FEDERAL COURT OF AUSTRALIA

Palmer v Australian Securities and Investments Commission [2024] FCA 1167

File number(s):	VID 115 of 2024
Judgment of:	**BUTTON J**
Date of judgment:	8 October 2024
Catchwords:	**PRACTICE AND PROCEDURE** – abuse of process – permanent stay or dismissal – fragmentation of criminal proceedings – where Applicants seek declaratory and other relief in relation to an examination of the First Applicant, and the transcripts thereof, conducted by ASIC pursuant to s 19 of the *Australian Securities and Investments Commission Act 2001* (Cth) – where transcripts used to formulate criminal charges against Applicants – whether this proceeding would inappropriately fragment criminal proceedings – whether proceeding should be stayed or summarily dismissed – held: proceeding stayed pending determination of criminal proceedings
Legislation:	*Constitution* s 109 *Australian Securities and Investments Commission Act 2001* (Cth) ss 19, 49 *Corporations Act 2001* (Cth) ss 184, 631 *Federal Court of Australia Act 1976* (Cth) s 23 *Federal Court Rules 2011* (Cth) r 1.32 *Criminal Code* (Qld) ss 408C, 590 *Uniform Civil Procedure Rules 1999* (Qld) r 16
Cases cited:	*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 *Alqudsi v Commonwealth* (2015) 327 ALR 1; [2015] HCA 49 *Anderson v Attorney-General (NSW)* (1987) 10 NSWLR 198 *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* (2019) 138 ACSR 42; [2019] FCA 964 *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 *Bell v The Queen* (2020) 286 A Crim R 501; [2020]

SASCFC 116

Biggs v Director of Public Prosecutions (1997) 17 WAR 534

Blair v Curran (1939) 62 CLR 464

Bou-Simon v Attorney-General (Cth) (2000) 96 FCR 325; [2000] FCA 24

Cain v Glass (No 2) (1985) 3 NSWLR 230

CGU Insurance Ltd v Blakeley (2016) 259 CLR 339; [2016] HCA 2

Chief Executive Officer of Customs v Jiang (2001) 111 FCR 395; [2001] FCA 145

Clyne v Director of Public Prosecutions (Cth) (1984) 154 CLR 640

Commissioner of Corrective Services v Liristis (2018) 98 NSWLR 113; [2018] NSWCA 143

Curtis v The Queen [2014] NSWSC 1392

DJ Builders & Son Pty Ltd (in liq), in the matter of DJ Builders & Son Pty Ltd (in liq) v Queensland Building and Construction Commission (No 3) (2021) 156 ACSR 539; [2021] FCA 1041

Emanuel Exports Pty Ltd v Department of Primary Industries and Regional Development (2023) 414 ALR 26; [2023] WASCA 36

Figurehead Construction Pty Ltd v Machado [2023] VSC 448

Flanagan v Commissioner of the Australian Federal Police (1996) 60 FCR 149

Frugtniet v Victoria (1997) 148 ALR 320; [1997] HCA 44

Gamage v Riashi [2023] NSWSC 390

Gedeon v Commissioner of the New South Wales Crime Commission (2008) 236 CLR 120; [2008] HCA 43

GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore (2023) 414 ALR 635; [2023] HCA 32

Hausfeld v Commissioner of Police [2018] NSWSC 1540

Hutson v Australian Securities and Investments Commission [2022] QSC 243

Hutson v Australian Securities and Investments Commission [2023] QCA 167

Johnson v Gore Wood & Co [2002] 2 AC 1

Lamb v Moss (1983) 49 ALR 533; [1983] FCA 264

McEwan v Clark [2023] QCA 120

Mudginberri Station Pty Ltd v Australasian Meat Industry Employees' Union (1986) 12 FCR 10

Neil Pearson & Co Pty Ltd v Comptroller-General of

Customs (1995) 38 NSWLR 443
Obeid v The Queen (2016) 329 ALR 372; [2016] HCA 9
Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland [2019] QSC 8
Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland [2022] QSC 227
Palmer v Magistrates Court of Queensland (2020) 3 QR 546; [2020] QCA 47
Palmer v Magistrates Court of Queensland [2024] QCA 8
Phong v Attorney-General (Cth) (2001) 114 FCR 75; [2001] FCA 1241
Power v Heyward [2007] 2 Qd R 69; [2007] QSC 26
R v Carroll (2002) 213 CLR 635; [2002] HCA 55
R v Iorlano (1983) 151 CLR 678
Re Rozenes; Ex parte Burd (1994) 120 ALR 193
Ridgeway v The Queen (1995) 184 CLR 19; [1995] HCA 66
Rochfort v John Fairfax & Sons Ltd [1972] 1 NSWLR 16
Rogers v The Queen (1994) 181 CLR 251
Sankey v Whitlam (1978) 142 CLR 1
Telstra Ltd v Sulaiman [2024] NSWSC 971
Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507; [2015] HCA 28
UBS AG v Tyne (2018) 265 CLR 77; [2018] HCA 45
Yates v Wilson (1989) 168 CLR 338

Division:	General Division
Registry:	Victoria
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	199
Date of last submission/s:	20 September 2024
Date of hearing:	22 August 2024
Counsel for the Applicants:	Mr P Dunning KC with Mr M Karam, Ms S Palaniappan and Mr K Byrne
Solicitor for the Applicants:	Robinson Nielsen Legal
Counsel for the First	Mr O P Holdenson KC with Mr C J Tran and Mr A Petridis

Respondent:

Solicitor for the First Respondent:	Norton Rose Fulbright Australia
Counsel for the Second Respondent:	Mr M Hickey with Ms S Marsh
Solicitor for the Respondents:	Australian Government Solicitor

ORDERS

VID 115 of 2024

BETWEEN:	**CLIVE FREDERICK PALMER** First Applicant
	PALMER LEISURE COOLUM PTY LTD Second Applicant
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** First Respondent
	COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS Second Respondent

ORDER MADE BY:	**BUTTON J**
DATE OF ORDER:	**8 OCTOBER 2024**

THE COURT ORDERS THAT:

1. The proceeding be stayed pending the hearing and final determination, including any appeals, of the criminal prosecutions brought against the Applicants by complaints dated 22 February 2018 (CDPP File Nos. QC16100658 and QC16100658A), or until further order.
2. The parties inform the Court as soon as possible of the determination of the proceedings referred to in paragraph 1.
3. The proceeding be listed for a case management hearing within 14 days of the determination of the proceedings referred to in paragraph 1.
4. There be liberty to apply on three days' notice.
5. By **4:00pm on 14 October 2024**, the parties file and serve any submissions on costs (limited to three pages).
6. By **4:00pm on 17 October 2024**, the parties file and serve any responsive submissions on costs (limited to two pages).

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BUTTON J:

1 Clive Frederick Palmer needs little introduction. Mr Palmer and Palmer Leisure Coolum Pty Ltd (**PLC**) (together, the **Palmer parties**) commenced proceedings in this Court on 15 February 2024. The respondents are the Australian Securities and Investments Commission (**ASIC**) and the Commonwealth Director of Public Prosecutions (**CDPP**).

2 The proceedings concern ASIC's exercise of its powers to require Mr Palmer to attend a compulsory interview on 7 July 2016, and the use to which the transcripts of that interview was subsequently put.

3 The relief sought by the Palmer parties is as follows:

> A Declarations that:
>
> (i) The purported exercise by the First Respondent of the power contained in s 19 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) to compulsorily examine the Applicant on 7 July 2016 was unlawful;
>
> (ii) the summons issued to Mr Palmer dated 17 May 2016 compelling him, pursuant to s 19 of the ASIC Act, to be subjected to examination under oath, and to provide reasonable assistance to ASIC in relation to its investigation, was unlawful;
>
> (iii) the examination of Mr Palmer purportedly pursuant to s 19 of the ASIC Act conducted by ASIC on 7 July 2016, was unlawful;
>
> (iv) the transcripts of [the] compulsory examination of Mr Palmer under s 19 of the ASIC Act were unlawfully obtained;
>
> (v) the transcript of the compulsory examination by ASIC, and which has been provided to the CDPP, may not be used for any purpose including:
>
> (1) formulating the charge;
>
> (2) preparing, relying on, or adducing into evidence, the summary of facts.
>
> B An order restraining ASIC and the CDPP from using, directly or indirectly, the transcripts of the compulsory examination of Mr Palmer purportedly under s 19 of the ASIC Act, including by restraining any person, whether within ASIC the CDPP or elsewhere, from having any further involvement in relation to any matter concerning the subject matter of the s 19 notice.
>
> C An order requiring ASIC and the CDPP to file an affidavit deposing to whom the transcripts of the compulsory examination of Mr Palmer purportedly under s 19 of the ASIC Act were disseminated.

D An order requiring ASIC and the CDPP to deliver up to the applicant all copies of the transcripts of the compulsory examination of Mr Palmer purportedly under s 19 of the ASIC Act.

E Such further or other order or relief as this Honourable Court considers appropriate.

F Interest.

G Costs.

4 The relief sought must be understood in light of the claims advanced by the Statement of Claim filed by the Palmer parties in this proceeding. It is sufficient for present purposes to observe that the Palmer parties allege that:

(a) the factual context involves the "Palmer Coolum Resort" (formerly the Hyatt Regency Coolum), the timeshare scheme operated by The President's Club Ltd (**TPC**) and the ownership and management arrangements of TPC;

(b) PLC lodged with ASIC a document outlining a proposed bid for all shares in TPC and the corresponding villa units, but later notified ASIC that it did not intend to proceed with its bid, whereupon ASIC took the position that, pursuant to s 631(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**), PLC could not withdraw its bid;

(c) after disputed proceedings before the Takeovers Panel, and proceedings in this Court, on 29 October 2015 ASIC commenced an investigation of the Palmer parties in relation to suspected contraventions of s 631(1) of the Corporations Act and, on 17 May 2016, summoned Mr Palmer to a compulsory interview;

(d) the summons issued to Mr Palmer was unlawful, being in contravention of s 49(1) and (4) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**);

(e) the examination of Mr Palmer was unlawful;

(f) the transcripts of that examination were unlawfully obtained, and any dissemination of the transcripts was unlawful; and

(g) ASIC provided the transcripts to the CDPP and used the transcripts to formulate two criminal complaints, referred to as the **PLC Complaint** and the **C Palmer Complaint** (which I explain further below), and made unlawful use of the transcripts in using them to draft a summary of facts in connection with the criminal proceedings.

5 Section 49 of the ASIC Act is in the following terms:

49 ASIC may cause prosecution to be begun

(1) This section applies where:

(a) as a result of an investigation; or

(b) from a record of an examination;

conducted under this Part, it appears to ASIC that a person:

(c) may have committed an offence against the corporations legislation; and

(d) ought to be prosecuted for the offence.

(2) ASIC may cause a prosecution of the person for the offence to be begun and carried on.

(3) If:

(a) ASIC, on reasonable grounds, suspects or believes that a person can give information relevant to a prosecution for the offence; or

(b) the offence relates to matters being, or connected with, affairs of a body corporate, or to matters including such matters;

ASIC may, whether before or after a prosecution for the offence is begun, by writing given to the person, or to an eligible person in relation to the body, as the case may be, require the person or eligible person to give all reasonable assistance in connection with such a prosecution.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

(3A) An offence under subsection 63(3) relating to subsection (3) of this section is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(4) Subsection (3) does not apply in relation to:

(a) the person referred to in subsection (1); or

(b) a person who is or has been that person's lawyer.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4), see subsection 13.3(3) of the *Criminal Code*.

(5) Nothing in this section affects the operation of the *Director of Public Prosecutions Act 1983*.

6 The crux of the Palmer parties' claim that the examination was unlawful is contained at paragraphs 98–99 of the Statement of Claim, as follows:

> On its proper construction, s 49(1) of the ASIC Act requires that it appears to a relevant officer of ASIC, or objectively it should appear to such a relevant officer of ASIC, that a person may have committed an offence against the corporations legislation and ought to be prosecuted for the offence.
>
> By no later than 7 October 2015, ASIC had obtained the evidence and formed the view,

> such that Mr Palmer was a person within the purview of s49(1) and, by virtue of the operation of s 49(4), not able to be examined …

7 A further series of allegations are pleaded under the heading "The compulsory examination breached a companion principle of criminal law". This section of the pleading alleges that the summons and s 19 examination were unlawful, and the transcripts unlawfully obtained, on the basis that:

(a) it is a fundamental principle of the accusatorial system of criminal justice that the onus of proof beyond reasonable doubt rests with the Crown;

(b) a companion rule is that a person cannot be required to testify to the commission of the offence charged; and

(c) a further principle is, or ought to be, that the decision to use compulsive investigatory powers must be for the sole purpose of investigating whether an offence has been committed, whereas ASIC used its powers to assist with the "TPC Purpose", earlier pleaded as TPC's purpose of having PLC and/or Mr Palmer purchase shares in TPC and the Villa Interests.

THE CRIMINAL PROCEEDINGS

8 The PLC Complaint is a prosecution, commenced on 22 February 2018, against PLC. It alleges that, contrary to s 631(1) of the Corporations Act, PLC did not make an offer for securities in TPC within two months of publicly proposing to make a takeover bid.

9 The C Palmer Complaint is a prosecution, commenced on 22 February 2018, against Mr Palmer. It alleges that Mr Palmer did aid, abet, counsel or procure PLC to commit the offence (being the contravention of s 631(1)).

10 The PLC Complaint and the C Palmer Complaint are together referred to as the **PLC Prosecution**.

11 The CDPP is prosecuting the PLC Prosecution. In the proceedings in this Court, as has been outlined above, the Palmer parties allege that ASIC and the CDPP wrongfully used the transcripts to formulate the criminal complaints pursued through the PLC Prosecution, and to draft a summary of facts in that prosecution.

12 ASIC and the CDPP each lodged an interlocutory application on 24 April 2024, seeking a permanent stay of the proceedings, alternatively summary dismissal of the proceedings, on abuse of process grounds. Stated at a high level, ASIC and the CDPP contend that the

proceedings are an abuse of process on the basis that they seek to fragment the criminal process and have determined, in this Court, questions that can and should be determined in the criminal proceedings in relation to which the transcripts were allegedly used by ASIC and the CDPP. The Palmer parties resist this characterisation of their case, and stress that they seek, from this Court, relief that goes well beyond the relief that the court seized of the criminal matters (currently the Magistrates Court of Queensland) could grant.

