Strickland (a pseudonym) v Director of Public Prosecutions (Cth) - [2018] HCA 53

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

M168/2017

TONY STRICKLAND (A PSEUDONYM) APPELLANT

AND

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS RESPONDENTS

M174/2017

DONALD GALLOWAY (A PSEUDONYM) APPELLANT

AND

COMMONWEALTH DIRECTOR OF PUBLIC
PROSECUTIONS & ORS RESPONDENTS

M175/2017

EDMUND HODGES (A PSEUDONYM) APPELLANT

AND

COMMONWEALTH DIRECTOR OF PUBLIC
PROSECUTIONS & ORS RESPONDENTS

M176/2017

RICK TUCKER (A PSEUDONYM) APPELLANT

AND

COMMONWEALTH DIRECTOR OF PUBLIC
PROSECUTIONS & ORS RESPONDENTS

Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions
Donald Galloway (a pseudonym) v Commonwealth Director of Public Prosecutions
Edmund Hodges (a pseudonym) v Commonwealth Director of Public Prosecutions
Rick Tucker (a pseudonym) v Commonwealth Director of Public Prosecutions
[2018] HCA 53
8 November 2018
M168/2017, M174/2017, M175/2017 & M176/2017

ORDER

1. *Appeals allowed.*

2. *Set aside orders 2 and 3 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 25 May 2017 and, in their place, order that the appeal to that Court be dismissed.*

3. *Subject to orders 4 and 5, the reasons for judgment of the Court be made available from the High Court Registry only in their redacted form and by request, subject to payment of the prescribed fee.*

4. *The full, unredacted reasons for judgment of the Court be provided to the parties and their legal representatives.*

5. *Pursuant to s 77RE(1) of the* Judiciary Act *1903 (Cth) , it being necessary to prevent prejudice to the proper administration of justice under s 77RF(1)(a) of the* Judiciary Act *, there be no disclosure other than disclosure in accordance with order 4, whether by publication or otherwise, of the full, unredacted reasons for judgment of the Court until 10:00am on Wednesday, 14 November 2018 or further order.*

6. *There be liberty to apply within 5 days for orders to continue the suppression or non-publication of any of the redacted sections of the unredacted reasons for judgment of the Court.*

On appeal from the Supreme Court of Victoria

Representation

C G Mandy for the appellant in M168/2017 (instructed by Jimmy Lardner Lawyers)

M P Cahill SC with M D Stanton for the appellant in M174/2017 (instructed by Hicks Oakley Chessell Williams)

B W Walker SC with G H Livermore and C E Currie for the appellant in M175/2017 (instructed by Holding Redlich)

P F Tehan QC with C T Carr for the appellant in M176/2017 (instructed by Slades & Parsons Solicitors)

W J Abraham QC with K T Armstrong for the first respondent in all matters (instructed by Director of Public Prosecutions (Cth))

S P Donaghue QC, Solicitor-General of the Commonwealth, with S J Maharaj QC and G A Hill for the second respondent in all matters (instructed by Australian Government Solicitor)

Submitting appearances for the third, fourth and fifth respondents in each matter

CATCHWORDS

Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions
Donald Galloway (a pseudonym) v Commonwealth Director of Public Prosecutions

Edmund Hodges (a pseudonym) v Commonwealth Director of Public Prosecutions
Rick Tucker (a pseudonym) v Commonwealth Director of Public Prosecutions

Criminal practice – Abuse of process – Where Australian Crime Commission ("ACC") received information concerning allegations that company involved in criminal activity – Where allegations referred to Australian Federal Police ("AFP") – Where appellants declined to participate in cautioned record of interview with AFP – Where appellants compulsorily examined by ACC – Where examiner aware that appellants were suspects who may be charged with an offence – Where examiner permitted AFP officers to watch examinations from nearby room without disclosing their presence to appellants – Where examiner permitted dissemination of examination material to AFP and Commonwealth Director of Public Prosecutions – Where appellants subsequently charged with Commonwealth and Victorian offences – Where appellants sought permanent stay of prosecutions for abuse of process – Where primary judge permanently stayed prosecutions – Where Court of Appeal of Supreme Court of Victoria allowed appeals from orders of primary judge – Whether ACC conducted special investigation under *Australian Crime Commission Act* 2002 (Cth) – Whether examinations unlawful – Whether prosecution derived forensic advantage from examinations – Whether appellants suffered forensic disadvantage as result of examinations – Whether examinations unlawful infringement upon appellants' right to silence – Whether examiner's conduct reckless – Whether permanent stay necessary to prevent administration of justice falling into disrepute.

Words and phrases – "abuse of process", "administration of justice", "coercive powers", "compulsive powers", "compulsory examination", "derivative use", "direct use", "dissemination of examination product", "fair trial", "forensic advantage", "forensic choice", "forensic disadvantage", "illegally obtained evidence", "improper purpose", "integrity of the court", "locked in", "may be charged", "non-publication directions", "permanent stay", "prejudice", "prosecution brief", "prosecutorial team", "reckless", "right to silence", "special investigation", "suspect", "trial directions", "unlawfully obtained evidence".

Australian Crime Commission Act 2002 (Cth), ss 7C, 46A , Pt II Div 2 .

1. **Following paragraph cited by:**

   FAN19 v Australian Criminal Intelligence Commission (15 February 2021) (Banks-Smith J)

Onley v Commissioner of the Australian Federal Police (10 May 2019) (Bathurst CJ, Basten and Meagher JJA)

KIEFEL CJ, BELL AND NETTLE JJ. These are appeals from a decision of the Court of Appeal of the Supreme Court of Victoria (Maxwell P, Redlich and Beach JJA)[1] allowing appeals from orders of the primary judge permanently staying prosecutions of the appellants for offences contrary to the *Criminal Code* (Cth) and, in some cases, contrary to s 83(1)(a) of the *Crimes Act* 1958 (Vic) . The appellants were compulsorily examined by the Australian Crime Commission ("the ACC")[2] in 2010 prior to being charged with those offences. The principal issue in each appeal is whether the ACC acted so much in disregard of the requirements of Div 2 of Pt II of the *Australian Crime Commission Act* 2002 (Cth) ("the ACC Act") as it then stood, and therefore in unlawful violation of each appellant's common law right to silence, that the prosecutions should be stayed.

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[1] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120.

[2] The ACC is also known as the Australian Criminal Intelligence Commission: *Australian Crime Commission Act* 2002 (Cth), s 7(1A) ; Australian Crime Commission Regulations 2002 (Cth), reg 3A .

Relevant statutory provisions

2. The ACC is established by s 7 of the ACC Act . Section 7A(c) provided at the time of the examinations that the functions of the ACC included investigating, when authorised by the Board of the ACC, matters relating to federally relevant criminal activity.

3. The Board was constituted by s 7B of the ACC Act and comprised the Commissioner of the Australian Federal Police, the Commissioner or head of the police force of each State and Territory, the Secretary of the Attorney-General's Department, the Chief Executive Officer of Customs, the Chairperson of the Australian Securities and Investments Commission, the DirectorGeneral of Security, the Chief Executive Officer of the ACC ("the CEO") and the Commissioner of Taxation. The Commissioner of the Australian Federal Police was the Chair of the Board.

4. Section 7C(3) provided that the Board may determine in writing that an investigation into matters relating to federally relevant criminal activity is a special investigation. Before doing so, however, the Board must consider whether ordinary police methods of investigation into the matters are likely to be effective.

5. Section 7C(4) provided that a determination that an investigation is a special investigation must describe the general nature of the circumstances or allegations constituting the federally relevant criminal activity, state that the relevant crime or crimes is or are an offence or offences against a law of the Commonwealth, a State or a Territory, and set out the purpose of the investigation.

6. Section 46A(2A) provided that as soon as practicable after the Board authorises in writing the ACC to investigate matters relating to federally relevant criminal activity, the CEO must determine in writing the head of the investigation.

7. Section 46B provided for the appointment by the GovernorGeneral of a person who has been enrolled as a legal practitioner for at least five years as an examiner.

8. Division 2 of Pt II of the ACC Act provided for the conduct of examinations by the ACC. Sect ion 24A provided that an examiner may conduct an examination "for the purposes of a special ACC operation/investigation". A special ACC investigation was defined in s 4(1) as an investigation into matters relating to federally relevant criminal activity that the ACC is conducting and that the Board has determined to be a special investigation.

9. Section 28(1) provided that an examiner may summon a person to appear before an examiner at an examination to give evidence and produce documents or other things as are referred to in the summons, but s 28(1A) provided that before issuing a summons the examiner must be satisfied that it is reasonable in all the circumstances to do so and also record in writing the reasons for the issue of the summons either before or at the same time as the issue of the summons.

10. Section 28(5) provided so far as is relevant that an examiner may at an examination take evidence on oath or affirmation and for that purpose require a person appearing at the examination to give evidence to take an oath or affirmation.

11. Section 28(7) provided so far as is relevant that the powers conferred by s 28 are not exercisable except for the purposes of a special ACC investigation.

12. Section 30(2)(b) provided that a person appearing as a witness at an examination before an examiner shall not refuse or fail to answer a question that the examiner requires the person to answer. Section 30(6) provided that a person who fails to answer is guilty of an indictable offence punishable by up to five years' imprisonment.

13. Section 30(4) and (5) provided so far as is relevant that if before answering a question a person claims that the answer might tend to incriminate the person or make the person liable to a penalty the answer is not admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty other than confiscation proceedings or a proceeding in respect of the falsity of the answer.

14. Section 25A(3) provided that an examination before an examiner must be held in private and the examiner may give directions as to the persons who may be present during the examination or part of the examination.

15. Section 25A(6) provided so far as is relevant that at an examination a witness may, so far as the examiner thinks appropriate, be examined or cross-examined on any matter that the examiner considers relevant to the special ACC investigation by counsel assisting the examiner, any person authorised by the examiner to appear at the examination or any legal representative of the person at the examination.

16. Section 25A(7) provided that if a person other than a member of the staff of the ACC is present at an examination while another person ("the witness") is giving evidence, the

examiner must inform the witness that the person is present and give the witness an opportunity to comment on the presence of the person. Section 25A(8) provided that a person does not cease to be entitled to be present at an examination or part of an examination if the examiner fails to comply with s 25A(7) .

17. Section 25A(9) provided so far as is relevant that an examiner may direct that any evidence given before the examiner must not be published or must not be published except in such manner and to such persons as the examiner specifies, and further provided that the examiner must give such a direction if the failure to do so might prejudice the fair trial of a person who has been or may be charged with an offence.

The facts

18. The primary judge found that, for every special investigation authorised by the Board, the CEO nominated a head of investigation under s 46A(2A) of the ACC Act , and that the position was referred to within the ACC as the Head of Determination ("the HOD"). While the determination for an investigation remained on foot, the HOD identified projects that he or she considered could appropriately be pursued under the determination. For each such project, the HOD prepared an application to the relevant internal management committee, seeking approval for the work to be undertaken. To begin with, the relevant internal management committee was called the Governance Operations Committee ("the GOC"). Later, the GOC was replaced by the Organised Crime Management Committee ("the OCMC"). Those committees were set up to assist the CEO in his or her responsibility to manage, coordinate and control ACC investigations. Each committee was chaired by an Executive Director and consisted of all HODs, State and National Managers, and other senior members of staff of the ACC and met, on average, two to four times per month, to consider project applications, reports and other operational matters.

19. Applications for project approval set out the significance of the proposed work, its alignment with determination objectives, the resources required, the expected outcomes, and any legal advice as to the legality of the proposed activity. The GOC/OCMC determined whether the project should be undertaken. If a project were approved by the GOC/OCMC, resources were applied, which may have included analysts, investigators, lawyers and examiners who would identify how best to achieve the project aims. In the case of special ACC investigations, that may have involved conducting compulsory examinations. If a potential witness for examination was identified, an application would be made to an examiner.

20. On 25 June 2008, the Board made the Australian Crime Commission Special Investigation Authorisation and Determination (Financial Crimes) 2008 ("the Financial Crimes Determination") under s 7C authorising the ACC to investigate "the matter mentioned in Schedule 1 relating to federally relevant criminal activity until 30 June 2009". The following appeared in Sched 1 cl 1 under the heading "Investigation":

> "An investigation to determine whether, in accordance with the allegations mentioned in clauses 3 and 4 and in the circumstances mentioned in clause 2, federally relevant criminal activity:
>
> (a) was committed before the commencement of this Instrument; or

(b) was in the process of being committed on the commencement of this Instrument; or

(c) may in future be committed."

21. Clause 2 of Sched 1 identified the circumstances which were said to comprise the federally relevant criminal activity as follows:

"The general nature of the circumstances constituting federally relevant criminal activity that may have been, may be being, or may in future be, committed are those implied from information available to Australian law enforcement agencies indicating:

(a) reports made by cash dealers under the *Financial Transaction Reports Act 1988* or by reporting entities under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* may be linked to persons or entities suspected of involvement in relevant criminal activity, or of their nature indicate suspicious activities pointing to likely involvement of entities involved in relevant criminal activity;

(b) the failure of persons suspected of involvement in relevant criminal activity to lodge income tax returns over a number of years;

(c) the acquisition of assets totally disproportionate to declared income or nondeclaration of income by persons suspected of involvement in relevant criminal activity;

(d) that business structures and financial arrangements of organised crime entities are becoming increasingly complex and are making use of professional facilitators, intermediaries and financial services providers in Australia and overseas;

(e) that criminal enterprise structures are increasing their global networking and employ the intermingling of legitimate funds and proceeds of crime and are participating in otherwise legitimate commercial enterprises;

(f) effective targeting of the business structures of organised crime entities requires a multiagency intelligence driven approach at a national level with access to coercive powers."

22. As to the allegations said to constitute the federally relevant criminal activity, cl 3 of Sched 1 stated that:

"The general nature of the allegations that federally relevant criminal activity may have been, may be being, or may in future be, committed, is that from 1 January 1995 certain persons in concert with one another or with other persons, may be engaged in one or more of the following activities:

(a) money laundering within the meaning of the *Proceeds of Crime Act 1987* ;

(b) dealing with money or other property contrary to sections 400.3, 400.4, 400.5, 400.6(1), 400.6(2) or 400.7(1) of the *Criminal Code* ;

..."

23. That was followed by a list extending over three A4 pages of more than 70 different offences against Commonwealth and State laws ranging from money laundering through to offences of general dishonesty, customs offences, currency offences and violence related offences, as well as "such other incidental offences the head of this ACC special investigation suspects may be directly or indirectly connected with, or may be a part of, a course of activity involving" the commission of any of some 58 of the offences specifically identified plus "other unlawful activities that are related to or connected with [those] activities and that involve relevant offences against a law of a State [defined to include the Australian Capital Territory and the Northern Territory] that have a federal aspect".

24. Clause 6 of the Financial Crimes Determination provided under the heading "Determination" that:

"Pursuant to paragraph 7C(1)(d) and subsection 7C(3) of the [ACC] Act, the Board:

(a) has considered whether ordinary police methods of investigation into the matter mentioned in Schedule 1 relating to federally relevant criminal activity are likely to be effective; and

(b) determines that the investigation mentioned in Schedule 1 is a special investigation."

25. Clause 9 of the Financial Crimes Determination identified the purpose of the investigation as follows:

"The purpose of the investigation is:

(a) to collect and analyse criminal information and intelligence relating to the federally relevant criminal activities, to disseminate that information and intelligence in accordance with the [ACC] Act and to report to the Board; and

(b) to identify and apprehend persons involved in the federally relevant criminal activities, to collect evidence about those activities and to reduce the incidence and effect of those activities; and

(c) to make appropriate recommendations to the Board about reform of:

(i) the law relating to relevant offences; and

(ii) relevant administrative practices; and

(iii) the administration of the courts in relation to trials of relevant offences."

26. The GOC subsequently approved a project to deal with matters arising under the Financial Crimes Determination.

27. In December 2008, the ACC received information from an "unregistered human source" concerning allegations that XYZ Limited[3] was involved in criminal activity. That criminal activity was not one of the offences set out in Sched 1 cl 3 of the Financial Crimes Determination. In March and April 2009, the ACC conducted an initial assessment of those allegations.

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[3] A pseudonym.

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28. Based on that assessment, the Operations Manager of the Financial Crimes Program within the ACC produced an undated investigation proposal in which it was suggested that a GOC application be made for an operation to investigate the claims relating to XYZ Limited. The Operations Manager noted, however, that:

> "It is not the intention of the team to complete a complex full scale investigation at this stage, but rather to determine the validity of the claims made by the source and to identify opportunities for intelligence and evidence collection. There is also a significant foreign component of a full scale investigation which would require the cooperation of the Australian Federal Police and various overseas partner agencies."

29. As the primary judge determined, the Operations Manager was not recommending a joint investigation involving the Australian Federal Police ("the AFP") but rather advising *against* a full scale investigation at that time *because* it would require bringing in the AFP and overseas agencies. The Operations Manager recommended instead that the next step should be to conduct preliminary discussions with a number of cooperative witnesses identified in the initial assessment by way of either examinations or "general discussion" with witnesses who were not implicated in the allegations of corruption. Significantly, the Operations Manager advised against the examination of employees who were likely to be implicated in the allegations.

30. Further, as the primary judge also found, there was no evidence that the Operations Manager's recommendation was adopted. The ACC did not appoint a head of investigation or assign any of its staff to investigate the allegations involving XYZ Limited. Instead, on 22 April 2009, the ACC referred the allegations to the AFP and offered to allow the AFP to utilise the ACC's coercive powers. Thereafter, as the primary judge found, the ACC did not undertake any investigation of XYZ Limited of its own. It acted at all times "as a facility for the AFP to crossexamine under oath whoever the AFP wished, for the AFP's own purposes" [4].

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[4] [2016] VSC 334R at [395] .

31. In late May 2009, the AFP formally commenced an investigation entitled "Operation Thuja"[5] and a lead investigator was appointed. Initially, Operation Thuja was a broad-ranging investigation which concerned the culture within XYZ Limited and focussed on the company's activities.

[5] A pseudonym.

32. On 9 June 2009, a meeting was held between members of the AFP and ACC to discuss a "proposed" joint investigation into XYZ Limited and to "discuss future cooperation" between the AFP and the ACC. The ACC advised the AFP that it had a number of sources who could provide the AFP with further information regarding the allegations against XYZ Limited and reiterated its offer to make its coercive powers available to the AFP to pursue "agreed lines of enquiry". But as will become apparent, there never was any joint investigation.

33. On 10 June 2009, the Board of the ACC resolved to extend the Financial Crimes Determination for a further 12 months[6], noting "the review of activity conducted" under the 2008 Determination and reaffirming "the view of the Board that the requirements of s 7C(3) … continue to be met". Pointedly, as the primary judge found, there was no amendment of the Financial Crimes Determination to include within its coverage the criminal activity alleged to have been engaged in by XYZ Limited.

[6] Australian Crime Commission Special Investigation Authorisation and Determination (Financial Crimes) Amendment No 1 of 2009.

34. By July 2009, AFP officers had met with representatives of XYZ Limited on a number of occasions, and XYZ Limited had voluntarily provided the AFP with substantial documents and hard-drive material to assist with the AFP's investigation. The AFP had also approached the ACC to assist the AFP by providing the ACC's compulsive powers under the Financial Crimes Determination. It was proposed that ACC coercive hearings be used in circumstances where the AFP perceived that current XYZ Limited senior executives had knowledge of corrupt practices.

35. By October 2009, the ACC had confirmed to the AFP that it was prepared to assist by holding examinations. On 6 November 2009, a meeting was held at the ACC's Melbourne office, attended by the lead investigator of Operation Thuja and ACC staff, during which a tentative timetable was set for the examination of XYZ Limited employees and managers who the AFP believed had knowledge of the conduct forming the basis of the allegations. The suspect was

proclaimed to be XYZ Limited and all employees were to be viewed as witnesses, not suspects. Shortly after that meeting, Officer Schwartz[7] became the lead investigator of Operation Thuja. On the same day, the Commissioner of the AFP (who was also the Chair of the Board of the ACC) gave Operation Thuja his approval to use the ACC's coercive examination powers.

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[7] A pseudonym.

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36. In January 2010, the former lead investigator of Operation Thuja expressed concerns that the Financial Crimes Determination [8] did not cover the AFP's investigation of XYZ Limited's alleged criminal activity. He was overridden by Schwartz, however, and, by February 2010, the investigation had been extended to another company, QRS Limited[9], as well as XYZ Limited.

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[8] The primary judge referred to "the money laundering determination", but this appears to be a typographical error as that determination was not made until 9 June 2010: [2016] VSC 334R at [373] .

[9] A pseudonym.

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37. In February 2010, Schwartz confirmed in an internal AFP minute:

> "The AFP has engaged the [ACC] in relation to Operation [Thuja] in order to extract information and evidence from witnesses and suspects by means of the ACC's coercive powers to conduct examinations. The hearings will be conducted pursuant to the ACC's Financial Crimes/Money Laundering Determination."

38. On 12 March 2010, it was determined that no joint agency agreement between the AFP and the ACC was required because the examinations to be conducted by the ACC could take place under an existing memorandum of understanding and practical guidelines.

39. Schwartz stated that as far as the AFP was concerned, the ACC was not even a partner in the AFP's investigation. He described the extent of the ACC's role as being a "facility used by the AFP for compulsory examinations of suspects". He described ACC examinations as "available to the police in all our investigations" and as "a common tool that is traditionally used by police" [10] .

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[10] [2016] VSC 334R at [388] .

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40. In April 2010, two of the appellants, Galloway and Hodges, were examined by the ACC, purportedly pursuant to the Financial Crimes Determination.

41. On 9 June 2010, the Board of the ACC resolved to make a new determination, entitled the Australian Crime Commission Special Investigation Authorisation and Determination (Money Laundering) 2010 ("the Money Laundering Determination"), for which the Statement in Support stated as follows:

> "**PURPOSE OF THIS STATEMENT**
>
> 1. This statement supports a request from the [ACC] for the Board of the [ACC] to –
>
> (a) authorise the ACC under paragraph 7C(1)(c) and subsection 7A(c) of the [ACC Act] to conduct an investigation into federally relevant criminal activity, namely Money Laundering activity in Australia, and
>
> (b) determine under paragraph 7C(1)(d) and subsection 7C (3) of the Act that the investigation is a special investigation.
>
> 2. The special investigation will be known as the Money Laundering Special Investigation (ML SI).
>
> …
>
> **Does Money Laundering constitute federally relevant criminal activity?**
>
> 34. As noted above, the scope of money laundering activity is consistent with the definition under Section 4 of the [ACC Act]. The activity involves, or is of the same general nature as: tax evasion, fraud, theft, company violations; cyber crime and other serious offences within the meaning of the *Proceeds of Crime Act 2002* .
>
> **Whether Ordinary Police Methods Of Investigation are Likely To Be Effective**
>
> 35. Over the past few years, including through accessing data from private sector institutions, the ACC has continued to improve its understanding of trends in major financial crime. These public/private sector partnerships are critical to build knowledge and understanding where criminal networks merge illicit and mainstream activities.
>
> 36. On their own, however, such information flows, or in combination with conventional intelligence gathering efforts, may be unable to uncover, and unravel, the most sophisticated and highest threat financial crimes.

37. By their nature, the principals involved in major revenue and other fraud and money laundering offences use complex structures to distance themselves from actions that may be incriminating. Sometimes professional facilitators with specialised expertise assist in concealing criminal proceeds with legitimate investments and transactions. In many cases such strategies may involve offshore arrangements. Multiple, 'shell' and 'phoenix' corporate structures may be employed. In these circumstances, without inside knowledge, access to develop intelligence and evidence on the key protagonists is likely to be limited.

38. The use of ACC coercive powers, integrated with appropriate use of covert investigative techniques, has and is expected to continue to provide key capabilities to overcome these challenges by:

· providing unique and directly actionable intelligence and evidence, and

· providing additional focus to enable more effective utilisation of information already held by law enforcement and regulatory agencies, including the ACC." (footnote omitted)

42. As in the Financial Crimes Determination, the subject-matter of the investigation was defined in cl 1 of Sched 1 as follows:

"An investigation to determine whether, in accordance with the allegations mentioned in clause 3 and in the circumstances mentioned in clause 2, federally relevant criminal activity:

(a) was committed before the commencement of this Instrument; or

(b) was in the process of being committed on the commencement of this Instrument; or

(c) may in future be committed."

43. Clause 2 of Sched 1 set out the circumstances constituting federally relevant criminal activity. The introductory paragraph and sub-paragraphs (a) to (d) of cl 2 were identical to the introductory paragraph and corresponding sub-paragraphs in Sched 1 cl 2 of the Financial Crimes Determination [11] . Clause 2 of Sched 1 of the Money Laundering Determination went on to say:

"(e) that criminal enterprise structures are storing significant quantities of cash proceeds from illicit activities, increasing their global networking and employ the inter-mingling of legitimate funds and proceeds of crime, participating in otherwise legitimate commercial

enterprises, and some Australian-based criminal groups are using specialised overseas-based transnational criminal networks to launder significant quantities of illicit funds;

(f) banks, equity market and non bank financial institutions are a favoured means of laundering illicit funds nationally and internationally;

(g) effective targeting of the business structures of organised crime entities requires a multi-agency intelligence driven approach at a national level with access to coercive powers."

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[11] Above at [21].

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44. Clause 3 of Sched 1 provided that the general nature of the allegations which constituted federally relevant criminal activity was that "from 1 January 1995 certain persons in concert with one another or with other persons, may be engaged in one or more of" a range of Commonwealth and State offences which were similar, but not identical, to those identified in the Financial Crimes Determination. Once again, however, the Money Laundering Determination did not include in the list of relevant criminal activity the activity allegedly engaged in by XYZ Limited; and, as the primary judge observed, that was because it was not the type of criminal activity that seemed to be at the forefront of the ACC's concerns.

45. On 9 September 2010, the OCMC approved a project to deal with matters arising under the Money Laundering Determination. The HOD stated that it was a narrow project set up to address the remaining issues in relation to XYZ Limited that had not been finalised in the project established under the Financial Crimes Determination. The HOD said that the purpose of the project was to provide Operation Thuja with the examination powers that the ACC possessed, "to the extent that an examiner was prepared to approve them".

46. In November 2010, the appellants Strickland and Tucker were examined by the ACC, purportedly pursuant to the Money Laundering Determination.

47. Hodges, Strickland and Galloway were arrested and first charged with Commonwealth offences on 1 July 2011. Tucker was first charged on 13 March 2013.

The appellants' examinations

48. Prior to their examinations, each appellant had been asked to participate in a cautioned record of interview by the AFP. Each had declined that request.

49. Mr Sage was an examiner appointed under s 46B of the ACC Act and acted as the examiner for each appellant's examination. The primary judge found that by the time of the examinations of each of the appellants, Sage was aware that they were regarded by the AFP as suspects and as persons who "may be charged" for the purposes of s 25A(9) of the ACC Act .

50. During the examinations, several AFP officers involved in Operation Thuja watched the examinations from a nearby room. Their presence was not disclosed to any of the appellants. There were six AFP officers in attendance at Galloway's examination; seven at Hodges'; nine at Strickland's; and six at Tucker's.

51. Following each examination, Sage made non-publication directions under s 25A(9) that permitted dissemination of examination material to the AFP and the Commonwealth Director of Public Prosecutions ("the CDPP"). The ACC provided audio recordings of the examinations of the appellants to both the AFP and the CDPP. In April 2012, some 10 months after Hodges, Strickland and Galloway were charged, the AFP provided electronic copies of their examination transcripts to the CDPP.

The primary judge's reasoning

52. The primary judge found [12] that, at relevant times, the ACC was conducting a special ACC investigation constituted, sequentially, of the Financial Crimes Determination and the Money Laundering Determination. In the primary judge's view [13] , it was sufficient to reach that conclusion that the determinations had been made or, as her Honour accepted, were "in place" or were "operative". The primary judge also appears to have accepted [14] that the examinations were conducted for the purpose of the special investigation, or at least appears to have concluded that she ought not to infer that the examinations were conducted for a purpose that could not be reconciled with the proper exercise of the examination power.

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[12] [2016] VSC 334R at [343]-[348], [840] .

[13] [2016] VSC 334R at [343], [347] .

[14] [2016] VSC 334R at [404], [428], [841] .

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53. The primary judge found [15] that, although Sage was the examiner, and, therefore, the statutory office holder with legal responsibility for deciding whether the appellants were to be examined and the matters upon which they should be examined, Sage did not in fact make any of those decisions. The entire examination process was driven by the AFP for the purposes of Operation Thuja. Schwartz decided that the appellants should be examined and Schwartz determined the matters upon which they should be interrogated. Sage did not exercise any independent judgment in relation to the matter: he merely "rubber stamped" the AFP's requests as to who would be examined, which members of the AFP would be in attendance during each examination, and the persons to whom the examination product would be disseminated.

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[15] [2016] VSC 334R at [390], [395], [448], [509], [537], [845], [849]-[850] .

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54. **Following paragraph cited by:**

R v Hanna (19 March 2021) (Morrison and Philippides JJA and Crow J)

The primary judge found [16] that Schwartz had decided that, if the appellants would not voluntarily answer the AFP's questions, he would force them to answer questions by taking advantage of the ACC's coercive powers. Schwartz considered that forcing the appellants to answer the AFP's questions would yield the prosecution a forensic advantage of locking each appellant into a version of events, on oath, from which the appellant could not credibly depart at trial, and a further tactical advantage that, once the appellant had been examined, the answers given on oath could be used to persuade or induce the appellant to make a statement in admissible form [17] . In an internal AFP minute dated 20 January 2011, Schwartz recorded those views thus [18] :

> "The hearings did not substantially add to our current intelligence holdings but did lock certain witnesses into a version of events which may prove valuable in court. The transcripts of the hearings will be disseminated to CDPP so that they may be used in future indemnity or coerced statement assessments."

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[16] [2016] VSC 334R at [449] .

[17] [2016] VSC 334R at [407]-[411] .

[18] [2016] VSC 334R at [408] .

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55. The primary judge also found [19] that, in relation to at least two of the appellants, Strickland and Tucker, the AFP's purpose of so forcing the appellants to answer AFP questions was to "trigger them" into making admissions on oath and that Sage knew that that was the AFP's objective in relation to those appellants.

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[19] [2016] VSC 334R at [426] .

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56. By contrast, the primary judge does not appear to have reached a firm conclusion as to Sage's purposes other than that it was not demonstrated that they were improper purposes. Having observed [20] that an improper purpose is not lightly to be inferred, her Honour stated [21] in substance that, while Sage was aware of the AFP's various purposes, it did not follow that the AFP's purposes were Sage's purposes. Her Honour did not state that she found that Sage's purposes were different from Schwartz's purposes but it appears implicit in what her Honour did state that she was not persuaded that they were the same. If so, that suggests that the path of her Honour's reasoning regarding Sage's purposes was that, whether or not Schwartz's purposes were improper, it was not demonstrated that Sage's purposes were the same as

Schwartz's purposes, and, therefore, it was not demonstrated that Sage's purposes were improper.

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[20] [2016] VSC 334R at [404] , citing *Industrial Equity Ltd v Deputy Commissioner of Taxation* (1990) 170 CLR 649 at 672 per Gaudron J; [1990] HCA 46 .

[21] [2016] VSC 334R at [428], [847] .

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57. The primary judge was clear, however, that Sage had entirely abrogated his statutory responsibilities at every level of the examination process. Her Honour found that Sage had been well aware that the appellants had been regarded as suspects by the AFP at the time of their examinations and that they had declined to participate in cautioned interviews. Accordingly, her Honour found [22] that had Sage turned his mind to the requirements of s 25A(9) , it should have been abundantly clear that the appellants were persons who "may be charged" and, therefore, persons entitled to the benefit of the protective provisions in s 25A . Instead of making appropriate orders, Sage made nonpublication orders which would have the effect of completely undermining the appellants' rights to a fair trial [23] . Her Honour added [24] that while Sage's failure to tell the appellants that AFP officers were watching their examinations was not unlawful, his decision deprived the appellants of the opportunity to object or submit that their fair trial rights might be compromised.

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[22] [2016] VSC 334R at [851]-[853] .

[23] [2016] VSC 334R at [709], [864], [868] .

[24] [2016] VSC 334R at [860]-[863] .

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58. Further, although the primary judge stated that she was unable to conclude that Sage acted in deliberate disregard of his statutory obligations, her Honour held [25] that it was apparent that he had been "reckless" as to the discharge of his various obligations to an unacceptable degree, and that, if he had exercised his powers independently and with appropriate diligence, those responsible for investigating the alleged offences and preparing the prosecution brief would never have received the information which they received.

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[25] [2016] VSC 334R at [853], [862], [868], [881] .

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59. In fact, as the primary judge found, information obtained from the examinations was used to compile the prosecution brief and to obtain evidence against the appellants in circumstances

where the AFP had no entitlement to obtain such information and would not have been able to do so if Sage had not exercised his powers inappropriately. The prosecution had therefore gained an unfair forensic advantage as a result of the prosecution brief having been prepared, at least in part, using information from the examinations. Moreover, as her Honour found [26] , numerous investigators who were privy to the examinations would continue to be involved in giving evidence, liaising with witnesses, and suggesting avenues of examination and tactical decisions to be made at trial.

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[26] [2016] VSC 334R at [814], [816]-[817], [871]-[873], [876] .

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60. In the result, the primary judge found [27] in relation to Strickland, Hodges and Tucker that the practical effect of each of their examinations had been to constrain their legitimate forensic choices in the conduct of their trials because of the answers they were compelled to give during those examinations. By contrast, in relation to Galloway, who, subsequent to his examination, participated in an interview with the AFP and voluntarily disclosed matters previously disclosed at his examination and then relied on that and his ACC examination during committal proceedings, the primary judge could not see what remaining forensic disadvantage could be said to result from his compulsory examination [28] . But as her Honour later acknowledged [29] , all of the appellants, including possibly Galloway, had been deprived of a forensic choice to test before a jury the basis upon which the documents in the prosecution brief were selected.

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[27] [2016] VSC 334R at [766], [870] .

[28] [2016] VSC 334R at [760]-[763], [765] .

[29] [2016] VSC 334R at [818]-[819], [870] .

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61. It followed, in her Honour's view, that it was practically impossible to "unscramble the egg" so as to remove the forensic advantage which the prosecution had improperly obtained, or to ameliorate the forensic disadvantage suffered by at least three of the appellants, with the possible exception being Galloway. Short of creating a new investigative team and conducting a new investigation, it would be impossible to ensure sufficient quarantining of the investigative officers and the prosecutorial team to mitigate the permeation of examination material from the prosecutions [30] .

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[30] [2016] VSC 334R at [877]-[879] .

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62. **Following paragraph cited by:**

Camelo-Gomez v The The Queen (01 June 2022) (Davies, Bellew and Fagan JJ)
Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Limited (No 5 Indictment) (03 November 2021) (Wigney J)
Director of Public Prosecutions (SA) v Jaunay & Anor (22 April 2020) (Kourakis CJ; Kelly and Parker JJ)

156. In *Strickland (a pseudonym) v Director of Public Prosecution (Cth)* [29] (*Strickland*), the High Court ordered the stay of a prosecution brought after the compulsory processes of the Australian Crime Commission were engaged at the behest of an investigating police officer without any lawful basis to examine the accused after they had refused to answer that police officer's questions. Kiefel CJ, Bell and Nettle JJ (the plurality) summarised the finding of the trial Judge as follows: [30]

> [62] … this case involved the deliberate, coercive questioning of suspects for the very reason that they had exercised their right to decline a cautioned police interview, and thereby for the very purpose of achieving a forensic disadvantage for the appellants and a forensic advantage for the prosecution in foreseen future criminal prosecutions.

via
[30] *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 93 ALJR 1 at [62] .

The primary judge noticed [31] the principal authorities in which it has been held that a permanent stay of prosecution is only ever to be granted in rare and exceptional circumstances [32] . But her Honour considered [33] this case to be different from previous cases in which a stay of prosecution has been refused despite illegality or impropriety in the conduct of an ACC examination or the use of examination material. Unlike any of those previous cases, this case involved the deliberate, coercive questioning of suspects for the very reason that they had exercised their right to decline a cautioned police interview, and thereby for the very purpose of achieving a forensic disadvantage for the appellants and a forensic advantage for the prosecution in foreseen future criminal prosecutions.

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[31] [2016] VSC 334R at [49]-[50] .

[32] See *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31, 34 per Mason CJ, 60 per Deane J, 76 per Gaudron J; [1989] HCA 46 . See also *R v Glennon* (1992) 173 CLR 592 at 605 per Mason CJ and Toohey J; [1992] HCA 16 ; *Dupas v The Queen* (2010) 241 CLR 237 at 250 [33]-[35]; [2010] HCA 20.

[33] [2016] VSC 334R at [880] .

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63. On that basis, the primary judge concluded [34] that the prosecutions should be permanently stayed not only because of the forensic disadvantage to which the appellants have been subjected as a result of the unlawful dissemination of the examination product but also in order to protect public confidence in the administration of justice.

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[34] [2016] VSC 334R at [883] .

The Court of Appeal's reasoning

64. By contrast to the primary judge, the Court of Appeal found [35] that there was never an ACC investigation at any stage of the process and that the results of the examination or examination product were never intended to be used by the ACC for any ACC investigative purpose. The conduct of each examination was merely a step in the AFP investigation with the result that the product was only ever to be used by the AFP. It followed, their Honours held, that the appellants' examinations were not conducted "for the purposes of a special ACC investigation" but for an extraneous, improper purpose of assisting an AFP examination. Consequently, the decisions to conduct the examinations and the decisions to permit disclosure of material from the examinations to the AFP and the CDPP were unlawful [36] .

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[35] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [187] -[189], [209] .

[36] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [212] .

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65. Despite so concluding, however, the Court of Appeal considered that the primary judge had erred in holding that the prosecution was unfairly advantaged by the examinations. The Court of Appeal reasoned [37] that the appellants had failed to identify any evidence which was to be relied on by the prosecution which, but for the examinations, would not have been obtained by the prosecution. Alternatively, their Honours said that, even if investigators derived some assistance from the examinations in "guiding" and "refining" subsequent documentary searches, the case against the appellants rested almost entirely on documents and had not been materially affected by the results of the examinations. Nor had the appellants sought to establish that information obtained during the examinations assisted the prosecution. To the contrary, each appellant's case before the primary judge had been that the prosecution's case against him was so much developed by the time of his examination that the information extracted in the course of examinations accorded with the prosecution case theory. And, their Honours said [38] , if a claim of specific forensic advantage were to be pursued, it was incumbent on each appellant as a matter of fairness to put to each prosecution witness the

advantages which it was said the witness obtained from the examination or examination product and enable the CDPP to call evidence in rebuttal. Subject to one insignificant exception, nothing of that kind had been undertaken.

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[37] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [258]-[266].

[38] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [270]-[271].

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66. The Court of Appeal further rejected [39] the appellants' contentions, which relied upon the observations of Hayne and Bell JJ in *X7 v Australian Crime Commission* ("*X7 (No 1)*")[40], that, even where answers given at a compulsory examination are kept secret, they are productive of forensic disadvantage in the sense that an examinee can no longer decide the course to be adopted at trial according only to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial or the strength of the evidence led by the prosecution at trial. The Court of Appeal considered [41] that, in view of concessions made by counsel for the appellants, the position that obtained accorded with the observations of Gageler and Keane JJ in *Lee v New South Wales Crime Commission* ("*Lee (No 1)*")[42] that they were unable to regard as the deprivation of a legitimate forensic choice a practical constraint on the capacity of an examinee's legal representatives at trial to lead evidence, crossexamine or make submissions inconsistent with evidence given by the examinee at a compulsory examination.

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[39] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [285]-[289].

[40] (2013) 248 CLR 92 at 142-143 [124] (Kiefel J agreeing at 152 [157]); [2013] HCA 29.

[41] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [297]-[299].

[42] (2013) 251 CLR 196 at 316 [323]; [2013] HCA 39. The Court of Appeal also referred to *X7 v The Queen* (2014) 292 FLR 57 at 78 [108]-[109] per Bathurst CJ (Beazley P, Hidden J, Fullerton J and R A Hulme J agreeing at 79 [114], [116]-[118]) and *Zhao v Commissioner of the Australian Federal Police* (2014) 43 VR 187 at 204 [48].

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67. Alternatively, the Court of Appeal held [43], if particular lines of crossexamination of AFP officers might be impeded, for example, because an investigator needed to explain that he or she had not conducted a line of enquiry or search because of what was said in the compulsory examination, the disadvantage to the appellants thereby created could be sufficiently

ameliorated by trial directions that the investigator refrain from explaining his or her actions by reference to what the investigator had learned or believed that he or she had learned from the compulsory examinations.

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[43] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [301].

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68. Finally, the Court of Appeal rejected [44] the primary judge's conclusion that, because of Sage's "reckless" disregard of his statutory responsibilities, it was necessary to stay the prosecutions to protect confidence in the administration of justice. Their Honours reasoned that, given that the primary judge had not found that Sage had adverted to the possibility that his actions with respect to s 25A(9) were unlawful, it was not open for her Honour to conclude that Sage had acted recklessly, and further, that anything short of reckless disregard of responsibilities would not suffice to bring the case within the exceptional category of cases in which, absent unfairness, a stay is necessary to preserve public confidence in the administration of justice. Their Honours found it unnecessary to deal separately with the primary judge's conclusion that Sage had also been reckless with respect to his obligations under s 25A(7), as they regarded that conduct as involving no unlawfulness.

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[44] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [108]-[109], [116]-[117], [312].

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69. Accordingly, the Court of Appeal held [45] that because they rejected the "twin bases" on which the primary judge had ordered a stay, being the primary judge's findings as to recklessness and incurable forensic disadvantage, the appeal should be allowed and the stay applications refused. Their Honours added that, although not mandatory, a change in prosecutorial team and the ability of the trial judge to make directions enjoining the investigators from disclosing the contents of the ACC examinations to the prosecutor, or the CDPP from leading evidence, or prohibiting certain matters from being referred to in crossexamination, would ensure that the appellants receive a fair trial.

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[45] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [314]-[315].

Absence of special ACC investigation

70. The Court of Appeal were correct to hold that there was no special ACC investigation into the matters the subject of the AFP investigation or otherwise relevant to the examination of the appellants. As the primary judge found, there was no evidence that the proposal of the ACC

Operations Manager to conduct preliminary discussions with witnesses ever proceeded. No investigation head was ever appointed, and no ACC staff were ever assigned to investigate the allegations involving XYZ Limited. The ACC referred the allegations to the AFP on 22 April 2009 and thereafter did not undertake any investigation of XYZ Limited. The ACC acted at all times simply as a facility for the AFP to crossexamine the appellants under oath for the AFP's own purposes.

71. The determinations were incapable in and of themselves of constituting a special ACC investigation. At most, they amounted to authorisations for the conduct, in future, of investigations yet to be identified or undertaken and a stipulation that, if in future any such investigation were conducted, it would be a special ACC investigation. The question of whether such an investigation was conducted was a question of fact and the availability of the examination power depended on the existence of an investigation in fact[46]. As the Court of Appeal observed [47] , there are at least four considerations which conduce to that conclusion. First, as is apparent from s 24A of the ACC Act , the power to conduct an examination is an ancillary power available to be used "for the purposes of a special ACC operation /investigation". As was held in *GG v Australian Crime Commission* [48] , that implies that it is a power which is available for the purposes of a particular investigation. Otherwise, an ACC examiner required to make a determination whether to invoke the power could not sensibly decide whether the proposed examination would be "for the purposes of" that investigation. Secondly, in order to construe s 24A as authorising the invocation of the examination power in the absence of an extant special ACC investigation, it would be necessary to strain the meaning of the words "for the purposes of a special ACC operation /investigation" to include the meaning "for the purposes of examining persons in relation to matters which are not the subject of an ACC investigation". Thirdly, inasmuch as s 25A(6) pro vided for the presence of "counsel assisting the examiner … in relation to the matter to which the ACC operation/investigation relates" and authorised counsel assisting to ask questions on any matter judged by the examiner to be "relevant to the ACC operation/investigation", the provision implicitly assumes the existence of a separate ACC investigation and thus a "matter" to which that specific investigation relates and hence to which the questions may be relevant. Fourthly, to hold otherwise would be to read "for the purposes of a special ACC operation/investigation" as meaning for the purpose of any line of enquiry, howsoever suggested, and of whatever significance or insignificance, as to a matter which perchance satisfies the description of one of the kinds of federally relevant criminal activity delineated in a determination. Given the nature of the examination power, and its effect upon the liberty of the subject, that is not a construction which presents as at all probable [49] .

