



The impact of special commissions of inquiry/crime commissions on criminal trials - speech

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Background and introduction

1 Investigating crime and assembling evidence for a prosecution is a task normally left to the police. They engage in surveillance, question witnesses, conduct forensic examinations and interrogate suspects. However, police powers are limited. Suspects are entitled to refuse to answer their questions. They can frustrate, and even thwart, searches conducted under warrant, for example, by invoking legal professional privilege,² a claim which may take months, if not years, to work its way through the courts.

2 Criminal activity has become ever more sophisticated. Police using only normal investigative methods have often found themselves unable to counter, in particular, organised crime. As a result, alternative mechanisms have increasingly been utilised to enable adequate investigation to be carried out into such crime.

3 Some of these mechanisms include Royal Commissions or Commissions of Inquiry.³ For practical purposes, these terms may be viewed as indistinguishable.

¹ Judge, Court of Appeal, Supreme Court of Victoria. The opinions expressed are my own. They are not to be taken as reflecting the views of any other member of the Supreme Court of Victoria. I wish to express my gratitude to my Associate, Emily Brott, for her assistance in the preparation of this paper.

² Described as 'client legal privilege' in the Uniform Evidence Acts. This privilege is not available to corporations: *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

³ In Victoria, they are known as 'Boards of Inquiry'.



4 Royal Commissions, and their ilk, have been described as ‘unquestionably the most ancient and the most dignified’ of the various forms of inquiry that are available.⁴ It is said that they go back as far as the Domesday survey into land ownership in 1086. They have been used, in England, to investigate crime since at least the twelfth century,⁵ and in Australia for that same purpose, since the end of the nineteenth century.⁶

5 Between 1960 and 1991, some 47 ad hoc commissions into crime, corruption, or impropriety were established in this country. From the late 1980s onwards every Australian state hosted at least one high profile commission, of one sort or another, into crime or corruption.⁷

6 Royal Commissions and Commissions of Inquiry are, as I have indicated, created on an ad hoc basis. They are given substantial coercive powers which enable them to investigate and report into, inter alia, serious criminal conduct. They may also perform information gathering or advisory tasks. However, matters of that kind are not the concern of this paper.

7 Since the early 1980s, ad hoc bodies have been largely supplanted, in this country, by standing commissions whose charter is to investigate corrupt conduct, or serious and complex crime. These standing commissions have vast powers, similar to those vested in their ad hoc counterparts. These powers greatly exceed those generally available to the

⁴ Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (Butterworths, 2001) 5 [1.2] quoting Hugh McDowall Clokie and J. William Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (Stanford University Press, 1937) 24–5.

⁵ See generally, the Inquest of Sheriffs 1176.

⁶ In 1892 a Royal Commission (the Bank of Van Dieman’s Land Inquiry) was appointed in Tasmania to obtain evidence for a criminal prosecution.

⁷ See, eg, the Wood Police Inquiry in New South Wales, the Fitzgerald Inquiry in Queensland, the WA Inc Commission in Western Australia, the Tricontinental Commission in Victoria and the State Bank of South Australia Commission in South Australia. At the Commonwealth level, the Costigan Commission into the Painters and Dockers’ Union, and the Stewart Commission into drug trafficking achieved considerable prominence.



police.

National level

8 The main standing commissions that operate on a national level, and have responsibility for investigating crime, are the Australian Crime Commission (ACC)⁸ (formerly the National Crime Authority⁹) and the Australian Securities and Investments Commission (ASIC).¹⁰

9 The role of the ACC is to investigate serious crimes that involve two or more offenders, substantial planning and organisation, and the use of sophisticated methods and techniques of a kind ordinarily associated with organised crime. Its powers are limited to investigating specified crimes. These include, for example, theft, tax evasion, money laundering, drug dealing, extortion and the use of violence. The ACC is supervised by an Inter-Governmental Committee (IGC) constituted by Commonwealth and state Ministers, or their delegates. It can conduct both general and special investigations. Special investigations, which involve the use of coercive powers, require a specific reference.

10 In the case of matters within federal jurisdiction, references are granted by the relevant Commonwealth Minister. Correspondingly, in the case of matters within state jurisdiction, it is the relevant state Minister who has responsibility for granting references. A reference may not be granted unless the IGC has considered whether ordinary police methods of investigation are likely to be effective. General investigations do not require a reference. However, they utilise only normal policing and investigative powers, and do not authorise the use of statutory coercive methods.

⁸ Established by the *Australian Crime Commission Act 2002* (Cth) (ACC Act).

⁹ Established by the *National Crime Authority Act 1984* (Cth) (NCA Act).

