Mason's emphasis on the preservation of judicial discretion in the passages of Hamilton v Oades relied upon by the appellants (at 496-497, 499: AS at [42]) related to the court's power in s 541(5) of the Companies (NSW) Code to give directions concerning particular questions in the examination (contrast the power to order an examination in s 541(3), extracted at 492). Similarly, the protective provision in s 25A of the Australian Crime Commission Act 2002 (Cth) relied upon by Emmett and Jacobson JJ in OK (at 277 [107], 277-278 [109], 278 [113]; see also AS at [45]) dealt with the conduct of an examination by an examiner; the examiner's power to summon a person for examination was found in s 28: see at 269 [70].

17. Applying these principles, on its proper construction s 31D neither authorises conduct that would amount to contempt nor precludes judicial intervention to prevent the use of the examination power in a contemptuous or abusive manner. For the reasons set out at [7]-[8] above, the CAR Act clearly contemplates the making of an examination order under s 31D in civil proceedings at a time when the prospective examinee may be subject to criminal proceedings. While the Supreme Court should give effect to legislative intention when determining whether to make an order under s 31D, in the unlikely scenario that the judge hearing the Commission's application is persuaded that, as a matter of practical reality and having taken into account the various protective orders able to be made by the court at an examination, there is nevertheless

a real risk of prejudice to a pending criminal trial such that even taking the preliminary step of ordering an examination will itself amount to a contempt or abuse of process, he or she can take that into consideration in deciding the application.

18. Section 63 of the CAR Act does not require any different construction. Whatever limitation s 63 imposes on the power to stay proceedings under the CAR Act (see Lee v Director of Public Prosecutions (Cth) (2009) 75 NSWLR 590 at 591 [38]-[39] and Chapman v Director of Public Prosecutions (WA) (2009) 194 A Crim R 323 at 329 [27] as to comparable provisions in Commonwealth and Western Australian civil assets forfeiture legislation), the Supreme Court still has a discretion under s 31D as to whether or not to order the examination sought in light of any real risk to the fairness of a future criminal trial given the protections provided by the CAR Act as well as other legislation and available to the court in relation to any such examination ordered: see Beazley JA at [9], [10], AB 115.

Validity of s 31D of the CAR Act

19. The NSW Attorney submits that construed in either the manner set out above – or, failing that, in the manner advocated by the appellants – s 31D of the CAR Act does not confer any constitutionally impermissible function on the Supreme Court. It does not need to be read down to save its validity. It is therefore unnecessary to consider the appellants' alternative submission that s 31D is invalid.

20. If, contrary to the above submission, it is necessary to reach the constitutional issue, the NSW Attorney submits that the section does not infringe the principle in Kable. Maintenance of the institutional integrity of the Supreme Court does not constrain the NSW Parliament from conferring power on the court to order an examination on oath under s 31D of the CAR Act in relation to matters overlapping with those forming the subject of a pending criminal trial, even if the Supreme Court is precluded from considering the consequences of such an order on the fairness of the pending trial when making the order, given the protections for the fairness of the trial that are applied by legislation and available to the court when the examination is conducted.

21. As with other constitutional constraints upon legislative power, the relevant inquiry for the purposes of Kable is systemic or "functionalist" in character: see eg Wainohu v New South Wales (2011) 243 CLR 181 at 212 [52] per French CJ and Kiefel J. While

content must be given to the notion of institutional integrity of State courts, that "is a notion not readily susceptible of definition in terms that will dictate future outcomes": Pompano at [124] per Hayne, Crennan, Kiefel and Bell JJ.

22. The appellants' submission that Kable operates to entrench a State Supreme Court's "inherent power to protect the integrity of the administration of justice", extending to protection of a specific process for "the determination of guilt or innocence by means of a fair trial", namely "the accusatorial process" (AS at [62], [63], [67]) accords more specific constitutional content to a court's inherent power to protect its own processes than has hitherto been recognised in the context of the requirements of Ch III.

10 23. This Court has accepted that the legislative power of the Commonwealth does not extend to such interference with the judicial process as would authorise or require a Court exercising judicial power to do so in a manner which is inconsistent with its nature: see eg Nicholas v The Queen (1998) 193 CLR 173 per Gummow J at 233 [148]; IFTC at 352-353 [50] per French CJ. That acceptance has not extended to constitutional entrenchment of particular forms of common law criminal procedure.