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[46] Whether the determinations would have been effective to render any such investigation a special ACC investigation is a question of law which, for present purposes, need not be decided.

[47] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [174] -[179] .

[48] (2010) 182 FCR 513 at 522 [31] per Jessup and Tracey JJ (Downes J agreeing at 5 15 [3]).

[49] See *Smith v Corrective Services Commission (NSW)* (1980) 147 CLR 134 at 139; [1980] HCA 49.

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72. **Following paragraph cited by:**

R v Bell (07 August 2020) (Chapman J)

Contrary to submissions which were advanced before this Court by the Solicitor-General of the Commonwealth on behalf of the ACC (which was an intervener before the primary judge and the Court of Appeal and thus a respondent before this Court [50]), it does not detract from that conclusion that the primary purpose of the ACC may be to obtain evidence that can be used to prosecute persons who have committed serious offences. Whatever the ambit of the ACC's powers, they are constrained by the ACC Act to be exercised only in the circumstances and only for the purposes for which the Act provides.

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[50] High Court Rules 2004 (Cth), r 41.01.1 ; *Thomas v The Queen* [2008] HCATrans 258 at 709-790 .

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73. **Following paragraph cited by:**

FAN19 v Australian Criminal Intelligence Commission (15 February 2021) (Banks-Smith J)

Contrary also to the Solicitor-General's submissions, it is not the case that the legislative antecedents of the ACC Act imply that the Act should be construed as authorising the ACC generally to lend its compulsory interrogation powers to the AFP whenever the AFP has under investigation a federally relevant criminal offence that is listed in a determination. The compulsory powers conferred on ACC examiners by Div 2 of Pt II of the ACC Act are by design, in terms and in effect available for use only for the purposes of a specific ACC investigation which the Board has determined, after consideration of whether ordinary police powers in relation to the matters the subject of investigation are likely to be effective, will be a special ACC investigation [51] . They are not available to be let out to the AFP whenever an AFP suspect declines to be interviewed, for the purpose of compelling the suspect to make admissions in relation to the offence of which he or she is suspected.

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[51] See generally Australia, Senate, Australian Crime Commission Establishment Bill 2002, Revised Explanatory Memorandum at 12, 6, 910, 1718; Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 September 2002 at 7329; *X7 (No 1)* (2013) 248 CLR 92 at 149150 [144][147] per Hayne and Bell JJ (Kiefel J agreeing at 152 [157]).

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74. **Following paragraph cited by:**

Bazzo v Kirman (07 April 2020) (Buss P, Mitchell JA, Beech JA)

It follows, as the Court of Appeal held, that, since the examinations of the appellants were not held for the purposes of a special ACC investigation, there being no ACC investigation on foot, but rather for an extraneous, unlawful purpose of assisting the AFP to compel the appellants to give answers to questions about offences of which they were suspected and had declined to be interviewed, the examinations were unlawful.

Forensic advantage and disadvantage

75. **Following paragraph cited by:**

SQH v Scott (23 February 2022) (Williams J)
R v Hanna (19 March 2021) (Morrison and Philippides JJA and Crow J)

The Court of Appeal were not correct, however, in rejecting the primary judge's conclusion that the prosecution derived a forensic advantage from the examinations. If nothing else, the prosecution derived the forensic advantage, which the examinations were expressly calculated to achieve, of compelling the appellants to answer questions that they had lawfully declined to answer and thereby locking the appellants into a version of events from which they could not credibly depart at trial. For the same reason, the primary judge was right to hold that, with the exception perhaps of Galloway, the appellants suffered a forensic disadvantage as the result of the examinations. They suffered the forensic disadvantage of being locked into a version of events from which they could not credibly depart at trial.

76. **Following paragraph cited by:**

Kontis v Coroners Court of Victoria (01 August 2022) (O'Meara J)
Kontis v Coroners Court of Victoria (01 August 2022) (O'Meara J)
Kontis v Coroners Court of Victoria (01 August 2022) (O'Meara J)
Kontis v Coroners Court of Victoria (01 August 2022) (O'Meara J)

SQH v Scott (23 February 2022) (Williams J)
R v Hanna (19 March 2021) (Morrison and Philippides JJA and Crow J)
Application of the Securities and Exchange Commission of the United States of America under the Evidence on Commission Act 1995 (NSW) (No 2) (27 October 2020) (Walton J)

291. *X7* was referred to by the High Court in *Strickland* (at [76]) where the plurality considered that the observations of Hayne and Bell JJ in *X7* had the following effect:

> [76] As Hayne and Bell JJ observed in *X7 (No 1)* in relation to an unlawful compulsory examination conducted post charge, even if the answers given at a compulsory examination are kept secret, and so cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged, the requirement to give answers after being charged fundamentally alters the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial and adversarial trial in the courtroom. The examinee can no longer decide the course which he or she should adopt at trial according only to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial or to the strength of the evidence led by the prosecution at trial…
>
> [Footnotes omitted.]…

R v Bell (07 August 2020) (Chapman J)
R v Bell (07 August 2020) (Chapman J)
R v Bell (07 August 2020) (Chapman J)
R v Bell (07 August 2020) (Chapman J)
R v Bell (07 August 2020) (Chapman J)
R v Bell (07 August 2020) (Chapman J)
R v Bell (07 August 2020) (Chapman J)
National Australia Bank Limited v Human Group Pty Ltd (16 October 2019) (Henry J)
Application of Computer Sciences Corporation under the Evidence on Commission Act 1995 (NSW) (25 June 2019) (Black J)

As Hayne and Bell JJ observed [52] in *X7 (No 1)* in relation to an unlawful compulsory examination conducted post charge, even if the answers given at a compulsory examination are kept secret, and so cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged, the requirement to give answers after being charged fundamentally alters the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial and adversarial trial in the courtroom. The examinee can no longer decide the course which he or she should adopt at trial according only to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial or to the strength of the evidence led by the prosecution at trial:

> "The accused person would have to decide the course to be followed in light of that material and in light of any selfincriminatory answers which he or she had been compelled to give at an examination conducted after the charge was

laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused person is thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge."

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[52] (2013) 248 CLR 92 at 142-143 [124] (Kiefel J agreeing at 152 [157]). This reasoning was adopted by this Court in *Lee v The Queen* (2014) 253 CLR 455 at 466-467 [32]; [2014] HCA 20. See also *Lee (No 1)* (2013) 251 CLR 196 at 236 [79] per Hayne J, 261 [159] per Kiefel J, 292-293 [264] -[265] per Bell J.

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77. **Following paragraph cited by:**

R v Kinghorn (21 December 2021) (Bathurst CJ, Payne JA, Bell P, Ward CJ in Eq and Bellew J)

R v Kinghorn (21 December 2021) (Bathurst CJ, Payne JA, Bell P, Ward CJ in Eq and Bellew J)

Similar considerations apply where, as here, a person is *unlawfully* subjected to a pre-charge compulsory examination conducted for the extraneous, unlawful purpose of assisting the AFP to compel the person to give answers to questions about offences of which he or she is suspected and in respect of which he or she has declined to be interviewed. Even if the answers given at such a compulsory examination are kept secret, the unlawful requirement to give answers in respect of an offence of which a person is suspected, or in relation to which he or she is a person of interest, fundamentally alters the accusatorial process for the investigation, prosecution and trial of that offence by unlawfully compelling the person to provide the prosecution with information.

78. Such a person can no longer decide the course which he or she should adopt at any subsequent trial according only to the strength of the prosecution case as revealed by the material provided by the prosecution before trial or to the strength of the evidence led by the prosecution at trial. Such a person must decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to the answers which he or she has been unlawfully compelled to give at the examination. And as will be explained in greater detail later in these reasons, such a person is thus denied the protection of the common law right to refuse to answer any question except under legal compulsion and the very protection which the Parliament, through the ACC Act , has ordained that he or she should have.

79. Moreover, such concerns are not to be sloughed off as captious or overly punctilious as, in effect, counsel for the CDPP submitted they should be. They go to the heart of the accusatorial nature of the criminal justice system. Nor need the court be informed or

persuaded of specific respects in which the person's defence will or may be compromised in order to conclude that the forensic disadvantage resulting from the subjection of a person to an unlawful compulsory examination in relation to a matter in respect of which he or she is subsequently charged is significant [53] . For assuming for the sake of argument that the person has given at least one answer in the course of the examination which can arguably be construed as an admission of guilt or otherwise against interest – and in these cases, the primary judge found that to be so at least in the case of Hodges, Tucker and Strickland [54] – it must follow that the person has thereby been limited in the conduct of his or her defence in a manner to which he or she should not lawfully have been subjected.

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[53] See *Lee (No 1)* (2013) 251 CLR 196 at 236-237 [81] per Hayne J; *Lee v The Queen* (2014) 253 CLR 455 at 470-471 [43]-[44] . See also *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46 at 59-60 [42]-[43]; [2015] HCA 5.

[54] [2016] VSC 334R at [723]-[726], [728]-[732], [735][739] .

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80. **Following paragraph cited by:**

Director of Public Prosecutions (SA) v Jaunay & Anor (22 April 2020) (Kourakis CJ; Kelly and Parker JJ)
CDirector of Public Prosecutions v Leach (No 3) (24 March 2020) (Smith DCJA)
R v Kinghorn (No 4) (18 October 2019) (Adamson J)
R v Kinghorn (No 4) (18 October 2019) (Adamson J)

In the particular circumstances of these cases, it is also no answer to the forensic disadvantage thus created to say that it may be overcome by the appointment of prosecutors who know nothing of the examinations. As the primary judge stated [55] , compared to previous cases in which the effects of unlawful examination and dissemination of examination product have been considered, these cases involve an extraordinarily wideranging, undocumented dissemination of examination product to AFP officers involved in the investigation process, including to those who would be required to give evidence at trial. The lack of clear records of dissemination [56] makes it extremely difficult to assess how and by whom the examination product has been used to build the prosecution case or how it might inform prosecution witnesses' responses to questions asked in cross-examination at trial.

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[55] [2016] VSC 334R at [834], [874]-[879] .

[56] [2016] VSC 334R at [648]-[685], [771], [826][827] .

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81. Furthermore, despite such admissions as the appellants might appear to have made in the course of their examinations, they remain lawfully entitled to put the Crown to proof and so, without advancing any form of positive defence, to throw as much doubt as is honestly possible upon the quality of the Crown case.

82. The primary judge explained that the prosecution case against each appellant is a circumstantial one that is dependent upon the inferences to be drawn from documents selected for inclusion in the prosecution brief. Her Honour pointed out that in ordinary circumstances the appellants might have challenged the inference of guilt by raising as reasonable possibilities that the documents adduced by the prosecution are a biased or an incomplete selection. Her Honour found that the selection of those documents had been influenced by the investigators' knowledge of the answers given by the appellants during their unlawful examinations. Apart from the forensic advantage this conferred on the prosecution, her Honour observed that it is a circumstance that deprives the appellants of the ability to test the basis of the selection or to raise the reasonable possibility that the selection does not reveal the true facts.

83. The Court of Appeal suggested that any forensic disadvantage of this kind could be overcome by an instruction to the witness that the witness not explain his or her actions by reference to what he or she learned, or believed he or she had learned, from the examinations. The suggestion that witnesses could be directed to avoid reference to the examinations, while truthfully answering questions concerning the basis for the selection of documents, has an air of unreality to it in light of the primary judge's finding of the extent of the use made by the AFP of the unlawfully obtained information to guide the selection of the materials included in the prosecution brief.

84. Nor is it an answer to the forensic disadvantage identified to say, as the Court of Appeal considered it to be, that it was incumbent on the appellants to demonstrate the respects in which the prosecution had been thereby advantaged. After all, how were the appellants practically to go about that? Where, as here, there were some tens of millions of relevant documents [57] and no documentary record of the distribution of examination product within the AFP and the Office of the CDPP and the manner in which it was used to inform prosecutorial decisions [58] , it would surely have been extremely difficult. And it would have been potentially dangerous for the appellants to make a serious attempt at discrediting the perfunctory denials of use which appeared in several prosecution witnesses' affidavits [59] , as it would have risked exacerbating the prejudice to the appellants by potentially exposing perceived weaknesses in the prosecution case and possible paths of available defences.

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[57] [2016] VSC 334R at [778] .

[58] [2016] VSC 334R at [648]-[685], [771], [826][827] .

[59] [2016] VSC 334R at [773] ; *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [241] .

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85. In the result, all that can be said with any degree of confidence, as the primary judge in effect found, is that given the number of AFP officers who attended the examinations and that the examination product was disseminated far and wide within the AFP and the Office of the CDPP, it is practically impossible to try the appellants (with the possible exception of Galloway) without subjecting them to the forensic disadvantages which have been referred to. Regardless, therefore, of the extent to which the examination product was or was not of assistance to the prosecution in constructing the Crown case, the only sure way of wholly eradicating the effects of the unlawful examinations and the unlawful dissemination of the examination product would be to begin the investigation again, with different investigators, without access to the fact or results of the previous examinations. Short of that, the prejudice to a fair trial is at least to a significant extent incurable.

Bringing the administration of justice into disrepute

86. **Following paragraph cited by:**

FAN19 v Australian Criminal Intelligence Commission (15 February 2021) (Banks-Smith J)
Bazzo v Kirman (07 April 2020) (Buss P, Mitchell JA, Beech JA)

So to conclude is not necessarily to say that the forensic prejudice suffered by any of the appellants as a result of his unlawful compulsory examination would of itself constitute a sufficient basis to stay his prosecution. But the primary judge was correct to hold that, when such forensic disadvantage is taken in conjunction with Sage's unlawful, reckless disregard of his statutory responsibilities, the continued prosecution of the appellants would bring the administration of justice into disrepute.

87. As was earlier noticed, the Court of Appeal were critical of the primary judge's conclusion that Sage had been reckless in making nonpublication directions under s 25A(9) permitting dissemination of examination product to the AFP and the CDPP. Their Honours regarded that conclusion as inconsistent with the primary judge's earlier finding of fact that she was not satisfied that Sage positively turned his mind to the possibility that the extent of distribution of the examination product was unlawful. But there was no error in that aspect of her Honour's reasoning. Granted, the mental element of recklessness in the criminal law is ordinarily conceived of as entailing at least some actual awareness on the part of the offender of the possibility of a proposed course of action having an unlawful consequence and the determination of the offender to proceed along that course regardless [60] . And here, the primary judge did not find that Sage turned his mind to the possibility that the dissemination to the AFP and the CDPP of the product of the appellants' examinations would be unlawful but rather that he entirely failed to consider what the ACC Act required of him. But the primary judge was not wrong to characterise that abrogation of statutory responsibility as reckless. Plainly, her Honour used the term in the sense of heedlessness of or indifference towards the requirements of the ACC Act , and, semasiologically, that was an entirely apt description of Sage's lack of care in the discharge of the functions legislatively entrusted to him in his capacity as examiner.

[60] See *Helmhout* (2001) 125 A Crim R 257 at 262-263 [33] per Hulme J (Ipp AJA and Sterling J agreeing at 257 [1], 266 [56]); *Director of Public Prosecutions v Marijancevic* (2011) 33 VR 440 at 462 [84]-[85] ; *Zaburoni v The Queen* (2016) 256 CLR 482 at 497 [42] per Kiefel, Bell and Keane JJ; [2016] HCA 12 .

88. The same observations can be made in respect of the primary judge's finding that Sage was reckless in respect of his statutory responsibilities under s 25A(7) by permitting AFP officers to watch the appellants' examinations without the appellants' knowledge. And while her Honour made no express finding of recklessness as to Sage's decisions to examine the appellants and issue summonses therefor, the speed with which Sage considered the supporting documents for each summons suggested that very little deliberation could have attended those decisions, as the primary judge observed [61] . The AFP, not Sage, chose the witnesses to be examined, and Sage did not query the AFP's choices [62] . The picture that is painted is one in which Sage invoked his compulsive powers in aid of an AFP investigation in wholesale disregard of the requirements of the ACC Act . Sage's examinations of the appellants thus defied the conditions which the Parliament had laid down in the ACC Act as essential to be met before an examiner may begin to trench upon a subject's common law right to silence. Sage further acted in violation of his statutory responsibilities by subjecting the appellants, as suspects, to deliberate, coercive questioning for the very reason that they had exercised their common law right to silence. As Sage knew, the AFP wanted the appellants examined because they were suspects who may be charged but who refused to answer questions. Sage had no reasons for examining the appellants other than the AFP's reasons. His "reasons" for issuing summonses to the appellants simply parroted the information which the AFP provided [63] .

[61] [2016] VSC 334R at [448], [501], [509] .

[62] [2016] VSC 334R at [390], [448], [509] .

[63] [2016] VSC 334R at [502] .

89. To procure a compulsory examination of persons in those circumstances also contravened the AFP Examinations Guide, a document recording the AFP's understanding of the ACC's practice in relation to compulsory examinations. While not legally binding on the ACC, the following matters from the Guide reflected the ACC's practice at the relevant time [64] :

> "- the ACC will not examine a witness directly about their own criminal offending. The exception to this is where the person has pleaded guilty and is not yet sentenced, or is currently serving a sentence.

- if a person is to be charged with a criminal offence, or there is considered to be sufficient evidence to ground the laying of a criminal charge (*prima facie*), the ACC is unlikely to examine that witness. In all such cases the ACC and the relevant Examiner should be advised ASAP to discuss available options." (emphasis omitted)

To repeat, Sage was aware that the appellants were regarded by the AFP as suspects, and therefore as persons who may be charged, and that they had refused to answer questions. In plain contravention of ACC practice not to examine witnesses likely to be charged, Sage compelled them to answer questions relating to the very matters in respect of which he knew that they may be charged.

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[64] [2016] VSC 334R at [436]-[437] .

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90. **Following paragraph cited by:**

CDirector of Public Prosecutions v Brady (costs) (26 June 2019) (Hollingworth J)

9. The court acknowledged that a permanent stay of a criminal prosecution is an extraordinary step, which will very rarely be justified. However, in their joint judgment, Kiefel CJ, Bell and Nettle JJ said that 'where a defect in process is so profound as to offend the integrity and functions of the court …, it is necessary that proceedings be stayed in order to prevent the administration of justice falling into disrepute.' [6] Their Honours described the conduct of the examinations as involving a 'grossly negligent disregard of statutory protections and fundamental rights', [7] and as being 'profoundly unlawful'. [8] They also concluded that a fair trial was not possible.

via

[8] *Strickland* , [90] .

Arguably, that would not have been unlawful, albeit contrary to ACC practice, if there had been a special ACC investigation on foot and if the appellants had been examined for the purposes of the special investigation [65] . But since there was no special ACC investigation and the purpose of the examinations was not for the purposes of a special ACC investigation, rather to assist the AFP to compel the appellants to give answers to questions about offences of which they were suspected and in relation to which they had exercised their common law right to silence, the whole exercise was profoundly unlawful.

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[65] See for example *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459; [2016] HCA 8.

91. Further, in commendably clear explication of the obligations imposed on an examiner under s 25A(3) of the ACC Act , at relevant times the ACC Policy and Standard Operating Procedures document entitled "Examinations – Use of Coercive Powers" ("the Operating Procedures Document") provided that [66] :

> "Where it is anticipated that the witness will be asked questions which relate to the offences with which the witness has been charged or in respect of which the witness will be charged the following procedure should be followed:
>
> - An Examiner will not approve any person being present during an examination where that person is involved in the investigation or prosecution of the witness.
> - When making a decision as to who may be permitted access to the evidence of the witness, the Examiner could be expected to preclude from having access to the evidence of the witness all persons who are involved in the investigation or prosecution of the witness.
> - When making a decision as to who may be permitted access to the evidence of the witness, the Examiner may consider a submission that all evidence that relates to the charges that the witness faces, or is going to face, be excised from the transcript of the examination. The Examiner may then preclude from having access to the excised evidence of the witness all persons who are involved in the investigation or prosecution.
>
> Counsel Assisting may also make an application to an Examiner that the evidence of the witness not be published to a prosecuting authority. Careful consideration of submissions regarding nonpublication directions should be given to ensure that the full effect of the Act can be reached, for example, for use in confiscation proceedings but not otherwise.
>
> The above procedure strikes a balance between the need for ongoing investigations, particularly where there exists opportunity to secure valuable intelligence outcomes, and the obligation to avoid interfering with the course of justice."

[66] [2016] VSC 334R at [585] .

92. Although expressed with respect to persons who have been charged or will be charged, the document can also be taken as raising matters relevant to an examiner's obligations with respect to witnesses who "may be charged".

93. Contrary to the Operating Procedures Document, and in clear breach of the responsibilities reposed in Sage by s 25A(3) of the ACC Act (to make appropriate directions as to who should be present at the appellants' examinations), Sage, at the request of the AFP, allowed at least six AFP investigating officers to be present at each appellant's examination. And in clear contravention of s 25A(7) , Sage allowed the AFP officers present at each examination to be hidden from view and unannounced, with the effect if not intention of denying the appellants their statutory rights under s 25A(7)(b) to object to the presence of the police officers. Given that there was no special ACC investigation, any suggestion that Sage considered the AFP officers to be members of staff of the ACC and thus entitled to be present without announcement is untenable [67] .

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[67] See the definition of "member of the staff of the ACC" in s 4(1) of the ACC Act .

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94. Finally, if Sage had at all turned his mind to his obligations under s 25A(9) , it would have been abundantly clear to him that each of the appellants was entitled to the benefit of the protections afforded by s 25A(9) , and thus that Sage was bound by that provision to make such directions concerning the publication of the evidence given in the examinations as would ensure so far as practicable that the appellants' chances of fair trials would not be prejudiced. Far from doing so, in eminent contravention of s 25A(9) and again in contrast to the Operating Procedures Document, Sage allowed the product of the examinations to be distributed to all AFP officers involved in the AFP investigation and the CDPP without any restriction. In the result, as the primary judge concluded, instead of making nonpublication orders to prevent prejudice to the fair trials of the appellants, Sage made nonpublication orders that served to undermine their fair trials. As her Honour further observed [68] :

> "The fact that [Sage] could offer little explanation for why he allowed wholesale dissemination to all AFP investigators, other than that someone (presumably counsel assisting) must have asked him to, is an unacceptable explanation from an independent statutory office holder entrusted with extraordinary powers such as Sage had."

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[68] [2016] VSC 334R at [709] .

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95. **Following paragraph cited by:**

Coates-Kelly v New Zealand (16 August 2022) (Logan, Abraham and O'Sullivan JJ)

117. Regardless, the authorities relied on by Ms Coates-Kelly as to the importance of the right to silence, and indeed the concept of the right to silence itself, is not concerned with a situation of a person who has been convicted: see, for example, *Petty* at 99-100, *Strickland* at [95] . At [95] in *Strickland* , Kiefel CJ, Bell and Nettle J said the right to silence "applies at all stages of the process to all persons *suspected of an offence* whether charged or not yet charged as well as at trial" (emphasis added).

Coates-Kelly v New Zealand (16 August 2022) (Logan, Abraham and O'Sullivan JJ)
R v Kinghorn (21 December 2021) (Bathurst CJ, Payne JA, Bell P, Ward CJ in Eq and Bellew J)
R v Kinghorn (21 December 2021) (Bathurst CJ, Payne JA, Bell P, Ward CJ in Eq and Bellew J)
R v Kinghorn (21 December 2021) (Bathurst CJ, Payne JA, Bell P, Ward CJ in Eq and Bellew J)
Director of Public Prosecutions (Cth) v Kinghorn (25 March 2020) (Bathurst CJ, Fullerton and Beech-Jones JJ)

24. The written submissions filed by the parties before the primary judge in relation to the stay motion confirm that one of the issues between the parties concerns the scope of *Leach* . During argument on the appeal, Senior Counsel for the CDPP, Mr Giles SC, stated that at the hearing of the stay motion the CDPP will not contend that *Leach* was wrongly decided. Instead, the CDPP will contend that *Leach* does not address the circumstance where the making of a false statement during a s 264 examin ation is an element or an aspect of the charge. The CDPP will submit that, as a matter of necessary intendment, a charge which involves or is constituted by the making of a false statement at a s 264 examination does not engage the "accusatorial principle" or the "companion rule", ie, it does not involve him being "required to testify to [prove] the commission of [the] charged offence" (*Strickland* at [95]) but instead his testimony constitutes the commission of the charged offence.

Director of Public Prosecutions (Cth) v Kinghorn (25 March 2020) (Bathurst CJ, Fullerton and Beech-Jones JJ)

23. Mr Kinghorn's stay motion seeks to invoke the "fundamental principle" (also described as the "accusatorial principle"), that it is for the prosecution to prove the guilt of an accused person and its "companion rule", that "an accused person cannot be required to testify to the commission of a charged offence" (see *Strickland (A Pseudonym) v Director of Public Prosecutions (Cth)* [2018] HCA 53; 93 ALJR 1 at [95] ; "Strickland"). On his behalf it is, or will be, contended that the use of the s 264 information as part of his prosecution for offences under s 135.1(7) of the Code violates these principles. Mr Kinghorn places particular reliance on the judgment of the Queensland Court of Appeal in *R v Leach* [2019] 1 Qd R 459; [2018] QCA 131 ("Leach"), in which a conviction for

various fraud offences was set aside by reason of the possession, use and deployment by the prosecution of the transcript of an examination of the accused under s 264 of the *ITAA* .

Onley v Commissioner of the Australian Federal Police (10 May 2019) (Bathurst CJ, Basten and Meagher JJA)
Helicopter Resources Pty Ltd v Commonwealth of Australia (15 February 2019) (Rares, McKerracher and Robertson JJ)

In this Court, the Solicitor-General of the Commonwealth argued to the contrary that such reasoning was influenced by an understanding of authorities concerning the accusatorial system of justice which was rejected by this Court in *R v Independent Broad-Based AntiCorruption Commissioner* ("*IBAC*")[69] . But that submission misconceives the effect of *IBAC* . In substance, *IBAC* held that, where compulsory powers were exercised *lawfully* in accordance with the statute under which they were conferred for the purpose for which they were conferred, the examiner was not prevented by the fundamental principle (*scil* that it is for the prosecution to prove the guilt of an accused person) or the companion rule (*scil* that an accused person cannot be required to testify to the commission of a charged offence) from compelling persons suspected of offences who had not been charged to answer questions concerning the offences of which they were suspected. That was so, however, because the companion rule is a principle which governs the conduct of curial criminal proceedings and is thus not engaged until and unless an accused is charged [70] . Nothing said in *IBAC* runs counter to the learning explicated by the majority of this Court in *X7 (No 1)* [71] that the process for the investigation, prosecution and trial of an indictable Commonwealth offence is entirely accusatorial or, consequently, counter to the precept that, subject to statute, an accused is not to be called upon to answer an allegation of wrongdoing until presented with particulars of the evidence on which it is proposed to rely in proof of a charge and then only to enter a plea of guilty or not guilty when and if charged. As was made plain by the majority in *X7 (No 1)* , those fundaments of the criminal justice system comprise the common law "right to silence", which includes the substantive right of any person to refuse to answer any question except under legal compulsion and the privilege of any person to refuse to answer any question [72] , and which, subject to statute, applies at all stages of the process to all persons suspected of an offence whether charged or not yet charged as well as at trial [73] .

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[69] (2016) 256 CLR 459 .

[70] *IBAC* (2016) 256 CLR 459 at 473 [48] per French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ.

[71] (2013) 248 CLR 92 at 134-137 [97]-[105], 140 [118] per Hayne and Bell JJ (Kiefel J agreeing at 152 [157]), 153 [160] per Kiefel J. See also *Lee v The Queen* (2014) 253 CLR 455 at 466-467 [31]-[34] .

[72] *Lee (No 1)* (2013) 251 CLR 196 at 313 [318] per Gageler and Keane JJ.

[73] See *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198-199 per Gibbs CJ (Mason J, Murphy J and Brennan J agreeing at 199-201, 202-203), 206-207 per Deane J; [1982] HCA 42 ; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 294-295 per Gibbs CJ; [1983] HCA 10 ; *Petty v The Queen* (1991) 173 CLR 95 at 99-101 per Mason CJ, Deane, Toohey and McHugh JJ; [1991] HCA 34 ; *X7 (No 1)* (2013) 248 CLR 92 at 117-120 [39]-[47] per French CJ and Crennan J (in dissent but not in point of principle), 136-137 [102]-[105] per Hayne and Bell JJ (Kiefel J agreeing at 152 [157]); *Le e (No 1)* (2013) 251 CLR 196 at 202 [1] per French CJ, 249 [125] per Crennan J, 268 [182] per Kiefel J (Bell J agreeing at 290 [255], 293-294 [266]), cf at 313 [318] per Gageler and Keane JJ.

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96. In *IBAC* , the common law right to silence was beside the point because it was *lawfully* overridden by the examiner's exercise of compulsive powers, under statute, for the purpose for which the statute provided, and otherwise in accordance with the statute. Here, the common law right to silence is very much to the point because Sage did not exercise his compulsive powers under the ACC Act lawfully for the purpose for which the ACC Act provided but for the extraneous unlawful purpose of assisting the AFP to compel the appellants to give answers to questions about offences of which they were suspected and in relation to which they had exercised their common law right to silence.

97. It is true that, in previous decisions regarding unlawful ACC examinations, the only circumstances in which it has been held necessary permanently to stay a prosecution to prevent the administration of justice falling into disrepute have been where there has been deliberately unlawful conduct on the part of investigative or prosecutorial authorities or at least advertent reckless disregard of lawful requirements. In argument before this Court, the CDPP relied on the reasoning of Bathurst CJ in *X7 v The Queen* ("*X7 (No 2)*")[74] as representative of that course of authority. In that case it was held that, in circumstances where there is nothing to suggest that an unlawful examination has been conducted otherwise than in the bona fide belief that it is authorised by the ACC Act , and there is no incurable prejudice to a fair trial, a prosecution should not be stayed. It followed, in the CDPP's submission, that there is no basis here for a permanent stay of prosecution.

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[74] (2014) 292 FLR 57 at 78 [109]-[111] (Beazley P, Hidden J, Fullerton J and R A Hulme J agreeing at 79 [114], [116]-[118]).

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98. The circumstances here, however, are very different from those in *X7 (No 2)* and in previous authorities to which Bathurst CJ referred [75] . Here, as has been explained, with the possible exception of Galloway, there is an indeterminate element of incurable prejudice as a consequence of the ACC's widespread, uncontrolled dissemination of the examination product to and within the AFP and the Office of the CDPP. More fundamentally and more significantly, far from there being no suggestion that the ACC acted otherwise than in the bona fide belief that what was done was lawful, in each of these cases the ACC through Sage

acted in disregard of the stringent statutory requirements mandated by the Parliament for the protection of the liberty of the subject and to prevent prejudice to the subject's fair trial.

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[75] See *R v CB* (2011) 291 FLR 113; *R v Seller* (2013) 273 FLR 155; *R v X* [2014] NSWCCA 168. See also *R v Seller; R v McCarthy* (2015) 89 NSWLR 155.

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99. **Following paragraph cited by:**

La Rocca v The King (10 March 2023) (Bell CJ, Davies and N Adams JJ)
La Rocca v The King (10 March 2023) (Bell CJ, Davies and N Adams JJ)
La Rocca v The King (10 March 2023) (Bell CJ, Davies and N Adams JJ)
Higgs v The Queen (05 November 2021) (IRVING ASJ)

51. The applicant relied on the following passage from the majority judgment in *Strickland* : [27]

> Further, although in previous cases regarding unlawful examination and dissemination of examination product the courts' concerns regarding the administration of justice falling into disrepute have focussed on deliberate or advertent reckless disregard of legal requirements, nothing in previous authority suggests or should be taken to imply that abjectly insouciant, wide-ranging disregard of the requirements of the ACC Act of the kind that occurred in the present case may not also bring the administration of justice into disrepute. As the majority of this Court stated in *Moti v The Queen*, decided cases should not be read as attempting to chart the boundaries of abuse of process. Nor should they be read as attempting to define exhaustively the circumstances that warrant exercise of the power to stay criminal proceedings or as providing some 'exhaustive dictionary of words' by one or more of which executive action must be capable of description before proceedings may be stayed. As Kirby J aptly summarised the position in *Troung v The Queen*:
>
> > "relief is not confined to cases of deliberate and knowing misconduct, although that may be sufficient to enliven the jurisdiction. It extends to serious cases where, whatever the initial motivation or purpose of the offending party, and whether deliberate, reckless or seriously negligent, the result is one which the courts, exercising the judicial power, cannot tolerate or be part of."
>
> No doubt, society and therefore the law ordinarily looks more askance on instances of deliberate or advertent reckless disregard of a duty or obligation than upon the accidents of incompetence. As a rule, the former are conceived of as entailing greater moral culpability and for that reason their condonation is conceived of as more likely to bring the administration of justice into disrepute. But ultimately it is a question of degree which substantially depends upon the nature of the duty or obligation. If a duty or obligation is of no more than peripheral significance, condonation of its breach, even of an intentional

> breach, may appear justified in the interest of relatively more pressing considerations of justice. The power to stay proceedings is not available to cure venial irregularities. But if, as here, the duty or obligation is of a kind that goes to the very root of the administration of justice, condonation of its breach will bring the administration of justice into disrepute regardless of the culprit's mentality. Ultimately, these appeals turn on that distinction.

via

[27] Ibid [99] .

Le v The Queen (24 January 2019) (Sleight Cjdc)

Further, although in previous cases regarding unlawful examination and dissemination of examination product the courts' concerns regarding the administration of justice falling into disrepute have focussed on deliberate or advertent reckless disregard of legal requirements, nothing in previous authority suggests or should be taken to imply that abjectly insouciant, wideranging disregard of the requirements of the ACC Act of the kind that occurred in the present cases may not also bring the administration of justice into disrepute. As the majority of this Court stated in *Moti v The Queen* [76] , decided cases should not be read as attempting to chart the boundaries of abuse of process. Nor should they be read as attempting to define exhaustively the circumstances that warrant exercise of the power to stay criminal proceedings or as providing some "exhaustive dictionary of words" by one or more of which executive action must be capable of description before proceedings may be stayed. As Kirby J aptly summarised the position in *Truong v The Queen* [77] :

> "relief is not confined to cases of deliberate and knowing misconduct, although that may be sufficient to enliven the jurisdiction. It extends to serious cases where, whatever the initial motivation or purpose of the offending party, and whether deliberate, reckless or seriously negligent, the result is one which the courts, exercising the judicial power, cannot tolerate or be part of."

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[76] (2011) 245 CLR 456 at 479 [60] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 50 .

[77] (2004) 223 CLR 122 at 171-172 [135]; [2004] HCA 10 ; cf at 161 [96] per Gummow and Callinan JJ.

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100. **Following paragraph cited by:**

La Rocca v The King (10 March 2023) (Bell CJ, Davies and N Adams JJ)

63. This conclusion is not the result of a mere difference of opinion with the primary judge. Any mere disagreement would not warrant interference with her Honours discretionary decision. Rather, it follows from a consideration of the authorities summarised above in light of the matters referred to in the previous paragraph. In short and with respect, the primary judge's refusal to grant the stay was not one that was reasonably open to her on the extraordinary facts of the present case. The deliberate alteration of the appearance of evidence in a way directly relevant and material to the ability to establish a statutory defence is a matter that "goes to the very root of the administration of justice": *Strickland* at [100] .

La Rocca v The King (10 March 2023) (Bell CJ, Davies and N Adams JJ)

60. True it is that the existence of *deliberate or reckless* conduct will be more obviously corrosive of the proper repute in which the administration of justice should be held and will weigh heavily in a court's earnest consideration whether to grant a permanent stay of criminal proceedings: *Strickland* at [100] . But less egregious, although still unlawful and negligent or incompetent conduct, with serious consequences for an accused may equally warrant the granting of a permanent stay of criminal proceedings.

La Rocca v The King (10 March 2023) (Bell CJ, Davies and N Adams JJ)
Le v The Queen (24 January 2019) (Sleight Cjdc)

No doubt, society and therefore the law ordinarily looks more askance on instances of deliberate or advertent reckless disregard of a duty or obligation than upon the accidents of incompetence. As a rule, the former are conceived of as entailing greater moral culpability and for that reason their condonation is conceived of as more likely to bring the administration of justice into disrepute. But ultimately it is a question of degree which substantially depends upon the nature of the duty or obligation. If a duty or obligation is of no more than peripheral significance, condonation of its breach, even of an intentional breach, may appear justified in the interests of relatively more pressing considerations of justice. The power to stay proceedings is not available to cure venial irregularities [78] . But if, as here, the duty or obligation is of a kind that goes to the very root of the administration of justice [79] , condonation of its breach will bring the administration of justice into disrepute regardless of the culprit's mentality. Ultimately, these appeals turn on that distinction.

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[78] See *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42 at 77 per Lord Lowry; *Truong v The Queen* (2004) 223 CLR 122 at 172 [136] per Kirby J.

[79] See and compare *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34 per Mason CJ, 75 per Gaudron J; *Williams v Spautz* (1992) 174 CLR 509 at 518-520 per Mason CJ, Dawson, Toohey and McHugh JJ; [1992] HCA 34 ; *Lee v The Queen* (2014) 253 CLR 455 at 472-473 [50] .

101. **Following paragraph cited by:**

XY v Companies Auditors Disciplinary Board (22 December 2022) (Beach J)
Commissioner of the Australian Federal Police v Luppino (25 March 2021) (Besanko, Wigney and Abraham JJ)
Commissioner of the Australian Federal Police v Luppino (25 March 2021) (Besanko, Wigney and Abraham JJ)
De Belin (First Applicant) v The Queen (Director of Public Prosecutions); Sinclair (Second Applicant) v The Queen (Director of Public Prosecutions) (Respondent) (28 August 2020) (A Haesler SC DCJ)
R v Botrus (No 1) (27 August 2020) (Walton J)

10. Counsel for the accused, Mr Sam Pararajasingham, made the following submissions on the motion:

    1. The terms of s 139(1)(c) are clear and ought not be construed narrowly. The subsection is a direction that an accused must be informed about the privilege against self-incrimination, a fundamental right in the criminal justice system. The caution is meant to convey to an arrested person that he/she has the right to choose to speak or to remain silent; it is meant to ensure that the person is aware that if he/she speaks, what he/she says may be given in evidence.

    2. The Crown conceded that the accused was not read his full rights prior to the commencement of the ERISP, which amounted to non-compliance with s 139(1)(c) .

    3. Although the accused was told that the interview would be recorded and could be used as evidence, this did not alert the accused in any way to a caution as it omitted his right to silence, and hence amounted to a breach of s 139(1)(c) .

    4. In addition, the shorthand enquiry as to whether the accused "wanted to exercise any of those rights" in reference to the exercise undertaken by Sergeant Ryder almost an hour earlier, cannot satisfy the specific obligation in s 139(1)(c) .

    5. The breach of s 139(1) was not merely a technical breach. It operates as a deeming provision for s 138 , in that the Court's satisfaction of a breach of s 139(1) satisfies the first arm of s 138 th at the evidence was obtained improperly.

    6. In addition, the breach shifts the onus to the party seeking the admission of the evidence, rather than the party seeking its exclusion. As such, the evidence is *prima facie* inadmissible unless

the Crown discharges the onus and satisfies the second arm of s 138 , namely, that the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

7. Parliament purposefully drafted the section in this way to foster public policy considerations, including the protection of an accused from the many powers at the disposal of police authority.

8. In conducting the balancing exercise, the Court is to have regard to the non-exhaustive considerations set out in s 138(3) .

9. The primary considerations put by the Crown to satisfy the balancing exercise of s 138 was the probative value of the evidence, the importance of the evidence, and the nature of the offence under s 138(3)(a)-(c) .

10. The obverse is true of the proposition that the greater the probative value of an item of evidence, the greater the public interest in its admission.

11. The probative value of the ERISP is minimal. At no point did the accused make any admissions to the alleged conduct. A great deal of the questioning traversed topics canvassed earlier with the accused, although in considerably more detail.

12. The Crown relies on the making of three lies in the ERISP that they say are capable of being used as evidence of lies demonstrating consciousness of guilt by the accused.

13. The first alleged lie from the ERISP which the Crown relies upon is the contention by the accused that he did not know the deceased.

14. The accused submitted that the Crown had contended that, if it is accepted that the Wickr messages found on the phone seized from the accused where, in fact, sent by the accused, this amounts to an admission of the charged offending. Hence, if the accused committed the offending against the deceased, it follows that he had to have been lying when he asserted in the ERISP that he did not know the deceased.

15. As it is a matter of dispute at trial that the accused sent the Wickr messages, to rely on it as proof of a lie is a circular argument. To make out the lie requires that the accused committed the offence; therefore, it is incapable of being relied upon as a lie because it presumes that he sent the message and what inevitably follows from that is that it was an admission.

16. When it was raised with counsel for the accused that the fact of the accused's knowledge of the accused, if proven, might demonstrate a resolution of a fact in issue in the proceedings separate to that of

a lie establishing consciousness of guilt, it was submitted that the Court must resolve this issue on the motion based on the evidence before it, notwithstanding that the evidence may be utilised in a different context at trial proper.

17. The second alleged lie put by the Crown was in relation to the accused's denial of riding the motorbike which was in the garage.

18. It was accepted that this class of evidence was capable of establishing a lie indicating consciousness of guilt. However, the transcript from the earlier interviews divulges the accused making similar denials as to riding the motorbike which would be open for the Crown to rely on. This limits the importance of the excerpts from the ERISP.

19. The third alleged lie relied upon was effectively an admitted lie. The accused firstly gave an account of a conversation that he had with his father after the allegations were said to have occurred. The accused said that he asked his father to take him to Fairfield Police Station to report on bail with no mention that he intended to go to EB Games as well and then by the end, the accused's position was that rather than asking his father to take him to report, he had in fact asked his father to take him to Stockland's so he might "suss out" the stabbing incident.

20. Two issues were said to arise with respect to the third component of the evidence. Firstly, the suggestion of unrelated criminality to a jury, which arises from the evidence of reporting for bail, raises the spectre of s 137. Hence, there is difficulty in the Crown relying on it for that basis. Secondly, even if it is able to be relied up on to amount to a lie, then at its highest, it is a lie that could be used to discredit the accused but not as proof of consciousness of guilt due to it being post allegation of conduct which is not capable of establishing the accused's guilt.

21. The further considerations put by the Crown to satisfy the balancing exercise of s 138 was the gravity of the impropriety and whether it was deliberate or reckless under s 138(3)(d) and (e).

22. In this case, the impropriety takes the form of non-compliance with a statutory obligation by law enforcement officers. It is observed that s 138 contemplates improprieties which do not involve the breach of statutory obligations including: the breach of internal police guidelines and instructions; entrapment by police officers; the misstatement of fact in an affidavit in support of a warrant; the offer of an inducement to a witness that he or she not give evidence; and the failure to comply with protocol. Furthermore, the section is not confined to evidence obtained by the improper or illegal conduct of the police: *Kadir v The Queen; Grech v The Queen* (2020) 94 ALJR 168; [2020] HCA 1 ("*Kadir*").

It is submitted that, in this case, the non-compliance with a statutory obligation by law enforcement elevates the nature of the gravity.

23. Relevantly to the content of the obligation, as raised above, the protection conferred in s 139(1) is of fundamental importance. It functions to ensure that an accused is advised prior to any questioning by an investigating official of the existence of an important right. Here, the comments of Kiefel CJ, Bell and Nettle JJ in *Strickland v Commonwealth Director of Public Prosecutions* (2018) 361 ALR 23; [2018] HCA 53 (" *Strickland* ") at [101] are apposite:

> [101] The common law right to silence is a fundament of the criminal justice system that applies at all stages of the process to all persons suspected of an offence, whether charged or not yet charged, and also at trial" and "condonation" of an unlawful breach of the right "is apt to bring the administration of justice into disrepute.