¹⁰ Established by the *Australian Securities and Investments Commission Act 1989* (Cth), which, prior to 1998, was titled the *Australian Securities Commission Act 1989* (Cth) (ASC Act).



11 The ACC has no power to lay or prosecute criminal charges. If it obtains evidence that would be admissible in the prosecution of an offence, it is required to provide that evidence to the appropriate law enforcement agency or prosecuting authority.

12 ASIC was established in 1991 as the primary regulator of Australian corporate activity. It was known until 1998 as the Australian Securities Commission (ASC).

13 There has been an ongoing debate, for many years, as to whether ASIC's primary role should be regulatory, or whether it should, instead, focus upon criminal law enforcement. Once a formal investigation has been initiated, ASIC may employ coercive powers similar to those vested in Royal Commissions or Commissions of Inquiry. Unlike the ACC, ASIC can commence investigations on its own initiative. It is not generally bound by any set terms of reference. It can initiate prosecutions, but in serious cases it is required to defer to the Commonwealth Director of Public Prosecutions (DPP) who will determine whether a prosecution should be brought, and who will have the carriage of any such case.

14 It should be noted, for the sake of completeness, that the Australian Competition and Consumer Commission (ACCC) also has available to it a range of coercive powers that can be invoked when investigating, inter alia, cartel conduct.¹¹ Since 2009, the ACCC has had the ability to bring criminal proceedings on indictment for certain forms of anti-competitive conduct, and not merely the power, which it has long had, to institute civil penalty proceedings. Surprisingly, no such criminal proceedings have yet been instituted. If and when that course is eventually adopted, some of the issues raised in this paper may become directly relevant to the ACCC's operations.

¹¹ Sections 155(7) and 159 of the *Competition and Consumer Act 2010* (Cth) confer upon the ACCC the power to require evidence to be given, and documents provided, in response to a notice issued on its behalf, and abrogate the privilege against self-incrimination. These provisions provide limited compensation in the form of a 'use' immunity.



New South Wales

- 15 In New South Wales, both the Independent Commission Against Corruption (ICAC)¹² and the New South Wales Crime Commission (NSWCC)¹³ function as general standing commissions into criminal conduct.¹⁴
- 16 ICAC has broad investigative, corruption prevention and educative functions.¹⁵ It is, in effect, a permanent Royal Commission. Despite what is often suggested in the tabloid press, ICAC is precluded from making findings of guilt. Its purpose is to uncover the truth of what has occurred, and to recommend any appropriate course of action.
- 17 ICAC is not primarily concerned with securing criminal convictions. It is, however, required to assemble evidence that may be admissible in a prosecution in connection with corrupt conduct¹⁶ and to furnish that evidence to the New South Wales DPP, or some other appropriate law enforcement official. Its jurisdiction extends to investigating possible corrupt conduct by all public officials in New South Wales.
- 18 The NSWCC was established in 1985. It was originally known as the State Drug Crime Commission. Its principal object is to reduce the incidence of illegal drug trafficking. A

¹² Established by the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act).

¹³ Which exists pursuant to s 7(1) of the *Crime Commission Act 2012* (NSW) and was established by the *New South Wales Crime Commission Act 1985* (NSW) (NSWCC Act).

¹⁴ In Victoria, there exists a somewhat pale imitation of ICAC, known as the Independent Broad-based Anti-corruption Commission (IBAC), established by the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic). Its powers are somewhat limited by comparison with those of ICAC. Until recently, it has discharged its statutory responsibilities in private, and therefore very little is known about what it does. It has only just now commenced to conduct public hearings. Victoria also has a body known as the Office of the Chief Examiner, established by the *Major Crime (Investigative Powers) Act 2004* (Vic), whose task is to investigate, using coercive powers, organised crime.

¹⁵ A useful discussion of ICAC's early history is to be found in W G Roser, 'The Independent Commission Against Corruption: The New Star Chamber?' (1992) 16 *Criminal Law Journal*, 225.

¹⁶ In *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 the High Court considered the meaning of this phrase as used in the ICAC Act. The Court observed that the term was used in a broad sense to include conduct that was capable of constituting or involving a criminal offence, as well as a disciplinary offence, or reasonable grounds for dismissing a public official.



secondary goal is to reduce the incidence of organised and other crime. It pursues these objects by investigating matters relating to relevant criminal activity, and by assembling admissible evidence to be provided to the relevant authorities.

Overview

19 It can be seen from this cursory summary that there are a number of standing commissions, at both federal and state level, that are given the task of investigating serious, complex, and in some cases, organised crime. These investigative bodies are typically vested with extremely broad coercive powers. Plainly, in the light of recent events (particularly those involving ICAC) they do not hesitate to use them.