24. The broad principle that our system of criminal justice is "accusatory" may be an accurate description, but it is not a rule of substantive law, as acknowledged by Spigelman CJ (Hidden and Latham JJ agreeing) in NSW Food Authority v Nutricia Pty Ltd (2008) 72 NSWLR 456 at 492 [165]. Sorby v Commonwealth (1983) 152
20 CLR 281 stands in the way of attributing constitutional significance to the accusatorial system: Mason, Wilson and Dawson JJ there analysed (and rejected) the proposition that Ch III in some way entrenched the privilege against self incrimination: at 308 (see also at 298 per Gibbs CJ, at 314 per Brennan J).

25. There is support in the authorities for the proposition that the power to control abuse of process, together with the contempt power, are properly regarded as attributes of the judicial power provided for in Ch III: Hogan v Hinch (2011) 243 CLR 506 at 552 [86], referring to Dupas v The Queen at 243 [15]; see also Batistatos v Roads and Traffic Authority of NSW (2006) 226 CLR 256 at [13]. Similarly, it has been suggested that legislation authorising interference in the administration of a Court amounting to a
30 contempt may exceed the powers of the Commonwealth Parliament: see Hammond

at 206 per Deane J; Sorby at 306 per Mason, Wilson and Dawson JJ; Pioneer Concrete at 474 per Mason J.

26. That said, nothing can be drawn from Ch III which restricts in "absolute terms" the legislative power of the Commonwealth to deal with such matters: Hogan v Hinch at 554 [91]. The Commonwealth Parliament may make laws dealing with substantive and procedural matters which alter the range of circumstances in which the judicial power may be exercised, including in the context of a criminal trial. The fact that such laws may involve Parliament striking a different balance between competing public policy interests to that drawn by the common law does not require a conclusion that there has been an impermissible intrusion on the judicial power: see eg Nicholas at 197 [37]-[38] per Brennan CJ, 239 [164] per Gummow J and 272 [234], 274 [238], 276 [244] per Hayne J.

27. Consistent with that approach, apart from the requirements of s 80, where applicable, this Court has not entrenched specific features of common law process as essential attributes of any exercise of Ch III judicial power in the context of a criminal trial, notwithstanding statements to the effect that judicial power must be exercised in accordance with the judicial process (see above at [23]), consideration of methods and standards that have characterised judicial activities in the past (see eg. Thomas v Mowbray (2007) 233 CLR 307 at 355 [111] per Gummow and Crennan JJ, Heydon J agreeing at 526 [651]) and remarks by individual justices as to the requirement of a fair trial in criminal cases being an attribute of judicial power: see eg. Nicholas at 208-209 per Gaudron J.

28. Even where the judicial power of the Commonwealth is engaged, in view of the authorities referred to above (at [13]), Ch III would not give rise to an absolute prohibition on the enactment of Commonwealth legislation contemplating a compulsory examination of a criminal accused taking place on the same subject matter as pending charges.

29. Justice Deane's obiter suggestion in Hammond at 206-207 that legislation authorising such a compulsory examination is invalid appears to rest principally upon his view that the conduct of such an inquiry where criminal proceedings were pending constituted contempt and a passage from O'Connor J's reasons in Huddart, Parker & Co Pty Ltd v

Moorehead (1908) 8 CLR 330 at 379-380 (relied upon by the appellants at AS [66]). However, as Gibbs CJ observed in Pioneer Concrete at 466, the first two sentences of that passage relate to the proper construction of the relevant section and the third supports that construction by reference to the possible consequences of adopting a broader view of the Comptroller's powers. As to the last point, Gibbs CJ suggested that O'Connor J meant no more than such an exercise of power "might" amount to a contempt of Court – accepting that that may be so "if the powers were used to extract information for the purpose of aiding a prosecution already commenced" [emphasis added]: at 466. So understood, O'Connor J's reasons provide no support for the broader proposition as to invalidity advocated by the appellants.

