SUPREME COURT OF QUEENSLAND

CITATION:	*Commonwealth Director of Public Prosecutions v Clarke (a pseudonym)* [2026] QCA 219
PARTIES:	**COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (appellant) v **JULIE CLARKE (a pseudonym)** (respondent)
FILE NO/S:	CA No 273 of 2025 SC No 425 of 2025
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Appeal – Criminal
ORIGINATING COURT:	Supreme Court at Brisbane - [2025] QSCPR 17 (Smith J)
DELIVERED ON:	30 October 2026
DELIVERED AT:	Brisbane
HEARING DATE:	18 June 2026; 19 June 2026
JUDGES:	Bond JA, Brown JA, Bradley JA
ORDERS:	**1. Appeal allowed in part.** **2. The order of 3 October 2025 is set aside and in lieu thereof it is ordered that the prosecution of the respondent on the charge under sections 134.2(1) and 11.1 of the *Criminal Code 1995* (Cth) be stayed and not proceeded with without an order of the District Court.** **3. Any application for an order permitting the prosecution to proceed on undertakings to the Court offered by the appellant must be made within 90 days of the date of this order.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – ABUSE OF PROCESS – IN GENERAL – where the primary judge ordered a permanent stay of the prosecution of the respondent on an indictment – whether the primary judge erred in concluding a compulsory examination ostensibly conducted under s 353-10 of schedule 1 of the *Taxation Administration Act 1953* (Cth) was for a substantially unlawful purpose – where numerous acts of misconduct were found to have been committed by the investigating agency – whether the primary judge erred in concluding a stay was warranted to prevent

oppression to the accused or protect public confidence in the administration of justice

Criminal Code (Cth), s 11.1, s 134.2(1)
Criminal Code (Qld) s 590AA(2)(a), s 669A(1A)
Director of Public Prosecutions Act 1983 (Cth), s 9(7)
Income Tax Assessment Act 1997 (Qld)
Judiciary Act 1903 (Cth), s 68(2)
Taxation Administration Act 1953 (Cth) schedule 1, s 353-10, s 355-50

Attorney-General v Wands (2019) 1 QR 365; [2019] QCA 125, cited
Jago v District Court (NSW) (1989) 168 CLR 23; [1989] HCA 46, applied
Knuckey v Commissioner of Taxation (Cth) (1998) 87 FCR 187; [1998] FCA 1143, cited
Moti v The Queen (2011) 245 CLR 456; [2011] HCA 50, cited
MWJ v The Queen (2005) 80 ALJR 329; [2005] HCA 74, applied
R v Duncan [2025] QCA 187, cited
R v Ferguson; Ex parte Attorney-General (Qld) (2008) 186 A Crim R 483; [2008] QCA 227, cited
R v Leach [2019] 1 Qd R 459; [2018] QCA 131, cited
R v Lee (1950) 82 CLR 133; [1950] HCA 25, cited
R v Van Eps; Ex parte Commonwealth Director of Public Prosecutions (2024) 19 QR 149; [2024] QCA 46, applied
Robinson Helicopter Co Inc v McDermott (2016) 90 ALJR 679; [2016] HCA 22, cited
Rohde v Director of Public Prosecutions (1986) 161 CLR 119; [1986] HCA 50, cited
Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board (1982) 56 ALJR 678, applied
Strickland (a pseudonym) v Director of Public Prosecutions (Cth) (2018) 266 CLR 325; [2018] HCA 53, distinguished
Sutton v Hunter [2022] QCA 208, cited
Thompson v Randwick Corporation (1950) 81 CLR 87; [1950] HCA 33, applied
Wang v Hur [2024] QCA 126, applied
Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285; [1987] HCA 11, applied
Willmot v Queensland (2024) 283 CLR 339; [2024] HCA 42, applied
X7 v Australian Crime Commission (2013) 248 CLR 92; [2013] HCA 29, cited

COUNSEL: T M Begbie KC and Z C Heger SC, with F J Nagorcka, G F Perry and W C H Randles, for the appellant
S C Holt KC, with K M Hillard, for the respondent (pro bono)

SOLICITORS: Director of Public Prosecutions (Commonwealth) for the appellant
Sibley Lawyers for the respondent (pro bono)

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[1] **THE COURT:** On 3 October 2025, the learned primary judge ordered a permanent stay of the prosecution of the respondent on an indictment alleging a single count of attempting, by deception, to dishonestly obtain a financial advantage from a Commonwealth entity (the **Commonwealth charge**).[1] The respondent had applied for the order on the ground that the prosecution was an abuse of process.[2] The application was heard before the primary judge over 35 days between 28 November 2023 and 4 July 2025, followed by further written submissions on 10 and 13 July 2025. On 3 October 2025, when making the order, his Honour provided extensive reasons which detailed findings of grave investigative and prosecutorial misconduct.[3]

[2] Before this Court the appellant sought to reverse the outcome obtained before the primary judge. The appellant's primary position was that the orders made by the primary judge should be set aside for legal and factual error, the respondent's stay application should be dismissed, and the proceeding should be remitted to the District Court for trial. In the alternative, and if this Court was not persuaded that the primary judge had erred in finding relevant investigative and prosecutorial misconduct, the appellant argued that there should only be a temporary stay pending the appellant offering undertakings to permit the prosecution of the respondent to continue.

[3] For reasons which follow, the Court concludes that although the primary judge erred in some important respects, the appellant has not demonstrated that his Honour erred in finding there had been grave investigative and prosecutorial misconduct. The prosecution cannot be permitted to proceed unless the appellant can offer undertakings as to the manner in which the prosecution can continue to be conducted which can sufficiently ameliorate the oppressive impact of the misconduct on the respondent and the risk of damage to the public confidence in the administration of justice. Whether the appellant can offer undertakings which will sufficiently ameliorate those concerns is something which this Court cannot presently assess.

[4] Accordingly, while the Court will set aside the orders made below, it will make orders the effect of which will be to continue the stay but to afford to the appellant the opportunity (within a relatively short time frame) to file an application to the District Court to discharge the stay upon undertakings which the appellant contends are sufficient. As the trial court, the District Court will be in the best position to determine whether the undertakings offered are sufficient to address the consequences of the misconduct found by the primary judge and not set aside by this Court.

The nature of the appeal

[5] The appellant appealed under s 669A(1A) of the *Criminal Code* (Qld).[4] It is an appeal in the strict sense.[5] The appellant is required to demonstrate error in the primary judge's decision, based on a review of the evidence before his Honour. This Court

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1 *Criminal Code 1995* (Cth) (the ***Commonwealth Code***), ss 11.1 and 134.2(1). The offence attracts a maximum penalty of imprisonment for 10 years. The Commonwealth entity was the Australian Taxation Office (**ATO**).

2 Under s 590AA(2)(a) of the *Criminal Code* (Qld) (the ***Code***).

3 *R v Clarke (a pseudonym) (No 9)* [2025] QSCPR 17 (**Reasons**).

4 The appellant's standing is conferred by s 68(2) of the *Judiciary Act 1903* (Cth) and s 9(7) of the *Director of Public Prosecutions Act 1983* (Cth). See: *Rohde v DPP* (1986) 161 CLR 119; *R v Carngham* (1978) 140 CLR 487; *Peel v The Queen* (1971) 125 CLR 447.

5 *Attorney-General (Qld) v Wands* (2019) 1 QR 365, 377 [42] (Davis J; Sofronoff P and Morrison JA agreeing), citing *R v Ferguson; Ex parte Attorney-General (Qld)* (2008) 186 A Crim R 483, 490 [20] (McMurdo P; Keane and Muir JJA agreeing).

determines whether any alleged error was made and whether the primary judge's ultimate decision to order a stay of the prosecution was correct. In the absence of an error, this Court may not exercise the discretion afresh based on its own view of the facts.[6] Appropriately, the respondent abandoned an application for leave to adduce further evidence.[7] It is common ground in this appeal that this Court must apply the "correctness standard" to its review of the primary judge's ultimate decision and not the "discretionary standard" applied in *House v The King*.[8]

The factual context

[6] The basic factual context within which the respondent came to be the subject of the investigation which culminated in her prosecution may be stated in short compass.

[7] The respondent and companies associated with her had been involved in attempts to develop a drug for therapeutic purposes. VB was one of the respondent's companies. Pursuant to the *Income Tax Assessment Act 1997* (**ITAA 1997**), VB could claim a refundable tax offset in respect of expenditure it incurred on "R&D activities" for which it was registered, provided certain conditions were met. AusIndustry was responsible for registering R&D activities. The ATO was responsible for assessing any entitlement to the tax offset under Div 355 of the ITAA 1997.

[8] In an income tax return for the 2016-17 financial year lodged by a registered tax agent authorised by the respondent on behalf of VB, VB had claimed a tax offset for $8,456,800 for expenses which it said it had incurred in relation to R&D activities for the development of the drug, especially in relation to the purchase of raw materials (**R&D Claim**). In September 2017, the ATO commenced an audit into VB's R&D Claim.

[9] By January 2018, ATO audit officers had formed the suspicion that the respondent had attempted to defraud the ATO and had created false documents in support of the R&D Claim. They decided to conduct a compulsory tax interview with the respondent, under s 353-10 of the *Taxation Administration Act 1953* (Cth) (**TAA**) and also to involve ATO staff who the primary judge described as "the crime team", namely the ATO criminal law staff involved in the investigation.

