SUPREME COURT OF QUEENSLAND

CITATION:	*R v Elfar; R v Golding; R v Sander* [2017] QCA 149
PARTIES:	**In CA No 214 of 2015:** **R** **v** **ELFAR, Terrance** (appellant) **In CA No 215 of 2015:** **R** **v** **GOLDING, Simon Charles** (appellant) **In CA No 211 of 2015:** **R** **v** **SANDER, Holger** (appellant)
FILE NO/S:	CA No 214 of 2015 CA No 215 of 2015 CA No 211 of 2015 SC No 864 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeals against Conviction
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Convictions: 13 August 2015
DELIVERED ON:	11 July 2017
DELIVERED AT:	Brisbane
HEARING DATE:	13 February 2017
JUDGES:	Gotterson and Morrison and McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In CA No 214 of 2015:** **The appeal by Elfar against conviction be dismissed.** **In CA No 215 of 2015:** **The appeal by Golding against conviction be dismissed.** **In CA No 211 of 2015:** **The appeal by Sander against conviction be dismissed.**

CATCHWORDS: CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – ILLEGALLY OBTAINED EVIDENCE – where the Australian Federal Police (AFP) received information from the United States Drug Enforcement Agency (DEA) that a ship was sailing from South America containing narcotics, and had a planned rendezvous with an Australian vessel, the *Mayhem of Eden*, at an identified location – where AFP surveillance identified two ships about a quarter of a nautical mile apart near the location identified by the DEA – where the *Mayhem of Eden* was tracked back to a location at the Scarborough Marina – where two men were observed leaving the vessel, each with a large, heavy duffel bag – where one of the men, Golding, subsequently took the bags into a hire car, which was stopped and searched by the AFP – where the AFP officer cut open the duffel bag and it was found to contain blocks of cocaine – whether the AFP officers suspected, on reasonable grounds, that a thing relevant to an indictable offence was in the car – whether the AFP officers suspected, on reasonable grounds, that it was necessary to exercise the powers under s 3T *Crimes Act* 1914 (Cth) to prevent the drugs from being concealed, lost or destroyed – where the duffel bag was opened in non-compliance with s 3U *Crimes Act* 1914 (Cth) because it was cut open without giving the persons apparently in charge of the car the opportunity to open it – whether the evidence of the cocaine found within the car should have been excluded

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – ILLEGALLY OBTAINED EVIDENCE – where the *Mayhem of Eden* was searched, and cocaine seized, pursuant to a warrant – where the appellant contended that the evidence of the search and seizure should have been excluded because of events which preceded it – where members of the AFP Operational Response Group (OR Group) were directed to board the *Mayhem of Eden*, by forced entry, shortly after the car carrying Golding was stopped and searched – whether the OR Group leader held a reasonable suspicion that there were narcotics on the *Mayhem of Eden* – where Elfar, who had been arrested at Kippa Ring, informed the AFP just prior to the OR Group's forced entry that he had a key to the vessel but where that circumstance was unknown to the OR Group – whether Elfar was a person 'apparently in charge' of the *Mayhem of Eden* for the purposes of s 203D(2) *Customs Act* 1901 (Cth)

CRIMINAL LAW – PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – ABUSE OF PROCESS – IN GENERAL – where each of the appellants was examined purportedly under the *Australian*

Crime Commission Act 2002 (Cth) (the ACC Act) after he had been charged – where the High Court in *X7 v Australian Crime Commission* (2013) 248 CLR 92 held that the ACC Act did not authorise the compulsory examination of a charged person about the subject matter of that charge – where Elfar and Golding submitted that there had been a fundamental alteration of the accusatorial judicial process of a criminal trial by reason of the unauthorised examination – whether the fact of the unauthorised examination resulted in a miscarriage of justice – where Elfar and Golding further submitted that they suffered a specific prejudice because they could not give evidence without running the risk of further prosecution if the evidence diverged from that given during the ACC examination – where neither Elfar nor Golding provided any indication of what exculpatory evidence he might have given at the trial but for the suggested impediment – whether a miscarriage of justice occurred – where Sander further submitted that his right of election to testify in his own defence had not been decided according only to the strength of the evidence presented against him – where Sander adduced evidence of his instructions to his lawyers at trial, which included a statement that he understood that if he gave evidence which was inconsistent with that which he gave before the ACC examination, he could be charged with perjury – where Sander did not provide evidence as to the content of any exculpatory evidence which he could have given at trial – whether a miscarriage of justice occurred

CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – LEGISLATION AND LEGISLATIVE POWERS – EXTRATERRITORIAL OPERATION OF LEGISLATION – where the appellant Sander was arrested and his ship was searched and seized beyond the outer edge of the contiguous zone of Australia – where s 184A and s 185 of the *Customs Act* 1901 (Cth) provided the authority to board the ship and detain Sander – whether s 51(xxix) of the *Constitution* requires some nexus or connexion between Australia and the 'external affairs' which the law seeks to regulate – whether s 184A and s 185 of the *Customs Act* 1901 (Cth) nevertheless satisfied any such requirement in s 51(xxix) if it existed – whether s 184A and s 185 of the *Customs Act* 1901 (Cth) are beyond the legislative power of the Commonwealth under s 51(xxix) of the *Constitution*

Constitution (Cth), s 51(xxix)
Crimes Act 1914 (Cth), s 3T, s 3U
Customs Act 1901 (Cth), s 183UA, s 184A, s 185, s 203B, s 203D

Bunning v Cross (1978) 141 CLR 54; [1978] HCA 22, cited
Commissioner of the Australian Federal Police v Zhao (2015) 255 CLR 46; [2015] HCA 5, considered

George v Rockett (1990) 170 CLR 104; [1990] HCA 26, applied
Hammond v The Commonwealth (1982) 152 CLR 188; [1982] HCA 42, considered
Lee v New South Wales Crime Commission (2013) 251 CLR 196; [2013] HCA 39, considered
Lee v The Queen (2014) 253 CLR 455; [2014] HCA 20, considered
Nudd v The Queen (2006) 80 ALJR 614; (2006) 162 A Crim R 301; [2006] HCA 9, applied
Polyukhovich v The Commonwealth (1991) 172 CLR 501; [1991] HCA 32, considered
R v Harper [2015] QCA 273, considered
R v Rondo (2001) 126 A Crim R 562; [2001] NSWCCA 540, cited
R v Seller; R v McCarthy (2015) 89 NSWLR 155; [2015] NSWCCA 76, considered
Victoria v The Commonwealth (Industrial Relations Act Case) (1996) 187 CLR 416; [1996] HCA 56, cited
X7 v Australian Crime Commission (2013) 248 CLR 92; [2013] HCA 29, considered
X7 v The Queen (2014) 246 A Crim R 402; [2014] NSWCCA 273, applied
XYZ v The Commonwealth (2006) 227 CLR 532; [2006] HCA 25, cited

COUNSEL:

In CA No 214 of 2015 and CA No 215 of 2015:
A Edwards for the appellants
G R Rice QC, with R J Sharp, for the respondent

In CA No 211 of 2015:
M J Copley QC, with E J Longbottom, for the appellant
G R Rice QC, with R J Sharp, for the respondent

SOLICITORS:

In CA No 214 of 2015 and CA No 215 of 2015:
Ashkan Tai Lawyers for the appellants
Director of Public Prosecutions (Commonwealth) for the respondent

In CA No 211 of 2015:
Anderson Fredericks Turner for the appellant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by McMurdo JA and with the reasons given by his Honour.

[2] **MORRISON JA:** I have read the reasons of McMurdo JA and agree with those reasons and his Honour's orders to dismiss the appeals against conviction.

[3] **McMURDO JA:** After a 16 day trial before Atkinson J and a jury each of the appellants, was convicted of an offence of the importation into Australia of a commercial quantity of a border controlled drug, namely cocaine, in contravention of s 11.2A(1) and (2) and s 307.1(1) of the *Criminal Code* (Cth). Each was

sentenced to a term of 30 years' imprisonment, but different non-parole periods were fixed: Elfar's period was 20 years, Golding's period was 18 years and Sander's period was 16 years.

[4] Each appeals against his conviction. The grounds of appeal are identical between Elfar and Golding, who have the same counsel. Sander is separately represented and relies upon further grounds to challenge his conviction.

[5] None of the appellants criticises the summing up or argues that the verdict was unreasonable. The verdicts are challenged upon arguments that certain evidence was unlawfully obtained and ought not to have been admitted, that the prosecution did not make proper disclosure and that the indictment ought to have been permanently stayed because, before the trial, the appellants had been compulsorily but unlawfully examined about the relevant events. It is convenient to set out the facts before more precisely describing the grounds of appeal and considering the arguments.

The facts

[6] On 3 August 2010, a boat called the *Edelweiss* sailed from Panama City, south to the coast of Ecuador, and then west across the Pacific. By 8 October 2010, it was about 320 nautical miles off the Australian east coast.

[7] On 7 October 2010, the Australian Federal Police (AFP) received information that a vessel carrying a large quantity of narcotics was sailing towards Australia in order to meet another vessel, to which it would transfer its cargo at sea. The information was provided by the Drug Enforcement Agency (the DEA), a law enforcement agency of the United States government. The DEA informed the AFP that this rendezvous was expected to occur at a position, defined by certain coordinates, on the evening of 8 October 2010. The DEA subsequently provided an updated expected date and time for the meeting.

[8] On the basis of that information, the AFP, together with the Australian Customs and Border Protection Service, conducted surveillance flights in the region of the anticipated rendezvous. On the night of 8 October 2010, one of these aircraft identified two vessels approximately two miles apart and sailing towards each other. At about 2.00 am on the morning of 9 October 2010, an aircraft relocated the two vessels, which were then about a quarter of a nautical mile apart and not far from where they had been seen earlier. Digital imagery identified one of the vessels as a sloop with the name *Mayhem of Eden* (which I will call the *Mayhem*). From then, the location of the *Mayhem* was tracked by the AFP and other agencies as it sailed towards the Australian coast until, early on the morning of 12 October 2010, it was observed entering Moreton Bay and mooring off the Scarborough Marina.

[9] On board the *Mayhem* were the appellants Elfar and Golding. The *Mayhem* was registered to a company of which Elfar was a director. It had sailed from Port Macquarie in early October 2010, where Elfar had paid for mooring and fuel at the Port Macquarie Marina.

[10] At about 7.40 am on the morning of 12 October 2010, Elfar and Golding were seen by AFP and Customs officers leaving the *Mayhem* in a tender to go to the marina, where they booked a berth. At about 11.00 am, the *Mayhem* entered the Scarborough boat harbour and tied up at the berth. Half an hour later, Elfar and

Golding were observed as they disembarked. Each was carrying a large, heavy duffel bag. They left the marina by taxi, after placing the two bags in the boot, at 11.45 am.

[11] The taxi took them to the Kippa Ring Village Shopping Centre where they arrived about five minutes later. They walked into the centre with the duffel bags. Just before midday, Golding was seen by officers using a mobile phone and walking towards the exit of the shopping centre, while Elfar was at a table inside the centre with the two bags at his feet. A few minutes later, Golding was again seen using his phone and a few minutes after that, he returned to the table where Elfar was still seated. They were joined by a man called Triplett and another man called Mandas. Triplett, together with Elfar and Golding who were carrying the duffel bags, walked towards the car park of the centre where Golding placed one bag in the back seat of Triplett's car before sitting in the front passenger seat. The other bag was placed in the boot of the car. Elfar walked back to the shopping centre where, not long afterwards, he was arrested. Golding and Triplett drove away from the shopping centre in the car. It was a Toyota Corolla which had been hired by Triplett.

[12] At about 12.24 pm, the Corolla, carrying Triplett and Golding and the bags, was stopped by the AFP. The two men were arrested and the car was searched without a search warrant.

[13] An AFP officer removed the duffel bag from the boot and cut it open. It was found to contain blocks of cocaine. The car was then moved to a quieter location where it remained under the supervision of an AFP officer, pending the arrival of a search warrant. When the warrant arrived at 5.50 pm, AFP officers began to conduct a thorough examination of the car. But before that search was complete, and before the cabin of the car and the duffel bag on the back seat had been searched, the car was moved to police headquarters. It was not until 15 October that the second duffel bag was removed, searched and found to contain blocks of cocaine.

[14] After cocaine had been found in the bag in the boot of the Corolla, officers from the AFP Operational Response Group (the OR Group) immediately went to the Scarborough Marina to secure the *Mayhem*. They were able to obtain entry to the marina by permission granted by marina staff. But the *Mayhem* itself was locked. The OR Group boarded the *Mayhem* at about 1.00 pm, by a forced entry. The officers walked through the vessel without conducting an actual search or removing any items. A search warrant was not obtained until 7.30 pm on that evening. Shortly after 1.00 pm, just after the initial forced entry of the *Mayhem*, AFP officers obtained a key to the *Mayhem* from Elfar at the Kippa Ring Shopping Centre and the key was brought to the marina.

