[2016] WASC 198

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CRIMINAL
CITATION	**:**	HOPES -v- AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION [2016] WASC 198
CORAM	**:**	CORBOY J
HEARD	**:**	3 FEBRUARY 2016
DELIVERED	**:**	1 JULY 2016
FILE NO/S	**:**	SJA 1073 of 2015
BETWEEN	**:**	HARRY ROY HOPES Appellant AND AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION Respondent

ON APPEAL FROM:

Jurisdiction	**:**	MAGISTRATES COURT OF WESTERN AUSTRALIA
Coram	**:**	MAGISTRATE P MALONE
File No	**:**	PE 108869 of 2014, PE 108870 of 2014

Catchwords:

Criminal law - Single judge appeal against conviction - Whether *Royal Style and Titles Act 1973* (Cth) is valid - Whether *Corporations Act 2001* (Cth) valid as having received the Royal Assent - Whether unrepresented appellant unfairly denied assistance from friend

Legislation:

Royal Style and Titles Act 1953 (Cth)
Royal Style and Titles Act 1973 (Cth)
Royal Style and Titles Act 1947 (WA)

Result:

Leave to admit further evidence refused
Leave to appeal refused
Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	In person
Respondent	:	Ms S J Oliver

Solicitors:

Appellant	:	In person
Respondent	:	Director of Public Prosecutions (Cth)

Case(s) referred to in judgment(s):

Collier v Hicks (1831) 2 B & Ad 663; 109 ER 1290
CPCF v Minister for Immigration & Border Protection [2015] HCA 1; (2015) 89 ALJR 207; (2015) 316 ALR 1
Davis v The Commonwealth [1988] HCA 63; (1988) 166 CLR 79
Deputy Commissioner of Taxation v Aitken [2015] WADC 18
Helljay Investments Pty Ltd v Deputy Commissioner of Taxation [1999] HCA 56; (1999) 166 ALR 302
Joosse v Australian Securities and Investments Commission [1998] HCA 77; (1998) 159 ALR 260
McKenzie v McKenzie [1971] P 33
O'Connell v The State of Western Australia [2012] WASCA 96
Pape v Commissioner of Taxation [2009] HCA 23; (2009) 238 CLR 1

Petersen v The State of Western Australia [2016] WASCA 66
Samuels v The State of Western Australia [2005] WASCA 193; (2005) 30 WAR 473
Santos v The State of Western Australia [No 2] [2013] WASCA 39
Scarce v Killalea [2003] WASCA 81
Schagen v The Queen (1993) 8 WAR 410
Shaw v Jim McGinty in his capacity as Attorney General [2006] WASCA 231
Southern Centre of Theosophy Inc v South Australia [1979] HCA 59; (1979) 145 CLR 246
Victoria v The Commonwealth and Hayden [1975] HCA 52; (1975) 134 CLR 338
Williams v The Commonwealth [No 1] [2012] HCA 23; (2012) 248 CLR 156
Williams v The Commonwealth [No 2] [2014] HCA 23; (2014) 252 CLR 416

CORBOY J:

The appeal and the result

1 The appellant was the sole director and secretary of Finelion Pty Ltd (in liquidation). On 10 June 2014, the Federal Court made an order for the winding up of Finelion. Mr Neil Cribb was appointed the liquidator of Finelion.

2 The appellant was convicted, following a trial in the Magistrates Court, of two offences against the *Corporations Act 2001* (Cth):

(1) failing to comply with the requirements of s 475(1) and s 475(4) to submit to the liquidator a report in the prescribed form as to the affairs of Finelion;

(2) failing to deliver to the liquidator the books of Finelion as required by s 530A(1).

3 The appellant appeals against his conviction. His appeal notice contained 10 proposed grounds of appeal. A copy of the proposed grounds is annexed to these reasons.

4 In addition, the appeal notice described the decision from which leave to appeal was sought in the following terms:

> *Corporations Act 2001* is validly assented, thus valid Commonwealth law and defendant found guilty of both offences, is not denied by the facts.
>
> There is no evidence to deny the validity of the Queen of Australia. The official FOI documents of the Department of the Prime Minister and Cabinet do not show a fact for validity of the *Royal Style and Titles Act 1973*.
>
> The defendant may not have the assistance of his friend other than to shuffle and hand over the defendant's documents of record.

5 That description of the presiding magistrate's decision foreshadowed the appellant's principal argument in his application for leave to appeal: that the Commonwealth Parliament lacked power to enact the *Royal Style and Titles Act 1973* (Cth) (the 1973 Act) as there was no instrument authorising its enactment with the result that legislation passed since the commencement of the 1973 Act, including the *Corporations Act*, had not received the Royal Assent (the assent having been impermissibly given in the name of the 'Queen of Australia').

6 Section 9 of the *Criminal Appeals Act 2004* (WA) provides that leave is required for each proposed ground of an appeal. This court must not grant leave unless it is satisfied that the proposed ground has a reasonable prospect of succeeding. In ***Samuels v The State of Western Australia*** [2005] WASCA 193; (2005) 30 WAR 473, the Court of Appeal stated:

> The ordinary meaning of the words, taken in their context (which includes the legislative purpose) must accordingly be taken to mean that a ground is required to have a rational and logical prospect of succeeding; that is, it would not be irrational, fanciful or absurd to envisage it succeeding in that forum; in effect, that it has a real prospect of success [56].

7 I have concluded that none of the grounds of appeal proposed by the appellant have a reasonable prospect of success applying the test stated in ***Samuels***. Leave to appeal on all of the proposed grounds will be refused for the reasons that follow.