24. It was submitted that the failure to provide the caution, in the terms within the subsection, impaired the accused's ability to exercise that right. That the accused in this case had been advised of that right earlier, in some other context, in no way satisfied the obligation that arose at the point of questioning.

25. The proposition put by the Crown that this Court would be satisfied that at the time of the interview commenced the accused was aware of his right to silence makes assumptions about the thought processes of the accused and his presence of mind. He had just turned 18 and found himself in a room with two experienced detectives. A document was "flashed" at him, he was asked whether he wanted to exercise any of those rights. He replied in the negative and they continued.

26. The Crown invited the Court to draw an inference of the accused's state of mind when he was placed in a different context to that which he was in prior to the ERISP. When the 3:50pm interview with police commenced, the accused was not a suspect in a murder charge. The questioning occurred at his home and his parents were somewhere within the house. He was offered twice, but declined to exercise his right to silence in this context.

27. In the second context at 5:45pm, when he was cautioned at the police station, there was no suggestion in Sergeant Ryder's statement that particular attention was drawn to the caution when the bundle of rights were provided to him.

28. These two contexts compared to the impugned transaction where the accused was in a room with two detectives is of material difference. For this reason, the Crown's argument that the accused

was aware that he could decline to answer questions due to what occurred in the two previous contexts is flawed.

29. Regarding the state of mind of the officers at the relevant time, whilst unclear, it may be put that the police were merely negligent in the execution of their duty. However, that does not attenuate the gravity of the impropriety. Nothing short of strict compliance was required. Indeed, it is important that police officers entrusted with powers which abrogate fundamental liberties pay close attention to the conditions on which their lawful exercise depends: *R v Nguyen* (2013) 117 SASR 432; [2013] SASCFC 91 at [41] .

R v Botrus (No 1) (27 August 2020) (Walton J)
Onley v Commissioner of the Australian Federal Police (10 May 2019) (Bathurst CJ, Basten and Meagher JJA)

As was remarked [80] by Hayne and Bell JJ in *X7 (No 1)* , the common law right to silence is a fundament of the criminal justice system that applies at all stages of the process to all persons suspected of an offence, whether charged or not yet charged, and also at trial. But it is not constitutionally entrenched [81] . Those who framed the Constitution conceived of parliamentary supremacy and the rule of law as administered through the courts as better protecting traditional freedoms than a bill of rights limiting legislative power[82]. Hence, the right to silence may be restricted by statute. Inasmuch, however, as any restriction of the right to silence is *pro tanto* a denial of liberty, the rule of law, and in particular the principle of legality, mandates that any statutory provision that purports to restrict the common law right to silence must be perspicuously expressed and strictly construed [83] . Accordingly, a statute such as the ACC Act may confer power on an identified recipient to compel a person to answer questions for a specific, identified purpose and, if the exercise of the power is undertaken strictly in accordance with the statute, it is lawful for the recipient to require the person to answer questions despite that doing so may infringe upon the person's right to silence. By contrast, invocation of the power for a purpose other than the specific, identified purpose, or that otherwise does not accord strictly with the statute, flouts the will of the Parliament as expressed through the statute and as such is an unlawful infraction of the common law right to silence that cuts deep against the grain of the accusatorial nature of the criminal justice system. It follows that, whether such an unlawful infraction of the will of the Parliament and the right to silence is intentional, or the result of advertent recklessness, or, as here, the consequence of grossly negligent abrogation of statutory responsibilities, its condonation is apt to bring the administration of justice into disrepute.

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[80] (2013) 248 CLR 92 at 136-137 [102]-[105] (Kiefel J agreeing at 152-153 [157]). See also *Lee (No 1)* (2013) 251 CLR 196 at 268-269 [182]-[186] per Kiefel J (Bell J agreeing at 290 [255]); *Lee v The Queen* (2014) 253 CLR 455 at 466-467 [31]-[34] .

[81] See by way of comparison authorities in relation to so much of the right to silence as is comprised of the privilege against self-incrimination: *Sorby v The Commonwealth* (1983) 152 CLR 281 at 298 per Gibbs CJ, 306309 per Mason, Wilson and Dawson JJ; *X7 (No 1)* (2013) 248 CLR 92 at 120 [48] per French CJ and Crennan J.

[82] See for example *Official Record of the Debates of the Australasian Federal Convention*, (Melbourne), 8 February 1898 at 678; Patapan, "The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia", (1997) 25 *Federal Law Review* 211 at 227, 232.

[83] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 328-329 [19]-[21] per Gleeson CJ; [2004] HCA 40 ; *Momcilovic v The Queen* (2011) 245 CLR 1 at 46-47 [43] per French CJ, 97 [191] per Gummow J, 200 [512] per Crennan and Kiefel JJ, 240 [659] per Bell J; [2011] HCA 34 ; *X7 (No 1)* (2013) 248 CLR 92 at 109-110 [24], 117 [39] per French CJ and Crennan J, 131-132 [86]-[87], 140-141 [118]-[119], 142-143 [124]-[125] per Hayne and Bell JJ (Kiefel J agreeing at 152 [157]), 153 [158] per Kiefel J; *Lee (No 1)* (2013) 251 CLR 196 at 217-218 [29] per French CJ, 249 [126] per Crennan J, 264-265 [171]-[173] per Kiefel J, 307-310 [307]-[312] per Gageler and Keane JJ; *Lee v The Queen* (2014) 253 CLR 455 at 466-467 [31]-[32] .

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102. Admittedly, as has been recognised in cases such as *X7 (No 2)* [84] , an infraction is less likely to bring the administration of justice into disrepute where it is the result of an honest and reasonable mistake. But the unlawful exercise of compulsive powers in these cases was carried out in blatant disregard of the protections conferred by the ACC Act . The departures from those requirements infected the exercise of compulsive power with illegality at every stage of the process.

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[84] (2014) 292 FLR 57 at 78 [111] per Bathurst CJ (Beazley P, Hidden J, Fullerton J and R A Hulme J agreeing at 79 [114], [116]-[118]).

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103. The CDPP argued against that conclusion that, if the ACC had chosen to do so, there would have been nothing to prevent the ACC resolving to conduct its own investigation into the matters the subject of the AFP investigation and examining the appellants as part of that investigation; and, if the ACC had adopted that course, the result would have been the same. That being so, in the CDPP's submission, it cannot be that the fact that the examination was conducted for the purposes of the AFP investigation rather than for the purposes of a special ACC investigation is sufficient to warrant the extraordinary remedy of staying the appellants' prosecutions.

104. That contention assumes too much. Arguably, the ACC might have determined to conduct its own investigation into the matters the subject of the AFP investigation and conceivably to interrogate the appellants concerning the matters of which they were suspected. But there is

little reason to suppose that the Board of the ACC would have been disposed to make it a special ACC investigation. As has been observed, neither of the determinations extended to the Commonwealth offences of which the appellants were suspected and with which they were charged, and in light of the AFP's evidence that the AFP had all but completed its investigation by the time of the appellants' examinations, and gained virtually nothing of forensic significance from the examinations, except of course the forensic advantage of locking the appellants into a version of events from which it would be difficult for them credibly to depart at trial, it appears inherently improbable that the Board would have considered that ordinary police methods were unlikely to be effective or, therefore, considered it appropriate to unleash the extraordinary compulsive powers which a special ACC investigation would have entailed.

105. Furthermore, in the apparently unlikely event that the Board had determined to authorise the ACC to conduct an investigation into the matters the subject of the AFP investigation, and that it be a special ACC investigation, Sage would have been constrained to proceed strictly in accordance with the provisions of Div 2 of Pt II of the ACC Act , including in particular s 25A (3) , (5), (7), (8) and (9), to ensure so far as possible that neither the examinations nor any dissemination of information thereby obtained could prejudice the appellants' fair trial.

106. **Following paragraph cited by:**

R v Koschier (17 August 2023) (Fitzsimmons SC DCJ)
La Rocca v The King (10 March 2023) (Bell CJ, Davies and N Adams JJ)

34. The following principles or statements of authority relating to the grant of a permanent stay of a criminal prosecution appear to be uncontroversial:

1. the remedy is an extraordinary one, only to be given in exceptional or extreme circumstances: *R v Glennon* (1992) 173 CLR 592 at 605 ; [1992] HCA 16 (**Glennon**); *Dupas v The Queen* (2010) 241 CLR 237; [2010] HCA 20 at [33]-[35] (**Dupas**); *Strickland* at [166] ;

2. such a description recognises the powerful social imperative for those who are charged with criminal offences to be brought to trial: *Strickland* at [106], see also at [166]-[167], [262] ;

3. notwithstanding this, the categories or circumstances in which the exceptional remedy of a permanent stay of criminal proceedings may be granted are not and should not be closed: *Strickland* at [99] ;

4. there is no “definitive category” of extreme cases: *Dupas* at [35] ;

5. each case accordingly must be decided according to its own facts: *Moti v The Queen* (2011) 245 CLR 456; [2011] HCA 50 (**Moti**) at [60] ; *Strickland* at [99], [246], [261] ;

6. a permanent stay of criminal proceedings may be appropriate where to refuse such a remedy would bring the administration of

justice into disrepute: *Rogers v The Queen* (1994) 181 CLR 251 at 286; [1994] HCA 42; *Moti* at [10] ;

7. the administration of justice may be brought into disrepute in a number of different ways;

8. one example which may warrant a permanent stay is the toleration of an unfair trial where there is a fundamental defect which goes to the root of the trial "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences": *Barton v The Queen* (1980) 147 CLR 75 at 111; [1980] HCA 48; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34; [1989] HCA 46; *Glennon* at 605-606 ; *Dupas* at [35] ;

9. other examples include where the manner in which the case was developed and brought:

- was contrary to basic tenets of the Australian criminal justice system as may be embodied in statute: *Strickland* at [261], see also at [186]-[187] ;

- was contrary to the rule of law: *R v Horseferry Road Magistrates' Court; ex parte Bennett* [1994] 1 AC 42 at 62, 67 ; *R v Grant* [2009] 2 SCR 353 at [67] ;

- was otherwise corrosive of the "trust reposed constitutionally in the courts": *Moti* at [57] ; or

- presented a defect in process "so profound as to offend the integrity and functions of the court as such": *Strickland* at [106] .

10. considerations beyond the immediate trial may bear upon confidence in the administration of justice: *Strickland* at [270] ; *Ridgeway* at 75, 77-78, 86-87, 92 ;

11. the administration of justice may be brought into disrepute where a miscarriage of justice would be the result of a failure to grant a permanent stay of proceedings: *Glennon* at 616, 624 ;

12. the administration of justice may be brought into disrepute irrespective of whether the conduct affecting proceedings is deliberate or reckless, and the grant of a permanent stay of proceedings is not confined to cases of deliberate and knowing misconduct nor dependent upon the initial motivation or purpose of the offending party: *Truong v The Queen* (2004) 223 CLR 122; [2004] HCA 10 at [135] ; *Strickland* at [99] ;

13. the administration of justice will not necessarily be brought into disrepute, however, where prejudice to an accused may be cured

by, for example, directions to a jury or undertakings by prosecuting authorities, or where the prejudice is of a minor or venial nature: *Strickland* at [100] .

La Rocca v The King (10 March 2023) (Bell CJ, Davies and N Adams JJ)
R v Kola and Londono-Gomez (08 September 2022) (Honour Kudelka J)
Macri v The The Queen (22 August 2022) (Beech-Jones CJ, Cl, N Adams and Lonergan JJ)

131. The power to permanently stay proceedings will only be granted in an extreme or exceptional case: *Barton* at 111 ; *Jago* at 34; *Glennon* at 605-606 ; *Agar v Hyde* at [57] . In order to justify a permanent stay, there must be a fundamental defect which goes to the root of the trial of such a nature that there is nothing the court can do to relieve against its unfair consequences: *Jago* at 34; Gl*ennon* at 605-606; *Dupas* at [18], [35] ; and *S trickland* at [106] .

R v Wiggins (No 5) (05 August 2022) (N Adams J)
R v Lehrmann (No 2) (29 April 2022) (McCallum CJ)
Dawson v R (11 June 2021) (Bathurst CJ, Adamson and Bellew JJ)
Dawson v R (11 June 2021) (Bathurst CJ, Adamson and Bellew JJ)
R v Dawson (11 September 2020) (Fullerton J)
R v QX (19 August 2020) (Loukas-Karlsson J)
R v Bell (07 August 2020) (Chapman J)
Director of Public Prosecutions (Cth) v Kinghorn (25 March 2020) (Bathurst CJ, Fullerton and Beech-Jones JJ)
Director of Public Prosecutions (NSW) v Hamzy (19 December 2019) (Gleeson, Payne and Brereton JJA)

Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions (Cth) [2018] HCA 53; (2018) 272 A Crim R 69 at [106] , [154] ; *Walton v Gardiner* (1993) 177 CLR 378; [1993] HCA 77 at 393, applied.

Director of Public Prosecutions (NSW) v Hamzy (19 December 2019) (Gleeson, Payne and Brereton JJA)
Director of Public Prosecutions (NSW) v Hamzy (19 December 2019) (Gleeson, Payne and Brereton JJA)
Director of Public Prosecutions (NSW) v Hamzy (19 December 2019) (Gleeson, Payne and Brereton JJA)
Te Waiti v The State of Western Australia (21 November 2019) (Sleight Cjdc)
R v Du (No 2) (30 August 2019) (Murrell CJ)
Director of Public Prosecutions v Abuk Kuol (Ruling No. 1) (30 July 2019) (Lewitan)
CDirector of Public Prosecutions v Brady (costs) (26 June 2019) (Hollingworth J)

9. The court acknowledged that a permanent stay of a criminal prosecution is an extraordinary step, which will very rarely be justified. However, in their joint judgment, Kiefel CJ, Bell and Nettle JJ said that ‘where a defect in process is so profound as to offend the integrity and functions of the court …, it is necessary that proceedings be stayed in order to prevent

the administration of justice falling into disrepute.' [6] Their Honours described the conduct of the examinations as involving a 'grossly negligent disregard of statutory protections and fundamental rights' , [7] a nd as being 'profoundly unlawful'. [8] They also concluded that a fair trial was not possible.

via

[6] *Strickland* , [106] .

CDirector of Public Prosecutions v Brady (costs) (26 June 2019) (Hollingworth J)
Le v The Queen (24 January 2019) (Sleight Cjdc)
Le v The Queen (24 January 2019) (Sleight Cjdc)

Certainly, as this Court has stated repeatedly[85], a permanent stay of a criminal prosecution is an extraordinary step which will very rarely be justified. There is a powerful social imperative for those who are charged with criminal offences to be brought to trial and, for that reason, it has been said that a permanent stay of prosecution should only ever be granted where there is such a fundamental defect in the process leading to trial that nothing by way of reconstitution of the prosecutorial team or trial directions or other such arrangements can sufficiently relieve against the consequences of the defect as to afford those charged with a fair trial. But, as this Court has also stated [86] , there is, too, a fundamental social concern to ensure that the *end* of a criminal prosecution does not justify the adoption of any and every *me ans* for securing a conviction and, therefore, a recognition that in rare and exceptional cases where a defect in process is so profound as to offend the integrity and functions of the court as such, it is necessary that proceedings be stayed in order to prevent the administration of justice falling into disrepute.

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[85] See above n 32.

[86] *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34 per Mason CJ, 75 per Gaudron J; *R v Glennon* (1992) 173 CLR 592 at 605 per Mason CJ and Toohey J; *Truong v The Queen* (2004) 223 CLR 122 at 172 [136] per Kirby J; *Dupas v The Queen* (2010) 241 CLR 237 at 251 [37] ; *Moti v The Queen* (2011) 245 CLR 456 at 478 [57] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. See also *Levinge v Director of Custodial Services, Department of Corrective Services* (1987) 9 NSWLR 546 at 556-557 per Kirby P, 564-565 per McHugh JA.

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107. **Following paragraph cited by:**

CDirector of Public Prosecutions v Brady (costs) (26 June 2019) (Hollingworth J)

To condone such grossly negligent disregard of statutory protections and fundamental rights as occurred in these cases would be to encourage further negligent infractions of the strict statutory requirements of Div 2 of Pt II of the ACC Act and thus of the common law right to silence. In effect, it would be to imply that, short of intentional or advertent reckless disregard of the ACC Act , ACC officers might proceed however negligently in violation of the Act and the protections which it expressly affords to examinees, and therefore however much in violation of a suspect's common law right to silence, confident in the knowledge that this Court would wave through the results on condition only that there be a change of prosecutorial team and such trial directions as it might be hoped would ameliorate the prejudice thereby caused to the persons whose statutory and common law rights have thus been abused. To allow the prosecutions of the appellants to proceed in these cases would so much bring the administration of justice into disrepute that the prosecutions should be stayed.

The ACC's standing in these appeals

108. It remains to mention a matter concerning the ACC's standing in these appeals. Before the primary judge, the ACC sought and was granted leave to intervene, that leave being limited to making submissions on issues affecting the ACC and taking objection to evidence on grounds of legal professional privilege and public interest immunity. At that stage, the appellants did not object to the intervention. On appeal to the Court of Appeal, the ACC again sought leave to intervene and, at that point, the appellants objected. The Court of Appeal, however, granted leave to intervene, albeit without giving reasons for that decision, and without explicit restriction of the scope of intervention. As the appellants were bound to do by r 41.01.1 of the High Court Rules 2004 (Cth) , the appellants joined the ACC as a respondent to the appellants' applications for special leave to appeal, and so, upon the grant of special leave to appeal, the ACC became a respondent to these appeals. Subsequently, the ACC filed a notice of contention. Nevertheless, during the course of argument, the appellants objected to the ACC making submissions concerning the effect of the ACC Act or the lawfulness of the ACC's actions in subjecting the appellants to examination, for the reason, among others, that they were not submissions in which the CDPP joined or which the CDPP adopted. The objection should be allowed.

109. **Following paragraph cited by:**

Schafer v Acting Deputy Commissioner Tony Wright (23 January 2020) (Aughterson SM)
CDirector of Public Prosecutions v Brady (costs) (26 June 2019) (Hollingworth J)

> 105. Although the CDPP and ACC had a common interest in defending the stay application, and cross-referenced parts of each other’s submissions, their submissions were not identical. The plurality in the High Court were critical of the ACC’s attempts to intervene in the High Court appeal, noting that where an accused is put on trial for a criminal offence, the issues are joined between the Crown and the accused, and it is for the Crown (appearing by the CDPP) and no one else to represent the community. Their Honours said that it would be unfairly prejudicial to a putative offender to be required to meet two different cases where, as here, the Crown and the intervener are not as one in relation to the issues

which the intervener seeks to agitate. [80] Although there was no objection to the ACC intervening at first instance, the ACC accused were thereby put in a position where they had to face and respond to two opponents to the stay application.

via

[80] *Strickland* , [109] .

As the appellants submitted, where an accused is put on trial for a criminal offence, the issues are joined between the Crown and the accused and it is for the Crown and no one else to represent the community [87] . Here, the Crown appears by the CDPP and so it is for the CDPP and for no one else to represent the community. Occasionally, circumstances arise in which it is appropriate in a civil appeal for this Court to hear an intervener but only if a substantial affection of the intervener's legal interests is demonstrable (as where the intervener is a party to a pending proceeding) or likely [88] . Very occasionally, the Court may hear an intervener on a criminal appeal. Thus far, however, the Court has only ever been disposed to do so in circumstances where the Crown embraces or supports the intervener's contentions [89] or the intervener's contentions directly support those of the Crown [90] . Where, as here, the Crown and the intervener are not as one in relation to the issues which the intervener seeks to agitate, the intervener should ordinarily not be heard. It would be unfairly prejudicial to the putative offender in that it would require him or her in effect to meet two different cases.

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[87] Blackstone, *Commentaries on the Laws of England* , (1765), bk 1, c 7 at 258-259 ; *R v GJ* (2005) 16 NTLR 230 at 235 [54] per Mildren J (Riley J and Southwood J agreeing at 241 [66], [67]) (a full report of this case appears at (2005) 196 FLR 233). See also *R v Osolin* [1993] 2 SCR 313 at 314 ; *R v Vallentgoed* (2016) 612 AR 48; cf *R v Finta* [1993] 1 SCR 1138.

[88] *Levy v Victoria* (1997) 189 CLR 579 at 601-602 per Brennan CJ; [1997] HCA 31 .

[89] *Thomas v The Queen* [2008] HCATrans 258 at 367-378, 448453 .

[90] See *Hughes v The Queen* (2017) 92 ALJR 52 at 60 [11] per Kiefel CJ, Bell, Keane and Edelman JJ; 344 ALR 187 at 192; [2017] HCA 20 ; *Hughes v The Queen* [2017] HCATrans 016.

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110. Moreover, the difficulty thus created is not alleviated by the device adopted by the CDPP in these appeals of announcing that she neither supported nor opposed the ACC's contentions. A subject's liability to conviction or punishment should not be allowed to turn on a basis for which the Crown does not contend or otherwise than upon the issues joined between the Crown and the subject. To hold otherwise would be contrary to a fundamental tenet of the criminal justice system.

111. When the appellants raised objection during the oral hearing to the ACC being heard as to the effect of the ACC Act and the lawfulness of the ACC's actions in subjecting the appellants to examination, we announced that we would defer ruling on the objection until after hearing the ACC's submissions. Having now decided that the ACC's submissions should be rejected for the reasons earlier given, it is evident that, if they were taken into account, they would not lead to the appeals being decided on a basis other than the issues joined between the Crown and the appellants. Even so, the objection should be upheld.

Conclusion

112. It follows that the appeals should be allowed. Orders 2 and 3 of the Court of Appeal should be set aside and in their place it should be ordered that the appeal to the Court of Appeal be dismissed.

113. **Following paragraph cited by:**

Barilaro v Shanks-Markovina (No 2) (13 August 2021) (Rares J)

78. In *Lunt* 388 ALR at 381 [18]–[19], Kiefel CJ, Gageler, Keane and Gordon JJ said:

> … The power to stay, or summarily dismiss, proceedings **because one party has abused the processes of the court is concerned to prevent injustice**, [*Barton v The Queen* (1980) 147 CLR 75 at 96. See also *Connell y v Director of Public Prosecutions* [1964] AC 1254 at 1301-1302, 1347 ; *T omlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [25] ; *UBS AG v Tyne* (2018) 265 CLR 77 at [1]] **and that power is properly exercised where the conduct of the moving party is such that the abuse of process on its part may prevent or stultify the fair and just determination of a matter**.
>
> In *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* [(2018) 266 CLR 325 at [113]], Gageler J explained that the concern which engages a court's power to order a stay of proceedings is the need to protect the integrity of its own processes. His Honour said:
>
> > "The power of a superior court to stay its own proceedings as an abuse of process is a power to protect the integrity of its own processes. The power is in that limited respect and to that limited extent a power to 'safeguard the administration of justice'. [*Moti v The Queen* (2011) 245 CLR 456 at [11]]"
>
> (emphasis added)
>
> *Must the Court stay or strike out a claim because Parliamentary privilege prevents a defence to it?*

GAGELER J. The power of a superior court to stay its own proceedings as an abuse of process is a power to protect the integrity of its own processes. The power is in that limited respect and to that limited extent a power to "safeguard the administration of justice" [91] . Wi thin that basal proposition, in my opinion, lies the reason why these appeals should be dismissed.

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[91] *Moti v The Queen* (2011) 245 CLR 456 at 464 [11]; [2011] HCA 50; *Dupas v The Queen* (2010) 241 CLR 237 at 243 [14]; [2010] HCA 20, citing *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 265-266 [10]; [2006] HCA 27.

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114. The administration of justice that has been brought into disrepute by the unlawful conduct of officers of the Australian Crime Commission ("the ACC") and of the Australian Federal Police ("the AFP") which founded the underlying applications for permanent stays of criminal proceedings against each appellant is the administration of justice by law enforcement agencies having responsibility for discharging the executive function of investigating criminal conduct. It is not the administration of justice by a court.

115. The prior unlawful conduct of the ACC and the AFP does not bring into disrepute the administration of justice by the court that is seized of jurisdiction in the criminal proceedings subsequently commenced and maintained against each appellant by the Commonwealth Director of Public Prosecutions ("the CDPP"). To the extent that the prior unlawful conduct of the ACC and the AFP has the potential to impact adversely on the conduct of those criminal proceedings, there is no reason now to conclude that substantial unfairness in the conduct of those proceedings is incapable of being averted through the adoption by the trial judge of measures less drastic than ordering a permanent stay. A permanent stay has not been shown now to be necessary and, for that reason, a permanent stay is at this stage inappropriate.

The appellants and the appeals

116. By orders of the Supreme Court of Victoria, unchallenged in the appeals and made for reasons not revealed in the appellate record, the appellant in each appeal has been assigned a pseudonym. The appellants are referred to as Mr Strickland, Mr Galloway, Mr Hodges and Mr Tucker. The company for which all of them once worked has been assigned the pseudonym XYZ Ltd.

117. Each appellant stands indicted before the Supreme Court of Victoria on charges of having conspired with a wholly owned subsidiary of XYZ Ltd and with others to provide a benefit, not legitimately due, to a person with the intention of influencing a foreign public official in order to obtain or retain business contrary to provisions of the *Criminal Code* (Cth) [92] . Mr Strickland, Mr Galloway and Mr Hodges are also charged with dishonestly falsifying a document made for an accounting purpose contrary to a provision of the *Crimes Act* 1958 (Vic) [93] .

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[92] Sections 11.5(1) and 70.2(1) of the *Criminal Code* .

[93] Section 83(1)(a) of the *Crimes Act* .

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118. On the pre-trial applications made by the appellants, which gave rise to an interlocutory hearing over some 57 days, the proceedings on each indictment were permanently stayed as an abuse of process by orders of the primary judge, Hollingworth J [94] . The primary judge's conclusions that the proceedings should be stayed as an abuse of process were reached on the basis of extensive findings of fact. The core facts can be summarised as follows.

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[94] [2016] VSC 334 R.

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119. In the course of an investigation by officers of the AFP and after exercising his right to decline a cautioned interview with officers of the AFP, each appellant was subjected to a compulsory examination purportedly conducted under the *Australian Crime Commission Act* 2002 (Cth) ("the ACC Act")[95] . Each compulsory examination was conducted for the "purpose of achieving forensic disadvantage to [the appellant], and advantage to the prosecution, in foreseen future legal proceedings" [96] . To a varying degree in relation to each appellant, each compulsory examination achieved the result of occasioning forensic disadvantage to the appellant in the proceedings which were subsequently commenced by the filing of the indictments by the CDPP [97] .

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[95] [2016] VSC 334R at [39], [433], [514]-[536] .

[96] [2016] VSC 334R at [880] .

[97] [2016] VSC 334R at [726]-[727], [733], [739]-[740], [747]-[748], [766], [790], [798], [802], [817]-[819], [870]-[874] .

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120. The main forensic disadvantage to each appellant which the primary judge found that the examination had the purpose of achieving lay in the appellant being "locked in" to a version of events on oath from which the appellant could not credibly depart at trial [98] . The additional forensic advantage to the prosecution which the primary judge found that the examination had the purpose of achieving lay in information obtained through the examination being available to be used to assist AFP officers to assemble the prosecution brief to be provided to the CDPP [99] . To the extent the information was so used, its use carried the additional practical consequence of occasioning forensic disadvantage to each appellant by limiting the appellant's ability to cross-examine the AFP officers who assembled the prosecution brief with a view to casting doubt on the prosecution case [100] .

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[98] [2016] VSC 334R at [426]-[427], [726]-[727], [733], [739]-[740], [747]-[748], [766] .

[99] [2016] VSC 334R at [790], [814]-[817] .

[100] [2016] VSC 334R at [818] .

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121. The primary judge held that the summoning and examination of each appellant by the ACC examiner, Mr Sage, was not unlawful and was not done for an improper purpose [101] . However, her Honour found that Mr Sage had "automatically approve[d]" the AFP's requests for the examinations without considering the appropriateness of the requests [102] , that he allowed investigating AFP officers secretly to observe the examinations from a nearby room without considering the potential impact on the right of each appellant to a fair trial [103] , and that he made non-publication directions permitting dissemination of examination material to the AFP and to the CDPP without considering whether such dissemination might prejudice the right of each appellant to a fair trial [104] . In taking those actions, the primary judge found that Mr Sage failed to exercise his examination powers independently and diligently and that he "completely disregarded" his statutory obligations to ensure that the examinations were conducted in such a way as to prevent the possibility of forensic prejudice to each appellant [105] .

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[101] [2016] VSC 334R at [347]-[348], [427]-[428] .

[102] [2016] VSC 334R at [508]-[509] .

[103] [2016] VSC 334R at [598], [616]-[620], [858] .

[104] [2016] VSC 334R at [708]-[710] .

[105] [2016] VSC 334R at [616], [709] .

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122. Based on those findings, the primary judge was "satisfied that a permanent stay should be granted, not only as a result of the forensic disadvantage considerations, but also in order to protect confidence in the administration of justice" [106] .

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[106] [2016] VSC 334R at [883] .

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123. On appeal by the CDPP, the orders of the primary judge were set aside in a unanimous decision of the Court of Appeal constituted by Maxwell P, Redlich and Beach JJA [107] . Contrary to the conclusions reached by the primary judge, the Court of Appeal held that the

summoning and examination of each appellant was unlawful because the examinations were not conducted "for the purposes of a special ACC operation/investigation" within the meaning of s 24A of the ACC Act [108] and because the examinations were conducted for the improper purpose of assisting in a criminal investigation conducted not by the ACC but by the AFP[109]. Their Honours accepted that Mr Sage's non-publication directions were unlawful [110] , but held that it was not open to the primary judge to conclude, as her Honour did, that Mr Sage's disregard of his statutory obligations to protect the integrity of the examination process could be characterised as "reckless" [111] .

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[107] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120.

[108] [2017] VSCA 120 at [187]-[189] .

[109] [2017] VSCA 120 at [209]-[211] .

[110] [2017] VSCA 120 at [58]-[60] .

[111] [2017] VSCA 120 at [108]-[109] .

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124. Further, the Court of Appeal did not accept that the compulsory examinations had been shown by the evidence adduced before the primary judge to have resulted in any forensic disadvantage to the appellants or forensic advantage to the prosecution which could not be remedied to an extent sufficient to ensure that the appellants are able to receive a fair trial [112] . The remedial measures to which the Court of Appeal referred as available and appropriate to achieve that result were: the replacement of the CDPP prosecution team; the enjoining of ACC and AFP officers from disclosing information obtained as a result of the compulsory examinations to prosecutors or at all; the giving of directions by the trial judge to prohibit the leading of prosecution evidence or the revelation of information by AFP investigators in cross-examination if to do so would be productive of unfairness; and the exclusion of certain evidence by the trial judge if necessary, accompanied by appropriate directions [113] .

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[112] [2017] VSCA 120 at [15], [258], [266], [276]-[277], [292], [296], [300]-[301] .

[113] [2017] VSCA 120 at [301]-[305], [315] .

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125. The Court of Appeal was also unable to discern anything in the improper purpose which it had identified, or otherwise in the circumstances of the case, which would bring the proceedings "into the exceptional category where a stay is necessary, absent unfairness, in order to preserve public confidence in the administration of justice" [114] .

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[114] [2017] VSCA 120 at [312] .

126. Each appeal to this Court is restricted by the grant of special leave to a single ground, the gist of which is to challenge the Court of Appeal's conclusion that a permanent stay is not necessary in order to preserve public confidence in the administration of justice. The ground is that the Court of Appeal erred in finding that the unlawful compulsion of answers from each appellant for the purpose of obtaining a forensic advantage to the prosecution was insufficient in "the circumstances" to justify the ordering of a permanent stay.

127. Because devils lurk in the detail of "the circumstances", there is a need to note something of the consequences of the unlawful conduct for the trial process before turning to consider the significance of the purpose of that conduct and to respond to the principal argument developed by the appellants on the hearing of the appeals.

The unlawful conduct and its consequences

128. The conduct of the unlawful compulsory examinations by Mr Sage at the behest of officers of the AFP is comprehensively recounted in the reasons for judgment of the plurality. Despite the Court of Appeal's rejection of the primary judge's description of Mr Sage as having acted with "reckless indifference to his statutory obligations" [115] , I agree with the plurality that her Honour's description was an appropriate use of language.

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[115] [2016] VSC 334R at [862] ; [2017] VSCA 120 at [108]-[109] .

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129. Having a purpose of his own which he consistently explained as no more complicated than "to get witnesses to tell the truth, and be forthcoming about their knowledge of the activities about which they were being examined" [116] , Mr Sage singularly failed to exercise the independent judgment required of an ACC examiner under the ACC Act . Instead, he allowed himself to become a conduit for a process driven from beginning to end by officers of the AFP for the purposes of conducting their own investigation. To describe his conduct using the metaphor of the primary judge, Mr Sage acted as a "rubber stamp" for the AFP officers, who were conducting their own investigation [117] .

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[116] [2016] VSC 334R at [423] .

[117] [2016] VSC 334R at [390], [395] .

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130. **Following paragraph cited by:**

FAN19 v Australian Criminal Intelligence Commission (15 February 2021) (Banks-Smith J)

Not only was each examination which Mr Sage conducted unlawful from the outset, both because the examination was not conducted for the purposes of any investigation into matters relating to federally relevant criminal activity which the ACC was in fact conducting and because the examination was conducted instead for the purposes of the AFP investigation, but Mr Sage failed in the course of those examinations to turn his mind to questions which he was statutorily obliged to consider in order to safeguard the interests of those he examined. He directed that AFP officers be present at each examination without inquiry as to who the various officers were and what role they played in relation to the investigation, arrest or prosecution of each appellant [118] . He failed to inform each appellant of the clandestine presence of those officers [119] . And, in defiance of the obligation of an examiner to give a direction that evidence given before the examiner must not be published "if the failure to do so might ... prejudice the fair trial of a person who ... may be ... charged with an offence" [120] , the non-publication directions he made imposed no restriction on the communication of any information extracted from each appellant to any officer of the AFP or of the CDPP [121] .

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[118] [2016] VSC 334R at [595] .

[119] [2016] VSC 334R at [540] .

[120] Section 25A(9) of the ACC Act .

[121] [2016] VSC 334R at [394], [864], [868] .

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131. The upshot was that testimony containing admissions against interest was unlawfully extracted from each appellant under compulsion and unlawfully disseminated. The testimony became immediately available to be used by officers of the AFP conducting the investigation. In due course, the testimony was also provided to the CDPP.

132. Flagrant as the unlawful conduct was, there is a need to be realistic about the extent of the potential for that conduct to impact on each appellant's trial. There has never been any suggestion that testimony given in the course of the examinations would be sought to be tendered at the trial. Had the examinations been lawful, direct use of the testimony in the trial would have been prohibited by the ACC Act [122] . Had the examinations been lawful, derivative use of the testimony (in the sense of use of information contained in the testimony to obtain or assemble other evidence to be tendered at trial) would not have been prohibited by the ACC Act , except to the extent that a practical limitation on derivative use might have arisen from such restriction on communication as might have been imposed by a valid non-publication direction.

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[122] Section 30(4) and (5) of the ACC Act .

133. There is no doubt that the officers of the AFP who were conducting the investigation made some derivative use of the testimony unlawfully extracted from the appellants. The prosecution case against each appellant to the extent it had been assembled at the time of the examinations was, as it remains, largely documentary. The derivative use of the testimony by the AFP officers lay in using information it contained to "refine and define" the search for documents to be included in the prosecution brief which the AFP provided to the CDPP [123] .

[123] [2016] VSC 334R at [783] .

134. The primary judge and the Court of Appeal drew different inferences as to the extent of that derivative use. The primary judge inferred that the derivative use gave the AFP "a substantial investigative advantage" [124] . Noting that each AFP officer who gave evidence said that the derivative use was not extensive, and that it was no part of the appellants' case before the primary judge to establish the extent of that derivative use, the Court of Appeal reached the contrary conclusion [125] . The prosecution case "had not materially changed as a result of the examinations" [126] .

[124] [2016] VSC 334R at [790] .

[125] [2017] VSCA 120 at [258], [263]-[265], [276] .

[126] [2017] VSCA 120 at [266] .

135. The difference between the primary judge and the Court of Appeal as to the extent of that derivative use is, in my opinion, immaterial. Even if it could be said that the extent of the derivative use of the unlawfully extracted and disseminated information in assembling the prosecution brief was sufficient to give the AFP a substantial investigative advantage, that investigative advantage did not of itself amount to a forensic advantage to the CDPP or disadvantage to the appellants. The primary judge did not find, and the appellants do not suggest, that the AFP's use of information contained in the testimony unlawfully extracted from the appellants in the search for documents to be included in the prosecution brief is likely to prejudice them in the conduct of the proceedings except in relation to the second of two potential sources of forensic prejudice to which I will turn.

136. That leaves me to deal directly with the potential sources of forensic prejudice to each appellant in the conduct of the proceedings. Two have been identified.

137. The first potential source of forensic prejudice lies in the appellants being constrained, in the overall forensic choices available to be made at trial, by the evidence each appellant has

already been forced to give on oath. To the extent that such a limitation on forensic choice might be a source of forensic prejudice, it is a source of forensic prejudice which remains potentially applicable to Mr Strickland, Mr Tucker and Mr Hodges. That potential source of forensic prejudice can no longer be applicable to Mr Galloway, who has since chosen to make voluntary disclosure of the substance of the testimony extracted from him under compulsion.

138. The second source of forensic prejudice, which remains potentially applicable to each appellant, lies in each of them being constrained (to the extent that his or another appellant's testimony might have been used by AFP officers to guide and refine their decision-making) in his ability to cast doubt on the prosecution case through cross-examining AFP officers as to the basis of the officers' choice of documents for inclusion in the prosecution brief. To cross-examine on that topic would run the risk of eliciting answers which reveal the fact of the examinations having occurred, if not the content of the testimony.

139. For my own part, I see no reason to doubt the Court of Appeal's conclusion that both of those sources of potential prejudice to the appellants in the conduct of their defences at trial can, and therefore should, be adequately addressed by means less drastic than ordering a permanent stay. The guiding principle, as the Court of Appeal recognised [127] , is that prejudice occasioned to a criminal defendant by circumstances outside a court's control ought to result in a permanent stay of criminal proceedings only if it is productive of substantial unfairness which cannot be substantially mitigated by the court exercising the control that it has over its own procedure [128] .

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[127] [2017] VSCA 120 at [276], [288] .

[128] *R v Glennon* (1992) 173 CLR 592 at 605; [1992] HCA 16; *Williams v Spautz* (19 92) 174 CLR 509 at 519; [1992] HCA 34; *Dupas v The Queen* (2010) 241 CLR 237 at 245 [18], 250 [35] ; *Moti v The Queen* (2011) 245 CLR 456 at 464 [10] .

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140. In relation to such prejudice as might potentially be occasioned to Mr Strickland, Mr Tucker and Mr Hodges by reason of them being constrained by the testimony involuntarily extracted in the forensic posture available to be taken at trial, I adhere to the view I expressed with Keane J in *Lee v New South Wales Crime Commission* [129] ("*Lee (No 1)*"). My view as there expressed was and remains that, accepting that deprivation of a legitimate forensic choice otherwise available to a criminal defendant from whom testimony has been involuntarily extracted has the potential to give rise to unfairness amounting to an interference with the due course of justice in a particular case, deprivation of such a legitimate forensic choice is not to be found merely by reason of an ethical constraint on the ability of a criminal defendant's legal representatives to lead evidence or cross-examine or make submissions to suggest a version of the facts which contradicts that testimony [130] .

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[129] (2013) 251 CLR 196; [2013] HCA 39 .

[130] (2013) 251 CLR 196 at 316 [323] .

141. The defendant, of course, remains free to contradict or explain any previous testimony in the instructions he or she chooses to give to his or her legal representatives. To the extent that the defendant's instructions at trial depart from his or her previous testimony, his or her legal representatives are not disinhibited by the previous testimony from acting on those instructions. Indeed, they are bound to do so. Only to the extent that the defendant's instructions adhere to the previous testimony does the relevant ethical constraint arise. Even then, the ethical constraint on his or her legal representatives goes no further than to prevent them from suggesting a contrary version of the facts. The legal representatives are not constrained from making a submission, or from cross-examining in support of a submission, that the prosecution has failed to discharge its onus and burden of proof.

142. I did not at the time of *Lee (No 1)* , and I do not now, consider that view to have been contradicted by the observation of Hayne and Bell JJ in *X7 v Australian Crime Commission* [131] to the effect that involuntarily extracted testimony, even if kept secret from the prosecution, might deprive a criminal defendant of the forensic advantage of being able to tailor his or her instructions as the prosecution case unfolds. The observation in *Lee (No 1)* was concerned to illustrate the more general point that not every deprivation of a forensic choice which would otherwise be available to a criminal defendant from whom testimony has been involuntarily extracted is properly to be characterised as giving rise to substantial unfairness. As Bathurst CJ noted in *X7 v The Queen* [132] ("*X7 (No 2)*"), the observation in *Lee (No 1)* "emphasises the fact that the conduct of [a compulsory] examination may have different consequences depending on its nature and extent in any given case".

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[131] (2013) 248 CLR 92 at 142-143 [124]; [2013] HCA 29 .

[132] (2014) 292 FLR 57 at 78 [108] .

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143. For completeness, I record that, like Bathurst CJ in *X7 (No 2)* [133] , I do not consider the observation in *Lee (No 1)* to be inconsistent with the reasoning or the result in *Lee v The Queen* [134] ("*Lee (No 2)*"). There, the Court concluded that a substantial miscarriage of justice had been occasioned by reason of involuntarily extracted testimony having come into the possession of the prosecution in contravention of a non-publication order. In the failure to quarantine the testimony from those involved in the prosecution of the charges, and not more generally, the trial of the appellants in that case was found to have "differed in a fundamental respect from that which our criminal justice system seeks to provide" [135] . The substantial miscarriage of justice was found to lie in the unremedied disclosure of the testimony causing "the balance of power" in the original trial to have "shifted to the prosecution" [136] .

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[133] (2014) 292 FLR 57 at 78 [109] .

[134] (2014) 253 CLR 455; [2014] HCA 20 .

[135] (2014) 253 CLR 455 at 467 [34] .

[136] (2014) 253 CLR 455 at 471 [46] .

144. The result in *Lee (No 2)* was the quashing of the convictions and the ordering of a new trial. As to the remedial steps which could and should have occurred at the original trial, and which by implication might have been expected to guide the substantively fair conduct of the new trial which was ordered, it was said in *Lee (No 2)* [137] :

> "The prosecution should have inquired as to the circumstances in which the evidence came into its possession and alerted the trial judge to the situation, so that steps could be taken to ensure that the trial was not affected. The trial judge could have ordered a temporary stay, while another prosecutor and other DPP personnel, not privy to the evidence, were engaged."

[137] (2014) 253 CLR 455 at 470-471 [44] .

145. To the extent that the unlawfully extracted and disseminated testimony of the appellants has come into the possession of officers of the CDPP, engagement of a new prosecution team is precisely the kind of remedial measure which the Court of Appeal identified as available and appropriate to be implemented by the trial judge in the context of the pending proceedings against the appellants. To the extent that the unlawfully communicated testimony of the appellants remains within the knowledge of officers of the AFP, some of whom may be called as witnesses to explain their selection of documents, the contemplation of the Court of Appeal was that those officers would appropriately be prohibited from communicating that information to the new prosecution team or to anyone connected with the prosecution. As noted by Gordon J, measures of that kind have since been implemented in undertakings given to and accepted by the primary judge.

146. In relation to such specific prejudice as might potentially be occasioned to the appellants by reason of them being constrained in their ability to cast doubt on the prosecution case in their cross-examination of those AFP officers who may be called as witnesses on the topic of their choice of documents for inclusion in the prosecution brief, I cannot see in the abstract why that prejudice would not be substantially mitigated by appropriately tailored interlocutory orders confining the scope of those witnesses' permitted testimony. Cross-examination is never at large, and a constraint on a witness being able to give probative evidence in comprehensive answer to a question asked in cross-examination is not necessarily productive of injustice.

