This and the following 18 pages are the Appellant's submissions in reply for publication pursuant to paragraph 27 of Practice Note No. SC CA 1.

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Written Submissions

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00205659

TITLE OF PROCEEDINGS	
First Appellant	Kaldon Karout
First Respondent	New South Wales Crime Commission ABN 51897996354

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Legal representative reference	
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ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Appellant's Submissions in Reply.pdf)

[attach.]

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

KALDON KAROUT

- v -

NEW SOUTH WALES CRIME COMMISSION

REPLY SUBMISSIONS ON BEHALF OF THE APPELLANT

I. Ground 1

1. The totality of the evidence concerning the issue of the value of the prohibited drugs was that found in the evidence of Detective Inspector O'Neil. In his affidavit of 30 July 2020, the officer spoke about the prices at which cocaine and heroin were "valued" in 2015. At 4 [17], those figures were for kilogram lots, and at 4 [18] those figures were for ounce lots.

2. However, the concept of "value" as used by the officer is informed by his evidence at 5 [19], where he says: "There exist a number of contributing factors, which account for the price range of each drug. Generally, the greater number of units purchased the lower the price within the stated range. Geography, purity and availability also appear to have a contributing factor to pricing." It is submitted that, in the light of those clarifying comments, the detective was clearly speaking about the prices of the prohibited drugs when sold or, conversely, the price paid, if they were to be purchased.

3. Notwithstanding the respondent's reliance upon s. 28(3) *Criminal Assets Recovery Act 1990* at trial, and now seemingly on appeal (*see* RWS at 5 [17]), the primary judge concluded at 11 [22] (**Black 22P-Q**), "The amount calculated should more accurately be brought to account under s. 28(1)(a)-(c), rather than in the summation of expenditure under s. 28(3)." His Honour correctly rejected the suggestion that the appellant had demonstrably expended monies to acquire possession of the prohibited drugs, since there was no evidence that he had ever

paid for the drugs, *see* T104.38-48 (**Red 104S-W**). Not only was there no evidence of this, but Detective O'Neil accepted also, during the course of cross-examination, that someone can obtain possession of drugs, and pay for them later (T103.39-41) (**Red 103S-T**); *see also* T104.19-20 (**Red 104K**).

4. Instead, Fagan J. appropriately accepted (at 11 [22]) (**Black 22N-O**) that the appellant "acquired an 'interest' of possession in the drugs, or at least he obtained the 'benefit' of that possession." Detective O'Neill did not purport to give evidence about what the value of the "benefit of possession" might be. His evidence was limited to the sale value of the drugs. Thus, there was simply no evidence of the value of the interest (subsection (1)(a)), or of the benefit (subsection (1)(b)), which the appellant had acquired.

5. In this context, it must be borne in mind that the objection had been raised on behalf of the appellant to [21(a), (c) and (d)] of Detective O'Neill's affidavit. Counsel for the respondent, accordingly, did not press those paragraphs (T5.18-22) (**Black 5J-L**), which meant that there was no evidence that the appellant had prepared the prohibited drugs for sale, let alone, that he had sold them himself.

6. The respondent's reference to the case of *R v. Carey* (1990) 20 NSWLR 292 (RWS 4-5 [16]) is, with respect, entirely misplaced. The line of authority exemplified by *Carey's case* involves persons, who, while possessing a prohibited drug for another, are not involved in the process of supply. It was never suggested that the appellant was not involved in such a process. Nevertheless, that did not mean that the value of his possessory interest equated to the resale value of the prohibited drugs.

7. Likewise, the respondent's reference to s. 28(4) (RWS 5 [16]), which precludes the Court from taking into account "expenses or outgoings incurred by the defendant in relation to the illegal activity or activities", is also misplaced. Since his Honour correctly held that the value of the appellant's interest was not to be calculated on the basis of what had been expended, there was simply no occasion to deduct expenses incurred in the acquisition of the drugs. That was never an argument advanced on behalf of the appellant.

II. Ground 2 and an application for leave to add a further ground of appeal

8. In answer to ground 2, the respondent raises for the first time the proposition that the appellant's utterances were not caught by the hearsay rule, since they were not "previous representations" as understood in accordance with the Dictionary to the *Evidence Act 1995* (RWS 5 [19]). Before testing the correctness of the submissions, it is appropriate to have regard, firstly, to the manner in which the argument was advanced on behalf of the respondent below, and, secondly, the views expressed by Fagan J. in the absence of the foreshadowed reasons.

9. In written submissions below, the respondent contended (at 2 [4]) (**Black 211B-D**): "Section 54(5) is a facilitative provision which does not purport to limit the use that may be made of an examinee's answers to the questions asked of him or her during their examination. No exception to the hearsay rule is required to permit the admission of an examination transcript into evidence."