[10] A meeting was held between the ATO audit team and the crime team on 22 January 2018, the day before the compulsory interview was to commence. It was agreed at this meeting that the audit team would question the respondent as to the alleged fraud and would then meet the crime team after the interview concluded to discuss the matter and the interviews.

[11] Mr Anthony Rains, an ATO criminal investigator, was nominated to be the lead investigating officer on 22 January 2018. The compulsory interviews took place on 23 and 25 January 2018. At the interviews, the defendant was cross examined by audit team members about the alleged fraud. She was directed to answer questions and was advised that if she did not, she would be committing an offence.

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6 *R v Ferguson; Ex parte Attorney-General (Qld)* (2008) 186 A Crim R 483, 490 [20] (McMurdo P; Keane and Muir JJA agreeing).

7 Filed on 2 December 2025.

8 (1936) 55 CLR 499.

The reasons of the primary judge

[12] His Honour's reasons identified two alternative bases for the stay.

Unlawful questioning of the respondent

[13] The primary judge found that the conduct of ATO officers involved in the compulsory questioning of the respondent was unlawful.[9] His Honour found the questioning undermined the respondent's fundamental right to remain silent, caused the respondent to suffer forensic disadvantage, and affected the forensic choices available to the respondent at a trial for the Commonwealth charge, so that it was intrinsically unfair.[10]

[14] His Honour concluded that the court could not be seen to tolerate the use of the compulsory interview for the purpose of the criminal prosecution of the respondent, particularly as ATO officers had attempted to conceal the existence of a meeting at which the audit officers had agreed with criminal investigation officers to proceed with the compulsory interview for the purpose of a criminal investigation, which his Honour found was an ulterior unlawful purpose.[11]

[15] His Honour found that substantial purposes of the interview on 25 January 2018 concerned questioning the respondent about the fraud and the allegedly false invoices and that so doing was outside the powers of the audit team.[12] His Honour found a substantial purpose was to obtain evidence for a criminal investigation into whether the respondent had committed an offence under *Commonwealth Code* and that was an improper purpose.

Protecting the integrity of the court

[16] In addition to the conclusion about the questioning of the respondent, the primary judge concluded that nothing short of a stay would protect the integrity of the court's processes because other conduct of ATO officers, during the investigation and prosecution of the Commonwealth charge, and an alleged offence of fraud (the **State charge**),[13] amounted to undue oppression. This conclusion was expressly independent of his Honour's conclusion that the unlawful questioning required a stay.

[17] The ATO officers' conduct included the prosecution of the State charge, which should not have been commenced, was an abuse of process, and was continued for an unlawful collateral purpose. It included the prosecution of the State charge and the Commonwealth charge at the same time. In respect of each charge, it included, preparing false witness statements, placing false evidence before judicial officers to obtain search warrants, and tendering in court false affidavits and an exhibit that had been materially altered to remove an exculpatory part. It also included attempts to hide exculpatory evidence from the respondent and the court, failing to disclose relevant documents and information to the respondent, and misleading the court that full disclosure had been made.

[18] Acting on instructions of the ATO, the appellant had relied on false evidence at the committal hearings and had proposed to rely on it at trial, in relation to the

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9 Under s 353-10 of Sch 1 of the *Taxation Administration Act 1953* (Cth) (**TAA**).

10 Reasons, [21], [1918] (zz), (aaa), [2052].

11 Reasons, [2037].

12 Reasons, [1918 (xx)].

13 *Criminal Code* (Qld), s 408C(1) and 408C(2A)(a). The offence attracts a maximum penalty of imprisonment for 20 years.

Commonwealth charge and the State charge. The court itself had become the instrument of oppression by having the State charge before it.[14] The conduct of the ATO had brought the administration of justice into disrepute and had the tendency to undermine the integrity of the court.[15] Indeed, "justice has been put at risk".[16]

[19] The principle on which the primary judge acted was considered by the High Court in *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)*,[17] a case in which investigative zeal seemed to have inspired grave misconduct on the part of the agents of executive government. In that case, Keane J summarised two "fundamental policy considerations [that] affect abuse of process in criminal proceedings" identified by the majority in *Moti v The Queen*:[18]

> "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'. 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'."[19]

[20] In *Strickland*, Justice Edelman observed:

> "'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."[20]

[21] It will appear that the outcome of this appeal turns on the appellant's challenge to this second basis for the stay order. As the appellant submitted, "both questions of unfairness and the way in which that impacts upon the administration of justice are in play".

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14 Reasons, [2067]. See also: [2037].
15 Reasons, [23].
16 Reasons, [2070]-[2071].
17 (2018) 266 CLR 325 (***Strickland***).
18 (2011) 245 CLR 456, 478 [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
19 (2018) 266 CLR 325, 396 [197].
20 (2018) 266 CLR 325, 409 [249].

Grounds of appeal

[22] The appellant abandoned the original four grounds of appeal.[21] At the hearing of the appeal, the appellant advanced two[22] new grounds as follows:

> "1. The Primary Judge erred in concluding that a permanent stay of the prosecution of the respondent was required on the basis that the circumstances which warranted the granting of a stay in *Strickland (A Pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 were 'on all fours with', and 'materially indistinguishable from' the present case because:
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> a. his Honour erred in concluding that a substantial purpose of the interview conducted by the Australian Taxation Office (ATO) under s 353-10 of Sch 1 to the *Taxation Administration Act 1953* (Cth) was an improper purpose such that relevant questioning of the respondent was unlawful; and
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> b. in any event, even had the conduct of the interview been unlawful, his Honour erred in concluding that the present circumstances were in other respects materially indistinguishable from the circumstances in *Strickland* and erred in treating them as justifying the grant of a permanent stay.
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> 2. The Primary Judge erred in concluding that a permanent stay of the prosecution was required on the basis of oppression and bringing the administration of justice into disrepute because:
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> a. the factual findings did not warrant that conclusion in circumstances where:
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> i. they were substantially based upon findings that lacked a logical connection to the conclusion that the continuance of the ATO charge would be oppressive or bring the administration of justice into disrepute, including those relating to the investigation and prosecution of a charge brought against the respondent under s 408C of the Criminal Code (Qld) (**State fraud charge**) which was discontinued in 2021; and
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> ii. there were means for avoiding oppression and protecting the administration of justice other than the grant of a permanent stay which his Honour did not consider before concluding that a permanent stay was warranted; and

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21 This change rendered unnecessary an application to strike out the appellant's original first ground of appeal, which the respondent had filed on 4 November 2025 and amended on 7 November 2025.

22 The amended notice of appeal also advanced a third ground but during the course of oral argument the appellant conceded that it rose or fell with the first ground. It is not necessary to consider that ground further.

b. in any event, his Honour erred in making factual findings involving inferences of deliberate malfeasance in circumstances where less serious inferences ought to have been drawn and/or certain allegations were not put to the person concerned."

[23] The appellant filed a lengthy written outline of submissions. The outline assisted in more fully articulating each of the new grounds of appeal.

The first ground of appeal

[24] As advanced, the substance of the first new ground of appeal was that the primary judge made two alternative errors in concluding that the conduct of the ATO was "materially indistinguishable" from the circumstances considered by the High Court in *Strickland*:

(a) The first error was his Honour's conclusion that a substantial purpose of the compulsory examination of the respondent was an improper purpose such that the relevant questioning (i.e. that which occurred on 25 January 2018, the second day of the compulsory examination) [23] was unlawful.

(b) The second error was that, if his Honour was not in error to conclude that the questioning was unlawful, then his Honour erred in not finding that the auditors' questioning, although unlawful, was not "grossly unlawful and improper".

[25] The first ground of appeal must be upheld on the basis of the first error for the following reasons.

[26] First, the finding was based, at least in part, on his Honour's conclusion that the audit officers could not have questioned the respondent on the topic of possible fraud for the purpose of administration of the taxation statutes; that being the statutory purpose of a compulsory interview. But that finding was in error. It is undoubtedly part of the administration of taxation statutes to consider the accuracy of information which a taxpayer has provided in support of a claimed deduction or refund, and even whether the taxpayer or others have been involved in fraudulently claiming such deductions or refunds. As the appellant correctly submitted, questioning the respondent about suspected false documents (including invoices), or fraud, was entirely consistent with the following powers and functions under the taxation law:

(a) the function of determining whether VB had incurred the R&D expenditure for which it claimed to be entitled to the R&D tax offset,[24] in making and amending assessments of VB to tax;[25]

(b) the power to retain the tax refund sought by VB, having regard to the likely accuracy of information it provided, including the likelihood of it having been affected by "fraud or evasion" or "intentional disregard of a taxation law";[26]

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23 Reasons, [1918] (xx).
24 See principally ITAA 1997, ss 355-100, 355-205, 355-210.
25 See TAA, Vol 2, Sch 1, Ch 4, Div 155.
26 TAA, ss 8AAZLGA(2)(a)-(b).

(c) the power to impose administrative penalties, including for false or misleading statements made orally or in documents by VB or its agents (with the level of penalty affected by whether this was intentional or reckless);[27] and

(d) the function of determining objections in relation to the above matters.[28]

[27] Second, the finding was based, at least in part, on his Honour's conclusion that the audit function of the compulsory interview had substantially finished by the end of the first day of the compulsory interview on 23 January 2018. But that finding too was erroneous. As to this:

(a) In a letter dated 5 July 2018 the Deputy Commissioner sent the respondent a 137 page "Audit position paper" for her response. The respondent was told that based on her response and any other information, a final position would be reached. In that paper, the audit officers used the respondent's responses to questions put in the compulsory interview, including on 25 January 2018, to explain their advice to the Commissioner in respect of a decision on the R&D Claim.