147. There is no obvious reason why the framing or implementation of orders confining the scope of the permitted testimony of the AFP officers would give rise to practical problems of a nature different from the problems which might be encountered in a case where relevant evidence is rendered inadmissible on the ground of client legal privilege [138] or public interest immunity [139] , or is excluded on the basis that it would reveal a confidential

communication of the victim of an alleged sexual offence [140] or that its probative value is substantially outweighed by the danger that it might be unfairly prejudicial [141] . If a real and insurmountable problem were to be encountered in the course of cross-examination, the issue of a permanent stay could be re-agitated at that time.

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[138] Sections 118 and 119 of the *Evidence Act* 2008 (Vic) .

[139] Section 130 of the *Evidence Act* 2008 (Vic) .

[140] Section 32C(1)(c) of the *Evidence (Miscellaneous Provisions) Act* 1958 (Vic) .

[141] Section 135 of the *Evidence Act* 2008 (Vic) .

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148. That brings me to the question of the purpose of the unlawful conduct.

The purpose of the unlawful conduct

149. It will be recalled that the purpose of the AFP officers conducting the AFP investigation, and derivatively the purpose of Mr Sage who simply did their bidding, was twofold. First, it was to "lock in" each appellant to a version of events on oath from which he could not credibly depart at trial. Second, it was to assist the AFP officers to assemble the prosecution brief.

150. Significantly, neither element of that twofold purpose was an improper purpose in the conventional sense of a statutorily extraneous purpose which would render unlawful an examination which was otherwise lawful under the ACC Act . To the extent that any potential criminal defendant might be "locked in" to a version of events by having given evidence about them on oath before an examiner, that is the inevitable consequence of the form of compulsory examination which the ACC Act specifically authorises. And, as has already been noted, subject to limitations imposed by a non-publication direction, the ACC Act contains nothing to prohibit derivative use by officers of the AFP of testimony extracted in an examination.

151. There is accordingly difficulty in seeing how the purpose of the examinations could suffice to justify a permanent stay of proceedings if the unlawfulness of the examinations could not.

152. Unsurprisingly, the appellants' arguments as developed on the appeals focused less on the purpose of the examinations than on the extent of the departure from the statutory norm produced by the reckless indifference of Mr Sage to his statutory obligations. The extent of the departure, they argued, was such as to bring the criminal proceedings against each of them within the category of case where a permanent stay can be justified on the basis that "the use of the court's procedures would bring the administration of justice into disrepute" [142] . To that argument, I now turn.

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[142] Cf *Rogers v The Queen* (1994) 181 CLR 251 at 286; [1994] HCA 42; *Moti v The Queen* (2011) 245 CLR 456 at 464 [10] .

The administration of justice and its disrepute

153. Ours is not a system of justice in which courts and law enforcement agencies exist in some sort of continuum. Between the two, there is a sharp, constitutionally mandated, division. Courts, in exercising their own powers, should be careful to guard against creating a tendency for the public perception of that division to become blurred.

154. **Following paragraph cited by:**

Athans v The Queen (No 2) (11 August 2022)
R v Bell (07 August 2020) (Chapman J)
Director of Public Prosecutions (NSW) v Hamzy (19 December 2019) (Gleeson, Payne and Brereton JJA)

Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions (Cth) [2018] HCA 53; (2018) 272 A Crim R 69 at [154] , [106] ; *Jago v District Court (NSW)* (1989) 168 CLR 23; [1989] HCA 46 at 28, 30, 33-34, 47-48, 74, 76-77 ; *Walton v Gardiner* (1993) 177 CLR 378; [1993] HCA 77 at 393-394, applied.

Director of Public Prosecutions (NSW) v Hamzy (19 December 2019) (Gleeson, Payne and Brereton JJA)

52. The error in this finding was to conflate public confidence in the administration of justice "within the Correctional system" with public confidence in the administration of justice in this case and other cases: *Strickland* at [154] .

Director of Public Prosecutions (NSW) v Hamzy (19 December 2019) (Gleeson, Payne and Brereton JJA)
Director of Public Prosecutions (NSW) v Hamzy (19 December 2019) (Gleeson, Payne and Brereton JJA)

As I have emphasised from the outset, the power of a superior court to stay its own proceedings as an abuse of process is a power to protect the integrity of its own processes. It is not a power to discipline or to punish those who might bring those proceedings or those who might stand behind them. Its focus is on prevention of the court's procedures being used in a manner that is inconsistent with the due administration of justice by the court. In a case where use of the court's procedures would be substantially unfair, the inconsistency lies in the administration of justice by the court being converted into an instrument of that substantial unfairness. In a case where use of the court's procedures would bring the administration of justice into disrepute, the inconsistency lies correspondingly in the tendency of the court, in permitting that use of its procedures to occur, to erode public confidence in the court's administration of justice in that and other cases.

155. Where criminal proceedings are brought in a court by or on behalf of the executive, by or at the behest of a law enforcement agency, the function of the court is to adjudicate the controversy which at that point exists between the executive and the criminal defendant as to the existence and consequences of the criminal liability that is charged. Where such criminal proceedings are sought to be permanently stayed as an abuse of process on the application of the defendant by reference to the prior unlawful conduct on the part of officers of one or more law enforcement agencies or other officers of the executive, the focus of the requisite analysis must be on the effect of that conduct on the performance of that function.

156. Two questions arise. How, if at all, does or might the unlawful conduct affect the proceedings? To the extent that the unlawful conduct does or might affect the proceedings, how, if at all, would permitting the proceedings to continue erode public confidence in the court's administration of justice?

157. In *Moti v The Queen* [143] , where the unlawful conduct of officers of the executive procured the criminal defendant's presence in the jurisdiction so as to meet a precondition to the commencement of the proceedings against him, those two questions were readily capable of being answered. The unlawful conduct facilitated commencement of the proceedings [144] . And if the court had permitted the proceedings to continue, it would have been turning a blind eye to the invocation of its jurisdiction by conduct which was knowingly unlawful [145] .

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[143] (2011) 245 CLR 456 .

[144] (2011) 245 CLR 456 at 477 [54]-[55] .

[145] (2011) 245 CLR 456 at 480 [63] . Cf *Truong v The Queen* (2004) 223 CLR 122 at 161 [96]-[97], 171-172 [135]; [2004] HCA 10, citing *Levinge v Director of Custodial Services, Department of Corrective Services* (1987) 9 NSWLR 546 at 564-565 .

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158. In a case where criminal proceedings might be commenced or continued for an unlawful or otherwise illegitimate purpose [146] , the same questions could readily be answered to similar effect. To permit the proceedings to continue would be implicitly to condone the use of the court's processes for that purpose.

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[146] Cf *Williams v Spautz* (1992) 174 CLR 509.

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159. Were the same questions ever to be asked in a case where the unlawful conduct consists only of the obtaining of evidence on which the prosecution seeks to rely, however, different answers would almost certainly be given. The established position at common law [147] , reflected now relevantly in uniform evidence legislation [148] , is that the admissibility of evidence of that nature turns on a balancing of competing public interests: "the public need to

bring to conviction those who commit criminal offences" and "the public interest in the protection of the individual from unlawful and unfair treatment" [149] . The rationale for the existence of a judicial discretion to exclude evidence on a balancing of those considerations has been variously explained in terms of "the public policy of not giving the appearance of curial approval to wrongdoing on the part of those whose duty is to enforce the law" and "the public policy that it is better that a possibly guilty accused be allowed to go free than that society or the courts sanction serious illegality or other serious impropriety on the part of officials in gathering the evidence with which to convict the accused" [150] . Never has it been suggested in any of the cases in which questions of admissibility of unlawfully obtained evidence have been considered in this Court, however, that the mere obtaining of such evidence or the mere attempt by the prosecution to rely on such evidence so affected the proceedings against the defendant as to have eroded public confidence in the court's administration of justice.

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[147] *Bunning v Cross* (1978) 141 CLR 54; [1978] HCA 22.

[148] Section 138 of the *Evidence Act* 2008 (Vic) .

[149] *Bunning v Cross* (1978) 141 CLR 54 at 72, quoting *R v Ireland* (1970) 126 CLR 321 at 335; [1970] HCA 21.

[150] *Police v Dunstall* (2015) 256 CLR 403 at 417 [26], 430 [63]; [2015] HCA 26.

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160. In *Ridgeway v The Queen* [151] , where the unlawful conduct of officers of the AFP went so far as to give rise to the offences into which the criminal defendant was entrapped and of which he was charged and convicted, the conviction was set aside and a permanent stay of proceedings was ordered. Of the six members of the Court who formed the majority, all rejected an argument to the effect that the whole of the prosecution evidence should be excluded on the basis that some of that evidence had been obtained through the unlawful conduct [152] . Five members of the majority supported the order for a permanent stay on the basis that the illegally obtained evidence should be excluded and that the exclusion of the illegally obtained evidence led to the prosecution being unable to prove an element of the offence [153] . The remaining member of the majority, Gaudron J, alone supported the order on the basis that the proceedings amounted to an abuse of process [154] .

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[151] (1995) 184 CLR 19; [1995] HCA 66 .

[152] (1995) 184 CLR 19 at 43, 52-53, 56, 74.

[153] (1995) 184 CLR 19 at 43, 52, 64-65 .

[154] (1995) 184 CLR 19 at 78.

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161. Pivotal to the conclusion of Gaudron J in *Ridgeway v The Queen* that the criminal proceedings in that case amounted to an abuse of process was the proposition that "the administration of justice is inevitably brought into question, and public confidence in the courts is necessarily diminished, where the illegal actions of law enforcement agents culminate in the prosecution of an offence which results from their own criminal acts" on the basis that "[p]ublic confidence could not be maintained if, in those circumstances, the courts were to allow themselves to be used to effectuate the illegal stratagems of law enforcement agents or persons acting on their behalf" [155] . That proposition has no present relevance.

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[155] (1995) 184 CLR 19 at 77.

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162. Here, the unlawful conduct of officers of the ACC and the AFP did not give rise to the offences with which the appellants have been charged, did not result in the commencement of the criminal proceedings against the appellants, does not inform the CDPP's intention to continue those proceedings, and produced no evidence on which the CDPP intends to rely in the proceedings. Insofar as the unlawful conduct resulted in the appellants making admissions against their interests which were made available to officers of the AFP and of the CDPP and on which officers of the AFP derivatively relied in locating and assembling documents on which the CDPP does intend to rely in the proceedings, there are procedural measures available and appropriate to be taken by the trial judge to mitigate the resultant forensic prejudice to the appellants to an extent which is likely to avoid substantial unfairness in the conduct of the proceedings.

163. Neither in permitting the proceedings to continue nor in implementing procedural measures for the purpose of avoiding substantial unfairness in the conduct of those proceedings can the court seized of jurisdiction in the proceedings realistically be characterised as tolerating or excusing the unlawful conduct which has occurred. The effect of the unlawful conduct on the conduct of the proceedings, in my opinion, is not such as to undermine public confidence in the administration of justice by that or any other court. Courts must be made of sterner stuff lest the public's confidence in them be eroded by their own timidity.

Conclusion

164. The circumstances capable of giving rise to an abuse of process are not confined to closed categories, and the ordering of a permanent stay of proceedings is in every case an exercise of power that is discretionary in nature [156] . The question whether criminal proceedings should be permanently stayed as an abuse of process is to be determined by balancing considerations which bear in competing ways on the public interest [157] .

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[156] *R v Carroll* (2002) 213 CLR 635 at 657 [73]; [2002] HCA 55; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 264 [7] .

[157] *Walton v Gardiner* (1993) 177 CLR 378 at 395-396; [1993] HCA 77; *Rogers v The Queen* (1994) 181 CLR 251 at 256.

165. Nothing I have written should be read as denying the possibility of a case where unlawful conduct on the part of law enforcement agencies in investigating criminal conduct, which has not resulted in irremediable forensic unfairness or in the undermining of public confidence in the administration of justice in a court but which has occasioned some prejudice to a criminal defendant, might combine with other considerations to give rise to a misuse of a court's processes in a way which amounts to an abuse of process justifying the ordering of a permanent stay of criminal proceedings. The fact that no prior cases of that kind have been discovered through the researches of counsel suggests that, if there have been any at all, they must have been exceedingly rare. In my opinion, it is important that they should remain so.

166. **Following paragraph cited by:**

La Rocca v The King (10 March 2023) (Bell CJ, Davies and N Adams JJ)

34. The following principles or statements of authority relating to the grant of a permanent stay of a criminal prosecution appear to be uncontroversial:

1. the remedy is an extraordinary one, only to be given in exceptional or extreme circumstances: *R v Glennon* (1992) 173 CLR 592 at 605 ; [1992] HCA 16 (**Glennon**); *Dupas v The Queen* (2010) 241 CLR 237; [2010] HCA 20 at [33]-[35] (**Dupas**); *Strickland* at [166] ;

2. such a description recognises the powerful social imperative for those who are charged with criminal offences to be brought to trial: *Strickland* at [106], see also at [166]-[167], [262] ;

3. notwithstanding this, the categories or circumstances in which the exceptional remedy of a permanent stay of criminal proceedings may be granted are not and should not be closed: *Strickland* at [99] ;

4. there is no “definitive category” of extreme cases: *Dupas* at [35] ;

5. each case accordingly must be decided according to its own facts: *Moti v The Queen* (2011) 245 CLR 456; [2011] HCA 50 (**Moti**) at [60] ; *Strickland* at [99], [246], [261] ;

6. a permanent stay of criminal proceedings may be appropriate where to refuse such a remedy would bring the administration of justice into disrepute: *Rogers v The Queen* (1994) 181 CLR 251 at 286; [1994] HCA 42; *Moti* at [10] ;

7. the administration of justice may be brought into disrepute in a number of different ways;

8. one example which may warrant a permanent stay is the toleration of an unfair trial where there is a fundamental defect which goes to

the root of the trial "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences": *Barton v The Queen* (1980) 147 CLR 75 at 111; [1980] HCA 48; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34; [1989] HCA 46; *Glennon* at 605-606 ; *Dupas* at [35] ;

9. other examples include where the manner in which the case was developed and brought:

- was contrary to basic tenets of the Australian criminal justice system as may be embodied in statute: *Strickland* at [261], see also at [186]-[187] ;
- was contrary to the rule of law: *R v Horseferry Road Magistrates' Court; ex parte Bennett* [1994] 1 AC 42 at 62, 67 ; *R v Grant* [2009] 2 SCR 353 at [67] ;
- was otherwise corrosive of the "trust reposed constitutionally in the courts": *Moti* at [57] ; or
- presented a defect in process "so profound as to offend the integrity and functions of the court as such": *Strickland* at [106] .

10. considerations beyond the immediate trial may bear upon confidence in the administration of justice: *Strickland* at [270] ; *Ridgeway* at 75, 77-78, 86-87, 92 ;

11. the administration of justice may be brought into disrepute where a miscarriage of justice would be the result of a failure to grant a permanent stay of proceedings: *Glennon* at 616, 624 ;

12. the administration of justice may be brought into disrepute irrespective of whether the conduct affecting proceedings is deliberate or reckless, and the grant of a permanent stay of proceedings is not confined to cases of deliberate and knowing misconduct nor dependent upon the initial motivation or purpose of the offending party: *Truong v The Queen* (2004) 223 CLR 122; [2004] HCA 10 at [135] ; *Strickland* at [99] ;

13. the administration of justice will not necessarily be brought into disrepute, however, where prejudice to an accused may be cured by, for example, directions to a jury or undertakings by prosecuting authorities, or where the prejudice is of a minor or venial nature: *Strickland* at [100] .

Ordering a permanent stay of criminal proceedings as an abuse of process, even on the ground of irremediable unfairness, has repeatedly been described as a "drastic remedy" to be confined to a case that is "exceptional" [158] or "extreme" [159] . If the ordering of a permanent stay of criminal proceedings were ever to become other than exceptional, "it would not be long before courts would forfeit public confidence" [160] .

[158] Eg *Dupas v The Queen* (2010) 241 CLR 237 at 250 [33] .

[159] Eg *R v Glennon* (1992) 173 CLR 592 at 605 ; *Dupas v The Queen* (2010) 241 CLR 237 at 250 [33]-[35] .

[160] *Jago v District Court (NSW)* (1989) 168 CLR 23 at 50; [1989] HCA 46.

167. **Following paragraph cited by:**

R v Camelo-Gomez (21 February 2022) (Wilson J)

307. The question of whether criminal proceedings should be permanently stayed as an abuse of the court's process is to be determined by balancing competing considerations that all have some bearing on the public interest in the operation of the criminal justice system: *Rogers v The Queen* (1994) 181 CLR 251; [1994] HCA 42 at 256. There is a strong public interest in the fair and just operation of the criminal justice system; there is a strong public interest in seeing persons charged with serious crimes brought to trial. Failure to protect either interest risks forfeiting public confidence. The matters raised by the accused fall to be weighed in the balance.

> "Fundamental amongst the considerations to be weighed in determining whether criminal proceedings should be permanently stayed as an abuse of process is "the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime". That is because a permanent stay order has the practical effect of providing immunity from prosecution to a criminal defendant, leaving that criminal defendant under an "irremovable cloud of suspicion" and leaving the potential if not the likelihood of engendering within the community "a festering sense of injustice", if not cynicism": *Strickland* , at [167] per Gageler J (footnotes omitted).

Fundamental amongst the considerations to be weighed in determining whether criminal proceedings should be permanently stayed as an abuse of process is "the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime" [161] . That is because a permanent stay order has the practical effect of providing immunity from prosecution to a criminal defendant, leaving that criminal defendant under an "irremovable cloud of suspicion" and leaving the potential if not the likelihood of engendering within the community "a festering sense of injustice", if not cynicism [162] .

[161] *Walton v Gardiner* (1993) 177 CLR 378 at 396 ; *Rogers v The Queen* (1994) 181 CLR 251 at 256. See also *Williams v Spautz* (1992) 174 CLR 509 at 519.

[162] *Jago v District Court (NSW)* (1989) 168 CLR 23 at 50. See also *Williams v Spautz* (1992) 174 CLR 509 at 519.

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168. The public interest in the disposition of charges against a criminal defendant is no less in respect of criminal defendants charged with crimes of dishonesty than in respect of those charged with crimes of malice. Weighed in the present case, in my view that public interest should prevail.

169. KEANE J. For the reasons that follow, I agree with the orders proposed by Kiefel CJ, Bell and Nettle JJ. In my opinion, the decision by the primary judge to take the extraordinary step of staying the prosecutions of the appellants was warranted in the extraordinary circumstances of this case. To continue the criminal trials of the appellants would bring the administration of justice into disrepute; and that would be so whether or not the departures from the requirements of the *Australian Crime Commission Act* 2002 (Cth) ("the Act") on the part of the Australian Crime Commission ("the ACC") and Mr Sage enured to the forensic disadvantage of the appellants.

170. **Following paragraph cited by:**

R v Richards (16 December 2020) (Abadee DCJ)

In *Moti v The Queen* [163] , French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ adopted the statement of McHugh J in *Rogers v The Queen* [164] that:

> "although the categories of abuse of process are not closed, many such cases can be identified as falling into one of three categories: '(1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute.'"

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[163] (2011) 245 CLR 456 at 463464 [10]; [2011] HCA 50 .

[164] (1994) 181 CLR 251 at 286; [1994] HCA 42 .

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171. The focus of debate before the primary judge, in the Court of Appeal and in this Court has been upon the second and third of these categories of abuse of process. There may be cases where these categories overlap; but that will not always be so. In particular, so far as the third category is concerned, it is not necessary to show that the use of the court's procedures would occasion unjustifiable forensic disadvantage to one of the parties in order to warrant a stay of proceedings [165] .

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[165] Cf *Moti v The Queen* (2011) 245 CLR 456 at 461 [2] .

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172. It is sufficient to make out a case within the third category that the unlawful conduct that has occurred would affect the trial in prospect in a way that is contrary to the purpose of the applicable legislation. This Court's decision in *Lee v The Queen* [166] ("*Lee (No 2)*") establishes that a conviction resulting from a criminal trial affected by unlawful conduct of a kind less grievous in degree than the lawlessness which occurred in this case will, for that reason alone, be a miscarriage of justice.

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[166] (2014) 253 CLR 455; [2014] HCA 20 .

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173. In this case the primary judge was given no reason to conclude that the trials of the appellants can, or will, be quarantined from the effects of the lawless conduct which occurred. That being so, the appellants have made out their case for a stay by reference to the third category of abuse of process. Accordingly, it is, in my respectful opinion, unnecessary to consider whether any of the appellants would suffer a forensic disadvantage at his trial so as to bring his case within the second category referred to in *Rogers* and *Moti* .

174. Gratefully adopting the summary by Kiefel CJ, Bell and Nettle JJ of the relevant legislative provisions, the facts, the reasons of the courts below and the contentions of the parties, I proceed directly to explain the reasons for my conclusion.

The unlawfulness of the examinations

175. The first step in the appellants' case involves a consideration of the nature and extent of the unlawfulness that attended their examinations. Sage's disregard of the requirements of the Act i s described by Kiefel CJ, Bell and Nettle JJ. Sage's failure to observe the requirements of subss (7) and (9) of s 25A compounded the ACC's disregard of the statutory constraints on its power to carry out compulsory examinations.

176. The Court of Appeal held, rightly, that the disregard of the requirements of the Act by the ACC and by Sage rendered the examinations of each of the appellants unlawful [167] . It is not necessary to rehearse the conclusions of the Court of Appeal in this regard; it is sufficient to say that the departures from the requirements of the Act on the part of the ACC and Sage,

as found by the Court of Appeal, were so serious and extensive that they produced a situation where each of the appellants is confronted by the prospect of a criminal trial in circumstances contrary to the purpose of the Act .

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[167] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [187][189] , [209], [212] .

Is reckless disregard of the law the test?

177. The primary judge, focusing upon s 25A(9) of the Act , described Sage's disregard of its requirements as "reckless". The Court of Appeal disagreed with that description on the basis that Sage's disregard of his statutory obligations in relation to the publication of the results of the examinations to investigators and prosecutors could properly be described as reckless only if Sage had been found to have been aware of the possibility that s 25A(9) of the Act required a nonpublication direction in relation to investigators and prosecutors, and allowed publication to occur anyway [168] . The Court of Appeal concluded that, because the primary judge did not, and could not, make a finding that Sage was so aware, a case of abuse of process within the third category was not made out by the appellants.

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[168] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [108][109] , [116][117], [312] .

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178. The search for an appropriate epithet to describe the conduct of Sage (or that of the ACC more broadly) should not distract from the real issue presented by the third category of abuse of process in this case: whether the disregard of the requirements of the Act by Sage and the ACC was such that the administration of justice would be brought into disrepute if the courts were to allow the prosecutions to proceed.

179. The Act provides for the compulsory examination of persons by the ACC and the protection of any trial of such persons that may ensue. The implementation of the Act is necessarily dependent upon the diligence and competence of the responsible officers of the ACC. That is no less so in relation to the observance of the Act 's safeguards of the integrity of any criminal trial in prospect than it is in relation to the obtaining of information by compulsory examination. The statutory scheme is predicated on the assumption that those officers of the ACC charged with the implementation of the scheme will bring to the discharge of their duties the irreducible minimum level of diligence necessary to give effect to the requirements of the Act , both in relation to the carrying out of the investigation, and by ensuring that the protections afforded to the integrity of any criminal trial in prospect are maintained. This assumption was falsified by the ACC and Sage. Whether that failure to act with the irreducible minimum of diligence assumed by the legislation occurred by reason of a deliberate or reckless disregard of the law or by reason of supine incompetence is neither here nor there. Failure for either reason was apt to defeat the purpose of the Act .

180. It may be accepted that, for some kinds of criminal offences [169] , a lack of understanding by a person of certain matters may preclude a finding of recklessness on the part of that person. But here the issue is whether it would bring the work of the courts into disrepute if they were to facilitate a proceeding pursued in defiance of the legislative will by an agency of the executive government. In this context, there is no reason to draw a distinction between a deliberate or reckless disregard of the requirements of the Act by agents of the executive government on the one hand, and an incompetent disregard of the law on the other. In either case, the disregard of the law leads to an episode of lawlessness apt to defeat the purpose of the Act .

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[169] Cf *Zaburoni v The Queen* (2016) 256 CLR 482 at 497 [42]; [2016] HCA 12.

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181. Accordingly, the Court of Appeal erred in concluding that the appellants' case failed because Sage could not be described as having been reckless in his disregard of the requirements of the Act .

Were the proceedings affected?

182. The next question to be addressed is whether the proceedings brought against the appellants are affected by the lawless conduct of the ACC and Sage. It is to be noted that this is not to ask whether the appellants will suffer any forensic disadvantage at their trials; rather, it is to inquire as to whether the unlawfulness will alter the trial in a way that is contrary to the purpose of the Act .

183. Section 25A of the Act prescribes the circumstances in which a compulsory examination may occur. It is evident that it does so with an eye to the trial which may ensue from a compulsory examination. Section 25A(7) is relevant in this regard; but more particularly s 25A(9) discloses an intention that the investigators and prosecutors should be armed with information obtained by compulsory process only if the fair trial of an examinee would not be prejudiced thereby. The safeguards prescribed by the Act , and in particular s 25A(9) , are integral to the legislative scheme for compulsory examination. The evident purpose of the Act is that a person who has been compulsorily examined under the Act and who comes to be tried for an offence related to the subject matter of the compulsory examination should then be subject to the ordinary processes of a criminal trial under the general law. Given that the provisions of s 25A(9) relating to nonpublication are expressly intended to prevent investigators or prosecutors being armed with information *lawfully* obtained pursuant to s 25A where that might adversely affect the fair trial of an examinee, it is no stretch to conclude that it is contrary to the purpose of the Act that investigators and prosecutors be armed in relation to a prospective trial with information obtained *unlawfully* as a result of the pretended observance of the Act that would alter the trial in a fundamental way. The failure to comply with the requirements of the Act by the ACC and Sage was, in its effect, contrary to the purpose of the Act in this regard. As will be seen, so much is established by *Lee (No 2)* .

Lee (No 2)

184. In focusing on whether the lawless conduct of the examinations by the ACC and Sage resulted in particular forensic disadvantage to each appellant, the Court of Appeal failed to recognise that the trial process was affected by that conduct whether or not the appellants' prospects of acquittal were diminished thereby. If the unlawful conduct of the ACC and Sage was not apt to affect the appellants' trials, there would be no reason to stay the trial. If the unlawful conduct was not apt to have that effect, to grant a stay of proceedings would be to impose a kind of punishment on these agents of the executive government; and that is not a proper basis for the exercise of the power to stay proceedings as an abuse of process. But to show that the trials in prospect were so affected as inevitably to lead to a miscarriage of justice, it is not necessary to point to any particular forensic disadvantage to any accused. This, too, is established by *Lee (No 2)* .

185. In *Lee (No 2)* , the New South Wales Crime Commission had failed to comply with the terms of a direction made by it under a provision of New South Wales legislation analogous to s 25A (9) of the Act . As a result, prior to the trial of two examinees, the transcripts of their evidence were published to the police and the officers of the Director of Public Prosecutions engaged in the trial. The appellants were convicted at trial. This Court was unanimous in holding that the publication altered the trial of the appellants in a fundamental respect so that a substantial miscarriage of justice had occurred. The Court said [170] :

> "It is sufficient ... to focus attention upon the publication of the transcripts of the appellants' evidence before the Commission to the prosecution, directly to the DPP officer and indirectly through the police. The decision to do so, without regard to the protective purpose of [the analogue to s 25A(9) of the Act], was not authorised by the [New South Wales law]. The publication to the DPP, in particular, was for a patently improper purpose, namely the ascertainment of the appellants' defences."

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[170] (2014) 253 CLR 455 at 469 [39] .

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186. It is important to appreciate that the appeals to this Court in *Lee (No 2)* were not "decided by reference to whether there can be shown to be some 'practical unfairness' in the conduct of the appellants' defence affecting the result of the trial." [171] Rather, it was held that "[w]hat occurred … affected this criminal trial in a fundamental respect, because it altered the position of the prosecution vis-à-vis the accused." [172] For this alteration in the respective positions of accuser and accused at trial there was no legislative authority. The alteration occurred in defiance of the legislation. As the Court in *Lee (No 2)* explained [173] :

> "Indeed, [the alteration] occurred contrary to the evident purpose of [the analogue to s 25A(9)], directed to protecting the fair trial of examined persons."

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[171] (2014) 253 CLR 455 at 470 [43] .

[172] (2014) 253 CLR 455 at 473 [51] .

[173] (2014) 253 CLR 455 at 473 [51] .

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187. The same may be said here. As in *Lee (No 2)* , the prosecution unlawfully ascertained the appellants' defences by reason of the disregard of the requirements of the Act . The unlawful disregard by the ACC and Sage of the requirements of the Act was not only inexcusable; it was also apt to defeat the legislative purpose that the criminal trial of an examinee should not be affected by lawless conduct which occurred in pretended compliance with the Act . A conviction obtained at such a trial would inevitably be set aside as a miscarriage of justice, irrespective of whether a particular forensic disadvantage to the accused were able to be demonstrated. The concern is not with whether the accused has been disadvantaged, but with the preservation of the integrity of the trial process that the Act has in view.

188. *Lee (No 2)* , and the present case, may be contrasted with the line of cases of which *Bunning v Cross* [174] is the leading example. In *Bunning v Cross* , the issue was whether the information obtained by a wrongful interference with the liberty of the defendant should be excluded from the trial in the exercise of a judicial discretion to exclude evidence obtained unlawfully. There was no suggestion that the legislation in issue concerned itself with, and discountenanced, the use at trial of evidence so obtained. The issue was one of fairness in relation to the admissibility of evidence obtained by a trespass to the person. As Barwick CJ said [175] , the question was:

> "whether the public interest in the enforcement of the law as to safety in the driving of vehicles on the roads and in obtaining evidence in aid of that enforcement is so outweighed by unfairness to the applicant in the manner in which the evidence came into existence or into the hands of the Crown that, notwithstanding its admissibility and cogency, it should be rejected."

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[174] (1978) 141 CLR 54; [1978] HCA 22 .

[175] (1978) 141 CLR 54 at 64.

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189. In the present case, the issue is not about the exercise of judicial power, uninstructed by legislation, to strike a balance between the public interest in the enforcement of the law against those who may have committed an offence and unfairness to the alleged offender, where the unfairness in question may have involved a breach of the law such as a breach of property rights or an interference with personal liberty.

190. In *Bunning v Cross* , the legislation in question was silent as to the forensic use of the evidence so obtained. Stephen and Aickin JJ pointed out that the unlawfulness of concern in that case related to the interference by police with the personal liberty of the accused in obtaining the evidence in question rather than unlawfulness in the forensic use of the evidence so obtained [176] . Such a case may be contrasted with one, like *Lee (No 2)* , where the legislation expresses a concern as to the forensic use of information obtained pursuant to it. It

is integral to the purpose of the Act that the facility for compulsory examination that it provides should operate to ensure that an examinee who comes to be charged is tried in accordance with the ordinary processes of a criminal trial under the general law. While the Act does not expressly prohibit the pursuit of a prosecution where s 25A(9) has been ignored, it would be inconsistent with the purpose of the Act for a court to allow, much less to facilitate, that prosecution. In the present case, as in *Lee (No 2)* , the legislation which has been disregarded discountenances the forensic use of information obtained in breach of its provisions.

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[176] (1978) 141 CLR 54 at 80.

Accommodating the consequences of unlawfulness

191. The issue reduces then to whether a court of trial might be required to alter the ordinary processes attending a criminal trial in order to neutralise the consequences of the ACC's failure to adhere to the Act without bringing the administration of justice into disrepute.

192. In approaching this issue, the primary consideration must be that the courts, as the branch of government directly responsible for the administration of justice, should not give effect to a preference for the wishes of the executive government over the legislative purpose. It would put the courts at odds with the legislature if the courts were to take unusual steps specifically to accommodate a bid by the executive government to overcome a deficit in the integrity of a trial that arose solely by reason of the executive's disregard of the relevant legislation. That would bring the administration of justice into disrepute.

193. In *Lee (No 2)* , the convictions were set aside, and a new trial was ordered. The orders made by this Court in *Lee (No 2)* left to the presiding judge at the retrial the question whether the position of the accused visàvis the prosecution had been restored so that the retrial in prospect would not be affected by the earlier unlawfulness. It was left as a matter for the judge at the retrial to determine whether sufficient steps had been taken by the prosecution to avoid the ongoing effect of the publication by the prosecution ensuring that "another prosecutor and other DPP personnel, not privy to the evidence, were engaged." [177] In the present case, the primary judge was called upon to perform a task akin to that of the judge at the retrial ordered in *Lee (No 2)* .

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[177] (2014) 253 CLR 455 at 470471 [44] .

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194. The primary judge found that information from the examinations was used by the Australian Federal Police ("the AFP") to compile the prosecution brief and to obtain evidence which the AFP would not otherwise have been able to obtain. Further, the lack of clear records in respect of the dissemination of this material to AFP officers involved in the prosecutions made it difficult to determine by whom it had been used. Her Honour concluded that only the

creation of a new investigative team to conduct a new investigation could remove the effect of the consequences of the departures from the Act upon the trials of the appellants. Her Honour was given no reason to be satisfied that this would, or could, occur. On that basis, her Honour's decision to stay the prosecutions was amply justified.

195. The Court of Appeal, adopting a focus upon whether there was a prospect of actual forensic disadvantage to the appellants, concluded that the trial judge might give directions with a view to ensuring that the trials might proceed fairly to the appellants. For example, it was said that the trial judge might give directions to ensure that an investigator crossexamined by counsel on behalf of the appellants should not explain his or her actions by reference to what the investigator had learned from the unlawful examinations [178] . For the court to give directions so that the evidence at trial might be distorted in this way, for no reason other than to accommodate the lawlessness of the ACC and Sage, would bring the administration of justice into disrepute. It would be to embroil the court in the invidious process of accommodating the wish of the executive government to prosecute the appellants notwithstanding the executive's disregard of the legislative purpose that such accommodation should not be necessary. It would also detract from the fundamental presupposition of the trial that it is the jury that is to be the constitutional tribunal of fact [179] . What is in contemplation by such measures is not a familiar and uncontroversial judicial process, such as the editing out of material that is irrelevant or insufficiently relevant to the factfinding function of the jury, but the judicial suppression of relevant evidence that might affect the jury's assessment of the credibility of the witness.

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[178] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [301] .

[179] *Hocking v Bell* (1945) 71 CLR 430 at 440; [1945] HCA 16; *R v BadenClay* (2016) 258 CLR 308 at 329 [65]; [2016] HCA 35.

Moti

196. It may be noted that in *Moti* the majority stayed the further prosecution of criminal charges as an abuse of process because officers of the executive government of the Commonwealth had facilitated the deportation of the accused to Australia to stand trial, knowing that the deportation was unlawful under the law of the Solomon Islands. Their Honours held that the circumstance that the deportation of the accused from the Solomon Islands was unlawful "was a necessary but not a sufficient step towards a decision about abuse of process." [180] In deciding that a stay of proceedings should be ordered, the majority went on to refer to two "fundamental policy considerations" that are material to whether the prosecution of criminal proceedings is an abuse of process [181] .

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[180] (2011) 245 CLR 456 at 477 [53] .

[181] (2011) 245 CLR 456 at 478 [57] .

197. The first of these considerations was "the public interest in the administration of justice [that] requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike." [182] The second consideration was that "unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice." [183]

[182] *Williams v Spautz* (1992) 174 CLR 509 at 520; [1992] HCA 34.

[183] *Williams v Spautz* (1992) 174 CLR 509 at 520.

198. In *Moti* these policy considerations were held to support the stay of the criminal proceedings. It is to be noted that these considerations did not fall to be applied in a context in which legislation had put in place protections to preserve the integrity of any criminal trial in prospect and in which the illegal conduct of the executive involved the disregard of these protections by the agency of the executive government specifically charged with the maintenance of these protections. Given the context in which these considerations fall to be applied here, the present case is a stronger case for the grant of a stay of proceedings than was *Moti* itself.

199. **Following paragraph cited by:**

Director of Public Prosecutions Reference No 1 of 2019 (14 May 2021) (Kiefel CJ; Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

GORDON J. White collar crime affects individuals, business enterprises, institutions and sovereign states. The crimes are transactional; their reach and impact is often transnational. Controls of, and responses to, white collar crime extend beyond a single agency or state with the added complication that states take often quite different views on the criminality to be ascribed to certain conduct. White collar crime causes not only monetary losses but distrust in and between individuals, business enterprises, institutions and sovereign states[184].

[184] See generally Green, *Lying, Cheating, and Stealing: A Moral Theory of WhiteCollar Crime*, (2007), especially Ch 16; Pinto and Evans, *Corporate Criminal Liability*, 3rd ed (2013), especially Ch 19; Healy and Serafeim, "Who Pays for WhiteCollar Crime?", Harvard Business School Working Paper 16-148, 29 June 2016; Senate Economics References Committee, *"Lifting the fear and suppressing the*

greed": Penalties for white-collar crime and corporate and financial misconduct in Australia, (2017).

200. Over the last few decades, State, national and international measures have been developed to seek to address the nature and complexity of the detection and punishment of white collar crime. In Australia, after a series of Royal Commissions in the 1980s led to the creation of the National Crime Authority[185], the Australian Crime Commission ("the ACC") was established in 2003 to further reduce[186] the incidence of serious and organised criminal activity and its impact on the Australian community [187] .

[185] See, eg, Royal Commission of Inquiry into Drug Trafficking, *Report*, (1983) at 771-777, 783-788; Royal Commission on the Activities of the Federated Ship Painters & Dockers Union, *Final Report*, (1984), vol 2 at 150 [14.007]. See also Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 June 1984 at 3092-3093.

[186] See generally Australia, House of Representatives, *Parliamentary Debates* (Hansa rd), 26 September 2002 at 7328-7329.

[187] As to the ACC's functions, see generally s 7A of the *Australian Crime Commission Act* 2002 (Cth) .

201. The appellants have been charged with serious white collar crimes [188] which are alleged to involve individuals, corporations, institutions and various sovereign states. The appellants contend that the prosecution of those charges should be permanently stayed because aspects of the ACC's conduct before, during and after each appellant's compulsory examination by the ACC were not lawful.

[188] Contrary to the *Criminal Code* (Cth) and, in some cases, the *Crimes Act* 1958 (Vic) .

202. **Following paragraph cited by:**

Marwan v Director of Public Prosecutions (18 July 2019) (Leeming JA, R A Hulme and Adamson JJ)

Accused persons have a right to a "not unfair" trial [189] and it is the courts that decide what is fair, or not fair. Courts have powers to protect an accused's right to a fair trial. A permanent stay of a criminal trial for abuse of process is one of those powers. What

will amount to an abuse of process sufficient to justify the grant of a stay cannot be defined exhaustively [190] . Fairness to an accused is both relevant and important in assessing whether a stay should be granted [191] ; a public interest consideration that underpins the power to grant a stay is that "trials and the processes preceding them are conducted fairly" [192] . But it is not the only consideration [193] . The grant of a stay is not about punishing investigators or prosecutors. It is to *prevent* the court's processes being used in a manner inconsistent with the recognised purposes of the administration of justice [194] .

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[189] See *Jago v District Court (NSW)* (1989) 168 CLR 23 at 56; [1989] HCA 46; *Dietrich v The Queen* (1992) 177 CLR 292 at 362; [1992] HCA 57.

[190] *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 266-267 [14]-[15]; [2006] HCA 27 quoting *Ridgeway v The Queen* (1995) 184 CLR 19 at 74-75; [1995] HCA 66 and *Rogers v The Queen* (1994) 181 CLR 251 at 286; [1994] HCA 42.

[191] See *Dupas v The Queen* (2010) 241 CLR 237 at 251 [37]; [2010] HCA 20 citing *Jago* (1989) 168 CLR 23 at 33 ; see also at 30.

[192] *Jago* (1989) 168 CLR 23 at 30.

[193] *Dupas* (2010) 241 CLR 237 at 251 [37] .

[194] *Jago* (1989) 168 CLR 23 at 30 quoting *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481.

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203. There is, of course, a "substantial public interest" in having persons charged with criminal offences brought to trial [195] . To grant a permanent stay of a criminal proceeding is "tantamount to a continuing immunity from prosecution" [196] . It is a drastic remedy [197] . Often there are less drastic steps available to courts which are capable of preserving the fairness of a trial [198] . And there is no defined list of such steps.

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[195] *Dupas* (2010) 241 CLR 237 at 251 [37] citing *R v Glennon* (1992) 173 CLR 592 at 598; [1992] HCA 16.

[196] *Dupas* (2010) 241 CLR 237 at 251 [37] citing *Glennon* (1992) 173 CLR 592 at 599.

[197] See, eg, *Jago* (1989) 168 CLR 23 at 31, 76, 78.

[198] *Dietrich* (1992) 177 CLR 292 at 365.

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204. The question raised by these appeals is whether, in all the circumstances, each appellant would receive a fair trial or whether, in any event, there should be a permanent stay of the

prosecution of the charges against the appellants to *prevent* the court's processes being used in a manner inconsistent with the recognised purposes of the administration of justice. The ACC's conduct may be condemned. But if a fair trial can be had, or if it is not possible to say now that a fair trial cannot be had, why would the administration of justice be brought into disrepute?

205. In the circumstances of these appeals, the administration of justice would not be brought into disrepute if the prosecutions were permitted to proceed.

206. First, in relation to the appellants, the direct use immunity prescribed by the *Australian Crime Commission Act* 2002 (Cth) ("the ACC Act") is preserved. The transcripts of the ACC examinations are not sought to be tendered at the trial. Insofar as the investigators from the Australian Federal Police ("the AFP") have knowledge of what was said at the ACC examinations, each investigator has provided an undertaking to the Supreme Court of Victoria that: they have not communicated the contents of, or what took place at or in relation to, the ACC examinations to the replacement prosecutors; they will use their best endeavours not to communicate, directly or indirectly, the contents of, or what took place at or in relation to, the ACC examinations to the replacement prosecutors or any other person who to their knowledge has conduct of the trials of the appellants ("a relevant communication"); and should they become aware of a relevant communication, they will advise the Supreme Court.

207. Second, the fact that some of the evidence sought to be tendered at the trial may have been obtained derivatively from the ACC examinations (and has thereby itself been illegally obtained) does not automatically render that evidence inadmissible [199] , let alone result in the impossibility of a fair trial so as to justify a stay. Indeed, it was plausible that the appellants could have been examined lawfully under the ACC Act . And if that had occurred, any derivative evidence lawfully obtained could have been subsequently sought to be tendered at trial.

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[199] See *Bunning v Cross* (1978) 141 CLR 54 at 78-80; [1978] HCA 22.

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208. Third, the courts, not the ACC or the AFP, are the administrators of justice. As the administrators of justice, the courts can and do control their own processes if they consider that those processes are being misused or that, for some identifiable reason, an accused is not receiving, or will not receive, a fair trial. The courts can and do act of their own motion and in response to applications by the Crown and the defence. The courts can and do act at any point in the criminal process. And, as just explained, the steps that the courts can and do take are not closed and need not be as drastic as ending proceedings before they begin.

209. Fourth, if a specific issue did arise during the course of the trial, the appellants could make a further application for the Supreme Court to exercise its powers to protect their right to a fair trial. If such an application were made, it would be for the trial judge to consider whether, in the circumstances then presented, it was necessary for the Court to exercise one or more of its various powers to protect the appellants' right to a not unfair trial – including granting a stay,

"tempering the rules and practices to accommodate the case concerned" [200] or, to the extent that the issue was capable of being addressed by directions to the jury, making appropriate directions.

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[200] *Dietrich* (1992) 177 CLR 292 at 365.

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210. In the resolution of these appeals, it is appropriate to address the following considerations. Each has several dimensions. All are interrelated: the ACC Act (as it stood at the relevant time); the nature and extent of the unlawful conduct by the ACC before, during and after the ACC examinations of the appellants; the illegally obtained evidence; the fairness of any future trial (including the mechanisms available to a trial judge to ensure the appellants receive a fair trial [201]); and the effect on the reputation of the administration of justice if the prosecutions were permitted to proceed.