The trial

The evidence

8 Mr Cribb was the only witness called by the respondent. He produced a letter dated 11 June 2014 advising the appellant that he was required, within 14 days, to submit a report as to the affairs of Finelion and to deliver the company's books (exhibit P3). A further letter was sent on 31 July 2014 but the appellant did not provide the report or the company's books.

9 The appellant did not challenge that evidence. Rather, Mr Cribb was cross-examined on whether he had received a letter sent by the appellant and described as 'from the Prime Minister and Cabinet regarding the finding for the head of the State for the Queen of Australia' (ts 15). Mr Cribb stated that he could not recall having received the letter.

10 The appellant gave evidence that he had a letter from the Department of the Prime Minister and Cabinet (the Department) which stated that the Department could not find any records for the 'head of power' for the 'Queen of Australia' (ts 16). Accordingly, he had inquired with the respondent as to the authority under which Mr Cribb had been appointed. However, neither the respondent nor Mr Cribb had refuted what was stated in the letter from the Department.

11 The appellant tendered two documents evidencing inquiries that had been made about the existence of an instrument relating to the 'head of

power' for the 1973 Act. Exhibit A1 was a response by the Department to an application made under the *Freedom of Information Act 1982* (Cth) (FOI Act) by Mr Joe Rossi. The response was dated 27 February 2015 and reproduced Mr Rossi's request. The request was stated to be for 'the discovery of documents to do with the matter of Royal Style and Titles Act 1973'. The request continued:

> Specifically, I request the instrument that the *Royal Style and Titles Act (C'lth) 1973* looks to for its head of power under the constitution for its valid creation by the Commonwealth Parliament or, a lawfully valid instrument outside those powers set out in section 51 of the Constitution. This instrument is necessary to be a public domain document in order to establish that the 'Queen of Australia' is lawfully competent in the exercise of executive power in the Commonwealth of Australia.

12 The request incorporated a series of contentions that were said to clarify the nature of the document(s) sought by Mr Rossi:

> 1 - The powers of parliament necessarily are found in section 51 of the constitution.
>
> 2 - It is not apparent that Section 51 provides for the power that this titles act requires creating an identity for the monarch. The identity for the monarch, as sovereign for the Commonwealth of Australia, is dictated by the UK parliament.
>
> 3 - The Australia Act 1986 utilises the title created by this *Royal Styles and Titles Act (Cl'th) 1973* to act in a capacity of sovereign Queen for the Commonwealth of Australia
>
> 4 - The instrument for head of power for this titles act needs to be apparent for the Australia Act 1986 to lawfully use the entity created by this titles act.
>
> 5 - The second covering clause of the Commonwealth of Australia Constitution Act (UK) 1900 mandates the UK monarch to exercise executive power in the Commonwealth of Australia.
>
> 6 - The Title created by the *Royal Styles and Titles Act (Cl'th) 1973* is not the monarch "in the sovereignty of the United Kingdom".

13 The Department refused the request. It was noted that similar requests had been made in the past and those requests had been refused on the ground that no document of the kind sought had been found in the Department's possession.

14 Exhibit A2 was a further response by the Department to a request made by Mr Neil Piccinin under the FOI Act for production of various instruments, including:

(a) the instrument that 'the *Royal Styles and Titles Act (C'lth) 1973* looks to for its head of power under the constitution for its valid creation by the Commonwealth Parliament or, a lawfully valid instrument outside those powers set out in s 51 of the constitution';

(b) the instruments relied upon to 'establish the "Crown of Australia" and continue its use as an entity or authority within or over the Commonwealth of Australia in place of the "Crown of the United Kingdom" as referenced by the Preamble of the Commonwealth of Australia Constitution Act 1900'; and

(c) the 'instrument/s that executes or allows a transfer of the executive powers of the Sovereign for the Commonwealth of Australia, as referenced by the Commonwealth of Australia Constitution Act 1900, from the Queen of United Kingdom to the Queen of Australia'.

15 The Department responded to that request by noting, among other things, that no documents relating to the 1973 Act of the kind sought had been located in response to an identical request previously made by Mr Piccinin. The response further stated that executive power had not been transferred on the enactment of the 1973 Act and that:

> The *Royal Style and Titles Act* in no way alters Australia's constitutional framework, or the executive powers set out therein. Rather, the *Royal Style and Titles Act* merely provides assent to Her Majesty adopting a particular style and titles for use in Australia and its territories. As such, it replaced the royal style and titles which had been used by Her Majesty in Australia since the passage of the *Royal Style and Titles Act 1953*.

16 The appellant also tendered a bundle of documents (exhibit A3) that comprised a document entitled 'Understanding of a Commonwealth record FOI finding - *Royal Style and Titles Act 1973*', with five attachments, dated 30 September 2015 and written by Mr Hopes to the secretary of the Department; a document entitled 'Letter of Inquiry' dated 30 November 2015 and written by Mr Hopes to the Commonwealth Director of Public Prosecutions; a document entitled 'Notice of Non-response', with two attachments, dated 6 July 2015 and written by Mr Hopes to an officer of the respondent; and a document entitled 'Show Cause for Prosecution' dated 26 August 2015 and written by Mr Hopes to another officer of the respondent.