(b) As a matter of law, the audit officers could lawfully question the respondent in this way for the purpose of advising the Commissioner. Moreover, the relevant provisions are to be construed to permit the Commissioner to obtain information and evidence compulsorily and, notwithstanding common law privilege against self-incrimination, to extend to authorising the provision of information to investigative and prosecutorial bodies in connection with the detection and prosecution of contraventions of the tax legislation or criminal conduct that undermines the tax legislation: *R v Van Eps; Ex parte Commonwealth Director of Public Prosecutions* (***Van Eps***).[29]

(c) The paper expressed and set out detailed justification for the Commissioner's conclusions that –

(i) AusIndustry had revoked VB's registration of the R&D tax incentive for the 2017 income year and therefore it was not entitled to claim a notional deduction for the claimed $8,456,800 R&D expenditure.

(ii) The Commissioner did not consider that VB had incurred the claimed $8,456,800 expenditure on R&D activities during the 2017 income year expenditure and would not have been entitled to the notional deduction even if it had been registered. The Commissioner considered that VB was liable to administrative penalties pursuant to Division 284 of Schedule 1 of the TAA in relation to the claim for the R&D tax offset for the 2017 income year on the basis that it had made a false or misleading statement that resulted from an intentional disregard of a taxation law. The base penalty rate was 75 per cent. The Commissioner had also determined that VB had taken steps to prevent or obstruct the Commissioner from finding out about VB's shortfall amount and had increased the base penalty rate by 20 per cent.

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27 See TAA, Vol 2, Sch 1, Ch 4, Div 284 and ss 284-20, 284-25, 284-75, 284-90(1). These penalties are also increased if the taxpayer has taken steps to obstruct the Commissioner from discovering the false or misleading nature of the statement: ss 284-220, 284-85.

28 See TAA, Vol 1, Part IVC, read with s 8AAZLGA(6) and Vol 2 Sch 1, ss 155-90, 298-30(2).

29 *R v Van Eps; Ex parte Commonwealth Director of Public Prosecutions* (2024) 19 QR 149, [69]-[77].

(iii) The Commissioner did not consider that VB was entitled to a deduction of $3,744,100 for other deductible expenses because the Commissioner did not consider it had incurred the expenditure. In relation to that claim the Commissioner also determined that VB was liable to administrative penalties with a base penalty rate of 50 per cent because a false or misleading statement which resulted from recklessness had been made.

(iv) The Commissioner proposed to amend VB's income tax return and to impose penalties for the 2017 income year by disallowing the claimed $8,456,800 and $3,744,100 deductions; retaining a refund of $3,678,708 and imposing penalties in the amount of $3,319,237.20.[30]

(d) The Commissioner's final decision was not before the primary judge. But it is clear that the performance of the audit function continued at least up until the production of the Audit position paper dated 5 July 2018.

[28] Third, in addressing the question whether any illegitimate purpose of conducting the compulsory examination could so taint the compulsory examination as to render it unlawful, the primary judge did not apply the proper test. The primary judge's conclusion that the compulsory examination was unlawful turned upon his finding that the interview had been conducted substantially for the improper purpose of examining the respondent about fraud offences under the Commonwealth *Criminal Code*. But his Honour accepted (as he had to accept) that the purpose of the interview included an audit purpose, and therefore that the questioning had multiple purposes. On settled principles,[31] the primary judge could only conclude that the improper purpose was "substantial", in the relevant sense, if he found that the identified questions would not have been asked at all but for the improper purpose. The primary judge failed to conduct the counterfactual analysis called for by the test. Had he done so, having regard to the matters discussed in relation to the first and second reasons above, the outcome would inevitably have been different.

[29] In the circumstances, the primary judge should not have concluded that the audit officers would not have questioned the respondent about an alleged fraud but for their intention to prosecute the respondent for a crime under the *Commonwealth Code*. It follows that his Honour should not have concluded that the questioning of the respondent was unlawful. The prosecution should not have been stayed for that reason.

Notice of contention reserved for later consideration

[30] The respondent filed a notice of contention challenging the correctness of the decision of this Court in *Van Eps*.[32] If upheld, the notice might affect the above conclusion that the use of the respondent's answers in a prosecution would be unlawful. The notice was not the subject of oral submissions at the hearing of the appeal, on the basis that the respondent reserved the issue for submissions and consideration in any

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30 Equivalent findings were also made in relation to a minor input tax credits claim and adjustments made and penalties imposed in relation to an activity statement, but there is no need to record those details.

31 *Thompson v Randwick Corporation* (1950) 81 CLR 87, 106; *Samrein Pty Ltd v Metropolitan Water Sewerage and Drainage Board* (1982) 56 ALJR 678 at 679; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285, 294; *Knuckey v Commissioner of Taxation (Cth)* (1998) 87 FCR 187, 195-7; *R v Duncan* [2025] QCA 187, [6] and [39]-[41] (per Bond JA).

32 By the notice, filed on 4 June 2026, the respondent sought a determination that the decision of the Court in *Van Eps* should not be followed. The notice superseded the respondent's application to "reopen" *Van Eps*, which had been filed on 21 May 2026.

further appeal. So, any order to be made by this Court in this appeal is not affected by the notice of contention.

The second ground of appeal

[31] As advanced, the substance of the second new ground of appeal was that the primary judge made two further alternative errors in concluding the prosecution amounted to oppression and brought the administration of justice into disrepute:

(a) His Honour's finding was in error (the third error) because:

(i) His Honour erred in considering the misconduct of the ATO in respect of the State charge, when such misconduct was irrelevant to whether prosecution of the Commonwealth charge should be stayed; and

(ii) his Honour erred in making certain adverse factual findings about the conduct of the lead criminal investigator, Mr Rains, and others, which were said to be a basis of his Honour's conclusion that the ATO's conduct was so oppressive of the respondent that, if tolerated, it would bring the administration of justice into disrepute,

and if the misconduct in respect of the State charge and any erroneous factual findings were to be excluded, then the conduct of the ATO would be materially distinguishable from the circumstances in *Strickland*.

(b) Alternatively, the primary judge erred in failing to consider whether there were means, short of a stay of the prosecution, that would adequately respond to any concern that the respondent's trial on the Commonwealth charge would be unfair or would bring the administration of justice into disrepute (the fourth error).

[32] In written submissions and at the outset of the appeal hearing, counsel for the appellant submitted that to set aside the stay order, the appellant must succeed in both grounds of appeal.[33] On the second day of the hearing, the appellant modified that position, contending that success on the first ground could affect this Court's decision on whether the primary judge made the third or the fourth error alleged in the second ground.

[33] By the end of the hearing, the appellant's position was narrowed to the contention that, if the Court found the audit officers engaged in misconduct in relation to questioning the respondent, but their questioning was not unlawful, then the Court's conclusion on whether the primary judge made the third or fourth error would be affected by that finding. That approach should be accepted.

The test for whether the primary judge erred

[34] Relevantly for this appeal, the primary judge's order was based on a conclusion that a trial of the respondent will necessarily be unfair or so unfairly and unjustifiably oppressive as to constitute an abuse of process, such that it would bring the administration of justice into disrepute. This finding is either correct or incorrect.

Whether the ATO's conduct in respect of the State charge was relevant

[35] In the written outline, the appellant submitted that the concerns of the primary judge about the conduct of the investigation and prosecution of the State charge "have little

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33 Outline of Submissions of the Appellant, 24 April 2026.

relevance to the question of whether to stay the proceedings" in respect of the Commonwealth charge. At the hearing of the appeal, it was submitted that the misconduct in relation to the State charge was irrelevant to whether or not a stay should be ordered.

[36] The appellant's submissions on the relevance of the ATO conduct in investigating and prosecuting the State charge cannot be accepted or rejected in abstract. It requires an examination of any connections between that conduct and the investigation and prosecution of the Commonwealth charge. It also requires consideration of the particular conduct itself.

Connections between the misconduct in relation to each charge

[37] The two charges were against a common respondent. They arose out of common circumstances.

[38] Both were investigated by Mr Rains. In doing so, it was conceded by the appellant below that he breached "a lot" of ATO policies that required him to comply with the Australian Government Investigation Standards (**AGIS**).[34] Mr Rains misconducted himself in relation to potentially exculpatory evidence in both investigations, failing to follow up potentially exculpatory evidence available to him, including evidence that "may well have proved crucial for the defence case".[35] In respect of each charge, Mr Rains omitted any reference to important exculpatory documents in affidavits he prepared and executed to obtain search warrants. This was a material non-disclosure of evidence that would have undermined his statements in the affidavits.[36] Mr Rains failed to include known exculpatory evidence in the brief of evidence.[37]

[39] The appellant prosecuted both charges. Both were prosecuted in the courts of this State. In each prosecution, the appellant failed to detect misconduct by Mr Rains, and some others, so that relevant documents were not disclosed to the respondent. In each, the concealment of this evidence was deliberate on the part of the ATO. It persisted years into the prosecutions. In each, the appellant misled the court by maintaining that full disclosure had been made. The logical consequence of this misconduct was to adversely affect the respondent's right to a fair trial on each charge.