[15] Three AFP officers went on board the *Mayhem* at about 1.43 pm. They inspected the vessel and saw that there was a cargo of drugs.

[16] When the *Mayhem* was searched later that day, after the issue of a warrant, drugs were found in two cabins, in packages and bags of the same kind as those which had been taken by Elfar and Golding to Kippa Ring.

[17] The bag in the boot of the Corolla contained 25 kilograms of cocaine and the bag on the car's back seat was later found to contain 20 kilograms of the drug. From the *Mayhem*, some 355 blocks of cocaine, having a gross weight of 355.67 kilograms with a total pure weight of cocaine of 251.6 kilograms, were seized.

[18] On 13 October 2010, the *Edelweiss* was boarded, outside Australia's territorial waters, by AFP and Customs officers. The appellant Sander and another man called Serna were taken on board the Customs vessel and detained and the *Edelweiss* was taken in tow. Sander, Serna and the vessel were brought to Australia by Customs and arrived in Brisbane two days later. Upon arrival in Brisbane, Sander refused to be interviewed, but Serna was interviewed and made extensive admissions. The AFP and Customs officers had found on board the *Edelweiss* Australian food products of a kind which matched those which had been found on the *Mayhem*.

The appeals by Elfar and Golding

[19] In 2012, Ann Lyons J made rulings under s 590AA of the *Criminal Code* (Qld) about the inadmissibility of a number of items of evidence. At that stage, Serna and Triplett were charged with the present appellants and all five accused applied to exclude certain parts of the evidence. Each of those applications was unsuccessful. At the commencement of the hearing in this Court, counsel for Elfar and Golding sought and was granted leave to amend their notice of appeal so as to pursue only the grounds, as set out in counsel's outline of submissions, as follows:

> "1. The learned Judge [Ann Lyons J] erred in ruling against inadmissibility of the evidence found as a result of the search of the Toyota Corolla on 12 October 2010;
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> 2. The learned Judge erred in ruling against inadmissibility of the evidence found as a result of the searches of the *Mayhem of Eden* on 12 October 2010 and following and of the *Edelweiss* on 15 October 2010 and following;
>
> 3. The learned Judge erred in not granting either a temporary or permanent stay of the indictment as a result:
>
> …
>
> (ii) of the failure to disclose material relevant to which Australian Customs and Border Protection Service ("ACBPS") officers ("customs officers") and Australian Federal Police ("AFP") agents were involved, and their roles, in the investigation of the appellants, including particularly at the Scarborough marina on 12 October 2010; or
>
> as a result of a combination of those factors."

[20] But Elfar and Golding also argue that their convictions should be quashed upon the basis of their having been required to give evidence before an examiner of the Australian Crime Commission (the ACC), having been already been charged with this offence. These examinations occurred on 22 October 2010 (Golding) and 28 October 2010 (Elfar). In *X7 v Australian Crime Commission*,[1] it was held that the *Australian Crime Commission Act* 2002 (Cth) (the ACC Act) did not authorise an examiner to require a person charged with a Commonwealth indictable offence to answer questions about the subject matter of that offence. For Elfar and Golding, it is argued that, irrespective of the strength of the prosecution case, the consequence of those examinations was that there was such a defect in the process of the trial that their convictions resulted from a miscarriage of justice. A related

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1 (2013) 248 CLR 92

complaint is that the prosecution did not disclose material which was relevant to "the extent to which the content of the ACC hearings had been disseminated" and to a question of "which Customs officers and AFP agents were present at the ACC hearings of each of the appellants".

Evidence from the car

[21] In a pre-trial ruling, conducted under s 590AA of the *Criminal Code* (Qld), Ann Lyons J was asked to exclude, relevantly for the present appeals, evidence obtained from the search of the Corolla, evidence obtained from the search of the *Mayhem* and evidence of the items seized during the search of the *Edelweiss*. Those and other applications[2] occupied five days, resulting in a reserved judgment delivered in December 2012.

[22] The evidence obtained from the car was challenged on the basis that there had been no power in the AFP officers to stop the car and no power to cut open the bag in which cocaine was then found. Those arguments called for a consideration of the evidence against the powers and requirements prescribed by s 3T and s 3U of the *Crimes Act* 1914 (Cth).

[23] Section 3T provides as follows:

> "(1) This section applies if a constable suspects, on reasonable grounds, that:
>
> (a) a thing relevant to an indictable offence is in or on a conveyance; and
>
> (b) it is necessary to exercise a power under subsection (2) in order to prevent the thing from being concealed, lost or destroyed; and
>
> (c) it is necessary to exercise the power without the authority of a search warrant because the circumstances are serious and urgent.
>
> (2) The constable may:
>
> (a) stop and detain the conveyance; and
>
> (b) search the conveyance and any container in or on the conveyance, for the thing; and
>
> (c) seize the thing if he or she finds it there.
>
> (3) If, in the course of searching for the thing, the constable finds another thing relevant to an indictable offence or a thing relevant to a summary offence, the constable may seize that thing if he or she suspects, on reasonable grounds, that:
>
> (a) it is necessary to seize it in order to prevent its concealment, loss or destruction; and
>
> (b) it is necessary to seize it without the authority of a search warrant because the circumstances are serious and urgent.

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2 A successful application to exclude evidence of information provided by Elfar to an AFP officer and an unsuccessful application to exclude the confession of Serna (then a co-accused).

(4) The constable must exercise his or her powers subject to section 3U."

[24] Section 3U provides as follows:

> "When a constable exercises a power under section 3T in relation to a conveyance, he or she:
>
> (a) may use such assistance as is necessary; and
>
> (b) must search the conveyance in a public place or in some other place to which members of the public have ready access; and
>
> (c) must not detain the conveyance for longer than is necessary and reasonable to search it and any container found in or on the conveyance; and
>
> (d) may use such force as is necessary and reasonable in the circumstances, but must not damage the conveyance or any container found in or on the conveyance by forcing open a part of the conveyance or container unless:
>
> (i) the person (if any) apparently in charge of the conveyance has been given a reasonable opportunity to open that part or container; or
>
> (ii) it is not possible to give that person such an opportunity."

[25] Section 3T(1) provides that the section applies if a constable, on reasonable grounds, suspects three things. The first is that "a thing relevant to an indictable offence is in or on a conveyance". In the present case, plainly there was a suspicion that narcotics were in the car. But in this Court, it is argued for Elfar and Golding that the suspicion lacked reasonable grounds. However at the pre-trial hearing, the actions of the AFP were not challenged upon that basis. That contention was not put to any relevant witness. It was not put to a Ms Barrett, an officer of the AFP, who was one of the police officers involved in the location of the drugs in the bag in the boot of the vehicle. Ms Barrett was the person who, using a knife, cut open the bag to reveal the drugs. Nor was that case put to the officer in charge of the group which stopped the car, Mr Watt, when he had given evidence at the committal hearing. That evidence was included within the evidence for the hearing under s 590AA. More generally, at the committal, the validity of the actions in stopping the car and locating the drugs were not challenged on the basis that there was no reasonable ground for suspecting that drugs were within the car.

[26] In this Court, it was not said that the appellants were precluded from making the argument now. But the absence of the argument at the hearing under s 590AA, when the Court was asked to rule upon this evidence, explains why Ann Lyons J did not discuss it. Mr Edwards, who now appears for Elfar and Golding, submits that the matter had been argued before her Honour. He says that this appeared from something said by counsel then appearing for his clients which appears in the appeal record at pages 300 and 301. It is unnecessary to set out those passages from the record of the addresses of the pre-trial hearing. It is sufficient to say that Mr Rice QC, who did appear at that hearing, is correct in saying that this was not an argument which was then made. What was there said was relevant to the distinct

argument, which is repeated here, that there was no reasonable ground for a suspicion that it was necessary to exercise a power under s 3T(2) without the authority of a search warrant because the circumstances were serious and urgent.

[27] Indisputably, the relevant police officers, Mr Watt in particular, suspected that there were narcotics in the car. Under surveillance, Elfar and Golding had sailed the *Mayhem* into Scarborough harbour and almost immediately left the boat to go to the shopping centre, carrying the two bags. Again under surveillance, they had been seen to meet another two men and the bags had been seen to be placed in the vehicle before it was driven away. The present argument is that it cannot have been reasonably suspected that the bags contained drugs, because it could not have been reasonably suspected that the *Mayhem* had drugs on board as it arrived at Scarborough.

[28] In *George v Rockett*,[3] the High Court discussed the state of mind which is a suspicion, as distinct from a belief. The Court there said:[4]

> "Suspicion, as Lord Devlin said in *Hussien v. Chong Fook Kam*, 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove."' The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In *Queensland Bacon Pty. Ltd. v. Rees*, a question was raised as to whether a payee had reason to suspect that the payer, a debtor, 'was unable to pay [its] debts as they became due' as that phrase was used in s. 95(4) of the *Bankruptcy Act* 1924 (Cth). Kitto J. said:
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> > 'A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to "a slight opinion, but without sufficient evidence", as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which "reason to suspect" expresses in sub-s. (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the subsection describes – a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.'"
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> (footnotes omitted)

As to what is meant by "reasonable grounds" for a state of mind, in the same judgment the High Court said that what is required is "the existence of facts which are sufficient to induce that state of mind in a reasonable person".[5]

[29] At the committal, Mr Watt gave oral evidence and a five page written statement by him was tendered. He was asked by counsel for Elfar whether at the time that the

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3 (1990) 170 CLR 104.
4 Ibid at 115-116.
5 Ibid at 112.

drugs were found in the car, he suspected that "the items or some of them [in the car] may have contained border controlled drugs?" to which he answered "yes". He was not asked any question about the basis for that suspicion except that, at one point, he was asked whether it was derived from the discovery of drugs on board the *Mayhem*.[6] He answered that he had derived his suspicion "from the bags that were in the car".[7] When cross-examined by the solicitor then appearing for Golding, Mr Watt was asked to explain his authority to search the vehicle and he answered "section 3T of the *Crimes Act*". He was asked to give his understanding of that section to which he said:

> "Well… – if I had the suspicion that there were evidential items on board that conveyance – had already been involved in the commission of an indictable offence, then I'm able to stop and search that vehicle."[8]

That cross-examination continued as follows:

> "Are you also aware, however, that it is actually a three stage test in relation to the fact that there has to be also the involvement of possibly the destruction or concealment of evidence if that search did not get conducted there and then? -- Or the stopping of the car, correct.
>
> Sorry? -- Or the stopping of the car.
>
> Or the stopping of the car. But did you understand that you need to be satisfied prior to conducting the search that that evidence is going to be concealed or destroyed? -- Yes.
>
> Okay. And you'd come to that conclusion, had you? -- I'd come to the conclusion - I was concerned that if we didn't stop that car at that time, because we didn't know where it was going, or both cars to be honest, that we may lose control of it and there may be a loss or destruction of evidence."[9]

[30] Mr Watt had been in the vicinity of the Scarborough Marina from about 4 am on 12 October 2010. He had travelled there with other officers of the AFP to assist with this investigation. At the time he left the vicinity of the marina and travelled with other officers to Kippa Ring, which was at about 12.20 pm on that day, neither the *Mayhem* nor the *Edelweiss* had been boarded by police or customs officers. The suspicion that the car contained drugs came from the movements of Elfar and Golding at the time that they left the *Mayhem*, together with their suspicion that the *Mayhem* had arrived with drugs on board.

[31] This whole exercise of surveillance and detection had resulted from the information which had been provided by the DEA, as I have discussed.

[32] It is argued for Elfar and Golding that the information from the DEA was insufficient to found a reasonable suspicion. It is said that the information was "hearsay intelligence" which suggested only a possibility of drugs being on board the

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6 Supplementary Appeal Record (SAR) 1535.
7 Ibid.
8 SAR 1550.
9 Ibid ll26-52.

Mayhem, rather than providing reasonable grounds for a suspicion.[10] Reliance was placed upon the judgment of Smart JA in *R v Rondo*,[11] where it was said that "[a] reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by [the relevant provision]".

[33] There was no direct evidence of the communication of information from the DEA to the Australian agencies. The progress of the provision of this information was evidenced and supported by two documents, each dated 13 October 2010. One was an email from an AFP officer named Perkins to Mr Saunders, the commander of the Australian Customs vessel (the *Ocean Protector*) which intercepted the *Edelweiss*. The second document was from another Customs officer, Mr Christensen, also dated 13 October 2010 and also addressed to Mr Saunders.

[34] The email from Mr Perkins began with this statement as to the "background":

> "On 7 October 2010, information was received from the United States Enforcement Agency (DEA) that indicated a large vessel suspected of containing a quantity of narcotics may be en route from Ecuador to the Australian east coast. It was estimated by the DEA that if the vessel continued in its westerly direction, it could reach the Australian east coast sometime around 6:00pm Australian Eastern Daylight time on 8 October 2010."