20 Standing commissions of this kind are, by virtue of their statutory structure, independent of government. In that respect, it might be said, they operate quite differently from the way in which other arms of the Executive, such as police, do.

21 ICAC, in particular, has repeatedly displayed its independence from Executive control. It has, on a number of occasions, caused immense damage, or at least severe embarrassment, to the government of the day. Indeed, in New South Wales, ICAC, through its investigative activities, has directly brought about the downfall of two State Premiers. Democratic accountability is maintained, in the case of such bodies, through the scrutiny of parliamentary committees that supervise their actions.

22 Other standing commissions such as the ACC, ASIC and the NSWCC have less formal independence. Some of these bodies require references from federal or state Ministers before they can exercise coercive powers. This means that governments effectively exercise a veto over the use of such powers.

23 Royal Commissions have no legal independence, as such. They can be terminated at any time by the simple expedient of revoking letters patent. However, in practical terms, they



seems to operate independently of government, even when, as sometimes happens, those who establish them later have cause to regret having done so.¹⁷

24 Bodies of this kind are normally created because of a perception, on the part of government, that existing law enforcement mechanisms are inadequate for the task at hand. There is a belief that inquiries conducted using coercive powers can suppress crime, or at least expose criminal activity and reveal the truth. It has even been suggested that because prosecutions take too long to work their way through the court system, and are, in any event, ineffective in preventing criminal activity, the main object of these bodies should be the suppression of crime, through public exposure.

25 I interpolate to say that notwithstanding the existence of investigative bodies of this kind in this country, their record in bringing about criminal prosecutions for serious white collar offending can only be described as somewhat modest. Recently, I had occasion to read a remarkable book entitled *The Divide: American Injustice in the Age of the Wealth Gap*.¹⁸ The author, Matt Taibbi, analysed in considerable depth, the history of major fraud in the United States throughout and beyond the Global Financial Crisis. He noted that in 2010, Eric Holder, the United States Attorney-General had warned that 'mortgage-fraud crimes have reached crisis proportions'. He vowed to take strong action in response. In fact, Wall Street crime had been given almost no priority by the Department of Justice, and since 2009 the Federal Bureau of Investigation had closed 747 mortgage-fraud cases with barely any prosecutions having been launched.

26 It is a fact that not a single executive of HSBC faced criminal charges after the bank 'admitted to laundering billions of dollars for drug cartels in Mexico and Colombia, washing money for terrorist-connected organisations in the Middle East ... and letting Russian

¹⁷ The Costigan Royal Commission provides a clear example of a body created to achieve a particular political objective, but which ended up causing great embarrassment to the government which had established it.

¹⁸ Matt Taibbi (Scribe Publications, 2014).



mobsters wash money on a grand scale'.¹⁹ Instead, criminal conduct of this magnitude has been dealt with by way of pecuniary penalty, sometimes in amounts that seem substantial, but, when viewed in context, are far less punitive than would truly be warranted.

27 Regrettably, much the same can be said of the approach taken by regulatory bodies in this country. In Victoria (and, I assume, other states as well), truly sophisticated fraud is almost never detected, and rarely, if ever, prosecuted. State police, under-resourced as they are, find the task of unravelling complex white collar crime beyond them. ASIC, the corporate regulator, chooses, for whatever reason, to settle many cases on the basis of pecuniary penalties, rather than charging offenders on indictment. Its record, in relation to the activities of certain Commonwealth Bank of Australia officials, as revealed in recent Senate hearings, leaves a great deal to be desired.²⁰

28 Notwithstanding their relative ineffectiveness, at least in relation to serious fraud, the use of coercive powers of the kind vested in standing commissions intrudes upon long-standing and fundamental common law rights. There is a particular danger, associated with the exercise of such power, when an individual whose conduct is the subject of scrutiny is, at the same time, facing the prospect of a criminal trial.

29 Legislatures have provided some safety mechanisms to protect the rights of accused persons in such circumstances. However, there is an ongoing debate, within the broader legal community, as to whether these mechanisms go far enough.

30 Before embarking upon a consideration of that debate, it may be useful to set out, by way of example, the legislative scheme which governs the operation of federal Royal Commissions, and the New South Wales scheme which governs ICAC.

¹⁹ Hedrick Smith, Book Review entitled 'Above the Law', *Australian Financial Review*, Friday 11 July 2014, 5R, citing Taibbi, above n 18.

²⁰ It need hardly be said that neither the Australian Taxation Office, nor the ACCC, have distinguished themselves in this field either.



The Royal Commissions Act 1902 (Cth) (RC Act)²¹

31 Even a cursory perusal of the RC Act demonstrates the width of the powers typically vested in those who conduct Royal Commissions.