[40] The simultaneous prosecution of the two charges appeared to exhaust the resources of the respondent, leaving the respondent unrepresented for the defence to the State charge and the Commonwealth charge.[38] The position persists in respect of the Commonwealth charge.

Undisputed findings concerning the State charge

[41] The undisputed findings concerning the State charge may be summarised in this way:

(a) By 5 April 2018, the lead ATO criminal investigator Anthony Rains knew that most of the funds that would be the subject of the State charge had been applied for legitimate expenses.[39]

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34 Reasons, [1900]-[1903].
35 Reasons, [1882].
36 Reasons, [1877]-[1881], [1885].
37 Reasons, [1871], [1873]-[1874].
38 Reasons, [2002](i).
39 Reasons, [1365], [1951].

(b) Mr Rains formed an inappropriate relationship with a consultant to the Brisbane Angels (**BA**).[40] The BA was an investment group which had provided funds for the research and development work in which the respondent was engaged. Emails Mr Rains exchanged with that person in April, May and June 2018 reflected the nature of their relationship. Some of the emails contained information that tended to support the respondent's defence to the State charge. The appellant did not disclose these to the respondent's defence until November 2020, after the committal hearing, after the presentation of the indictment, and after the listing of the State charge for trial.[41]

(c) Mr Rains instigated the complaint to the Queensland Police Service (**QPS**) alleging the respondent had committed the State charge.[42] He did so by going to the QPS before any complaint had been made,[43] speaking with potential witnesses and encouraging them to go to the QPS. His denials of these acts, contradicted by his own contemporaneous emails, other witnesses, and other contemporaneous documents, were rejected.[44]

(d) In June 2018, Mr Rains prepared a Joint Agency Agreement (**JAA**) between the ATO and QPS about the State charge and sent it to the QPS.

(e) In the JAA, Mr Rains described himself as the lead investigator for the State charge, the ATO as the lead agency for the investigation, the investigation would be "ATO led", and the ATO would assume prosecutorial responsibility for both the State charge and the Commonwealth charge.[45] Mr Rains' claims that these were "errors" he made in preparing the JAA were rejected.[46] Mr Rains' recommendation to the QPS that the appellant prosecute the State charge, using the same prosecutor who would prosecute the Commonwealth charge, was accepted and acted upon.

(f) Mr Rains gave misleading information to the QPS in the JAA.[47] He deliberately left exculpatory documents and information out of the JAA.[48]

(g) On 22 August 2018, the respondent was charged with the State charge. The information for the State charge came directly from the JAA Mr Rains had prepared.[49] The QP9 particulars stated that the ATO was the informant.

(h) Mr Rains exchanged 68 emails with the QPS officer investigating the State charge and had 23 known meetings and conversations with the officer.[50] Mr Rains was the "architect" of the State charge.[51] Mr Rains provided information obtained by the ATO to the QPS, interviewed the ATO officers about matters relevant to investigation of the State charge, and assisted in

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40 Reasons, [2061] (g).
41 Reasons, [1784]-[1789].
42 Reasons, [1975].
43 Reasons, [1971].
44 Reasons, [1814]-[1816].
45 Reasons, [1040], [1808].
46 Reasons, [1809].
47 Reasons, [2061] (f).
48 Reasons, [1973], [2061] (d).
49 Reasons, [1976], [1820].
50 Reasons, [1807].
51 Reasons, [1805].

preparing the ATO officers' statements. Mr Rains was present when the QPS executed warrants to obtain documents relevant to the State charge.[52]

(i) Mr Rains deliberately left exculpatory documents and information out of the witness statements he prepared for the BA witnesses to be used in the prosecution of the State charge.[53]

(j) Mr Rains exceeded his authority as an ATO officer by being heavily involved in the investigation of the State charge and the decision of the appellant to proceed with the prosecution of the respondent for the State charge.[54] His testimony that he was not really involved in the State charge was untrue.[55]

(k) In April 2019, while the prosecution of the State charge was still proceeding, the ATO charged the respondent with the Commonwealth charge, amongst numerous other alleged Commonwealth offences.

(l) In late 2019, the respondent was committed for trial on the State charge. When the respondent told the Magistrates Court that the prosecution of the State charge was unjustified and based on falsified evidence, the appellant submitted to the magistrate that the respondent was making unfounded and spurious allegations.[56]

(m) On 5 June 2020, the appellant presented an indictment alleging the respondent had committed the State charge.

(n) The State charge was listed for trial commencing on 21 September 2020.

(o) The appellant failed to disclose relevant documents to the respondent before the State charge was listed for trial.[57]

(p) The State charge carried a maximum penalty of imprisonment for 20 years. The respondent was "absolutely fearful" of being unjustly convicted on the State charge.[58] The respondent felt no one was listening, including the courts.[59] This caused considerable emotional stress to the respondent and her family. The respondent spent about $80,000 on legal costs defending the State charge, ran out of funds, and thereafter was not legally represented in her defence to the State charge or the Commonwealth charge.[60]

(q) On 9 September 2020, the appellant delivered particulars of the State charge. The particulars failed to articulate the respondent's knowledge, belief or intent which was alleged to render the respondent's conduct dishonest. The appellant could not prove the respondent was dishonest, which was an essential element of the State charge. The delivered particulars contained no particulars of why the respondent was not authorised to spend money on the items on which the appellant alleged the money had been spent.

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52 Reasons, [1918] (qqq), [705]-[712].
53 Reasons, [1973], [2061] (d).
54 Reasons, [2057].
55 Reasons, [1807].
56 Reasons, [2060].
57 Reasons, [2061] (c).
58 Reasons, [2059]-[2060].
59 Reasons, [2060].
60 Reasons, [2002](i).

(r) On 11 September 2020, the respondent's trial on the State charge was adjourned, due to the appellant's late delivery of particulars.

(s) The respondent had no case to answer on the State charge. The appellant gave no or insufficient consideration to the exculpatory evidence. The appellant ignored the respondent's reasonable no case submissions on the State charge or gave them insufficient consideration.[61]

(t) The prosecution of the State charge was continued for an unlawful collateral purpose of recovering from the respondent moneys paid by the BA.[62] (In other words, its purpose was to deplete the financial resources available to the respondent.)

(u) The prosecution of the State charge should not have been commenced or continued.[63] It was an abuse of process.[64]

(v) The State charge was not discontinued until 12 May 2021.

Consideration of the appellant's submissions on the irrelevance of the State charge

[42] The appellant explained the submission that the State charge misconduct was irrelevant in this way:

(a) Firstly:

> "Whatever 'oppression' the respondent may have suffered while facing both charges from April 2019 to May 2021 had fallen away by the time the primary judge came to determine the permanent stay application in 2025. … it is difficult to see how the fact that it was being prosecuted 'at the same time' as the [Commonwealth charge], could have justified a permanent stay of the [Commonwealth charge]."

(b) Secondly, the appellant submitted:

> "Defendants routinely (and appropriately) face multiple prosecutions simultaneously and, to the extent there is any concern about 'oppression', the remedy would at most be a temporary stay of one of the charges."

(c) Thirdly, there was no "logical connection" between the prosecution of the State charge having been pursued for an improper purpose, or the appellant's failure to accept reasonable no case submissions that "should have been accepted", and whether the prosecution of the Commonwealth charge "would bring the administration of justice into disrepute".

(d) Fourthly:

> "Misconduct by an investigator in respect of one charge does not make the prosecution of a different charge oppressive or unfair."

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61 Reasons, [2061] (b).
62 Reasons, [19], [541]-[542], [546], [1593], [2061] (a).
63 Reasons, [2002] (i).
64 Reasons, [2057].

[43] As to the first explanation, the appellant did nothing to address the consequences of the appellant's wrongful prosecution of the State charge or to rectify the prejudice to the respondent, notwithstanding the clear interconnection between the State and Commonwealth charges and their investigation. The respondent's evidence was that the prejudice continued. The contention that any oppression caused by the appellant's pursuit of the State charge had "fallen away" is without foundation.

[44] As to the second explanation, the appellant's observation that defendants routinely face multiple charges has no significance in the context of this appeal. It would be concerning if the appellant wished this Court to proceed on the assumption that the appellant routinely brings prosecutions for serious criminal offences that should not have been commenced, continues them and has them listed for trial, when the prosecutions are an abuse of process. Any submission that it is "appropriate" that defendants face such prosecutions should be rejected.

[45] As to the third explanation, it would be irrational to pretend that there was not a clear relationship between the misconduct in each matter. The misconduct of Mr Rains in relation to the State charge, in addition to his misconduct in respect of the Commonwealth charge, affects his credit as a witness in the prosecution of the Commonwealth charge. The primary judge found Mr Rains to be without credit on most of the factual issues in the application. The appellant has challenged some of those findings, considered below, but it is apparent from the unchallenged findings that his Honour's conclusions on Mr Rains' credit were well-founded.

[46] The appellant's fourth contention is that the respondent, who by the appellant's pursuit of the State charge had been forced to spend a large sum and who ended up representing herself,[65] may defend the Commonwealth charge, without any oppression, at a trial in which the appellant proposes to rely on the evidence of Mr Rains as to the investigation of the charge and the proof of elements of the offence. It is convenient to consider possible measures to address the oppression below, when dealing with the appellant's contention that the primary judge failed to consider whether such means would adequately respond to concerns about the administration of justice. As a matter of principle, the Court should not accept the appellant's contention that misconduct in relation to one charge does not make prosecution of another charge oppressive or unfair.