17 The attachments to the 'Understanding of a Commonwealth record' document comprised five responses by the Department to freedom of information requests made by Mr Piccinin, Mr Rossi and others (including the responses that were exhibits A1 and A2). The appellant asserted in the 'Understanding of a Commonwealth record' that '[the] fact finding answer on each of the documents is such that there is no head of power for the *RS&T Act* as none could be found and as refused under section 24A(1)(b)(ii) of the *FOI Act*, "does not exist"'. The document contained further arguments that culminated in the assertion that:

> From the record it is drawn that there is no mistake that the ***Department of the Prime Minister and Cabinet*** made a finding on several occasions on the head of power for the ***RS&T Act*** 1973 and that finding, in that the head of power does not exist, extends to the fact that the ***RS&T Act*** 1973 is not valid ***Commonwealth*** law, which extends to the fact that the ***Queen of Australia*** does not exist in law and provides no right or force of application. (original emphasis)

18 The 'Letter of Inquiry' document enclosed a copy of the 'Understanding of a Commonwealth record' document and responses by the Department to freedom of information requests. The letter stated:

> Please find, as enclosed, communication to the [Department] upon inquiry for the understanding that ought to be taken arising from the several previous findings by the Department on the head of power for the [1973 Act], the Purported Commonwealth law amending or creating the Queen of Australia. My concern is that such use of alternative title may be a contempt of the Sovereign, the Constriction and the Commonwealth of Australia when used in lieu of the monarch in capacity referenced by the second clause of the Commonwealth of Australia Constitution Act 1900.
>
> You are provided with the opportunity to verify the official documents for their findings that carry the weight of law as being *prima facie* evidence for attention and discernment.

19 The 'Notice of Non-response' document referred to other correspondence (not tendered) between the appellant and the respondent, including a document entitled 'Notice to Produce' dated 15 April 2015. The appellant stated in the 'Notice of Non-response' that the respondent had not replied to the 'material points' raised in the 'Notice to Produce' and other correspondence and continued:

> The material points regard themselves with the validity of ASIC and the Corporations Act 2001 in being valid law within the Commonwealth of Australia with reference to the Constitution and the requirement of valid Royal Assent. Further material points are referenced to the Federal Court order for windup of FINELION Pty Ltd and the appointment of a

> liquidator. The production for such validity, as requested, has not been received to substantiate the alleged Commonwealth laws, the court order or appointment of a liquidator for said windup and therefore such prosecution thereupon is a sham.

20 The 'Notice of Non-response' attached an affidavit made by the appellant and a document entitled 'memo of admissions'. The affidavit recorded the date on which various documents had been sent by the appellant to the respondent and the 'memo of admissions' recorded 'points' drawn from correspondence between the appellant and the respondent that were said to have not been denied by the respondent. The points allegedly admitted by the respondent (the failure to deny being taken by the appellant to be an admission) included that the *Corporations Act* was not 'validly created to be recognised as Commonwealth law'; the respondent had not been 'validly created to be recognised, at law, as a Commonwealth entity'; that the 'validity of ASIC, the Corporations Act 2001 and the Federal Court Order of the said ASIC meeting turns on the issue of the assent given and jurisdiction held under, the ***Queen of Australia***' and that the freedom of information response given by the Department in 2004 provided *prima facie* evidence that the 1973 Act was 'not known at law and that the Queen of Australia may not provide the Corporations Act …nor the ASIC Act …, with Royal Assent'.

21 Finally, the 'Show Cause for Prosecution' document stated that the respondent had not produced 'evidence for the validity' of the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) and posed question 'to be put and answered for the prosecution to go ahead'. Eight questions were posed, including 'Am I not bound to' covering cl 5 of the *Commonwealth of Australia Constitution Act 1900* (Imp) and, 'Am I not bound to deny the force and effect of any order or enactment, made under the *Queen of Australia*, for exercise of powers that are not lawfully vested for such exercise?'.

Mr Piccinin

22 The appellant was accompanied at the trial by a person who was not identified in the transcript but who also accompanied the appellant at the hearing of the appeal, Mr Piccinin. The magistrate indicated at the commencement of the trial that he had previously encountered Mr Piccinin and he anticipated that the appellant would raise whether the respondent had 'any entitlement to existence' (ts 2). At the completion of the prosecutor's opening address, the appellant informed the magistrate that he had 'a record keeper and an assistant' with him. He stated 'if it's

okay I will need to refer to him as we go along for some record keeping and information'. His Honour replied, 'I don't have any problem with - if the gentleman is marshalling papers for you or something for that to - yes, you to consult him' (ts 8). The appellant was permitted to consult Mr Piccinin prior to and during the cross-examination of Mr Cribb (ts 15 - 16).

The magistrate's findings

23 In summary, the magistrate found that:

(a) The appellant was the sole director and secretary of Finelion (ts 31).

(b) Mr Cribb was appointed the liquidator of Finelion by an order made by the Federal Court on 10 June 2014 (ts 30 - 31).

(c) A letter was given to the appellant by Mr Cribb advising that the appellant was required within 14 days to submit a report as to the affairs of Finelion and to deliver up the company's books. The appellant acknowledged receipt of the letter but did not submit the report or deliver up the books of Finelion within the period specified or at all (ts 32).

(d) The appellant wrote five letters to Mr Cribb raising matters that he also sought to rely on in his defence in the trial (ts 32). He also wrote to ASIC seeking evidence of the 'fundamentals of its existence' (ts 34). In effect, the appellant sought to raise issues concerning the validity of the *Corporations Act* and the ASIC Act (ts 34).

(e) The matters sought to be raised by Mr Hopes did not constitute a reasonable excuse for the purpose of s 475(11) and s 530A(6B) of the *Corporations Act* (which provide that a person will not contravene the requirements imposed by s 475 and s 530A to the extent that the person has a reasonable excuse). A reasonable excuse for the purpose of those sections was an excuse that related to an officer's ability to comply with the obligation to provide a liquidator with a statement of the company's affairs and the company's books (ts 34).

