IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **No S100 of 2012**

BETWEEN:

X7
Plaintiff

and

AUSTRALIAN CRIME COMMISSION
First Defendant

COMMONWEALTH OF AUSTRALIA
Second Defendant

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR VICTORIA (INTERVENING)

PART I. CERTIFICATION

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

PART II. BASIS AND NATURE OF INTERVENTION

2. The Attorney-General for Victoria intervenes in this proceeding pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the defendants.

PART III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV. CONSTITUTIONAL AND LEGISLATIVE PROVISIONS

4. It is not necessary to add to the applicable statutory provisions reproduced in the annexure to the second defendant's submissions.

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Filed on behalf of: Attorney-General for the State of Victoria

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PART V. STATEMENT ADDRESSING THE ISSUES

A. Summary of argument

5. These submissions are directed to the second question stated for the consideration of the Court, namely "Is Division 2 of Part II of the *Australian Crime Commission Act 2002* (Cth) invalid as contrary to Ch III of the Constitution?".

6. This question arises for consideration only in the event that the Court affirmatively answers the first question stated for the consideration of the Court. That is, the question of the validity of Division 2 of Part II only arises if the Court finds that those provisions empower an examiner appointed under the *Australian Crime Commission Act 2002* (Cth) (the **ACC Act**) to conduct an examination of a person concerning the subject matter of a Commonwealth indictable offence with which that person has already been charged.

7. In summary, Division 2 of Part II of the ACC Act is not contrary to Ch III of the Constitution. Its provisions are neither inconsistent with the essential character of a court nor inconsistent with the nature of judicial power. Further, the provisions of Division 2 of Part II of the ACC Act are not inconsistent with any of the essential features of trial by jury that are guaranteed by s 80 of the Constitution.

8. The second question stated for the consideration of the Court should therefore be answered "no".

B. Division 2 of Part II is neither inconsistent with the essential character of a court nor the nature of judicial power

(1) The requirements of Ch III

9. Chapter III is based on fundamental assumptions about the rule of law and the independence of courts and judges.[1] It mandates the separation of federal judicial power from federal executive and legislative power so that Ch III courts can only exercise judicial power and powers ancillary to the exercise of that power. It guarantees the institutional integrity of State courts so that they may fulfil their

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1 *South Australia v Totani* (2010) 242 CLR 1 at 21 [4] (French CJ).

function of exercising federal jurisdiction in the integrated national judicial system of which they are part.[2]

10. A law that requires or authorises the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner that is inconsistent with the essential character of a court or with the nature of judicial power will therefore offend Ch III.[3]

11. Whilst it is "neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court",[4] the essential character of a court derives from matters such as the reality and appearance of the court's independence and impartiality, the application of procedural fairness and general adherence to the open court principle.[5] This includes the capacity of a court independently and impartially to conduct a criminal trial.[6]

12. A court in which criminal jurisdiction under a law of the Commonwealth is vested pursuant to Ch III exercises the judicial power of the Commonwealth when it adjudges and punishes criminal guilt.[7]

13. In this context, Gaudron J has described consistency with the essential character of a court and with the nature of judicial power as necessitating the determination of guilt or innocence by means of a "fair trial according to law".[8]

14. However, the variation or replacement of common law procedural rights or entitlements available to an accused person during a criminal trial will not necessarily

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2 *South Australia v Totani* (2010) 242 CLR 1 at 21 [4] (French CJ).

3 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 26-27 (Brennan, Deane and Dawson JJ).

4 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64] (Gummow, Hayne and Crennan JJ).

5 *Wainohu v New South Wales* (2011) 243 CLR 181 at 208-209 [44] (French CJ and Kiefel J). In the context of a hearing by a judge alone, the essential characteristics were also said to include the giving of reasons for decisions: see 208-209 [44]. See also *South Australia v Totani* (2010) 242 CLR 1 at 43 [62] (French CJ).

6 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [64] (Gummow, Hayne and Crennan JJ).