[35] In the document written by Mr Christensen, under the heading "Initial Information Received from AFP", this was said:

> "On Thursday 7 October 2010, AFP received information from foreign law enforcement counterparts that a vessel had departed a South American country approximately two months previously. This vessel ("the suspected mothership") was believed to be carrying a large quantity of narcotics, and planned to meet another vessel ("the suspected daughter vessel") at sea in approximate position 2842S 15818E on the evening of Friday 8 October 2010."

[36] It is now argued that the information from the DEA included the fact that it was unknown whether this "large vessel" was to sail to the Australian coast or was instead to rendezvous with another vessel. However, it appears that Mr Christensen's document referred to later information from the DEA, by which time the Australian agencies were being told that there would be a rendezvous as Mr Christensen's document described. The initial and more general information from the DEA had been superseded by more precise information.

[37] It is argued for the appellants that the information was unreliable for the fact that it had referred to a "large vessel" whereas the *Edelweiss* was about 12 metres in length. Again, that submission is inspired by what is described in Perkins's email and not in the more detailed record of Mr Christensen's document. It is also argued that the information had less weight for the fact that it said that the vessel would be "on route from Ecuador", whereas the *Edelweiss* had sailed from Panama. That submission is unpersuasive, because the *Edelweiss* did sail from Ecuador via

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10 Written Submissions for Elfar and Golding, paragraph 15.

11 (2001) 126 A Crim R 562 at [53].

Panama. In any event, the relevant question is what was reasonable to suspect on the information then available, and a later discovery that this information had been incorrect in some respect would not have been relevant.

[38] The argument for the appellants points out that there was no radar or surveillance of an actual meeting between the two vessels. But what was also known was the information provided by a Mr Sheffield, who was the navigator on board a surveillance aircraft and who recorded the position of the *Mayhem* relative to the other vessel. He was in real-time communication with Customs officers stationed in Canberra and, at the time, he sent a number of images which he had taken to record the positions of the vessels. The vessel subsequently identified as the *Mayhem* was not only very close to the other vessel but they maintained the same relative positions for some time.

[39] But the fact that the information had been provided by this source, a leading drug law enforcement agency, was relevant to the weight which is to be given to it. It was detailed, progressively supplied information as to the timing and precise location of the rendezvous of the vessels. That information was then supported by two vessels, the *Mayhem* included, being found at a time and at a location which was consistent with the most recent information from the DEA. After the vessels had apparently met, the *Mayhem* immediately sailed back to Australia. Elfar and Golding were then seen leaving the *Mayhem*, within an hour of berthing, carrying large heavy bags.

[40] In these circumstances, a reasonable person could at least suspect that the bags within the vehicle contained drugs which had been illegally imported. The requirement of s 3T(1)(a) was satisfied.

[41] The next question was whether Mr Watt had a reasonable suspicion that it was necessary to exercise the powers under s 3T(2) "in order to prevent the [drugs] from being concealed, lost or destroyed."[12] The question here is not whether it was, in fact, necessary to exercise those powers. Rather, it is whether the relevant officer reasonably suspected that it was necessary to do so.

[42] In her judgment, Ann Lyons J recorded the argument by defence counsel that the evidence obtained during the search of the car should be excluded because there was "no basis for an emergent search of the vehicle as there was no reason to believe that anything in the car would be concealed, lost or destroyed once it was stopped". Although the car had later been searched under the authority of a warrant, it was argued that the results of that later search should also be excluded, because the warrant had been obtained upon a suspicion that was derived from what had been found, unlawfully, in the boot of the car when it was stopped.

[43] Her Honour referred to evidence from Mr Watt and another AFP officer, Ms Cressy, that in their view the circumstances were "serious and urgent". Her Honour summarised their evidence as follows:

> "They stated that they intercepted and searched the car and the boot of the car without a warrant because they knew the vehicle was being driven away from the shopping centre to a place unknown and that it contained bags brought from the vessel which had been the subject

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12 Section 3T(1)(b).

of surveillance from Customs and foreign law enforcement agencies. Their evidence was that there was a concern about losing track of the vehicle and with loss of the evidential material."

Her Honour then reasoned as follows:

"[40] It would seem clear that until Triplett arrived at 12.13 pm at the shopping centre in the Corolla they had no idea of his role and a new element was inserted into the circumstances they were aware of. The car was then driven away from the shopping centre at around 12.17 pm. I accept that there was a real concern the car would be driven away and get lost in the traffic. The AFP were concerned that they would lose contact with both the car and the passengers. Until that point in time the AFP were not aware of Triplett or the role he played. Furthermore and in my view significantly, they had no idea what Triplett planned to do with the duffle bags and their contents.

[41] I consider that there were, in all of the circumstances, reasonable grounds for a suspicion that illegal drugs were in the duffle bags in the Corolla and that it was necessary to stop, detain and search the vehicle in order to prevent the car being driven away such that the drugs could be concealed, lost or destroyed. I am also satisfied that the circumstances were both serious and urgent. I consider there was a very real concern that there were significant quantities of drugs in an unknown car being driven by an unknown driver and it could simply disappear. On the evidence before me, it would seem that the AFP officers had no idea Triplett or a car was involved until the Corolla pulled up and the bags were loaded into it. I consider that there was no time to obtain a search warrant to search the car in the four minute period between Triplett's arrival on the scene and the time he started to drive away.

[42] The fact that police stopped and waited for a search warrant to arrive after the initial cursory search was completed does not in any way invalidate their authority to search the vehicle when it was initially stopped. I accept that both occupants of the vehicle were placed in police custody and handcuffed after the vehicle was stopped.

[43] In my view it is clear that the police had possession of the vehicle and had conducted a preliminary search to ascertain if there were reasons to obtain a search warrant. It was obviously concluded that a search warrant should be obtained. I do not consider, however, that the initial search was unlawful."[13]

[44] Counsel for Elfar and Golding submitted that it was unnecessary to exercise any of the powers under s 3T(2), particularly the power to stop the car. It is said that there was no real risk that the car might have been lost as it was followed by the AFP

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13 Appeal Record (AR) 465.

officers. In effect, it is said that the AFP officers should have continued to follow the car until a warrant was obtained.

[45] Counsel went further, submitting that the AFP officers, most particularly Mr Watt, made a calculated decision to not seek a warrant because "they realised that, upon an application for a warrant to a magistrate, they were unlikely to be successful."[14] As I have said, Mr Watt did not give evidence at the s 590AA hearing, but his evidence at the committal was before her Honour and he was not there challenged with the theory which counsel now advances. As I have explained, there was a reasonable suspicion held by Mr Watt that the drugs were in the car. Once that is accepted, there was clearly a risk that the drugs could have been "concealed, lost or destroyed" by the police officers losing track of the car. There was, at the least, a reasonable ground for a suspicion by Mr Watt that it was necessary to exercise the power to stop and detain the car, and to search the car for the drugs.

[46] The remaining argument about the evidence from that search is that there was a failure to duly exercise the power of search, having regard to the requirements of s 3T. The bag which was in the boot was cut open by Ms Barrett without giving an opportunity to the person or persons apparently in charge of the car to open the bag. Those persons were Golding and Triplett, each of whom was then handcuffed and sitting on the side of the road. As the prosecution agrees, they could have been given an opportunity to open the bag, and therefore, the bag was opened in non-compliance with s 3U.

[47] But it did not follow that this non-compliance required the evidence of what was found in the bag to be excluded. Ann Lyons J concluded that there was a clear non-compliance, but that, having regard to the probative value of the evidence, it should not be excluded in the exercise of what can be described as a *Bunning v Cross*[15] discretion. Her Honour described the non-compliance as follows:

> "In the overall circumstances of this case I do not consider that the failure by officers to first ask Triplett to open the bag before they cut it open was a grave breach. It is best characterised as clumsy and was probably an innocent oversight … There is no indication that by opening the bag in the way they did that the evidential value of the bag was compromised."

[48] In this Court, counsel for Elfar and Golding accepts that the non-compliance with s 3U, of itself, could not have warranted the exclusion of the evidence. Rather, this non-compliance is relied upon, in combination with the suggested absence of power to stop and search the vehicle, as justifying the exclusion of the evidence. It is conceded, both in the written and oral submissions of counsel for the appellants, that if the vehicle was lawfully stopped and searched, this non-compliance with s 3U alone could not have justified the exclusion of the evidence.

[49] For these reasons, Ann Lyons J was correct to refuse the application to exclude the evidence of the search of the vehicle and of the drugs then found.

Search of the Mayhem

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14 Transcript of the appeal hearing, Monday 13 February 2017, T1-19.

15 *Bunning v Cross* (1978) 141 CLR 54.

[50] A search for and seizure of drugs took place on the *Mayhem* after 8.00 pm on 12 October 2010. That search and seizure was authorised by a warrant under the *Crimes Act*. It is argued that the evidence of that search and seizure should have been excluded because of events which preceded it.

[51] The first of those events was the seizure of drugs from the car. Upon the premise that the search of and seizure from the car was unlawful, it is argued that the warrant which was obtained for the *Mayhem* was wrongly obtained, because it was obtained on evidence from that search. But because, as I have concluded, the search of the car was lawful, this ground for the exclusion of the evidence of the search of the *Mayhem* must be rejected.

[52] Another event which is said to have tainted the evidence of the search of the *Mayhem* was the entry of the vessel, at about 1.00 pm on 12 October 2010, by the OR Group. It is argued that the entry by the OR Group was unlawful. Further, there were the three AFP officers who were on board the *Mayhem* after it had been secured by the OR Group and before the warrant was obtained. It is argued that their entry was unlawful.

[53] Elfar was arrested at the Kippa Ring Shopping Centre at about 12.38 pm on that day. He was detained there until investigators arrived. At about the same time, the car carrying Golding and Triplett was stopped and searched. Shortly after that, the OR Group members, who were then at the Brisbane Airport, were directed to go to the Scarborough Marina. They arrived there at about 1.00 pm and were directed to board the *Mayhem* by Detective Superintendent Baker, who was controlling the investigation remotely from Port Macquarie. Just a few minutes later, AFP officers who were speaking with Elfar were told by him that he was carrying a key for the *Mayhem*. That was unknown to Detective Superintendent Baker or any of the OR Group before the group went on board.

[54] One of the officers in the OR Group, Mr Evans, described what occurred in his evidence in the s 590AA hearing. He said that the group's purpose was to secure the vessel in the circumstance that at that stage, according to some reports, more than two people had been on the *Mayhem*. He said that the group was "to secure the vessel as quickly as possible to prevent the loss and destruction of evidence and to also apprehend any further offenders [who] may have been on the vessel".[16] In cross-examination, Mr Evans referred to his diary in which he had noted the possibility that there could have been up to three persons originally on board the vessel[17] and he referred to the further circumstance that the vessel was in a public area, so that the "rapid containment of the vessel" was necessary to ensure the safety of the public.[18]

[55] The OR Group had completed its task by about 1.43 pm. They handed over responsibility for the vessel to the three AFP officers, who were Federal Agents McGilvray, Mazlin and Begbie. They inspected the vessel with the leader of the OR Group, Mr Irving. When cross-examined at the committal, Mr McGilvray said that he was shown by Mr Irving items which he had seen inside the vessel.[19] In her pre-trial ruling, Ann Lyons J said that agents McGilvray, Begbie and Mazlin

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16 AR 166.
17 AR 185.
18 AR 186.
19 SAR 835.

boarded the *Mayhem* and made "a brief visual inspection". But, according to the evidence of each of these agents, nothing was touched or seized until the search was undertaken pursuant to the warrant.

[56] For Elfar and Golding, it is argued that neither the OR Group nor this other group of officers was entitled to board the *Mayhem*. The respondent argues, as Ann Lyons J held, that the entry of the vessel was authorised by s 203B of the *Customs Act* 1901 (Cth) which provides as follows:

> "203B Seizure without warrant of special forfeited goods, or of evidentiary material relating to special forfeited goods at a Customs place
>
> (1) This section applies in 2 circumstances, namely:
>
> (a) in a circumstance where an authorised person suspects on reasonable grounds that there are special forfeited goods:
>
> (i) at, or in a container (other than a designated container in the immediate physical possession of a person to whom subparagraph (b)(i) applies) at, a Customs place; or
>
> (ii) in, on, or in a container (other than a designated container in the immediate physical possession of a person to whom subparagraph (b)(i) applies) on, a conveyance at a Customs place; or
>
> (b) in a circumstance where a person:
>
> (i) is at a Customs place that is also a designated place; and
>
> (ii) has a designated container, or has goods reasonably suspected by an authorised person to be special forfeited goods, in his or her immediate physical possession; but
>
> (iii) is not carrying that container or those goods on his or her body.
>
> Note 1: ***Container*** and ***designated container*** have special definitions for the purposes only of this Division.
>
> Note 2: The baggage of a passenger entering or leaving Australia or of the captain or crew of a vessel or aircraft so entering or leaving is not a designated container.
>
> Note 3: To determine the question whether a person is carrying a designated container, or goods reasonably suspected of being special forfeited goods, on his or her body, see subsection 4(19).
>
> (2) In the circumstances referred to in paragraph 1(a), the authorised person may, without warrant:

(a) search the Customs place, or the container at that place, for special forfeited goods; or

(b) stop and detain at the Customs place the conveyance and search it and any container on it for special forfeited goods;

as the case requires and seize any goods that the authorised person reasonably suspects are special forfeited goods if the authorised person finds them there.