The appellant's affidavits

24 The appellant made two affidavits that were filed and served in the appeal. The first affidavit (sworn on 22 December 2015) was filed

following a directions hearing in which the appellant (through Mr Piccinin who was permitted to speak on behalf of the appellant) indicated that he had further documents that would establish the invalidity of the *Corporations Act*. The second affidavit (sworn on 8 April 2016) was filed without reference to the court.

25 The first affidavit attached 40 documents. In summary, the documents comprised:

(a) Correspondence between the appellant/Mr Piccinin and the Federal Court registry. The effect of the correspondence was to contend that the *Federal Court Rules 2011* (Cth) had not been validly made as they did not receive Royal Assent 'where the Sovereign is mandated by covering clause 5 of the Act of 1900' (email dated 27 June 2014, attachment 'HH-001').

(b) Correspondence between Mr Hopes and various officers of the respondent, in effect challenging the appointment of Mr Cribb as liquidator pursuant to the *Corporations Act*. The correspondence reflected what I have identified below as the appellant's principal argument in the appeal.

(c) Correspondence between Mr Hopes and lawyers employed by the respondent also concerning the validity of the *Corporations Act* and the ASIC Act. Much of the correspondence was in the form of demands that the respondent make admissions regarding the arguments advanced by the appellant as to why legislation such as the *Corporations Act* and the ASIC Act was invalid.

(d) Freedom of information requests for 'the instruments for the establishment of the Corporations Act … to be lawfully recognised within the Commonwealth of Australia, as required and pursuant to clause 5 of the *Commonwealth of Australia Constitution Act 1900*, that is made pursuant to the Sovereign's legislative powers and has receive the Sovereign's Royal Assent "in the sovereignty of the United Kingdom" pursuant to clause 2' and a reply from Treasury.

(e) A 'Notice of Understanding' dated 21 July 2015 and sent by the appellant to the respondent and related correspondence - the 'notice' is further summarised below.

(f) Correspondence between the appellant and the Department regarding covering cl 2 and covering cl 5 of the *Commonwealth of Australia Constitution Act* and related correspondence.

(g) Correspondence between the appellant and the Department of the Attorney General and the Treasury regarding covering cl 2 and covering cl 5 of the *Commonwealth of Australia Constitution Act* and related correspondence.

(h) Correspondence between Mr Piccinin and the Foreign and Commonwealth Office.

26 It is not necessary to further summarise the documents annexed to the appellant's first affidavit other than to note two matters. First, a document entitled 'Notice to Produce', dated 15 April 2015 and sent by the appellant to the respondent was referred to in the various documents tendered by the appellant as exhibit A3. The 'notice' attached what was said to be transcript of a meeting between the appellant, Mr Piccinin and officers of the respondent. According to the transcript, the appellant and Mr Piccinin pressed their arguments concerning the alleged invalidity of the *Corporations Act* and by implication, the ASIC Act during the meeting. In effect, the 'notice' demanded that the respondent produce evidence of the validity of those Acts.

27 Second, the 'Notice of Understanding' dated 21 July 2015 foreshadowed the appellant's defence to the charges alleged against him:

> It has been part of my defense statement, and evident by ASIC's failure to deny such material points, that a prosecution under cover of the Corporations Act 2001 is without law basis for the main reason that both the ASIC Act, and the Corporations Act, cannot be valid law as they bear the assent of an office of the Monarch that does not exist in law. It has been agreed at every opportunity provided, by failure to deny, that the 2004 finding of the Department of the Prime Minister and Cabinet on the Royal Style and Titles Act 1973 is without a head of power and thus the Act invalid and thus unable to create an office of the Queen for assent purposes.
>
> That you have not and will not challenge this material point that the Queen of Australia cannot provide assent for Commonwealth laws is taken that it is settled and the ASIC Act 2001 and the Corporations Act 2001, having received assent in the name of the Queen of Australia, are not Commonwealth laws.

28 The documents attached to the appellant's affidavit did not constitute evidence, apart from the responses to the freedom of information requests

that established that the Department did not have in its possession an instrument relating to the 'head of power' for the 1973 Act. The balance of the documents merely incorporated the appellant's arguments or asserted that the respondent had made admissions by not responding to those arguments - 'admissions' about the alleged invalidity of the *Corporations Act* and the ASIC Act. Accordingly, I have reviewed the documents to ensure that the appellant's arguments have been fully identified, especially as proposed grounds of appeal 1 and 2 complain that the appellant was denied a fair opportunity to put those arguments in the trial. However, I have not admitted into evidence in the appeal either of the affidavits made by the appellant as they do not contain evidence (and, in any event, some of the attached documents were created after the trial and the appellant has not explained why the balance of the documents were not produced at the trial).

29 The second affidavit made by the appellant attached a number of documents created by the appellant well after the appeal had been commenced. Again, the documents were similar in content to the documents attached to the appellant's first affidavit. The documents were not evidence and did not alter or enlarge the substance of the appellant's argument.