7 *Nicholas v The Queen* (1998) 193 CLR 173 at 187 [17] (Brennan CJ).

8 *Nicholas v The Queen* (1998) 193 CLR 173 at 208-209 [74]. In *Thomas v Mowbray* (2007) 233 CLR 307 at 355 [111], Gummow and Crennan JJ were prepared to assume that this meant that legislation requiring a court exercising federal jurisdiction to depart to a significant degree from the methods and standards that have characterized judicial activities in the past *may* be repugnant to Ch III, but their Honours did not suggest any automatic repugnancy in such cases.

be repugnant to Ch III. Legislation may alter the rules of evidence and procedure in civil and criminal courts in ways that depart, even radically, from the traditional judicial process without compromising the institutional integrity of the courts that must administer that legislation.[9] For example:

(a) the choice of the standard or burden of proof may be fixed by the Parliament without offending Ch III;[10]

(b) the privilege against self-incrimination may be abrogated, as it does not constitute "an integral element of the exercise of the judicial power reposed in the courts by Ch III;[11]

10 (c) Parliament may also change the law governing pre-trial disclosure of defences, as witnessed by longstanding statutory requirements for the disclosure of details of alibi defences,[12] and more recent reforms directed to efficient administration of criminal justice.[13]

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9 *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 at 601 [41] (McHugh J). As to the Commonwealth legislative power to alter the rules of evidence in federal criminal cases, see *Nicholas v The Queen* (1998) 193 CLR 173 at 189 [23] (Brennan CJ), 203 [55] (Toohey J), 273 [235] (Hayne J); see also 232 [143], 234-235 [152] (Gummow J).

10 *Thomas v Mowbray* (2007) 233 CLR 307 at 356 [113] (Gummow and Crennan JJ) and the cases cited therein. In relation to the power to enact "reverse onus" provisions, see *Nicholas v The Queen* (1998) 193 CLR 173 at 190 [24] (Brennan CJ), 203 [55] (Toohey J), 234-236 [152]-[156] (Gummow J) and 225 [123] (McHugh J); see also *Milicevic v Campbell* (1975) 132 CLR 307 at 316-317 (Gibbs J), 318-319 (Mason J) and 321 (Jacobs J).

11 *Sorby v Commonwealth* (1983) 152 CLR 281 at 308 (Mason, Wilson and Dawson JJ).

12 See for example, *Crimes Act 1976* (Vic), s 4 (inserting s 399A into the *Crimes Act 1958* (Vic); see now *Criminal Procedure Act 2009* (Vic), s 190); *Crimes and Other Acts (Amendment) Act 1974* (NSW), s 8 (inserting s 405A into the *Crimes Act 1900* (NSW); see now *Criminal Procedure Act 1986* (NSW), s 150); *Criminal Code and the Justices Act Amendment Act 1975* (Qld), s 22 (inserting s 590A into the *Criminal Code* (Qld); *Criminal Law Consolidation Act Amendment Act (No.2) 1984* (SA), s 2 (inserting s 285C into the *Criminal Law Consolidation Act 1935* (SA)). The United States Supreme Court has held that the requirement to give notice of an alibi defence does not breach the privilege against self-incrimination as provided for in the Fifth Amendment to the United States Constitution: *Williams v Florida* (1970) 399 US 78 at 85 (White J, for the Court: "Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense"); see also *Macdonald v Australian Securities and Investments Commission* (2007) 73 NSWLR 612 at 622-623 [61]-[63] (Mason P), 626 [77] (Giles JA); see also at 617 [24] (Spigelman CJ).

13 See, for example, *Criminal Procedure Act 2009* (Vic), ss 182-185 (pre-trial disclosure generally), 189 (notice of expert evidence for defence); *Criminal Procedure Act 1986* (NSW), ss 141-147 (pre-trial disclosure), 151 (notice of mental impairment evidence in murder trials); *Criminal Code* (Qld), s 590B (notice of expert evidence for defence); *Criminal Law Consolidation Act 1935* (SA), ss 285BA (notice to defendant to admit facts), 285BB (notice of certain kinds of defence evidence), 285BC (notice of expert evidence for defence).