Disputed findings of fact

[47] In *Wang v Hur*,[66] drawing on the leading High Court authorities,[67] and a lengthier examination in *Sutton v Hunter*,[68] this Court summarised the settled principles governing the circumstances in which an appellate court should be prepared to interfere with a factual finding made by a primary judge:

> "(a) On an appeal by way of rehearing, it is for the appellant to satisfy the appellate court that the order that is the subject of appeal is the result of some legal, factual or discretionary error.

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65 Reasons, [2002](i).

66 [2024] QCA 126, [24].

67 *Warren v Coombes* (1979) 142 CLR 531, 551; *Allesch v Maunz* (2000) 203 CLR 172, 180-181 [23] (Gaudron, McHugh, Gummow and Hayne JJ); *Fox v Percy* (2003) 214 CLR 118, 127 [26]-[27] (Gleeson CJ, Gummow and Kirby JJ); *Robinson Helicopter Company Incorporated v McDermott* (2016) 90 ALJR 679 (***Robinson Helicopter***), [43] (French CJ, Bell, Keane, Nettle and Gordon JJ); and *Lee v Lee* (2019) 266 CLR 129, [55] (Bell, Gageler, Nettle and Edelman JJ).

68 [2022] QCA 208, [46]-[51] (Bond JA; Crow and Mellifont JJ agreeing).

(b) On such an appeal, the appellate court is bound to conduct a 'real review' of the evidence given at first instance and of the judge's reasons for judgment to determine whether it should be so satisfied.

(c) If the appellate court concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings.

(d) When determining whether a judge has erred in fact, in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge.

(e) However, in determining whether the judge has erred in fact, an appellate court is required to exercise restraint when invited to interfere with a primary judge's findings of fact, at least where those findings are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. Such appellate restraint applies not merely to findings of primary facts but also applies to findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts.

(f) In such cases, a finding of fact is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact. The finding must stand unless it can be shown that the trial judge 'has failed to use or has palpably misused [his or her] advantage' or has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence', or which was 'glaringly improbable', or which was 'contrary to compelling inferences.'"

[48] The appellant challenged ten specific findings of fact. Amongst other criticisms the appellant suggested that the primary judge had acknowledged the need to apply the *Briginshaw* standard[69] when determining whether to reach conclusions of grave impropriety, but suggested that despite acknowledging that standard the primary judge had not applied it.

Deliberate manufacture of an altered document

[49] The appellant challenges the primary judge's finding that, to undermine the respondent's defence to the State charge, in July 2018 Mr Rains deliberately altered a relevant part of an acquittal spreadsheet (the **spreadsheet**).[70]

[50] The respondent prepared the spreadsheet and sent it to the BA consultant on 16 August 2017.[71] It listed how a total of $185,023.30 had been expended. Those funds were later the subject of the State charge.

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69 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362.
70 Reasons, [18] (3), [1764]-[1778], [2061] (e).
71 Reasons, [492].

[51] On 12 April 2018, Mr Rains had received the spreadsheet from the BA consultant.[72] It was an Excel document, sent to him as an electronic document. On 6 June 2018, he had received a hard copy of the spreadsheet, from the BA pursuant to a warrant.[73] Each copy included at the bottom of the list the statement that the expenses were "as agreed by in the business plan all costs were agreed to by the board".

[52] On 29 October 2018, Mr Rains had said he was scanning exhibits, not saving them as PDFs.[74] On 14 January 2019, he stated that he used the hard copy of the spreadsheet to create the exhibit later used at the committal hearing for each of the State and the Commonwealth charges.[75]

[53] Mr Rains provided an altered version of the spreadsheet to the appellant for use in the prosecution of the respondent.[76] The alteration was the deletion of the words that tended to show that the listed expenditure had been approved; something Mr Rains had omitted to mention in the JAA.

[54] In late 2019, the altered spreadsheet was tendered as an exhibit at the respondent's committal hearing on the State charge.

[55] In December 2020, Mr Rains told one of the appellant's prosecutors that the omission of the words at the bottom of the list was an error he made in converting the spreadsheet to a PDF document. This out of court explanation was demonstrated to be wrong, when, in court, the Excel version of the spreadsheet was saved as a PDF without the loss of the relevant words.

[56] Before the primary judge, Mr Rains gave another explanation. He said he missed the omitted words because the original spreadsheet was printed double sided and he had only scanned the front page.[77] Mr Rains had plenty of time to correct the exhibit, which he prepared for the brief of evidence and sent to the QPS. He never did so.[78] In May 2023, he used the altered spreadsheet at the committal hearing for the Commonwealth charge.

[57] The appellant submitted that Mr Rains' evidence of a mere printing and scanning mistake should be accepted.[79] The primary judge found Mr Rains deleted the words deliberately. His Honour found Mr Rains knew the deleted words proved that the expenses had been approved by the board. He had failed to disclose the fact of the approval in the JAA. The deletion of the words was to "cover his tracks". He found Mr Rains' evidence, implying he used the hardcopy to create the altered exhibit, was "to cover the fact he amended the electronic version". His Honour found it "very concerning" that the production of the altered exhibit "without those words undermined the defence case and strengthened the crown case".[80]

[58] As his Honour noted, the finding that Mr Rains deliberately altered the spreadsheet to undermine the respondent's defence to the State charge, was a serious one. His Honour was assisted by other factual findings: that Mr Rains deliberately hid the existence of the 22 January 2018 meeting; that he falsely claimed the defendant had claimed to have invented DBH, and that he was involved in the preparation of a false

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72 Reasons, [1765], [1957].
73 Reasons, [1768].
74 Reasons, [1768].
75 Reasons, [1769].
76 In the Reasons, the altered document is referred to as JV052.
77 Reasons, [1766], [1021]-[1022].
78 Reasons, [1771].
79 Reasons, [1764].
80 Reasons, [1773]-[1775].

statement from a witness and uploaded it to the brief. Any of these findings rendered it more probable that Mr Rains deliberately altered the spreadsheet to create the exhibit.[81]

[59] The primary judge's finding was affected by impressions his Honour formed about Mr Rains' credibility and reliability by observing and listening to Mr Rains and the other witnesses give evidence at the lengthy hearing.[82] There were many exhibits, some comprising multiple documents, which his Honour had the opportunity to read and consider completely. The primary judge had the opportunity to consider all the evidence in its totality and reflect at length upon the interaction of oral testimony and documents.[83]

[60] His Honour's finding is not inconsistent with any other fact incontrovertibly established by the evidence. It is consistent with the evidence, and other unchallenged findings, about other misconduct by Mr Rains in the investigation and prosecution of the respondent. It is not glaringly improbably. Nor is it contrary to any compelling inference. This Court should not set aside his Honour's finding.

Deliberately pursuing a false allegation that the respondent claimed to have invented DBH and misleading judicial officers in the search warrant applications

[61] In his affidavit of 13 March 2018, prepared to obtain a search warrant seeking evidence for the investigation of the Commonwealth charge, Mr Rains deposed that there were "reasonable grounds to suspect" that the respondent had "dishonestly attempted to portray an already existent chemical" (**DBH**) as the respondent's "own invention". The appellant accepts that in this and subsequent affidavits seeking other search warrants, and in statements Mr Rains prepared for himself and other witnesses, Mr Rains stated that the respondent had claimed to have invented DBH and omitted evidence that the respondent had disclaimed having done so.

[62] Before Mr Rains engaged in any of this conduct, he had been told by an AusIndustry employee, who dealt directly with the respondent about the registration of R&D activities by VB, that the respondent "did not claim to have invented" DBH. The evidence Mr Rains omitted to refer to or attach to his affidavits seeking the warrants included this employee's email containing this information contradicting Mr Rains' false assertion.

[63] The appellant challenges the primary judge's finding that Mr Rains deliberately pursued this false allegation, knowing it to be untrue.[84] The appellant also challenges his Honour's finding that the judicial officers who issued the search warrants were misled by the inclusion of this false allegation in the affidavits placed before them.[85]

[64] The appellant submitted that Mr Rains' false assertion of the invention claim was "an entirely plausible interpretation" of documents VB had provided to the ATO in 2017, or the result of confusion on Mr Rains' part about "technical concepts from chemistry". The appellant also submitted it was open to conclude that Mr Rains did not consider the documents that recorded the respondent's disclaiming any invention to be "relevant" to the subject matter or purpose of the affidavits and the statement he prepared.

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81 Reasons, [1773].
82 Reasons, [748].
83 *Robinson Helicopter*, [57].
84 Reasons, [2061] (h).
85 Reasons, [2061] (i).

[65] His Honour's finding was supported by the documentary evidence that Mr Rains had been told from an early point in his involvement with the investigation that the respondent did not make such a claim. The only reasonably open inference is that Mr Rains included the false allegation in the affidavits and statements, and omitted the evidence that the claim was not being made, to influence the judicial officers who read the affidavits and the appellant's prosecutors who were prosecuting the Commonwealth and the State charges, to the prejudice of the respondent.

[66] Although it is based on the documentary evidence, it was affected by his Honour's impressions about Mr Rains' credibility and reliability formed in observing and listening to Mr Rains and the other witnesses give evidence at the hearing, the other documents in evidence before his Honour and the interaction of that oral testimony and the documents.[86]

[67] This conduct is consistent with Mr Rains' unchallenged misconduct in the investigation and prosecution of the Commonwealth charge and the State charge. It is not glaringly improbable. Nor is it contrary to any compelling inference. The proposition that judicial officers were misled is an obviously legitimate inference. This Court should not set aside his Honour's finding.