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[201] See *Glennon* (1992) 173 CLR 592 at 598 ; *Dupas* (2010) 241 CLR 237 at 251 [38] .

The ACC Act

211. By its compulsory examination powers, the ACC Act [202] modified a person's right to silence in specific and limited circumstances. That in itself is not unusual. As Gageler and Keane JJ said in *Lee v New South Wales Crime Commission* ("*Lee (No 1)*"), there is "no free-standing or general right of a person charged with a criminal offence to remain silent" [203] .

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[202] As in force in April and November 2010 (being the periods during which the appellants were compulsorily examined by the ACC).

[203] (2013) 251 CLR 196 at 313 [318]; [2013] HCA 39 .

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212. Under the ACC Act , for a compulsory examination to be validly conducted, two things were necessary: that there be, relevantly, a special ACC investigation and that the examination be conducted "for the purposes of" that special ACC investigation [204] .

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[204] s 24A of the ACC Act .

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213. For a special ACC investigation to come into existence, the Board of the ACC had to "*authorise* , in writing, the ACC to … investigate matters relating to *federally relevant criminal activity*" [205] and "*determine*, in writing, [that] … such an investigation [was] a *special investigation*" [206] (emphasis added). "Federally relevant criminal activity" was defined to include "a relevant criminal activity[[207]], where the relevant crime [was] an offence against a law of the Commonwealth"[208] and extended to "any circumstances implying, or any allegations, that a relevant crime *may* have been, may be being, or may in future be, committed against a law of the Commonwealth" [209] (emphasis added). A person need not have been charged in order for activities related to a crime to fall within the ACC's functions and powers.

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[205] s 7C(1)(c) of the ACC Act .

[206] s 7C(1)(d) and (3) of the ACC Act .

[207] See the definition of "relevant criminal activity" in s 4(1) of the ACC Act .

[208] In these appeals, there is no dispute that the offences of which the appellants were suspected were offences against a law of the Commonwealth.

[209] See the definition of "relevant criminal activity" in s 4(1) of the ACC Act .

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214. Before determining that an investigation was a special investigation, the Board had to "consider whether ordinary police methods of investigation … [were] likely to be effective" [210] . The Board was not required to conclude that ordinary police methods of investigation would definitely be ineffective. Nor was it necessary for ordinary police methods to have already been tried and been proven to be unsuccessful. Rather, the likely effectiveness of ordinary police methods was a matter the Board was required to simply "consider"[211].

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[210] s 7C(3) of the ACC Act .

[211] In these appeals, there is no dispute that each appellant had declined to participate in a cautioned record of interview with the AFP.

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215. If those specific and limited circumstances identified in the ACC Act existed *and* the ACC exercised its powers lawfully, then the ACC Act permitted a person to be summonsed to attend for compulsory examination. The ACC Act provided that examinations conducted under the ACC Act would be conducted in private [212] , subject to exceptions for legal representatives [213] and directions made by the examiner permitting other persons to be present [214] .

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[212] s 25A(3) and (5) of the ACC Act .

[213] s 25A(4) of the ACC Act .

[214] s 25A(3) of the ACC Act .

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216. In addition to directions an examiner might make as to the persons who may be present during an ACC examination (and therefore the persons who may directly hear evidence given by examinees), there were restrictions under the ACC Act on the use of information obtained during an examination: first, a direct use immunity which prevented answers given (or documents produced) in an examination from being admissible in evidence against the examinee in, relevantly, criminal proceedings, if the examinee claimed that the answer (or document) might tend to incriminate them [215] ; and, second, obligations on the examiner to consider, and make where required, orders limiting or preventing the disclosure of evidence obtained during the course of an examination [216] .

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[215] s 30(4)-(5) of the ACC Act .

[216] s 25A(9) of the ACC Act .

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217. Consistent with ACC policy and standard operating procedures[217], if a person was "to be charged with a criminal offence, or there [was] considered to be sufficient evidence to ground the laying of a criminal charge", the ACC was unlikely to examine that person or, at the very least, would ensure that any person involved in the investigation or prosecution of the person was not present during the examination and was precluded from having access to the evidence of the person[218].

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[217] As recorded in the documents described by other members of this Court: see reasons of Kiefel CJ, Bell and Nettle JJ at [89], [91].

[218] In these appeals, at the time each appellant was examined, each was a suspect who had not been, but may have been, charged.

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218. Pursuant to s 12(1) of the ACC Act , where the ACC, in carrying out an ACC operation or investigation, obtained evidence of an offence against a law of the Commonwealth and that evidence would be admissible in a prosecution for the offence, the Chief Executive Officer of the ACC was *obliged* to assemble the evidence and give that evidence to the relevant law enforcement agency or prosecuting authority. The obligation in s 12 sat alongside another of

the ACC's express statutory obligations: namely, that when performing its functions under the ACC Act , the ACC "shall, so far as is practicable, work in cooperation with law enforcement agencies" [219] .

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[219] s 17(1) of the ACC Act .

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219. With respect to ACC examinations, those general obligations as to information sharing and co-operation were subject to override by an examiner who, under s 25A(9) , was required to give a direction that evidence given before the examiner "must not be published, or must not be published *except in such manner, and to such persons,* as the examiner specifies" if the failure to make such a direction "might … prejudice the fair trial of a person who has been, *or may be*, charged" (emphasis added).

220. By its express terms, the ACC Act (including s 25A(9)) recognised that a person could be summonsed to attend an examination and provide sworn evidence *before* having been charged. Not only was an examinee not entitled to refuse to answer questions on the ground that the answers were likely to incriminate them [220] but, at the very least, consistent with the objects, functions and powers of the ACC, the ACC *was obliged* to consider disclosing the substance of the information provided by an examinee to law enforcement agencies and prosecuting authorities.

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[220] Although, as noted above, they could have prevented the direct use of those answers in a subsequent criminal proceeding by claiming (before answering) that the answer might tend to incriminate them: see s 30(4)(5) of the ACC Act .

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221. Further, there is no derivative use immunity. If a compulsory examination were conducted lawfully, any subsequent disclosures by the ACC, provided that the disclosures did not contravene a direction under s 25A(9) , could have been made available to law enforcement agencies to assist with, for example, narrowing document searches, preparing for interviews with other witnesses and preparing a brief of evidence. And that derivative evidence would also be able to be adduced as evidence in a subsequent trial. The disclosures by the ACC were intended not only to assist law enforcement agencies and their investigations but, ultimately, to provide evidence in the prosecution of crimes.

222. Put another way, the ACC Act made disclosure lawful even where direct use immunity had been claimed, provided that the disclosure did not contravene any non-publication direction made by an examiner under s 25A(9) . So, for example, after a person had been lawfully summonsed and examined under the ACC Act , the ACC could have disclosed the existence and contents of particular documents to a law enforcement agency without disclosing how the documents were identified or the source of those documents. That is, the ACC could have advised the relevant law enforcement agency that certain documents disclosed potential criminal conduct but not revealed the name of the person examined or even that there was an

examination. And that disclosure could have been made even where a person, not the examinee, had been charged [221] .

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[221] s 25A(9) of the ACC Act .

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223. As is apparent, given the breadth of the ACC's powers and the consequences of the exercise of those powers, the ACC and its staff were obliged to act according to law, as well as intelligently and in a structured manner so that their disclosures to law enforcement agencies or prosecuting authorities did not prejudice the fair trial of a person who had been, or may be, charged. And the ACC and its staff were obliged to act in that manner at all times before, during and after any ACC examination.

224. At first blush, these provisions appear to be at odds: on the one hand, the ACC Act provided for a direct use immunity as well as the override against disclosure of information if disclosure might have prejudiced a fair trial but then, on the other hand, the ACC was under an obligation to hand over information to law enforcement agencies and prosecuting authorities, and derivative use of that information was not prohibited by the ACC Act . The tension between those provisions arose because the ACC Act sought to balance the ACC's coercive examination powers, and the ACC's goal of assisting with the investigation of crime, with the right of an accused to a fair trial.

Nature and extent of the ACC's unlawful conduct in relation to the appellants

225. Aspects of the conduct of the ACC before, during and after each appellant's compulsory examination by the ACC were not lawful[222]. The unlawful conduct of the ACC was deliberate and comprised unlawful acts of omission and commission. But the ACC and its staff did not consider what they were doing was unlawful; they simply failed to turn their minds to the specific requirements of the ACC Act [223] and failed to consider, let alone keep at the forefront of their minds, that their actions might prejudice the fair trial of a person who may be charged with an offence.

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[222] See reasons of Kiefel CJ, Bell and Nettle JJ at [70], [88], [93]-[94].

[223] See *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506 [76]; [2003] HCA 2 cited in *Lee v The Queen* ("*Lee (No 2)*") (2014) 253 CLR 455 at 468 [36]; [2014] HCA 20.

The illegally obtained evidence

226. As a result of the unlawful conduct of the ACC, the examinations of the appellants, and the evidence derived from those examinations, were illegally obtained.

227. The illegally obtained evidence included the answers given during the examinations. Not only was that evidence illegally obtained as a result of the examinations themselves being unlawful but some of the answers were directly heard by AFP investigators observing the examinations (without the appellants being aware of, or being given the opportunity to comment on, the investigators' presence [224]), or otherwise read or listened to by persons in receipt of one or more of the transcripts of the appellants' examinations. There is no dispute that the transcripts and any oral account of the examinations by the AFP investigators are inadmissible as evidence in any trial of the appellants. The direct use immunity is, to that extent, preserved. Indeed, in each case, the examiner made orders under s 30(5) preventing all evidence given by the appellants during the examinations from being admissible against them in criminal proceedings.

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[224] See s 25A(7)-(8) of the ACC Act .

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228. The illegally obtained evidence also included *derivative evidence* – that is, evidence obtained as a consequence of the AFP investigators' knowledge of the content of the examinations. The evidence was said to have been used in narrowing document searches to prepare the briefs of evidence and in the identification of other witnesses.

229. But, as has been explained, there was no derivative use immunity in the ACC Act . If the ACC had acted lawfully then this information might have been made available in such a form, and to nominated persons within the AFP in such a way, that there was no basis upon which its disclosure "might … prejudice the fair trial of a person who … may be … charged" [225] .

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[225] s 25A(9) of the ACC Act .

Fair trial

230. Given the existence of that illegally obtained evidence, will the trial of the appellants be a fair trial or a "not unfair" trial?

231. As was explained in *Bunning v Cross* [226] , neither the fact that evidence was obtained illegally nor the fact that an investigating authority such as the ACC acted unlawfully means that the evidence is inadmissible. And it would be a step further still to say that obtaining evidence illegally or investigators acting unlawfully means (without more) that a fair trial of the accused is precluded.

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[226] (1978) 141 CLR 54 at 78.

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232. The ACC Act does not alter that conclusion. The ACC Act made express that which was assumed in *Bunning v Cross* : the fair trial of a person who may be charged must be at the forefront of consideration before, during and after the obtaining of evidence. Second, unlike the position in *Bunning v Cross* , under the ACC Act there was nothing to suggest that there could not have been a legal basis to compulsorily examine the appellants and for the ACC to disclose, thereafter, the information obtained – in a particular way and to specific persons – so long as the potential impact on the fair trial of the person was considered and addressed.

233. The position of each appellant also stands in stark contrast to that in *Lee v The Queen* ("*Lee (No 2)*")[227] . In the prosecutions of the present appellants, the fact that the ACC acted unlawfully, and the consequences arising from that unlawful conduct, are known *before* the trial begins. At its heart, the difficulty of this case is that the AFP investigating team will not be replaced for the trial. It is therefore necessary to take what the AFP investigators have – illegally obtained evidence – and ask "does that lead to an unfair trial?" Put in different terms, the fact that evidence was obtained unlawfully presents the question, not the answer.

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[227] (2014) 253 CLR 455 .

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234. The prosecution team will be replaced for the trial: they have been, and will remain, quarantined from the ACC examinations themselves and what was said in those examinations. Each prosecutor has provided an undertaking to the Supreme Court that: they have not had access to either the recordings or the transcripts of the ACC examinations and the contents of, or what took place at or in relation to, the ACC examinations has not been communicated directly, or indirectly, to them; they will use their best endeavours not to communicate, directly or indirectly, about the contents of, or what took place at or in relation to, the ACC examinations with any person, and not to read any document containing such matters (also defined as "a relevant communication"); and should they become aware of a relevant communication, they will advise the Supreme Court.

235. The AFP investigators are in a different position. The investigating team has not been replaced. However, as noted earlier, the AFP investigators have also provided extensive undertakings to the Supreme Court [228] .

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[228] See [206] above.

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236. Two practical matters or issues were identified in argument – first, the AFP investigators *might* disclose the illegally obtained evidence (the contents of the examinations) to the replacement prosecutors and, second, if the AFP investigators are called to give evidence at any trial, they may be asked questions which, if answered truthfully and completely, would require disclosure of the fact of the examinations or, so it is said, the contents of the illegally obtained evidence.

237. The first has been addressed. The AFP investigators have provided extensive undertakings to the Supreme Court. There is nothing to suggest that the AFP investigators have not complied, or will not comply, with those undertakings. Of course, if an AFP investigator failed to comply, the prosecution would be obliged to bring that fact to the attention of defence counsel and the Supreme Court, and the trial judge would then have to decide whether the trial of the accused should continue.

238. The second issue – that if the AFP investigators are called to give evidence at any trial, they may be asked questions which, if answered truthfully and completely, would require them to disclose the fact of and the contents of the examinations – has not arisen. The trial has not yet been held. As is often the case in white collar crime, the prosecution case against the appellants is largely documentary. It is not known if the issue just identified will arise and, if it does, how and at what point in the trial. If such an issue did arise then, having ascertained what the issue is and the circumstances in which it has arisen, it would be for the trial judge to consider how to address the issue – including granting a stay, tempering the rules and practices to accommodate the case concerned, or making appropriate directions to the jury. For example, an unreliability warning under s 32 of the *Jury Directions Act* 2015 (Vic) may be made if a party in a jury trial requests such a warning and the evidence in question is "of a kind that may be unreliable" [229] , within the meaning of s 31 of that Act. Not only are the categories listed in s 31 not closed, jury directions are just one of the many steps that could be taken by a trial judge to protect an accused's right to a fair trial [230] .

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[229] See generally Judicial College of Victoria, *Victorian Criminal Charge Book* , (2017), Ch 4.17.

[230] See [208]- [209] above.

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239. It is inappropriate to speculate about whether the need for such a step will arise and, if so, what step or steps will be required. Without the necessary facts and matters, it cannot be concluded that the appellants are presently not going to receive a fair trial. Foresight, like hindsight, is dangerous. Trial judges can and do deal with what is before them. It should be left to the trial judge to deal with any issue *if* it arises.

240. The disadvantage identified as critical by the plurality is that the appellants were compelled to give on oath, and are now locked into, a version of events from which it is said they will be incapable of credibly departing at trial. But that disadvantage might lawfully have resulted in any event – there was nothing to suggest that the ACC examinations of the appellants could not have been conducted lawfully; that is, the proper procedures under the ACC Act could have been followed, and could have resulted in a lawful examination. If that had occurred, transcripts of the examinations would have been prepared, signed by the examinee and provided by the examinee to their defence counsel.

241. In any event, any disadvantage said to arise from the appellants being "locked in" has been, or is capable of being, remedied. As noted earlier, the "locked-in" version of events would not be known to the replacement prosecution team. The orders made by the examiner under s 30

(5) prevent the transcripts and recordings of the examinations from being admissible as evidence in criminal proceedings against the appellants. The undertakings given by the AFP investigators and the replacement prosecution team are aimed at ensuring that the fact and contents of the examinations do not otherwise come into the hands of the replacement prosecution team. The prosecution must prove its case beyond reasonable doubt, and the appellants remain entitled to put the prosecution to its proof.

242. If the ACC's conduct warrants criticisms of the kind and intensity levelled by the plurality, those criticisms would be relevant only if seeking to punish the ACC.

Prosecutions bring the administration of justice into disrepute?

243. In the circumstances, it is not open to conclude now that each appellant would not receive a fair trial or that there should be a permanent stay of the prosecution of the charges against each appellant to prevent the court's processes being used in a manner inconsistent with the recognised purposes of the administration of justice.

244. **Following paragraph cited by:**

Dawson v R (11 June 2021) (Bathurst CJ, Adamson and Bellew JJ)

> 29. In these circumstances, it would be surprising if the primary judge deviated in one part of her judgment and adopted an incorrect test. I do not think her Honour did so. Rather her Honour was looking to the future and considering the prospect of empanelling an impartial jury, an essential prerequisite to a fair trial. If there was no prospect of doing so, a stay would be inevitable. Whether it could be done ultimately depends on the empanelment process. It was in this context that the primary judge was referring to reasonable prospects of empanelling a jury not influenced by the podcast. Her Honour was not suggesting it was sufficient that there was a jury empanelled in respect of which there were reasonable prospects that it would be impartial: cf *Strickland (A Pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325; [2018] HCA 53 at [244] per Gordon J in dissent, but cited with approval in *Lunt* at [22] .

The ACC acted unlawfully. There is illegally obtained evidence. The conduct of the ACC may be condemned. The administration of justice requires the fair trial of persons accused of crime. But if a fair trial can be had, or if it is not possible to say now that a fair trial cannot be had, why would the administration of justice be brought into disrepute if the prosecutions were permitted to proceed? It would not be.

Conclusion and orders

245. For the foregoing reasons, the appeals should be dismissed.

EDELMAN J.

Introduction

246. Suppose that, before charging a person, the police or prosecutors seek to resile, without cause, from a written indemnity from prosecution given to the person. Or suppose that a suspect is charged after "the deliberate invasion by the police of a suspect's right to legal professional privilege" [231] . Or suppose that a person is unlawfully removed from one country to another to face a fair trial for an offence in the other country. Although an "infinite variety of cases could arise" [232] , and although every case must be assessed on its own facts, these appeals, like the examples above, raise the basic question of the nature of a court's power to grant a permanent stay of criminal proceedings despite the possibility of the person receiving a fair trial.

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[231] *Warren v Attorney General for Jersey* [2012] 1 AC 22 at 35 [36] .

[232] *R v Latif* [1996] 1 WLR 104 at 113; [1996] 1 All ER 353 at 361.

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247. In circumstances based upon each of the first [233] , second [234] , and third [235] examples above, courts have recognised the possibility that the power to stay proceedings as an abuse of process might be exercised. In some instances, the power was exercised. In each case the possibility of exercising the power existed "although the fairness of the trial itself was not in question" [236] .

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[233] *Delellis v The Queen* (1989) 4 CRNZ 601 at 604; *Williamson v Trainor* [1992] 2 Qd R 572 at 583 ; *R v Croydon Justices; Ex parte Dean* [1993] QB 769 at 778. See also *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42 at 61, referring to *Chu Piu-wing v Attorney General* [1984] HKLR 411 at 417-418 .

[234] *Warren v Attorney General for Jersey* [2012] 1 AC 22 at 35 [36] .

[235] *R v Hartley* [1978] 2 NZLR 199; *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546 at 556-557, 564-565 ; *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42 at 61-62, 67-68, 73-74, 84 ; *Moti v The Queen* (2011) 245 CLR 456; [2011] HCA 50.

[236] *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42 at 61. See also *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546 at 565 ; *Fox v Attorney-General* [2002] 3 NZLR 62 at 71 [37] .

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248. A permanent stay of proceedings for an abuse of process is a measure of last resort. It will be ordered where there is no other way to prevent an unfair trial. It will also be ordered where

there is no other way to protect the integrity of the system of justice administered by the court. The latter category, which can be conveniently described as protecting the "integrity of the court", is the concern of these appeals.

249. **Following paragraph cited by:**

Director of Public Prosecutions v Tuteru (17 August 2023) (Beach, Walker and Taylor JJA)

67. Consequently, a permanent stay may be ordered where there are no other means to protect the integrity of the court's processes. As Edelman J stated in *Strickland (a Pseudonym) v Commonwealth Director of Public Prosecutions*:

> "Abuse of process" may not be the best language to describe the category where the focus is upon the integrity of the court generally rather than its particular processes. The rationale for this category has been described in various ways. The rationale has been described as being "a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law". It has been described as avoiding "an erosion of public confidence". It has also been described as arising where a trial would bring the administration of justice into disrepute. Each of these verbal formulations attempts to capture a concern for the systemic protection of the integrity of the court within an integrated system of justice. The possibility of an unfair trial, or a degree of unfairness in a trial, may be a factor contributing to that concern. But an unfair trial is not a prerequisite for a permanent stay in this category. [35]

via

[35] (2018) 266 CLR 325, [249] (Edelman J); [2018] HCA 53 (' *Strickland*') (citations omitted).

Gardiner v Attorney-General (No 4) (21 May 2021) (Richards J)
Gardiner v Attorney-General (No 4) (21 May 2021) (Richards J)
Gardiner v Attorney-General (No 3) (18 August 2020) (Richards J)

"Abuse of process" may not be the best language to describe the category where the focus is upon the integrity of the court generally rather than its particular processes. The rationale for this category has been described in various ways. The rationale has been described as being "a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law" [237] . It has been described as avoiding "an erosion of public confidence" [238] . It has also been described as arising where a trial would bring the administration of justice into disrepute [239] . Each of these verbal formulations attempts to capture a concern for the systemic protection of the integrity of the court within an integrated

system of justice. The possibility of an unfair trial, or a degree of unfairness in a trial, may be a factor contributing to that concern. But an unfair trial is not a prerequisite for a permanent stay in this category.

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[237] *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42 at 62.

[238] *Williams v Spautz* (1992) 174 CLR 509 at 520; [1992] HCA 34.

[239] *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536 ; *M oti v The Queen* (2011) 245 CLR 456 at 464 [10] , quoting *Rogers v The Queen* (1994) 181 CLR 251 at 286; [1994] HCA 42.

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250. The issue on these appeals is whether a permanent stay of proceedings is necessary to protect the integrity of the court and thus to prevent an "abuse of process". The issue arises due to the stultification of basic safeguards contained in a Commonwealth statute that permitted, in certain circumstances, compulsory examination of a person even where his or her answers might be self-incriminating. The statutory regime contained various protections for the examinee, including: (i) the existence of a special Australian Crime Commission ("ACC") operation or investigation; (ii) the examinee's right to be told of the presence of any person at the examination other than an ACC staff member; and (iii) a usual direction to be given that evidence must not be published, other than in accordance with exceptions specified by the examiner. The Australian Federal Police ("AFP") examinations guide also recorded that the ACC practice was not to examine a witness directly about the witness' own criminal offending [240] .

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[240] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [69] .

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251. In the circumstances of these appeals, the safeguards were ignored. After the appellants had refused to answer questions from the AFP, the AFP unlawfully used the ACC, without any special operation or investigation being undertaken or conducted by the ACC, as a "hearing room for hire" to compel the appellants to answer questions. Many of the police investigators secretly watched from a nearby room as the appellants were compelled to incriminate themselves. The transcripts of the interviews were widely disseminated to the AFP and prosecution teams.

252. The conduct of the unlawful examinations involved the AFP dictating who would be examined, whether and when the examinations would be held, and generally the questions that would be asked at the examinations. The AFP had two purposes, supported by the conduct of the ACC examiner, whose improper purpose was to assist the police generally. The AFP's purposes were (i) to lock each of the appellants into a version of events on oath in an attempt to prevent them from providing an alternative version at any trial, and (ii) to obtain assistance in knowing what to look for in assembling any briefs for the prosecution from tens of millions

of documents. Both of those purposes were achieved. The appellants gave their versions of the events on oath. And briefs were compiled using the material obtained following a refined search, which material was described by the lead investigator as "the most significant influence on the charging decision and the focus of the investigation".

253. The appeals to this Court were much assisted by the comprehensive reasons of the primary judge and the Court of Appeal of the Supreme Court of Victoria, both of which clearly expose and analyse the issue. The primary judge held that a permanent stay of proceedings should be ordered due to the forensic disadvantage caused to the appellants and also to protect confidence in the administration of justice. However, an appeal by the Commonwealth Director of Public Prosecutions ("CDPP") was allowed by the Court of Appeal.

254. For the reasons below, the primary judge was correct to order that the proceedings be permanently stayed. The serious nature of the charges is subordinated to the potential damage to the integrity of the court if a trial were to proceed. A permanent stay of proceedings is necessary as it is the only response that can adequately protect the integrity of the court. The appeals to this Court should be allowed, and orders made as proposed in the joint judgment of Kiefel CJ, Bell and Nettle JJ.

255. During the course of preparing and writing these reasons, I have had the benefit of reading the joint judgment and the reasons of Keane J. In these reasons I agree with, and gratefully adopt, various sections of the joint judgment. I also agree with the reasons of Keane J. However, in light of (i) the importance of the power to stay proceedings as an abuse of process, and (ii) the divergence of views about its scope and application, this is an instance where the expression of separate reasons may help the common law to "work itself pure" [241] .

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[241] *Omychund v Barker* (1744) 1 Atk 21 at 33 [26 ER 15 at 23].

The rationale for the power to stay proceedings as an abuse of process

256. **Following paragraph cited by:**

Camelo-Gomez v The The Queen (01 June 2022) (Davies, Bellew and Fagan JJ)
R v Camelo-Gomez (21 February 2022) (Wilson J)

289. A complaint of this nature can of itself, or in combination with other features, amount to an abuse of process. In *Tony Strickland (A Pseudonym) & Ors v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325; [2018] HCA 53 Edelman J referred to three categories of cases where a stay might be granted, at [256] :

> "The power to prevent an abuse of process is an inherent common law power of a superior court of law; it is a power that does not derive from statute but is intrinsic to the nature and structure of the court itself. The power to stay proceedings to prevent an abuse of process has been

conveniently divided into three main categories. In a passage quoted with approval on a number of occasions, McHugh J said that the three categories are: (i) the court's procedures are invoked for an illegitimate purpose; (ii) the use of the court's procedures is unjustifiably oppressive to one of the parties; and (iii) the use of the court's procedures would bring the administration of justice into disrepute" (footnotes omitted)."

Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Limited (No 4 examination orders) (12 October 2021) (Wigney J)

14. Even in the absence of that express power, the Court could in any event make such an order as part of its implied or incidental power to prevent abuse or frustration of its processes in relation to matters coming within its jurisdiction: *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623 (Deane J); see also 616 (Mason CJ), 618 (Wilson and Dawson JJ) and 620-621 (Brennan J). Such a power is "an inherent common law power of a superior court of law; it is a power that does not derive from statute but is intrinsic to the nature and structure of the court itself": *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325; [2018] HCA 53 at [256] (Edelman J) . If the Court has the power to stay proceedings if the trial would otherwise be unfair, as it unquestionably does, it must also have the power to make orders which would prevent the risk of unfairness in the first place.

The power to prevent an abuse of process is an inherent common law power of a superior court of law; it is a power that does not derive from statute but is intrinsic to the nature and structure of the court itself [242] . The power to stay proceedings to prevent an abuse of process has been conveniently divided into three main categories. In a passage quoted with approval on a number of occasions [243] , McHugh J said that the three categories are [244] : (i) the court's procedures are invoked for an illegitimate purpose; (ii) the use of the court's procedures is unjustifiably oppressive to one of the parties; and (iii) the use of the court's procedures would bring the administration of justice into disrepute.

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[242] *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1 at 7; [1972] HCA 34.

[243] *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 267 [15]; [2006] HCA 27; *PNJ v The Queen* (2009) 83 ALJR 384 at 386 [3]; 252 ALR 612 at 613; [2009] HCA 6; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 452 [89] ; [2011] HCA 48; *Moti v The Queen* (2011) 245 CLR 456 at 464 [10] .

[244] *Rogers v The Queen* (1994) 181 CLR 251 at 286.

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257. **Following paragraph cited by:**

Armstrong v McIntosh [No 4] (07 February 2020) (LE Miere J)

These categories are not exhaustive, although each captures a wide range of different circumstances. The reference to "repute" in the final category, which echoes the language of "public confidence" [245] , is not concerned with the actual reputation of the court among members of the public, or with their actual perception of the court. The notion of repute, or public confidence, is a construct that is concerned with the systemic protection of the integrity of the court within an integrated system of justice. It represents "the trust reposed constitutionally in the courts" [246] . The close association of that construct with matters at the core of judicial power may be the reason why it has been suggested that the inherent power to prevent an abuse of process may be an attribute of the judicial power provided for in Ch III of the Constitution [247] .

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[245] See *Jago v District Court (NSW)* (1989) 168 CLR 23 at 30; [1989] HCA 46, quoting *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481 ; *Williams v Spautz* (1992) 174 CLR 509 at 520 ; *Walton v Gardiner* (1993) 177 CLR 378 at 396, 416; [1993] HCA 77; *Rogers v The Queen* (1994) 181 CLR 251 at 256-257 ; *Ridgeway v The Queen* (1 995) 184 CLR 19 at 74, 78; [1995] HCA 66; *Moti v The Queen* (2011) 245 CLR 456 at 478 [57] .

[246] *Moti v The Queen* (2011) 245 CLR 456 at 478 [57] .

[247] *Dupas v The Queen* (2010) 241 CLR 237 at 243 [15]; [2010] HCA 20; *Hogan v Hinch* (2011) 243 CLR 506 at 552 [86]; [2011] HCA 4.

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258. **Following paragraph cited by:**

Armstrong v McIntosh [No 4] (07 February 2020) (LE Miere J)

The three categories described by McHugh J are not independent. If the use of the court's procedures is unjustifiably oppressive to one of the parties (category (ii)), imperilling the fairness of a trial, this can contribute to the conclusion that the administration of justice would be brought into disrepute. There may even be circumstances where oppression of one of the parties is sufficient to bring the administration of justice into disrepute, even if the trial would be fair [248] . Further, the underlying rationale of category (iii), namely, protection of the integrity of the court and its processes, might also encompass category (i) where a trial is instituted or maintained with an immediate, predominant purpose that is improper [249] . Ther efore, at a higher level of generality, it may be that the three categories are really only two, which overlap [250] : (i) cases where a defendant cannot receive a fair trial; and (ii) cases where a trial would bring the administration of justice into disrepute.

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[248] *Jago v District Court (NSW)* (1989) 168 CLR 23 at 58.

[249] *Williams v Spautz* (1992) 174 CLR 509 at 520-521 . See also *Bloomfield* [1997] 1 Cr App R 135 at 143.

[250] Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings*, 2nd ed (2008) at 18. See also *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42 at 74 ; *Fox v Attorney-General* [2002] 3 NZLR 62 at 71-72 [37] .

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259. Although there was considerable argument on these appeals about the potential fairness of a trial of the appellants, unfairness to the appellants is a relevant, but not necessary, factor for a conclusion on the central issue in this case: whether the use of the court's procedures would bring the administration of justice into disrepute. Since the rationale for a stay in cases in this category is the protection of the integrity of the court rather than the fairness of the court's processes, the label "abuse of process" may not be entirely apt [251] . But the use of that label is well-established and will be used here for convenience.

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[251] *R v Looseley* [2001] 1 WLR 2060 at 2073 [40]; [2001] 4 All ER 897 at 908 ; *Pan day v Virgil (Senior Superintendent of Police)* [2008] AC 1386 at 1395 [28] .

The integrity of the court

260. It is well-established that the function of deciding whether to initiate and maintain a criminal proceeding is vested in the executive, whilst the function of hearing and determining a criminal proceeding is vested in the courts. Nonetheless, it is equally well-established that, in an integrated justice system, these two functions are not hermetically sealed from each other. As Richardson J said in *Moevao v Department of Labour* [252] , in a passage cited with approval in this Court [253] , "the due administration of justice is a continuous process ... [T]he Court is protecting its ability to function as a Court of law in the future as in the case before it." In protecting its ability to function as a court of law in the future, the court can make orders that cut across the executive function of initiating and maintaining a criminal proceeding. Hence, during a hearing, evidence that might have been the basis for the initiation of the proceeding might be excluded. Or the maintenance of the criminal proceeding might be precluded by the order of a permanent stay. "[I]t has long been established that, once a court is seized of criminal proceedings, it has control of them and may, in a variety of circumstances, reject relevant and otherwise admissible evidence on discretionary grounds or temporarily or permanently stay the overall proceedings to prevent abuse of its process." [254]

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[252] [1980] 1 NZLR 464 at 481.

[253] *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29-30 ; *Williams v Spautz* (1992) 174 CLR 509 at 520 ; *Walton v Gardiner* (1993) 177 CLR 378 at 394.

[254] *Ridgeway v The Queen* (1995) 184 CLR 19 at 33 (footnotes omitted).

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261. **Following paragraph cited by:**

La Rocca v The King (10 March 2023) (Bell CJ, Davies and N Adams JJ)

The notion of the integrity of the court is a loose principle which is not easily applied to a particular case. This is one reason why it has been said in this area of law that forms of expression should be "understood in the context of the particular facts of each case" and should not "be read as attempting to chart the boundaries of abuse of process" [255] . In a case of the nature of these appeals, the question to be asked is whether, despite the substantial public interest in pursuing a trial of the accused, the trial must be stayed due to the threat to the integrity of the court arising from the systemic incoherence that would result if the trial were allowed to proceed. That incoherence arises where the manner in which the case against the accused was developed and brought was contrary to basic tenets of the Australian criminal justice system, as embodied in a statute.

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[255] *Moti v The Queen* (2011) 245 CLR 456 at 479 [60] .

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262. **Following paragraph cited by:**

Linden v Foster (21 October 2022) (Magistrate Theakston)

There is a substantial public interest in prosecuting persons reasonably suspected of having committed a crime, and against whom there is a prima facie case with reasonable prospects of conviction [256] . The more serious the offence, the stronger will be the public interest and therefore the more fundamental, and irreparable, the systemic incoherence must be in order to justify a permanent stay of proceedings [257] . But the public interest in prosecuting persons reasonably suspected of crimes is not absolute [258] . The most obvious instance of this is the discretion vested in the CDPP, and every Director of Public Prosecutions of the States and Territories, to decline, in the public interest, to prosecute a person reasonably suspected of an offence and against whom there is a prima facie case. The expressed factors that can be considered in the exercise of that discretion include "whether or not the prosecution would be perceived as counter-productive to the interests of justice"[259] and the necessity to maintain public confidence in the courts[260].

[256] See, eg, *Williams v Spautz* (1992) 174 CLR 509 at 519 ; *Walton v Gardiner* (1993) 177 CLR 378 at 396.

[257] *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546 at 565 ; *Warren v Attorney General for Jersey* [2012] 1 AC 22 at 38 [47] .

[258] *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29-30, quoting *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481 ; *R v Latif* [1996] 1 WLR 104 at 113; [1996] 1 All ER 353 at 361.

[259] Queensland, Office of the Director of Public Prosecutions, *Director's Guidelines*, (2016) at 3 [4(ii)(g)]; Western Australia, Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines*, (2005) at 9 [31(g)]. See also Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, (2014) at 6 [2.10(i)]; New South Wales, Office of the Director of Public Prosecutions, *Prosecution Guidelines*, (2007) at 8 [3.3]; Victoria, Office of the Director of Public Prosecutions, *Polic y of the Director of Public Prosecutions for Victoria*, (2017) at 3 [6]; South Australia, Director of Public Prosecutions, *Statement of Prosecution Policy & Guidelines*, (2014) at 7; Tasmania, Director of Public Prosecutions, *Prosecution Policy and Guidelines*, at 8; Northern Territory, Office of the Director of Public Prosecutions, *Guidelines of the Director of Public Prosecutions*, (2016) at [2.5(4)]; Australian Capital Territory, Office of the Director of Public Prosecutions, *Prosecution Policy of the Australian Capital Territory* , (2015) at 4 [2.9(j)].

[260] Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, (2014) at 6 [2.10(u)]; New South Wales, Office of the Director of Public Prosecutions, *Prosecution Guidelines*, (2007) at 8-9 [3.6]; Victoria, Office of the Director of Public Prosecutions, *Policy of the Director of Public Prosecutions for Victoria*, (2017) at 2 [6]; South Australia, Director of Public Prosecutions, *Statement of Prosecution Policy & Guidelines*, (2014) at 7; Queensland, Office of the Director of Public Prosecutions, *Dire ctor's Guidelines*, (2016) at 4 [4(ii)(s)]; Northern Territory, Office of the Director of Public Prosecutions, *Guidelines of the Director of Public Prosecutions*, (2016) at [2.5(6)]; Australian Capital Territory, Office of the Director of Public Prosecutions, *Prosecution Policy of the Australian Capital Territory*, (2015) at 5 [2.9(w)].

263. The same factors are also reflected in the common law's approach to an "abuse of process" where the proceeding would bring the administration of justice into disrepute. The administration of justice, used in this sense, includes all of the means by which the trial is prepared and brought. Just as the end of criminal prosecution does not justify the adoption of any and every means for securing the presence of an accused person before the court [261] , so too that end does not justify any and every means in the preparation of the case to be presented to the court. In each case, as Lord Steyn said in *R v Latif* [262] :

> "the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in

not conveying the impression that the court will adopt the approach that the end justifies any means."

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[261] *Moti v The Queen* (2011) 245 CLR 456 at 479 [60] .

[262] [1996] 1 WLR 104 at 113; [1996] 1 All ER 353 at 361.

Less extreme measures to protect the integrity of the court

264. **Following paragraph cited by:**

Le v The Queen (24 January 2019) (Sleight Cjdc)

54. Justice Edelman in a separate judgment also upheld the primary judge's order for a permanent stay of proceedings but emphasised that before a permanent stay can be ordered, it is necessary to consider whether there are any other curial measures that can be taken to address 'any systemic incoherence that would be caused by a trial of the accused'. [50]

via
[50] ***Strickland*** [264] .

Before a permanent stay can be ordered, it is necessary to consider whether there are any other curial measures that could be taken to address any systemic incoherence that would be caused by a trial of the accused. This must be considered because the court's ability to protect its integrity is not confined to orders that grant a permanent stay of proceedings.

265. There is a range of measures less drastic than a permanent stay of proceedings that can protect the integrity of the court. It should be an extremely rare case in which orders could not be made, or sufficient undertakings given by a conscientious prosecution team and accepted by the court, to address concerns that a trial will be unfair or that the trial will bring the administration of justice into disrepute. For instance, pre-trial publicity that could threaten a fair trial can be remediated by directions or orders for trial before a judge without a jury. Prosecution teams tainted with knowledge of information that should not be known can be replaced after giving undertakings to the court about any dissemination of that information. Undertakings can be given to destroy transcripts, recordings, or documents that have been unlawfully or improperly obtained.

266. Although many other examples can be given of measures to reduce any unfairness of a trial or to minimise the prospect that a trial will bring the administration of justice into disrepute, it is necessary to say a little more about two curial measures that are less extreme than a permanent stay of proceedings, but that respond to the same concern about the integrity of the

court. The first, commonly used in civil proceedings, is allowing the proceeding to continue but refusing to enforce a plaintiff's right. The second is the exclusion of evidence on the ground of public policy.

267. As to the refusal to enforce a right, in *Holman v Johnson* [263] Lord Mansfield said that "[n]o Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act". Underlying the breadth of this statement is the notion that, if the purpose of legislation that makes conduct unlawful would be stultified by the enforcement of common law rights, then those rights generally should not be enforced. To do so could imperil the integrity of a court, if and when it enforces the same legislation in other cases. An example is the decision of this Court in *Equuscorp Pty Ltd v Haxton* [264] . In that case, a lender was deprived of the right to enforce a claim for restitution of unjust enrichment, which claim was assumed to exist. Although the *Companies (New South Wales) Code* and *Companies (Victoria) Code* did not bar any action for unjust enrichment, either expressly or impliedly, the majority deprived the lender of the ability to enforce the right because to have allowed it would be contrary to the "policy" of the statute and would stultify its purpose [265] . This response was less extreme than a permanent stay of proceedings, although it had the same effect and arose from the same rationale. In both instances, the integrity of the court would be compromised if a court enforced rights in a manner that stultified the purpose of legislation.

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[263] (1775) 1 Cowp 341 at 343 [98 ER 1120 at 1121].

[264] (2012) 246 CLR 498; [2012] HCA 7 . See also *Miller v Miller* (2011) 242 CLR 446 at 458-459 [27]; [2011] HCA 9.

[265] *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 514 [25], 523 [45], 537-538 [96], 544 [111] .

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268. The exclusion of evidence on the ground of "public policy" is another instance of a less extreme response than a permanent stay of proceedings to the same systemic concern. In *Jago v District Court (NSW)* [266] , Mason CJ [267] and Gaudron J [268] treated the exclusion of evidence and the stay of proceedings, in cases of unfairness, as co-existing in the same armoury of remedies. That armoury responds to the concern to protect the integrity of the court generally. The exclusion of evidence based upon "public policy", sometimes called the *Bunning v Cross* [269] "discretion", has been described as the "principle of judicial integrity"[270]. The exclusion occurs to avoid "the loss of respect that would befall the courts should they turn a blind eye to the abuse by those responsible for the investigation and prosecution of offences"[271] or should they give "the appearance of curial approval to wrongdoing on the part of those whose duty is to enforce the law" [272] .

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[266] (1989) 168 CLR 23 .

[267] (1989) 168 CLR 23 at 29.

[268] (1989) 168 CLR 23 at 77.

[269] (1978) 141 CLR 54; [1978] HCA 22 .

[270] Zuckerman, "Illegally-Obtained Evidence – Discretion as a Guardian of Legitimacy", (1987) 40 *Current Legal Problems* 55 at 59.

[271] Paciocco, "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept", (1991) 15 *Criminal Law Journal* 315 at 341.

[272] *Police v Dunstall* (2015) 256 CLR 403 at 417 [26], see also at 430 [63]; [2015] HCA 26.

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269. Just as a permanent stay of proceedings can be ordered on the ground of ensuring that the administration of justice is not brought into disrepute, so too the exclusion of evidence on this public policy ground is "to ensure that the conviction of the alleged offender is not bought at too high a price by reason of curial approval of – if not reward for – illegal conduct on the part of the law enforcement agency" [273] . As Professor (now Justice) Paciocco observed, in such a case a stay of proceedings and the exclusion of "technically admissible evidence" are both responses to protect public confidence in "the administration of justice"[274]. Each remedy aims to protect the integrity of the court. And just as exclusion of evidence or other curial measures should be considered before the extreme remedy of a permanent stay on the ground of unfairness [275] , so too should exclusion of evidence and other measures be first considered before a permanent stay of proceedings is ordered on the ground of protection of public confidence in the administration of justice.

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[273] *Ridgeway v The Queen* (1995) 184 CLR 19 at 49. See also *Bunning v Cross* (1978) 141 CLR 54 at 74-75 ; *R v Swaffield* (1998) 192 CLR 159 at 190-191 [59]; [1998] HCA 1.

[274] Paciocco, "The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept", (1991) 15 *Criminal Law Journal* 315 at 336.

[275] *Dupas v The Queen* (2010) 241 CLR 237 at 245 [18], 251 [38] .

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270. **Following paragraph cited by:**

La Rocca v The King (10 March 2023) (Bell CJ, Davies and N Adams JJ)

An example is the decision of this Court in *Ridgeway v The Queen* [276] . In that case, a majority of this Court ordered a permanent stay of proceedings on the basis that the drugs of which the appellant had been charged with possession had been imported as part of an

undercover operation organised between the AFP and the Royal Malaysian Police Force. In a joint judgment, Mason CJ, Deane and Dawson JJ held that the appropriate response was to exclude all evidence of the offence; the permanent stay was granted because the proceeding was bound to fail [277] . Their Honours took a narrow view of abuse of process. They held that an abuse of process could not encompass "the improper invocation by the State of the judicial process and its powers" [278] , even in a circumstance where the police conduct creates the charged offence, such as by stealing and then supplying stolen property in order to obtain a conviction of the person to whom it is supplied [279] . In contrast, Gaudron and McHugh JJ, each writing separately, took a wider view of abuse of process that included considerations, beyond the immediate trial, that bear on public confidence in the administration of justice [280] . But they differed in the outcome. Gaudron J, in the majority, concluded that the proceedings in question were an abuse of process [281] . McHugh J, in the minority, concluded that they were not, principally because the police officers acted in the belief that their conduct was lawful and "with the best of motives" in relation to a plan of which the appellant was the architect [282] .