10. This is explained by the preceding paragraph (at 1 [3]) (**Black 210O-U**):

> Contrary to the submissions made by the Defendant in his written submissions (DS) at [7]-[12],4 consistent with the accompanying subsections, the purpose of s. 54(5) is to facilitate proof into evidence of the transcript of an examinee's examination on the basis that it comprises an accurate depiction of the answers given by the examinee to the questions asked of him or her during their examination: *cf* DS [22]-[23]. This is consistent with the Second Reading Speech to the *Drug Trafficking (Civil Proceedings) Amendment Act 1997*, which relevantly records the following:
>
> > Amongst these more minor changes are amendments of an evidentiary nature including provisions which will enable the following: … the admission into evidence in other proceedings under the Act of transcripts of an examination made under section 12 of the Act …

11. In other words, the respondent argued below that s. 54(5) amounted, in effect, to an independent basis for admissibility, which stood outside of the limitations otherwise imposed by the *Evidence Act*. Notably, there is no reference in the respondent's submissions below to the definition of the term "previous representation". Indeed, counsel for the respondent made no reference to the *Evidence Act* whatsoever.

12. While, in written submissions, the respondent refers (at 5-6 [20]) to *New South Wales Crime Commission v. Vu* (2012) 221 A.Crim.R. 445 at 447 [6] *per* Johnson J. and, on appeal, *Vu v New South Wales Crime Commission* [2013] NSWCA 282 at [17] *per* McColl JA, neither judgment actually addressed in any detail the basis of admissibility of answers obtained by way of compulsory examination in any detail. Johnson J. held (at 447 [6]), "That transcript was admissible in the proceedings under s.54(5) CAR Act and was admitted, in any event, without objection." In the absence of argument about the admissibility of the utterances, there was no occasion to consider the operation of s. 54(5). In any event, where there is no objection, representations, which would otherwise be excluded by the hearsay rule, are admissible, *see Perish v. R* (2016) 92 NSWLR 161 at 208 [261] - 210 [271] (and cases cited therein).

13. The only discussion in this Court in *Vu's case* concerning the admissibility of the transcript appears (at [17]), where McColl JA states that the respondent had tendered the transcript of the appellant's examination.

14. In the apparent absence of any reasoned argument, it is submitted that both decisions were decided *per incuriam*, *compare CSR Limited v. Eddy* (2005) 226 CLR 1 at 11-12 [14] *per* Gleeson CJ, Gummow and Heydon JJ.

15. Without the benefit of reasons from the primary judge, it is, of course, difficult to determine on what basis his Honour held that the utterances were admissible against the appellant. Reliant upon *TC v. R* [2025] NSWCCA 170 at [115] *per* Payne JA, the respondent suggests (RWS 6 [23]) that, notwithstanding the absence of reasons for admitting the transcript of the appellant's compulsory examination, one can turn to the statements by Fagan J. during the course of argument.

16. As explained by the Court of Criminal Appeal in *Mohindra v. R* [2020] NSWCCA 340 at [37] *per* Basten JA (as his Honour then was), *cited with approval in Stanley v. DPP (NSW)* (2023) 278 CLR 1 at 66-67 [215] *per* Jagot J., resort to exchanges is permissible only in limited circumstances. None are present in this case.

17. However, even if regard were had to the exchanges, there is no doubt whatsoever that the primary judge did not embrace the argument now advanced by the respondent, for the first time. For example, Fagan J. stated (at T84.3-7) (**Black 84D-E**) (emphasis added):

> ... *to the extent that they are admissions*, those statements made in answer to questions, *admissions against his interest* in relation to any matter in this current proceeding, they would be admissible, *an admission against interest, an exception to the hearsay rule*.

18. Similarly (at T18-20) (**Black 84J-K**): "… I don't know why you say second hand. There just seems to me to be *one level of hearsay* in that, and *because it's an admission against interests, there is an exception to it*" (emphasis added). Similar statements were made by Fagan J. at T85.14-15 (**Black 85H**), T85.24-25 (**Black 85M**), T85.49-T86.2 (**Black 85X-86C**), T88.9-14 (**Black 88F-H**) T88.35-38 (**Black 88Q-S**), T88.45-T89.2 (**Black 88V-89C**), and T92.15 (**Black 92I**).

19. His Honour's assumption that the hearsay rule operated, in the absence of an exception, is amply demonstrated by the following exchange (T87.40-47) (**Black 87T-W**) (emphasis added):

> Suppose Mrs Karout was examined under the [sic.] s 12, having a partial interest in something that was restrained, and that she said, "Well, Kaldon told me that he was paying $23,000 a month. I was only putting out 3,500 from the account, but he told me he was making up the other 8 and a half somewhere else". That's her saying that he's made an admission to her. *While under s. 54(5), I don't think that would be much help to [counsel for the respondent] because that would just be evidence of the answers that she gave.*
> *But when you look at her answers, they're just hearsay.*

20. Likewise, his Honour concluded the argument by holding (T92.40-43) (**Black 92T-U**) (emphasis added): "I think that so far is what is said in the examination, as recorded in the transcript, can be proved by the transcript *to the extent that it constitutes admissions against interest by Mr Karout*."