13 In addition to the two criminal proceedings referred to above, a further proceeding was commenced (again initiated by a complaint on ASIC's behalf) on 6 February 2020 against Mr Palmer, for offences under s 184(2)(a) of the Corporations Act and s 408C(1)(d) of the *Criminal Code* (Qld). This was referred to as the **Cosmo Prosecution**. The statement of facts supplied by the CDPP on 7 February 2021 in relation to the Cosmo Prosecution (set out at [11] of *Palmer v Magistrates Court of Queensland* [2024] QCA 8 (***Palmer Appeal (No 2)***)) gives the following overview:

> The alleged offending relates to two transactions effected by the defendant in August and September 2013, [concerning] the withdrawal of funds totalling $12.167 million from an account held by Mineralogy Pty Ltd (**Mineralogy**) and the subsequent [deposit] of funds to the same value into the bank accounts of various entities controlled by, or related to, the defendant. In short, it is alleged that the funds held in the Mineralogy account were [being] held on account of other entities for a specific purpose and, knowing this to be so, the defendant dishonestly used those funds for his own benefit, including to fund his political party, Palmer United Party (**PUP**) (as it was then known).

14 The Cosmo Prosecution has, since 27 November 2020, generally been mentioned in the Magistrates Court together with the PLC Prosecution. It remains at the pre-committal stage. I refer to the Cosmo Prosecution and the PLC Prosecution together as the **Prosecutions**.

15 It would be an understatement to say that the PLC Prosecution has been bedevilled by delay. Despite the complaints having been lodged some six and a half years ago, the PLC Prosecution remains at the pre-committal stage. Since the complaints were made in February 2018, the PLC Prosecution has been mentioned in the Magistrates Court at least 36 times (including administrative adjournments). Numerous applications have been made in the proceedings. As at 18 June 2024, there were five extant interlocutory applications filed in the Prosecutions by the Palmer parties. The current status is that further disclosure was made by the CDPP on 22 July 2024, and the Prosecutions are adjourned to 28 October 2024.

16 Quite some of the affidavit material was devoted to exploring the reasons for the delay, and pointing fingers to apportion blame. It is not necessary to delve into that particular swamp. The

relevant point to note is that, while the Prosecutions have had somewhat of a long and tortured history to date, they are progressing.

OTHER PALMER LITIGATION

17 This is not the first superior court litigation launched by the Palmer parties that relates to, or bears on, the PLC Prosecution.

The first challenge (Proceeding 3721/18)

18 On 5 April 2018, the Palmer parties filed an originating application in the Supreme Court of Queensland, naming ASIC and the CDPP as respondents, seeking a declaration that the PLC Prosecution was an abuse of process, an order that the complaints commencing the PLC Prosecution (and summonses issued) be permanently stayed as an abuse of process, and an injunction restraining ASIC and the CDPP from commencing further proceedings against the Palmer parties other than on certain conditions. The originating application did not detail the basis upon which abuse of process was alleged.

19 The Palmer parties discontinued the proceeding shortly after filing, on 12 April 2018.

The second challenge (Proceeding 10132/18)

20 On 19 September 2018, the Palmer parties commenced proceedings in the Supreme Court of Queensland against the Magistrates Court of Queensland, the CDPP and ASIC. In those proceedings, the Palmer parties sought, among other relief, a declaration that the complaints filed in the PLC Prosecution were an abuse of process and an order that the PLC Prosecution be permanently stayed.

21 The table of contents to the Statement of Claim indicates that the allegations made included allegations to the effect that there was an unreasonable delay in commencing the criminal proceedings, the circumstances giving rise to the criminal proceedings had already been litigated (making the criminal proceedings vexatious and oppressive) and the criminal proceedings had been commenced for an improper purpose as the Commonwealth Government had adopted a coordinated and targeted campaign against Mr Palmer relating to his political activities, which campaign was being pursued by ASIC and the CDPP.

22 On 31 October 2018, ASIC and the CDPP filed an application to set aside or permanently stay the claim and to strike out the Statement of Claim filed in the proceeding.

23 On 16 November 2018, the Palmer parties filed an Amended Statement of Claim in Proceeding 10132/2018.

24 On 4 December 2018, immediately prior to the hearing of ASIC and the CDPP's stay and strike out application, Mr Palmer (but not PLC) discontinued Proceeding 10132/2018.

The third challenge (Proceeding 13339/18)

25 On 3 December 2018, the day before the hearing of the stay and strike out application in Proceeding 10132/18, Mr Palmer commenced proceedings against the Magistrates Court of Queensland, the CDPP and ASIC in the Supreme Court of Queensland. Mr Palmer again sought a declaration that the complaint filed against him was an abuse of process, and an order that the PLC Prosecution be permanently stayed. The table of contents of the Statement of Claim indicates that similar types of allegations were made by Mr Palmer as had been advanced in the second challenge. In particular, the Statement of Claim alleged that the Commonwealth Government had pursued a targeted campaign against him and the prosecution was, or had the appearance of having been, commenced for an improper purpose.

26 On 4 December 2018, ASIC and the CDPP filed an application to set aside or permanently stay the claim and to strike out the Statement of Claim in Proceeding 13339/18.

Second and third challenges struck out

27 On 4 December 2018, Ryan J heard ASIC and the CDPP's applications to set aside, and strike out, the claims and statements of claim filed in Proceedings 10132/18 and 13339/18. On 23 January 2019, her Honour delivered judgment, and ordered that the Palmer parties' claims (in Proceedings 10132/18 and 13338/18) be set aside and the accompanying statements of claim be struck out: *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland* [2019] QSC 8.

Decisions to strike out and set aside appealed

28 The Palmer parties appealed from the decisions of Ryan J. The appeals were heard by the Queensland Court of Appeal on 4 June 2019. On 17 March 2020, the Court of Appeal (Fraser JA, Morrison JA and Boddice J agreeing) dismissed the appeals with costs: *Palmer v Magistrates Court of Queensland* (2020) 3 QR 546; [2020] QCA 47 (***Palmer Appeal (No 1)***).

29 On the appeal, Fraser JA (Morrison JA and Boddice J agreeing) considered that the primary judge had erred in deciding that the Palmer parties' claims were amenable to summary

dismissal pursuant to r 16(e) of the *Uniform Civil Procedure Rules 1999* (Qld) on the ground that they amounted to fragmentation of, or interference in, criminal proceedings without addressing whether the claims might succeed if taken to trial. Upon considering the matter afresh, Fraser JA concluded that the Palmer parties' proceedings had so little prospect of success that they should be summarily terminated as an abuse of process.

30 In explaining Fraser JA's reasons, a differently constituted bench of the Queensland Court of Appeal, delivering judgment in an appeal in another, later matter in 2024 (*Palmer Appeal (No 2)* (Dalton JA, Boddice JA and Burns J agreeing)) explained (at [80], [81], [83] and [89]) that:

(1) Ryan J struck out the claims pursuant to r 16(e). While the application before the Court also sought a stay under r 16(g), it was accepted in *Palmer Appeal (No 1)* that nothing turned on Ryan J's having made orders to strike out the proceedings, rather than stay them.

(2) Fraser JA considered that, the Palmer parties having invoked the Supreme Court's jurisdiction in a regular way, the case could not be struck out or stayed as an abuse of process unless the claims were so clearly bound to fail that they should be summarily terminated.

(3) On reconsidering the matter, Fraser JA concluded that the claims were so untenable as to warrant summary termination. One factor that was significant was that, because the jurisdiction to intervene in committal proceedings was so exceptional, it was relatively easy to establish that the case was untenable.

(4) Because the categories of abuse are not closed, attracting the principles recognised in *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 414 ALR 635; [2023] HCA 32 (***GLJ***) — *viz*, that a permanent stay will not be granted except in exceptional circumstances, because to stay a proceeding deprives the plaintiff of a determination of their claim in accordance with law — the reasoning of Fraser JA "is not to be read as meaning that a proceeding can only ever be struck out as an abuse of process if the merits of the claim are untenable".

Special leave refused

31 On 16 April 2020, the Palmer parties each applied to the High Court for special leave to appeal from the whole of *Palmer Appeal (No 1)*. On 5 August 2020, Gageler and Keane JJ made orders dismissing the applications for special leave to appeal.

The fourth challenge (Proceeding 6224/21)

32 On 1 June 2021, the Palmer parties commenced proceedings against the Magistrates Court of Queensland, the CDPP and ASIC seeking a declaration that the PLC Prosecution was an abuse of process and an order that the PLC Prosecution be permanently stayed. Injunctions restraining the Magistrates Court and the CDPP from conducting the prosecution were also sought, as was an order compelling ASIC to withdraw the complaints. The Statement of Claim alleged that the proceeding was unarguable and contrary to orders made by the Federal Court in another proceeding, such that the prosecution was hopeless and an abuse of process.

33 A number of interlocutory applications were filed in that proceeding, including:

(a) an application made by ASIC and the CDPP to set aside or permanently stay the claim, or for the claim to be struck out;

(b) an application made by the Palmer parties seeking summary judgment;

(c) an application made by the Palmer parties seeking leave to file and serve a Second Further Amended Statement of Claim; and

(d) an application by the Queensland Attorney-General to act as amicus curiae for the Magistrates Court of Queensland.

34 On 16 November 2022, Callaghan J delivered judgment in *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland* [2022] QSC 227 and, relevantly, made orders that Proceeding 6224/21 be permanently stayed, and that the Palmer parties pay the costs of ASIC and the CDPP on an indemnity basis.

35 The Palmer parties had delivered a proposed Second Further Amended Statement of Claim in Proceeding 6224/21, which sought to bring in the same substantive claims regarding the s 19 examination of Mr Palmer as are agitated in this proceeding. However, leave was not granted to file that pleading due to the primary judge having determined to stay the proceeding.

The fourth challenge appealed

36 The Palmer parties appealed from the decision of Callaghan J. The Queensland Court of Appeal (Dalton JA, Boddice JA and Burns J agreeing) delivered its reasons for dismissing the appeal with costs on 6 February 2024: *Palmer Appeal (No 2)*. As noted above, Dalton JA's reasons explained, and apparently limited, the approach of Fraser JA in *Palmer Appeal (No 1)*. In setting out a broad outline of why her Honour agreed with the primary judge that the Palmer parties' proceedings were an abuse of process, Dalton JA said at [5] (emphasis added):

> the proceedings sought the exercise of the supervisory jurisdiction of this Court to interfere in the course of pending criminal proceedings (a "most exceptional" jurisdiction) in circumstances where it was not, and could not, be demonstrated that there was any compelling reason to do so. It was not demonstrated that either the Cosmo prosecution or the Coolum Resort prosecution was doomed to fail. **There was no reason demonstrated why such points of legal argument or defence as the appellants wished to raise could not be determined in the criminal courts in the ordinary way**. In those circumstances, the **delay and disruption to the prosecutions** which the Cosmo proceeding and the Coolum Resort proceeding were causing, and would continue to cause, meant that they were an abuse of the process of this Court because they interfered with the proper administration of criminal justice according to law.

37 In expanding on those reasons, Dalton JA observed (at [75]) that the basis upon which the Palmer parties had brought their proceeding seeking to stay the PLC Prosecution raised points of fact that would be contested. Accordingly, if the proceedings were not stayed, they would require full interlocutory processes leading to a trial, thereby delaying the prosecution.

38 It should also be noted that Dalton JA returned to the question of prospects, referring (at [41]) to the reasons of Kiefel CJ, Bell and Keane JJ in *UBS AG v Tyne* (2018) 265 CLR 77; [2018] HCA 45 (***UBS***). Her Honour explained that "where the abuse of process asserted was that determination of those points in this Court would disrupt the ordinary criminal process, the merits of the points sought to be advanced did not have to be so poor that they could be described as untenable or unarguable before the Cosmo and Coolum Resort proceedings could be stayed".

Special leave refused (again)

39 On 21 February 2024, Mr Palmer filed an application in the High Court seeking special leave to appeal from *Palmer Appeal (No 2)*. A special leave application was filed by PLC on 5 March 2024.

40 On 6 June 2024, the High Court refused the Palmer parties special leave to appeal.

The fifth challenge (Proceeding 12722/23)

41 On 9 October 2023, the Palmer parties commenced yet more proceedings in the Supreme Court of Queensland against the Magistrates Court of Queensland, the CDPP and ASIC. Declaratory relief was sought in relation to certain matters of fact and law going to the viability of the PLC Prosecution, as well as declarations that the prosecution was doomed to fail and involved an abuse of process. An order was also sought that the PLC Prosecution be permanently stayed.

42 On 1 November 2023, following a letter sent from the Australian Government Solicitor to the Palmer parties' solicitors demanding the discontinuance of the proceedings, the Palmer parties discontinued Proceeding 12722/23.

LEGAL PRINCIPLES

Abuse of process and fragmentation

43 By their interlocutory applications, the primary relief sought by ASIC and the CDPP is an order permanently staying the proceeding as an abuse of process.

44 It is trite to observe that courts have the power to control their proceedings and to order a stay in an appropriate case.

45 Where a court's jurisdiction has been regularly invoked, a stay requires justification on proper grounds. The caution exercised in staying proceedings reflects what Sugerman ACJ referred to as the "fundamental principle that a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the court, subject only to an exercise of judicial discretion on proper grounds": *Rochfort v John Fairfax & Sons Ltd* [1972] 1 NSWLR 16 (***Rochfort***) at 19 (Holmes and Mason JJA agreeing). Nevertheless, the doctrine of abuse of process has been recognised as being broader and more flexible than estoppel and as being "capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute": *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507; [2015] HCA 28 (***Tomlinson***) at [25] (French CJ, Bell, Gageler and Keane JJ).

46 The grant of a permanent stay to prevent an abuse of process has recently been said by the High Court to involve "an ultimate decision that permitting a matter to go to trial and the rendering of a verdict following trial would be irreconcilable with the administration of justice through the operation of the adversarial system": *GLJ* at [3] (Kiefel CJ, Gageler and Jagot JJ). The plurality in *GLJ* described that ultimate decision as one of "last resort", only justifiable in an exceptional case: *GLJ* at [3].