(2A) In the circumstance referred to in paragraph (1)(b), an authorised person who is an officer of Customs may, without warrant:

(a) search any designated container in the immediate physical possession of the person to whom that paragraph applies; and

(b) seize any goods reasonably suspected by the authorised person of being special forfeited goods (whether or not those goods are found as a result of such a search).

(2B) An authorised person must not exercise the powers referred to in subsection (2A) unless the person having immediate physical possession of the container to be searched is present at the time when the container is searched.

(2C) For the avoidance of doubt, the power of the authorised person under subsection (2) to seize, without warrant, goods found as a result of a search of, or at, a Customs place that are reasonably suspected of being special forfeited goods includes the power to seize, without warrant, any goods that:

(a) have been produced as a result of a frisk search of a person; or

(b) have been discovered on the body of a person as a result of an external search or an internal search of the person;

if the search is conducted under Division 1B at the Customs place and the goods are reasonably so suspected.

(3) If, in the course of searching under subsection (2) or (2A) for special forfeited goods, an authorised person finds a thing that the authorised person believes on reasonable grounds is evidential material relating to an offence committed in respect of those special forfeited goods, the authorised person may, without warrant, seize that thing whether or not the authorised person has found any such special forfeited goods.

> (4) For the purposes of a search conducted under subsection (2) or (2A), the authorised person may question any person apparently in charge of the place, conveyance or container about any goods or thing at the place, in or on the conveyance, or in the container.
>
> (5) The authorised person must exercise his or her powers subject to section 203D."

[57] The term "Customs place" is defined by s 183UA of the *Customs Act* to include "a port … or wharf that is appointed, and the limits of which are fixed, under section 15". Ann Lyons J concluded, by reference to evidence which need not be discussed here, that the Scarborough Marina was a "Customs place" and there is no challenge to that conclusion.

[58] Her Honour was also satisfied, as the appellants' argument now accepts, that narcotics are "special forfeited goods" for the purposes of s 203B. And the *Mayhem* was a "conveyance" which was defined by s 183UA to include a "vessel of any kind".

[59] Under s 203B(2), an authorised person[20] was permitted to search the vessel and any container on it for special forfeited goods and, as the case required, to seize any goods reasonably suspected to be special forfeited goods if found there, in the circumstances referred to in s 203B(1)(a). Ann Lyons J held, and the respondent argues here, that there was such a circumstance in that an authorised person suspected on reasonable grounds that there were narcotics on the conveyance (the *Mayhem*).

[60] As her Honour discussed, Detective Superintendent Baker understood that he was exercising a power under s 203C, rather than under s 203B, in instructing the OR Group to go on board. Section 203C was, in relevant respects, in the same terms as s 203B except that it applied in circumstances where the relevant place or the relevant container was in a place other than a Customs place. Because the Scarborough Marina was a Customs place, it was s 203B which was the source of the relevant power. But the suspicion which Superintendent Baker held for the purposes of s 203C was a sufficient suspicion under s 203B, namely it was a suspicion that there were narcotics on the *Mayhem*. That was a reasonably held suspicion, not only because of what was known prior to the search of the car, but also from what was found in the car. It is not to the point that Detective Superintendent Baker believed that prior to the discovery of drugs in the car, there was not a sufficient basis for the search of the *Mayhem* without a warrant.[21] At the relevant time, he held the requisite suspicion and, on an objective view, that was a reasonable suspicion. I agree with the reasoning of Ann Lyons J that there was a reasonable ground for that suspicion from what was known before the car was intercepted, for the same reasons that there was a reasonable ground for a suspicion that drugs were in the car.

[61] Under s 203B, an authorised person was entitled, without warrant, to search the *Mayhem* for drugs and to seize anything suspected of being drugs, without it being necessary to exercise that power in order to prevent the drugs from being concealed,

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20 Defined by s 183UA to include an officer of police.

21 AR 98.

lost or destroyed. It follows that the OR Group and subsequently the three AFP officers were entitled to go on board and indeed to search for drugs, without a warrant.

[62] Section 203D(2) provides:

> "An authorised person exercising powers under section 203B, 203C, 203CA or 203CB may use such force as is necessary and reasonable in the circumstances, but must not:
>
> (a) forcibly remove any container or other goods from a person's physical possession; or
>
> (b) damage any place, conveyance, container or other goods of which the person is apparently in charge;
>
> unless:
>
> (c) the person has been given a reasonable opportunity to facilitate the exercise of the powers by providing access to the place, conveyance, container or goods or by opening the conveyance or container; or
>
> (d) it is not possible to give that person such an opportunity."

[63] The OR Group damaged the vessel by smashing some glass to gain entry. It is argued that this was prohibited by paragraph 2(b) and there existed neither of the circumstances referred to in paragraph 2(c) and (d). More specifically, it is submitted that Elfar was the person "apparently in charge" of the vessel and he had not been given the opportunity to facilitate the provision of access to it. As I have discussed, Elfar told AFP officers that he had a key for the vessel just minutes after the OR Group forcibly entered it. Ann Lyons J held there were circumstances of urgency, which precluded the provision of that opportunity and which required the vessel to be forcibly entered. Her Honour referred to the need to secure the drugs to ensure they were not lost or destroyed, noting that they could have been tipped overboard had another offender been on the vessel. There was no error in that reasoning. Further, the premise for the appellants' argument, namely that Elfar was "the person … apparently in charge" of the *Mayhem*, is not established. At this time Elfar was in Kippa Ring. He was not in physical possession of the vessel and therefore he was not a person who could have fallen within paragraph (2)(a). "The person … apparently in charge", as referred to in paragraph (2)(b), is an apparent reference to the same person described in paragraph (2)(a). That is inconsistent with the notion, implicit in the appellants' argument, that a person could be apparently in charge of a vessel when, by being somewhere else, is unable to provide access to the vessel at the point when the authorised person wishes to search it.

[64] Therefore, what the AFP did on the *Mayhem*, prior to the search under the warrant, was not unlawful.

[65] For these reasons, there was no basis to exclude the evidence of what was found on board the *Mayhem* under the search pursuant to the warrant.

Complaints about disclosure

[66] It is argued that AFP officers deliberately attempted to hide aspects of the searches of the car and the *Mayhem*, and that these attempts justify the quashing of the convictions and a stay of the prosecution "pending full disclosure, a *voir dire* and … informed argument as to the admissibility of the evidence from the search of the *Mayhem of Eden*".[22] The argument suggests five ways in which there was this conduct of concealment by the AFP.

[67] Firstly, it is said that there was a concealment by the officers involved in the interception of the car by not mentioning in their witness statements that the bag taken from the boot had been cut open in non-compliance with s 3U(d) of the *Crimes Act*. But that fact was not concealed: indeed it was video recorded by Mr Watt and the recording was tendered and played at the committal hearing. Relevant witnesses were cross-examined about the cutting of the bag and it was upon the basis of that evidence that Ann Lyons J was able to rule, correctly, that there was a non-compliance with s 3U.

[68] Secondly, there was a suggested failure by AFP officers to mention that Elfar, having been arrested, had been taken to the Scarborough Marina where the key to the vessel was provided to AFP officers there. It is said this was a deliberate attempt to disguise a non-compliance with s 203D of the *Customs Act*. Again, the facts do not suggest any deliberate concealment of the truth. Detective Superintendent Baker had ordered the OR Group to enter the vessel and they had done so because of a perceived circumstance of urgency, both in securing public safety and in securing potential evidence. As I have explained, their actions were lawful and there was no need for the AFP officers to withhold the information that, subsequently, there was a key with Elfar when he was brought back to the marina.

[69] Thirdly, it is said that there was a failure by the AFP officers, agents McGilvray, Mazlin and Begbie, to mention in their witness statements that they had boarded the *Mayhem* ahead of the issue of the search warrant. As I have concluded, their boarding of the vessel was also lawful according to s 203B. Nothing was then seized and their boarding was not productive of any evidence which could have further strengthened the prosecution case. Nor could the fact of that boarding have damaged the case. The appellants' argument is that these officers were alert to the prospect of criticism of their conduct and for that reason they sought to conceal it. At least once it is seen that their conduct was lawful, this submission is unpersuasive.

[70] Fourthly, it is argued that the AFP acted improperly by not obtaining CCTV footage of events at the marina. Mr Mazlin gave evidence at the committal that police had requested that all CCTV footage of the marina be kept, but that, subsequently, police had obtained only some of the footage. But what was obtained was that which was considered relevant, namely footage of the movements of Elfar and Golding leaving the marina on their way to Kippa Ring and footage of a police search of a bin where one of the appellants had then thrown some items. There was no footage available which showed the vessel berth. Consequently, there was no footage available which would have shown the entry of the *Mayhem* by AFP officers. This argument appears to be inspired by evidence given at the trial, by an employee of the marina, that when she left work at 5.00 pm "there were a lot of

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22 Written Submissions for Elfar and Golding, paragraph 67.

agents coming and going, removing the stuff from the boat".[23] She said that this conduct by the agents may have commenced at around 2.00 pm.[24] But as the appellants' written submissions properly concede, the witness said that this had occurred on the same day as the marina manager had signed some AFP documents, which other evidence showed were signed on 13 October, the day after the events in question.

[71] Fifthly, there was an alleged failure to disclose video footage taken by the AFP itself. This was footage of some of the search which was conducted under the warrant. Its existence emerged during an earlier trial of the appellants on these charges. It should have been disclosed. The non-disclosure was explained (although not excused) by the fact that it was not footage taken by any investigating police officer; instead, it was taken by a civilian employed by the AFP for the purpose of providing footage to the media. At this trial, the film was tendered in the Crown case. And there is no suggestion that in some way it may have assisted the defence case.

[72] None of these allegations of non-disclosure provides any basis for the convictions to be quashed.

Ground 3 of the appeal

[73] According to this ground of the appeals by Elfar and Golding, the indictment ought to have been stayed, either permanently or temporarily, because of an alleged failure to disclose material which was relevant to the identification of the Customs officers and AFP officers who were involved in the investigation of the appellants, particularly at the Scarborough Marina on 12 October 2010, and all material evidencing the respective roles of those persons.

[74] This ground of appeal complains of an error by Ann Lyons J in not granting a stay upon this basis. But neither Elfar nor Golding asked her Honour to do so. They applied for a stay upon other bases. The relevant judgments were those given by her Honour on 18 September 2013 and 11 September 2014, from which it can be seen that a stay was sought upon the different basis (discussed below) of the unlawful examination of the defendants by the ACC.

[75] It is argued that it emerged only during the subject trial that there were more than 10 Customs officers present at the marina on 12 October 2010. Until then, it is said, the presence of Customs officers had not been disclosed. It is argued that having regard to the importance to the defence case of the legality of the search of the *Mayhem*, witness statements of all who had been present should have been obtained and provided. The argument asserts that "given the obvious attempts at hiding what in fact occurred" (an apparent reference to the five contentions discussed above at paragraphs [67] to [71]) "their evidence was integral and was buried".[25] It is argued that absent disclosure of who was present throughout the day, "the defence were left merely to speculate as to what really occurred at the *Mayhem* prior to the arrival of the warrant [that] night and as to how that might have affected the legality of the

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23 AR 1279.
24 AR 1282.
25 Written Submissions for Elfar and Golding, paragraph 61.

search, there being only the unreliable evidence of AFP officers who had attempted to cover up other potential wrongdoing"[26].

[76] As I have discussed, the actions of the AFP officers (save for the cutting of the bag found in the boot of the car) were in all respects lawful and the suggestion of an attempted "cover up" is made upon the false premise that there was something unlawful or otherwise irregular which had to be concealed.

[77] More generally, because the conduct of AFP officers at the marina was in all respects lawful, there was no relevance in the number and identity of other persons who were present, including any Customs officers. The lawfulness of what occurred on the *Mayhem*, prior to the search under the warrant, came from the existence of a reasonable suspicion that there were imported drugs on board. The accounts of other persons who were at the marina could not have mattered to that question, especially when it is recalled that these events occurred after cocaine was found in the car. This ground of appeal must be rejected.

The ACC Examinations

[78] Each of the three appellants was examined purportedly under the ACC Act, after he had been charged with the subject offence. The dates of their examinations were 21 October 2010 (Sander), 22 October 2010 (Golding) and 28 October 2010 (Elfar). At the conclusion of each examination, a direction was made by the examiner under s 25A(9) of the ACC Act, the effect of which was to prohibit the disclosure of, amongst other things, the evidence given in the examination. That direction was able to be varied, but only if it did not prejudice the fair trial of a person.