(2) Division 2 of Part II does not impact on the determination of guilt or innocence by means of a "fair trial according to law"

15. The provisions in Division 2 of Part II of the ACC Act neither prevent, nor otherwise impact upon, the determination of guilt or innocence of an accused person who has been subject to an examination under the ACC Act by way of a fair trial according to law. Furthermore, they do not constrain the capacity of a court independently and impartially to conduct a criminal trial. This is because the provisions of Division 2 of Part II do not:

(a) permit an examination of a person for the purposes of advancing a criminal prosecution; or

(b) remove, abrogate or otherwise constrain the mechanisms available to a court to ensure that a trial is conducted fairly and in accordance with law, and to prevent the trial from continuing in circumstances where this is not possible.

16. The provisions of Division 2 of Part II contemplate examinations continuing in the face of pending charges.[15] They contain a number of safeguards to avoid risk to a fair trial of those pending charges. These safeguards form part of a comprehensive statutory scheme for the conduct of examinations and the use of evidence obtained during the course of an examination.[16]

(a) An examiner[17] is only permitted to conduct an examination for the purposes of a special ACC operation/investigation.[18]

(b) An examiner is only permitted to summon a person to appear before an examiner at an examination to give evidence and to produce documents for the purposes of a special ACC operation/investigation.[19]

(c) A special ACC operation/investigation is an "intelligence operation" that the ACC is undertaking and that the Board of the ACC has determined to be a special operation, or an investigation into matters relating to "federally relevant

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15 *ACC v OK* (2010) 185 FCR 258 at 278 [110] (Emmett and Jacobson JJ).

16 A similar scheme operates in Victoria in relation to examinations concerning organised crime offences by the Chief Examiner under the *Major Crime (Investigative Powers) Act* 2004 (Vic).

17 Defined in s 4(1) to mean a person appointed under s 46B(1).

18 Section 24A.

19 Section 28(1) and (7).

criminal activity" that the ACC is conducting and that the Board of the ACC has determined to be a special investigation.

(d) An intelligence operation is an operation that is primarily directed towards the collection, correlation, analysis or dissemination of criminal information and intelligence relating to "federally relevant criminal activity", but that may involve the investigation of matters relating to federally relevant criminal activity.

(e) Federally relevant criminal activity is any circumstances implying, or any allegations, that "serious and organised crime"[20] or indigenous violence or child abuse[21] may have been, may be being, or may in future be, committed against a law of the Commonwealth, of a State or of a Territory, where the relevant crime is an offence against a law of the Commonwealth or of a Territory, or an offence against a law of the State and has a "federal aspect".[22]

(f) An examination before an examiner must be held in private.[23] The examiner may give directions as to the persons who may be present during the examination or a part of the examination.[24] However, the examiner cannot prevent the presence of a person representing the person giving evidence when evidence is being taken at the examination.[25]

(g) If a person (other than a member of the staff of the ACC) is present at an examination while a person is being examined, 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.[26]

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20 Defined in s 4(1).

21 Defined in s 4(1).

22 See the definitions of "federally relevant criminal activity", "relevant crime" and "relevant criminal activity" in s 4(1). Section 4A(2) prescribes the circumstances in which a State offence has a "federal aspect".

23 Section 25A(3).

24 Section 25A(3).

25 Section 25A(4)(a) and (2)(a).

26 Section 25A(7).

(h) At the examination, the examiner may require a witness to take an oath or make an affirmation, or to produce a document or other thing.[27] However, this can only be done for the purposes of a special ACC operation/investigation.[28] In addition, a witness can only be examined or cross-examined on matters that the examiner considers relevant to the ACC operation/investigation.[29]

(i) A witness is not permitted to refuse or fail to answer a question or produce a document or thing.[30] To this extent, the witness' privilege against self-incrimination is abrogated.[31] However, where a witness gives an answer or produces documents or things, that answer and those documents or things are not admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty,[32] as long as before answering the question or producing the document or thing, the person claims that the answer, document or thing might tend to incriminate him or her or make him or her liable to a penalty.[33]

(j) The examiner must give a direction that any evidence before him or her, or the contents of any document, or a description of any thing produced to him or her, or any information that might enable a person who has given evidence to be identified, or the fact that any person has given or may be about to give evidence at an examination, not be published, or must not be published except in a certain manner, if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been or

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27 Section 28(4) and (5).