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[276] (1995) 184 CLR 19 .

[277] (1995) 184 CLR 19 at 40-41, 43.

[278] (1995) 184 CLR 19 at 40.

[279] (1995) 184 CLR 19 at 39.

[280] (1995) 184 CLR 19 at 75, 77-78, 86-87, 92.

[281] (1995) 184 CLR 19 at 78.

[282] (1995) 184 CLR 19 at 93.

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271. Four members of this Court subsequently quoted with approval the broader approach taken by Gaudron J [283] . The broader approach was also applied in *Moti v The Queen* [284] , where Australian officials facilitated the unlawful deportation of the appellant to face trial in Australia, despite being told that the deportation was not believed to be lawful. However, neither of those decisions cast doubt upon the decision of Mason CJ, Deane and Dawson JJ in *Ridgeway* to grant the permanent stay on the sole basis that the proceedings would inevitably fail due to the exclusion of essential evidence. Since the exclusion of evidence for reasons of "public policy" is a less drastic remedy than the grant of a permanent stay, that should be the first remedy considered. As Toohey J said in *Ridgeway* , a matter of "great importance" in considering whether a permanent stay should be granted was the court's ability to exclude the evidence obtained by unlawful means [285] .

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[283] *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 266-267 [14] .

[284] (2011) 245 CLR 456 at 463-464 [10], 481 [65] .

[285] *Ridgeway v The Queen* (1995) 184 CLR 19 at 63.

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272. The facts of *Moti* also illustrate the way that the broad approach to abuse of process can interact with the exclusion of evidence. In that case, one ground upon which the permanent stay was sought was that payments to witnesses had been made by the AFP before and after the appellant was charged [286] . This Court unanimously refused to order a stay of proceedings on that basis [287] . But the Court did not dismiss the ground on the basis that a pre-trial payment to a witness could never be capable of being an abuse of process. Instead, a joint judgment of six members of the Court held that a stay of the proceedings for abuse of process should be denied because the payments were lawful, and they were not designed to, and did not, procure evidence from the witnesses [288] . If the payments had been unlawful, and if they had been designed to procure evidence, then it would have been necessary to ask whether a permanent stay of proceedings was the only possible response to ameliorate the threat to the integrity of the court in allowing the proceedings to continue. It may be that, in those circumstances, the systemic concern could have been addressed by excluding the evidence of the witnesses who were paid.

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[286] *Moti v The Queen* (2011) 245 CLR 456 at 464-465 [13] .

[287] (2011) 245 CLR 456 at 465-466 [15], 481-482 [68] .

[288] (2011) 245 CLR 456 at 465 [15] .

The conduct to which the appellants were subjected

273. The *Australian Crime Commission Act* 2002 (Cth) ("the ACC Act") involves a statutory compromise between the interests of the individual and public interest considerations including the conviction of offenders. The relevant interests of the individual are sometimes described as a so-called "right" to silence at common law. More accurately, this is a liberty to "maintain silence when questioned by persons in authority about the occurrence or authorship of an offence" [289] and, building upon that liberty, the "deeply ingrained" privilege against self-incrimination that "a person cannot be compelled 'to answer any question ... if to do so "may tend to bring him into the peril and possibility of being convicted as a criminal"'" [290] . As French CJ and Crennan J said in *X7 v Australian Crime Commission* [291] , in balancing public interest considerations and these interests of the individual the ACC Act provides "compensatory protection to the witness" compelled to answer questions at an examination. Two essential components of that protection are relevant. First, an examination can only be conducted under s 24A "for the purposes of a special ACC operation/investigation". The existence of a special ACC operation/investigation is central to the conduct of examinations in Pt II, Div 2 . For instance, examination and cross-examination is confined by s 25A(6) to "any

matter that the examiner considers relevant to the ACC operation/investigation". Secondly, in the conduct of an examination, compensatory protection is contained in the provisions of ss 25A(3), 25A(7) and 25A(9) .

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[289] *Petty v The Queen* (1991) 173 CLR 95 at 106; [1991] HCA 34.

[290] *Reid v Howard* (1995) 184 CLR 1 at 11-12; [1995] HCA 40, quoting *Sorby v The Commonwealth* (1983) 152 CLR 281 at 288, 309; [1983] HCA 10. See also *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 137 [104]; [2013] HCA 29.

[291] (2013) 248 CLR 92 at 112 [28] (not in dissent on this point).

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274. A full recitation of the facts, the decisions below, and the legislative provisions is contained in the joint judgment. For the reasons given in the joint judgment, in the section entitled "Absence of special ACC investigation", the Court of Appeal was correct to conclude that there was no special ACC investigation relevant to the examination of the appellants. The entirety of the examinations was unlawful. Indeed, this conclusion was not challenged by the CDPP and, for the reasons given in the joint judgment under the heading "The ACC's standing in these appeals", the ACC had no independent standing to raise this issue. The ACC had, and has, no interest in the trial of the appellants. The persons with that interest are the Crown and the appellants; in this sense, the ACC is a third party. It is contrary to basic tenets of fairness in our criminal justice system for a third party to intervene in a criminal dispute to create new issues for a person to answer on the question of whether the person should stand trial.

275. The examinations were not merely unlawful as a consequence of the lack of a special ACC investigation. They were also improperly conducted without regard to the AFP's own guidelines or the ACC Act . As to the former, the approach of the AFP was contrary to its own guidelines, which provided that in circumstances including those faced by the appellants "the ACC will not examine a witness directly about their own criminal offending" [292] . As to the latter, the ACC examiner engaged in compulsory questioning of the appellants without any consideration of his statutory duties under ss 25A(3), 25A(7) and 25A(9) of the ACC Act . He did so even though he was aware of s 25A and had previously considered and made orders under it [293] .

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[292] [2016] VSC 334R at [436] .

[293] [2016] VSC 334R at [124] .

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276. Section 25A(3) required the ACC examiner to determine who could be present (which includes watching simultaneously from another room) at the examinations. Section 25A(7) required the ACC examiner to inform the witness if a person, other than a member of ACC staff, is present. Section 25A(9) required the ACC examiner to make a non-publication direction if

not to do so might prejudice the fair trial of the appellants as persons who may be charged with an offence. As explained below, the ACC examiner knew that the appellants had refused to participate in a record of interview but he agreed, without any real consideration, to the AFP request for summonses and compulsory examinations. He knew that officers of the AFP were secretly watching the examinations from another room but agreed to the AFP's requests for their attendance without any real consideration. And he made non-publication directions that permitted "wholesale dissemination" [294] of the transcript to all AFP investigators and the CDPP without any consideration of its effect on the fairness of any trial of the appellants.

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[294] [2016] VSC 334R at [709] .

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277. The circumstances in which this conduct occurred emphasise the considerable extent to which the AFP and the ACC examiner departed from the statutory scheme. These circumstances can be summarised by considering the period before, during, and after the examinations. The pseudonyms used to describe the persons in the discussion below are the same as those used in the joint judgment.

The period prior to the examinations

278. Prior to the examinations, the AFP was in the following position [295] . Any prosecution case would be largely circumstantial, based upon interpretation of documents. The AFP had obtained tens of millions of documents from witnesses and search warrants, with the total number potentially being more than 80 million documents. Initially, these documents were not even capable of being electronically searched. Very little, if any, analysis of the documents had been completed. None of the appellants had been charged with any offence. However, each was a suspect. Each had been offered a record of interview, under caution. Each had declined. Some had been offered a statutory sentencing discount for a plea of guilty. Each had declined.

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[295] [2016] VSC 334R at [433], [778], [780], [781], [790], [851] .

The examinations

279. The unlawful examinations of the appellants took place between April and November 2010 [296] .

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[296] [2016] VSC 334R at [533]-[536] .

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280. The senior investigating police officer, Schwartz, described the ACC as having been "engaged" by the AFP "in order to extract information and evidence from witnesses". That was a polite euphemism for what the primary judge accurately characterised as the ACC being a "hearing room for hire" [297] . As the primary judge found, the ACC examiner followed the directions of the AFP, and exercised no independent judgment in relation to any of the following [298] : (i) who would be examined; (ii) why summonses should be issued for them to be examined; (iii) when, within a window of time, the examinations would take place; (iv) who, of the 19 or 20 police officers authorised by the ACC examiner to attend, would be present to observe the examinations; (v) what role those present had, or would have, in the investigation; (vi) generally, the questions asked at the examinations, which were prepared by the police; and (vii) to whom the examination material would be disseminated. AFP officers also participated in tactical adjournments of the examinations and discussions with examinees during the breaks [299] .

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[297] [2016] VSC 334R at [845] .

[298] [2016] VSC 334R at [390], [395], [501], [509], [537], [564], [569], [595], [849] -[850], [858], [865] .

[299] [2016] VSC 334R at [564], [625]-[633] .

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281. The ACC examiner knew that each appellant was a suspect and that each appellant had declined to participate in a record of interview [300] . The ACC examiner also knew that, at the time of the examinations, the tens of millions of documents obtained by the AFP had not been electronically searched or analysed [301] . The purposes of the AFP, supported by the conduct of the ACC examiner, whose purpose was to assist the AFP, were to (i) lock each of the appellants into a version of events on oath in an attempt to prevent them from providing an alternative version at any trial, and (ii) ascertain what to look for in assembling any briefs for the prosecution from tens of millions of documents [302] .

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[300] [2016] VSC 334R at [852] .

[301] [2016] VSC 334R at [781] .

[302] [2016] VSC 334R at [846] .

The period after the examinations

282. The AFP achieved its purposes by the unlawful examinations. The appellants gave compelled evidence under oath, answering the questions that the AFP wanted answered [303] . The AFP also used the examinations to guide its selection of the documents to include in prosecution briefs and to refine and define its searches [304] . The material obtained as a result of the

searches was described by Schwartz as "the most significant influence on the charging decision and the focus of the investigation" [305] .

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[303] [2016] VSC 334R at [726], [728], [734], [766], [870] .

[304] [2016] VSC 334R at [783] .

[305] [2016] VSC 334R at [784] .

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283. Each appellant was first charged with offences under ss 11.5(1) and 70.2(1) of the *Criminal Code* (Cth) in July 2011 or, in the case of Mr Tucker, March 2013. Each of the appellants except Mr Tucker was also charged with false accounting, under s 83(1)(a) of the *Crimes Act* 1958 (Vic) .

Allowing the trial to proceed would compromise the integrity of the court

284. There are powerful reasons that favour the refusal of a stay in this case. First, charges under ss 11.5(1) and 70.2(1) of the *Criminal Code* concern serious offences. As counsel for Mr Strickland frankly submitted in reply, the appellants were seen as "sharks", not "minnows". Secondly, curial orders could be made, and undertakings could be given, to reduce substantially the forensic disadvantage to the appellants that arises from the unlawful examinations. All of the examination material could be excluded from the trial. A new prosecution team, quarantined from any of the examination material, could conduct the prosecution. Any further forensic disadvantage that might arise at trial, such as during cross-examination, might be ameliorated in part by curial orders. If that unfairness were not able to be sufficiently ameliorated, then another stay application could be brought.

285. On the other hand, to allow the trial to proceed, however fairly it may be conducted, would effectively stultify the operation of essential provisions of the ACC Act . The examinations were instigated unlawfully. They were conducted with unlawful purposes and without regard to the ACC Act . The two purposes of the AFP, and the purpose of the ACC examiner (to assist the police), were achieved contrary to the basic safeguards in the ACC Act . And the achievement of these purposes was a contributing factor in bringing the case against the appellants to trial.

286. If the unlawful conduct of the AFP and the ACC examiner were the cause of [306] , rather than merely a factor contributing to, the appellants being charged, it would not be difficult to see that the remedy of a permanent stay of proceedings to protect the integrity of the court was enlivened. The court proceedings would be caused by the stultification of key provisions of the ACC Act for unlawful purposes that had been achieved.

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[306] See, eg, *Warren v Attorney General for Jersey* [2012] 1 AC 22 at 37-38 [46], 38 [51] .

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287. These appeals fall short of a "but for" causal case where the prosecution could not have occurred but for the unlawful conduct. It is possible that the AFP, even without the examinations, would have been able to compile prosecution briefs by eventually making electronic searches of the tens of millions of documents without the appellants' compelled assistance. It may also be that voluntary disclosures made by some of the appellants [307] mig ht still have been made in the absence of any unlawful examination. It may also be that a properly instituted and properly conducted examination could have caused the appellants to be locked into a case at trial.

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[307] [2016] VSC 334R at [760] .

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288. Before the Court of Appeal and before this Court, the CDPP went further. It submitted that the appellants had not merely failed to prove causation but also had not proved the precise contribution to the prosecution of the benefit that the AFP obtained from the examinations when preparing the prosecution briefs.

289. There are two reasons why the failure of the appellants to prove strict causation or the precise contribution made by the unlawful conduct should not prevent the conclusion that a permanent stay is necessary to protect the integrity of the court.

290. First, as to the extent of the contribution, that information was peculiarly within the knowledge of the AFP and the prosecution, "which has the responsibility of ensuring its case is presented properly and with fairness to the accused" [308] . Evidence is "weighed according to the proof which it is in the power of one side to have produced and the power of the other to have contradicted" [309] . There is a ring of absurdity to the submission that the appellants had made a forensic choice not to attempt to cross-examine members of the AFP in circumstances where (i) the AFP kept no record about which searches were conducted as a result of information provided by each appellant [310] , and (ii) it would have been extremely difficult to trace the precise mental process followed by individual police officers in using particular information from the examinations, by itself or in combination with other information, to identify particular key documents. Indeed, with a large team of police officers, tens of millions of available documents, many hours of examinations, and the fact that examination answers could not be related to documents in a binary equation of "contribution" or "no contribution", the suggested exercise of cross-examination was described by the primary judge as "extremely difficult". Indeed, as she acknowledged, this description was an understatement [311] . It is doubtful that the conclusion could ever have been put any more precisely, or that the appellants could have proved anything more than the primary judge's natural inference that the police obtained "a substantial investigative advantage" [312] .

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[308] *Lee v The Queen* (2014) 253 CLR 455 at 470 [44]; [2014] HCA 20.

[309] *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 454 [36]; [2001] HCA 12, citing *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

[310] [2016] VSC 334R at [785] .

[311] [2016] VSC 334R at [775], [874] .

[312] [2016] VSC 334R at [790] .

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291. Secondly, proof of a strict causal connection should not always be required. In relation to exclusion of evidence on the "public policy" ground of protecting the integrity of the court, although the improper or unlawful conduct must be a contributing factor to the obtaining of the evidence to be excluded, there is no requirement for proof of a strict causal connection between the conduct and the obtaining of the unlawful evidence [313] . The same should apply to conduct upon which a stay of proceedings is sought on that same ground. In *Moti* , it would have been no answer to the allegation of abuse of process for the respondent to say that there could be no prejudice to the integrity of the court because the same result might have been achieved lawfully, through the extradition process. Equally, given the nature and extent of the unlawful examinations and contraventions of the ACC Act , it cannot be an answer in this case to say that the same information might have been extracted from the appellants by lawful means, had there been a genuine investigation and had the examinations been conducted lawfully.

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[313] Heydon, *Cross on Evidence*, 11th Aust ed (2017) at 1067 [27240].

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292. **Following paragraph cited by:**

La Rocca v The King (10 March 2023) (Bell CJ, Davies and N Adams JJ)

In summary, the unlawful examinations of the appellants involved a failure to comply with key provisions of the ACC Act . The improper purposes motivating that non-compliance were achieved. They substantially contributed to the preparation for, and therefore would substantially contribute to, any trial of the appellants. The compromise to the court's integrity, or the disrepute into which the administration of justice is brought, could only be remedied by one measure short of a permanent stay of proceedings. That measure would be orders ensuring destruction of the entire product of the tainted investigation that led to the charging of the appellants, and the giving of undertakings to the court wholly quarantining from a fresh investigation every investigator or prosecutor who had been involved with the investigation or the proceedings. It is telling that neither the ACC nor the CDPP ever suggested that it might be a realistic alternative to recommence, from scratch, an assessment of up to, or even more

than, 80 million documents, but without the benefit of the appellants' unlawful examinations. To use the primary judge's metaphor, the egg could not be unscrambled. Allowing the trials to proceed would undermine the statutory regime and compromise the integrity of the court.

The decision of the primary judge should be restored

293. For the reasons above, the decision of the primary judge to grant a permanent stay should be restored. Two further matters should be mentioned. The first should be mentioned because of its prominence in submissions. The second should be mentioned despite its absence from submissions.

294. First, a central issue in dispute on these appeals was whether the primary judge was correct to characterise the state of mind and conduct of the ACC examiner as reckless. The Court of Appeal held that this description by the primary judge was erroneous because the ACC examiner was not shown to have proceeded with knowledge of his obligations but without concern for them [314]. However, her Honour's decision rightly did not depend upon the precise epithet used to describe the ACC examiner's state of mind and conduct. Whatever shorthand description is used, her Honour found that the ACC examiner exercised no independent judgment in relation to the central matters concerning the examinations.

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[314] *Director of Public Prosecutions (Cth) v Galloway* [2017] VSCA 120 at [108][109].

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295. Secondly, throughout these appeals the appellants referred many times to the "discretionary" decision of the primary judge. The CDPP carefully avoided the use of that adjective. But no doubt was cast by the CDPP upon the observation of four members of this Court in *Batistatos v Roads and Traffic Authority (NSW)* [315] to the effect that judicial restraint should be exercised when considering an appeal from a decision to grant a permanent stay to protect the integrity of the court. That observation contrasts with the lack of judicial restraint on an appeal from a decision concerning the "public policy" exclusion of evidence to protect the integrity of the court in s 138(1) of the *Evidence Act* 2008 (Vic) [316].

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[315] (2006) 226 CLR 256 at 264 [7], cf at 321-322 [223].

[316] Heydon, *Cross on Evidence*, 11th Aust ed (2017) at 1080 [27315]. See also *R v Ba uer (a pseudonym)* (2018) 92 ALJR 846 at 864 [61]; [2018] HCA 40.

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296. On the assumption that the decision of the primary judge was one about which judicial restraint should have been exercised on appeal, the conclusion that she reached was open to her. But even if the assumption of judicial restraint were abandoned, for the reasons I have expressed above the primary judge's decision was correct, as bolstered by the finding of the Court of Appeal that there was no special ACC investigation.

Conclusion

297. It is an extreme measure to stay proceedings permanently as an abuse of process on the basis that the administration of justice would be brought into disrepute. But a permanent stay can be ordered where, despite the public interest in prosecuting reasonably suspected crime, no less extreme remedial measure will sufficiently avoid the damage to the integrity of the court. The integrity of the court would be impaired by trials of the appellants. No lesser remedial measure was offered or available to prevent the stultification of key safeguards in the ACC Act and the achievement of the unlawful purposes for which those safeguards were contravened.

Cited by:

Kuksal v State of Victoria [2023] VSC 625 (20 December 2023) (Ginnane J)

206. Mr Kuksal sought orders, if a reopening order was granted, to allow the proposed amended origin be filed, to be able to issue subpoenas to make up for the lack of discovery, and the scheduling of a for the determination of the search warrant's validity and whether a stay of the Magistrates' Court should be ordered because it was fundamentally affected by the unlawful conduct of the executive

via

[99] The plaintiffs relied on *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2

GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2023] HCA 32 (01 November 20 Gageler, Steward, Gleeson and Jagot JJ)

26. This reasoning was not critical to the decision in *Batistatos*, which was argued and determined at th power to grant a permanent stay [52] . The difficulty with this reasoning is that a discretionary deci called, is one in respect of which the law permits reasonable minds to differ. If, as correctly recogn and *Batistatos*, a judge must stay proceedings that are an abuse of process and must not stay proce not an abuse of process, it necessarily follows that the decision is not a discretionary one for the pu ascertaining the applicable standard of appellate review [53] . Nor does the application of the stand discretionary decisions – "whether the primary judge acted upon a wrong principle, was guided or extraneous or irrelevant matters, mistook the facts, or failed to take into account some material co reflect either the purpose of the power (to protect the integrity of the adversarial system) or the ext consequences of an exercise of the power (a court declining to exercise its jurisdiction). That the cl abuse of process are not closed because "notions of justice and injustice, as well as other considera public confidence in the administration of justice, must reflect contemporary values and, as well, t the circumstances of the case" [54] may be accepted, but does not dictate that a decision to grant a discretionary in nature.

via

[53] cf, for example, *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at 38 *AG v Tyne* (2018) 265 CLR 77 at 105 [74] .

GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore [2023] HCA 32 - Australian Competition and Consumer Commission v Meta Platforms, Inc. (formerly Facebook, Inc.) (No 2) [2

R v Alzuain (No 5) [2023] SASC 137 -
R v Alzuain (No 5) [2023] SASC 137 -
R v Alzuain (No 5) [2023] SASC 137 -
R v Alzuain (No 5) [2023] SASC 137 -
Director of Public Prosecutions v Tuteru [2023] VSCA 188 (17 August 2023) (Beach, Walker and Taylor JJA)

67. Consequently, a permanent stay may be ordered where there are no other means to protect the int court's processes. As Edelman J stated in *Strickland (a Pseudonym) v Commonwealth Director of Publi*

> "Abuse of process" may not be the best language to describe the category where the focus is integrity of the court generally rather than its particular processes. The rationale for this cat been described in various ways. The rationale has been described as being "a responsibility maintenance of the rule of law that embraces a willingness to oversee executive action and t countenance behaviour that threatens either basic human rights or the rule of law". It has b described as avoiding "an erosion of public confidence". It has also been described as arising trial would bring the administration of justice into disrepute. Each of these verbal formulati attempts to capture a concern for the systemic protection of the integrity of the court within integrated system of justice. The possibility of an unfair trial, or a degree of unfairness in a t a factor contributing to that concern. But an unfair trial is not a prerequisite for a permanen this category. [35]

via

[35] (2018) 266 CLR 325, [249] (Edelman J); [2018] HCA 53 (' *Strickland*') (citations omitted).

R v Koschier [2023] NSWDC 323 -
Yovanovic v The King [2023] NTSC 53 (21 June 2023) (Blokland J)

23. While not involving loss of evidence, but rather a form of mis-handling evidence *Strickland v Comm Director of Public Prosecutions* (*'Strickland'*)[29] provides some guidance. *Strickland* involved a perma basis of unlawful conduct by the Australian Crime Commission during an investigation. The High decision of the Victorian Court of Appeal and ordered a permanent stay. In brief, it was found the Commission acted unlawfully by holding compulsory examinations and permitting the Australian ('the AFP') to watch the examinations without the interviewee's knowledge and disseminated the examinations to the AFP and the Commonwealth Director of Public Prosecutions.

Yovanovic v The King [2023] NTSC 53 -
Yovanovic v The King [2023] NTSC 53 -
Yovanovic v The King [2023] NTSC 53 -
Yovanovic v The King [2023] NTSC 53 -
Yovanovic v The King [2023] NTSC 53 -
Commissioner of the Australian Federal Police v Song & Ors (Subpoena Objection) [2023] VSC 273 -
State of Victoria v 5 Boroughs NY Pty Ltd [2023] VSCA 101 -
R v TB (No 2) [2023] SASC 60 (27 April 2023) (Kimber J)

37. The facts of *Strickland* were very different to this case. In *Strickland* , the High Court permanently s prosecutions of four persons who had declined to participate in recorded interviews with the AFP criminal offending. The four persons were later compulsorily questioned by the Australian Crime) in breach of numerous provisions of the *Australian Crime Commission Act 2002* (Cth) (**ACCA**). In examiner had undertaken the examinations in the absence of a special ACC investigation, for the providing the AFP with 'assistance in knowing what to look for in assembling any briefs for the pr tens of millions of documents' [23] and 'lock[ing] each of the appellants into a version of events on attempt to prevent them from providing an alternative version at any trial'. [24] Further, the exam permitted AFP personnel to secretly view the examinations without informing the examinees of th

permitted widespread dissemination of the transcript of the examinations without regard to its im
fairness of any trial of the appellants. It was held that to condone such an unlawful infraction of st
fundamental common law right to silence would bring the administration of justice into disrepute

via

[24] Ibid .

R v TB (No 2) [2023] SASC 60 -
R v TB (No 2) [2023] SASC 60 -
R v TB (No 2) [2023] SASC 60 -
R v TB (No 2) [2023] SASC 60 -
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La Rocca v The King [2023] NSWCCA 45 (10 March 2023) (Bell CJ, Davies and N Adams JJ)

63. This conclusion is not the result of a mere difference of opinion with the primary judge. Any mere would not warrant interference with her Honours discretionary decision. Rather, it follows from a the authorities summarised above in light of the matters referred to in the previous paragraph. In respect, the primary judge's refusal to grant the stay was not one that was reasonably open to her extraordinary facts of the present case. The deliberate alteration of the appearance of evidence in relevant and material to the ability to establish a statutory defence is a matter that "goes to the ver administration of justice": *Strickland* at [100] .

La Rocca v The King [2023] NSWCCA 45 (10 March 2023) (Bell CJ, Davies and N Adams JJ)

34. The following principles or statements of authority relating to the grant of a permanent stay of a c prosecution appear to be uncontroversial:

    1. the remedy is an extraordinary one, only to be given in exceptional or extreme circumstanc *Glennon* (1992) 173 CLR 592 at 605; [1992] HCA 16 (**Glennon**); *Dupas v The Queen* (2010) 241 CL HCA 20 at [33]-[35] (**Dupas**); *Strickland* at [166] ;

    2. such a description recognises the powerful social imperative for those who are charged with offences to be brought to trial: *Strickland* at [106], see also at [166]-[167], [262] ;

    3. notwithstanding this, the categories or circumstances in which the exceptional remedy of a stay of criminal proceedings may be granted are not and should not be closed: *Strickland* at [

    4. there is no "definitive category" of extreme cases: *Dupas* at [35] ;

    5. each case accordingly must be decided according to its own facts: *Moti v The Queen* (2011) 245 [2011] HCA 50 (**Moti**) at [60] ; *Strickland* at [99], [246], [261] ;

    6. a permanent stay of criminal proceedings may be appropriate where to refuse such a remed bring the administration of justice into disrepute: *Rogers v The Queen* (1994) 181 CLR 251 at 28 HCA 42; *Moti* at [10] ;

7. the administration of justice may be brought into disrepute in a number of different ways;

8. one example which may warrant a permanent stay is the toleration of an unfair trial where t fundamental defect which goes to the root of the trial "of such a nature that nothing that a tr can do in the conduct of the trial can relieve against its unfair consequences": *Barton v The Q* 147 CLR 75 at 111; [1980] HCA 48; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34; [1989] HC *on* at 605-606 ; *Dupas* at [35] ;

9. other examples include where the manner in which the case was developed and brought:

- was contrary to basic tenets of the Australian criminal justice system as may be embodied in *ckland* at [261], see also at [186]-[187] ;

- was contrary to the rule of law: *R v Horseferry Road Magistrates' Court; ex parte Bennett* [1994] 1 67 ; *R v Grant* [2009] 2 SCR 353 at [67] ;

- was otherwise corrosive of the "trust reposed constitutionally in the courts": *Moti* at [57] ; or

- presented a defect in process "so profound as to offend the integrity and functions of the cou *Strickland* at [106] .

10. considerations beyond the immediate trial may bear upon confidence in the administration *trickland* at [270] ; *Ridgeway* at 75, 77-78, 86-87, 92 ;

11. the administration of justice may be brought into disrepute where a miscarriage of justice w result of a failure to grant a permanent stay of proceedings: *Glennon* at 616, 624 ;

12. the administration of justice may be brought into disrepute irrespective of whether the conc affecting proceedings is deliberate or reckless, and the grant of a permanent stay of proceed confined to cases of deliberate and knowing misconduct nor dependent upon the initial mo purpose of the offending party: *Truong v The Queen* (2004) 223 CLR 122; [2004] HCA 10 at [135 at [99] ;

13. the administration of justice will not necessarily be brought into disrepute, however, where to an accused may be cured by, for example, directions to a jury or undertakings by prosecu authorities, or where the prejudice is of a minor or venial nature: *Strickland* at [100] .

La Rocca v The King [2023] NSWCCA 45 (10 March 2023) (Bell CJ, Davies and N Adams JJ)

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La Rocca v The King [2023] NSWCCA 45 (10 March 2023) (Bell CJ, Davies and N Adams JJ)

*B*arton v The Queen (1980) 147 CLR 75 ; *Jago v District Court (NSW)* (1989) 168 CLR 23; *R v Glennon* (1992) 173 CLR 592; *Stri pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 , referred to.

La Rocca v The King [2023] NSWCCA 45 (10 March 2023) (Bell CJ, Davies and N Adams JJ)

55. The unfairness to the Applicant was the *direct* product of the deliberate alteration by the officer in appearance of one of the boxes containing the consignment of concealed drugs. This had a result a and, on Keane J's analysis, in *Strickland* , namely "alter[ing] the position of the prosecution vis-à-vis

subverted the intention of the Parliament in providing for a defence in s 307.5(4) of the Code, name opportunity to a person caught in possession of (or attempting to possess a) commercial quantity c defence as to ignorance of their foreign origin.

La Rocca v The King [2023] NSWCCA 45 (10 March 2023) (Bell CJ, Davies and N Adams JJ)

58. The primary judge was also strongly swayed by her conclusion that the concededly incurable disa Applicant was not caused by any deliberate or intentional conduct on the part of the officer in cha emphasise that point, as her Honour did with her use of the word "However" and her identificatio her first (of two) reasons given in support of the ultimate refusal of the stay, was, with respect, to o clear statements by the plurality and Keane J in *Strickland* to the effect that deliberate, intentional misconduct was not essential in order for a permanent stay to be warranted. That is perhaps parti the consequences of the conduct concerned were potentially so profound.

La Rocca v The King [2023] NSWCCA 45 (10 March 2023) (Bell CJ, Davies and N Adams JJ)

60. True it is that the existence of *deliberate or reckless* conduct will be more obviously corrosive of the which the administration of justice should be held and will weigh heavily in a court's earnest cons whether to grant a permanent stay of criminal proceedings: *Strickland* at [100] . But less egregious, unlawful and negligent or incompetent conduct, with serious consequences for an accused may ec granting of a permanent stay of criminal proceedings.

La Rocca v The King [2023] NSWCCA 45 (10 March 2023) (Bell CJ, Davies and N Adams JJ)

29. After referring to passages from *Strickland (a pseudonym) v Commonwealth Director of Public Prosecu* CLR 325; [2018] HCA 53 (**Strickland**), to which I shall return, the primary judge's dispositive reasor follows:

> "Whilst not limiting what may ground a stay, *Strickland* clearly affirms the principle which has been repeatedly stated by the courts, which is that [100]:
>
> > 'a permanent stay of a criminal prosecution is an extraordinary step, which will very rarely be justified'.
>
> The process which must be undertaken by this Court is, therefore, twofold and aligns with issues raised this application. I repeat them here:
>
> > (1) First, what was the nature of the officer's conduct and,
> >
> > (2) Second, what is the relevance of that conduct, that is, was it such
>
> that it is necessary that proceedings be stayed to prevent the administration of justice falling into disrepu
>
> This matter involves an investigating officer deliberately changing the appearance of a consignment in t course of a controlled delivery. The alteration was done with the intention of making the package look r the context of the reconstruction of a package as part of a controlled delivery. The complaint arises not s from the fact a label was placed on the package. If one had originally been there or, indeed, any referenc overseas origin, there could be no complaint at all. The label was, however, (based on the evidence befor placed on the package in the absence of any real inquiry about how it had looked, or regard being had to effect on the accused.
>
> The acts of the investigative officer were, however, not a deliberate or reckless disregard of legal requirements, rather, I accept they were a result of inexperience on his part and a lack of diligence and sophistication in the transfer, deconstruction and reconstruction by the multiple agencies involved.

> What flowed from the act of the officer was to create a carton, which appeared on the face of it to have b imported. That carton was then delivered to an address, which the accused attended. It is the Crown cas he picked up the carton and later examined it in the hotel room. It is the Crown case that it is at the poin collection, after the label had been placed on it, that is, when he took the carton from the delivery addre that he committed the offence of attempting to take possession of a prohibited substance.
>
> The defence submitted that the decision of *Ridgeway v R* (1995) 184 CLR 19 had no relevance as it was not considering the balancing exercise required by the Court and, as already referred to - the adoption by th plurality in *Strickland* and the statements of the Court in *Moti* that 'decided cases should not be read as attempting to chart the boundaries of abuse of process'.
>
> *Ridgeway* is, however, relevant in determining whether the officer's act constitutes a breach that brings t administration of justice into disrepute and if it is one that cannot be condoned by this Court. *Ridgeway* a distinction between conduct that procures the offence and conduct that amounts to an opportunity. Th former may well be viewed as a serious injustice. The latter was held in *Ridgeway* , that is, in cases of mer opportunity, that the accused person is fairly regarded as wholly responsible for his own actions. That is is not productive of serious injustice, and this is relevant on my determination of whether the officer's ac grounds the permanent stay in these proceedings.
>
> Taking all of the circumstances into account, I am not satisfied that the officer's act and the consequence are such that a trial in this matter would bring the administration of justice into disrepute. The fact of th means the accused cannot raise the statutory defence. However, this was not the deliberate or intended consequence of the officer's act. Further, the potential unfairness only crystallised when the accused too opportunity afforded to him of taking possession of the box after it had been delivered."

The last sentence of this passage and, in particular, her Honour's use of the word "opportunity" appears reference to *Ridgeway v The Queen* (1995) 184 CLR 19; [1995] HCA 66 (**Ridgeway**) in the previous paragrap the judgment of Gaudron J in that case addresses situations in which "police or other law enforcement a provide the opportunity for the commission of the crime": see [51] below.

La Rocca v The King [2023] NSWCCA 45 -
La Rocca v The King [2023] NSWCCA 45 -
La Rocca v The King [2023] NSWCCA 45 -
La Rocca v The King [2023] NSWCCA 45 -
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La Rocca v The King [2023] NSWCCA 45 -
La Rocca v The King [2023] NSWCCA 45 -
La Rocca v The King [2023] NSWCCA 45 -
Unions NSW v New South Wales [2023] HCA 4 -
XY v Companies Auditors Disciplinary Board [2022] FCA 1583 -
XY v Companies Auditors Disciplinary Board [2022] FCA 1583 -
R v Bell [2022] SADC 140 -
R v Bell [2022] SADC 140 -
Elfar (formerly EGS21) v Commonwealth of Australia [2022] FCA 1402 -
Zabusky v Virgtel Limited [2022] QCA 223 (11 November 2022) (Mullins P and Bradley and Cooper JJ)

12. The costs orders were a consequence of the appellants starting a proceeding in this court, which w inappropriate forum. The effect of this finding by Crow J is that the appellant's conduct was unjus oppressive and vexatious, and constituted an abuse of process. [7] The appellants' misconduct wa them being ordered to provide the respondent with a partial costs indemnity for the consequences misconduct.

via

[7] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 555-556 and 564-565 (Mason CJ, Deane, Daw Gaudron JJ), citing *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 247-248 (Deane J); *Wa* 93) 177 CLR 378, 393 (Mason CJ, Deane and Dawson JJ). The granting of a permanent stay has been descri measure of last resort" to be ordered "where there is no other way to protect the integrity of the system o administered by the court". See: *Victoria International Container Terminal Ltd v Lunt* (2021) 271 CLR 132, 141- (Kiefel CJ, Gageler, Keane and Gordon JJ), citing with apparent approval *Strickland (a pseudonym) v Direc Prosecutions (Cth)* (2018) 266 CLR 325, 409 [248] and 415 [264] (Edelman J), 373 [115] (Gageler J) , and 408 [24

Re Dawning Investments Pty Ltd and Dawning Developments Pty Ltd [2022] VSC 641 -
McGee v Independent Assessor [2022] QSC 257 (26 October 2022) (North J)

21. For his part Mr Keim SC on behalf of the first respondent sought to distinguish the decision of *Rog* d rebut any latent claim based on estoppel. In lengthy and comprehensive submissions[20] he dev submission relying upon a number of authorities that no basis in law for a permanent stay of proc out, in other words the initiation of the proceeding by the application made by the first responden respondent was not an abuse of process. [21]

via

[21] See for example *Clayton v Bant* (2020) 272 CLR 1 at [25]-[26] & [29]; *Ramsay v Pigram* (1967-1968) 118 *Kuligowski v Metrobus* (2004) 220 CLR 363 at [21], [40], [47] ; *Tomlinson v Ramsey Food Processing Pty Ltd* (201 20]-[23] ; *ASIC v Helou* [2019] FCA 1634; *Strickland v Director of Public Prosecutions* (2018) 93 ALJR 1 at [98]-[1 *r of Public Prosecutions (SA) v Jaunay & Anor* [2020] SASCFC 25 at [147]-[156] .

McGee v Independent Assessor & Anor [2022] QSC 257 -
R v Hanlon (No 2) [2022] SADC 128 (24 October 2022) (Honour Heffernan J)
R v Hanlon [2022] SADC 85; *Barton v The Queen* (1980) 147 CLR 75; *Walton v Gardiner* (1993) 177 CLR 378; *R v Filippidis* (1987) 45 SASR 418; *R v Petroulias (No 1)* (2006) 177 A Crim R 153; *R v McGee* (2008) 102 SASR 318; *Ju Court (NSW)* (1989) 168 CLR 23; *Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutio Rona v District Court (SA)* (1995) 63 SASR 223; *R v Ratcliff, Stanfield & Utting* [2007] SASC 297; *R v Mellifont* (75; *CB v Director of Public Prosecutions (NSW)* (2013) 231 A Crim R 522; *Johnson v Miller* (1937) 59 CLR 467, co

R v Hanlon (No 2) [2022] SADC 128 (24 October 2022) (Honour Heffernan J)

33. The prosecution accepted that proceedings may be stayed where they can clearly be seen to be for 1] It also accepted that a stay may be ordered where the continuation of the prosecution might brin administration of justice into disrepute. [12]

via

[12] *Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* [2018] HCA 53 .

Linden v Foster [2022] ACTMC 23 -
Linden v Foster [2022] ACTMC 23 -
The Commissioner of the Australian Federal Police v He [2022] NSWSC 1260 -
The Commissioner of the Australian Federal Police v He [2022] NSWSC 1260 -
R v Kola and Londono-Gomez [2022] SADC 108 -
R v Kola and Londono-Gomez [2022] SADC 108 -
Macri v The The Queen [2022] NSWCCA 177 (22 August 2022) (Beech-Jones CJ, Cl, N Adams and Lonergan JJ)

131. The power to permanently stay proceedings will only be granted in an extreme or exceptional cas
o at 34; *Glennon* at 605-606 ; *Agar v Hyde* at [57] . In order to justify a permanent stay, there must be
defect which goes to the root of the trial of such a nature that there is nothing the court can do to r
unfair consequences: *Jago* at 34; G*lennon* at 605-606; *Dupas* at [18], [35] ; and *Strickland* at [106] .

Macri v The The Queen [2022] NSWCCA 177 -
Coates-Kelly v New Zealand [2022] FCAFC 131 (16 August 2022) (Logan, Abraham and O'Sullivan JJ)

117. Regardless, the authorities relied on by Ms Coates-Kelly as to the importance of the right to silenc
concept of the right to silence itself, is not concerned with a situation of a person who has been co
example, *Petty* at 99-100, *Strickland* at [95] . At [95] in *Strickland* , Kiefel CJ, Bell and Nettle J said the
"applies at all stages of the process to all persons *suspected of an offence* whether charged or not yet
as at trial" (emphasis added).

Coates-Kelly v New Zealand [2022] FCAFC 131 -
Coates-Kelly v New Zealand [2022] FCAFC 131 -
Athans v The Queen (No 2) [2022] SASCA 70 -
Athans v The Queen (No 2) [2022] SASCA 70 -
R v Wiggins (No 5) [2022] NSWSC 1055 (05 August 2022) (N Adams J)

90. The relevant principles regarding the granting of a personal stay are well established. They are de
numerous decisions of the High Court including *The Queen v Glennon* (1992) 173 CLR 592; [1992] HC
Dupas v The Queen (2010) 241 CLR 237; [2010] HCA 20 ("*Dupas*"), Strickland (a pseudonym) v Comm
Director of Public Prosecutions (2018) 266 CLR 325; [2018] HCA 53 ("Strickland"), *The Queen v* Edwa
ALJR 717; [2009] HCA 20 ("*Edwards*'"), *Jago v The District Court of NSW* (1989) 168 CLR 23 [1989] HC
gar v Hyde (2000) 201 CLR 552; [2000] HCA 41.

R v Wiggins (No 5) [2022] NSWSC 1055 -
Kontis v Coroners Court of Victoria [2022] VSC 422 (01 August 2022) (O'Meara J)

142. Broadly speaking, the following may relevantly be discerned from and in relation to the authoritie
referred –

(a) the privilege against self-incrimination is an important common law right;

(b) the prejudice faced by a person required to give evidence over such an objection can ext
beyond the potential use of the evidence in other proceedings (*X7* ; *Lucciano*);

(c) such prejudice can operate to 'fundamentally alter the accusatorial judicial process' (*X7*
also *Lucciano* and *Villan*);

(d) the privilege against self-incrimination may be abrogated by statute – although that mus
effected in terms that fall strictly to be construed (*X7* ; compare *IBAC*);

(e) statutory provisions abrogating the privilege must not be misused for an unlawful
extraneous purpose (*Strickland*);

(f) section 128 of the *Evidence Act* specifically abrogates the privilege against self-incriminatio
and seeks to strike a balance between upholding an objection to giving evidence and requiri
that the witness give the evidence (*Villan*);

(g) in that connection, all the circumstances of the case must be considered (*Villan*); and

(h) a certificate provided under s 128(5) of the *Evidence Act* does not provide the witness with complete protection – however, a witness may be required to give evidence 'in the interests justice' even if the possibility of prejudice is established (*Villan*).

Kontis v Coroners Court of Victoria [2022] VSC 422 -
Kontis v Coroners Court of Victoria [2022] VSC 422 -
Kontis v Coroners Court of Victoria [2022] VSC 422 -
Kontis v Coroners Court of Victoria [2022] VSC 422 -
Kontis v Coroners Court of Victoria [2022] VSC 422 -
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Kontis v Coroners Court of Victoria [2022] VSC 422 -
Kontis v Coroners Court of Victoria [2022] VSC 422 -
In the matter of Tian [2022] NSWSC 899 -
Camelo-Gomez v The The Queen [2022] NSWCCA 108 -
Camelo-Gomez v The The Queen [2022] NSWCCA 108 -
Camelo-Gomez v The The Queen [2022] NSWCCA 108 -
Camelo-Gomez v The The Queen [2022] NSWCCA 108 -
R (Cth) v Alqudsi (No 2) [2022] NSWSC 609 -
Kinghorn v The Queen & Ors [2022] HCATrans 80 -
Brown v Corrections Victoria [2022] VSC 217 (03 May 2022) (Hetyey AsJ)

28. The question of when a proceeding will be stayed or summarily dismissed as an abuse of process v considered by the High Court in *Victoria International Container Terminal Ltd v Lunt*. [29] The follo principles emerge from that case:

(a) the Court has power to stay or summarily dismiss a proceeding in order to prevent injustice where a party has abused the Court's processes; [30]

(b) the Court's power is limited to protecting the integrity of its own processes and to taki action only insofar as is necessary to 'safeguard the administration of justice'; [31]

(c) where a proceeding is brought for an 'improper purpose' it is liable to be an abuse of process. [32]

via

[31] Ibid 381, [19] , citing *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 a *Queen* (2011) 245 CLR 456.