The appellant's principal argument in the appeal

30 The principal argument made by the appellant at trial and in his application for leave to appeal is apparent from the documents summarised above. The appellant contends that:

(a) he was aware of freedom of information requests made by Mr Piccinin and others to the Department for the 'instrument' that empowered Parliament to enact the 1973 Act (the 'head of power') to be identified and produced;

(b) the Department advised that no such instrument could be produced and accordingly, it was to be inferred that the instrument did not exist;

(c) s 51 of the *Constitution* did not confer legislative power on the Commonwealth Parliament to enact the 1973 Act and no other instrument had been identified that empowered Parliament to enact the Act;

(d) the Bill for the *Corporations Act* (and all other Bills passed by the Commonwealth Parliament since the commencement of the 1973

Act) had been presented to the Governor-General for assent by Her Majesty adopting the style and title 'Queen of Australia';

(e) as there was no 'evidence' that Commonwealth Parliament had power to assent to Her Majesty adopting that style and title (as Parliament had purported to do in the 1973 Act) there was no 'evidence' that the *Corporations Act* (and all other Acts of Commonwealth Parliament since the commencement of the 1973 Act) had validly received the Royal Assent.

31 The appellant referred in his written submissions to covering cl 2 and covering cl 5 of the *Commonwealth of Australia Constitution Act* and submitted that:

> All of the appeal grounds concern a common right of the appellant in that this court owes the appellant the Crown's protection, a reciprocal act of to the appellant's allegiance to the Crown enshrined in law by birthright and the joint performance of the Preamble and second clause, held to strict performance held by the fifth clause, of the ***Act to Constitute the Commonwealth of Australia*** 1900 (UK) as expressed to be in force for which departure, the appellant contends, is treason.

32 The appellant also contended that the reference to assent by or in the name of the Queen in s 2(3) of the *Constitution Act 1889* (WA) was not to the Queen of Australia. Consequently, legislation enacted by State Parliament such as the *Magistrates Court Act 2004* (WA) and the *Criminal Appeals Act* had not been assented to in the name of the Queen as required by s 2(3) of the *Constitution Act 1889*.

Proposed grounds of appeal 1 and 2

33 Proposed grounds 1 and 2 allege that the appellant was denied a fair trial as he was prevented from obtaining assistance from Mr Piccinin and because the magistrate had failed to 'properly disclose the options of the court procedure to the defendant for his understanding'. The appellant's written submissions focussed on an alleged failure to allow Mr Piccinin to assist the appellant, with the result, so it was contended, that the appellant had been unable to adduce all of the evidence that was relevant to his defence (and I infer, to fully develop in his closing submissions the argument that the *Corporations Act* and the ASIC Act were invalid).

34 There is no merit in either of proposed grounds 1 or 2.

35 First, as has been noted, the appellant requested that he be able to consult Mr Piccinin as his 'record keeper'. The magistrate acceded to that

request and the appellant consulted with Mr Piccinin before and during the cross-examination of Mr Cribb.

36 The appellant contended in his written submissions that the transcript was not an accurate record of what had occurred during the trial. It appears that the transcript commences a short time after the matter was called, appearances taken and at some point during the magistrate's primary explanation of the trial procedure. However, the terms in which the appellant requested assistance from Mr Piccinin (ts 8) do not suggest that this topic had been raised earlier in the proceedings. There is no break or inconsistency in the balance of the transcript that would suggest that it is an incomplete record of what occurred in relation to the appellant's request for assistance.

37 Second, and in any event, it is apparent that the appellant misapprehends the role that can be played by a person who is not a legal practitioner but who is permitted by a court to assist an unrepresented party (having regard to the prohibition contained in s 12 of the *Legal Profession Act 2008* (WA)). The term 'McKenzie friend' is derived from the decision of the English Court of Appeal in ***McKenzie v McKenzie*** [1971] P 33. The Court of Appeal applied the statement of Lord Tenterden in ***Collier v Hicks*** (1831) 2 B & Ad 663, 669; 109 ER 1290, 1292 that:

> Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the Court as settled by the discretion of the justices.

38 Accordingly, a McKenzie friend may assist a self-represented party before the court by, for example, making notes and giving suggestions to the party but he or she does not perform the role of an advocate or representative: ***Scarce v Killalea*** [2003] WASCA 81 [47]; ***Santos v The State of Western Australia [No 2]*** [2013] WASCA 39 [10]. A court has inherent jurisdiction to determine the extent to which a McKenzie friend may take part in proceedings. However, it is only in rare and exceptional circumstances that a McKenzie friend is permitted to address the court or otherwise take an active part in proceedings: ***Schagen v The Queen*** (1993) 8 WAR 410, 412 (Malcolm CJ).

39 Third, for the reasons developed below, the submission that the appellant claims he was unable to effectively and fully make concerning the alleged invalidity of the *Corporations Act* and the ASIC Act is

misconceived. A substantial miscarriage of justice would not have occurred even if either of proposed grounds 1 and 2 might have been decided in favour of the appellant: refer s 14(2) of the *Criminal Appeals Act* (it could not be said that there had been a significant denial of procedural fairness at trial even if there was merit in the appellant's complaint: refer ***Petersen v The State of Western Australia*** [2016] WASCA 66 [23] (McLure P).

Proposed ground of appeal 3

40 At the heart of the appellant's principal argument is the proposition that the Commonwealth Parliament lacked power to enact the 1973 Act - at least, in the absence of an 'instrument' conferring power. An analogous argument was rejected by Hayne J in ***Joosse v Australian Securities and Investments Commission*** [1998] HCA 77; (1998) 159 ALR 260 and see also ***Helljay Investments Pty Ltd v Deputy Commissioner of Taxation*** [1999] HCA 56; (1999) 166 ALR 302. The effect of the 1973 Act on the status of a person for the purpose of migration and related matters has been considered by the High Court on several occasions. The reasoning in those cases does not suggest that the Commonwealth Parliament lacked power to enact the 1973 Act (with the consequence that Bills passed by Parliament since the commencement of the Act had not received the Royal Assent). Further, the history of legislation enacted to assent to changes in the royal style and titles of the monarch briefly summarised below does not suggest that the Commonwealth Parliament lacks legislative power in relation to such matters.