47 While making an order permanently staying a proceeding will inevitably be a grave step to take, the plurality's statements in *GLJ* need to be understood in their context. In *GLJ*, the High Court was considering whether there should be a permanent stay of proceedings to vindicate a right in circumstances where the grant of a permanent stay would forever sterilise the right said to have been infringed: see *GLJ* at [21] (Kiefel CJ, Gageler and Jagot JJ). Cases where a stay

is sought to avoid fragmentation of the criminal justice process are different. As the authorities expose, cases involving fragmentation often involve an attempt to use the civil courts to obtain relief when the point that the accused seeks to agitate falls within the ambit of the criminal justice process and should be heard and determined by the criminal courts, whether immediately or at a subsequent stage of the process (eg after committal or on appeal after conviction). As such, those cases do not involve the kind of permanent sterilisation of asserted rights with which the High Court was concerned in *GLJ*.

48 It should be recalled that the varied circumstances in which use of a court's processes will amount to an abuse "do not lend themselves to exhaustive statement": *UBS* at [1] (Kiefel CJ, Bell and Keane JJ); see also *UBS* at [72] (Gageler J) and *GLJ* at [27] (Kiefel CJ, Gageler and Jagot JJ), citing *Ridgeway v The Queen* (1995) 184 CLR 19 at 75; [1995] HCA 66 at [32] (Gaudron J).

49 As set out above, one class of case in which a stay (or another course not involving determining the case advanced) may be warranted is where proceeding to hear and determine the claim brought in civil jurisdiction would involve the fragmentation of criminal proceedings. The position has been stated on many occasions by the High Court. The leading statement is that of Gibbs ACJ (as his Honour then was) in *Sankey v Whitlam* (1978) 142 CLR 1 (***Sankey***) at 26, where his Honour said:

> a court will be reluctant to make declarations in a matter which impinges directly upon the course of proceedings in a criminal matter. Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order.

50 In *Obeid v The Queen* (2016) 329 ALR 372; [2016] HCA 9 (***Obeid***), Gageler J (as his Honour then was) referred (at [15]) to the existence of "a longstanding and general reluctance on the part of this Court in point of policy to make orders which would have the effect of fragmenting a criminal process which has already been set in train".

51 There are numerous other statements of the principle and cases emphasising its importance, including statements of Full Courts of this Court. For example, the principle was stated in simple terms by the Full Court in *Flanagan v Commissioner of the Australian Federal Police* (1996) 60 FCR 149 (***Flanagan***) at 187 (Beaumont, Ryan and Lindgren JJ): "The principle is well-established that criminal proceedings should not be fragmented by other courts' entertaining, except in exceptional or extraordinary circumstances, applications of various kinds by or against one or more of the participants in the criminal trial".

52 *Flanagan* concerned an application for judicial review of decisions to apply for, and issue, a warrant, the fruits of which (records of telephone conversations) aided in the bringing of criminal proceedings. The applicants sought relief directed at preventing the Director of Public Prosecutions from tendering evidence that became available as a direct or indirect result of the impugned warrant, as well as damages for misfeasance in public office by members of the Australian Federal Police. The Full Court separately considered (at 187) whether to grant:

(a) the discretionary relief sought (being the orders for judicial review and consequential relief in the form of declarations, injunctions and other relief); and

(b) the relief as of right (being the claim for damages).

53 That first category was further divided into two sub-categories: claims that involve pure questions of law, emerging from undisputed facts, and claims involving contentious matters of fact, including questions of mixed fact and law. The former sub-category was stated to be much better suited to being heard and determined (as an exception to the fragmentation principle), as compared with the latter category, being claims that the courts will not usually entertain: at 188. In the result, the Full Court determined to address some discrete points of law but declined to address allegations of bad faith and impropriety, as well as the consequences of any such findings on the admissibility of the fruits of such conduct (at 204), and deferred consideration of the claim for damages until after the criminal trial: at 219–20.

54 The distinction between cases involving pure questions of law and cases involving contested facts, which was referred to by the Full Court in *Flanagan*, was also referred to by Dalton JA in *Palmer Appeal (No 2)*. There, the fact that the civil case involved contested factual matters — cf pure questions of law, or matters otherwise suited to determination in a summary way — was cited by Dalton JA (Boddice JA and Burns J agreeing) (at [77]) as a reason why the Court ought not exercise jurisdiction in respect of the “fourth challenge” of the Palmer parties. As was observed (at [75]), where a civil proceeding involves contested facts, the period to trial, the duration of the trial, and any appeal, will all contribute to the delay in criminal proceedings being finalised.

55 The undesirability of civil courts permitting their jurisdiction to be exercised so as to give rise to the fragmentation of criminal proceedings has been confirmed, time and again.

56 In *Bou-Simon v Attorney-General (Cth)* (2000) 96 FCR 325; [2000] FCA 24 (***Bou-Simon***), the appellant had been charged with contraventions of the *Corporations Law*, to be tried in a state

court. The Commonwealth initiated extradition proceedings in France. The appellant appealed against a decision of Emmett J in the Federal Court dismissing an application for declarations that a supplementary affidavit relied upon in support of the extradition was misleading and its provision to the French court was an abuse of process. The appellant also sought orders restraining the Attorney-General from continuing the extradition proceeding, and the CDPP from continuing the criminal proceedings. The Full Court (Black CJ, Tamberlin and Katz JJ) determined that it was inappropriate for the Federal Court to determine certain issues, on grounds of fragmentation. The Full Court observed (at [55]) that the "undesirability of fragmentation" has been stressed by the High Court (and also by the Federal Court) on many occasions, citing *Yates v Wilson* (1989) 168 CLR 338 at 339 (Mason CJ for the Court).

57 The Full Court in *Bou-Simon* drew attention to the added complications arising where a court is asked to rule on a matter which may yet be raised again by the unsuccessful party in the criminal proceeding at [55] (Black CJ, Tamberlin and Katz JJ):

> The present case provides a good example of the problem. The appellant appeals from the ruling against him in a proceeding that was amended to include a challenge to the decision to prosecute him. That carries with it the prospect of a ruling in this Court on a fundamental matter which, if decided against the appellant here, could nevertheless be raised by the appellant on his trial and, in certain events, on appeal to the New South Wales Court of Criminal Appeal.

58 One of the vices of fragmentation (but not the only vice) is the potential for the accused to seek to raise the same point in multiple courts, for example by raising the point again in the criminal trial court if unsuccessful in the separate proceedings: eg *Bou-Simon* at [55] and [59] (dismissing the appeal against the dismissal of the challenge to the decision to prosecute, but without ruling on the matter that would be directly in issue in the criminal proceedings).

59 Other reasons for "the basic rule of restraint" were canvassed by Kirby P (as his Honour then was) (in dissent on the result) in *Cain v Glass (No 2)* (1985) 3 NSWLR 230 (***Cain***) at 235, as follows (emphasis added):

> At the stage of committal, whether by declaration or otherwise, superior courts do well to limit their intervention to exceptional or special cases. This principle is well-established: [citations omitted] … It is important, therefore, to understand the **rationale behind the rule of restraint.** The reasons include: (1) the undesirability of discontinuity, **disruption or delay** in committal proceedings; (2) the superior knowledge of the committing magistrate concerning the whole facts and circumstances of the case under his consideration; (3) the undesirability of the beneficial remedies of declaration or the prerogative writs being misused to justify transfer to the superior courts of matters committed by law to the magistracy; (4) the cost, much of it borne by the public purse, of proliferating litigation, especially at an interlocutory stage, which diverts attention from the real substance of the accusations brought and concentrates

> instead upon peripheral and often procedural matters; (5) the **undue advantage that may be given to rich and powerful defendants to interrupt and delay the operation of the criminal law** in a way not so readily available to ordinary citizens; and (6) the power of the Attorney-General to present an ex officio indictment or to refuse to present an indictment, whatever the outcome of the committal proceedings.

60 *Cain* concerned an application by 26 prisoners involved in a committal hearing seeking the intervention of the Supreme Court of New South Wales to declare that the magistrate conducting the committal erred in law in upholding a claim of public interest immunity in respect of documents identifying witnesses the prisoners wished to call in their defence. Their application was dismissed at first instance.

61 In separate reasons concluding that the appeal should be dismissed, Priestley JA (in the majority) reasoned that no injustice would be done to the appellants by leaving them to be "dealt with by the regular course of the criminal law" as: the committal proceedings were not yet concluded, and various applications could yet be made to the magistrate; and, if committed for trial, the trial court would have the power to stay the proceedings: at 244–5. In separate reasons, McHugh JA (as his Honour then was) (in the majority) also drew attention to the question of whether there would be injustice to the appellants were the Court to decline to intervene. As will be seen, the question of injustice is a relevant consideration in the determination of the present applications.

62 The capacity of those with financial means to fragment and delay criminal proceedings by bringing collateral proceedings (such as for judicial review of decisions to prosecute) was also referred to by the Full Court of this Court in *Chief Executive Officer of Customs v Jiang* (2001) 111 FCR 395; [2001] FCA 145 (***Jiang***) in explaining the development of the body of case law in which courts "stressed the dangers of fragmentation of the criminal justice process, and the need for restraint on the part of civil courts in reviewing decisions taken in the course of that process": at [6]–[7] (O'Loughlin, North and Weinberg JJ). The criminal courts have the jurisdiction to, and should, determine collateral challenges, and also have the power to stay criminal proceedings conditionally or permanently, if that course is necessary to ensure a fair trial: *Commissioner of Corrective Services v Liristis* (2018) 98 NSWLR 113; [2018] NSWCA 143 at [103] (Basten JA).

63 Most discussions of the law on fragmentation begin, as I have, with the judgment of Gibbs ACJ (as his Honour then was) in *Sankey*. But *Sankey* is not the last word on the principle or its ambit. For example, Gibbs CJ returned to the subject in *Clyne v Director of Public Prosecutions (Cth)* (1984) 154 CLR 640 (***Clyne***), observing (at 643) that: "This Court has in a number of

cases said that it is wrong that the ordinary course of proceedings in the criminal courts should be interrupted by applications for declarations as to **questions that will or may arise** in the criminal proceedings: see *Crouch v The Commonwealth* and *Sankey v Whittam*; cf. *Reg. v Iorlano*" (emphasis added) (citations omitted). As the words emphasised make clear, fragmentation is not only an issue in respect of questions that are already live in the criminal proceedings, or that are certain to arise. As Gibbs CJ stated, the question of fragmentation extends to questions that "may arise". Other expressions have also been used to identify the nature of the necessary connection with criminal proceedings. In *Hausfeld v Commissioner of Police* [2018] NSWSC 1540 (***Hausfeld***), Fagan J referred (at [21]) to the "determination of issues which **bear upon** the conduct of criminal proceedings" (emphasis added).

64 Similarly, the fact that the issue in question *could* be raised in the course of the criminal proceedings, and an answer obtained in that forum, often features prominently in reasons explaining why a civil court has declined to address the question posed in the separate civil proceedings: eg *Hausfeld* at [24] (Fagan J): "For present purposes the important point is that the challenge which the plaintiff wishes to make to this warrant can be made before the trial judge."

65 Restraint does not, however, constitute abdication of responsibility, as courts continue to assert an entitlement to intervene in exceptional or special circumstances: *Cain* at 235 (Kirby P, as his Honour then was). The capacity of the criminal court to address the asserted issue, even at a later stage of proceedings (eg after committal for trial), is an important consideration in determining whether exceptional circumstances exist, warranting the exercise of jurisdiction: eg *Cain* at 245, where Priestley JA referred to the potential for the trial court to stay the criminal proceedings, after committal, if it determined it would not be fair for the trial to proceed until certain evidence had been made available; see also *Jiang* at [12], where the Full Court observed: "Most complaints regarding decisions taken in the context of the criminal justice process can adequately be addressed by the criminal courts. Civil courts generally deny judicial review of such decisions on discretionary grounds" (O'Loughlin, North and Weinberg JJ). See also *Frugtniet v Victoria* (1997) 148 ALR 320; [1997] HCA 44 (***Frugtniet***) at 326–7 (Kirby J), concerning preservation of the capacity to interfere in exceptional cases.

66 Many of the authorities involve what might be described as direct, collateral attacks on rulings in criminal proceedings, or on the continued progress of the prosecution in its entirety. While it may appear that describing an attack as direct and collateral is an oxymoron, what I mean is

a civil proceeding that seeks orders that directly challenge, in a civil proceeding, a ruling made in the criminal proceeding, or seek to stay the prosecution. Examples of cases of that kind include: *Biggs v Director of Public Prosecutions* (1997) 17 WAR 534 (in which the appellant sought, amongst other things, a declaration that the trial judge's orders setting aside the jury's verdict in the criminal proceeding were invalid); *Cain* (where the appellants sought to challenge the committing magistrate's ruling in relation to public interest immunity); *Emanuel Exports Pty Ltd v Department of Primary Industries and Regional Development* (2023) 414 ALR 26; [2023] WASCA 36 (***Emanuel Exports***) (where the appellant applied for review of the magistrate's decision as to the constitutional validity of the provisions under which the appellant was charged); *Hutson v Australian Securities and Investments Commission* [2022] QSC 243 (where the applicant sought a permanent stay of criminal proceedings and to impugn matters dealt with by the District Court); *Lamb v Moss* (1983) 49 ALR 533; [1983] FCA 264 (where the first respondent on the appeal sought judicial review of decisions made by the magistrate in committal proceedings); *McEwan v Clark* [2023] QCA 120 (where the appellant sought an order that her committal hearing be delisted and other related relief); *R v Iorlano* (1983) 151 CLR 678 (***R v Iorlano***) (involving an application for special leave to appeal from the trial judge's decision on a voir dire to exclude a statement made by the accused); and *Re Rozenes; Ex parte Burd* (1994) 120 ALR 193 (***Rozenes***) (an application commenced in the original jurisdiction of the High Court seeking to contest rulings made by the trial judge in criminal proceedings).

67 Nevertheless, not all cases in which civil courts have declined to exercise jurisdiction on grounds of fragmentation involve that kind of direct, but collateral, attack. One such case is *Bell v The Queen* (2020) 286 A Crim R 501; [2020] SASCFC 116 (***Bell***). In that case, the accused appealed against a ruling of a District Court judge dismissing his application for a permanent stay where the grounds for the application concerned the extent of, and alleged misuse of, powers of the Independent Commissioner Against Corruption (the **Commissioner**). By a separate originating application, the Commissioner sought declaratory relief on matters concerning the Commissioner's powers and in relation to the impugned actions. The appeal and the declaratory relief proceeding were heard and determined together.