Failing to disclose contact with a company that may have supplied goods or services the subject of the R&D claim

[68] The appellant accepts that a foreign company had been paid an amount for materials supplied to VB, which may have been the subject of the R&D claim. It is also accepted that Mr Rains had had contact with the company and knew it had been paid. There was an additional word and letter in the name of this company he contacted that did not appear in the name of the company written in English on the invoice VB had supplied to the ATO in support of the R&D claim. The company was based in a non-English speaking country with a national language not written in Latin script.

[69] In seeking a warrant to search the home of the respondent's spouse, including a computer belonging to the spouse, Mr Rains deposed that there were doubts about the legitimacy of the alleged manufacturer of the materials. In a briefing note Mr Rains also prepared at this time, he stated that "the alleged manufacturer of the compound does not exist". The primary judge found that, when he did these things, Mr Rains had evidence that the manufacturer could well have existed.[87] In particular, Mr Rains had received an email from the aforementioned foreign company when asking inquiries about the other company, stating "[t]hese are our colleagues, Mr Wu Zheng", and providing an email address from that person. He never emailed Mr Zheng,[88] and did not attach this email to any of the search warrant affidavits, nor was it attached to any of the search warrants after that date.[89]

[70] The appellant challenges the primary judge's finding that, in his affidavit seeking the warrant, Mr Rains failed to disclose his contact with that company.[90]

[71] The appellant submits that in the affidavit, Mr Rains was referring to the company named on the invoice and not to the company with the same name, plus the additional

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86 Reasons, [748].

87 Reasons, [783].

88 Reasons, [851]. This was despite there existing other independent evidence that the relevant representative of the company was Mr Zheng: Reasons, [1886]. A later email from Mr Rains to another prosecutor asked whether they should "sit" on evidence concerning Mr Zheng: Reasons, [1889].

89 Reasons, [1885].

90 Reasons, [2061] (j).

word and letter, which he knew had been paid for the supply of materials to VB, and was likely related to the company with which the impugned invoice was concerned.

[72] This is an implausible explanation. Nothing in the evidence before this Court indicates that Mr Rains was so simple-minded that he would have missed the similarity of the company names or forgotten about the evidence that an existing company of a very similar name had been paid to supply materials to VB.

[73] His Honour's finding should not be disturbed.

Deliberately asserting a false allegation in statements and in affidavits placed before judicial officers to obtain search warrants

[74] The appellant accepts that Mr Rains prepared and executed affidavits in which he deposed that the respondent had claimed to have invented DBH. The appellant accepts that the affidavits were prepared to be placed before judicial officers in support of applications for the issue of search warrants and were used that way. The appellant also accepts that Mr Rains prepared a draft witness statement for an AusIndustry employee that suggested the witness understood the respondent to have made the invention claim, despite the witness' own draft stating no such thing. The appellant did not challenge the finding that Mr Rains failed to disclose to the judicial officers evidence he held that contradicted the assertion that the respondent had made the invention claim; and he did not disclose this evidence to the respondent until after the State charge was listed for trial.

[75] The appellant sought to overturn the primary judge's finding that Mr Rains deliberately pursued this false allegation, by lying in his affidavits and failing to disclose the contrary evidence in his possession.

[76] The appellant submitted that Mr Rains "can be forgiven for thinking" the respondent had made the invention claim. This should be rejected. When he deposed that "based on available evidence" he believed there were "reasonable grounds to suspect" the respondent "dishonestly attempted to portray an already existent chemical" as one that the respondent had invented, Mr Rains knew the respondent was not asserting the invention claim. It follows that he knew he was giving false evidence to each judicial officer asked to issue a warrant.

[77] This matter had been clarified by the AusIndustry officer in an email.

[78] There is no evidence from which it might be inferred that Mr Rains was "confused about the technical chemistry concepts" or "misunderstood the whole situation", as the appellant contended. The appellant went so far as to submit that Mr Rains' decision to omit any reference to the clarification to be "not material". Later, the appellant submitted the false affidavits were simply a "Very unfortunate term[turn] of phrase, [that] could have been drafted better" and that it was "an insufficient basis to conclude it's[sic] deliberate dishonesty".

[79] Taken together, Mr Rains' conduct with respect to the false assertion is consistent with deliberate dishonesty. The finding is not inconsistent with any incontrovertibly established facts, glaringly improbable, or contrary to compelling inferences. It is consistent with his failure to disclose in his affidavit for another search warrant the email with the foreign company that had been paid to supply materials, which disclosure might have qualified his deposition that "the alleged manufacturer of the compound does not exist". It is also consistent with his character revealed by his unchallenged misconduct, and his misconduct in altering a material part of an exhibit tendered twice in court.

[80] For the most part, his Honour's finding is based on an examination of the contemporaneous documents, later disclosed. However, his Honour's conclusion is based on a combination of the evidence in those documents and impressions formed about the credibility and reliability of Mr Rains in seeing and hearing him give evidence. The finding should not be disturbed.

Preparing a false witness statement, placing it in the brief of evidence

[81] The appellant challenges the primary judge's finding that Mr Rains was involved in the preparation of a false statement of another witness and caused it to be placed in the brief of evidence with the intention of inducing a prosecutor to believe that the witness had not been paid the amount stated in the spreadsheet.[91] This amount was included in the sum that the State charge alleged the respondent had obtained by fraud. The appellant submitted that in preparing the statement Mr Rains merely left open whether or not the invoice had been paid.

[82] The appellant accepts that the invoice had been paid after the due date, and before Mr Rains prepared the witness statement. Mr Rains' work log entry for 27 March 2018 recorded that the witness had "stated that she had to take [the respondent] to court before [the respondent] paid up". So, he knew the invoice had been paid.

[83] The draft witness statement was amended to include an assertion that "the invoice was not paid". It seems, the witness understood these words to convey that the invoice had not been paid *when due*. His Honour found the words, as they appeared in the statement, were an "obvious falsehood", which Mr Rains did not correct.

[84] Later, when the statement was finalised, at Mr Rains' request, words were added, which stated that on 12 February 2018 "$25,000 (including legal fees) was transmitted to my solicitor's trust fund … per court settlement".

[85] The appellant accepts that Mr Rains was involved in preparing the witness statement. The appellant submits that the statement was not false and was not intended to mislead. The appellant submits that Mr Rains' initial failure to ask the witness to "clarify" the words was because he was not interested in whether the witness had been paid.

[86] There is an unfortunate commonality to the manner in which Mr Rains approached his work in the investigation and prosecution of the respondent in respect of both the State and the Commonwealth charges. This conduct is consistent with Mr Rains' unchallenged misconduct. On the evidence, it is not glaringly improbable or contrary to any compelling inference. This Court should not set aside his Honour's finding.

Deliberately omitting any reference to the 22 January 2018 meeting from witness statements and deliberately failing to disclose documents relevant to the meeting

[87] The appellant challenges the primary judge's finding that Mr Rains deliberately omitted any reference to the 22 January 2018 meeting from the witness statements of ATO officers, including his own and deliberately failed to disclose documents relevant to this meeting. Subsidiary findings included that no log was made of this meeting, Mr Rains falsely denied in oral evidence having attended the meeting, documents relating to it were not saved in Siebel (a document management system), and a number of requests relating to disclosure of it were "deliberately ignored".

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91 Reasons, [2061] (k).

[88] The appellant submitted that the meeting between senior ATO officers about how they would proceed with the questioning of the respondent was an "incidental and largely inconsequential meeting"; that Mr Rains failed to record the meeting in Siebel due to an "oversight"; and that 12 months later he had "simply forgotten" about the meeting when he prepared two formal statements about the investigation (including his own), and in his testimony before the primary judge, when he denied attending the meeting.

[89] In January 2018, when the various ATO officers from the audit section and the criminal investigation section, including Mr Rains, met to discuss the compulsory examination of the respondent, they held the view that it was unlawful to question the respondent for the purpose of investigating a suspicion that the respondent had committed a Commonwealth offence, such as the Commonwealth charge.[92]

[90] The appellant did not produce the evidence about the 22 January 2018 meeting until about 30 August 2024.

[91] That evidence showed:

(a) By 10 January 2018, an ATO audit officer, Mr Challans, had formed the view that the respondent had most likely attempted a multi-million-dollar criminal fraud.[93] He emailed the respondent about "the opportunity to undertake a formal interview" to "assist us to clarify the gaps in the evidence". He did not mention any suspicion of fraud or that the interview might be used against the respondent in a criminal investigation or prosecution.[94]

(b) When the respondent repeatedly asked Mr Challans "what the gaps were", he did not respond.[95]

(c) Mr Challans began emailing others in the ATO about "false or altered documents" and stated that "potential falsified evidence will be referred to Tax Crime" noting such a matter was "not the purpose of the formal interviews".[96]

(d) On 12 January 2018, Mr Challans and other ATO audit officers suspected the respondent had committed a criminal offence and decided they should "contact tax crime to have on standby".[97]

(e) On 19 January 2018, the Commissioner, at the apex of the ATO, "thought it was likely the taxpayer may be involved in fraud".[98]

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92 Reasons, [1614]. Their view appears to have been consistent with the effect of decisions of the High Court in *R v Lee* (1950) 82 CLR 133 and *X7 v Australian Crime Commission* (2013) 248 CLR 92, the decision of the Full Court of the Federal Court in *Deputy Commissioner of Taxation v De Vonk (Cth)* (1995) 61 FCR 564, and the decision of the New South Wales Court of Criminal Appeal in *R v Seller* (2013) 232 A Crim R 249. It may be assumed that the ATO officers remained of this view following publication of the reasons for the decision of this Court in *R v Leach* [2019] 1 Qd R 459. It does not appear they had any reason to have a different view until the decision of the New South Wales Court of Criminal Appeal in *R v Kinghorn* (2021) 106 NSWLR 322. It may be assumed that they formed a different view about the lawfulness of such questioning after the decision of this Court in *R v Van Eps; Ex parte Commonwealth Director of Public Prosecutions* (2024) 19 QR 149 published on 3 April 2024, or after 5 December 2024, when the High Court refused special leave to appeal from the *Van Eps* decision.