R v Lehrmann (No 2) [2022] ACTSC 92 -
R v Leach; R v Leach; Ex parte [2022] QCA 23 -
R v Leach; R v Leach; Ex parte [2022] QCA 23 -
R v Leach; R v Leach; Ex parte [2022] QCA 23 -
R v Leach; R v Leach; Ex parte [2022] QCA 23 -
R v Leach; R v Leach; Ex parte [2022] QCA 23 -
R v Leach; R v Leach; Ex parte [2022] QCA 23 -
SQH v Scott [2022] QSC 16 (23 February 2022) (Williams J)

195. In *Strickland* , Kiefel CJ, Bell and Nettle JJ referred to the *X7* statement and found that the forensic occurred. [78] However, the decisive element in that case was that an alteration to the accusatoria occurred without lawful authority. [79]

SQH v Scott [2022] QSC 16 -
SQH v Scott [2022] QSC 16 -
SQH v Scott [2022] QSC 16 -

operation of the criminal justice system: *Rogers v The Queen* (1994) 181 CLR 251; [1994] HCA 42 at 256 strong public interest in the fair and just operation of the criminal justice system; there is a strong seeing persons charged with serious crimes brought to trial. Failure to protect either interest risks confidence. The matters raised by the accused fall to be weighed in the balance.

> "Fundamental amongst the considerations to be weighed in determining whether criminal proceedings should be permanently stayed as an abuse of process is "the legitimate public interest in the disposition c charges of serious offences and in the conviction of those guilty of crime". That is because a permanent s order has the practical effect of providing immunity from prosecution to a criminal defendant, leaving th criminal defendant under an "irremovable cloud of suspicion" and leaving the potential if not the likelih engendering within the community "a festering sense of injustice", if not cynicism": *Strickland* , at [167] pe Gageler J (footnotes omitted).

R v Camelo-Gomez [2022] NSWSC 136 -
Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) [2022] HCA 3 -
Walton v ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) [2022] HCA 3 -
R v Leach; R v Leach; Ex parte [2022] QCA 7 (09 February 2022) (Fraser, Morrison and Bond JJA)

83. That the proper exercise of the discretion requires an evaluation of the significance of the suggeste process and of the likely efficacy of the measures which have and can be taken to relieve against th so as to afford the accused a fair trial, bearing in mind the fundamental principles identified in the also emphasised in the later case of *Strickland (a pseudonym) v Director of Public*

130. *Maxwell v The Queen* (1996) 184 CLR 501, 513 (Dawson and McHugh JJ).

131. *Attorney-General's Reference (No 1 of 1990) (UK)* [1992] 3 All ER 169 (Lord Lane CJ).

132. *Jago v District Court (NSW)* (1989) 168 CLR 23, 30-1 (Mason CJ).

133. *Salmat Document Management Solutions Pty Ltd v The Queen* (2006) 199 FLR 46, [110] .

Prosecutions (Cth) (2018) 266 CLR 325 per Kiefel CJ, Bell and Nettle JJ in the following passage: [134]

> "Certainly, as this Court has stated repeatedly,[135] a permanent stay of a criminal prosecution extraordinary step which will very rarely be justified. There is a powerful social imperative f those who are charged with criminal offences to be brought to trial and, for that reason, it ha been said that a permanent stay of prosecution should only ever be granted where there is s fundamental defect in the process leading to trial that nothing by way of reconstitution of th prosecutorial team or trial directions or other such arrangements can sufficiently relieve aga the consequences of the defect as to afford those charged with a fair trial. But, as this Court h also stated,[136] there is, too, a fundamental social concern to ensure that the *end* of a criminal prosecution does not justify the adoption of any and every *means* for securing a conviction a therefore, a recognition that in rare and exceptional cases where a defect in process is so profound as to offend the integrity and functions of the court as such, it is necessary that proceedings be stayed in order to prevent the administration of justice falling into disrepute

R v Leach; R v Leach; Ex parte [2022] QCA 7 -
R v Leach; R v Leach; Ex parte [2022] QCA 7 -
R v Leach; R v Leach; Ex parte [2022] QCA 7 -
R v Leach; R v Leach; Ex parte [2022] QCA 7 -
R v Leach; R v Leach; Ex parte [2022] QCA 7 -
Nikolovski v The Queen [2021] NSWCCA 327 (30 December 2021) (Payne JA, Fullerton and Lonergan JJ)

68. My fundamental difficulty with this aspect of the applicant's case is that, unless and until the High otherwise, the Crown prosecutor alone bears the responsibility of deciding whether a person shou witness for the Crown. A decision of the prosecutor not to call a particular person as a witness will ground for setting aside a conviction if, when viewed against the conduct of the trial as a whole, it to a miscarriage of justice: *R v Apostilides* (1984) 154 CLR 563; [1984] HCA 38 at 575. It may be that the circumstances where, in accordance with existing authority (such as *Strickland (A Pseudonym) v Co Director of Public Prosecutions* (2018) 266 CLR 325; [2018] HCA 53), the circumstances in which a part called may give rise to a miscarriage of justice. I am not persuaded that a miscarriage has been sho reason of the decision to call Mr Williams. As Bathurst CJ said of a similar objection in *Koloamatan*

> "[318] So far as the evidence of [Mr Williams] was concerned, the decision in the previous judgme to the admissions allegedly made to him by Bubanja. The Court did not deal with the admissions were made to him by the applicants. The fact that [Mr Williams] was found to be a witness who la credibility in the previous judgment does not mean his evidence could not be relied on in respect admissions by different persons in the present case."

Nikolovski v The Queen [2021] NSWCCA 327 (30 December 2021) (Payne JA, Fullerton and Lonergan JJ)

73. Assuming, without deciding, that a change in the forensic balance between the Crown and the acc possible retrial was effected by the subsequent decision of this Court about the credibility of Mr W *atangi* , I am not persuaded that a miscarriage of justice has been shown. It appears to me that such would stray beyond the boundaries of a miscarriage of justice as explained by the High Court, mos *kland* . Whilst the outer limits of a miscarriage are, for good reason, not clear, any extension to cov circumstances would be a matter for the High Court.

Sub-contention 3: it would be contrary to public policy to allow the conviction to stand

R v Kinghorn [2021] NSWCCA 313 (21 December 2021) (Bathurst CJ, Payne JA, Bell P, Ward CJ in Eq and Belle

126. As we have pointed out, senior counsel for the respondent submitted that what was said in *Strickla* that *IBAC* did not in any way qualify the extent of the accusatorial principle and the companion ru There are two things that may be said in respect of this submission. First, although *Strickland* invol examination purportedly conducted by the Australian Crime Commission for the purpose of a spe investigation, there being no investigation on foot, the examination was in fact conducted for an e unlawful purpose of assisting the AFP to compel the appellants to give answers to questions about which they were suspected and in respect of which they had declined to be interviewed.

R v Kinghorn [2021] NSWCCA 313 (21 December 2021) (Bathurst CJ, Payne JA, Bell P, Ward CJ in Eq and Belle

74. Senior counsel for the Crown submitted that *Strickland* was not contrary to those submissions. He *nd* as involving the post-trial effect of anterior unlawful conduct. He submitted that a lawful pre-cl examination did not become unlawful simply because there was subsequently a charge. He submi *d* was explained in *Commonwealth v Helicopter Resources Pty Ltd* [2020] HCA 16; (2020) 94 ALJR 466 *Resources*") at [22] where the plurality stated that *Strickland* had nothing to do with the lawfulness c examination of potential third-party witnesses and that, as was made clear in *IBAC* , if a compulso procedure is sufficiently authorised by statute it may be invoked notwithstanding that as a matter reality the result would fundamentally alter the ability of an accused to defend charges that may h be levied against him or her.

R v Kinghorn [2021] NSWCCA 313 (21 December 2021) (Bathurst CJ, Payne JA, Bell P, Ward CJ in Eq and Belle

129. It should be noted that apart from *Leach* , none of the cases relied on by the respondent in support proposition that the companion rule applied involved a lawful pre-charge examination. *Hammond* nvolved proposed examinations post-charge. *Lee* (2014), *Strickland* and *R v Seller; R v McCarthy* eacl an examination for an improper purpose (*Strickland*) or the improper distribution of material (*Le R v McCarthy*).

R v Kinghorn [2021] NSWCCA 313 (21 December 2021) (Bathurst CJ, Payne JA, Bell P, Ward CJ in Eq and Belle

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R v Kinghorn [2021] NSWCCA 313 (21 December 2021) (Bathurst CJ, Payne JA, Bell P, Ward CJ in Eq and Belle

91. Senior counsel for the respondent referred to *IBAC* and *Strickland* . He noted that in *IBAC* there wa before the court either in the sense of pre-trial supervision or post-trial post-conviction appeal. He question in *IBAC* was whether or not the power enacted in express terms to compel co-operation b in investigations of possible police misconduct was unavailable by reason of the accusatorial princ companion rule.

R v Kinghorn [2021] NSWCCA 313 -
R v Kinghorn [2021] NSWCCA 313 -
R v Kinghorn [2021] NSWCCA 313 -
R v Kinghorn [2021] NSWCCA 313 -
R v Kinghorn [2021] NSWCCA 313 -
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R v Kinghorn [2021] NSWCCA 313 -
R v Kinghorn [2021] NSWCCA 313 -
R v Kinghorn [2021] NSWCCA 313 -
Deputy Commissioner of Taxation v Huang [2021] HCA 43 -
Deputy Commissioner of Taxation v Huang [2021] HCA 43 -
Higgs v The Queen [2021] VSCA 301 (05 November 2021) (IRVING ASJ)

52. Contrary to the applicant's submission, I comprehend the above passage to direct the Court's atte nature of the duty or obligation breached and its centrality to the administration of justice — rath mental state of the person or institution carrying out that breach. In my view, the judgment in *Stri* against being distracted from that task by focussing too greatly on whether the offending party act recklessly.

Higgs v The Queen [2021] VSCA 301 (05 November 2021) (IRVING ASJ)

51. The applicant relied on the following passage from the majority judgment in *Strickland* : [27]

> Further, although in previous cases regarding unlawful examination and dissemination of examin product the courts' concerns regarding the administration of justice falling into disrepute have focussed on deliberate or advertent reckless disregard of legal requirements, nothing in previous authority suggests or should be taken to imply that abjectly insouciant, wide-ranging disregard of requirements of the ACC Act of the kind that occurred in the present case may not also bring the administration of justice into disrepute. As the majority of this Court stated in *Moti v The Queen*, decided cases should not be read as attempting to chart the boundaries of abuse of process. Nor s they be read as attempting to define exhaustively the circumstances that warrant exercise of the p to stay criminal proceedings or as providing some 'exhaustive dictionary of words' by one or more which executive action must be capable of description before proceedings may be stayed. As Kirb aptly summarised the position in *Troung v The Queen*:
>
> > "relief is not confined to cases of deliberate and knowing misconduct, although that may be sufficient to enliven the jurisdiction. It extends to serious cases where, whatever the initial motivation or purpose of the offending party, and whether deliberate, reckless or seriously negligent, the result is one which the courts, exercising the judicial power, cannot tolerate or be part of."
>
> No doubt, society and therefore the law ordinarily looks more askance on instances of deliberate advertent reckless disregard of a duty or obligation than upon the accidents of incompetence. As rule, the former are conceived of as entailing greater moral culpability and for that reason their condonation is conceived of as more likely to bring the administration of justice into disrepute. B ultimately it is a question of degree which substantially depends upon the nature of the duty or obligation. If a duty or obligation is of no more than peripheral significance, condonation of its br even of an intentional breach, may appear justified in the interest of relatively more pressing considerations of justice. The power to stay proceedings is not available to cure venial irregularities. But if, as here, the duty or obligation is of a kind that goes to the very root of the administration of justice, condonation of its breach will bring the administration of justice into disrepute regardless of the culprit's mentality. Ultimately, these appeals turn on that distinction.

via

[27] Ibid [99] .

Higgs v The Queen [2021] VSCA 301 -
Higgs v The Queen [2021] VSCA 301 -
Higgs v The Queen [2021] VSCA 301 -
Higgs v The Queen [2021] VSCA 301 -
Higgs v The Queen [2021] VSCA 301 -
Higgs v The Queen [2021] VSCA 301 -
Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Limited (No 5 Indic FCA 1345 -
Commonwealth Director of Public Prosecutions v Citigroup Global Markets Australia Pty Limited (No 4 exan [2021] FCA 1237 (12 October 2021) (Wigney J)

14. Even in the absence of that express power, the Court could in any event make such an order as par incidental power to prevent abuse or frustration of its processes in relation to matters coming with *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623 (Deane J); see also 616 (Mason CJ), 618 (Wils JJ) and 620-621 (Brennan J). Such a power is "an inherent common law power of a superior court of that does not derive from statute but is intrinsic to the nature and structure of the court itself": *Stri pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325; [2018] HCA 53 at [256] the Court has the power to stay proceedings if the trial would otherwise be unfair, as it unquestion also have the power to make orders which would prevent the risk of unfairness in the first place.

Council of the Law Society of New South Wales v McGlinchey [2021] NSWCATOD 147 -
Barilaro v Shanks-Markovina (No 2) [2021] FCA 950 (13 August 2021) (Rares J)

78. In *Lunt* 388 ALR at 381 [18]–[19], Kiefel CJ, Gageler, Keane and Gordon JJ said:

> ... The power to stay, or summarily dismiss, proceedings **because one party has abused the proce court is concerned to prevent injustice**, [*Barton v The Queen* (1980) 147 CLR 75 at 96. See also *Con Director of Public Prosecutions* [1964] AC 1254 at 1301-1302, 1347 ; *Tomlinson v Ramsey Food Processing P* 256 CLR 507 at [25] ; *UBS AG v Tyne* (2018) 265 CLR 77 at [1]] **and that power is properly exercised conduct of the moving party is such that the abuse of process on its part may prevent or stultif and just determination of a matter.**
>
> In *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* [(2018) 266 CLR 325 at [113]], Gagel explained that the concern which engages a court's power to order a stay of proceedings is the nee the integrity of its own processes. His Honour said:
>
> > "The power of a superior court to stay its own proceedings as an abuse of process is a powe protect the integrity of its own processes. The power is in that limited respect and to that lir extent a power to 'safeguard the administration of justice'. [*Moti v The Queen* (2011) 245 CLR at [11]]"
>
> (emphasis added)

Must the Court stay or strike out a claim because Parliamentary privilege prevents a defence to it?

Barilaro v Shanks-Markovina (No 2) [2021] FCA 950 -
Barilaro v Shanks-Markovina (No 2) [2021] FCA 950 -
Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 2] [2021] WASCA 105 (25 June 2021) (Buss P, Murphy JA, Beech JA)

164. What is decisive in determining the question of abuse of process is the objective effect of the litigic continuation of the action said to constitute the abuse, and there is no requirement that this involv delinquency on the part of the party undertaking the impugned conduct or continuing the action. remedy of a stay of proceedings which are an abuse of process is not 'concerned ... with the punish miscreant'. [170] Rather, the remedy of a permanent stay is 'a measure of last resort' which will on where there is no other way to protect the integrity of the system of justice administered by the co

via

[171] ***Victoria International*** [21]; ***Strickland v Director of Public Prosecutions (Cth)*** [2018] HCA 53; (2018) 266 C

Mineralogy Pty Ltd v Sino Iron Pty Ltd [No 2] [2021] WASCA 105 -
Dawson v R [2021] NSWCCA 117 (11 June 2021) (Bathurst CJ, Adamson and Bellew JJ)

29. In these circumstances, it would be surprising if the primary judge deviated in one part of her judg adopted an incorrect test. I do not think her Honour did so. Rather her Honour was looking to the considering the prospect of empanelling an impartial jury, an essential prerequisite to a fair trial. I prospect of doing so, a stay would be inevitable. Whether it could be done ultimately depends on t process. It was in this context that the primary judge was referring to reasonable prospects of emp not influenced by the podcast. Her Honour was not suggesting it was sufficient that there was a ju respect of which there were reasonable prospects that it would be impartial: cf *Strickland (A Pseudo Public Prosecutions (Cth)* (2018) 266 CLR 325; [2018] HCA 53 at [244] per Gordon J in dissent, but cited *Lunt* at [22] .

Dawson v R [2021] NSWCCA 117 (11 June 2021) (Bathurst CJ, Adamson and Bellew JJ)

122. The principles relating to the grant of a permanent stay largely derive from four decisions of the H , *Glennon* , *Dupas* and *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) [2018] HCA 53 (*Strickland*).

Dawson v R [2021] NSWCCA 117 (11 June 2021) (Bathurst CJ, Adamson and Bellew JJ)

126. In *Strickland* , as part of its investigation of the appellants, the Australian Federal Police (AFP) appr Australian Crime Commission (ACC) and requested that it use its compulsory powers to examine circumstances where each appellant was told that he could not refuse to answer questions on the g answer might incriminate him. AFP officers watched the examinations from a nearby room. The others, were subsequently charged with conspiring with others to bribe a foreign official (contrary *Code* (Cth)) and dishonestly falsifying a document made for an accounting purpose (contrary to th Vic)).

Dawson v R [2021] NSWCCA 117 (11 June 2021) (Bathurst CJ, Adamson and Bellew JJ)

122. The principles relating to the grant of a permanent stay largely derive from four decisions of the H , *Glennon* , *Dupas* and *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) [2018] HCA 53 (*Strickland*).

Dawson v R [2021] NSWCCA 117 (11 June 2021) (Bathurst CJ, Adamson and Bellew JJ)

160. In *Strickland* , the High Court found that the unlawfulness of the conduct of the AFP and the ACC permanently derogate from the accused's right to silence and right to a fair trial and that the preju remedied.

Dawson v R [2021] NSWCCA 117 -
Dawson v R [2021] NSWCCA 117 -
Dawson v R [2021] NSWCCA 117 -
Dawson v R [2021] NSWCCA 117 -
Dawson v R [2021] NSWCCA 117 -
Dawson v R [2021] NSWCCA 117 -
Dawson v R [2021] NSWCCA 117 -
Dawson v R [2021] NSWCCA 117 -
Dawson v R [2021] NSWCCA 117 -
Dawson v R [2021] NSWCCA 117 -
Gardiner v Attorney-General (No 4) [2021] VSC 290 -
Gardiner v Attorney-General (No 4) [2021] VSC 290 -
Director of Public Prosecutions Reference No 1 of 2019 [2021] HCATrans 86 -
Victoria International Container Terminal Ltd v Lunt [2021] HCA 11 (07 April 2021) (Kiefel CJ, Gageler, Keane, Edelman JJ)

32. In the course of the hearing of the appeal, the appellant's argument reduced to the proposition tha summarily dismiss would bring the administration of justice into disrepute because the court shou deter or punish a want of candour on the part of a litigant of the kind revealed in this case irrespec fair trial can now be had. The appellant was not able to cite any authority in support of the propos considerations of deterrence or punishment are relevant to the exercise of the court's powers in re process. That is not surprising because, as has been noted above, the court's powers in relation to a are not informed by considerations of deterrence or punishment. Rather, they are exercised in ord integrity of the court's own processes [48] .

via

[48] *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 .

Victoria International Container Terminal Ltd v Lunt [2021] HCA 11 (07 April 2021) (Kiefel CJ, Gageler, Keane, Edelman JJ)

21. In *Strickland* [39] , Kiefel CJ, Bell and Nettle JJ held that a stay of proceedings was warranted in the that case because the abuse of process on the part of the prosecution so affected the prospects of a

"the prejudice to a fair trial is at least to a significant extent incurable". Edelman J [40] , who concu
plurality, explained that an order for a permanent stay is "a measure of last resort" which will be o
there is no other way to protect the integrity of the system of justice administered by the court". Hi
on to say:

> "Before a permanent stay can be ordered, it is necessary to consider whether there are any o
> measures that could be taken to address any systemic incoherence that would be caused by
> the accused. This must be considered because the court's ability to protect its integrity is not
> to orders that grant a permanent stay of proceedings."

via

[40] (2018) 266 CLR 325 at 409 [248] , 415 [264] .

Victoria International Container Terminal Ltd v Lunt [2021] HCA 11 (07 April 2021) (Kiefel CJ, Gageler, Keane, Edelman JJ)

22. Gageler J, who dissented as to the result of the case, was also of the opinion that a permanent stay
cannot properly be ordered where the substantial unfairness in the conduct of proceedings is capa
averted through the adoption ... of measures less drastic than ordering a permanent stay" [41] . And
also dissented as to the result of the case, agreed that there is no occasion to order a permanent sta
where the prejudice resulting from an abuse of process is curable by less drastic means. Her Hono

> "[I]f a fair trial can be had, or if it is not possible to say now that a fair trial cannot be had, wh
> the administration of justice be brought into disrepute if the prosecutions were permitted to

via

[42] (2018) 266 CLR 325 at 408 [244] .

Victoria International Container Terminal Ltd v Lunt [2021] HCA 11 -
Victoria International Container Terminal Ltd v Lunt [2021] HCA 11 -
Victoria International Container Terminal Ltd v Lunt [2021] HCA 11 -
Victoria International Container Terminal Ltd v Lunt [2021] HCA 11 -
Victoria International Container Terminal Ltd v Lunt [2021] HCA 11 -
Victoria International Container Terminal Ltd v Lunt [2021] HCA 11 -
Victoria International Container Terminal Ltd v Lunt [2021] HCA 11 -
Commissioner of the Australian Federal Police v Luppino [2021] FCAFC 43 -
Commissioner of the Australian Federal Police v Luppino [2021] FCAFC 43 -
Commissioner of the Australian Federal Police v Luppino [2021] FCAFC 43 -
R v Hanna [2021] QCA 48 (19 March 2021) (Morrison and Philippides JJA and Crow J)

20. There are distinguishing features between the present case and that which applied both in *Strickla*
n *Strickland* and *X7 [No 1]* the relevant evidence was compelled after the charge had been brought.
evidence was given at the Royal Commission in 2015, when the indictment was not presented until
March 2019. Secondly, each of *Strickland* and *X7* involved unlawful compulsory examination, whic
here. The appellant eschewed any suggestion that the Royal Commission acted unlawfully to com
answer questions.[22] Thirdly, there is no suggestion in this case that the content of the examinati
placed in the hands of the prosecution. In *Strickland* not only was the examination illegal, but the
material had been placed in the hands of the police prosecution.

R v Hanna [2021] QCA 48 (19 March 2021) (Morrison and Philippides JJA and Crow J)

18. Considerable reliance was placed upon the High Court decision in *Strickland (a pseudonym) v Direc*
Prosecutions (Cth) . [17] That case involved illegality which tainted the examinations conducted by

Crime Commission at the invitation of the Australian Federal Police. A key finding noted by the H that the lead investigator with the AFP had decided that if the appellants would not voluntarily an questions, he would force them to answer questions by taking advantage of the Australian Crime C coercive powers and that the AFP investigator considered that process would yield the prosecutio advantage of locking each appellant into a version of events, on oath, from which they could not c trial. [18] The plurality held that that finding was correct and went on to observe: [19]

> "As Hayne and Bell JJ observed in *X7 [No 1]* in relation to an unlawful compulsory examinati conducted post charge, even if the answers given at a compulsory examination are kept secr cannot be used directly or indirectly by those responsible for investigating and prosecuting charged, the requirement to give answers after being charged fundamentally alters the accu judicial process that begins with the laying of a charge and culminates in the accusatorial an adversarial trial in the courtroom. The examinee can no longer decide the course which he should adopt at trial according only to the strength of the prosecution's case as revealed by t provided by the prosecution before trial or to the strength of the evidence led by the prosecu trial:
>
> > 'The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge a what evidence to give or lead at trial according to what answers he or she had given at examination. The accused person is thus prejudiced in his or her defence of the charg that has been laid by being required to answer questions about the subject matter of t pending charge.'"

R v Hanna [2021] QCA 48 -
R v Hanna [2021] QCA 48 -
R v Hanna [2021] QCA 48 -
R v Hanna [2021] QCA 48 -
R v Hanna [2021] QCA 48 -
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R v Hanna [2021] QCA 48 -
R v Hanna [2021] QCA 48 -
ZYX (pseudonym initials) v JD (pseudonym initials) [No 2] [2021] WADC 20 -
Midson v State of Victoria (Ruling) [2021] VSC 120 (16 March 2021) (Richards J)

19. It is common for a coercive investigatory power such as s 171(1) of the Police Act to be accompanied immunity such as s 171(3) . Restrictions on the use that may be made of information obtained coerc means of justifying a coercive power that limits the human right not to be compelled to testify aga confess guilt [11] and abrogates the common law privilege against self-incrimination. [12] Very sig can arise when information that is subject to a statutory use immunity is used in a criminal investi illustrated by cases such as *Lee v R* [13] and *Strickland v Commonwealth Director of Public Prosecutions* considerations tend against any blurring of the bright line against admissibility drawn in s 171(3) of

via

[14] (2018) 266 CLR 325 .

FAN19 v Australian Criminal Intelligence Commission [2021] FCA 100 -
FAN19 v Australian Criminal Intelligence Commission [2021] FCA 100 -
FAN19 v Australian Criminal Intelligence Commission [2021] FCA 100 -
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FAN19 v Australian Criminal Intelligence Commission [2021] FCA 100 -
Victoria International Container Terminal Limited and Richard Simon Lunt [2021] HCATrans 7 -
Green v Fairfax Media Publications Pty Ltd [No 3] [2021] WASC 7 (15 January 2021) (LE Miere J)

46. This court has power to stay proceedings to prevent an abuse of the process of the Court. The cate process are not closed. Cases such as ***UBS AG v Tyne*** [1] and more recently ***Strickland v Commonwe Public Prosecutions*** , [2] albeit in a different context, demonstrate the broad scope of the circumstan constitute such abuse.

Madafferi v The Queen [2021] VSCA 1 (15 January 2021) (Emerton, Weinberg and Osborn JJA)

107. These are matters that may reflect on the independence of the advice and representation that Mac from Acquaro in the Inca proceeding. In the circumstances, it is unnecessary for us to say anythin the arguments advanced by the amici that were more broadly framed by reference to lines of auth abuse of process and the perception of a miscarriage of justice. [39]

via

[39] See, eg, *R v Szabo* [2001] 2 Qd R 214; [2000] QCA 194; *Zai v Western Australia* (2007) 34 WAR 379; [*R v Smith* (1975) 61 Cr App R 128; *Strickland v CDPP & ACIC* (2018) 266 CLR 325; [2018] HCA 53 .

Green v Fairfax Media Publications Pty Ltd [No 3] [2021] WASC 7 -
Green v Fairfax Media Publications Pty Ltd [No 3] [2021] WASC 7 -
Visser v DPP (Cth) [2020] VSCA 327 -
Visser v DPP (Cth) [2020] VSCA 327 -
Visser v DPP (Cth) [2020] VSCA 327 -
R v Richards [2020] NSWDC 763 -
Bell v The Queen; Independent Commissioner Against Corruption v Bell [2020] SASCFC 116 (03 December 20 Peek and Blue JJ)

266. In *Strickland (a pseudonym) v Director of Public Prosecutions (Cth),* [88] the ACC undertook examinati who were subsequently charged with offences. They were undertaken purely at the behest and for the Australian Federal Police, who had sought to interview the appellants, who had declined to an By the time the matter reached the High Court, it was not in dispute that the examinations were be unlawful because they were not conducted for the purpose of a special ACC investigation. The qu Court was whether the unlawful conduct by the ACC should result in a permanent stay of the pros course of their reasons for judgment, Kiefel CJ, Bell and Nettle JJ referred to the sixth paragraph ex from the reasons of Hayne and Bell JJ in *X7* , saying:

> As Hayne and Bell JJ observed in *X7 [No 1]* in relation to an unlawful compulsory examinatio conducted post charge, even if the answers given at a compulsory examination are kept secr cannot be used directly or indirectly by those responsible for investigating and prosecuting charged, the requirement to give answers after being charged fundamentally alters the accu judicial process that begins with the laying of a charge and culminates in the accusatorial an adversarial trial in the courtroom. [89]

via

[88] (2018) 266 CLR 325 .

Bell v The Queen; Independent Commissioner Against Corruption v Bell [2020] SASCFC 116 (03 December 20
Peek and Blue JJ)

252. The High Court held that the principle articulated in *Strickland (a pseudonym) v Director of Public Pr*
0] in relation to the compulsory examination of a defendant in existing criminal proceedings has n
third party, including an employee of the defendant. Kiefel CJ, Bell, Gageler, Keane, Nettle and Go

> The Full Court were also correct in holding that the compulsory pre-trial examination of a potential witness do
> engage the general rule that an accused cannot be required to assist the Crown in proof of its case. That rule ha
> identified as a companion to the fundamental principle that the burden is upon the Crown to prove the guilt o
> beyond reasonable doubt. It applies to an accused, not a witness or potential witness other than the accused; an
> evidently, the compulsory examination of a potential witness other than the accused does not in itself involve a
> compulsion of the accused to give evidence or otherwise to assist the Crown in proof of its case...
>
> ...
>
> Contrary to Helicopter Resources' submissions, there is nothing fundamental to the accusatorial system of crir
> that requires that an accused employer be free to prevent statements of an employee from being used as evide
> the employer. And contrary to Helicopter Resources' submissions, it makes no difference that the employee in
> be of *central* importance to the employer's defence. An accused has no property in a witness or potential witnes
> who may be identified as the guiding mind of the accused or whose answers may be attributable to the accused
>
> ... *Strickland* had nothing to do with the lawfulness of compulsory interrogation of potential
> witnesses. In particular, the plurality in *Strickland* did not suggest, and the decision does not
> the notion that appears to have found favour with the Full Court that, because an otherwise
> compulsory investigative procedure may result in a witness making representations that car
> as an admission against an accused in subsequent criminal proceedings, the deployment of t
> procedure amounts, without more, to a breach of the companion rule or other interference w
> accusatorial system of criminal justice. To the contrary, as this Court made clear in *R v Indep*
> *Broad-Based Anti-Corruption Commissioner*, if a compulsory investigative procedure is sufficie
> authorised by statute, it may be invoked notwithstanding that, as a matter of practical reality
> will fundamentally alter the ability of an accused to defend charges that may have been or n
> against him or her.[81]

Bell v The Queen; Independent Commissioner Against Corruption v Bell [2020] SASCFC 116 (03 December 20
Peek and Blue JJ)

348. In *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* , [96] the ACC received informatio
informant that a company was involved in criminal activity. The Commission did not resolve to ur
investigation but instead referred the allegations to the Australian Federal Police and offered to al
utilise the Commission's coercive powers for the purposes of the Police investigation. The Police in
appellants to participate in a cautioned recorded interview and each declined. A Commission exar
issued summonses to, and conducted compulsory examinations of, each appellant. The decision w
examined, and on what topics, was made exclusively by the Police and not by Mr Sage. The questi
examinations were principally asked by counsel assisting the examiner, but the questions were lar
the Police. Mr Sage permitted numerous members of the Police to attend the examinations, gave t
transcripts of the examinations and permitted the Police to use them and they were disseminated w
Police. The purpose of the Police was to obtain a forensic advantage for the prosecution by locking
into a version of events on oath from which they could not credibly depart at trial.

Bell v The Queen; Independent Commissioner Against Corruption v Bell [2020] SASCFC 116 -
Bell v The Queen; Independent Commissioner Against Corruption v Bell [2020] SASCFC 116 -
Bell v The Queen; Independent Commissioner Against Corruption v Bell [2020] SASCFC 116 -
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Bell v The Queen; Independent Commissioner Against Corruption v Bell [2020] SASCFC 116 -
Application of the Securities and Exchange Commission of the United States of America under the Evidence Act 1995 (NSW) (No 2) [2020] NSWSC 1500 (27 October 2020) (Walton J)

291. *X7* was referred to by the High Court in *Strickland* (at [76]) where the plurality considered that the Hayne and Bell JJ in *X7* had the following effect:

> [76] As Hayne and Bell JJ observed in *X7 (No 1)* in relation to an unlawful compulsory examination condu post charge, even if the answers given at a compulsory examination are kept secret, and so cannot be use directly or indirectly by those responsible for investigating and prosecuting the matters charged, the requirement to give answers after being charged fundamentally alters the accusatorial judicial process tl begins with the laying of a charge and culminates in the accusatorial and adversarial trial in the courtroo The examinee can no longer decide the course which he or she should adopt at trial according only to th strength of the prosecution's case as revealed by the material provided by the prosecution before trial or strength of the evidence led by the prosecution at trial...
>
> [Footnotes omitted.]...

Application of the Securities and Exchange Commission of the United States of America under the Evidence Act 1995 (NSW) (No 2) [2020] NSWSC 1500 -
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Re Golding [2020] HCA 38 -
Re Golding [2020] HCA 38 -
Re Golding [2020] HCA 38 -
The Queen v The Herald & Weekly Times Pty Ltd (Ruling No 1) [2020] VSC 616 -
R v Dawson [2020] NSWSC 1221 -
R v Dawson [2020] NSWSC 1221 -
R v Dawson [2020] NSWSC 1221 -
R v Dawson [2020] NSWSC 1221 -
R v Dawson [2020] NSWSC 1221 -
R v Dawson [2020] NSWSC 1221 -
R v Dawson [2020] NSWSC 1221 -
De Belin (First Applicant) v The Queen (Director of Public Prosecutions); Sinclair (Second Applicant) v The C of Public Prosecutions) (Respondent) [2020] NSWDC 487 -
R v Botrus (No 1) [2020] NSWSC 1204 (27 August 2020) (Walton J)

10. Counsel for the accused, Mr Sam Pararajasingham, made the following submissions on the motio

    1. The terms of s 139(1)(c) are clear and ought not be construed narrowly. The subsection is a di that an accused must be informed about the privilege against self-incrimination, a fundame the criminal justice system. The caution is meant to convey to an arrested person that he/sh right to choose to speak or to remain silent; it is meant to ensure that the person is aware tha speaks, what he/she says may be given in evidence.

    2. The Crown conceded that the accused was not read his full rights prior to the commenceme ERISP, which amounted to non-compliance with s 139(1)(c) .

3. Although the accused was told that the interview would be recorded and could be used as ev this did not alert the accused in any way to a caution as it omitted his right to silence, and he amounted to a breach of s 139(1)(c) .

4. In addition, the shorthand enquiry as to whether the accused "wanted to exercise any of tho in reference to the exercise undertaken by Sergeant Ryder almost an hour earlier, cannot sa specific obligation in s 139(1)(c) .

5. The breach of s 139(1) was not merely a technical breach. It operates as a deeming provision that the Court's satisfaction of a breach of s 139(1) satisfies the first arm of s 138 that the evide obtained improperly.

6. In addition, the breach shifts the onus to the party seeking the admission of the evidence, ra the party seeking its exclusion. As such, the evidence is *prima facie* inadmissible unless the C discharges the onus and satisfies the second arm of s 138 , namely, that the desirability of adı evidence outweighs the undesirability of admitting evidence that has been obtained in the w which the evidence was obtained.

7. Parliament purposefully drafted the section in this way to foster public policy consideration the protection of an accused from the many powers at the disposal of police authority.

8. In conducting the balancing exercise, the Court is to have regard to the non-exhaustive cons set out in s 138(3) .

9. The primary considerations put by the Crown to satisfy the balancing exercise of s 138 was th probative value of the evidence, the importance of the evidence, and the nature of the offenc 8(3)(a)-(c) .

10. The obverse is true of the proposition that the greater the probative value of an item of evid greater the public interest in its admission.

11. The probative value of the ERISP is minimal. At no point did the accused make any admissi alleged conduct. A great deal of the questioning traversed topics canvassed earlier with the a although in considerably more detail.

12. The Crown relies on the making of three lies in the ERISP that they say are capable of being evidence of lies demonstrating consciousness of guilt by the accused.

13. The first alleged lie from the ERISP which the Crown relies upon is the contention by the ac he did not know the deceased.

14. The accused submitted that the Crown had contended that, if it is accepted that the Wickr n found on the phone seized from the accused where, in fact, sent by the accused, this amount admission of the charged offending. Hence, if the accused committed the offending against t deceased, it follows that he had to have been lying when he asserted in the ERISP that he di the deceased.

15. As it is a matter of dispute at trial that the accused sent the Wickr messages, to rely on it as p is a circular argument. To make out the lie requires that the accused committed the offence; it is incapable of being relied upon as a lie because it presumes that he sent the message and inevitably follows from that is that it was an admission.

16. When it was raised with counsel for the accused that the fact of the accused's knowledge of t accused, if proven, might demonstrate a resolution of a fact in issue in the proceedings sepa of a lie establishing consciousness of guilt, it was submitted that the Court must resolve this the motion based on the evidence before it, notwithstanding that the evidence may be utilis different context at trial proper.

17. The second alleged lie put by the Crown was in relation to the accused's denial of riding the which was in the garage.

18. It was accepted that this class of evidence was capable of establishing a lie indicating consci guilt. However, the transcript from the earlier interviews divulges the accused making simil as to riding the motorbike which would be open for the Crown to rely on. This limits the im the excerpts from the ERISP.

19. The third alleged lie relied upon was effectively an admitted lie. The accused firstly gave an a conversation that he had with his father after the allegations were said to have occurred. T said that he asked his father to take him to Fairfield Police Station to report on bail with no that he intended to go to EB Games as well and then by the end, the accused's position was t than asking his father to take him to report, he had in fact asked his father to take him to Sto he might "suss out" the stabbing incident.

20. Two issues were said to arise with respect to the third component of the evidence. Firstly, th suggestion of unrelated criminality to a jury, which arises from the evidence of reporting fo the spectre of s 137. Hence, there is difficulty in the Crown relying on it for that basis. Secon it is able to be relied up on to amount to a lie, then at its highest, it is a lie that could be used the accused but not as proof of consciousness of guilt due to it being post allegation of condu not capable of establishing the accused's guilt.

21. The further considerations put by the Crown to satisfy the balancing exercise of s 138 was th the impropriety and whether it was deliberate or reckless under s 138(3)(d) and (e).

22. In this case, the impropriety takes the form of non-compliance with a statutory obligation b enforcement officers. It is observed that s 138 contemplates improprieties which do not invo breach of statutory obligations including: the breach of internal police guidelines and instru entrapment by police officers; the misstatement of fact in an affidavit in support of a warran of an inducement to a witness that he or she not give evidence; and the failure to comply wi Furthermore, the section is not confined to evidence obtained by the improper or illegal co police: *Kadir v The Queen; Grech v The Queen* (2020) 94 ALJR 168; [2020] HCA 1 ("*Kadir*"). It is s that, in this case, the non-compliance with a statutory obligation by law enforcement elevat nature of the gravity.

23. Relevantly to the content of the obligation, as raised above, the protection conferred in s 139 fundamental importance. It functions to ensure that an accused is advised prior to any ques an investigating official of the existence of an important right. Here, the comments of Kiefel and Nettle JJ in *Strickland v Commonwealth Director of Public Prosecutions* (2018) 361 ALR 23; [2 (" *Strickland* ") at [101] are apposite:

> [101] The common law right to silence is a fundament of the criminal justice system that applies at all sta the process to all persons suspected of an offence, whether charged or not yet charged, and also at trial" "condonation" of an unlawful breach of the right "is apt to bring the administration of justice into disrep

24. It was submitted that the failure to provide the caution, in the terms within the subsection, i the accused's ability to exercise that right. That the accused in this case had been advised of earlier, in some other context, in no way satisfied the obligation that arose at the point of qu

25. The proposition put by the Crown that this Court would be satisfied that at the time of the i commenced the accused was aware of his right to silence makes assumptions about the thou processes of the accused and his presence of mind. He had just turned 18 and found himself with two experienced detectives. A document was "flashed" at him, he was asked whether h exercise any of those rights. He replied in the negative and they continued.

26. The Crown invited the Court to draw an inference of the accused's state of mind when he w a different context to that which he was in prior to the ERISP. When the 3:50pm interview w

commenced, the accused was not a suspect in a murder charge. The questioning occurred at
and his parents were somewhere within the house. He was offered twice, but declined to exe
right to silence in this context.

27. In the second context at 5:45pm, when he was cautioned at the police station, there was no su
in Sergeant Ryder's statement that particular attention was drawn to the caution when the b
rights were provided to him.

28. These two contexts compared to the impugned transaction where the accused was in a roon
detectives is of material difference. For this reason, the Crown's argument that the accused w
that he could decline to answer questions due to what occurred in the two previous contexts

29. Regarding the state of mind of the officers at the relevant time, whilst unclear, it may be put
police were merely negligent in the execution of their duty. However, that does not attenuat
gravity of the impropriety. Nothing short of strict compliance was required. Indeed, it is imp
police officers entrusted with powers which abrogate fundamental liberties pay close attenti
conditions on which their lawful exercise depends: *R v Nguyen* (2013) 117 SASR 432; [2013] SA
41] .

R v Botrus (No 1) [2020] NSWSC 1204 -
Will v The Queen [2020] ACTCA 42 -
Will v The Queen [2020] ACTCA 42 -
R v QX [2021] ACTSC 187 (19 August 2020) (Loukas-Karlsson J)
Prosecutions [2018] HCA 53; 266 CLR 325

Director of Public Prosecutions v Walker (Ruling No 2) [2020] VSC 519 (19 August 2020) (Coghlan JA)

77. Mr Carr placed reliance upon what was said by Edelman J in *Strickland* . *[36]* I do not regard that p
the matter further.

via

[36] (2018) 93 ALJR 1 , 261.

Director of Public Prosecutions v Walker (Ruling No 2) [2020] VSC 519 -
Director of Public Prosecutions v Walker (Ruling No 2) [2020] VSC 519 -
Director of Public Prosecutions v Walker (Ruling No 2) [2020] VSC 519 -
Director of Public Prosecutions v Walker (Ruling No 2) [2020] VSC 519 -
R v QX [2021] ACTSC 187 -
Director of Public Prosecutions v Walker (Ruling No 2) [2020] VSC 519 -
Gardiner v Attorney-General (No 3) [2020] VSC 516 -
R v Bell [2020] SADC 107 (07 August 2020) (Chapman J)

253. First, there was forensic advantage and disadvantage. The majority found 'the prosecution derive
advantage, which the examinations were expressly calculated to achieve, of compelling the appell
questions that they had lawfully declined to answer and thereby locking the appellants into a vers
from which they could not credibly depart at trial'. [208] The appellants suffered a forensic disad
locked into a version of events from which they could not credibly depart at trial.

via

[208] Ibid [75] .

R v Bell [2020] SADC 107 (07 August 2020) (Chapman J)

Smethurst v Commissioner of Police (2020) 376 ALR 575; *Strickland v Commonwealth Director of Public Prosecu* 8) 361 ALR 23 , discussed.

R v Bell [2020] SADC 107 (07 August 2020) (Chapman J)

251. The compulsory powers conferred on ACC examiners were available for use only for the purpose ACC investigation. 'Whatever the ambit of the ACC's powers, they are constrained by the ACC Ac only in the circumstances and only for the purposes for which the Act provides'. [204] The power available to be 'let out to the AFP whenever an AFP suspect declines to be interviewed, for the pur compelling the suspect to make admissions in relation to the offence of which he or she is suspect examinations were not held for the purpose of a special ACC investigation as there was no ACC in foot. Rather, they were held for an extraneous, unlawful purpose of assisting the AFP to compel th give answers to questions about offences of which they were suspected and had declined to be inte examinations were unlawful. [206] The ACC acted at all times simply as a facility for the AFP to cr appellants under oath for the AFP's own purposes. [207]

via

[207] Ibid [30] .