68 The Full Court of the Supreme Court of South Australia (Kourakis CJ, Peek and Blue JJ) upheld the District Court judge's dismissal of the stay application, but declined to make the declarations sought by the Commissioner. In explaining why, the Full Court made it clear that the restraint of civil courts — in relation to what is often referred to by the rubric

"fragmentation" — is not limited to circumstances where the orders sought from the civil court will have an immediate or direct impact on the criminal proceeding.

69 In *Bell*, their Honours observed that "civil courts exercise great caution before hearing and determining civil proceedings that raise common issues that are to be determined in criminal proceedings": at [407]. Their Honours acknowledged that the declarations sought by the Commissioner "would not directly interfere in the criminal proceeding", but would address issues that "are very closely aligned (if not identical) to those arising for decision in the criminal proceeding": at [416].

70 *Bell* also illustrates that another reason for caution is that the precise formulation of declarations may have unforeseen consequences in the criminal proceeding and that "[i]n general, an important factor weighing against the exercise of the discretion is that it is preferable that issues arising in the criminal proceeding be determined in the context of the criminal proceeding without the superadded complication of this Court making declarations in the civil proceeding": at [417]. Their Honours deferred addressing the application for declaratory relief until after the final determination of the criminal proceedings: at [419]. In other words, the stay was temporary, not permanent.

71 *Gamage v Riashi* [2023] NSWSC 390 (***Gamage***) is also an instructive example of a case in which the fragmentation principle was applied to dismiss a civil proceeding which did not have an immediate and direct effect on criminal proceedings. In *Gamage*, the plaintiff had been charged with 13 offences arising out of an investigation undertaken by the Independent Commission Against Corruption. The hearing of the charges had not yet commenced at the time the plaintiff brought proceedings seeking to obtain a copy of the application for a warrant, as he wished to mount an argument that the telephone recording of him (said to be authorised by the warrant) was improperly obtained and could not be used in the impending criminal proceedings. After setting out the authorities on fragmentation, Chen J dismissed the application and described "the fact that the challenge that the plaintiff seeks to make in connection with the warrant can be pursued in, and decided by, the Local Court" as "decisive considerations against granting the plaintiff the relief sought": at [30(1)].

72 *Hausfeld*, referred to above, is another example. In that case, the plaintiff sought a declaration that a search of his premises, and the seizure of items from the premises, was not lawful due to a defect affecting the issue of the warrant. He sought an order quashing or declaring the warrant to be invalid. The plaintiff also sought delivery up of items that were seized on execution of

the warrant, and an injunction to restrain police from acting on or taking any further step in relation to the material seized. The active defendants issued a notice of motion seeking that the summons be dismissed as an abuse of process, the ground being that permitting the summons to be litigated would fragment the criminal proceedings, in which the plaintiff had been indicted on charges that were based on the evidence seized under the impugned warrant. As noted above, Fagan J considered that the challenge could be mounted in the criminal court and dismissed the summons. It may be noted that Fagan J also observed that there was no significant question of law alone that could be decided, which would benefit the legal profession and the administration of justice generally: at [26]. The plaintiff's delay, only challenging the warrant by the civil proceedings a year after learning of the terms of the warrant, was another reason cited in support of dismissing the summons: at [27].

73 One of the Palmer challenges referred to above also touched on the nexus with criminal proceedings not being confined to instances involving a direct impact on criminal proceedings. In *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland* [2019] QSC 8, Ryan J referred (at [132]) to civil proceedings seeking to have "matters relevant to" decisions to be made in the criminal court attracting the fragmentation principle. While the Queensland Court of Appeal found error in aspects of Ryan J's approach in *Palmer Appeal (No 1)* (as discussed above at paragraphs 29–30), this particular aspect was not criticised.

74 Whether or not any particular case is exceptional, so as to warrant hearing and granting relief in an application brought separately and outside the criminal justice process, will depend on the facts of the case. In *Hutson v Australian Securities and Investments Commission* [2023] QCA 167 (***Hutson***), Mullins P (Dalton JA and Henry J agreeing) said (at [47]) that "[t]he broad test … is whether it is in the interests of justice", with the interests of justice not being confined to the interests of the defendant, but constituting "a broader question involving efficient and fair use of resources available in the criminal justice system and the interests of the administration of justice generally". Delay to criminal processes is one matter affecting the assessment of the interests of the administration of justice.

75 The decision of the Queensland Court of Appeal in *Hutson* is also instructive in stressing the importance of focusing on, and determining, the threshold question of whether the court should even proceed to consider the merits of an application for declaratory relief: *Hutson* at [61] (Mullins P, Dalton JA and Henry J agreeing). The potential for the matters in issue to be raised before the criminal court, and for any adverse pre-trial rulings to be appealed within the

criminal justice system, were identified as powerful factors tending against permitting fragmentation by considering the issue in question when advanced in separate declaratory relief proceedings: *Hutson* at [57], [58], [62].

76 Similarly, in *Obeid*, Gageler J (as his Honour then was) emphasised the applicant's capacity to agitate a point in any appeal against conviction as important in determining that the case was not exceptional so as to warrant fragmentation of the trial process, once set in motion: at [22].

77 *Phong v Attorney-General (Cth)* (2001) 114 FCR 75; [2001] FCA 1241 (***Phong***) is another case in which the fact that the trial judge was fully seized of the issues that the accused sought to raise in the Federal Court — including, relevantly, a claim for an order permanently restraining the respondents from proceeding upon an indictment — was central to a conclusion that, even if the Court had jurisdiction, it should decline to exercise jurisdiction and grant judicial review, to avoid unnecessary and undesirable fragmentation of the criminal process: at [1] (Black CJ), [53] (Beaumont J) and [58] (Hely J). As Beaumont J identified, an important question is whether "an alternative remedy is available", which avoids fragmentation: *Phong* at [47]. See also *Rozenes* at 195, where Dawson J (sitting as a single judge of the High Court) identified all manner of potential events during trial which may mean the questions raised would not need to be answered, and, in any event, could be addressed on appeal from any conviction. See also *Palmer Appeal (No 2)*, in which the Queensland Court of Appeal (Dalton JA, Boddice JA and Burns J agreeing) emphasised (at [5]) that "[t]here was no reason demonstrated why such points of legal argument or defence as the appellants wished to raise **could not be determined** in the criminal courts in the ordinary way" (emphasis added).

78 In considering where the interests of justice lie, consideration is given to the "practical" — and not just strictly legal — consequences of the civil court's decision on the criminal proceedings: *Hutson* at [54] (Mullins P, Dalton JA and Henry J agreeing). In considering the application for the claims of the Palmer parties to be set aside, stayed or struck out in what I have referred to as the "second challenge", Ryan J also had regard to the likely practical significance of the Court making declarations favourable to the Palmer parties. Her Honour observed that the Palmer parties would undoubtedly rely, in the committal proceedings, on any favourable declarations made by the Supreme Court: *Palmer Leisure Coolum Pty Ltd v Magistrates Court of Queensland* [2019] QSC 8 at [132]. Her Honour considered that the Palmer parties' attempt to have the Supreme Court determine matters that are "relevant to" decisions to be made in the Magistrates Court was productive of the disrupting or fragmentation of criminal proceedings

which is only to be countenanced in exceptional cases: at [132] and [136]. The attention paid to practical consequences is also reflected in the nexus between the civil and criminal proceedings, a matter to which I return below.

79 Where an application raises complaints about matters that may never transpire, that tells against there being exceptional circumstances warranting exercise of jurisdiction in a way that fragments the criminal process: *Rozenes* at 195 (Dawson J).

80 The principle against fragmentation clearly encompasses issues concerning procedural or evidentiary matters (eg *R v Iorlano* at 680 (the Court)), but it is not confined to procedural or evidentiary matters. This is illustrated by *Alqudsi v Commonwealth* (2015) 327 ALR 1; [2015] HCA 49 (***Alqudsi***). There, an accused initiated proceedings in the High Court, challenging the constitutional validity of the legislation under which he was charged and seeking to have his criminal trial in the Supreme Court of New South Wales stayed pending the outcome of his High Court challenge. The Commonwealth sought a direction in the High Court that the matter be remitted to the Supreme Court, in response to which the accused sought an order that the whole of the cause be removed from the Supreme Court to the High Court.

81 In granting a remitter to the Supreme Court, French CJ applied the conventional authorities on fragmentation; the fact that the challenge was a constitutional challenge to legislation did not factor in the analysis. His Honour said as follows at [22]–[23] (citations omitted):

> [22] There is ample authority for the proposition that this Court should be reluctant to disturb the progress of pending criminal proceedings. As Kirby J said in *Pan Laboratories Pty Ltd v Commonwealth*:
>
>> "This Court has said on many occasions, including recently, that great restraint must be exercised by the High Court and by other courts of appeal and review before issuing orders or taking steps which may disturb or fragment the course of a criminal trial."
>>
>> (footnote omitted)
>
> His Honour also applied that principle, as the Commonwealth points out, in determining to remit proceedings in this Court to the District Court under s 44 of the Judiciary Act. Further, it is open to the plaintiff, as has been foreshadowed, to file a motion to quash the indictment in the Supreme Court. That Court could also make directions for dealing with the declaratory proceedings if they are remitted to it from this Court. Whether it would be convenient to deal with them together with the quashing motion or to deal with the pretrial motion first and make other directions in relation to the declaratory proceedings would be a matter for the Supreme Court.
>
> [23] There are many contingencies that might shape the progress of the debate about constitutional validity in the Supreme Court. They may include an application for leave to appeal to the Court of Criminal Appeal from a decision on a

> quashing motion and/or an appeal in relation to declaratory proceedings, each of which might arguably lead to an application for special leave to appeal to this Court, even before the trial itself proceeds. There are other contingencies under which the constitutional point might never be reached or might become irrelevant, for example, because of an acquittal after trial. In my opinion, insufficient cause has been shown to overcome the principle against fragmentation of pending criminal proceedings by the interlocutory interventions of this Court.

See also *Frugtniet*, which also concerned a constitutional point, and the discussion of that case by Gageler J (as his Honour then was) in *Obeid* at [16]. *Obeid* is, itself, a further example, as the points at issue there concerned the jurisdiction of the Supreme Court of New South Wales and the validity of the criminal charge, having regard to the powers of the New South Wales Legislative Council: *Obeid* at [19].

82 *Emanuel Exports* is another case in which a court declined to consider a constitutional question. In *Emanuel Exports*, the appellant was facing charges in the Magistrates Court of Western Australia. In judicial review proceedings brought in respect of the magistrate's determination, the appellant contended that the state legislation penalising the conduct in question was the subject of direct inconsistency with Commonwealth law for the purposes of s 109 of the *Constitution*. On appeal, the Court of Appeal of Western Australia (Buss P, Mitchell and Beech JJA) declined to determine the substantive issues on fragmentation grounds. Their Honours considered (at [42]) that: "the interests of justice distinctly favoured allowing the trial to proceed on its ordinary course and leaving the constitutional question to be resolved on any appeal against a decision to convict or acquit Emanuel Exports to the extent necessary to determine that appeal."

83 The reluctance of civil courts to exercise jurisdiction when to do so would result in fragmentation does not mean that it is never appropriate for a separate proceeding to be heard and determined notwithstanding that the separate proceeding fragments the criminal process. But there are usually special circumstances when that occurs. *Anderson v Attorney-General (NSW)* (1987) 10 NSWLR 198 (***Anderson***) is one such example. In that case, the New South Wales Court of Appeal made a declaration, the day after the trial of 31 accused persons commenced, to the effect that the indictment was bad in law.

84 That course was not taken lightly. In *Anderson*, the President of the Court of Appeal, Kirby P (as his Honour then was), explained (at 200–2) the factors that made that case exceptional. Those factors included that the Attorney-General supported the making of a declaration and that the District Court judge made findings of fact to facilitate an application to the Court of

Appeal. In respect of the judge seized of the criminal prosecution making findings of fact, Kirby P observed (at 201) that that course removed "one of the reasons for restraint", being the proper deference due to be paid to a judge in whose charge a criminal trial is placed, so as not to undermine that authority. Other reasons referred to by Kirby P were that: the trial of the 31 accused would be long and costly; there was a lack of authority on the law in question; there was reason to look afresh at the law of riot under which the accused were charged; and there were practical considerations for seeking an urgent resolution of the point of law in question. In explaining why his Honour was willing for the Court to consider the matter, amongst other considerations, Samuels JA highlighted the significance of the fact that both parties wanted the Court to pronounce upon the problem and that the trial, if it were to proceed, would take six months: at 206.

85 *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120; [2008] HCA 43 (***Gedeon***) is another case in which the questions arising for determination were addressed, in circumstances where none of the respondents contended that the proceedings for declaratory relief were inappropriate and a matter of considerable public interest was identified by the High Court: at [25] (the Court).

86 While the Palmer parties characterised this proceeding as one in which they seek to vindicate their rights in respect of what they allege to be an unlawful process by a public authority in relation to which they have a real interest, the CDPP's submissions questioned whether the case advanced by the Palmer parties is suitable for the grant of the relief they seek in any event, given any further use of the transcripts that may be apprehended was speculative. Both cited the High Court's decision in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (***Ainsworth***) in support.

87 In *Ainsworth*, the High Court considered a report tabled in the Queensland Parliament by the Criminal Justice Commission, containing adverse recommendations about certain individuals to which they had not had an opportunity to respond. Having concluded that the rules of procedural fairness were attracted, but had not been observed, the plurality (Mason CJ, Dawson, Toohey and Gaudron JJ) turned to the appropriate relief at 581–2 (citations omitted) (emphasis added):

> It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which "[i]t is neither possible nor desirable to fetter ... by laying down rules as to the manner of its exercise." However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, **declaratory**

> **relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions**. The person seeking relief must have "a real interest" and relief will not be granted if the question "is purely hypothetical", if relief is "claimed in relation to circumstances that [have] not occurred and might never happen" or if "the Court's declaration will produce no foreseeable consequences for the parties".

88 Here, it may be observed that the usual principles concerning declaratory relief in respect of abstract or hypothetical questions go hand in glove with the proposition that there will not be exceptional circumstances warranting a court exercising jurisdiction in a way that fragments the criminal process where the court is asked to exercise that jurisdiction in respect of matters that may not come to pass: eg *Rozenes* at 195 (Dawson J).