93 Reasons, [1294].

94 Reasons, [1295].

95 Reasons, [1297], [1302].

96 Reasons, [1298].

97 Reasons, [1303], [1918] (x).

98 Reasons, [1308].

(f) The 22 January 2018 meeting between the ATO crime investigators (Ms Smith and Mr Rains) and the audit officers was contrary to the then ATO policies about the separation of audit investigation work from criminal investigation work;

(g) At the meeting, the officers arranged a workshop between them to follow the questioning of the respondent, which required the audit officers to stay in Brisbane overnight to attend the workshop;

(h) None of the ATO officers kept notes of the meeting;

(i) The ATO officers' accounts of the meeting, given in the hearing before the primary judge, were unreliable;

(j) Six and a half years later, in 2024, Mr Rains' ATO email account still contained records of the meeting, as did the email accounts of other ATO officers who corresponded with Mr Rains about the meeting; and

(k) The effect of Mr Rains not recording the meeting in Siebel was that other ATO officers instructing the appellant assumed no meeting occurred and did not seek to find or disclose to the respondent any record of the meeting.

[92] The primary judge's conclusion – that Mr Rains failed to record the meeting in Siebel because he did not want to create any official record that the meeting had occurred – is the most likely explanation for Mr Rains' conduct. There was no other sensible or rational explanation. It is consistent with Mr Rains' later misconduct in relation to the respondent, which is not challenged.

[93] For the same reasons, the primary judge's findings that Mr Rains deliberately concealed the fact that the meeting had occurred, failing to mention it in his statements prepared in 2019, and deliberately concealing it in his affidavit of 25 August 2022, should not be disturbed. Mr Rains' conduct delayed disclosure of relevant documents for about the first five years of the prosecution.

[94] His Honour had the benefit of observing the ATO officers, including Mr Rains, give evidence about the preparation for the questioning, their discussions about the questioning, their plans about the use of the respondent's answers, and related matters over many days. His Honour also examined all the related documents tendered by the appellant and by the respondent. In the circumstances, the primary judge's conclusion should not be disturbed.

[95] The appellant also challenged his Honour's finding on the basis that the unrepresented respondent had not articulated her case about deliberate concealment with enough specificity; with the consequence that Mr Rains did not have "sufficient notice … that sort of allegation would be put to him". Some sense of the audacity of this submission may be gained by considering that the appellant did not disclose the documents evidencing Mr Rains' involvement with the audit officers, including the 22 January 2018 meeting, until about five years after the prosecution commenced, and more than nine months after the hearing of the stay application commenced before the primary judge. The appellant did so only after being ordered to do so by the primary judge. The respondent had sought disclosure of documents evidencing Mr Rains' first contact with the audit officers on 13 earlier occasions. The appellant (and the ATO, then separately represented) had repeatedly opposed the respondent's applications for disclosure orders.

[96] The appellant's *Browne v Dunn* complaint must be rejected. The rule is "essentially that a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness' credit".[99] Mr Rains was cross-examined by the respondent as to his attendance at the 22 January 2018 meeting and the lack of disclosure of records pertaining to it. The respondent by her cross-examination and given the nature of the application had put the appellant sufficiently on notice that the propriety of Mr Rains' conduct was in issue, such that it was open for the primary judge to make the adverse findings which he did.

[97] The appellant also submitted that if it persuaded this Court that the compulsory interview and the use of information obtained at it was not unlawful, the significance of the presently impugned finding would fall away. That submission is not relevant to whether the primary judge erred in making the finding. In any event it is not the point. The impact on the public confidence in the administration of justice is the same whatever might have been Mr Rains' reasons for misconducting himself, including if those reasons were a mistaken subjective belief that disclosing the concealed information would reveal unlawful conduct.

Deliberately misleading the court that disclosure had been made

[98] The appellant accepts that the appellant told the courts, in which the appellant prosecuted the State charge and the Commonwealth charge, repeatedly that full disclosure had been made; and that, on each occasion, that was untrue. The appellant challenges the primary judge's finding that Mr Rains deliberately or dishonestly misled the courts about disclosure.

[99] Mr Rains was experienced in criminal investigations. He was the lead investigator for both the State charge and the Commonwealth charge. The documents that the appellant failed to disclose to the respondent were documents received by Mr Rains or created by Mr Rains during his criminal investigation and while each prosecution was proceeding. They were documents Mr Rains failed to refer to or include in the JAA, the brief of evidence, the witness statements, the affidavits, or the instructions he prepared or provided to the appellant for use in the prosecution of the State charge and the Commonwealth charge.

[100] When the Court ordered further disclosure of undisclosed documents, they were easily produced. In the circumstances, the primary judge's finding should not be disturbed.

Deliberately trying to hide evidence from the respondent or others

[101] The primary judge found that Mr Rains had scant regard for the AGIS policies about record-keeping and his breaches of those policies significantly affected his accountability, that of other ATO officers, and the ATO itself.[100] The appellant challenges only his Honour's finding that Mr Rains' lack of record keeping was "deliberate and to avoid later scrutiny".[101] The appellant submitted that the Court should take judicial notice that recording keeping is "an onerous and frequently neglected task".

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99 *MWJ v The Queen* (2005) 80 ALJR 329, [38].

100 Reasons, [1901]-[1903], [2061] (p).

101 Reasons, [1903].

[102] The Court should not accept a submission that Commonwealth officers engaged in criminal investigations frequently neglect to comply with policies designed to preserve the integrity of their processes for the benefit of persons accused and the fairness of the Court's processes. In any event, when an officer's breaches of significant policies become commonplace, or even customary, they do not cease to be deliberate.

[103] The fact Mr Rains engaged in misconduct that prejudiced the investigation and prosecution of the respondent gives rise to an inference that his failure to keep the required records of his misconduct was intended to avoid scrutiny.

[104] His Honour's finding was an obvious inference to draw from the extent of Mr Rains' relevant defalcations. It is consistent with other deliberate misconduct by Mr Rains. The concealment of misconduct was a continuation or elaboration of that misconduct, undertaken with a view to get away with it. There is no other compelling inference. His Honour's finding should not be disturbed.

Failing to disclose an exculpatory witness statement

[105] Mr Rains omitted from a witness statement the fact that the therapeutic compound met the definition of an NCE[102] and that research activities described by the respondent could constitute R&D activities eligible for an R&D Claim. The appellant challenges the primary judge's finding that the statement was exculpatory and that Mr Rains did this deliberately to mislead.[103]

[106] The appellant's submission is that his Honour erred in finding the omission was deliberate because the prosecution case for the Commonwealth charge did not turn on whether the respondent's research activities were eligible.

[107] If the eligibility of the respondent's research activities was not relevant to the prosecution, it is odd that the statement was sought and taken from the witness who dealt with the application for approval of the research activities as eligible.

[108] In any event, the Court should not accept the appellant's submission as meeting the criteria required to set aside the primary judge's finding based on the consideration of Mr Rains' oral testimony and the related documents tendered at the hearing. It is consistent with the evidence, and other unchallenged findings, about other misconduct by Mr Rains in the investigation and prosecution of the respondent. It is not glaringly improbable. Nor is it contrary to any compelling inference. This Court should not set aside his Honour's finding.

Conclusion on the challenged findings of fact

[109] The appellant has not succeeded in demonstrating any error in the primary judge's findings of misconduct concerning the investigation and continued prosecution of the Commonwealth offence. The question then is whether the imposition of a permanent stay on the basis of that misconduct was justified or in error.

Were there means short of a permanent stay that would adequately respond to concern about fairness and oppression?

[110] The appellant submitted, correctly, that:

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102 New chemical entity as defined in Schedule 9 Part 1 of the *Therapeutic Goods Regulations 1990* (Cth).

103 See Reasons, [1219]-[1220], [1871]-[1872].

> "It is well-settled that a permanent stay: is an 'extraordinary step which will very rarely be justified'; will be granted only where no other means exist to protect the court's integrity; and is 'not a power to discipline or to punish' the prosecution. Those principles balance the 'powerful social imperative for those who are charged with criminal offences to be brought to trial' with the need to ensure that the end of a criminal prosecution does not justify any and every means of securing a conviction."[104]

[111] Indeed in *Willmot v Queensland*,[105] dealing with a stay of a civil proceeding, the majority explained:

> "The position remains that a stay is a 'last resort' and requires an 'exceptional' case. An exceptional case will remain one in which it is impossible for the irreducible minimum necessary for a fair trial to be satisfied."

