

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
ON APPEAL FROM THE COURT OF APPEAL OF
THE SUPREME COURT OF VICTORIA

No. M175 of 2017

Between

EDMUND HODGES (a pseudonym)
Appellant

and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

First Respondent

AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION

Second Respondent

DONALD GALLOWAY (a pseudonym)

Third Respondent

TONY STRICKLAND (a pseudonym)

Fourth Respondent

RICK TUCKER (a pseudonym)

Fifth Respondent



APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I: Certification

10 This outline is in a form suitable for publication on the internet.

Part II: Outline of propositions to be advanced by the Appellant

Proposition 1: Her Honour the trial judge correctly identified and applied established principles governing the exercise of the jurisdiction to order a permanent stay of a criminal proceeding.¹

1 The trial judge had jurisdiction to order a permanent stay of the proceedings on the well established principles, summarised with reference to relevant authority by this Court in *Moti* at [10] and [11]. Her Honour recited these principles and properly applied them.

20 Argument before her Honour focused on where the power to stay had been considered in situations broadly analogous to the case of the appellant, namely, where the compulsive powers of the Australian Crime Commission had been unlawfully exercised.

3 Her Honour examined these cases in detail, including, *CB*², *Seller(1)* and *Seller(2)*³, *R v X*⁴, *X7(2)*⁵ and *Seller(3)*⁶, demonstrating and explaining clearly and carefully how each

¹ Appellant's Submissions to the High Court [36]-[37].

² Analysed by her Honour at Reasons [145]-[150] {7AB 2217-2219}, especially at [148]-[149].

³ Analysed by her Honour at Reasons [151]-[165] {7AB 2219-2223}, especially at [155]-[159], [163]-[165].

⁴ Analysed by her Honour at Reasons [214]-[221] {7AB 2235-2236}.

⁵ Analysed by her Honour at Reasons [222]-[227] {7AB 2236-2238}.

⁶ Analysed by her Honour at Reasons [232]-[242] {7AB 2240-2242}.

of them compared to the circumstances of the ACC accused and explaining why a stay was called for in this case.

Proposition 2: Applying the above principles, it would, as found by her Honour, be an abuse of process of the Supreme Court of Victoria in this case to permit the prosecution of the appellant to continue.⁷

4 The appellants' primary case was encompassed by her Honour's findings at paragraphs [880]-[883] of the Reasons {7AB 2367}. Much of the evidence and argument was directed towards the appellants seeking to establish and the ACC and CDPP seeking to dispute the case of the appellants leading to these findings.

10 5 **Proposition 3:** The Court of Appeal erred in adopting a "salami slicing" approach to the review of her Honour's decision (as did the CDPP's interlocutory appeal) and by doing so failed to pay due regard to all of her Honour's reasons and findings for ordering a stay and applicable principles on an appeal where the exercise of a discretion is the subject of dispute.⁸

6 **Proposition 4:** In overturning her Honour's findings of fact regarding derivative use, and decision to order a stay on the basis that the appellant would not receive a fair trial because of the forensic advantage to the prosecution and forensic disadvantage to the appellant by reason of the acts of illegality of the executive, the Court of Appeal erred in its understanding of the evidence before her Honour and erred in its application of the law.⁹

20 7 **Proposition 5:** The Court of Appeal erred in finding that unlawfully compelled testimony, regardless of its content, will not result in an unfair constraint or deprive an accused at trial of a "legitimate" forensic choice because the Court must proceed on the assumption that an examinee would give truthful instructions to his counsel who, in turn, would be ethically obliged to conduct the defence consistently with those instructions.¹⁰

8 **Proposition 6:** The Court of Appeal erred in overturning her Honour's finding that the examiner was recklessly indifferent to his legal obligations in the exercise of his powers or alternatively erred in finding that her Honour's undisturbed findings and the Court of Appeal's own finding as to the nature of the conduct of the examiner and the

⁷ Appellant's Submissions to the High Court [38]-[54].

⁸ Respondents' Submissions on CDPP Grounds 3 etc to Court of Appeal at [3], [27] {13AB 4376, 4381-4382}; Appellant's Reply to CDPP dated 27 April 2018 [14]-[15].

⁹ Appellant's Submissions to the High Court [55]-[56], [58]-[80].

¹⁰ Appellant's Submissions in Response to the Submissions of the ACIC dated 9 February 2018 at [31]; Appellant's Submissions to the High Court [43]-[47], [58]-[64]; Appellant's Reply to CDPP dated 27 April 2018 [18].

executive did not permit the ordering of a stay to protect confidence in the administration of justice.¹¹

9 Proposition 7: The Determinations relied upon for the compulsory interrogation of the appellants were invalid, because they did not comply with sec 7C(4) of the *Australian Crime Commission Act 2002* (Cth).¹²

Propositions in response to ACIC Contentions

10 Proposition 8: The ACIC should not be given leave to participate in the proceedings and agitate the matters raised in its Notice of Contention.¹³

11 Proposition 9: The ACIC submission (Notice of Contention {15AB 5010-5011}) that, contrary to the decision of the trial judge and the Court of Appeal, no directions under sec 25A(9) of the Act were required in the case of the appellants and that any forensic advantage to the prosecution and disadvantage to the appellants at trial is not unfair, cannot stand with the clear words of the section or with consideration of the provision by this Court and intermediate courts below, nor with the ACIC's understanding of the operation of the section and its own submission before the Court of Appeal that in certain circumstances the provision might require an Examiner to give directions preventing those seeking to prosecute an examinee who has not yet been charged from having access to the examination material.¹⁴

12 Proposition 10: Contrary to ACIC Contention 2, the Court of Appeal was correct in finding that the examinations of the appellants were unlawful, because the ACC was not conducting an investigation and the examinations were therefore not authorised by sec 24A of the *Australian Crime Commission Act 2002* (Cth).¹⁵

13 Proposition 11: Contrary to ACIC Contention 3, the Court of Appeal was correct in finding that the ACIC conducted the examinations of the appellants for an improper purpose.¹⁶

Dated: 8 May 2018

Bret Walker

Garry Livermore

Carmen Currie

¹¹ Appellant's Submissions to the High Court [81]-[94].

¹² Appellant's Submissions to the High Court [57]-[59].

¹³ Appellant's Submissions in Reply to the Submissions of the ACIC, dated 9 February 2018, at [6]-[8].

¹⁴ Appellants Submissions to the High Court [18]; Appellant's Submissions in Reply to the Submissions of the ACIC dated 9 February 2018 at [6]-[30] and especially at [23] where the ACIC's submission at [23] is dealt with.

¹⁵ CA [187]-[189] (AB(15) 4895); Appellant's Submissions to High Court [14].

¹⁶ Appellant's Submissions to the High Court [15]; Appellant's Submissions in response to the Submissions of the ACIC dated 9 February 2018 at [42]-[44].