Res judicata, issue estoppel and abuse of process

89 Where an application is made to stay or summarily dismiss a proceeding, it is necessary to consider the implications of making, or declining to make, the orders sought. In this case, those matters arise for consideration in relation to:

(a) the PLC Prosecution and the capacity of the parties to argue, and the criminal courts to determine, the question of the illegality of the s 19 examination of Mr Palmer; and

(b) the capacity of the Palmer parties to raise the question of the illegality of the s 19 examination of Mr Palmer in subsequent civil proceedings.

90 The leading statement of the operation of the doctrines of res judicata and issue estoppel is Dixon J's (as his Honour then was) explanation in *Blair v Curran* (1939) 62 CLR 464 (***Blair***) at 531–2. There, his Honour explained that (emphasis added):

> A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained **or that rights be declared**. The distinction between *res judicata* and issue-estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, **a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order**.
>
> **Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded**. In matters of fact the issue-estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of any one of which would be enough to defeat the claim, **the estoppel covers only the actual**

> **ground upon which the existence of the right was negatived**. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order.

91 As Dixon J's explanation makes clear, issue estoppels can not only arise where the court's orders are in the form of declarations, but also where a matter of fact or law has been determined in the course of determining an issue where relief (such as declaratory relief) is refused.

92 In *Tomlinson*, the plurality (French CJ, Bell, Gageler and Keane JJ) explained the difference between res judicata and estoppel, before drawing on Dixon J's explanation in *Blair* to clarify the scope of issue estoppel as follows at [22] (citations omitted):

> The second form of estoppel is almost always now referred to as "issue estoppel". Estoppel in that form operates to preclude the raising in a subsequent proceeding of an ultimate issue of fact or law which was necessarily resolved as a step in reaching the determination made in the judgment. The classic expression of the primary consequence of its operation is that a "judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies".

93 As may be noted, in determining the impact of issue estoppel, it is necessary to focus on the issues of fact or law that were "necessarily resolved" as a step in reaching the ultimate determination, including where the determination is constituted by a dismissal (as to which see also the discussion in Handley KR, *Spencer Bower and Handley: Res Judicata* (LexisNexis, 6th ed, 2024) at [2.28], [8.02]–[8.04] and [8.26]).

94 However, when regard is to be had to the future conduct of criminal proceedings, account must be taken of the fact that the criminal law does not recognise issue estoppel, as that doctrine has developed in civil cases. That position was confirmed by the High Court in *Rogers v The Queen* (1994) 181 CLR 251 (***Rogers***). However, the non-recognition of issue estoppel in criminal law was explained on the basis that it was not necessary to recognise and turn to the doctrine of issue estoppel given the operation of other doctrines in the criminal sphere: specifically, res judicata, autrefois acquit, autrefois convict, the rule against double jeopardy and the doctrine of abuse of process: at 255 (Mason CJ), 280 (Deane and Gaudron JJ, determining the issue on the basis of abuse of process).

95 In *Rogers*, the judge in an earlier criminal trial had rejected the tender of records of three of four interviews made by the accused on the ground they were not made voluntarily. At the trial on a later indictment, the prosecution proposed to rely on two of the records of interview (one of which had been rejected in the earlier trial). All records were made in the same circumstances. A majority of the High Court characterised the attempt to tender the records of

interview in the later trial as a direct challenge to the earlier determination, and so, in the circumstances, an abuse of process. The Chief Justice characterised the attempt to tender the records as exposing the accused to "re-litigation of the issue of the voluntariness of the confessional statements in the records of interview": at 256. It should be noted that the earlier determination was constituted by an evidentiary ruling in the earlier trial.

THE PARTIES' SUBMISSIONS

96 The parties prepared written submissions prior to the hearing, and made oral submissions at the hearing.

97 At the Court's request, the parties provided additional written submissions after the hearing, which addressed the following questions:

> (1) If the present proceeding went to trial and a declaration were made that the ASIC s 19 examination was unlawful, would it be open to the CDPP (or ASIC) as a matter of law (cf proper practice) to contend in the criminal proceedings that the Magistrate (or District Court judge) could and should consider the issue of the legality of the s 19 examination afresh in determining whether to admit evidence and/or dismiss or stay the prosecutions (accepting that the latter point could only arise post-committal)?
>
> (2) Conversely, if the present proceeding went to trial and this Court determined (in its reasons) that the s 19 examination was not unlawful, would it be open to Mr Palmer and/or PLC to contend in the criminal proceedings that the Magistrate (or District Court judge) could and should consider the issue of the legality of the s 19 examination afresh in determining whether to admit evidence and/or dismiss or stay the prosecutions (accepting that the latter point could only arise post-committal)?
>
> (3) If the present proceeding were summarily dismissed as an abuse of process, what effect would that have on the capacity of Mr Palmer and/or PLC to contend:
>
> > (i) In the criminal proceedings that the s 19 examination was unlawful, if they sought to run that argument in any dispute regarding the admissibility of evidence (either in the Committal or at trial) or in support of any contention that the prosecutions should be dismissed or stayed?
> >
> > (ii) In any future civil proceedings that the s 19 examination was unlawful?
>
> (4) If the present proceeding were permanently stayed, what would be the position in respect of the matters raised in paragraphs 3(i) and (ii)? What would be the position if the stay were temporary (pending the outcome of the criminal proceedings)?

98 The submissions of the parties referred to below include the post-hearing written submissions.

ASIC

99 ASIC submitted that this Court should not countenance its processes being used to challenge ASIC's conduct when "the proper and accepted course is for the applicants to raise these matters within the criminal proceedings for the criminal courts to determine".

100 As to the ability of the criminal courts to deal with the issues raised by the Palmer parties' claim, ASIC submitted by way of example that:

> the applicants can contend in the course of the prosecutions that Mr Palmer's s 19 examination was invalid as a step towards the exclusion of some piece of evidence or seeking a stay of the prosecution, or whatever other relief the applicants are advised to seek.

101 ASIC drew attention to the relief sought by the Palmer parties in the present proceeding, and observed that "orders requiring the return of a transcript of such an examination, and the rulings that can be made about the evidentiary use to which such a transcript can be put or the content of the examination can be put, they're very much the bread and butter of magistrates and trial judges presiding over criminal proceedings."

102 In addressing the intersection between the present proceeding and the PLC Prosecution, ASIC submitted that, if this Court does not stay the proceeding, the fact that this Court would be considering the lawfulness of the s 19 examination of Mr Palmer would inevitably affect, and delay, the criminal proceedings.

103 While noting that, as the PLC Prosecution is being conducted on its behalf by the CDPP and that, following committal, ASIC would not be party to the criminal proceedings, ASIC confirmed that, if this Court were to declare the s 19 examination to have been unlawful, it would not be open to ASIC to contend to the contrary in the PLC Prosecution (were it to have the opportunity to be heard in that proceeding). ASIC accepted that any attempt to persuade the criminal courts of a contrary conclusion would be rejected as an abuse of process.

104 ASIC noted that it was possible that a court would allow an attempt by an accused, in criminal proceedings, to obtain a different result in relation to an issue decided adversely to that person in earlier, civil, proceedings. Such a course may not constitute an abuse of process given the stricter standard of proof in criminal proceedings: *Neil Pearson & Co Pty Ltd v Comptroller-General of Customs* (1995) 38 NSWLR 443 (***Pearson***). Accordingly, ASIC accepted that it *may* be possible for the Palmer parties to contend, in the PLC Prosecution, that the s 19 examination was unlawful even if this Court were to conclude it was lawful. That said, ASIC

regarded the possibility as theoretical rather than real, given that the Queensland criminal courts would be required to follow this Court's construction of federal legislation unless persuaded it was plainly wrong: citing *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492 (the Court).

105 As to the implications were I to summarily dismiss this proceeding on abuse of process grounds arising from fragmentation, ASIC accepted that it would (of course) be open to the Palmer parties to argue for the illegality of the s 19 examination in the PLC Prosecution and to initiate any further civil proceedings raising that point, provided that the criminal proceedings had been concluded. ASIC submitted that the outcome would be the same if I permanently stayed the proceeding. If the proceeding was stayed temporarily, it would be an abuse of process to raise the issue in new civil proceedings while the temporary stay was in place.

106 ASIC also submitted that, even if the matter were to proceed to trial in this Court, it would not address the consequential relief sought by the Palmer parties concerning the use of, and delivery up of, the transcripts. That submission was put on the basis that it would be for the criminal court judge or magistrate to determine, having regard to the *Bunning v Cross* discretion, whether to admit unlawfully or improperly obtained evidence.

107 To deal with matters concerning the lawfulness of the s 19 examination as part of the PLC Prosecution was, ASIC submitted, "entirely orthodox": referring to *Gamage* at [36] (Chen J); *Power v Heyward* [2007] 2 Qd R 69; [2007] QSC 26 at [25] (Byrne J); *Commissioner of Corrective Services v Liristis* (2018) 98 NSWLR 113; [2018] NSWCA 143 at [103] (Basten JA); and *Curtis v The Queen* [2014] NSWSC 1392. ASIC further noted that the language used in the cases varies — one sees reference to "disrupt, dislocate, cause discontinuity to, interrupt, delay and/or fragment" — but the underlying principle is that stated by the High Court in *Gedeon* at [23] (the Court) (that the "power to make declaratory orders should be exercised sparingly where the declaration would touch the conduct of criminal proceedings"). That principle was developed to address the vices identified by Gibbs ACJ (as his Honour then was) in *Sankey* at 25–6 (that applications for declaratory relief in relation to a question of evidence or procedure are open to abuse and, even if made without an improper purpose, are "likely to be dilatory in effect, to fragment the proceedings and to detract from the efficiency of the criminal process").

108 As to whether this Court *should* determine issues capable of being dealt with in the criminal courts (and so "fragment" them), ASIC referred to "[l]ongstanding and binding authority" to

the effect that — absent some justification or exceptional circumstances — the determination of those issues would amount to an abuse or misuse of the civil court's processes. It referred in particular to *Jiang* at [6]–[12] (O'Loughlin, North and Weinberg JJ), *Phong* at [1]–[2] (Black CJ) and *Emanuel Exports*.

109 Reference was also made to the decision of the Queensland Court of Appeal in *Palmer Appeal (No 2)*, where the Court held (in ASIC's submission) that "these very same applicants' proceedings in the Supreme Court of Queensland involved an abuse of process because they were fragmenting the very same prosecutions".

110 ASIC concluded its written submissions as follows:

> there is nothing peculiar about the applicants' claims in this proceeding — nor anything special or exceptional about the applicants' circumstances — requiring the determination of those claims by this Court. Rather, the determination of the applicants' claims in this Court would inevitably lead to the further delay of the prosecutions, which carries with it the inherent risk of producing miscarriages of justice. These proceedings are thus an abuse of this Court's processes and they should be disposed of peremptorily and without determination on the merits.

The CDPP

111 The CDPP submitted that the proceeding in this Court is an abuse of process for two reasons:

(1) it is an inappropriate attempt to interfere with criminal processes (ie it improperly "fragments" them); and

(2) it involves re-litigation and creates an inappropriate multiplicity of proceedings.

112 In oral submissions, counsel for the CDPP focused on the re-litigation point and adopted ASIC's submissions on fragmentation.

Fragmentation

113 As to the first point, the CDPP referred to the "long-standing and general reluctance to fragment ongoing criminal proceedings", citing, among a great number of other cases, *Sankey* and *Obeid*. The CDPP advanced five reasons why this case lacks "anything approaching the kind of exceptional circumstances capable of justifying interference with the prosecutions", which were in summary:

(1) As in *Palmer Appeal (No 2)*, while the exact declaratory relief sought by the Palmer parties in this proceeding is not within the scope of the Magistrates Court's jurisdiction, there are "other mechanisms available to the [Palmer parties] to make the points and

challenges they wish throughout the committal process, and after any indictment is presented, in the trial court”: *Palmer Appeal (No 2)* at [79] (Dalton JA, Boddice JA and Burns J agreeing).

(2) In *Hutson*, also relied upon by ASIC, the Queensland Court of Appeal found (in circumstances where the defendant, in a criminal prosecution alleging, amongst other things, breaches of the Corporations Act, had sought to challenge the lawfulness of s 19 examinations) that the Supreme Court should have dismissed the defendant’s claim summarily, and reiterated the importance of avoiding fragmentation: at [60]–[62] (Mullins P, Dalton JA and Henry J agreeing).

(3) The criminal courts are the most appropriate forum for the determination of the matters alleged, rather than determination in a piecemeal way in a disparate proceeding in a separate jurisdiction.

(4) The imminent committal process will provide an opportunity for the Palmer parties to test the allegations they seek to make in this proceeding, and to disrupt the PLC Prosecution, even prior to that stage, “would be to create a fragmentation of the most serious kind”.

(5) The courts ought not countenance a lower bar of exceptionality (in the sense of there needing to be exceptional circumstances before a civil court will intervene in criminal proceedings) for “white collar” crimes as compared with other crimes or well-resourced defendants capable of commencing multiple collateral attacks.

114 The CDPP agreed with ASIC’s submissions on the implications of this Court determining the issue of the legality of the s 19 examination for the arguments that may be run in the PLC Prosecution. Like ASIC, the CDPP considered that, if this Court determined that the examination was unlawful, it would be an abuse of process for the CDPP to argue for the contrary position in the criminal proceedings. The CDPP also considered that it was possible that a converse decision in this Court would not preclude the Palmer parties arguing, in the criminal proceedings, that the examination was unlawful but, like ASIC, considered that the abuse of process doctrine would likely still operate in that instance.

115 The CDPP’s submissions observed that while a declaratory judgment (whether positive or negative) usually gives rise to an issue estoppel and an estoppel per rem judicatem, the position is nuanced in criminal proceedings given that *Rogers* is authority for the proposition that issue

estoppel does not apply in criminal proceedings (although abuse of process will often lead to the same result).

116 The CDPP submitted that, if this Court were to summarily dismiss, or permanently stay, the present proceeding, the Palmer parties would be free to raise the issue of the lawfulness of the s 19 examination in the criminal proceedings, or any subsequent civil proceedings unrelated to the PLC Prosecution. The CDPP's submissions on the position in relation to a temporary stay were not clear. It was submitted that a permanent stay is appropriate, and that a temporary stay "does not advance the applicant's position".