30. While "[t]here are advantages in keeping questions of power and contempt separate" (Pioneer Concrete at 473 per Mason J; see also OK at 276 [104] per Emmett and Jacobson JJ), if a power in a Commonwealth statute clearly authorised a contempt, it appears from the above that this might contravene Ch III. The same may be true of a Commonwealth provision removing a Ch III court's inherent power to control abuse of process. But that is not the effect of s 31D of the CAR Act, to the extent it precludes consideration of the consequences of such an order on the fairness of a pending trial at the time the power to order an examination is exercised. The appellants do not explain why it "must follow" (AS at [67]) from the invalidity of a law removing the Supreme Court's inherent powers to protect the integrity of its processes that precluding the Supreme Court from considering the consequences of an order under s 31D for the fairness of a pending trial is constitutionally impermissible. That submission appears to assume that the making of an order under s 31D is the only point in the statutory scheme when the Supreme Court can act to protect the integrity of its processes, despite the fact that the examination can only take place before the court or a registrar: s 31D(1) of the CAR Act and cl 2 of Sch 10 to the UCPR.

31. As a matter of practical reality, action to prevent any real risk of serious injustice in the course of an examination pursuant to the CAR Act is not only contemplated by the statutory scheme but can be taken at several stages subsequent to the making of an order under s 31D: see above at [10]. Furthermore, the CAR Act does not restrict the power of the District Court at the first appellant's money laundering trial to ensure the fairness of that trial. The governance of that trial is unaffected.

32. Other than the fact of the examination proceeding in the face of pending criminal proceedings, the only other form of possible risk to the first appellant's trial flowing from the order under s 31D identified by the appellants is derivative use of material obtained at or as a result of the examination, not limited to use in evidence of such material: see AS at [51]-[52]. The possibility that such derivative use will be made at trial of information disclosed in or as a result of an examination of the appellants under the CAR Act is entirely speculative at this stage, albeit that s 13A(3) expressly renders incriminatory derivative evidence admissible in criminal proceedings. Nevertheless, to the extent that the examination could yield such evidence, the possibility of derivative use does not render s 31D invalid.

33. The potential for derivative use of material obtained in or as a result of a compulsory examination at trial does not, without more, confer some form of unfair advantage upon a party to the proceeding so as to render the exercise of the statutory examination power a contempt: see Pioneer Concrete at 474 per Mason J. Hamilton v Oades presents an impediment to any argument that legislation authorising compulsory questioning without protection against derivative use will give rise to questions of contempt or abuse of process. This potential consequence of an order pursuant to s 31D would not give rise to any contravention of Ch III.

34. Since s 31D would not offend Ch III if enacted by the Commonwealth Parliament, there is no occasion for the application of Kable in this case: see Pompano at [126] per Hayne, Crennan, Kiefel and Bell JJ, quoting Bachrach (HA) Pty Ltd v Queensland (1998) 195 CLR 547 at 562 [14]. Even if that is incorrect, as recently reiterated by the plurality in Pompano at [125], when applying the Kable principles "there can be no direct application to the State courts of all aspects of the doctrines that have been developed in relation to Ch III". The notion of institutional integrity is not to be treated as though it "simply reflect[s] what Ch III requires in relation to the exercise of the judicial power of the Commonwealth": at [125]. Prior to Kable, members of this Court noted that they did not regard O'Connor J's comments in Huddart, Parker & Co Pty Ltd v Moorehead as having any application to a power to issue a notice to produce under NSW legislation, exercised after the commencement of criminal proceedings: Caltex at 507 per Mason CJ at Toohey J; see also at 558 per McHugh J.

35. The appellants have not identified any aspect of the institutional integrity of the NSW Supreme Court which is compromised by s 31D of the CAR Act, other than the Court's inherent power to "protect the integrity of the administration of justice": AS at [67]. In view of the "functionalist rather than formalist" analysis required by Kable (Wainohu at 212 [52]), it is important not to consider s 31D of the CAR Act separately from the other features of the statutory scheme, as illustrated by the analysis of the CAR Act by Gummow and Bell JJ (French CJ agreeing) in IFTC at 364-367 [90]-[97], albeit that their Honours there concluded that other aspects of the scheme of restraining order provisions did not save s 10 from invalidity; see also Pompano at [155] per Hayne, Crennan, Kiefel and Bell JJ. In the present case, not only does the scheme for compulsory examination enable the Supreme Court to control the conduct of the examination (see above at [9], [10]), it leaves untouched the trial court's powers to ensure the fairness of the pending criminal proceedings against the appellants.