21. Naturally, the exception to the hearsay rule, where a previous representation is an admission, is to be found in s. 81 *Evidence Act 1995*, *see also* the definition of "admission" in the Dictionary. The applicability of the provision presupposes that the hearsay rule under s. 59 applies. If s. 59 does not apply, there is simply no

need to turn to an exception. Accordingly, the exchanges between Bench and Bar do not assist the respondent.

22. However, if the Court were to conclude that the primary judge reasoned as now suggested, the appellant seeks leave to advance a further ground of appeal in the following terms: His Honour erred in concluding that the assertions made by the appellant during his compulsory examination under s. 12 *Criminal Assets Recovery Act 1990* were admissible, since they did not amount to "previous representations", as that expression is defined by the *Evidence Act 1995*.

23. Even if Fagan J. had reasoned in the way now suggested by the respondent, it would be erroneous. The respondent's novel interpretation would encounter the same problems raised by the appellant (at 5 [16]) in his principal submissions. Examinations under s. 12 and 31D of the *Criminal Assets Recovery Act* can be conducted in respect of persons not the subject of restraining orders under the Act. Their evidence would be admissible for the truth of the contents of the assertions, irrespective of whether the persons are available to give evidence, *compare* ss. 63 and 64 *Evidence Act 1995*, since the tendering party would not need to satisfy any of the exceptions to the hearsay rule.

24. Moreover, if the respondent's construction were correct, and the proceedings before the registrar were the same "proceedings" as before Fagan J., then it would follow inexorably that the *Evidence Act* would apply to both the hearing of a forfeiture application as well as a compulsory examination. Such a construction would inevitably impede the investigatory function of examinations under ss. 12 and 31D. Finally, the construction now advanced on behalf of the respondent is contrary to authority in the Federal Court, *see Hoy Mobile Pty, Ltd. v. Allphones Retail Pty. Ltd.* (2008) 167 FCR 314 at 320 [27] *per* Rares J.

III. The relevance of *Jones v. Dunkel*, and a further application for leave to advance an additional ground of appeal

25. If the Court were to conclude that the assertions made by the appellant during the course of his compulsory are admissible as assertions made in the same

proceeding, then the respondent's, and the primary judge's, reliance upon the rationale of *Jones v. Dunkel* would fall away entirely.

26. If the statements were admissible, then this would be an explanation for why the respondent was absent. In *Chairman, National Crime Authority v. Flack* (1998) 86 FCR 16, the Chairman on appeal sought to rely upon *Jones v. Dunkel,* in circumstances where the respondent had not given evidence at first instance. This submission was rejected by Heerey J., who noted (at 28) that a transcript of the respondent's examination had been tendered at first instance, and then held:

> Thus the appellants used in civil proceedings against [the respondent] evidence extracted from her under compulsion of legal powers conferred for a different purpose. In the course of that questioning the NCA could have asked her any questions it wished in relation to the goods in question. The appellants' argument that it should now get some forensic advantage from [the respondent's] declining to submit herself gratuitously to a second examination is not a particularly attractive one.

27. The capacity of the respondent to examine the appellant and others about the appellant's affairs, as well as the power to employ other investigative measures, was raised on behalf of the appellant in his principal submissions below (at 8 [29]) (**Black 236D-U**), relying upon the decisions of *Director of Public Prosecutions (C'th) v. Diez* [2003] NSWSC 238 at [47]-[49]. The submission was advanced in the context of the appellant having to prove a negative.

28. In this particular case, the appellant's examination summons was not discharged at the end of the hearing on 4 February 2020 but was instead adjourned with liberty to restore (T50.25-30, T52.10-11) (**Blue 3:1032N-P, 1034H-I**). Presumably, this was done to enable the respondent to conduct further enquires, and recall the appellant, if it were felt necessary. Durinx`g the course of the examination, the appellant was asked specifically about the topic of loans and gave the following evidence (T23.23-36) (**Blue 3:1005M-S**):

> Q. … Had you received loans from people between the period of 2012 to 2015?
> A. Yes, I have.
>
> Q. Who had you received loans from?
> A. Friends.

Q. When you say friends, who are you referring to?
A. Well, the names that you already have, my friend; Joe Harp, John Barton, and a lot of people that I am not thinking about at the moment.

Q. But is it the case that money was coming in and out in a manner of loans during that time?
A. Yeah.

29. He was also asked about a number of payments made to him, and specifically about monies received from John Barton (T32.45-T34.29, T36.20-44) (**Blue 3:1014W-1016O, 1018L-U**).