Multiplicity/re-litigation

117 The CDPP submitted that both of the conditions identified by Kiefel CJ, Bell and Keane JJ in *UBS* at [1] as enlivening the power to stay proceedings as an abuse of process — "where the use of the court's procedures occasions unjustifiable oppression to a party" and "where the use serves to bring the administration of justice into disrepute" — are relevant to the present proceeding. The CDPP referred in particular to the High Court's confirmation, in *UBS*, that bringing multiple proceedings to address the same issue, or different issues which should properly have been dealt with in the one proceeding, is vexatious and an abuse of process: citing *UBS* at [43]–[46], [58]–[59] (Kiefel CJ, Bell and Keane JJ), [61]–[63], [70]–[72], [75] (Gageler J, as his Honour then was).

118 It was said by the CDPP that the present proceedings represent an inappropriate multiplicity of proceedings, or re-litigation — the terms appeared to be used by the CDPP interchangeably — because:

(a) the complaints raised are capable of being (and it is more appropriate that they be) dealt with in the criminal proceedings;

(b) the duplicative nature of the present proceedings is apt to create the appearance of special treatment for the Palmer parties, and to squander the limited resources of the courts and the costs to be borne by ASIC and the CDPP (being publicly funded authorities);

(c) the duplicative and abusive nature of the present proceedings is amplified in circumstances where Queensland courts have repeatedly set aside or permanently stayed similar proceedings involving the same parties; and

(d) the allegations made in this proceeding are a reformulation of those made in the prior collateral attacks, designed to bring the proceeding within this Court's jurisdiction after several unsuccessful attacks made in Queensland.

119 In oral submissions, the CDPP submitted that: "in these proceedings, the Palmer parties are attempting to agitate things which have been agitated before both within the Supreme Court of Queensland and various other courts in that jurisdiction." The CDPP further submitted that this Court's processes ought not be allowed to become an instrument of harassment and oppression, that being the effect where "ASIC and the CDDP … are being put to the significant trouble and expense of coming back to court again and again and again to deal with what is effectively the same question in slightly different ways."

The Palmer parties

120 The Palmer parties submitted that there was no occasion for a permanent stay of the proceedings. They characterised the proceedings as an orthodox invocation of this Court's jurisdiction, such that they have the right to have their claims heard and determined: citing *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Ltd* (2019) 138 ACSR 42; [2019] FCA 964 (***ASIC v ANZ***) at [54] (Moshinsky J); *Rochfort* at 19 (Sugerman ACJ, Holmes and Mason JJA agreeing); and *Mudginberri Station Pty Ltd v Australasian Meat Industry Employees' Union* (1986) 12 FCR 10 at 12–13 (Sweeney, Pincus and Burchett JJ).

121 The Palmer parties submitted that the circumstances arising in this case simply do not constitute "fragmentation" as that concept is recognised in the authorities. They focused on the terms of the relief sought in the present proceeding and submitted that "[t]he proceedings in this court against ASIC do not touch on the criminal proceedings at all." Rather, they contended, ASIC was, by its stay application, seeking to immunise itself from the litigation of a valid claim against it. On the Palmer parties' case, the criminal proceedings were irrelevant given that the Palmer parties seek, from this Court, a final and binding ruling as to the legality of the s 19 examination. It was submitted that the case raises an important question of statutory construction regarding the interplay between ss 19 and 49 of the ASIC Act.

122 The Palmer parties acknowledged that the magistrate charged with the committal proceedings could address the issue of illegality in ruling on the admissibility of evidence, as could the District Court of Queensland were the PLC Prosecution to proceed to trial. They emphasised, however, the breadth of the relief sought in the present proceedings, contending that the

consequences of the use of the s 19 examination transcripts "are broader in application than just the criminal proceedings currently on foot". They submitted that the present litigation "is a standalone civil claim, wholly separate to the criminal proceedings" and seeks relief that could not be obtained from the Magistrates Court of Queensland, which is seized of the committal proceedings. Any relief available to them in the criminal proceedings would, it was submitted, be limited to relief that was interlocutory in nature in the form of an evidentiary ruling, the effect of which would be limited to those proceedings.

123 In addressing the relationship between the present proceeding and the PLC Prosecution in oral submissions, the Palmer parties submitted that a declaration of this Court in relation to the lawfulness of the s 19 examination would have no impact on the PLC Prosecution, as the magistrate would determine any challenge to the admissibility of evidence based on the evidence presented, and not any decision of this Court. It was said that the present proceeding, taken to its conclusion, would not touch, in any way, the criminal proceedings. The contention was that, in order to make good the allegation of fragmentation, ASIC and the CDPP had to show, but had not shown, how the relief sought "would stop the magistrate performing the magistrate's function". The same point was made, deploying more neutral language, in the contention that there is no fragmentation unless the proceedings "engage with", interfere with, intervene in or "dislocate" the criminal proceedings. What these formulations have in common is that, in order to be characterised as fragmentating criminal proceedings, a civil proceeding must have a direct impact on the criminal proceedings such that they cannot continue in parallel, unaffected by the civil proceedings, the archetypal case being one in which a ruling in a criminal proceeding is challenged by separate civil proceedings.

124 In putting the proposition that the present proceeding did not have the necessary impact on the PLC Prosecution, the Palmer parties referred to the criminal law not recognising issue estoppel: citing *Rogers* and *R v Carroll* (2002) 213 CLR 635; [2002] HCA 55 at [35]–[36] (Gleeson CJ and Hayne J). They submitted that the issue of the lawfulness of the s 19 examination would be considered wholly separately in the criminal proceedings (assuming the point is taken). In so submitting, the Palmer parties accepted that there would be a risk of inconsistent (or different) views on the illegality issue if this proceeding were pursued to its conclusion, and the same point regarding the lawfulness of the s 19 examination were pursued in the criminal proceedings. The Palmer parties emphasised, in their supplementary submissions on the questions posed by the Court, that *Rogers* concerned re-litigation of an issue that had been determined in prior *criminal* proceedings, such that the observations made in that case

concerning abuse of process have no application to the circumstances presently being considered.

125 The Palmer parties expanded on their view in supplementary written submissions, submitting that, if this Court were to conclude that the s 19 examination was unlawful, the CDPP and ASIC could contend in the criminal proceedings that the examination was lawful. This was said to be the result of issue estoppel not applying in criminal cases, and because the CDPP could, in the PLC Prosecution, still seek to tender the transcripts of the s 19 examination as illegality is only one factor going to admissibility. That said, the Palmer parties acknowledged that, as a matter of convention, the executive would act in accordance with declarations of this Court and so would not be expected to advance, in the PLC Prosecution, a position contrary to that decided in this Court, were the present proceeding to go to trial.

126 If this proceeding were to go to trial and this Court decided the s 19 examination was lawful, the Palmer parties contended that it would be open to them to contend in the criminal proceeding that the magistrate (or District Court judge) should consider the lawfulness of the s 19 examination afresh. This was said to be the case for two reasons. First because, if the Palmer parties are unsuccessful at trial, "there would be no declaration" — rather, the proceedings would just be dismissed. Secondly, because there is no issue estoppel in criminal proceedings it would also be open to the Palmer parties to contend that the issue should be considered afresh by the criminal courts in view of the different standards of proof applying in civil and criminal proceedings. In their further, responsive submissions on the questions posed by the Court, the Palmer parties submitted that the answer to this question is not relevant to the disposition of the applications of ASIC and the CDPP, and, in any event, *Pearson* is authority for the proposition that there would be no abuse of process in their contending for the illegality of the s 19 examination in criminal proceedings, even if they were unsuccessful in the present proceeding.

127 As to the position were this proceeding to be summarily dismissed or permanently stayed, the Palmer parties submitted that, while they could raise the legality of the s 19 examination in the criminal proceedings, summary dismissal of the proceeding would create a res judicata precluding them from bringing any further civil proceeding contending that the s 19 examination was unlawful. They submitted that a permanent stay of the present proceeding would likewise prevent them from bringing further civil proceedings raising the lawfulness of the s 19 examination. The Palmer parties contended that ASIC and the CDPP had not

considered whether a res judicata would arise if the proceedings were summarily dismissed, and submitted that even if the point is only seriously arguable, or a possibility, this Court would not then proceed to grant that relief: citing *DJ Builders & Son Pty Ltd (in liq), in the matter of DJ Builders & Son Pty Ltd (in liq) v Queensland Building and Construction Commission (No 3)* (2021) 156 ACSR 539; [2021] FCA 1041 at [43] (Derrington J).

128 In relation to a temporary stay, the Palmer parties submitted that it would be unjust to prevent the Palmer parties from vindicating their wider rights, even on a temporary basis, noting that neither ASIC nor the CDPP sought relief in the form of a temporary stay in their applications. The Palmer parties also raised, as a potential difficulty, that the CDPP may never present the indictment in the District Court, meaning that a temporary stay pending the "outcome of the criminal proceedings" would be uncertain and require the Court's constant supervision.

129 The Palmer parties also emphasised what they contended were the drastic consequences of the relief sought by ASIC and the CDPP, *viz*, that they "could never vindicate their rights as to the unlawful examination or prevent use of the s 19 transcript in any proceedings (presumably) outside of the criminal proceedings, even if ASIC or someone else sought to deploy the transcript in unrelated proceedings". Numerous other types of potential proceedings were identified in submissions. It was suggested that the granting of a permanent stay may also preclude the Palmer parties from challenging any future use of the transcripts in other fora.

130 In an exchange during the course of oral submissions concerning the practical utility of the relief sought by the Palmer parties on matters other than the criminal proceedings, the Palmer parties were asked to identify whether there was any inkling that anyone was pursuing any of the additional, and adverse, uses that might be made of the transcripts that had been raised in their written submissions. Counsel for the Palmer parties contended that was an irrelevant enquiry on the basis that a desire to vindicate the proposition that Mr Palmer had been unlawfully examined, and that no use should ever be made of the transcripts, was sufficient to warrant the grant of the relief sought even if there was no suggestion that anyone was proposing to use the transcripts adversely to their interests (outside the PLC Prosecution).

131 Subject to that overarching position, the Palmer parties proceeded to refer to correspondence from 2015 in which interested persons urged ASIC to take action against the Palmer parties, and an answer, given in cross-examination of a director of TPC in 2019, in which the director referred to a wish to obtain compensation and actions being on foot to obtain compensation. I was informed from the bar table that those proceedings had concluded. It was, however,

suggested that because the transcripts had been (on Mr Palmer's case) misused in formulating the charges that are the subject of the PLC Prosecution, Mr Palmer has a legitimate apprehension that the transcripts will continue to be misused in the future in a similar way.

132 In identifying the foreseeable consequences that the declarations sought would have — which is a question arising given what was said in *Ainsworth* concerning the need to identify "foreseeable consequences" for the parties — the Palmer parties said that the "foreseeable consequences are that they would then know the transcript cannot be further used unlawfully, and they would then know that it would not be further disseminated unlawfully."

133 The Palmer parties contended that the applications of ASIC and the CDPP are to be evaluated separately, as ASIC is merely the complainant in the PLC Prosecution and has no interest in asserting fragmentation "because they're not running the criminal proceedings."

134 In response to the re-litigation issue, the Palmer parties' principal submission was that the present claim has never been heard on the merits. They also submitted that no attempt had been made by the CDPP to establish an abuse of process based on multiplicity of proceedings on the basis that the points raised in the present proceeding can, and should, have been litigated in the earlier proceedings brought by the Palmer parties.

ASIC and the CDPP's response to the Palmer parties' submissions

135 ASIC's submissions in response resisted the Palmer parties' submission that authorities concerning fragmentation ought to be confined to instances where a party seeks to challenge discrete evidentiary and procedural rulings of a trial court. ASIC relied on the following cases as instances where fragmentation was the basis for a court declining to determine matters that were not evidential or procedural in nature: *Frugtniet*; *Alqudsi*; *Emanuel Exports*; and *Hutson*.

136 The CDPP made similar submissions, also highlighting that fragmentation is not just a concern that arises where only one or some of the issues in the criminal proceeding will be decided in the civil court. The CDPP referred to a number of cases in which it was submitted that the concern was not simply a challenge to a discrete evidentiary or procedural point. The CDPP submitted that, in any event, if the fragmentation principle only applies in relation to discrete evidentiary and procedural rulings, that criterion is satisfied in the present case given that the proceeding in effect seeks a prospective ruling on a possible objection regarding the use to which the impugned transcripts might be put.

137 In answer to the submission that ASIC and the CDPP had not sought to, but needed to, bring the case for a stay within the reasoning set out by the High Court in *GLJ,* ASIC distinguished *GLJ* as not being concerned with fragmentation. ASIC submitted that it is not necessary to superimpose any additional requirement that a verdict in the civil proceeding be "irreconcilable with the administration of justice" where the issue is fragmentation. ASIC submitted that, in any event, if that be a requirement, fragmentation of the criminal proceeding absent an exceptional reason would be irreconcilable with the administration of justice.

138 In addressing the Palmer parties' contention that the present proceeding is a "standalone" civil proceeding going beyond the underlying criminal proceedings, and extending to other potential uses of the transcripts, ASIC submitted that:

(1) The relief sought by the Palmer parties is plainly framed with reference to the underlying criminal proceedings, and the present proceeding was only commenced after numerous other collateral attacks had failed. The joinder of the CDPP and the application seeking relief as to the use to which the CDPP can put the information obtained from the s 19 examination confirms the real focus of the present proceeding.

(2) The delay in bringing this proceeding — eight years after the s 19 examination — calls out for explanation if it really is a "standalone" civil action, but is unexplained. Such delay would tend strongly against the exercise of discretion to grant declaratory relief in any event.

(3) In cases of fragmentation, the concern is the potential effect of the civil court's exercise of jurisdiction on the extant criminal prosecution. It is not a question of which court is the "proper forum". The fact that this Court's exercise of jurisdiction could have wider implications is not to the point, nor is the fact that the Palmer parties seek relief that could not be ordered by the court hearing the criminal charges. The authorities on fragmentation include examples where claims have been dismissed or stayed that went beyond the relief the criminal court could grant. Three examples relied on were: *Jiang*; *Flanagan*; and *Hutson*.

139 The CDPP made similar submissions, highlighting the "true position" that the relief sought by the Palmer parties is aimed at the use of the impugned transcripts in the PLC Prosecution, which is reinforced by the joinder of the CDPP. As to the further potential uses of the transcripts, the CDPP highlighted that only one use is currently in contemplation (namely use in the investigation and PLC Prosecution), and to address any other potential uses would take

this Court into the realms of speculation when declaratory relief must be confined to the determination of legal controversies, not hypotheticals. If such further uses as are contemplated by the Palmer parties arise, they can then decide whether or not to challenge the use of the impugned transcripts. It is not the case that a permanent stay would mean that the Palmer parties could never seek to vindicate their rights to preclude the use of the transcripts outside the extant criminal proceedings.