Part V Estimate of time for oral argument

36. The NSW Attorney estimates that he will require 20 minutes for oral argument.

Dated: 19 April 2013

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and

NEW SOUTH WALES CRIME COMMISSION
RESPONDENT

ANNEXURE A - LEGISLATION

Criminal Assets Recovery Act 1990 (NSW) (Historical version for 10 September 2010 to 30 June 2011)	As at 28 February 2011 Still in force as at 19 April 2013	ss 3, 6,* 28C, 35, 54

* Section 6 was amended by the Crimes (Criminal Organisations Control) Act 2012 (NSW), Sch 1, cl 1.3, which commenced on 21 March 2012 and by the Crimes Amendment (Consorting and Organised Crime) Act 2012 (NSW), Sch 2, cl 2.1, which commenced on 9 April 2012.

Clause 1.3 of Sch 1 to the Crimes (Criminal Organisations Control) Act 2012 (NSW) is as follows:

> "1.3 Criminal Assets Recovery Act 1990 No 23
> Section 6 Meaning of 'serious crime related activity'
> Omit section 6 (2) (g1). Insert instead:
> (g1) an offence under section 93T of the *Crimes Act 1900*, or"

Clause 2.1 to the Crimes Amendment (Consorting and Organised Crime) Act 2012 (NSW) is as follows:

> "2.1 Criminal Assets Recovery Act 1990 No 23 (as amended by the Crimes (Criminal Organisations Control) Act 2012)

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Section 6 Meaning of 'serious crime related activity'
Insert 'or 93TA' after 'section 93T' in section 6 (2) (g1)."

Criminal Assets Recovery Act 1990 No 23

3 Principal objects

The principal objects of this Act are:

(a) to provide for the confiscation, without requiring a conviction, of property of a person if the Supreme Court finds it to be more probable than not that the person has engaged in serious crime related activities, and

(a1) to enable the current and past wealth of a person to be recovered as a debt due to the Crown if the Supreme Court finds there is a reasonable suspicion that the person has engaged in a serious crime related activity (or has acquired any of the proceeds of any such activity of another person) unless the person can establish that the wealth was lawfully acquired, and

(b) to enable the proceeds of illegal activities of a person to be recovered as a debt due to the Crown if the Supreme Court finds it more probable than not the person has engaged in any serious crime related activity in the previous 6 years or acquired proceeds of the illegal activities of such a person, and

(b1) to provide for the confiscation, without requiring a conviction, of property of a person that is illegally acquired property held in a false name or is not declared in confiscation proceedings, and

(c) to enable law enforcement authorities effectively to identify and recover property.

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Criminal Assets Recovery Act 1990 No 23

Historical version for 10 September 2010 to 30 June 2011 (accessed 18 April 2013 at 15:30)
Current version

6 Meaning of "serious crime related activity"

(1) In this Act, a reference to a serious crime related activity of a person is a reference to anything done by the person that was at the time a serious criminal offence, whether or not the person has been charged with the offence or, if charged:

(a) has been tried, or

(b) has been tried and acquitted, or

(c) has been convicted (even if the conviction has been quashed or set aside).

(2) In this section, a reference to a serious criminal offence is a reference to:

(a) an offence referred to (before the commencement of the *Drug Misuse and Trafficking Act 1985*) in section 45A of the *Poisons Act 1966*:

(i) of supplying any drug of addiction or prohibited drug within the meaning of the *Poisons Act 1966*, or

(ii) of cultivating, supplying or possessing any prohibited plant within the meaning of that Act, or

(iii) of permitting any premises, as owner, occupier or lessee of the premises, to be used for the purpose of the cultivation or supply of any prohibited plant within the meaning of that Act or of being concerned in the management of any such premises, or

(b) a drug trafficking offence, or

(c) a prescribed indictable offence, or an indictable offence of a prescribed kind, that is of a similar nature to a drug trafficking offence, including in either case an offence under a law of the Commonwealth, another State or a Territory, or