30. Let it be assumed that the transcript of the appellant's compulsory examination was admissible for the truth of the assertions recorded. In that case, the complaint made by counsel for the respondent at the hearing, that there was a failure to call the appellant to which the doctrine of *Jones v. Dunkel* might apply, ignores the fact that there was evidence from him in the proceedings. Moreover, it was open to the respondent to obtain further evidence by way of examination at any time.

31. Counsel for the appellant had raised that an adequate explanation for failing to call the appellant in his case was in the context of what had already been done, and what would have been open to the respondent, namely the cross-examination of the appellant. Having regard to the particulars of the offence charged (supply of the prohibited drugs located during the execution of the search warrant at his premises), cross-examination, if embarked upon, would have required answers, which have might tended to incriminate him. Significant issues would have arisen as to whether, in these circumstances, a certificate under s. 128 *Evidence Act 1995* might ever be given. It was not necessary to determine that, because his Honour ruled peremptorily against the submission.

32. Thus, the appellant seeks leave to advance a further ground of appeal: <u>If the transcript of the appellant's compulsory examination was admissible, then his Honour erred in directing himself in accordance with the principles expressed in *Jones v. Dunkel*.</u>

33. If statements against the appellant's interest were admissible, then so, too, were explanatory statements in his favour, *see* ss. 81(1) and (2) *Evidence Act 1995*, as

explained in *Nguyen v. The Queen* (2020) 269 CLR 299 at 310 [19] - 311 [22]. Accordingly, his Honour would have been obliged to consider the transcript not just adversely to the appellant but also to have regard to statements that supported the appellants' case.

34. Moreover, it is submitted that his Honour misused the inferences legitimately arising from *Jones v. Dunkel* to discredit the loan witnesses. At no point, except perhaps in relation to Mrs. Elgamaal (at 21 [47]: "fatuous") (**Black 32O**), did his Honour assert any advantage from his observations of the witnesses' demeanour or like matters. However, it appears that Fagan J. derived from the absence of additional evidence from the appellant (who could have been called by either party) support for his rejection of the contention that the monies advanced were loans, and this despite the evidence the appellant had given in the compulsory examination. The respondent had chosen to take the matter no further than the evidence that the appellant had received the monies. In those circumstances, the appellant seeks leave to advance a further ground of appeal, namely: <u>His Honour misused his advantage by taking into account, when assessing the credit of the appellant's witnesses, the appellant's asserted failure to give evidence.</u>

<u>IV. Grounds 4 and 6</u>

35. It is clear that all of the loans were not regarded by the parties as commercial in nature, whatever be the purpose to which the loan proceeds were to be devoted by the appellant. Not only was there said to be a personal relationship to some extent, but it was also never suggested to any of these witnesses that there was some such commerciality about the transaction, which gave rise to a need for documentation; the stipulation of a repayment date or regime (instead of an implied term of repayment on demand); a stipulation for interest (let alone interest at some fixed rate), rather than some expectation of some reward or recompense upon discharge of the liability. There was nothing put, which might suggest that the loans were not made on the basis of some shared faith, or ethnicity, in which personal loans might not be appropriately accompanied by a requirement to pay interest.

36. Fagan J. and the respondent dealt with each loan separately, concluding that each transaction was "implausible" (*see* at 21 [47] 30 [78], 31 [83]) (**Red 32N, 41U,**

42V), without regard to the fact that there was a similarity about each of the matters, where the informality turned on a relationship of a more personal kind with the appellant. His arrest detention obviously put paid to any further ability to comply with the expected repayment or the stipulation of further conditions.

37. Nonetheless there was direct evidence from each of the counter-parties that the loans had been made. The fact of the making of the loans, at least to the extent of the proof of the advancing of monies, was well established in each case. There was nothing to support the positive proposition suggested by the respondent that the monies were the monies of the appellant.

38. In concluding that the evidence of the witnesses was implausible, his Honour did not go so far as to find that they had consciously lied on oath. Nor did the respondent make that submission. Yet, there was no evidence contradictory to the evidence given by the respondent's witnesses.

39. The implication from the respondent's submissions (at 10-11 [42]) is that if the advances were not genuine loans, there was either illegal funding, or at least such funding had not been proven not to be illegal. All of the respondent's witnesses could have been cross-examined about this, and the appellant could have been subjected to further examination under s. 12 of the Act. There was no basis, therefore, to hold that the witnesses were insufficiently credible, or reliable, particularly in the absence of it being suggested to them that they were deliberately telling untruths.

40. In the written submissions (at 11 [43]), the respondent asserts there was no need to find that the witnesses had engaged in any criminal conduct. Yet it is sought to deny the character, which each of the witnesses gave to the transactions, on the basis that the lawful character should be rejected.

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21 November 2025