140 ASIC and the CDPP submitted that the fact that there may be public interest in the answer to a question posed by the civil litigation does not overcome concerns about fragmentation, with ASIC citing *Hutson* as an example.

141 In oral submissions, ASIC contended that the authorities did not require that there be direct interference with criminal proceedings of the kind the Palmer parties contended was necessary in order for there to be fragmentation. ASIC also took issue with the suggestion that this Court's conclusion on the lawfulness of the s 19 examination would not affect the conduct of the criminal proceedings. The CDPP likewise contended that fragmentation was not confined to the way the point was put in *Sankey*, as the formulation adopted in that case was explained by the nature of the case before the Court on that occasion.

142 ASIC and the CDPP both filed further written supplementary submissions responding to the Palmer parties' submissions on the four additional questions posed by the Court.

143 The main points on which ASIC disagreed with the Palmer parties' submissions were as follows:

(1) Contrary to the Palmer parties' submissions — which argued that, if the present proceeding were summarily dismissed as an abuse of process, they would be unable to raise the legality of the s 19 examination in subsequent civil proceedings on the basis of res judicata — the orders sought by ASIC are interlocutory, and summary dismissal of this proceeding on the basis of the criminal proceedings being on foot would not result in determination on the merits of the legality of the s 19 examination.

(2) For the same reasons, ASIC disagreed with the Palmer parties' submission that a permanent stay of the present proceeding would also preclude further civil proceedings being initiated by the Palmer parties raising, as an issue, the legality of the s 19 examination.

(3) While ASIC has contended for a permanent stay, that does not constitute a disavowal of a temporary stay if its primary position were not accepted. Further, ASIC disputed that a temporary stay until the conclusion of the criminal proceedings would be too vague, and noted that any issue that might arise concerning whether the stay has expired could be raised by application to the Court.

144 In her further submissions, the CDPP noted that, in Queensland, an indictment must be presented no later than six months after the date of committal, and if the indictment is not presented in that period (or an extension of that period) the accused is entitled to be discharged from the consequences of the committal: s 590(1)–(2) and (4) of the *Criminal Code* (Qld).

CONSIDERATION

145 I will first address the CDPP's contention that the proceeding should be permanently stayed or summarily dismissed on the basis that there is a multiplicity in proceedings that constitutes an abuse of process.

Abuse of process based on re-litigation/multiplicity

146 While the CDPP referred to "re-litigation" and "multiplicity", I will refer to "re-litigation" as that most aptly captures the gravamen of the CDPP's complaint.

147 The CDPP's submissions on re-litigation focused on the numerous prior proceedings brought by the Palmer parties in which Queensland courts have repeatedly (including on appeal) set aside or permanently stayed "similar proceedings, by the same parties" (the CDPP's characterisation). The CDPP characterised the present proceeding as merely "reformulating" the prior complaints of impropriety advanced by the Palmer parties in that other litigation, so as to bring them within this Court's jurisdiction.

148 As the CDPP submitted, the Palmer parties have brought a number of proceedings in the Queensland courts that seek to stay the PLC Prosecution on the basis of alleged impropriety. The CDPP pointed to the proposed Second Further Amended Statement of Claim in the fourth challenge. That proposed pleading did advance essentially the same point as constitutes the lynchpin of the present proceeding: *viz*, that s 49 of the ASIC Act had the effect that the power of compulsory examination was not available to ASIC and, as a consequence, the s 19 examination of Mr Palmer was unlawful. The unlawful examination was said, in the proposed Second Further Amended Statement of Claim in the fourth challenge, to warrant the PLC Prosecution being permanently stayed.

149 The difficulty, however, is that no leave was ever granted for the Palmer parties to proceed on the case outlined in that proposed Second Further Amended Statement of Claim. Rather, that proceeding was permanently stayed by Callaghan J, and an appeal to the Queensland Court of Appeal failed, as did the Palmer parties' applications for special leave to appeal to the High Court.

150 In *UBS*, the plurality confirmed that the fact that a claim *could* have been raised in earlier proceedings can render later proceedings raising the point an abuse of process: at [43]. However, the Palmer parties did attempt to raise the issue in an earlier proceeding but were not granted leave to amend their pleading as the proceeding as a whole was stayed. Other than the proposed claim regarding s 49 of the ASIC Act — that was proposed to be brought into the fourth challenge — none of the Palmer parties' other challenges sought to agitate that particular point. As such, the prior proceedings cannot be characterised as constituting serial proceedings agitating the *same* claim, or the "staged conduct" of what is substantively one dispute: cf *UBS* at [46] and [59] (Kiefel CJ, Bell and Keane JJ). Accordingly, I do not accept that the present proceeding constitutes an attempt to "re-litigate" a point already raised in prior proceedings as the Palmer parties were not permitted to raise the point when they sought to do so, and the points upon which the various proceedings were brought did not include the central point underpinning the present proceeding (*viz*, that the s 19 examination was unlawful).

151 It is important to observe that the CDPP did not put this part of her application on the basis that an abuse arises because the Palmer parties *could have*, and *should have*, but did not, agitate the s 49 point in the prior proceedings. Rather, and as noted above, the CDPP's contention was that the present proceeding involved the re-litigation of complaints of impropriety that had already been litigated, albeit reformulated to bring the complaints within this Court's jurisdiction.

152 Of course, the factual circumstances that may give rise to an abuse of process are many and varied. However, the CDPP did not point to anything further in connection with her re-litigation argument that would, in my assessment, mean that permitting this matter to go to trial would be "irreconcilable with the administration of justice through the operation of the adversarial system" so as to warrant a permanent stay: *GLJ* at [3] (Kiefel CJ, Gageler and Jagot JJ). Nor was it suggested by the CDPP that the proceeding might be summarily dismissed were I to conclude that it ought not be permanently stayed on the basis of re-litigation giving rise to an abuse of process.

153 My conclusions on this issue ought not be read as condoning the Palmer parties' conduct. As is clear, many proceedings have been commenced, and some have been discontinued, only for another proceeding to sprout in its place. That conduct is wasteful of the resources of the CDPP (and ASIC) and the courts concerned. However, the High Court has made it clear in *GLJ* (if it were not already apparent) that there is a high hurdle in establishing that a proceeding ought never be allowed to go forward on abuse of process grounds. That high hurdle has not been met on the grounds of re-litigation, given the way the CDPP framed this part of her application.

Abuse of process based on fragmentation

154 The determination whether to permanently stay the proceeding on abuse of process grounds is evaluative, but not discretionary: *GLJ* at [26] (Kiefel CJ, Gageler and Jagot JJ).

155 While permanently staying a proceeding on abuse of process grounds is not discretionary, that does not mean that the consequences for the parties of a permanent stay — or conversely, the consequences if the proceeding is not stayed — are irrelevant. On the contrary, they are matters that inform (along with other relevant considerations) the qualitative assessment of where the interests of justice lie. Whether the circumstances are such that a proceeding constitutes an abuse of process has been described as a "broad, merits-based judgment which takes account of the public and private interests involved": *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31 (Lord Bingham, quoted with approval by the plurality in *UBS* at [7]). In the fragmentation context, consideration is given to whether the civil court refusing to exercise jurisdiction or declining to grant relief will cause injustice: eg *Cain* at 254 (McHugh JA, as his Honour then was); and *Hutson* at [47] and [61] (Mullins P, Dalton JA and Henry J agreeing).

156 Similar considerations regarding the impact on the parties of a temporary stay — or refusing a temporary stay — are also relevant in the exercise of discretion to order that proceedings be temporarily stayed. I return to consider the impact of permitting this proceeding to progress to trial, or, conversely, staying the proceeding permanently or temporarily, below. But first it is necessary to address a threshold question: namely, whether or not the present proceeding involves fragmentation at all.

157 The Palmer parties contended that the civil proceeding they have initiated in this Court does not involve fragmentation at all. ASIC and the CDPP said it does. The difference between the parties on this point arises from the narrower view of fragmentation taken by the Palmer parties. The Palmer parties contended that, in order to give rise to concerns associated with fragmentation, the civil proceeding must have a direct impact on the criminal proceedings.

158 The Palmer parties contended that the relief they seek in the present proceeding does not have a direct effect — or, as they would have it, any effect at all — on the criminal proceedings and therefore cannot be said to involve fragmentation.

159 I do not accept the Palmer parties' contention for the following reasons.

160 The nomenclature of "fragmentation" (or the other terms used, such as "disruption" or "dislocation") must not be allowed to obscure the underlying policy concerns that the High Court, and intermediate courts of appeal, have identified as standing behind the restraint shown by civil courts when it comes to proceedings that intersect with criminal proceedings. Those concerns, as canvassed by Kirby P (as his Honour then was) in *Cain* (at 235) and summarised above, include the undesirability of disruption or delay to criminal processes; the superior knowledge of the judge or magistrate seized of the criminal proceedings in respect of the facts and circumstances underlying the criminal case; the public cost of proliferating litigation; and the undue advantage that may be afforded to rich and powerful defendants to delay and interrupt the operation of the criminal law. See also *Bou-Simon* at [55] and [59] (Black CJ, Tamberlin and Katz JJ) and *Jiang* at [6]–[7] (O'Loughlin, North and Weinberg JJ), discussed above at paragraphs 57–58 and 62.

161 All of the Palmer parties' previous challenges to the PLC Prosecution have involved frontal assaults on the PLC Prosecution. Not only was the Magistrates Court of Queensland a party to all of the previous challenges (other than the first challenge), but orders were sought to stop the criminal proceedings in their tracks (in particular, orders staying the PLC Prosecution and/or restraining the Magistrates Court, the CDPP and ASIC from proceeding with the prosecution). As such, the applications brought by the CDPP and ASIC seeking to dispose of those proceedings clearly called for consideration of the authorities on fragmentation. I did not understand the Palmer parties to contend otherwise in the present proceeding.

162 The current proceeding stands apart from the blueprint of the Palmer parties' former, unabashed frontal assaults on the criminal proceedings. The Magistrates Court of Queensland is not a party to this proceeding. The relief sought in the present proceeding — set out above at paragraph 3 — does not include orders staying the PLC Prosecution.

163 Most of the cases where the principles concerning fragmentation are discussed involve what I have referred to above as "direct, collateral attacks". Without seeking to be exhaustive, such attacks have commonly taken the form of a civil application seeking orders staying a

prosecution, enjoining the criminal court or the prosecution from taking certain steps, and seeking judicial review of decisions made by the judicial officer conducting the committal or trial. The orders sought in such cases would, if made, have a direct and immediate effect on the criminal proceedings.

164 What the cases expose, however, is that civil proceedings can intersect with criminal proceedings in a variety of ways. Not all involve the direct impact on criminal proceedings that the Palmer parties contended must be present in order for a civil case to give rise to concerns about fragmentation.

165 For example, as outlined above, in *Bell* the Full Court of the Supreme Court of South Australia declined to grant the declaratory relief sought by the Commissioner despite acknowledging that it "would not directly interfere in the criminal proceeding" on the basis that it would nonetheless address issues that "are very closely aligned (if not identical) to those arising for decision in the criminal proceeding": at [416] (Kourakis CJ, Peek and Blue JJ). See also *Gamage* and *Hausfeld*, referred to above at paragraphs 71–72.

166 The question, then, is what is the nature of the intersection, if any, between the present civil proceeding and the PLC Prosecution?

167 The Palmer parties focused on the relief sought in in the present proceeding, but the relief sought cannot be considered in a vacuum. Rather, it must be considered in light of the pleading of the matters said to warrant that relief. The relief sought must also be considered from a practical standpoint (*Hutson* at [54] (Mullins P, Dalton JA and Henry J agreeing)), addressing the realities of how this matter proceeding to trial and judgment may affect the PLC Prosecution.

168 When the Statement of Claim is read from start to finish, and the relief sought is evaluated in that context, it is clear that the Palmer parties seek relief that has a close nexus with the PLC Prosecution. They seek declarations regarding the unlawfulness of the s 19 examination and the transcripts being unlawfully obtained. The relief sought also includes a declaration that the transcripts may not be used for "any purpose" including formulating the charge, which is the very subject of the PLC Prosecution, or the summary of facts in *those* criminal proceedings. To be specific, a declaration is sought that:

> the transcript of the compulsory examination by ASIC, and which has been provided to the CDPP, may not be used for any purpose including:

(1) formulating the charge;

(2) preparing, relying on, or adducing into evidence, the summary of facts.

169 Even if, as counsel for the Palmer parties submitted, a declaration in those terms would *also* operate in relation to any future and different criminal charges, it is clear from the Statement of Claim that *the* charge and *the* summary of facts referred to in the relief sought are those pleaded at paragraphs 107–115 of the Statement of Claim. Those paragraphs of the Statement of Claim set out the use of the transcripts culminating in the laying of the charges that constitute the PLC Prosecution, and the summary of facts in that prosecution. There is an air of unreality in the Palmer parties' submissions that the present claim has no sufficient point of intersection with the PLC Prosecution so as to bring the fragmentation principle into focus. As set out above, the present proceeding seeks to impugn, as "unlawful", steps that constitute foundations of the PLC Prosecution. I do not accept that the principles concerning fragmentation have no application simply because the relief that touches on the criminal proceedings has been framed so that the nexus with the criminal proceedings is indirect and has been pursued in a court of federal jurisdiction (cf by yet another full frontal attack in the Supreme Court of Queensland).

170 The relief sought also includes mandatory and prohibitive injunctions seeking to restrain any future use of the transcripts and to require ASIC and the CDPP to deliver up the transcripts and detail, on oath, to whom they have been provided. Again, there is an air of unreality in the suggestion that orders of this kind would have no impact on the PLC Prosecution, in circumstances where it is a key part of the Palmer parties' case in this proceeding that the transcripts of the s 19 examination were unlawfully used by ASIC and the CDPP to formulate the two complaints that initiated the PLC Prosecution, and were unlawfully used to draft the summary of facts deployed in the PLC Prosecution.

171 As I have said, the nexus between the civil and criminal proceedings must be assessed in a practical manner. The suggestion that the present proceeding could be run to trial and judgment with no impact on the PLC Prosecution has an air of unreality about it. Even if one adopts a more "technical" approach and considers the impact of this proceeding being run to trial and judgment by reference to the applicable legal doctrines, it is clear that running the present proceeding to trial and judgment would not, as the Palmer parties contended, have no impact on the criminal proceedings.