28 Section 28(7).

29 Section 25A(6).

30 Section 30(2).

31 See, for example, *R v CB; MP v R* [2011] NSWCCA 264 at [97] (McClellan CJ at CL); *ACC v OK* (2010) 185 FCR 258 at 273 [91] (Emmett and Jacobson JJ); *ABC v Sage* (2009) 175 FCR 319 at 328 [22] (Jessup J); *A v Boulton* (2004) 136 FCR 420 at 438 [66] (Kenny J, with whom Beaumont and Dowsett JJ agreed). It is beyond the power of the courts to maintain unimpaired common law freedoms that the Commonwealth Parliament, acting within its constitutional powers, has, by clear statutory language, abrogated, restricted or qualified: see *South Australia v Totani* (2010) 242 CLR 1 at 28-29 [31] (French CJ) and the cases cited therein.

32 Other than confiscation proceedings, or a proceeding in respect of the falsity of the answer or any statement contained in the document produced.

33 Section 30(4) and (5).

may be charged with an offence.[34] Such a direction overrides the obligation imposed on the ACC, the CEO or the Board of the ACC by ss 12 and 59 of the ACC Act to assemble and give evidence or disseminate and furnish information or reports.[35]

(k) Whilst the CEO of the ACC is empowered to vary or revoke such a direction, he or she must not do so if it might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been or may be charged with an offence.[36]

(l) Publication in contravention of such a direction (as well as presence at an examination in contravention of a direction as to the persons who may be present during the examination) is an offence.[37]

(m) The examiner is only required to give a record of the proceedings of the examination and any documents or other things given to the examiner at or in connection with the examination, to the head of the special ACC operation/investigation.[38]

17. The provisions of Division 2 of Part II therefore manage the risk of prejudice to a fair trial of pending charges by confining the persons to whom answers given by a witness in an examination can be disclosed, not by confining the questions that might be put to the witness.[39] Examination on a subject matter related to a pending charge may only continue so long as the protective prohibitions contemplated by s 25A(3) and (9) have been put in place.[40]

18. In this way, the provisions of Division 2 of Part II are "manifestly calculated to reduce to the minimum the prospect that evidence given in an examination will find its way into the hands of authorities or persons other than those to whom, in accordance with

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34 Section 25A(9). A provision in substantially identical terms appears in the *Major Crime (Investigative Powers) Act* 2004 (Vic): see s 43(1) and (2).

35 See s 12(2) of the ACC Act, inserted by *Crimes Legislation Amendment (Powers and Offences) Act 2012* (Cth) and *ACC v OK* (2010) 185 FCR 258 at 278 [111] (Emmett and Jacobson JJ).

36 Section 25A(10) and (11).

37 Section 25A(14).

38 Section 25A(15).

39 *ACC v OK* (2010) 185 FCR 258 at 277 [107] (Emmett and Jacobson JJ).

40 *ACC v OK* (2010) 185 FCR 258 at 277 [107], 278 [110] (Emmett and Jacobson JJ).

directions given by an examiner, it is limited".[41] They operate to protect the fairness and integrity of extant trials by preserving them from the effect of their statutory qualification of the "right to silence".[42] No such provisions operated in *Hammond v Commonwealth*,[43] a case in which this Court restrained the further questioning before a Royal Commission of a person who had been committed for trial in the County Court of Victoria, on the basis that the questioning would constitute a contempt of the County Court.