R v Bell [2020] SADC 107 -
R v Bell [2020] SADC 107 -
R v Bell [2020] SADC 107 -
R v Bell [2020] SADC 107 -
R v Bell [2020] SADC 107 -
R v Bell [2020] SADC 107 -
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R v Bell [2020] SADC 107 -
R v Bell [2020] SADC 107 -
R v Bell [2020] SADC 107 -
R v Bell [2020] SADC 107 -
Nguyen v The Queen [2020] HCA 23 (30 June 2020) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edeln

66. **Secondly**, a curious, even bizarre, attribute of a so-called pre-trial prosecutorial legal obligation to to tender a video record of interview is that it would be one that a trial judge would be incapable o judges have powers to enforce the prosecutor's duty to act fairly in order to ensure a fair trial with into the adversarial arena. Their powers include a range of directions and orders including, in the cases of unfairness, the grant of a permanent stay of proceedings where other measures cannot be ameliorate a substantial unfairness in the trial [92] . In contrast, a trial judge has no power to enfor pre-trial "obligation" to tender a video record of interview. As this Court said in *R v Apostilides* [93] , "cannot direct the prosecutor to call a particular witness". Nor could a trial judge direct a prosecut evidence is tendered. In *Apostilides* [94] , this Court also referred to discussion of Brinsden J in *Skub* 95] , including his Honour's quotation from Barwick CJ in *Ratten v The Queen* [96] :

> "[A criminal trial] is a trial, not an inquisition: a trial in which the protagonists are the Crow one hand and the accused on the other. Each is free to decide the ground on which it or he v

the issue, the evidence which it or he will call, and what questions whether in chief or in cro examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no part in that contest, having his own role to perform in e the propriety and fairness of the trial and in instructing the jury in the relevant law."

via

[92] *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 93 ALJR 1 at 23 [99]-[100] , 40 264]-[272] ; 361 ALR 23 at 49 , 71-72 , 86-88 ; *Director of Public Prosecutions (Cth) v Kinghorn* [2020] NSWCCA

Deputy Commissioner of Taxation v Shi [2020] FCAFC 100 (04 June 2020) (Davies, Lee and Stewart JJ)

110. *Fifthly*, and connected to the last two points, as Mr Shi correctly submits, any derivative use immu compulsorily acquired information, such as that which is provided for in s 128A(8) , is very difficult *amilton v Oades* (1989) 166 CLR 486 at 496 per Mason CJ; *Strickland* at 14 [61] per Kiefel CJ, Bell and N this is because derivative information is such that investigators and prosecutors may not even be a If the information was to be disclosed publicly (which would be quite possible if, for example, adm Privileged Affidavit were tendered on an application for the appointment of a receiver or some oth measure), a certificate is not a complete answer to this derivative use difficulty.

Deputy Commissioner of Taxation v Shi [2020] FCAFC 100 -
Deputy Commissioner of Taxation v Shi [2020] FCAFC 100 -
Deputy Commissioner of Taxation v Shi [2020] FCAFC 100 -
Henskens v Rudd [2020] NSWSC 533 -
R v Sutton (No. 4) [2020] ACTSC 106 -
R v Sutton (No. 4) [2020] ACTSC 106 -
R v Sutton (No. 4) [2020] ACTSC 106 -
R v Sutton (No. 4) [2020] ACTSC 106 -
R v Sutton (No. 4) [2020] ACTSC 106 -
Commonwealth v Helicopter Resources [2020] HCA 16 (24 April 2020) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Edelman JJ)

21. Finally, the Full Court supported their decision with reference to the plurality's conclusion in *Stric pseudonym) v Director of Public Prosecutions (Cth)* [27] that the unlawful examination of accused pers matters in relation to which they were likely to be charged would, as a matter of practical reality, f alter the position of those persons in subsequently instituted criminal proceedings. But the Full C that conclusion was misplaced. *Strickland* was concerned with grossly unlawful interrogation of pe known or believed would shortly be charged with criminal offences. In holding that the administr would be brought into disrepute unless the extraordinary remedy of a permanent stay of prosecut the plurality relied on that gross unlawfulness and the indeterminate element of incurable prejudi matter of practical reality, from the widespread, uncontrolled dissemination of the examination p to federal prosecutors.

Commonwealth v Helicopter Resources [2020] HCA 16 (24 April 2020) (Kiefel CJ, Bell, Gageler, Keane, Nettle, Edelman JJ)

15. But having so concluded, the Full Court then posed [10] for themselves the question "Does s 87 of t have the effect that [Helicopter Resources] is being so compelled?", which their Honours answered

"In our opinion, the crucial and dispositive consideration in relation to the issue of interfere Captain Lomas were compelled to give evidence in the inquest, as a matter of practical reali [Helicopter Resources'] position as an accused corporation in the criminal proceedings wou altered fundamentally [12] . That is because s 87(1)(b) of the ... *Evidence Act* would make his ev admissible, not merely as evidence of a witness of fact, but as evidence of an admission by [H Resources] itself."

via

[12] *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 93 ALJR 1 at 1819 [77]-[81] per and Nettle JJ ; 361 ALR 23 at 4243 .

Commonwealth v Helicopter Resources [2020] HCA 16 -
Commonwealth v Helicopter Resources [2020] HCA 16 -
Commonwealth v Helicopter Resources [2020] HCA 16 -
Commonwealth v Helicopter Resources [2020] HCA 16 -
Commonwealth v Helicopter Resources [2020] HCA 16 -
Director of Public Prosecutions (SA) v Jaunay & Anor [2020] SASCFC 25 (22 April 2020) (Kourakis CJ; Kelly ar

156. In *Strickland (a pseudonym) v Director of Public Prosecution (Cth)* [29] (*Strickland*), the High Court orc prosecution brought after the compulsory processes of the Australian Crime Commission were en behest of an investigating police officer without any lawful basis to examine the accused after they answer that police officer's questions. Kiefel CJ, Bell and Nettle JJ (the plurality) summarised the f Judge as follows: [30]

> [62] ... this case involved the deliberate, coercive questioning of suspects for the very reason that th exercised their right to decline a cautioned police interview, and thereby for the very purpose of achiev forensic disadvantage for the appellants and a forensic advantage for the prosecution in foreseen futur criminal prosecutions.

via

[30] *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 93 ALJR 1 at [62] .

Director of Public Prosecutions (SA) v Jaunay & Anor [2020] SASCFC 25 -
Director of Public Prosecutions (SA) v Jaunay & Anor [2020] SASCFC 25 -
Director of Public Prosecutions (SA) v Jaunay & Anor [2020] SASCFC 25 -
Director of Public Prosecutions (SA) v Jaunay & Anor [2020] SASCFC 25 -
Director of Public Prosecutions (SA) v Jaunay & Anor [2020] SASCFC 25 -
Director of Public Prosecutions (SA) v Jaunay & Anor [2020] SASCFC 25 -
Bazzo v Kirman [2020] WASCA 43 (07 April 2020) (Buss P, Mitchell JA, Beech JA)

60. In ***Strickland (a pseudonym) v Director of Public Prosecutions (Cth)*** , [45] four accused persons had be pre-charge compulsory examination by the Australian Crime Commission. It was held that the ex accused persons were not held for the purposes of a special ACC investigation, there being no AC foot. Rather, the examinations were 'for an extraneous, unlawful purpose of assisting the AFP to c [accused persons] to give answers to questions about offences of which they were suspected and h interviewed'. [46] Importantly, the purportedly compulsory examination was unlawful. The plur that the forensic disadvantage which would be suffered by the accused persons at trial, in conjunc relevant officer's 'unlawful, reckless disregard of his statutory responsibilities', meant that the cont prosecution would bring the administration of justice into disrepute. [47] The court restored an o prosecution be permanently stayed.

Bazzo v Kirman [2020] WASCA 43 -
Bazzo v Kirman [2020] WASCA 43 -
Bazzo v Kirman [2020] WASCA 43 -
Bazzo v Kirman [2020] WASCA 43 -
Bazzo v Kirman [2020] WASCA 43 -
Director of Public Prosecutions (Cth) v Kinghorn [2020] NSWCCA 48 (25 March 2020) (Bathurst CJ, Fullerton JJ)

24. The written submissions filed by the parties before the primary judge in relation to the stay motio one of the issues between the parties concerns the scope of *Leach* . During argument on the appeal for the CDPP, Mr Giles SC, stated that at the hearing of the stay motion the CDPP will not contenc wrongly decided. Instead, the CDPP will contend that *Leach* does not address the circumstance wh of a false statement during a s 264 examination is an element or an aspect of the charge. The CDPI as a matter of necessary intendment, a charge which involves or is constituted by the making of a f a s 264 examination does not engage the "accusatorial principle" or the "companion rule", ie, it doe being "required to testify to [prove] the commission of [the] charged offence" (*Strickland* at [95]) b testimony constitutes the commission of the charged offence.

Director of Public Prosecutions (Cth) v Kinghorn [2020] NSWCCA 48 (25 March 2020) (Bathurst CJ, Fullerton JJ)

23. Mr Kinghorn's stay motion seeks to invoke the "fundamental principle" (also described as the "acc principle"), that it is for the prosecution to prove the guilt of an accused person and its "companior accused person cannot be required to testify to the commission of a charged offence" (see *Stricklan Director of Public Prosecutions (Cth)* [2018] HCA 53; 93 ALJR 1 at [95] ; "Strickland"). On his behalf it is contended that the use of the s 264 information as part of his prosecution for offences under s 135.1 lates these principles. Mr Kinghorn places particular reliance on the judgment of the Queensland in *R v Leach* [2019] 1 Qd R 459; [2018] QCA 131 ("Leach"), in which a conviction for various fraud offe aside by reason of the possession, use and deployment by the prosecution of the transcript of an ex accused under s 264 of the *ITAA* .

Director of Public Prosecutions (Cth) v Kinghorn [2020] NSWCCA 48 -
Director of Public Prosecutions (Cth) v Kinghorn [2020] NSWCCA 48 -
CDirector of Public Prosecutions v Leach (No 3) [2020] QDC 42 (24 March 2020) (Smith DCJA)

328. I consider the reasoning of *Strickland* is of particular relevance to this case. I find there has been a alteration of the accusatorial nature of this trial; however, I do not consider the matter is irrevocab

CDirector of Public Prosecutions v Leach (No 3) [2020] QDC 42 (24 March 2020) (Smith DCJA)

50. The CDPP made the following oral submissions:

(a) The stay is opposed. There are other remedies available;[68]

(b) It was effectively conceded there was a problem with the formulation of the charges, and a quashing of the indictment was a course open to the court which would allow fresh "untainted" charges to be laid;[69]

(c) The crown did not accept it had the onus – it was for the defence to satisfy the court that a stay should be granted;[70]

(d) Even if there has been a disclosure of the interview, this does not necessarily lead to an exclusion of the evidence or a stay;

(e) As to Mr de Graff, it was submitted that the defence was not fully disclosed in the interview, e.g. at the trial it was put to him that he authorised the payment through a Power of Attorney ("POA"). The POA was never mentioned in the interview.[71] It was also submitted that evidence in relation to count 44 came from other sources;[72]

(f) In the exercise of the discretion, the evidence of Mr de Graff and Mr Lincoln-Smith would not be excluded in their entirety;[73]

(g) They could be directed not to mention the interview;

(h) As to Mr Fu, Ms McDonald knew about him before the interview particularly bearing in mind the defendant sent her documents about the trust which referred to him.[74] He would have been spoken to anyhow, and it is highly unlikely he would have admitted guilt. Again, his evidence could be edited to remove any prejudice;[75]

(i) It was conceded the CDPP will need to carefully consider whether to call Ms O'Bryan;

(j) Ms McDonald can still be called absent reference to the interview;

(k) It was submitted that *Strickland* is a far worse case than the present one. [76] In that case, there was a deliberate subverting of the right to silence and the police and ACC acted unlawfully, unlike here;

(l) The authorities do permit the use of derivative evidence – it is a question of discretion;[77] and

(m) It was stressed that if there were other remedies available, it was not necessary to decide any constitutional point.[78]

CDirector of Public Prosecutions v Leach (No 3) [2020] QDC 42 (24 March 2020) (Smith DCJA)

22. It is submitted that, by way of the compulsory interview, the defendant's right to silence was remo compulsory interview has been widely disseminated.[7] It is submitted that the defendant was for defence.[8] It is submitted that the CDPP's position is untenable in light of the decision of *Stricklan*

via

[9] *Strickland v Commonwealth Director of Public Prosecutions* (2018) 93 ALJR 1; (2018) 361 ALR 23; (2018 [2018] HCA 53 .

CDirector of Public Prosecutions v Leach (No 3) [2020] QDC 42 (24 March 2020) (Smith DCJA)

274. The following principles may be distilled from the cases:

(a) The prosecution ought not be provided with, nor make any use of, any evidence or information from compelled evidence which may tend to show that any documents or transactions, apparently regular on their face, in fact tend to support the charges; [287]

(b) The prosecution ought not be provided with, nor make any use of, any defences disclosed by the accused by compelled evidence; [288]

(c) The evidence which the prosecution is to call is not to be influenced by compelled evidence; [289]

(d) The accused can decide the course he or she will adopt at trial and answer to the charge only according to the strength of the evidence able to be led by the prosecution at the trial unaided by any of the matters identified in (a) to (c) above; [290]

(e) The accused is not to be compromised in the decision referred to in (d) by the unlawful subsequent use by the prosecutor of compelled evidence; [291]

(f) The prosecutor must prove the guilt of the accused and the accused may not be by compelled evidence, forced in any way, to confess his or her guilt; [292] and

(g) Consequently, the process for investigation, charge, prosecution and trial of the indictable offence is entirely accusatorial. [293]

via

[289] *X7* at [124] ; *Strickland v DPP* (2018) 361 ALR 23 [2018] HCA 53 at [76] .

CDirector of Public Prosecutions v Leach (No 3) [2020] QDC 42 (24 March 2020) (Smith DCJA)

259. The majority held that the accusatorial process had been fundamentally altered, and that such cor
heart of the criminal justice system. [276] The majority further held that it was no answer to the ma
prosecutors knew nothing of the examinations. This was because the lack of clear records made it
how and by whom the examinations had been used to build the case. [277] The examiner had acte
contravention of the law by allowing the AFP officers to watch the examinations. [278] The admini
had been brought into disrepute. [279]

via

[276] (2018) 93 ALJR 1; (2018) 361 ALR 23; (2018) 272 A Crim R 69; [2018] HCA 53 at [75]-[79] per Kiefel C
JJ .

CDirector of Public Prosecutions v Leach (No 3) [2020] QDC 42 -
CDirector of Public Prosecutions v Leach (No 3) [2020] QDC 42 -
CDirector of Public Prosecutions v Leach (No 3) [2020] QDC 42 -
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CDirector of Public Prosecutions v Leach (No 3) [2020] QDC 42 -
CDirector of Public Prosecutions v Leach (No 3) [2020] QDC 42 -
GH (a Pseudonym) v Independent Broad-based [2020] VSC 74 -
GH (a Pseudonym) v Independent Broad-based [2020] VSC 74 -
Armstrong v McIntosh [No 4] [2020] WASC 31 -
Armstrong v McIntosh [No 4] [2020] WASC 31 -
Armstrong v McIntosh [No 4] [2020] WASC 31 -
Armstrong v McIntosh [No 4] [2020] WASC 31 -
Armstrong v McIntosh [No 4] [2020] WASC 31 -
Armstrong v McIntosh [No 4] [2020] WASC 31 -
Armstrong v McIntosh [No 4] [2020] WASC 31 -
Schafer v Acting Deputy Commissioner Tony Wright [2020] QCAT 108 (23 January 2020) (Aughterson SM)

25. The applicant also submits that without a direction limiting the role of the Commission he would
'the prosecutor to the proceeding is'. [41] Reference was made to the decision in *Strickland (a pseudo*
, where observations were made in relation to potential prejudice where there is an intervener, in t
context of criminal proceedings. [42]

Schafer v Acting Deputy Commissioner Tony Wright [2020] QCAT 108 -
Schafer v Acting Deputy Commissioner Tony Wright [2020] QCAT 108 -
Director of Public Prosecutions (NSW) v Hamzy [2019] NSWCA 314 (19 December 2019) (Gleeson, Payne and H

Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions (Cth) [2018] HCA 53; (2018) 272 A C
106] ; *Jago v District Court (NSW)* (1989) 168 CLR 23; [1989] HCA 46 at 28, 30, 33-34, 47-48, 74, 76-77 ; *Walton v*
177 CLR 378; [1993] HCA 77 at 393-394, applied.

Director of Public Prosecutions (NSW) v Hamzy [2019] NSWCA 314 (19 December 2019) (Gleeson, Payne and H

52. The error in this finding was to conflate public confidence in the administration of justice "within
system" with public confidence in the administration of justice in this case and other cases: *Strickla*

Director of Public Prosecutions (NSW) v Hamzy [2019] NSWCA 314 (19 December 2019) (Gleeson, Payne and H

Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions (Cth) [2018] HCA 53; (2018) 272 A C
154] ; *Walton v Gardiner* (1993) 177 CLR 378; [1993] HCA 77 at 393, applied.

Director of Public Prosecutions (NSW) v Hamzy [2019] NSWCA 314 -
Director of Public Prosecutions (NSW) v Hamzy [2019] NSWCA 314 -
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Director of Public Prosecutions (NSW) v Hamzy [2019] NSWCA 314 -
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Director of Public Prosecutions (NSW) v Hamzy [2019] NSWCA 314 -
Director of Public Prosecutions (NSW) v Hamzy [2019] NSWCA 314 -
ZYX v JD [2019] WADC 164 (26 November 2019) (SLEIGHT CJDC)

110. Other than the orders for suppression and anonymisation as indicated in the previous paragraph, applications are dismissed.

I certify that the preceding paragraph(s) comprise the reasons for decision of the District Court of Weste

CG
Associate to Chief Judge Sleight

26 NOVEMBER 2019

JURISDICTION : DISTRICT COURT OF WESTERN AUSTRALIA

IN CIVIL

LOCATION: PERTH

CITATION : ZYX (pseudonym initials) -v- JD (pseudonym initials) [2019] WADC 164 (S)

CORAM : SLEIGHT CJDC

HEARD : 10 JUNE 2019

DELIVERED : 26 SEPTEMBER 2019

PUBLISHED : 7 FEBRUARY 2023

FILE NO/S : CIV 874 of 2019

BETWEEN : ZYX (pseudonym initials)

Plaintiff

AND

JD (pseudonym initials)

Defendant

WEST AUSTRALIAN NEWSPAPERS LTD and CHANNEL 7 PERTH PTY LTD

Intervener

Catchwords:

Civil procedure - Application to set aside writ of summons - Stay application - Right to silence in potenti
proceedings - Relevant principles - Whether criminal proceedings 'on the cards'

Civil procedure - Stay application - Delay - No limitation period - Relevant principles - Whether defenda
trial

Civil procedure - Suppression orders - Open justice principles in a civil case - Anonymisation of plaintiff
sexual abuse cases - Consequences of anonymising plaintiff's name - Whether defendant's name should
Whether full suppression order appropriate

Legislation:

District Court Rules 2005 (WA), r 71
Evidence Act 1906 (WA), s 36BD, s 36C
Limitation Act 2005 (WA), s 6A
Rules of the Supreme Court 1971 (WA), O 67B r 5

Result:

(a) Application for striking out and stay dismissed.
(b) Order that both plaintiff and defendant's name be anonymised.
(c) Partial suppression order only to protect the identity of the parties until judgment.

Representation:

Counsel:

Plaintiff : Mr T J Hammond
Defendant : Mr M J McPhee
Intervener : Mr A McCarthy

Solicitors:

Plaintiff : Rightside Legal
Defendant : MJ McPhee Barrister And Solicitor
Intervener : West Australian Newspapers Ltd

Case(s) referred to in decision(s):

ABC v D1 [2007] VSC 480

Anderson v Council of Trinity Grammar School [2018] NSWSC 1633

Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (N
FCA 609

Australian Securities and Investments Commission v Craigside Co Ltd [2013] FCA 201

Australian Securities and Investments Commission v Rich [2001] NSWSC 496

Batistatos v Roads and Traffic Authority of NSW (2006) 226 CLR 256; [2006] HCA 27

Broad Construction Services (WA) Pty Ltd v The Construction, Forestry, Mining and Energy Unio
Workers [2007] WASC 133

Carter v Walker [2010] VSCA 340

Citation Resources Ltd v Landau [2016] FCA 1114

Connellan v Murphy [2017] VSCA 116

Cunningham v Traynor [2016] WADC 168

Estate Judd v McKnight (No 4) [2018] NSWSC 1489

Gemmell v LeRoi Homestyle Cookies Pty Ltd (in Liq) (2014) 46 VR 583

Hogan v Hinch [2011] HCA 4; (2011) 243 CLR 506

Holt v Wynter [2000] NSWCA 143; (2000) 49 NSWLR 143

Jack Brabham Holdings v Minister for Industry, Technology and Commerce (Button) (1988) 85 ALI

John Fairfax & Sons Ltd v Police Tribunal (NSW) (1986) 5 NSWLR 465

John Fairfax Group Pty Ltd v Local Court of New South Wales (1991) 26 NSWLR 131

John Fairfax Publications Pty Ltd v District Court of New South Wales [2004] NSWCA 324; (2004)
344

Longman v The Queen [1989] HCA 60; (1989) 168 CLR 79; (1989) 89 ALR 161

McMahon v Gould (1982) 7 ACLR 202

Moti v The Queen [2011] HCA 50; (2011) 245 CLR 456

Moubarak by his tutor Coorey v Holt [2019] NSWCA 102

Patrick Jebb as trustee for the Trafalgar West Investments Trust v Superior Lawns Australia Pty Lt
WASC 121

Pennington v The State of Western Australia [2012] WASCA 85

R v Carroll (2002) 213 CLR 635; [2002] HCA 55

R v Davis (1995) 57 FCR 512

R v Edwards [2009] HCA 20

R v Millan [2018] WADC 110

R v Presser [1958] VR 45

R v Tait (1979) 46 FLR 386

Raybos Australia Pty Ltd v Jones (1985) 2 NSWLR 47

Re AWB Ltd; Australian Securities and Investments Commission v Flugge (2008) 222 FLR 240

Re Bromfield; Ex Parte West Australian Newspapers Ltd (1991) 6 WAR 153

Re Her Honour Chief Judge Kennedy, Ex parte West Australian Newspaper Ltd [2006] WASCA 17

Re Hogan, Ex parte West Australian Newspapers Ltd [2009] WASCA 221

Reid v Howard (No 2) (1995) 184 CLR 1

Rinehart v Welker [2011] NSWCA 403

Rogers v The Queen (1994) 181 CLR 251

Scott v Scott [1913] AC 417

Seven Network Ltd v News Ltd (No 9) (2005) 148 FCR 1

State of New South Wales v Ibbett [2006] HCA 57; (2006) 229 CLR 638

Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions [2018] HCA 53 ;
ALJR 1; (2018) 272 A Crim R 69

Walton v Gardiner (1993) 177 CLR 378

Whitfeld v De Lauret & Co Ltd (1920) 29 CLR 71

Williams v Spautz (1992) 174 CLR 509

XY v WA Country Health Service [No 2] [2016] WASC 245

SLEIGHT CJDC:

[Herron DCJ on 7 February 2023 in *ZYX (pseudonym initials) v Cable [No 3]* [2023] WADC 10 ordered that [19], [22], [23], [62], [64], [65], [106], [109(4)] and [109(7)] the suppression orders be lifted and the unredacted decision be published.]

ZYX v JD [2019] WADC 164 -
ZYX v JD [2019] WADC 164 -
ZYX v JD [2019] WADC 164 -
Te Waiti v The State of Western Australia [2019] WADC 159 (21 November 2019) (Sleight Cjdc)

Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions [2018] HCA 53

Te Waiti v The State of Western Australia [2019] WADC 159 (21 November 2019) (Sleight Cjdc)

30. In *Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* , [7] (*Strickland*) K Nettle JJ stated as follows: [8]

> Certainly, as this Court has stated repeatedly, a permanent stay of a criminal prosecution is an extraordinary will very rarely be justified. There is a powerful social imperative for those who are charged with criminal offe brought to trial and, for that reason, it has been said that a permanent stay of prosecution should only ever be where there is such a fundamental defect in the process leading to trial that nothing by way of reconstitution prosecutorial team or trial directions or other such arrangements can sufficiently relieve against the consequ defect as to afford those charged with a fair trial. But, as this Court has also stated, there is, too, a fundamenta concern to ensure that the *end* of a criminal prosecution does not justify the adoption of any and every *means* conviction and, therefore, a recognition that in rare and exceptional cases where a defect in process is so profo as to offend the integrity and functions of the court as such, it is necessary that proceedings be stayed in order the administration of justice falling into disrepute.
>
> (footnotes omitted)

via

[7] *Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* [2018] HCA 53 .

Te Waiti v The State of Western Australia [2019] WADC 159 -
Te Waiti v The State of Western Australia [2019] WADC 159 -
Te Waiti v The State of Western Australia [2019] WADC 159 -
PRS v Crime and Corruption Commission [2019] QCA 255 -
HT v The Queen [2019] HCA 40 -
Meneses v Directed Electronics OE Pty Ltd [2019] FCAFC 190 -
R v Kinghorn (No 4) [2019] NSWSC 1420 (18 October 2019) (Adamson J)

120. I note at the outset that the Commonwealth authorities acknowledged, in accordance with well-es principle, that the courts articulate the common law rather than make it. They accepted that the H articulation of the effects of the accusatory and companion principles in recent cases applies to all use of the s 264 examinations notwithstanding that the first disclosure occurred in 2007, before the which had been recognised in *Hammond v The Commonwealth* (1982) 152 CLR 188; [1982] HCA 42, w articulated in cases such as *X7* , *Lee (No 2)* and *Strickland* .

R v Kinghorn (No 4) [2019] NSWSC 1420 -

R v Kinghorn (No 4) [2019] NSWSC 1420 -
R v Kinghorn (No 4) [2019] NSWSC 1420 -
National Australia Bank Limited v Human Group Pty Ltd [2019] NSWSC 1404 -
ASIC v Helou [2019] FCA 1634 -
Hague v The Queen [2019] VSCA 218 (03 October 2019) (Ferguson CJ, Niall and Weinberg JJA)

113. Prosecutorial or investigative misconduct may also lead to a stay of criminal proceedings. [15] Alth submitted that the informant, Detective Senior Sergeant Iddles, played some impermissible role in identification parades and participated in the television program in a way that demonstrated his fi applicant's guilt, neither matter justified a stay. As to the first point, the evidence showed that pro practice entailed that police members who are responsible for investigating a crime not play an ac identification parades. However, it was not demonstrated that Mr Iddles transgressed the proper boundary. Further, the applicant was not identified in any identification parade, so any supposed could not have had an impact. There is no suggestion that the jury members either watched or we influenced by the television program.

via

[15] *Strickland (a pseudonym) v DPP (Cth)* [2018] HCA 53 ; *Lee v The Queen* (2014) 253 CLR 455.

Charles Hagan (a pseudonym)[1] v The Queen [2019] VSCA 200 -
Sandy v Yindjibarndi Aboriginal Corporation RNTBC [No 2] [2019] WASC 328 (11 September 2019) (LE Miere

60. In ***Strickland*** , Edelman J said that the notion of repute, or public confidence, is a construct that is c the systemic protection of the integrity of the court within an integrated system of justice. [23] Ed considered the notion of the integrity of the court in the context of a criminal proceeding, where th initiating and maintaining a criminal proceeding is vested in the executive and the function of hea determining the proceeding is vested in the courts. His Honour elaborated:

> The notion of the integrity of the court is a loose principle which is not easily applied to a pa case. This is one reason why it has been said in this area of law that forms of expression sho 'understood in the context of the particular facts of each case' and should not 'be read as atte chart the boundaries of abuse of process'. In a case of the nature of these appeals, the questi asked is whether, despite the substantial public interest in pursuing a trial of the accused, th be stayed due to the threat to the integrity of the court arising from the systemic incoherenc would result if the trial were allowed to proceed. That incoherence arises where the manne the case against the accused was developed and brought was contrary to basic tenets of the criminal justice system, as embodied in a statute. [24]

Sandy v Yindjibarndi Aboriginal Corporation RNTBC [No 2] [2019] WASC 328 (11 September 2019) (LE Miere

56. YAC says that this case falls within the third of those categories of abuse of process. The plaintiff r on the reasons for judgment of the members of the High Court in ***Strickland (a pseudonym) v Comm of Public Prosecutions*** (***Strickland***). [22]

via

[22] ***Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions*** (2018) 93 ALJR 1 .

Sandy v Yindjibarndi Aboriginal Corporation RNTBC [No 2] [2019] WASC 328 -
Sandy v Yindjibarndi Aboriginal Corporation RNTBC [No 2] [2019] WASC 328 -
Sandy v Yindjibarndi Aboriginal Corporation RNTBC [No 2] [2019] WASC 328 -
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Sandy v Yindjibarndi Aboriginal Corporation RNTBC [No 2] [2019] WASC 328 -
Sandy v Yindjibarndi Aboriginal Corporation RNTBC [No 2] [2019] WASC 328 -
Director of Public Prosecutions v Hazelwood Power Corporation Pty Ltd (Ruling 3) [2019] VSC 875 -
R v Du (No 2) [2019] ACTSC 241 -
R v Kinghorn (No 2) [2019] NSWSC 989 -
Director of Public Prosecutions v Abuk Kuol (Ruling No. 1) [2019] VCC 1143 -
Director of Public Prosecutions v Abuk Kuol (Ruling No. 1) [2019] VCC 1143 -
Director of Public Prosecutions v Abuk Kuol (Ruling No. 1) [2019] VCC 1143 -
Marwan v Director of Public Prosecutions [2019] NSWCCA 161 -
Forbes v Heffernan [2019] FCCA 1916 (17 July 2019) (Judge Brown)

46. In this context, Mr Doyle, counsel for Ms Forbes, relies on the High Court decision of *Strickland & Public Prosecutions (Cth).* [3] It is important to detail the factual situation, which led to the High Co earlier order leading to a permanent stay of a prosecution against the various appellants concerne assess the case's relevance to the current matter.

via

[3] *Strickland & Ors v Director of Public Prosecutions (Cth)* (2018) 361 ALR 23

Forbes v Heffernan [2019] FCCA 1916 -
Forbes v Heffernan [2019] FCCA 1916 -
Forbes v Heffernan [2019] FCCA 1916 -
Forbes v Heffernan [2019] FCCA 1916 -
O'Neill v Fairfax Media Publications Pty Ltd (No 2) [2019] NSWSC 655 -
CDirector of Public Prosecutions v Brady (costs) [2019] VSC 397 (26 June 2019) (Hollingworth J)

9. The court acknowledged that a permanent stay of a criminal prosecution is an extraordinary step, rarely be justified. However, in their joint judgment, Kiefel CJ, Bell and Nettle JJ said that 'where a is so profound as to offend the integrity and functions of the court ..., it is necessary that proceedin order to prevent the administration of justice falling into disrepute.' [6] Their Honours described t examinations as involving a 'grossly negligent disregard of statutory protections and fundamental being 'profoundly unlawful'. [8] They also concluded that a fair trial was not possible.

via

[8] *Strickland*, [90].

CDirector of Public Prosecutions v Brady (costs) [2019] VSC 397 (26 June 2019) (Hollingworth J)

105. Although the CDPP and ACC had a common interest in defending the stay application, and cross- of each other's submissions, their submissions were not identical. The plurality in the High Court the ACC's attempts to intervene in the High Court appeal, noting that where an accused is put on t criminal offence, the issues are joined between the Crown and the accused, and it is for the Crown the CDPP) and no one else to represent the community. Their Honours said that it would be unfa a putative offender to be required to meet two different cases where, as here, the Crown and the in as one in relation to the issues which the intervener seeks to agitate. [80] Although there was no c ACC intervening at first instance, the ACC accused were thereby put in a position where they had respond to two opponents to the stay application.

via

[80] *Strickland*, [109].

CDirector of Public Prosecutions v Brady (costs) [2019] VSC 397 (26 June 2019) (Hollingworth J)

9. The court acknowledged that a permanent stay of a criminal prosecution is an extraordinary step, rarely be justified. However, in their joint judgment, Kiefel CJ, Bell and Nettle JJ said that 'where a is so profound as to offend the integrity and functions of the court ..., it is necessary that proceedin order to prevent the administration of justice falling into disrepute.' [6] Their Honours described t examinations as involving a 'grossly negligent disregard of statutory protections and fundamental being 'profoundly unlawful'. [8] They also concluded that a fair trial was not possible.

via

[6] *Strickland*, [106].

CDirector of Public Prosecutions v Brady (costs) [2019] VSC 397 -
CDirector of Public Prosecutions v Brady (costs) [2019] VSC 397 -
CDirector of Public Prosecutions v Brady (costs) [2019] VSC 397 -
Application of Computer Sciences Corporation under the Evidence on Commission Act 1995 (NSW) [2019] NS
Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited [20
Deputy Commissioner of Taxation v Shi (No 3) [2019] FCA 945 -
Anglo American Investments Pty Ltd (Trustee) v Commissioner of Taxation [2019] FCA 1027 (03 June 2019) (L

18. In making those affidavits for the purposes of the present proceedings, Mr Gould must be taken to of the condition which would usually attend their use. More particularly, neither before nor after Commissioner sought the release from the implied undertaking in respect of the subject documen any application by Anglo American for the adjournment of the hearing of the taxation appeals pe and determination of the subject criminal proceedings. So the position in my view is quite differe compulsory examination before an examiner, pursuant to statute as considered in *Strickland* and *X*

Anglo American Investments Pty Ltd (Trustee) v Commissioner of Taxation [2019] FCA 1027 (03 June 2019) (L

16. It was put that Mr Gould, in respect of those proceedings, might be subject to the embarrassment by the prosecution of a forensic advantage by his being required in cross-examination to answer p questions based on the documents in respect of which release was sought by the Commissioner. T and more specifically the answers, so the submission went, would lock him into a particular versio which he could not credibly depart at his criminal trial. So a prejudice of the kind referred to in *St pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 93 ALJR 1 (***Strickland***), and *X7 v A Commission* (2013) 248 CLR 92 (***X7***) was set to be present.

Onley v Commissioner of the Australian Federal Police [2019] NSWCA 101 (10 May 2019) (Bathurst CJ, Basten

230. It is in this context that the reliance on what has been described as "inchoate prejudice" falls to be Consistently with what was said in *X7* at [124], *Lee No 2* at [31]-[38] and [42] and most recently in *Str* [101], the fact of the examination, even if kept secret, fundamentally alters the accusatorial judicial thus prejudicial to the accused person. There is thus prejudice in the present case.

Onley v Commissioner of the Australian Federal Police [2019] NSWCA 101 (10 May 2019) (Bathurst CJ, Basten

374. The circumstances of actual disclosure which arose in *Lee* were revealed in even more dramatic te Not only was the investigation undertaken by the Australian Crime Commission unlawful, becaus in accordance with the statutory requirements, but, involved "an extraordinarily wide-ranging, un dissemination of examination product to AFP officers involved in the investigation process, includ

would be required to give evidence at trial." [66] The majority [67] concluded that the course accep
requiring a fresh prosecution team with no knowledge of the contents of the compelled examinati
feasible, [68] or the continued prosecution would bring the administration of criminal justice into

Onley v Commissioner of the Australian Federal Police [2019] NSWCA 101 (10 May 2019) (Bathurst CJ, Basten

354. This reasoning does not advance the applicants' reliance on the reasoning in *X7* considered above.
, there was no statutory overriding of the "companion rule" of the general law, by which an accuse
not be compelled to answer questions regarding his or her involvement in alleged criminal condu
trickland , there was no statutory equivalent to s 319 of the *Proceeds of Crime Act* . At least for this pur
oes not affect the outcome of this case. (It will be considered further below in relation to questions
prejudice.)

Onley v Commissioner of the Australian Federal Police [2019] NSWCA 101 -
Onley v Commissioner of the Australian Federal Police [2019] NSWCA 101 -
Onley v Commissioner of the Australian Federal Police [2019] NSWCA 101 -
Onley v Commissioner of the Australian Federal Police [2019] NSWCA 101 -
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Onley v Commissioner of the Australian Federal Police [2019] NSWCA 101 -
Onley v Commissioner of the Australian Federal Police [2019] NSWCA 101 -
CXXXVIII v Commonwealth of Australia [2019] FCAFC 54 (03 April 2019) (Logan, Bromwich and Charleswort

88. After the primary judge dismissed the appellant's application for judicial review, the High Court d
judgment in ***Strickland** (a pseudonym) v Commonwealth Director of Public Prosecutions* [2018] HCA 53;
(Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). The issue in *Strickland* was wheth
examination powers had been validly exercised by the ACC for the purpose of a special ACC inves
determinations said by the ACC to support the exercise of the powers were the Australian Crime C
Special Investigation Authorisation and Determination (Financial Crimes) 2008 and the Australia
Commission Special Investigation Authorisation and Determination (Money Laundering) 2010. T
were expressed in similar terms to the Amended Instrument and were made in the exercise of the
the performance of the same functions at issue in this case.

CXXXVIII v Commonwealth of Australia [2019] FCAFC 54 (03 April 2019) (Logan, Bromwich and Charleswort

89. Pointedly, the instruments at issue in *Strickland* did not include within their coverage the particula
activity alleged to have been engaged in by a company in which the appellants were alleged to be i
appellants had been compulsorily examined in respect of the affairs of the company and the infor
in the examinations had led to the commencement of criminal proceedings against them. The que
each appeal were whether the ACC had acted in unlawful violation of each of the appellant's com
silence and, if so, whether the prosecutions should be permanently stayed. The respective judgme
their responses to the second question. There was however, a unanimous finding that the ACC ha
exercise coercive powers not for the purposes of an investigation in fact being conducted by the A
extraneous and improper purpose of aiding an investigation in fact being conducted by the Austra
Police (AFP). Kiefel CJ, Bell and Nettle JJ said (at [70]) that officers of the ACC had "acted at all tim
facility for the AFP to cross-examine the appellants under oath for the AFP's own purposes". In a
to this appeal, their Honours went on to say (at [71]):

> The determinations were incapable in and of themselves of constituting a special ACC investigati
> they amounted to authorisations for the conduct, in future, of investigations yet to be identified or
> undertaken and a stipulation that, if in future any such investigation were conducted, it would be
> ACC investigation. The question of whether such an investigation was conducted was a question
> the availability of the examination power depended on the existence of an investigation in fact. ...

CXXXVIII v Commonwealth of Australia [2019] FCAFC 54 -
CXXXVIII v Commonwealth of Australia [2019] FCAFC 54 -
Health Care Complaints Commission v Kirby [2019] NSWCATOD 47 -
CXXXVIII v Commonwealth of Australia [2019] FCAFC 54 -
CXXXVIII v Commonwealth of Australia [2019] FCAFC 54 -
CXXXVIII v Commonwealth of Australia [2019] FCAFC 54 -
PRS v Crime and Corruption Commission [2019] QSC 83 -
PRS v Crime and Corruption Commission [2019] QSC 83 -
PRS v Crime and Corruption Commission [2019] QSC 83 -
PRS v Crime and Corruption Commission [2019] QSC 83 -
McCleave v Chief of Navy [2019] ADFDAT 1 (21 February 2019) (Logan (President), Hiley (Member) and Garde

100. The processes open to the Australian Crime Commission under the ACC Act and considered by th
7 and in *Strickland v Commonwealth Director of Public Prosecutions* [2018] HCA 53 (***Strickland***) are sta
and exist for the very different reasons of collecting criminal information and intelligence, and inv
criminal activity (see ACC Act s 7A) .

McCleave v Chief of Navy [2019] ADFDAT 1 (21 February 2019) (Logan (President), Hiley (Member) and Garde

101. Under the ACC Act process, a person may be summonsed to give evidence and produce documen
examiner. The examination may be on oath or affirmation. It is an indictable offence, punishable b
imprisonment for the person appearing as a witness at an examination to refuse or fail to answer a
examiner requires the person to answer. If objection is taken to answering a question on the groun
might tend to incriminate the person or make the person liable to a penalty, the answer must none
but the answer is not admissible in evidence against the person in a criminal proceeding or procee
penalty, except for confiscation proceedings, or proceedings in respect of the falsity of an answer. .
examined or cross-examined on any matter that the examiner considers relevant by counsel assist
or any person authorised to appear, as well as a legal representative of the person at the examinati
30 ; *Strickland* at [9]–[13] per Kiefel CJ, Bell and Nettle JJ).

McCleave v Chief of Navy [2019] ADFDAT 1 -
McCleave v Chief of Navy [2019] ADFDAT 1 -
McCleave v Chief of Navy [2019] ADFDAT 1 -
McCleave v Chief of Navy [2019] ADFDAT 1 -
McCleave v Chief of Navy [2019] ADFDAT 1 -
McCleave v Chief of Navy [2019] ADFDAT 1 -
McCleave v Chief of Navy [2019] ADFDAT 1 -
Helicopter Resources Pty Ltd v Commonwealth of Australia [2019] FCAFC 25 (15 February 2019) (Rares, McKe
Robertson JJ)

169. In *Strickland* , Kiefel CJ, Bell, Keane, Nettle and Edelman JJ (Gageler and Gordon JJ, dissenting) all
from the Court of Appeal of the Supreme Court of Victoria which had allowed appeals from order
judge permanently staying prosecutions of the appellants for offences contrary to the *Criminal Coa*
some cases, contrary to s 83(1)(a) of the *Crimes Act 1958* (Vic) . The appellants were compulsorily exa
ACC in 2010 prior to being charged with those offences. The principal issue in each appeal was wh
acted so much in disregard of the requirements of Div 2 of Pt II of the *ACC Act* , and therefore in un
of each appellant's common law right to silence, that the prosecutions should be stayed.

Helicopter Resources Pty Ltd v Commonwealth of Australia [2019] FCAFC 25 -
Helicopter Resources Pty Ltd v Commonwealth of Australia [2019] FCAFC 25 -
Helicopter Resources Pty Ltd v Commonwealth of Australia [2019] FCAFC 25 -

Helicopter Resources Pty Ltd v Commonwealth of Australia [2019] FCAFC 25 -
Helicopter Resources Pty Ltd v Commonwealth of Australia [2019] FCAFC 25 -
Helicopter Resources Pty Ltd v Commonwealth of Australia [2019] FCAFC 25 -
Helicopter Resources Pty Ltd v Commonwealth of Australia [2019] FCAFC 25 -
Commonwealth Director of Public Prosecutions v Christian [2019] FCAFC 5 -
Le v The Queen [2019] WADC 11 (24 January 2019) (Sleight Cjdc)

51. A very recent decision of the High Court in ***Tony Strickland (a pseudonym) v Commonwealth Directo Prosecutions*** [44] concerning an application for a permanent stay, to some extent resonates with the against the accused in 294 of 2016. The case before the High Court concerned a major investigation number of individuals who were suspected of engaging in elaborate money laundering activities to receipt of large sums of cash from illicit activities. The primary judge made a finding that interview the Australian Crime Commission (ACC) were conducted in breach of the ACC's statutory obligat ACC had been driven by requests of the AFP for the purposes of its investigation. The ACC used i powers of interview to obtain for the AFP admissions from the appellants concerning alleged mon activities. The primary judge found that although the breach of the statutory obligations was not d officers of the ACC were reckless as to the discharge of their statutory obligations to an unacceptal that by virtue of the admissions obtained had jeopardised the appellants receiving a fair trial. [45] combination of the forensic disadvantage to which the appellants suffered as a result of the unlaw examination product, together with the need to protect public confidence in the administration of the primary judge to order a permanent stay. The High Court upheld an order made by the prima permanent stay of the prosecutions against the appellants. The plurality in its decision cited with judgment of Kirby J in ***Truong v The Queen*** [46] wherein His Honour stated as follows:

> [R]elief is not confined to cases of deliberate and knowing misconduct, although that may be to enliven the jurisdiction. It extends to serious cases where, whatever the initial motivation purpose of the offending party, and whether deliberate, reckless or seriously negligent, the r which the courts, exercising the judicial power, cannot tolerate or be part of. [47]

via

[44] ***Tony Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions*** [2018] HCA 53 .

Le v The Queen [2019] WADC 11 (24 January 2019) (Sleight Cjdc)

54. Justice Edelman in a separate judgment also upheld the primary judge's order for a permanent sta but emphasised that before a permanent stay can be ordered, it is necessary to consider whether th curial measures that can be taken to address 'any systemic incoherence that would be caused by a accused'. [50]

via

[50] ***Strickland*** [264] .

Le v The Queen [2019] WADC 11 -
Le v The Queen [2019] WADC 11 -
Le v The Queen [2019] WADC 11 -
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Le v The Queen [2019] WADC 11 -
Le v The Queen [2019] WADC 11 -
Le v The Queen [2019] WADC 11 -
Palmer v The State of Western Australia [2018] WASCA 225 -

CDirector of Public Prosecutions v Boillot [2018] VSC 739 -
CDirector of Public Prosecutions v Boillot [2018] VSC 739 -
CDirector of Public Prosecutions v Boillot [2018] VSC 739 -
Perera v GetSwift Ltd [2018] FCAFC 202 -