[79] The examinations were conducted prior to the decision of the High Court in *X7 v Australian Crime Commission*[27] (which I will call *X7*), which held that the ACC Act did not then authorise an examiner to require a person, who had been charged with a Commonwealth indictable offence, to answer questions about the subject matter of the charged offence. Each of the three appellants was required to answer questions on that subject and did so. Each argues that this had the consequence that his conviction should be quashed. The argument for the appellant Sander will be considered later in this judgment, but the discussion of the authorities which follows is relevant also to his appeal.

[80] *X7* was a proceeding brought by a person who, having been charged with Commonwealth indictable offences,[28] was compulsorily examined under the ACC Act, when he was asked and he answered questions about the subject matter of those offences. On a later date he refused to answer further questions on those subjects. He filed a proceeding in the High Court, seeking declarations and injunctions. A case was stated which reserved questions for the consideration of the Full Court, the first of which was whether Div 2 of Pt II of the ACC Act then empowered an examiner, appointed under s 46B(1) of the ACC Act, to conduct an examination of a person charged with Commonwealth indictable offence, where that examination concerned the subject matter of the offence so charged. By a majority (Hayne, Kiefel and Bell JJ, French CJ and Crennan J dissenting) that question was answered in the

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26 Ibid, paragraph 66.

27 (2013) 248 CLR 92.

28 Conspiracy to traffic in a commercial quantity of a controlled drug, conspiracy to import a commercial quantity of a border controlled drug and conspiracy to deal with money that is the proceeds of crime.

negative. In the view of the majority, the compulsory examination of a person in that circumstance would depart from the accusatorial nature of criminal justice, so that for an alteration of that kind to be made by statute, it would have to be made clearly by express words or necessary intendment, which was not manifest in this statute.[29]

[81] In analysing that departure from the accusatorial nature of the process, Hayne and Bell JJ said:[30]

> "Even if the answers given at a compulsory examination are kept secret, and therefore cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged, the requirement to give answers, after being charged, would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom. No longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according *only* to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused person is thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge."

[82] It is submitted for Elfar and Golding that according to that reasoning, there would be, in each and every case, such a fundamental alteration of the accusatorial judicial process of a criminal trial, from that person being compelled to answer questions about the subject matter of an offence with which the person has been charged, that any conviction would constitute a miscarriage of justice. It is argued that this is the consequence for a trial, irrespective of whether there was any more specific prejudice to the accused person in the sense that examination itself, or the use of evidence given in or derived from the examination, has deprived the person of a chance of an acquittal. An alternative argument for these appellants is that in the facts and circumstances of their cases, there was a practical unfairness to their defence of the charge.

[83] The first of those arguments likens this case to those within the third of the categories of miscarriage of justice, described in this passage from the judgment of Gleeson CJ in *Nudd v The Queen*:[31]

> "The concept of miscarriage of justice is as wide as the potential for error. Indeed, it is wider; for not all miscarriages involve error. Process is related to outcome, in that the object of due process is to secure a

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29 (2013) 248 CLR 92 at 132 [87], 152-153 [157].
30 (2013) 248 CLR 92 at 142-143 [124].
31 (2006) 162 A Crim R 301; (2006) 80 ALJR 614 at [7].

> just result. Justice, however, means justice according to law, and the observance of the requirements of law according to which a criminal trial is to be conducted has a public as well as a private purpose. An unjust conviction is one form of miscarriage. Another is a failure of process of such a kind that it is impossible for an appellate court to decide whether a conviction is just. *Another is a failure of process which departs from the essential requirements of a fair trial.*"
>
> (emphasis added)

Gleeson CJ discussed in that judgment the two different, although related, aspects to the concept of a miscarriage of justice, namely outcome and process. In cases within the first and second categories which he described in that passage, an appellate court assessing whether there has been a miscarriage of the justice will assess the justice of the outcome. It will decide whether the irregularity has resulted, or may have resulted, in the conviction. The third category of case, Gleeson CJ explained, involves such a "departure from the requirements of a fair trial according to law … that an appellate court will identify what occurred as a miscarriage of justice, without undertaking an assessment of the strength of the prosecution case."[32]

[84] In *Lee v New South Wales Crime Commission*,[33] the question was whether the *Criminal Assets Recovery Act* 1990 (NSW) empowered the Supreme Court of New South Wales, on the application of the New South Wales Crime Commission, to order the compulsory examination of a person about conduct which was the subject of a criminal offence with which the person had been charged. By a majority (French CJ, Crennan, Gageler and Keane JJ, Hayne, Kiefel and Bell JJ dissenting), that question was answered in the affirmative. As in *X7*, the question was whether the terms of the statute made it sufficiently clear that it was intended to intrude upon common law rights and freedoms under the accusatorial system of criminal justice. What is presently important from this judgment is what was said about those common law rights and freedoms. French CJ, referring to the passage which I have set out from the joint judgment of Hayne and Bell JJ in *X7*, said:[34]

> "It may be accepted that the examination process under the CAR Act may, if it touches upon matters the subject of pending criminal charges against the examinee, affect the accusatorial character of the trial process. Even if the responses of the examinee to questions put to him or her were kept secret and were solely exculpatory or did no more than disclose defences to the charges, the examinee could be said to have suffered a forensic disadvantage. The nature of that disadvantage was discussed in the joint judgment of Hayne and Bell JJ in *X7*. I do not, with respect, disagree with anything their Honours said in the description of that disadvantage."

In the joint judgment of Gageler and Keane JJ, this was said:[35]

> "323 There is a variety of ways in which, as a matter of practical reality, the examination on oath of a person against whom

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32 (2006) 162 A Crim R 301, 305; (2006) 80 ALJR 614, 618 at [6].
33 (2013) 251 CLR 196.
34 Ibid at 229-230 [54].
35 Ibid at 315-316 [323] – [324].

> criminal proceedings have been commenced may have a tendency to give rise to unfairness amounting to an interference with the due course of justice in a particular case. The deprivation of a legitimate forensic choice available to the person in those proceedings may be one of those ways. However, we are unable to regard as the deprivation of a legitimate forensic choice a practical constraint on the legal representatives of the person leading evidence or cross-examining or making submissions in the criminal proceedings to suggest a version of the facts which contradicted that given by their client on oath in the examination. The legal representatives would, of course, be prevented from setting up an affirmative case inconsistent with the evidence but they would not be prevented from ensuring that the prosecution is put to proof or from arguing that the evidence as a whole does not prove guilt.
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> 324 The notion that any subtraction, however anodyne it might be in its practical effect, from the forensic advantages enjoyed by an accused under the general law necessarily involves an interference with the administration of justice or prejudice to the fair trial of the accused is unsound in principle and is not consistent with *Hamilton v Oades*. To accept that a criminal trial 'does not involve the pursuit of truth by any means' is not to condone as legitimate the pursuit of falsehood. The words of Lord Scarman in *R v Sang*, concerning the judicial discretion to exclude legally admissible evidence on the ground of unfairness, resonate more widely:
>
> > 'The test of unfairness is not that of a game: it is whether … the evidence, if admitted, would undermine the justice of the trial. Any closer definition would fetter the sense of justice, upon which in the last resort all judges have to rely: but any extension of the discretion … would also undermine the justice of the trial. For the conviction of the guilty is a public interest, as is the acquittal of the innocent. In a just society both are needed.'"
>
> (footnotes omitted)

[85] In the following year, the High Court decided *Lee v The Queen*.[36] This was an appeal against conviction upon the basis that there had been a substantial miscarriage of justice, because the trial had been altered in a fundamental respect by the prosecution having in its possession the evidence which the appellants had given under the compulsion of the *New South Wales Crime Commission Act* 1985 (NSW). The first appellant had been examined by the Commission on two occasions before he was charged with the offences in question. Pursuant to s 13(9) of that Act, a Commissioner had made a direction which prohibited the publication of the first appellant's evidence except as specified by the Commission. The second appellant had been examined about a week later, when charges against both appellants were imminent. A direction under s 13(9) was not made, as it ought to have been made.

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36 (2014) 253 CLR 455.

But the appeal was conducted upon the basis that the Commission was subject to a direction in the same terms as those made for the first appellant. The transcripts of the appellants' evidence, however, were disclosed by the Commission to the police and to the DPP. It was conceded that this disclosure was unlawful. Before the trial, the appellants' legal representatives were aware that the prosecution was in possession of the transcripts and one of the solicitors later said that the disclosure of the transcript of his client's evidence had foreclosed the possibility that that appellant would give evidence at the trial. In the Court of Criminal Appeal, evidence had been given by the Crown prosecutor who had had the conduct of the trial. He agreed that it had been "informative" to know what the defence might say, as indicated by the transcripts. In these circumstances, the Crown resisted the appeal in the High Court only insofar as it sought a verdict of acquittal or a permanent stay, but accepted that it would be appropriate for a retrial to be ordered and that was the order which was made.

[86] What was unlawful in *Lee v The Queen* was not the examination of each appellant, but the disclosure of the transcript of his evidence. It was conceded in the Crown's argument that this disclosure had been made to the DPP, at the DPP's request, in order that the DPP could ascertain any defences the appellants might raise and that this had altered the trial in a fundamental respect.[37] On that basis, the case was an example of a miscarriage of justice of the third kind which Gleeson CJ had discussed. This judgment does not support the appellants' arguments in the present case. Here, counsel for Elfar and Golding accepts that the prosecutor, and the lawyers instructing him, had no knowledge of the content of the evidence given by the appellants on their examinations by the ACC.[38]

[87] In *X7*, the question was the lawfulness of that person's examination by the ACC. The effect or otherwise of that examination upon the course of the prosecution of that person was decided by the New South Wales Court of Criminal Appeal in *X7 v The Queen*.[39] After the High Court's judgment in his favour, X7 sought a permanent stay in the District Court of New South Wales. A stay was refused in that Court because X7 had not established that he would suffer any prejudice at his trial arising from his examination before the ACC. His appeal was dismissed, the Court rejecting his submission that it had not been necessary for him to provide some evidence of actual prejudice.

[88] The principal judgment was given by Bathurst CJ. He analysed four authorities upon which the submissions for X7 relied: they were the three cases in the High Court which I have discussed and the High Court's judgment, in 1982, in *Hammond v The Commonwealth*.[40] In that case, the appellant had been charged with criminal offences when he was required to be examined by a Royal Commissioner on matters which were the subject of his charges. He applied for an interlocutory injunction to restrain the Commissioner from examining him on those matters, upon the basis that to do so would constitute a contempt of the court in which he was to be tried. The relevant legislation had the effect that none of his evidence could have been admitted in the proceeding against him. He was granted an injunction which restrained his being examined on any matter relevant to those charges until after the

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37 Ibid at 463 [17]-[18].
38 Transcript of the Appeal Hearing (restricted access), 13 February 2017, T1-8.
39 (2014) 246 A Crim R 402.
40 (1982) 152 CLR 188.

determination of his trial. Bathurst CJ described the effect of that judgment as follows:[41]

> "The decision in *Hammond* did not involve a finding that a particular question proposed to be asked or any use made of the answers would give rise to prejudice. Rather, the point was made that the fact of an examination on matters the subject of the charge gave rise to a real risk of interference with the administration of justice and was very likely to prejudice Mr Hammond in his defence. In *X7* (*No 1*) this proposition was said to be correct."

[89] Bathurst CJ observed that none of those four cases "considered the question of whether, and in what circumstances, a permanent stay should be granted if examination of a charged person, unauthorised by statute, took place, or the content of an authorised examination had been transmitted to prosecuting authorities contrary to a direction designed to protect the accused person against the derivative use of the answers and other material obtained as a result of the examination". [42] The Chief Justice then turned to the authorities on the principles surrounding the grant of a stay in criminal proceedings, from which he identified three principles. The first was that "the power to grant a permanent stay is one that rarely will be exercised [because] in criminal proceedings there are significant countervailing considerations, namely, the interests of the community and the victims of crime in the enforcement of the criminal law".[43] The second was that "a stay will be ordered where there is a fundamental defect of such a nature that there is nothing a judge can do in the conduct of the trial to relieve against its unfair consequences" and that "[i]mplicit in that proposition is that it is necessary to identify both the fundamental defect and the unfair consequences".[44] The third was that "irrespective of whether or not unfairness is demonstrated, a stay may be granted if the proceedings in question are an abuse of process in the sense that the use of the court proceedings brings the administration of justice into disrepute".[45] Bathurst CJ held that this was not a case of that kind: although what had occurred was a contempt of court which could not be purged, in the circumstance where the ACC had acted in the bona fide belief that the examination was authorised by the ACC Act, he said that the continuation of the criminal proceedings would not bring the administration of justice into disrepute and nor was a stay necessary to protect the court process from abuse.[46]

[90] In relation to the second of those principles, Bathurst CJ held that it was necessary to see whether there had been a particular prejudice to X7 in his defence of the proceeding. In that respect, his Honour was influenced by the reasoning of Gageler and Keane JJ in *Lee v New South Wales Crime Commission* in the passage from their Honours' judgment which I have set out above. Bathurst CJ said:[47]

> "108 In considering the question of a stay I do not think that the reasoning of the majority in *Lee (2013)* can be ignored.