(d) an offence that is punishable by imprisonment for 5 years or more and involves theft, fraud, obtaining financial benefit from the crime of another, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide, or

(e) an offence under section 50A, 51, 51B, 51BA or 51BB of the *Firearms Act 1996*, or

(e1) a drug premises offence, or

(f) an offence under section 80D or 80E of the *Crimes Act 1900*, or

(g) an offence under Division 15 or 15A of Part 3 of the *Crimes Act 1900* (other than an offence under section 91D (1) (b) of that Act), or

(g1) an offence under section 93T of the *Crimes Act 1900*, or

Editorial note. This paragraph was inserted by the *Crimes (Criminal Organisations Control) Act 2009* No 6, which was declared invalid on 23.6.2011 by *Wainohu v New South Wales* [2011] HCA 24.

(h) an offence under section 197 of the *Crimes Act 1900*, being an offence involving the destruction of or damage to property having a value of more than $500, or

(i) an offence under the law of the Commonwealth or a place outside this State (including outside Australia) which, if the offence had been committed in this State, would be a serious criminal offence referred to in paragraphs (a)–(h), or

(j) an offence of attempting to commit, or of conspiracy or incitement to commit, or of aiding or abetting, an offence referred to in any other paragraph of this subsection.

(3) In subsection (2) (b):

drug trafficking offence means an offence under any of the following provisions of the *Drug Misuse and Trafficking Act 1985*:

(a) section 23 (Offences with respect to prohibited plants),

(b) section 24 (Manufacture and production of prohibited drugs),

(b1) section 24A (Possession of precursors for manufacture or production of prohibited drugs),

(c) section 25 (Supply of prohibited drugs),

(c1) section 25A (Offence of supplying prohibited drugs on an ongoing basis),

(d) section 26 in so far as it relates to conspiring to commit an offence referred to in paragraph (a), (b), (b1), (c) or (c1),

(e) section 27 in so far as it relates to aiding, abetting, counselling, procuring, soliciting or inciting the commission of an offence referred to in paragraph (a), (b), (b1), (c) or (c1),

(f) section 28 in so far as it relates to conspiring to commit, or aiding, abetting, counselling or procuring the commission of an offence, under a law in force outside New South Wales which corresponds to a provision referred to in paragraph (a), (b), (b1), (c) or (c1).

(4) In subsection (2) (e1):

drug premises offence means a second or subsequent offence under section 36Y (Allowing use of premises as drug premises—offence by owner or occupier) of the *Drug Misuse and Trafficking Act 1985*.

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28C General provisions applying to proceeds assessment and unexplained wealth orders

(1) In assessing the amount payable under an unexplained wealth order, the Supreme Court must deduct the following (but only if those amounts would otherwise be included in the assessment of the amount payable under the order):

(a) the value of any interests in property of the defendant forfeited under another confiscation order under this Act or an interstate assets forfeiture order,

(b) any amounts paid or payable by the defendant under any previous proceeds assessment order or unexplained wealth order under this Act or any interstate proceeds assessment or unexplained wealth order,

(c) the value of any interests in property of the defendant forfeited under a confiscation order or interstate forfeiture order within the meaning of the *Confiscation of Proceeds of Crime Act 1989*,

(d) any amounts paid or payable by the defendant under any drug proceeds order, pecuniary penalty order or interstate pecuniary penalty order within the meaning of the *Confiscation of Proceeds of Crime Act 1989*.

(2) The Supreme Court may not make a proceeds assessment order or unexplained wealth order in an application that relates wholly to external serious crime related activity, unless it is satisfied that no action has been taken under a law of the Commonwealth or any other place outside this State (including outside Australia) in relation to the proceeds of the external serious crime related activity.

(3) For the purposes of subsection (2), an affidavit by an authorised officer that includes a statement that the officer has made due inquiry and is satisfied that no action has been taken under a law of the Commonwealth or any place outside this State (including outside Australia) against any interests in property in relation to the proceeds of the external serious crime related activity is proof, in the absence of evidence to the contrary, of the matters contained in the affidavit.

(4) The quashing or setting aside of a conviction for a serious crime related activity does not affect the validity of a proceeds assessment order or unexplained wealth order.