172 The parties agreed that, if this proceeding were run to trial and judgment, and if I were to conclude that the s 19 examination was *unlawful*, neither the CDPP nor ASIC (to the extent it

has a role in the PLC Prosecution) would contend in the PLC Prosecution that the s 19 examination was *lawful*. While ASIC and the CDPP accepted they would be precluded from mounting such an argument on abuse of process grounds (see the discussion of *Rogers* above), the Palmer parties considered they would be so constrained as a matter of convention. All parties, however, agreed that the jurisprudential or practical source of the constraint is not relevant for present purposes.

173 Conversely, if this matter were run to trial and judgment, and if I were to conclude that the s 19 examination was *lawful*, ASIC and the CDPP accepted there would not be an *absolute* bar on the Palmer parties contending in the PLC Prosecution that the s 19 examination was unlawful. ASIC referred to the decision in *Pearson* as illustrating that there is a possibility, which ASIC described as "theoretical", that the Palmer parties could be permitted to mount such an argument in the PLC Prosecution, but that that possibility would only arise if there were some prospect that questions of evidence or the higher standard of proof in criminal proceedings might justify that inconsistency in result. The Palmer parties contended that there would be no constraint at all.

174 It is not necessary (or appropriate, for obvious reasons) to attempt to reach a concluded view on the extent to which an adverse decision in the present proceedings on the issue of the legality of the s 19 examination would constrain the Palmer parties in the future conduct of the PLC Prosecution. Nevertheless, the very fact that the parties have disagreed, as they have, on this point reinforces the intersection between the present civil and criminal proceedings. The fact, and nature, of the disagreement between the parties sharply illustrates that having this proceeding run to trial gives rise to the clear potential for *additional* issues to arise in the criminal proceedings concerning the impact of an adverse ruling in this Court. In addition to the base question of illegality possibly being re-litigated, additional arguments would need to be determined regarding:

(a) the significance of the present proceedings being dismissed, so that there is no declaration by this Court (noting the authorities concerning issue estoppel arising even where the claim is dismissed and the declarations sought are not made, and the authorities to the effect that issue estoppel not applying in criminal proceedings still leaves the question of abuse of process for determination);

(b) whether, in answer to a submission that it would be an abuse of process for the Palmer parties to contend for illegality in the criminal proceedings, differences in the applicable standards of proof would be such as to permit re-litigation of the point; and

(c) whether in fact the observations of the High Court in *Rogers* concerning the role of abuse of process in criminal proceedings (raised by the parties in this proceeding, as explained above) as a reason why it was not necessary for the criminal law to recognise issue estoppel, apply where the earlier litigation was civil, and not criminal.

175 The authorities on fragmentation make it clear that where a point *can* be raised in extant criminal proceedings, absent exceptional circumstances that warrant determining the point in the separate civil proceedings, it *should* be raised in the criminal court, and not by way of a separate civil proceeding: see *Palmer Appeal (No 2)* at [5] (Dalton JA); *Cain* at 244–5 (Priestley JA); *Jiang*; *Hausfeld* at [24] (Fagan J); and *Phong* at [47] (Beaumont J).

176 In this proceeding, it was common ground that a challenge may be made in the PLC Prosecution (at the committal or trial stage) to the admissibility of evidence, premised on the s 19 examination being unlawful. It was also accepted that the question of the lawfulness of the s 19 examination may arise if an application were made in the District Court of Queensland (post-committal) to have the prosecution stayed on the basis that the s 19 examination was unlawful (although the Palmer parties contended such an application would be unlikely to arise in that way), or to exclude evidence. As such, this is a case where the central point regarding the legality of the s 19 examination could be raised within the criminal jurisdiction.

177 It follows that the central question raised by the Palmer parties in the present proceedings — whether the s 19 examination of Mr Palmer was lawful — is a question that "will or may arise" in the criminal proceedings: *Clyne* at 643 (Gibbs CJ). While it is not necessary, in order for fragmentation concerns to arise, that the questions will definitely or inevitably arise in the criminal proceedings, I note that the Palmer parties did not suggest that the question of the illegality of the s 19 examination would *not* arise in the criminal proceedings.

178 For completeness, I note that I do not accept the suggestion of the Palmer parties that the principal question raised for determination in this proceeding would be fundamentally different from the question as it may arise in the criminal proceedings because the issue there would concern the admissibility of evidence. In either case, the same central point would arise: was the s 19 examination unlawful?

179 Given that the central issue regarding the legality of the s 19 examination can be determined in the criminal courts, the authorities referred to above — including *Cain* at 245 (Priestley JA); *Jiang* at [12] (O'Loughlin, North and Weinberg JJ) and *Hausfeld* at [24] (Fagan J) — emphasise that, absent exceptional circumstances, the accused should pursue the relevant issue through the criminal courts, rather than civil courts weighing in with declaratory or other relief.

180 Applied to the present case, this means that, because the Palmer parties *can* pursue the question of the legality of the s 19 examination in the criminal proceedings, they should do so unless there are compelling reasons that would justify the question being determined in the civil jurisdiction.

181 That raises the next question, namely whether there are circumstances that warrant permitting this proceeding to progress to trial in the ordinary course, notwithstanding the existence of the PLC Prosecution. Three points arise for consideration:

(1) The ambit of the civil proceeding (and, in particular, the relief sought by the Palmer parties), as compared with the relief they may obtain by pursuing the issue of the legality of the s 19 examination in the criminal forum.

(2) Any injustice that would be caused to the Palmer parties were the proceeding to be permanently stayed or summarily dismissed.

(3) Delay in bringing the present proceeding.

182 The first two of these points are interrelated.

183 The Palmer parties stressed that Mr Palmer is entitled to have his view — that the s 19 examination was unlawful — vindicated and for the Palmer parties to have the benefit of relief which ensures that the transcripts of that examination cannot be used adversely to their interests in the future. As I have set out above, while the Palmer parties identified other causes of action that *might* theoretically be mounted (one of which is statute barred), there is no suggestion that anyone is actually pursuing or preparing to pursue any adverse action in which the transcripts may be used. The impugned s 19 examination took place in July 2016, more than eight years ago. As noted above, the only material identified by the Palmer parties as suggesting there was any inkling that potential causes of action were to be pursued against them mostly pre-dated ASIC in fact taking action, and otherwise involved claims and proceedings which have concluded.

184 I accept that the relief sought by the Palmer parties goes beyond the relief that might be afforded by the criminal courts in the context of the PLC Prosecution, either in the committal or trial phase. Depending on how the issue were to arise in the criminal courts, the relief may be constituted by an interlocutory decision on the admissibility of evidence. The Palmer parties would not then have the benefit of a general and final declaration that the s 19 examination was unlawful (assuming success on that point). That suggests that the present proceeding does have some potential utility to the Palmer parties, while recognising that the interests of justice are not confined to the interests of the litigants themselves: *Hutson* at [47] (Mullins P, Dalton JA and Henry J agreeing).

185 It seems to me that the proceeding does have potential utility to the Palmer parties even though, if this proceeding went to trial, there would be a serious question as to whether this Court would grant declaratory relief in the general terms sought by the Palmer parties. That issue may arise given that, other than the PLC Prosecution, there is no present indication that there is a real prospect of the transcripts being put to any use that is adverse to the interests of the Palmer parties. As Nettle J explained in *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339; [2016] HCA 2 (at [83]), a party seeking declaratory relief must demonstrate a "real interest" in the subject matter of the declaration and it must be apparent that the declaration will be "productive of foreseeable consequences for the parties", whereas relief will not be granted if the question is hypothetical, in the sense that it is claimed in relation to circumstances that have not occurred, and may never happen.

186 That, then, links to the question of whether the Palmer parties' interests would be adversely affected by a permanent stay, or summary dismissal, of the proceeding. The parties agreed that, were the present proceedings to be permanently stayed or summarily dismissed by reason of concerns regarding fragmentation, the Palmer parties would be able to run the illegality point in the criminal proceedings. The parties were, however, at odds regarding whether a permanent stay or summary dismissal would prejudice the Palmer parties' ability to raise the illegality issue in subsequent civil proceedings; the Palmer parties contended that there would be a res judicata that would preclude future civil proceedings on this issue. The prospect of further civil proceedings arises given the constraints on the nature of the relief that the criminal courts may order — most likely an interlocutory decision on the admissibility of evidence — and the potential for the s 19 transcripts to be used in the future, in ways adverse to the Palmer parties.

187 In my view, the wider ambit of the present proceeding, and the possibility that future civil proceedings may be met with a res judicata argument, suggests that the interests of justice are best served by a temporary, rather than a permanent, stay or dismissal of the proceeding. A temporary stay, until the conclusion of the PLC Prosecution, and any appeals, will ensure that the interests of the Palmer parties are not compromised by a permanent stay (or summary dismissal) while also preventing any disruption or fragmentation of the criminal proceedings. In the circumstances of this case, it is not necessary to order a permanent stay in order to avoid this Court's procedures being abused.

188 A temporary stay will also be subject to further order of the Court. This means that, if it should transpire that action that is adverse to the Palmer parties is being taken that in some way uses the transcripts of the s 19 examination, the Palmer parties would be able to apply to this Court to lift the stay. I do not accept the Palmer parties' submission that a temporary stay would require the ongoing supervision of this Court. It is not uncommon for civil proceedings to be temporarily stayed while related criminal proceedings against the same defendant are on foot and permitting the civil proceedings to go forward would prejudice the accused in the criminal proceedings: for recent examples, see eg *Telstra Ltd v Sulaiman* [2024] NSWSC 971 (Black J); *Figurehead Construction Pty Ltd v Machado* [2023] VSC 448 (Matthews J); and *ASIC v ANZ* (Moshinsky J).

189 I also do not accept the Palmer parties' submission that a temporary stay would be inappropriate as the Palmer parties may be left in limbo if the CDPP were not to present the indictment for trial following committal. If the CDPP did not present the indictment following committal, the Palmer parties would not be left in limbo; rather, they could apply for the temporary stay to be lifted. In any event, as noted by the CDPP, in Queensland there are legislated timeframes for presenting an indictment following a committal, so it is unlikely that the PLC Prosecution would be left in limbo. While it is not generally desirable for a case to remain on the Court's docket unresolved for a substantial period of time, there are occasions in which a temporary stay, which may be prolonged, is appropriate. This is one such case.

190 In the present applications, both ASIC and the CDPP sought a permanent stay of this proceeding. The CDPP accepted, in oral submissions, that a temporary stay until the conclusion of the PLC Prosecution would address her concerns. While counsel for ASIC initially indicated in oral submissions that a temporary stay would address its concerns, it retreated from that position in oral reply submissions, urging that there should be a permanent stay. In its reply

supplementary submissions, ASIC said its oral reply submissions did not constitute a disavowal of a temporary stay, were its preference for a permanent stay to be rejected. The Palmer parties contended, however, that the applications must be determined on an "all or nothing" basis (my characterisation of their position). They said that either there was fragmentation warranting a permanent stay or there was not.

191 The CDPP and ASIC brought their applications for a permanent stay under s 23 of the *Federal Court of Australia Act 1976* (Cth) (the **Act**) and/or r 1.32 of the *Federal Court Rules 2011* (Cth) (the **Rules**).

192 Section 23 of the Act provides that "[t]he Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate." Rule 1.32 of the Rules provides that "[t]he Court may make any order that the Court considers appropriate in the interests of justice." As may be seen, both of the powers invoked by ASIC and the CDPP are in broad terms. They are powers to make such orders as the Court thinks "appropriate" (s 23) or "appropriate in the interests of justice" (r 1.32); they are not powers confined to the making of a permanent stay.

193 The power of the Court to order a temporary stay is an aspect of its general power to control its own proceedings. Further, and in any event, ASIC and the CDPP's applications were framed so as to invoke the Court's broad powers, which extend to the making of orders temporarily (rather than permanently) staying a proceeding, albeit a permanent stay was their preferred outcome. In addition, and as ASIC observed, the relief sought by the interlocutory applications included "such further or other orders as the Court considers appropriate". It was clear from the course of submissions (oral and the supplementary written submissions) that the grant of a temporary stay is one potential outcome of the two interlocutory applications. The Palmer parties had the opportunity to, and did, make submissions on the prospect of a temporary stay.

194 Accordingly, I consider that it is open to the Court to order a temporary stay. I also note that both *Bell* and *Flanagan* involved some issues being deferred for consideration after the conclusion of the criminal proceedings (see above at paragraphs 53 and 70), effectively a temporary stay. The question is whether that is the appropriate outcome, in the circumstances. I have determined, for the reasons set out above, that it is the appropriate outcome.

195 Something should be said about delay. The PLC Prosecution began in 2018 and the committal phase has not yet been concluded. The criminal proceedings have been beset by delay. The parties agreed that it was not relevant for the purposes of the present applications to apportion blame for those delays. On one view, it might be suggested that, given the criminal proceedings have suffered extensive delays, this Court ought not be concerned by further delaying those proceedings by taking this matter to trial. Acknowledging that that was not a submission put by the Palmer parties, I would not accept it in any event. Rather than making the Court sanguine about further delay, extensive delay having been suffered to date reinforces the need to avoid this Court's processes being used in a way that adds to the delay.

196 In addition, were this proceeding to be taken to trial, it would not come on for trial quickly. It is not a matter involving pure questions of law: see *Flanagan* at 188 (Beaumont, Ryan and Lindgren JJ). Rather, taken to trial, the proceeding involves a long and complex factual narrative going back to 2000 (and earlier in some respects). It would be unsafe to assume that there would not be substantial contested factual issues requiring resolution in the course of a trial.

197 For the foregoing reasons, in my view a temporary stay is warranted in the interests of justice.

CONCLUSION

198 I will order that the proceeding be stayed pending the hearing and final determination, including any appeals, of the criminal prosecutions brought against the Palmer parties by complaints dated 22 February 2018 (CDPP File Nos. QC16100658 and QC16100658A), and that there be liberty to apply on three days' notice.

199 Although the CDPP and ASIC's primary position was that the proceeding should be permanently stayed, they have still enjoyed substantial success on the applications. As such, subject to hearing from the parties on costs, my preliminary view is that the appropriate order would be that costs follow the event. I will give the parties an opportunity to make submissions on costs.

I certify that the preceding one hundred and ninety-nine (199) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Button.

Associate: C O'Regan

Dated: 8 October 2024