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41 (2014) 246 A Crim R 402 at 406-407 [18].
42 Ibid at 418 [83].
43 Ibid at 419-420 [91] citing *Jago v District Court (NSW)* (1989) 168 CLR 23 at 54 per Brennan J.
44 Ibid at 420 [92].
45 Ibid at 420 [93] citing *Rogers v The Queen* (1994) 181 CLR 251 at 286 and *Moti v The Queen* (2011) 245 CLR 456 at 463-464 [10].
46 Ibid at 424 [111].
47 Ibid at 423 [108]-[109].

> Gageler and Keane JJ at [323] stated that the deprivation of a legitimate forensic choice available to a person may be one of the ways that unfairness amounting to an interference with the due course of justice could arise in a particular case. The reference to a particular case in my opinion is not inconsistent with the views expressed by the other members of the majority in *Lee (2013)* or what was said in *X7 (No 1)*. Rather, it emphasises the fact that the conduct of the examination may have different consequences depending on its nature and extent in any given case.
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> 109 In these circumstances, it does not seem to me that either the decision in *X7 (No 1*) or in *Lee (2014)* compels the conclusion that the fact of an unauthorised examination, on its own, requires an order that there be a permanent stay of criminal proceedings relating to the matters the subject of the examination. To grant a stay in such a case would be to grant one without regard to the nature and extent of the unfairness which results. It would also fail to take into account the interests of the community in the prosecution of serious criminal offences."

[91] Special leave to appeal against the judgment in *X7 v The Queen* was refused by French CJ and Kiefel J with the comment that:[48]

> "In our view, the absence of practical unfairness arising at trial is always a relevant consideration in the exercise of the discretion to refuse a permanent stay."

As Bathurst CJ said in *X7 v The Queen*,[49] such a remark in the dismissal of an application for special leave to appeal to the High Court does not constitute any binding precedent, but can provide "guidance".

[92] In *R v Seller; R v McCarthy*,[50] the defendants had been publicly examined by the ACC about matters which subsequently became the subject of the charges brought against them. One of the prosecution's proposed witnesses, an officer of the Australian Tax Office who had been seconded to the ACC, had been present on some occasions during the examinations and had had access to the transcripts. It was that person's involvement which was the basis for the stay of the proceedings which was originally granted. That stay had then been set aside by an earlier decision of the Court of Criminal Appeal.[51] Subsequently, the defendants obtained an order prohibiting the ATO officer from giving evidence in their prosecutions. That order was upheld in this appeal. Bathurst CJ (with whom the other members of the Court agreed) discussed the evidence likely to be given by the ATO officer and the possibility that the defendants would be limited or hindered in their cross-examination of the witness by their evidence given at the compulsory examinations. Bathurst CJ said that this possibility could not be excluded, so that if the witness was to give the evidence which was proposed, "this would alter the accusatorial process inherent in a criminal trial in the fundamental sense described in *X7* (2013)

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48 [2015] HCA Trans 109.
49 (2014) 246 A Crim R 402 at 421 [97].
50 (2015) 89 NSWLR 155.
51 *R v Seller; R v McCarthy* (2013) 232 A Crim R 249.

and *Lee* (2014)".[52] The defendants had (again) also sought a permanent stay. In rejecting that argument, Bathurst CJ applied the reasoning in *X7 v The Queen* and said that:[53]

> "[N]either *X7* (2013) nor *Lee* (2014) compels the conclusion that the fact of an unauthorised examination on its own requires a permanent stay of proceedings. To grant a permanent stay in these circumstances would be to do so without regard to the nature and extent of unfairness which results and would fail to take into account the interests of the community in the prosecution of serious criminal offences."

[93] Further, in that case, there had been some dissemination to persons who would not be involved in the conduct of the trial. The mere fact of the dissemination was held to be insufficient to warrant a permanent stay.[54]

[94] *Commissioner of the Australian Federal Police v Zhao*[55] involved a question of whether proceedings, which had been brought by the Commissioner of the forfeiture of property of the respondents as proceeds of crime, should be stayed pending the finalisation of criminal proceedings against them. The High Court upheld a decision of the Court of Appeal of the Supreme Court of Victoria that the forfeiture proceedings should be stayed. In the joint judgment of the High Court, it was said that:[56]

> "Courts will not grant a stay of civil proceedings merely because related charges have been brought against a person and criminal proceedings are pending. More is required. To warrant a stay of the forfeiture proceedings, it must be apparent that the person whose property is in question is at risk of prejudice in the conduct of his or her defence in the criminal trial."

The Court then identified the particular prejudice which warranted a stay in that case:[57]

> "42 The risk of prejudice to the second respondent if a stay is not granted in the forfeiture proceedings and the exclusion proceedings is plain. It is not necessary for the second respondent to say any more than he did on the application for a stay in order to identify that risk, given that the offences and the circumstances relevant to both proceedings are substantially identical.
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> 43 The Commissioner contends, as the primary judge had held, that it was necessary that the second respondent state the specific matters of prejudice before a stay could be contemplated. However, to require the second respondent to do so would be to make the risk of prejudice a reality by requiring him to reveal information about his defence, the very situation which an order for stay seeks to avoid. Similarly, the Commissioner's contention that the court should defer making an order for a stay until the parties have exchanged their evidence is beside the point."

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52 (2015) 89 NSWLR 155 at 178 [123].
53 Ibid at 191 [203].
54 Ibid at 191-192 [209].
55 (2015) 255 CLR 46.
56 Ibid at 58 [35].
57 Ibid at 59-60 [42]-[43].

The High Court referred to the reasoning of the Court of Appeal that if the proceedings were not stayed, the prosecution would be informed of the content of the likely defence of the criminal proceeding, which the Court of Appeal characterised as a fundamental alteration of the position of the prosecution vis-à-vis the defendant rendering the trial unfair by analogy to *Lee v The Queen*.[58] The High Court did not accept that the case before it was of the kind in *Lee v The Queen*. The Court said:[59]

> "It is necessary to observe that the circumstances in *Do Young Lee* differ substantially from those of the present case. *Do Young Lee* involved the wrongful release of evidence, which had been obtained by the New South Wales Crime Commission under its coercive powers given to it by the *New South Wales Crime Commission Act 1985* (NSW), to the Director of Public Prosecutions, which was pursuing charges against Lee. The question was whether the possession of that evidence by the prosecution caused a miscarriage of justice. This Court held that it did, because Lee had not had a trial for which our system of criminal justice provides, and which the *New South Wales Crime Commission Act* itself sought to protect, by a provision which, in effect, prohibited the release of such evidence. An important aspect of a criminal trial, which follows from a fundamental principle of the common law, is that the prosecution is to prove the guilt of an accused person and cannot compel a person charged with a crime to assist in the discharge of its onus of proof. It was in this context that it was said that Lee's trial was fundamentally affected because the position of the prosecution vis-à-vis the accused had been altered.
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> (footnotes omitted)

[95] In *R v Harper*,[60] a decision of this Court, the appellant had been convicted of drug offences. He had been examined by the ACC about relevant matters, although before he was charged with the offences of which he was convicted. Investigating police officers had been present at his examination. Based upon information which they had from that examination, they obtained a search warrant and searched premises at which they found evidence which was used against the appellant at his trial. They also learnt from the examination the likely defence to the charges. One of his grounds of appeal against his convictions was that the result had been an unfair advantage to the prosecution. The principal judgment was given by Mullins J (with whom Morrison JA and Burns J agreed). Her Honour discussed *X7*, *Lee v The Queen* and *R v Seller; R v McCarthy*. She noted that the prosecutor at Harper's trial had not obtained the transcripts of his evidence before the ACC. She held that in neither way was the prosecution significantly advantaged at the trial. The evidence of what had been found under the search warrant was described as "peripheral to the issues at the trial".[61] And the information as to the likely defence at the trial was insignificant, it was held, because from other sources the investigating officers had anticipated that case and knew that they should gather evidence to meet it.[62]

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58 Ibid at 54 [17].
59 Ibid at 54-55 [18].
60 [2015] QCA 273.
61 Ibid at [143].
62 Ibid at [145].

[96] Most recently, in *DPP v Galloway (a pseudonym)*,[63] the Victorian Court of Appeal (Maxwell P, Redlich and Beach JJA) considered whether the proceedings should be stayed where the defendants, who had not then been charged, were examined by the ACC in the presence of officers from the AFP and the Director of Public Prosecutions. This was unlawful because, the defendants then being each "a person who may be charged" within the meaning of s 25A(9) of the ACC Act, a direction under that provision, preventing dissemination of the material, was necessary. In refusing a stay, the Court, relevantly for the present case, said:

> "It was common ground on this application, as it was before the judge, that unlawfulness alone could not justify a stay.[64] The respondents needed to show either that they had suffered irremediable prejudice, such that they could not have a fair trial, or that the unlawful conduct was so egregious as to require a stay, irrespective of unfairness, in order to protect confidence in the administration of justice."[65]

[97] On the application of Golding, there were two occasions on which the Court was asked and refused to stay the prosecution of the case upon the basis of the ACC examinations. The first was in September 2013 when, together with Elfar and their co-accused Sander and Triplett, he asked her Honour to determine whether:

> "In circumstances where an accused is compulsorily examined or purportedly compulsorily examined by an examiner of the ACC after being charged, is it a fundamental defect in the trial process such that it justifies a stay of the proceedings on indictment?"

Her Honour answered that question in the negative, by reference to *X7*, *Hammond v The Commonwealth*, *Jago v District Court of New South Wales*, *Nudd v The Queen*, the 2013 decision of the New South Wales Court of Criminal Appeal in *R v Seller; R v McCarthy*[66] and other authorities. This judgment was given, of course, prior to the other authorities which I have discussed, most particularly *X7 v The Queen*. Nevertheless, the reasoning is consistent with that in *X7 v The Queen*.

[98] Her Honour then had no evidence of the content of the evidence which had been given by any of the defendants when examined by the ACC. The question which she was asked to answer did not contain a premise that there would be any practical unfairness to any of the defendants from his examination. Her Honour reasoned as follows:

> "[56] I accept the submission of Counsel for the CDPP that prejudice comes in many forms and grades of seriousness and that this Court must actually assess the nature and extent of the prejudice which has been established by the High Court in cases such as *Jago*. In my view, despite the decision in *X7*, I still need to assess the actual prejudice to these applicants because of their examinations before the ACC. As the

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63 [2017] VSCCA 120.

64 *X7 v The Queen* (2014) 246 A Crim R 402, 423 [109].

65 Ibid 419–20 [91]–[93]; see also *Jago v District Court of New South Wales* (1989) 168 CLR 23, 34 (Mason CJ); 47–8 (Brennan J); 75 (Gaudron J) ('Jago'); *Dupas v The Queen*; (2010) 241 CLR 237, 250 [35].

66 (2013) 232 A Crim R 249; [2013] NSWCCA 42.

> transcripts of the examinations are not in evidence, it is impossible to know what actually transpired. For the same reason, it would seem that none of the applicants can identify how the conduct of their defence has in fact been hampered. It is unknown whether there has been any dissemination contrary to the non-publication and non-disclosure orders. It is impossible to know if anything was actually said in the examinations which could assist the prosecution. There is no evidence that any of the applicants were asked about their defence."

[99] That ruling left open the possibility of a further application for a stay upon the basis of any evidence of a potential practical unfairness. A further application was made to her Honour by Golding in September 2014. On that occasion, the transcript of Golding's examination was before the Court. Because of the potential risk from that coming to the knowledge of the prosecutor who was to appear at the trial, a different counsel and different lawyers within the CDPP's office were engaged for this application. Her Honour described the content of the evidence from the examination: it covered Golding's association with Elfar, "almost every aspect of the trip undertaken by the *Mayhem*", communications undertaken whilst on board the *Mayhem*, discussions about and preparations for the trip to Kippa Ring and other matters relevant to the charge against him. Upon the basis of that content, it was submitted that Golding was prejudiced in his defence of the proceeding because "he will have to decide his course in the light of the answers which he was compelled to give to the questions which were put to him during the examination". That argument relied particularly on what was said by Hayne and Bell JJ in *X7* in the passage which I have set out above, (the effect of which was repeated by Hayne J in *Lee v New South Wales Crime Commission*).[67] Her Honour referred to the passage from the judgment of Gageler and Keane JJ in *Lee v Crime Commission of New South Wales*, as set out above, and concluded that no prejudice had been established by Golding. She said that she was influenced in that conclusion by the decisions of the New South Wales Court of Criminal Appeal which I have discussed.