(5) The making of a proceeds assessment order or unexplained wealth order does not prevent the making under Division 1 of an assets forfeiture order based on the serious crime related activity, or on all or any of the serious crime related activities, in relation to which the proceeds assessment order or unexplained wealth order is made.

(6) The amount a person is required to pay under a proceeds assessment order or unexplained wealth order is a debt payable by the person to the Crown on the making of the order and is recoverable as such.

(7) If a proceeds assessment order or unexplained wealth order is made against a dead person, subsection (6) has effect before final distribution of the estate as if the person had died the day after the making of the order.

(8) The net amount recovered under a proceeds assessment order or unexplained wealth order is to be paid to the Treasurer and credited to the Proceeds Account.

(9) Notice of an application for a proceeds assessment order or unexplained wealth order is to be given to the person against whom the order is sought and any other person required by the regulations to be given notice.

(10) The absence of a person entitled to be given notice of a proceeds assessment order or unexplained wealth order does not prevent the Supreme Court from making the order.

(11) The Supreme Court may, when it makes a proceeds assessment order or unexplained wealth order or at any later time, make any ancillary orders that the Court considers appropriate.

(12) Despite any rule of law, or any practice, relating to hearsay evidence, the Supreme Court may, for the purposes of an application for a proceeds assessment order or unexplained wealth order, receive evidence of the opinion of:

(a) a member of the NSW Police Force, or

(b) a member of the Australian Federal Police, cr

(c) an officer of Customs within the meaning of the *Customs Act 1901* of the Commonwealth, or

(d) a member or officer of the Commission,

who is experienced in the investigation of illegal activities involving plants or drugs, being an opinion with respect to:

(e) the amount that was the market value at a particular time of a particular kind of plant or drug, or

(f) the amount, or range of amounts, ordinarily paid at a particular time for the doing of anything in relation to a particular kind of plant or drug.

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35 Effect of production order on proceedings etc

(1) A person is not excused from complying with a production order on the ground that:

(a) the production or making available of the document might tend to incriminate the person or make the person liable to a forfeiture or penalty, or

(b) the production or making available of the document would be in breach of an obligation (whether imposed by an enactment or otherwise) of the person not to disclose the existence or contents of the document, or

(c) the production or making available of the document would disclose information that is the subject of legal professional privilege.

(2) If a person objects to a production order:

(a) the production or making available of the document, or

(b) any document or thing obtained as a consequence of the production or making available of the document,

is not admissible against the person in any criminal proceedings except proceedings for an offence under section 37 (Failure to comply with production order).

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54 Proof of certain matters

(1) A certificate that purports to have been signed by a full-time member or a delegate of the Commission and certifies that a specified person was or was not an authorised officer at a stated time is admissible in any proceedings under this Act and is evidence of the facts certified.

(2) A certificate of conviction of an offence (being a certificate referred to in section 178 (Convictions, acquittals and other judicial proceedings) of the *Evidence Act 1995*) is admissible in any civil proceedings under this Act and is evidence of the commission of the offence by the person to whom it relates.

(2A) A document certified by a judicial officer, registrar or other proper officer of a court stating that a specified person pleaded guilty to a specified offence on a specified day, and that the plea of guilty was not withdrawn, is admissible in any civil proceedings under this Act and is evidence of the commission of the offence by the person to whom it relates.

(3) In any proceedings under this Act, a certificate referred to in section 43 of the *Drug Misuse and Trafficking Act 1985* is prima facie evidence of the same matters of which it is prima facie evidence in legal proceedings under that Act, without proof of the signature, employment or appointment of the person appearing to have signed the certificate.

(4) In any proceedings on an application for an order under this Act, the court may, in determining the application, have regard to the transcript of any proceedings against a person for an offence to which the application relates and to the evidence given in any such proceedings.

(5) In any proceedings on an application for an order under this Act, the transcript of any examination under section 12 or 31D is evidence of the answers given by a person to a question put to the person in the course of the examination.

(6) In subsection (4), a reference to proceedings is a reference to proceedings regardless of their outcome, and includes proceedings that have not been determined or that were discharged or not proceeded with for any reason.

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