41 Accordingly, I did not direct that notices be given under s 78B of the *Judiciary Act 1903* (Cth): see ***O'Connell v The State of Western Australia*** [2012] WASCA 96 [90] (a matter that is trivial, unarguable, frivolous or vexatious is not a matter arising under the *Constitution* or involving its interpretation) and ***Shaw v Jim McGinty in his capacity as Attorney General*** [2006] WASCA 231 [42] (if the alleged 'constitutional issue' is unarguable or vexatious, there is in truth no constitutional issue at all).

The royal style and titles legislation

42 A history of the royal style and titles of the monarch is summarised in two works by Professor Anne Twomey: *The Chameleon Crown - the Queen and Her Australian Governors* (2006) (chapter 9) and *The Australia Acts 1986: Australia's Statutes of Independence* (chapter 6). The history is partly recorded in the second reading speeches for the Bills that became the *Royal Style and Titles Act 1953* (Cth) (the 1953 Act) and

the 1973 Act and, so far as is relevant to Australia, can be traced in a succession of legislative enactments: the *Royal and Parliamentary Titles Act 1927* (Imp), the *Statute of Westminster 1931* (UK), the *Royal Style and Titles (Australia) Act 1947* (Cth), the 1953 Act and the 1973 Act.

43 Briefly stated, the royal style and titles of the monarch were originally determined in the United Kingdom. *The Royal and Parliamentary Titles Act* authorised the King to issue a royal proclamation altering the royal style and titles in accordance with recommendations made by an Imperial Conference. The change authorised by the Act was declared in Australia by way of proclamation in June 1927 (Twomey, *The Chameleon Crown*, 104).

44 The object of the *Statute of Westminster* was to 'give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930'. The preamble to the Statute then recorded a convention agreed at those Conferences:

> And whereas it is meet and proper to set out by way of preamble to this Act that … it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.

45 The purpose of the *Royal Style and Titles (Australia) Act* was to give assent to an alteration in the royal style and title consequent upon the enactment of the *Indian Independence Act 1947* (UK). The preamble to the Act recited that the Act gave effect to the convention recognised in the preamble to the Statute of Westminster.

46 The 1953 Act gave effect to a further agreement made at a Prime Ministers' conference held in London in December 1952. It was agreed that each member country of the British Commonwealth should use, for its own purposes, a form of the royal style and titles that suited its particular circumstances but retained a substantial element that was common to all countries.

47 The preamble to the 1953 Act again recited the convention recorded in the *Statute of Westminster* and the agreement made at the Prime Ministers' London conference. Section 4(1) of the Act provided for the assent of the Commonwealth Parliament to the adoption by the Queen, for use in relation to the Commonwealth of Australia and its Territories, the style and titles set out in the schedule to the Act and to the issue of a royal

proclamation. The royal style and titles provided for in the schedule was 'Elizabeth the Second, by the Grace of God of the United Kingdom, Australia and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith'. Accordingly, the style and titles of the Queen under the 1953 Act included a reference to 'Queen of Australia'.

48 Section 2(1) of the 1973 Act also provided for the assent of the Commonwealth Parliament to be given to the adoption by the Queen of the royal style and titles set out in the schedule in lieu of the royal style and titles set out in the schedule to the 1953 Act and for the issue by the Queen of a royal proclamation for that purpose. The royal style and titles provided for in the schedule was 'Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth'.

49 The second and third reading speeches for the Bill that became the 1973 Act indicated that it was proposed that the Queen would sign the proclamation and personally give assent to the Bill during a forthcoming trip to Australia. That occurred in October 1973 (Twomey, *The Chameleon Crown*, 109; Commonwealth, *Government Gazette*, No 152 (19 October 1973) 5).

The *Royal Style and Titles Act 1947* (WA)

50 The Western Australian Parliament enacted legislation concerning the royal style and tiles in 1947: *Royal Style and Titles Act 1947* (WA). The Act was amended in 1953, including by amending the schedule to accord with the royal style and titles adopted in the schedule to the 1953 Act. The Act was not amended following the passage of the 1973 Act. However, the royal style and titles declared in the Western Australian Act was amended to that adopted in the schedule to the 1973 Act by a proclamation made in December 1973 (Twomey, *The Chameleon Crown*, 113).

The power to enact the 1973 Act

51 Professor Twomey noted that a briefing paper prepared by the Commonwealth Attorney-General's Department in 1974 identified four sources of power to enact the 1973 Act (*The Australia Acts*, 452, citing Commonwealth Attorney-General's Department, Briefing Paper, 'The Queen of Queensland', November 1974, National Archives of Australia, 1209 1974/6962):

(a) the *Statute of Westminster* 'as adopted by the Australian Parliament in 1942 in its character as a basic constitutional instrument modifying and extending the Constitution Act of 1900';

(b) an 'inherent power of the Commonwealth to provide for matters essentially involved in its existence as a self-governing Dominion under the sovereignty of the Queen within the Commonwealth of Nations';

(c) the incidental powers conferred on the Parliament by s 51(xxxix) of the *Constitution* in relation to such provisions as s 1 and s 61; and

(d) possibly, the external affairs power conferred by s 51(xxix).