[100] The present question is not whether her Honour was correct in refusing to stay the proceedings against Elfar or Golding. It is whether their convictions were the result of a miscarriage of justice, that being the relevant basis for their appeals against conviction. As I have noted, their argument is put in two ways. First, it is argued that the mere fact of their unlawful examination by the ACC on the subject matter of the charge against them resulted in such a departure from the essential conditions of a fair trial that their convictions should be quashed, regardless of whether the outcome could have been affected by this irregularity. The alternative expression of their argument is that there was, in this case, a specific prejudice, because "the appellant could not have given evidence without running the risk of further prosecution if his evidence diverged in a material way from his evidence given at the relevant ACC hearing, whether under [s 33] of the *Australian Crime Commission Act* 2002 or s 123 of the *Criminal Code* (Qld)".[68]

[101] Upon the authorities which I have discussed, the first of those two arguments cannot be accepted. For that argument, the authorities in relation to stay applications are

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67 (2013) 251 CLR 196 at 236 [79]-[80].

68 Written Submissions for Elfar and Golding, paragraph 91.

instructive. In an application for a stay of a criminal proceedings, the court must prospectively assess the risk of prejudice to the defendant from the irregularity which has occurred. The authorities, *X7 v The Queen* in particular, explain why the mere occurrence of the irregularity of the kind in this case (the unlawful examination, under compulsion, of the defendant on relevant matters) of itself does not give rise to a prejudice which can justify the permanent stay of the proceeding. The refusal of a permanent stay in the cases which I have discussed is irreconcilable with the first submission for the appellants, because if the inevitable effect of the irregularity would be a "failure of process which departs from the essential requirements of a fair trial",[69] constituting a miscarriage of justice, a stay would have to be granted. This first argument relies heavily upon the passage from the judgment of Hayne and Bell JJ in *X7* which I have set out. But as the other judgments have noted, what was there said was not in the context of an application to stay a criminal proceeding or to appeal a conviction.

[102] On the appellants' alternative argument, an actual prejudice (put another way, practical unfairness) is said to have resulted from an impediment upon each in his election to give or not give evidence at the trial. It is also said that his case was limited by being "hindered, or even prevented", from challenging at the trial any part of the prosecution case in a way which was inconsistent with his evidence given to the ACC. The content of Golding's evidence to the ACC was before Ann Lyons J and this Court. The content of Elfar's evidence has been put before this Court to support his appeal. The effect of their evidence to the ACC is detailed in the written submissions of their counsel. It is sufficient to say that, in each case, that evidence is entirely consistent with their guilt. It appears that they could not have given evidence at their trial which was exculpatory, without contradicting that evidence given to the ACC.

[103] However, neither appellant now claims that his evidence to the ACC was untrue, inaccurate or incomplete. And neither offers any indication of what exculpatory evidence he might have given at the trial, but for the suggested impediment from his ACC examination. That omission is unsurprising, having regard to the overwhelming strength of the case against each of them. Once their challenge to the evidence found in the car and on the *Mayhem* was rejected, the prosecution case against each of them was unanswerable. In these circumstances, what was said by Gageler and Keane JJ in *Lee v Crime Commission of New South Wales* is clearly applicable.

[104] If either of these appellants did have some exculpatory evidence which he could have given, the disclosure of that evidence at a pre-trial application might have been problematic. But there cannot be the same explanation for the absence of such evidence in these appeals. Here there are appeals against conviction upon the grounds that they resulted from a miscarriage of justice.[70] To succeed, it is incumbent upon each appellant to demonstrate how this predicament, in electing whether to give evidence at his trial, existed as a real and not merely theoretical consequence of his examination. Prior to the trial, a defendant's unwillingness to disclose his defence might be justified. Now there has been a trial, which has been duly conducted and the appellant must demonstrate an injustice by revealing the content of the case (if any) which he might have asked the jury to consider. The absence of that evidence is unexplained: in particular, it is not suggested that the

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69 *Nudd v The Queen* (2006) 162 A Crim R 301 at [7].

70 *Criminal Code* (Qld), s 668E(1).

disclosure of a case to this Court, which was not put to the jury, could now expose either appellant to an offence by that case being inconsistent with his evidence to the ACC.

[105] It follows that neither of these appellants has proved that by his evidence given to the ACC, he was unfairly deprived of the chance of an acquittal.

[106] It is further argued for Elfar and Golding that the content of their evidence to the ACC may have been unlawfully disseminated, thereby affecting the fairness of their trial. As I have already noted, it is conceded that the prosecutor at their trial had no knowledge of the content of this material. In the written submissions for these appellants, details are provided of communications between the ACC and the AFP in respect of the investigation of these offences. It also appears that there were variations of the non-publication directions by the examiner, by which their evidence was allowed to be disclosed by AFP officers. From this material it is submitted that there is at least a basis for apprehending that full disclosure was not made by the prosecution and that details of the examinations may have been disseminated to persons who had, in some way, an influence upon the course of the trial. Those submissions cannot be accepted. The first reason is that ultimately the case was conducted by a prosecutor who had no knowledge of the content of the evidence to the ACC. The second is that evidence that some AFP officers had, or may have had, knowledge of the content of this evidence to the ACC far from proves a risk that the fairness of the trial was in some way affected. It is not suggested, for example, that the examinations of Elfar and Golding led to the discovery of further and significant evidence. The strong case against them came from what was found in the car and on the boat.

[107] For these reasons the various arguments by Elfar and Golding, based upon the ACC examinations, should be rejected.

Appeals against conviction by Elfar and Golding: conclusion

[108] For these reasons I would order:

1. In CA 214 of 2015, the appeal by Elfar against conviction be dismissed;
2. In CA 215 of 2015, the appeal by Golding against conviction be dismissed.

Sander's appeal against conviction

[109] At the hearing, Sander was given leave to amend his grounds of appeal, by deleting some grounds and adding others. One of the deleted grounds was that the evidence of items which had been located on the *Edelweiss* should have been excluded, as the evidence was unlawfully obtained.

[110] The grounds of appeal became as follows:

> "…
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> (c) That s.184A(5) *Customs Act 1901* was invalid, not being supported by any head of power under s.51 of The Constitution.

(d) That s.185(3)(c) & s.185(3A) *Customs Act 1901* were invalid, not being supported by any head of power under s.51 of The Constitution.

(e) The learned judge erred in declining to stay proceedings on the indictment.

(f) A miscarriage of justice was occasioned because the appellant's right of election under s 618 of the Criminal Code (Qld) was constrained by the intrusion of considerations flowing from the unlawful examination of him after he was charged but prior to the trial.

(g) A miscarriage of justice occurred because a news report broadcast at the start of the trial revealed that the appellant had been kept in custody whilst his co-accused were permitted to be at large on bail."

[111] The grounds involving s 184A(5), s 185(3)(c) and s 185(3A) of the *Customs Act* 1901 (Cth) involve a challenge to the lawfulness of the detention and arrest of Sander. Ground (e) is based upon the unlawfulness of Sander's examination by the ACC. Ground (f) is a distinct ground, affecting only Sander.

The lawfulness of the detention and arrest of Sander

[112] When, on 13 October 2010, the *Edelweiss* was boarded by Australian Customs and police officers, it was outside the territorial waters of Australia. The only persons on board were the appellant Sander, a German national, and Serna, a Costa Rican. The *Edelweiss* was searched and items were seized from the boat. The appellant Sander and Serna were taken on board the Australian Customs vessel and detained. They, together with the *Edelweiss*, were brought to Australia by the Customs officers and arrived in Brisbane two days later. The authority of the Customs officers to board the *Edelweiss* was conferred by s 184A of the *Customs Act* 1901 (Cth). The power to detain the *Edelweiss* and to bring it to Brisbane was conferred by s 185(3). The power to detain Sander and to bring him to Australia was conferred by s 185(3A) of that Act. In a pre-trial application, Sander challenged the validity of these acts on the basis that those provisions of the *Customs Act* were invalid because they were unsupported by any head of power under s 51 of the *Constitution*. That application was dismissed upon the basis that the arguments for the invalidity of these provisions were inconsistent with several decisions of the High Court.

[113] In this Court, counsel for Sander accepts the correctness of that decision according to those decisions, particularly *Polyukhovich v The Commonwealth*[71] and *XYZ v The Commonwealth*[72]. The argument accepts that this Court is bound by those authorities to hold that these provisions were valid under the external affairs power in s 51(xxix) of the *Constitution*. But the grounds of appeal which challenge the validity of these provisions are maintained upon the basis that this case would be an appropriate vehicle for the High Court to reconsider the relevant content of the

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71 (1991) 172 CLR 501.

72 (2005) 227 CLR 532.

external affairs power. In the circumstances, these grounds of appeal can be dealt with briefly. At the relevant time, ss 184A and 185 relevantly provided as follows[73]:

> "184A Power to board a ship
>
> …
>
> (5) The officer may board a ship if:
>
> (a) the ship is a foreign ship; and
>
> (b) the ship is:
>
> (i) outside the outer edge of the contiguous zone of Australia; and
>
> (ii) outside the territorial sea of a foreign country; and
>
> (c) the commander of a Commonwealth ship or Commonwealth aircraft reasonably suspects that the ship is being or was used in direct support of, or in preparation for, a contravention in Australia of this Act, section 72.13 or Division 307 of the *Criminal Code* or an Act prescribed by the regulations for the purposes of this Subdivision, where the contravention involves another ship (whether a foreign ship or an Australian ship); and
>
> (d) the boarding occurs as soon as practicable after the contravention happens.
>
> …
>
> 185 Power to board and search etc ships and aircraft
>
> …
>
> (3) An officer may detain the ship or aircraft and bring it, or cause it to be brought, to a port or airport, or to another place (including in relation to a ship, a place within the territorial sea or the contiguous zone in relation to Australia), that he or she considers appropriate if:
>
> …
>
> (c) in the case of a foreign ship that is outside Australia – the officer reasonably suspects that the ship is, will be or has been involved in a contravention:
>
> (i) in Australia of this Act, section 72.13 or Division 307 of the *Criminal Code* or an Act prescribed by the regulations for the purposes of this Subdivision; or

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[73] The *Customs Act* 1901 (Cth) has since been amended by the *Maritime Powers (Consequential Amendments) Act* 2013 (Cth), which deleted these provisions from the *Customs Act*, but enacted similar provisions in the *Marine Powers Act* 2013 (Cth).

(ii) in Australia's exclusive economic zone of an Act prescribed by the regulations for the purposes of this Subdivision; and

…

(3A) If the officer detains a ship or aircraft under this section, the officer may:

(a) detain any person found on the ship or aircraft and bring the person, or cause the person to be brought, to the migration zone (within the meaning of the *Migration Act 1958*); or

(b) take the person, or cause the person to be taken, to a place outside Australia."

[114] There is no issue as to the proper construction of these provisions. If they were valid they permitted the boarding of the *Edelweiss* and the detention and bringing to Australia of the appellant and the ship. There can be no question of the existence of a reasonable suspicion, as required by s 184A(5)(c) or s 185(3)(c).

[115] In *Polyukhovich v The Commonwealth*, Dawson J said of the scope of the power conferred by s 51(xxix)[74]:

> "[T]he power extends to places, persons, matters or things physically external to Australia. The word 'affairs' is imprecise, but is wide enough to cover places, persons, matters or things. The word 'external' is precise and is unqualified. If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase 'external affairs'."

That was also the view of Mason CJ,[75] Deane J,[76] Gaudron J[77] and McHugh J.[78]

[116] In *Victoria v The Commonwealth* (*Industrial Relations Act Case*),[79] Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ said that view of the scope of the power must be taken as representing the view of the High Court. In *XYZ v The Commonwealth*, that view was accepted by Gleeson CJ[80] and in the joint judgment of Gummow, Hayne and Crennan JJ.[81]

[117] For Sander, it is accepted that according to these authorities, this Court is bound to hold that each of these provisions of the *Customs Act* was valid as an enactment within the scope of the external affairs power. These provisions were engaged only in circumstances which included the location of the ship being outside the outer edge of the contiguous zone of Australia.

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74 (1991) 172 CLR 501 at 632.
75 Ibid at 528-531.
76 Ibid at 599-603.
77 Ibid at 695-696.
78 Ibid at 712-714.
79 (1996) 187 CLR 416 at 485.
80 (2006) 227 CLR 532 at 539 [10].
81 Ibid at 548 [38].

[118] Counsel for Sander would seek to rely upon the minority judgments in *Polyukhovich* and *XYZ*. In *Polyukhovich*, Brennan J said that there had to be more than a matter, thing or person occurring or situated outside Australia: in his view, there had to be "some nexus, not necessarily substantial, between Australia and the 'external affairs' which a law purports to affect before the law is supported by s 51(xxix)".[82] Brennan J continued:[83]

> "It is, of course, for the Parliament to determine in the first instance whether there is any connexion between Australia and a relationship, set of circumstances or field of activity which exists or occurs outside Australia and which a proposed law would purportedly affect, but, if the legislative judgment cannot reasonably be supported, the law will be held to be outside the power conferred by s 51(xxix) … The limits of the power conferred by s 51(xxix) are, in a real sense, a guarantee of the immunity from harassment by Australian law of persons who, having no connexion with Australia, engage in conduct elsewhere which does not affect Australian interests or concerns."