19. Whilst Division 2 of Part II contains no express statutory prohibition on derivative use of material obtained during an examination,[44] its protective provisions (including the provisions concerning confidentiality directions) create a regime designed to ensure that no derivative use can arise.[45]

20. However, if a situation arises where the protective provisions are ineffective so that evidence given in an examination finds its way into the hands of prosecution authorities, Division 2 of Part II does not displace any of the ordinary mechanisms available to a court to deal with unfairness occasioned by that derivative use. These include the discretionary power to exclude evidence at the trial, to give directions to the jury and to grant a stay of the criminal trial. Thus, in *R v Seller; R v McCarthy*,[46] the Supreme Court of New South Wales stayed criminal proceedings against two accused persons in circumstances where information obtained during ACC examinations of Mr Seller and Mr McCarthy had been made available to the prosecution in contravention of directions given by an examiner.

21. The provisions of Division 2 of Part II also do not change the rights and privileges of an accused at a criminal trial. The onus of proof still lies on the prosecution. The accused cannot be made to testify in or in connection with the trial to the commission

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41 *ABC v Sage* (2009) 175 FCR 319 at 331 [29] (Jessup J).

42 *R v CB; MP v R* [2011] NSWCCA 264 at [97] (McClellan CJ at CL, with whom Buddin and Johnson JJ agreed).

43 (1982) 152 CLR 188.

44 See, for example, *A v Boulton* (2004) 204 ALR 598 at 616 [100] (Weinberg J).

45 *R v CB; MP v R* [2011] NSWCCA 264 at [100], [110] (McClellan CJ at CL, with whom Buddin and Johnson JJ agreed); *ACC v OK* (2010) 185 FCR 258 at 278 [113] (Emmett and Jacobson JJ).

46 [2012] NSWSC 934.

of the offence charged.[47] To the extent that there is a "parallel executive interrogation",[48] it is not one that is capable of leading to any finding of guilt, any conviction, or any punishment of the accused.[49]

22. Apart from the protections for which the ACC Act provides and the ability of a trial court to control its procedures to ensure a fair trial and to prevent abuse of its processes, it is also possible for a person subject to charge to approach a superior court seeking to restrain an examination (of themselves or anybody else) if the person apprehends that the examination threatens to constitute a contempt of the court in which the criminal proceeding is pending. *Hammond v Commonwealth* demonstrates the ability of the courts to prevent contempts of court in such circumstances.[50] Nothing in the ACC Act cuts across that ability, or requires a court to conduct a trial that is unfair or that would involve an abuse of its processes.

(3) Division 2 of Part II is not inconsistent with s 80

23. Section 80 of the Constitution entrenches the essential features or characteristics[51] of a trial by jury, which it prescribes as the "method of trial"[52] or "mode of criminal procedure"[53] for Commonwealth offences tried on indictment. The meaning and essence of the requirement contained in s 80 is that a jury, and not a judicial officer, shall pronounce upon the guilt or innocence of an accused who is tried on indictment with a Commonwealth offence.[54]

24. Section 80 says nothing about the rules of evidence or criminal procedure that are to be applied during a trial by jury. Thus, abrogation of the privilege against self-

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47 See *R v CB; MP v R* [2011] NSWCCA 264 at [100] (McClellan CJ at CL, with whom Buddin and Johnson JJ agreed).

48 See the plaintiff's submissions at p 16.

49 See *R v CB; MP v R* [2011] NSWCCA 264 at [101] (McClellan CJ at CL, with whom Buddin and Johnson JJ agreed).

50 (1982) 152 CLR 188. Brennan J expressly left open the question of the power of the Parliament to deprive an accused of the privilege against self-incrimination while standing charged with an offence: at 203; Deane J stated that Parliament could not "prevent or prejudice" the exercise of the judicial power of the Commonwealth by interference constituting a contempt of court: at 206.

51 See, for example, *Ng v The Queen* (2003) 217 CLR 521 at 526 [9] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ), citing *Brownlee v The Queen* (2001) 207 CLR 278.