[112] Importantly, however, the response to proven prosecutorial misconduct does not require a binary choice between granting or refusing a permanent stay. As Mason CJ observed in *Jago v District Court (NSW)*:[106]

> "The court may mould its order to meet the exigencies of the particular case. The court may grant a limited or conditional stay and it might even order that a proceeding be stayed and not proceeded with without an order of the court."[107]

[113] Similarly, in *Strickland* Edelman J observed:

> "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.
>
> 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 some 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.
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> 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

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104 See appellant's written submissions at [25], footnotes omitted.
105 (2024) 283 CLR 339, 351, [26].
106 (1989) 168 CLR 23, 32.
107 Citing *R v Campbell* [1959] 1 WLR 646; [1959] 2 All ER. 557; and *R v Roberts* [1979] Crim LR 44.

> 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."[108]

[114] The appellant submitted that the primary judge was required to consider "whether each particular instance of misconduct could have been remedied by some lesser remedy short of a permanent stay". In another case that may have been an appropriate approach. But where there has been wholesale misconduct in two prosecutions over an extended period, such an approach would ignore the scale and impact of the total misconduct on the respondent and on the integrity of any prosecution which depended on the evidence of Mr Rains. Accepting the appellant's submission would risk minimising the seriousness of the total impact of the misconduct. Before turning directly to the question whether there are any measures less than a permanent stay which are an adequate response to that impact, it is necessary to say a little more about the misconduct, viewed as a whole.

[115] Mr Rains had been a police officer for about 20 years, and an investigator for the Fair Work Ombudsman for about six years, before he first joined the ATO as an investigator in the crime team. He worked in that role for about two years. After an absence, in which he worked for a time as an investigator with the Department of Environment, he rejoined the ATO, again as an investigator in the crime team. He had been in that role for about two years when Ms Smith, the ATO regional director of criminal investigations, assigned him to the investigation of the respondent.

[116] Mr Rains' misconduct was not accidental. It was not due to an oversight. It was deliberate. He was not acting in circumstances of urgency or under operational pressure. His misconduct was not the result of incompetence, lack of training, or poor supervision. He was not acting on advice that he could do as he did. He did not act in good faith.

[117] Mr Rains' misconduct escalated. It began with breaches of policies: not recording decisions he made, the reasons, and the information on which he relied; and not recording engagements with the auditors, the appellant and the QPS; not keeping notes of witness interviews; not recording disclosures of information to the QPS and not notifying the ATO Information Disclosure Team (**IDT**) that he was disclosing taxpayer information to the QPS; and not recording the exhibits he obtained from the BA consultant and from BA. It progressed to suppressing exculpatory evidence, to withholding evidence, to falsifying evidence in witness statements; and to deposing to misleading affidavits. He did not correct false and misleading testimony or reveal he had materially altered an exhibit. As an experienced criminal investigator, he knew the prosecutor, the respondent and the court would be deceived by his misconduct. Ironically, Mr Rains did these things in proceedings where he was alleging the respondent had committed fraud.

[118] Mr Rains acted as if his primary obligation was to secure a conviction. His conduct was inconsistent with any concern for the fair administration of justice or the right of the respondent to a fair trial. In short, Mr Rains' actions corrupted the prosecution of the Commonwealth and the State charge. The officers of the ATO with responsibility

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108 (2018) 266 CLR 325, 415 [264]-[266].

for its management and operations did not prevent the misconduct, uncover it, or admit to it. The appellant, as an independent prosecution agency, failed to detect the misconduct, despite the respondent's complaints.

[119] The appellant made no offer or practical gesture to remedy or mitigate the effect of the misconduct on the respondent, who, in addition to the emotionally fraught prosecution for a serious criminal offence, which was an abuse of process, has been impoverished and suffered a lengthy delay in the other criminal prosecution, as she tried to expose the improper conduct which had occurred in the investigation.

[120] Nor did the ATO take steps to address Mr Rains' misconduct. The ATO imposed no sanction on Mr Rains for his misconduct in relation to the investigation and prosecution of the counts, once they became aware of it. He was not the subject of any disciplinary proceeding whatsoever. He left the role of criminal investigator voluntarily in 2022. At the time of the hearing before the primary judge, he was employed by the ATO as an intelligence analyst.

[121] Before the primary judge, the appellant relied on Mr Rains' evidence in which he denied any misconduct. In this appeal, the Court was urged to accept his evidence on challenged factual findings.

[122] The appellant gave the primary judge no reason to be satisfied that the prosecution of the Commonwealth charge would be conducted in a manner which would remove the effect of the consequences of Mr Rains' misconduct. Certainly, the appellant did not suggest the trial could proceed without relying on Mr Rains' evidence.

[123] At the hearing in this Court, when the appellant's counsel submitted that steps short of a permanent stay could be taken to ensure a fair trial, counsel were unable to identify those steps. The appellant's submissions that the trial should be permitted to proceed suggested that it would be a satisfactory outcome for this Court to leave it to the trial court to "deal with" any oppression to the respondent or any risk that the conduct of the trial might bring the administration of justice into disrepute.

[124] This may have been a reference to the possibility that a trial judge in a criminal trial may exclude evidence if the trial judge is satisfied that it is necessary to exercise a discretion to do so on public policy grounds. As has already been noted, in Strickland Justice Edelman confirmed the existence of a trial judge's discretion to exclude technically admissible evidence on public policy grounds. His Honour noted that:

> "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. … 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' or should they give 'the appearance of curial approval to wrongdoing on the part of those whose duty is to enforce the law.'"[109]

[125] And, of course, the respondent is entitled to a jury trial on the Commonwealth charge. So perhaps the reference encompassed the fact that the respondent would be free to impugn the credibility and reliability of Commonwealth witnesses, including Mr Rains, by reference to the misconduct exposed before the primary judge and not disturbed by this Court, and the respondent would be free to address the jury about

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109 (2018) 266 CLR 325, 416-417 [268]-[269].

the credibility of prosecution witnesses and the reliability of evidence the appellant had adduced.

[126] If the appellant's approach was adopted, the trial judge would have to approach the prosecution case with the utmost scrutiny. The jury would have to be made aware of the disgraceful conduct of the investigator, which tells of a distinct bias and a zeal that overbore his obligation to see justice fairly administered. The primary judge found comprehensively that Mr Rains is not a credible or reliable witness in respect of the investigation of the Commonwealth charge. This Court should not disturb his Honour's findings. Yet, the jury would observe that, despite those undisturbed findings, this Court had permitted the appellant to call Mr Rains as a witness and invite the jury to accept him as a witness of truth as to the investigation of the respondent.

[127] The appellant's submission that the trial should be permitted to proceed on the basis that it would be sufficient to leave it to the trial court to deal with the consequences of the demonstrated misconduct is most unsatisfactory, both from the point of view of the oppressiveness to the respondent and of the risk to the public confidence in the administration of justice.

[128] There was something in the suggestion made by senior counsel for the respondent that such a trial could be characterised as a farce. It would be oppressive to the respondent to put her in such a position, especially in light of the findings made by the primary judge and not overturned in this Court. Such a prosecution would impose a burden on the respondent that a presiding trial judge might not be able entirely to remedy, without risk of entering the arena. Requiring the respondent to have to determine how to redress the misconduct would allow the abuse of process to continue. The burden on the judge and the jury would not be acceptable for a circumstantial case of attempted fraud.

[129] Further, the primary judge was correct to be concerned that judicial toleration of the ATO's misconduct, and its detrimental consequences, would risk legitimising it, and damaging public confidence in the administration of justice. To allow the appellant to proceed with the prosecution of the Commonwealth charge without some form of qualification which, in advance of the commencement of any trial, eliminated or satisfactorily alleviated the impact of the misconduct already found to have occurred would be to act as if the Court, like the appellant and the ATO, was unconcerned by the serious misconduct of Mr Rains and the willingness of the appellant to proceed on the fruit of his investigation, and take his instructions, without effective testing or questioning.

[130] On the other hand, the offending of which the respondent is accused is serious offending. There is a strong policy reason in favour of permitting a trial to occur if the oppressive impact of the misconduct on the respondent and the risk to the public confidence in the administration of justice could be dealt with by some form of undertaking governing the way in which the appellant might seek to conduct the trial. The primary judge erred by not formulating an order which permitted the appellant the opportunity to explore that possibility.

[131] Whether the appellant can offer undertakings which will sufficiently ameliorate the concerns identified above is something which this Court cannot presently assess. Now that the question of the fact of relevant misconduct has been settled by the reasons of this Court, the appellant should be in the position to determine whether it can, by offering undertakings, propose a satisfactory way in which the prosecution could be permitted to proceed. Any suggestion that the prosecution should be

permitted to proceed should only be made in the context of an application to the District Court to discharge the stay on particular and clearly formulated terms or undertakings and on which the respondent would have an opportunity to be heard. The proper approach is to make an order along the lines of those suggested in *Jago v District Court (NSW)* by Mason CJ at [112] above.

[132] But in order to give the respondent some certainty, the appellant should be required to bring any such application within a relatively short time frame.

Final disposition

[133] The Court orders:

1. Appeal allowed in part.

2. The order of 3 October 2025 is set aside and in lieu thereof it is ordered that the prosecution of the respondent on the charge under sections 134.2(1) and 11.1 of the *Criminal Code 1995* (Cth) be stayed and not proceeded with without an order of the District Court.

3. Any application for an order permitting the prosecution to proceed on undertakings to the Court offered by the appellant must be made within 90 days of the date of this order.