52 Professor Twomey, in *The Chameleon Crown*, expressed doubt as to whether the *Statute of Westminster* conferred legislative power on the Commonwealth Parliament to enact the 1973 Act, either by reason of the preamble or the provisions of s 2. Although the external affairs power supported the *Australia Act 1986* (Cth), Professor Twomey dismissed the suggestion that the Commonwealth Parliament was empowered to enact the 1973 Act by s 51(xxix) of the *Constitution*. As she observed, it is difficult to characterise the subject matter of an Act that deals with the title of the Queen of Australia as an external affair (although see Freeman D, 'The Queen and her dominion successors: the law of succession to the throne in Australia and the Commonwealth of Nations (2002) 4(3) *CLPR* 28). Accordingly, Professor Twomey prefers the 'nationhood' power as the head of power to support the 1973 Act 'either characterised as an inherent power deriving from the status of the Commonwealth as a nation to deal with national matters such as the flag, anthem or the celebration of a bicentenary, or as a legislative power, under s 51(xxxix) of the *Australian Constitution*, to enact laws incidental to the executive power of the Commonwealth' (*The Chameleon Crown*, 110).

53 The reference to an inherent power to deal with matters such as the 'flag, anthem or the celebration of a bicentenary' is apparently a reference to the reasoning of the Mason CJ, Deane and Gaudron JJ in ***Davis v The Commonwealth*** [1988] HCA 63; (1988) 166 CLR 79. Their Honours concluded that the commemoration of the Bicentenary fell squarely within Commonwealth executive power as a 'matter falling within the peculiar province of the Commonwealth in its capacity as the national and federal government' (94). Consequently, the incidental power conferred by

s 51(xxxix) of the *Constitution* supported the enactment of the *Australian Bicentennial Authority Act 1980* (Cth). Further, it was considered that it might have been possible to conclude that the legislation was validly enacted without recourse to s 51(xxxix) as the 'requisite legislative power may be deduced from the nature and status of the Commonwealth as a national polity' (95) as 'the legislative powers of the Commonwealth extend beyond the specific powers conferred upon the Parliament by the Constitution and include such powers as may be deduced from the establishment and nature of the Commonwealth as a polity' (93). The 'nationhood power' is a term that has been given by academic writers to the power recognised in that case and in earlier authorities, particularly in the judgments of Mason J and Jacobs J in ***Victoria v The Commonwealth and Hayden*** [1975] HCA 52; (1975) 134 CLR 338 (the 'AAP Case').

54 The scope of the Commonwealth's executive power has been subsequently considered in a series of cases challenging legislation to give effect to various Commonwealth programmes and most recently, in relation to a claim for damages for wrongful imprisonment commenced by a refugee claimant who was detained on an Australian border protection vessel: ***Pape v Commissioner of Taxation*** [2009] HCA 23; (2009) 238 CLR 1; ***Williams v The Commonwealth [No 1]*** [2012] HCA 23; (2012) 248 CLR 156; ***Williams v The Commonwealth [No 2]*** [2014] HCA 23; (2014) 252 CLR 416 and ***CPCF v Minister for Immigration & Border Protection*** [2015] HCA 1; (2015) 89 ALJR 207; (2015) 316 ALR 1.

55 I do not consider that it is necessary to further explore the scope of the Commonwealth's executive power and the incidental power conferred by s 51(xxxix), read with s 61, or the 'nationhood' power as discussed in those cases for two reasons. First, the royal style and titles referred to in the schedule to the 1973 Act was actually adopted by royal proclamation - that is, by a prerogative act of the Queen. As French CJ observed in ***Pape***, the executive power of the Commonwealth Government includes the prerogatives of the Crown [126] - [127].

56 Second, there is nothing in the authorities to which I have referred that suggests that the style and titles of the monarch to be adopted in Australia is a matter that is outside the executive and legislative powers of the Commonwealth. The 1973 Act (and the 1953 Act) were within the executive power of the Commonwealth by their very subject matter and within the legislative power of the Commonwealth as either incidentally conferred by s 51(xxxix) or deduced from the nature and status of the Commonwealth as a national polity.

57 This overly discursive treatment of the appellant's arguments should not be taken as suggesting that there is any well-founded basis for contending the 1973 Act is invalid with the consequence that Bills passed by the Commonwealth Parliament since the commencement of the Act have not received the Royal Assent (indeed, the logic of the appellant's argument is that the alleged invalidity stretches back beyond the 1973 Act). Analogous arguments were dismissed in a few sentences by Hayne J in ***Joosse***. In another case in which Mr Piccinin was permitted to act as a McKenzie friend, ***Deputy Commissioner of Taxation v Aitken*** [2015] WADC 18, Bowden DCJ rightly linked arguments of the kind advanced by the appellant in this matter with a number of faux constitutional arguments that have been raised in this and other jurisdictions in recent years [40].

Proposed grounds of appeal 4 and 10

58 Proposed ground 4 alleges that the magistrate 'displayed bias' in favour of the respondent by denying 'the summary of the correspondence between the parties on the issue of validity'. Proposed ground 10 alleged that the prosecutor failed to 'acknowledge the material facts that had been established by correspondence between the parties'.

59 The matters alleged in those grounds reflect an erroneous assumption: that the correspondence between the appellant and respondent could constitute or create evidence that the 1973 Act, the *Corporations Act* and the ASIC Act were invalid. As has been explained, exhibit A3 included a 'Notice of Non-response' and a 'memo of admissions' which purportedly recorded admissions made by the respondent. Those documents could not constitute evidence of 'material facts' as alleged by the appellant - they concerned matters of law rather than fact – and the respondent was not obliged to respond to the various 'notices' sent by the appellant. The respondent's failure to respond to the notices could not constitute an admission about the alleged invalidity of the *Corporations Act* or the ASIC Act or about any aspect of the appellant's argument as to why those Acts were invalid.