52 See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375 (O'Connor J), cited in numerous cases, including *R v LK* (2010) 241 CLR 177 at 198 [36] (French CJ).

53 See *Brownlee v The Queen* (2001) 207 CLR 278 at 284 [6] (Gleeson CJ and McHugh J).

54 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 386 (Isaacs J).

incrimination has been held not to be inconsistent with the right of trial by jury in the case of Commonwealth cases tried on indictment.[55]

25. The essential features of a trial by jury concern the manner in which a jury is formed and goes about its business.[56] They include the requirement that the panel of jurors be randomly or impartially selected,[57] that the members of the jury be representative of the community,[58] that the jury be comprised of impartial lay decision-makers[59] and that the jury deliver a unanimous verdict.[60]

26. Contrary to the plaintiff's submission, s 80 does not guarantee any "immunity against parallel executive interrogation once a person has been charged".[61] The existence of any such immunity is a matter of substantive law, not a matter concerning the composition, selection of, or decision-making processes of a jury. It has not been (and could not be) described as an essential requirement of the method of trial by jury.

27. The statement of Murphy J in *Hammond* on which the plaintiff relies is not accompanied by any reasoned analysis. It predates much of the learning of this Court on the essential features of the method of trial by jury. In light of that learning, the statement cannot be used to support the extension of the jurisprudence concerning s 80 into matters of substantive law, including matters concerning the conduct of the executive outside the trial process.[62]

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55 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 358 (Griffith CJ), 375 (O'Connor J) and 386 (Isaacs J).

56 See *R v JS* (2007) 175 A Crim R 108 at 138 [170] (Mason P).

57 See *Cheatle v The Queen* (1993) 177 CLR 541 at 560-561 (the Court); *Brownlee v The Queen* (2001) 207 CLR 278 at 289 [22] (Gleeson CJ and McHugh J) and 299 [56] (Gaudron, Gummow and Hayne JJ); *Katsuno v The Queen* (1999) 199 CLR 40 at 64-65 [50]-[51] (Gaudron, Gummow and Callinan JJ) and 69 [67] (Kirby J); *Ng v The Queen* (2003) 217 CLR 521 at 534 [37] (Kirby J).

58 See *Cheatle v The Queen* (1993) 177 CLR 541 at 560-561 (the Court); *Brownlee v The Queen* (2001) 207 CLR 278 at 299 [56] (Gaudron, Gummow and Hayne JJ) and 321 [125] (Kirby J).

59 *Cheatle v The Queen* (1993) 177 CLR 541 at 549 and 560 (the Court); *Brownlee v The Queen* (2001) 207 CLR 278 at 289 [22] (Gleeson CJ and McHugh J), 299 [57] (Gaudron, Gummow and Hayne JJ); *Ng v The Queen* (2003) 217 CLR 521 at 534 [37] (Kirby J).

60 In the sense of a unanimous verdict of all the persons constituting the jury at the time the verdict is pronounced: see *Cheatle v The Queen* (1993) 177 CLR 541 at 548, 550, 552-553 and 562 (the Court); *Brownlee v The Queen* (2001) 207 CLR 278 at 284 [5] (Gleeson CJ and McHugh J) and 297 [52] (Gaudron, Gummow and Hayne JJ); *Ng v The Queen* (2003) 217 CLR 521 at 533 [37] (Kirby J).

61 Plaintiff's submissions at pp 16 [VI.12] and 17 [VI.14].

62 Murphy J said: "He has a constitutional right to trial by jury (see Constitution, s.80). It is inconsistent with that right that he now be subject to interrogation by the executive government or that his trial be prejudiced in any other manner. I would take this view whether or not he has privilege against self-incrimination": *Hammond v Commonwealth* (1982) 152 CLR 188 at 201.

PART VI. ESTIMATE OF TIME FOR ORAL ARGUMENT

28. It is estimated that approximately 20 minutes will be required for the presentation of oral submissions for the Attorney-General for Victoria.

Dated: 26 October 2012

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