Toohey J agreed with Brennan J on that interpretation, but found that the requisite connection with Australia existed in the case of that law.[84]

[119] In *XYZ*, Callinan and Heydon JJ said that the majority view in *Polyukhovich* should be rejected and that case and others which had followed it should be overruled.[85] In the same case, Kirby J said that the High Court should revisit the reasoning of Brennan J in *Polyukhovich*.[86]

[120] For Sander, it is argued that there was not a connection with Australia in the operation of these provisions. The statutes under consideration in *Polyukhovich* and *XYZ* at least regulated the conduct of Australian citizens or residents (although in the former case, not limited to conduct at a time that the person was a citizen or resident). However, there was a relevant connection in the case of these provisions, because their operation depended upon a reasonable suspicion of the use of the ship in support of, or in preparation for a contravention of the *Customs Act* or certain provisions of the *Criminal Code* (Cth): namely section 72(13), which prohibits the importing or exporting of unmarked plastic explosives and Division 307, which proscribes the importing or exporting of border controlled plants. The provisions of the *Customs Act* therefore had a relevant and sufficient connection with Australia because they facilitated the prevention, detection and investigation of offences under Australian law. In *Polyukhovich*, Brennan J said that the requisite connection with Australia is a matter for the judgment of the Parliament, save that that judgment must be one which could reasonably be supported. Applying that to the present case, these provisions had a sufficient connection (if any be required) between Australia and circumstances occurring outside Australia by which, according to their terms, those provisions would be engaged.

[121] These grounds of appeal cannot be accepted.

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82 (1991) 172 CLR 501 at 551.
83 Ibid at 552.
84 Ibid at 655.
85 (2006) 227 CLR 532 at 604 [206].
86 Ibid at 571-572 [116].

Ground (e) refusal of a stay of proceedings

[122] This ground challenges the ruling made by Ann Lyons J in September 2013. In particular, this reasoning is challenged:

> "[63] I would accordingly answer the preliminary question "no" because a stay can only be granted if the test set out by the High Court in *Jago* is satisfied. I am not satisfied that *X7* stands as authority for the proposition that any unlawful examination by an ACC examiner who has compelled a person charged with a Commonwealth indictable offence to answer questions irrespective of the answers given necessarily warrants a permanent stay of the indictment."

[123] Earlier in her judgment, her Honour said that *Jago* had required actual prejudice to be shown and that without knowing of any actual prejudice caused by the examinations, "as opposed to the presumed prejudice because of the fact of the examinations having taken place", her Honour could not be satisfied of an essential fact for the granting of a stay.

[124] The argument accepts that the prosecutor did not know the content of the ACC's examination of Sander. Instead, the argument is founded upon that same passage from the joint judgment of Hayne and Bell JJ in *X7* which I have set out. Upon that basis, it is submitted that Sander was prejudiced in that his election whether to testify in his own defence could not be decided according only to the strength of the evidence presented against him. It was also affected by the knowledge that he was at risk of being prosecuted for an offence against s 33(1) of the ACC Act, should any variation between evidence given in his own defence and that given to the examiner be detected. Because that impediment to the conduct of his case could not be remedied, the result was an abuse of process, because Mason CJ in *Jago* said that:[87]

> "The continuation of processes which will culminate in an unfair trial can be seen as a 'misuse of the Court process' which will constitute an abuse of process because the public interest in holding a trial does not warrant the holding of an unfair trial."

[125] The argument upon this ground must be rejected for reasons which I have given in the disposition of the appeals by Elfar and Golding. Essentially, for the reasons given by the Court of Criminal Appeal in New South Wales in *X7 v The Queen*, the mere fact of the unlawful examination of Sander of itself did not require the proceeding to be stayed. To assess whether there would be a prejudice of the kind suggested, it would be necessary for the Court to know at least the content of the evidence to the ACC. The evidence of Sander to the ACC was not before her Honour, when she refused to stay the proceeding against him. Nor is it before this Court. On the material before the judge, there was no reason to conclude that any exculpatory evidence which Sander might have been able to give would be inconsistent with his testimony before the ACC.

Ground (f)

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87 (1989) 168 CLR 23 at 30-31.

[126] For this ground, leave is sought to adduce evidence from Mr Anderson, a solicitor, as to the content of Sander's instructions to his lawyers at the trial. The relevance of this evidence, it is said, is that it demonstrates a particular prejudice in this case from the fact of the ACC examination. I would admit the evidence; but as I will now discuss, the evidence does not establish the ground of appeal.

[127] Mr Anderson is a principal in the firm which acts for Sander. His involvement has post-dated the trial. The solicitors who were engaged on the matter at and before the trial have since left the firm and Sander's trial counsel is now a judge. All of that explains why Mr Anderson has referred to Sander's trial instructions only insofar as they appear from documents on the file. However it does not explain why Sander himself has not given evidence of those instructions. And it does not explain why Sander has not revealed the content of the evidence which he might have given, but for what is said to have been the impediment to his doing so from the ACC examination.

[128] From the solicitor's file, there is an exhibit to Mr Anderson's affidavit which is a one page document headed "Trial Instructions", signed by Sander and dated 29 October 2014 which was shortly prior to the commencement of the first trial. The document records his instructions to defend the charge at the trial. It records that he had "been provided with, read and [understood] the evidence that is likely to be led by the Crown [and] received advice from my legal representatives about the strength of the evidence contained therein". The content of that advice does not appear from the evidence. It also records that he had "discussed the case with my legal representatives [and] had the benefit of a plea of guilty explained to [him]". Again, the effect of those discussions is not revealed.

[129] The document then contains these paragraphs, upon which the present ground of appeal is based:

> "5. I understand the advice that if I give evidence in my trial inconsistent with the version that I previously gave to the Australian Crime Commission (during a compulsory examination on 21 October 2010) I could be charged with an offence of perjury which is an offence against s 123 and 123A of the *Criminal Code* (Qld) and carries a maximum penalty of 14 years imprisonment.
>
> 6. In view of the circumstances at [5] above, I give instructions that I wish my legal representatives to conduct my trial by putting the Crown case to proof, that is, by raising as much doubt as possible on the Crown case, without putting forward a positive defence on my behalf."

[130] Counsel for the respondent argued, and counsel for Sander apparently agreed, that Sander could not have been convicted of perjury under s 123 of the *Criminal Code* (Qld) had he given evidence at the trial which was inconsistent with his evidence to the ACC. Counsel for Sander submitted that the more likely charge (if any) would have been one of an offence against s 33 of the ACC Act, by which a person shall not, at an examination before an examiner, give evidence that is to his knowledge false or misleading in a material particular. Obviously such a charge would have had difficulties, not the least of which would have been the need for the prosecution to rely upon the content of an examination which was unlawfully conducted.

Nevertheless, counsel for Sander argues that there was a prejudice by Sander's election at the trial not to give evidence being influenced by the prospect of a *charge*, under one law or the other, in the event of a deviation from his version given to the ACC. Whether or not the solicitor's advice was in all respects correct, the argument is that there was, by the fact of the unlawful examination, a practical unfairness to Mr Sander.

[131] In the course of his oral submissions, counsel for Sander was asked to explain how Sander might have defended the case by his own exculpatory evidence. It was conceded that the prosecution case against Sander was strong: the vessels had been seen to be in close proximity for at least half an hour, food items found on the *Mayhem*, which could only have been purchased in Australia, were also found on the *Edelweiss* and a satellite telephone on the *Mayhem* was used to contact a phone which was on the *Edelweiss*. Counsel for Sander suggested ways in which those circumstances might have been explained: it may have been another vessel which was in close proximity to the *Mayhem*, it may have been another vessel which supplied the food items to the *Edelweiss* or those persons on the *Mayhem* may have telephoned Serna about the cargo of drugs whilst Sander was then unaware of the nature of the cargo or what was to occur. None of those explanations would have been compelling. But more importantly, they are the product of speculation rather than evidence. What matters is what Sander would or would not have said had he given evidence. He has failed to disclose the content of his defence (if any). And he has failed to explain how it would have been his exculpatory version, rather than his account to the ACC.

[132] Again, this is an appeal against a conviction from a trial which was duly conducted. It is now incumbent upon the appellant to establish how the ACC examination, together with his legal advice, could have mattered for the outcome. As with Elfar and Golding (see paragraphs [103] – [104] above), there is no suggested explanation for this appellant now withholding whatever evidence he says could have been given at his trial. The result is that Sander has not demonstrated an actual prejudice to the conduct of his case at the trial and that his conviction resulted from a miscarriage of justice.

Ground (g)

[133] On the night of the first day of the trial, a television news report, broadcast in an area relevant for this jury, referred to the fact that the appellant had been remanded in custody for almost five years and that his co-accused were on bail. The footage showed the appellant in prison clothing and it showed the co-accused walking out of court. On the morning of the third day of the trial, Sander's counsel applied for the jury to be discharged upon the basis that this report had prejudiced Sander, because any juror who had seen the program was likely to have formed the impression that Sander was either dangerous or had previously offended in some way. That application, which sought an order for the discharge of the jury under s 60 of the *Jury Act* 1995 (Qld), was refused. The present ground of appeal is not that the application ought to have been granted, but rather that the consequence of the broadcast was that there was a miscarriage of justice from the possibility that one or more jurors were prejudiced by the broadcast.[88]

[134] At the commencement of the trial the jury was instructed, in the usual way, that they should ignore anything which they might read or see in the media about the trial. On the morning of day three, the jury was instructed to ignore any media coverage that might happen during the trial because it was only the evidence which the jury

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88 *R v Fox* [1998] QCA 121 at p 9, 10.

could consider, so that the jury must ignore references "to anything that is not in evidence". And in the summing up, on the 14th day of the trial, the jurors were told to exclude from their consideration anything they may have seen, heard or read about the trial. For Sander it is argued that these directions were not sufficient to overcome the potential prejudice from the broadcast.

[135] The starting point is that it is assumed that a jury in a criminal trial acts in accordance with the trial judge's directions.[89] And the potential for prejudice from this broadcast was not so strong that any juror would have been unable to put it out of his or her mind, in accordance with the judge's directions. In other words, the evidence does not displace the assumption that the jury acted according to the directions. Further, the broadcast occurred very early in the trial and any impression created by it was likely to have been lost by the end of a relatively long trial. I am unpersuaded that the broadcast caused a miscarriage of justice.

Sander's appeal against conviction: conclusion

[136] I would order that in CA 211 of 2015, the appeal by Sander against conviction be dismissed.

Publication of this judgment

[137] On 1 and 29 November 2016, Judges of this Court made orders to facilitate the provision of transcripts of the examinations by the ACC of Elfar and Golding to their lawyers for the purposes of their appeals. On each of those dates it was ordered that an unredacted copy of the ultimate judgments in their appeals be provided to the parties and their lawyers, but that the judgments as published have redacted from them anything which disclosed the content of those transcripts. No similar order was made or sought in Sander's appeal. As I have discussed, the content of the evidence of Elfar and Golding in their examinations was before this Court when their appeals were argued, but not that of Sander's evidence to the ACC.

[138] The parties were directed to provide written submissions as to whether any such redaction should remain in the published reasons for judgment. The respondent, with the concurrence of the Australian Criminal Intelligence Commission (formerly the ACC), seeks no redaction. Similarly, neither Golding nor Elfar seeks any redaction. In those circumstances, the orders made in their appeals for the redaction of any part of the judgment disclosing the content of their examination transcripts should be set aside.

[139] However, the appellant Sander now says that "his name should be redacted from the judgment". On his behalf it is submitted that the disclosure, within this Court's reasons for judgment, of the fact of his examination, could become the subject of speculation within the prison community, potentially exposing him to a risk of violence from other prisoners. This submission, which is not the subject of evidence, implies that other prisoners might consider that Sander gave evidence to the ACC which assisted in the prosecution of another offender.

[140] As I have discussed above, what Sander said when he was examined by the ACC remains unknown. What is known is that he testified before the ACC only under compulsion and that, as I have noted, he declined to be interviewed by police. More

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89 *Gilbert v The Queen* (2000) 201 CLR 414 at 425-426 [31]-[32].

generally, there is nothing which indicates that anything which Sander may have said, when compulsorily examined, provided any assistance in the investigation or prosecution of another offender. The contrary is indicated by the trial judge's remarks when sentencing Sander. Anyone reading this judgment could not believe that Sander may have cooperated with the authorities in any way, let alone as an informant.

[141] The submission for Sander does not refer to any legal impediment to the publication of the judgment in his name. The starting point, of course, is that the ultimate disposition of his prosecution should be a matter of public record and be able to be publicly reported. An order which prohibits that publication should only be made for some established reason. I am unpersuaded that there is such a reason in his case.