60 Accordingly, there was nothing that the magistrate was obliged to accept arising out of the correspondence between the appellant and the respondent and no question of bias arises. Similarly, there was no material fact 'established by the correspondence' that the prosecutor was required to acknowledge.

Proposed ground of appeal 5

61 The appellant's written submissions did not separately address proposed ground 5. However, the ground apparently alleges that the magistrate lacked jurisdiction to hear and determine the charges for the various reasons submitted by the appellant at trial and in his application for leave to appeal and which have been discussed and rejected above.

62 The prosecution was commenced with a prosecution notice that complied with the requirements of the *Criminal Procedure Act 2004* (WA) and the *Criminal Procedure Regulations 2005* (WA). There was no additional 'pleading' that the respondent was required to provide to initiate or maintain the prosecution or to confer jurisdiction on the magistrate to hear and determine the prosecution notwithstanding that the appellant contended in answer to the charges that the *Corporations Act*, the ASIC Act and the *Magistrates Court Act* were invalid.

Proposed grounds of appeal 6 and 9

63 Proposed grounds 6 and 9 allege that the *Magistrates Court Act* is also invalid as the Act was assented to by the Governor in the name of the Queen of Australia.

64 It was suggested in the second reading speech for the Bill that became the 1973 Act that the Act would bind the States. However, Professor Twomey doubts whether the 1973 Act does bind the States (*The Chameleon Crown*, 112). However, as she notes, any issue concerning the adoption of the royal style and titles set out in the schedule to the 1973 Act in Western Australia was resolved by the proclamation made in December 1973 that amended the royal style and titles set out in the schedule to the 1947 Western Australian Act to accord with the style and titles declared in the schedule to the 1973 Act. The appellant has not challenged the legislative power of State Parliament to have enacted the Western Australian legislation or the effect of the proclamation made in December 1973 (and the Commonwealth Parliament and State Parliaments have supreme legislative authority - a matter that was put beyond doubt by the *Statute of Westminster*, the *Statute of Westminster Adoption Act 1942* (Cth), the *Australia Act 1986* (Imp) and the *Australia Act 1986* (Cth)). In any event, there can be no doubt as to the effect of the proclamation and that legislation enacted by State Parliament since December 1973 has received the assent required by s 2(3) of the *Constitution Act 1889*.

Proposed grounds of appeal 7 and 8

65 Proposed grounds 7 and 8 allege that both the appellant and the magistrate were bound by covering cl 2 and covering cl 5 of the *Commonwealth of Australia Constitution Act* to, in effect, not recognise 'an authority diverse from' the terms of those covering clauses.

66 In ***Southern Centre of Theosophy Inc v South Australia*** [1979] HCA 59; (1979) 145 CLR 246, Gibbs J observed that the 1973 Act was a 'formal recognition of the changes that had occurred in the constitutional relations between the United Kingdom and Australia' (261). Hayne J in ***Joosse*** emphatically rejected the proposition that the 1973 Act worked a fundamental constitutional change. The change in the royal style and titles of the monarch is a change of form rather than substance and does not alter the constitutional status of the Crown or the Queen. There is nothing incompatible between the 1973 Act and the style and title set out in the schedule to that Act as subsequently proclaimed by Her Majesty and covering cl 2 of the *Commonwealth of Australia Constitution Act*. The 1973 Act is binding on the 'courts, judges, and people of every State and of every part of the Commonwealth' in accordance with covering cl 5. Bills presented to the Governor-General, including the Bills that became the *Corporations Act* and the ASIC Act, have received the Royal Assent by Her Majesty as required by s 58 of the *Commonwealth of Australia Constitution Act*.

Annexure: proposed grounds of appeal

Grounds of appeal[6]	1. The Magistrate frustrated the defendant by denying the defendant the assistance of a friend in order to refer to in delivery of the relevant causes and the relevant documents of the record that is maintained by the defendant's private assistant and record keeper. 2. The Magistrate failed to take into consideration the statement of the defendant , that he had received very little formal education, and the magistrate failed to properly disclose the options of the court procedure to the defendant for his understanding. 3. The Magistrate made a statement of analogy to dismiss the documents of a prima facie nature on an FOI answer for the authority of a Commonwealth law, and denied its force and effect of such finding that he ought to have taken judicial notice of a material point that had been the main address for correspondence with the prosecuting party. 4. The Magistrate displayed bias in favour of the prosecuting party by denying the summary of the correspondence between the parties on the issue of validity that had been the cause for inquiry for more than one year. 5. The Magistrate failed to receive sufficient pleadings in order to obtain the authority to conduct a hearing for force and effect by law. 6. The Magistrate failed to disclaose his position of bias in conducting a court under the Magistrate's Courts Act 2004 which is taken as having received Royal Assent in the name of the Queen of Australia. 7. The Magistrate failed to take account that the defendant is bound to the foundation law, in particular in this case to clauses 2 and 5 of the Commonwealth of Australia Constitution Act 1900, where he may not acknowledge an authority diverse from it where there is no instrument to modify or suspend the force and effect of the said clauses. 8. The Magistrate failed to take account that every court is bound to the foundation law, where the court may not acknowledge an authority diverse from clause 2. 9. The Magistrate failed to account for requirement of the West Australian Constitution, regarding his court operating under an Act that received assent of the Queen of Australia, in that it can be of no effect. 10. The prosecutor failed to acknowledge the material facts that had been established by correspondence between the parties and made statements contradictory to that as established through two previous prosecutors.