32 For one thing, the RC Act expressly abrogates the privilege against self-incrimination.²² The Act provides only partial compensation for the loss of the privilege through the device of what is often described as a ‘use’ immunity.²³

33 Importantly, however, there is, under the RC Act, no ‘derivative use’ immunity. The difference between the two forms of immunity is fundamental. A ‘derivative use’ immunity provides the same protection as a ‘use’ immunity, but goes much further. A ‘derivative use’ immunity also renders inadmissible any other evidence obtained as a result of the person giving the answer or producing the documents.²⁴

34 The ‘derivative use’ immunity is rarely employed these days, although that was not always so. Consider, for example, s 68(3) of the ASC Act which saw the inclusion of a ‘derivative use’ immunity in respect of evidence obtained under compulsion. In response to vociferous complaints by the ASC, and by the Commonwealth DPP,²⁵ as to the dangers to law enforcement that a ‘derivative use’ immunity posed,²⁶ that wider form of immunity was

²¹ Similar powers are vested in Royal Commissions or Commissions of Inquiry established under state law. See, for example, *Royal Commissions Act 1923* (NSW), *Special Commissions of Inquiry Act 1983* (NSW), *Evidence (Miscellaneous Provisions) Act 1958* (Vic) pt 1 div 5, *Royal Commissions Act 1917* (SA), *Commissions of Inquiry Act 1995* (Tas), *Royal Commissions Act 1968* (WA).

²² RC Act s 6A.

²³ RC Act s 6DD. If a person is compelled to answer questions or produce a document, and claims, before answering or producing that document, that the answers or production would tend to incriminate him or her, the answers or production cannot be admitted in evidence against that person. There is, of course, an exception in the case of a prosecution for perjury.

²⁴ For a further discussion of the two immunities and the privilege against self-incrimination, see Dan Rogers, ‘Coercion in Crime Commissions and the Abrogation of the Privilege Against Self-Incrimination’ (2012) 32 *Queensland Lawyer* 135.

²⁵ I have reason to remember this particular saga. I was the Commonwealth DPP at the relevant time.

²⁶ See generally Paul Sofronoff, ‘Derivative Use Immunity and the Investigation of Corporate



eventually abolished and replaced by the more limited 'use' immunity.

35 It is interesting to note that the wider form of immunity is conferred by s 128(7) of the *Evidence Act 1995* (NSW) and also s 128(7) of the *Evidence Act 1995* (Cth).

36 In the United States, the privilege against self-incrimination forms one of the key rights conferred by the Bill of Rights, and has constitutional status. The result is that the privilege can only be abrogated when strict 'derivative use' immunity provisions apply.

37 The RC Act is remarkable in one respect. Legal professional privilege, traditionally regarded as one of the most basic tenets of a society governed by the rule of law, is expressly modified to the extent that a member of a commission, or authorised officer, can inspect any document for which such privilege is claimed. Assuming the claim is made out, the only protection afforded to the holder of the privilege is a form of 'use' immunity. The document cannot be referred to or used for the purpose of the commission's report. Of course, knowledge of its contents, once gained, cannot be expunged.

The ICAC Act

38 Section 26 of the ICAC Act abrogates the privilege against self-incrimination. It provides nothing more than a 'use' immunity by way of compensation. Indeed, the section makes it clear that any answers given, after the privilege has been claimed, and any documents produced, can be used 'for the purposes of the investigation concerned'. In other words, 'derivative use' is expressly permitted.

39 Section 24 of the ICAC Act abrogates the right to make a claim for confidentiality in respect of answers sought or documents required, but does not abrogate legal professional privilege.²⁷ Indeed, s 24(2) operates to preserve that very privilege.

Wrongdoing' (1994) 10 *Queensland University of Technology Law Journal* 122, 130.

²⁷ The position in Victoria is quite different. Section 19D of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic), introduced in 1998, abrogates legal professional privilege in



Parallel investigations into criminal activity

40 There is a large, and ever-expanding body of authority dealing with the legality of investigation by commissions exercising coercive powers into alleged criminal activity.

41 It has traditionally been understood that Commissions of Inquiry should cease their investigative role, and the use of coercive powers, once ordinary criminal proceedings have been instituted.

42 As far back as the early seventeenth century, in the *Case of Commissions of Inquiry*,²⁸ it was held that commissions issued to investigate the depopulation of houses and the conversion of arable land into pasture, should cease at the point of hearing and determining whether particular offences had been committed. That question was to be resolved through the work of the courts, and particularly, the justices of oyer and terminer in the King's Bench, and not by the commissioners.

43 In *Clough v Leahy*,²⁹ the High Court upheld the validity of Royal Commissions of Inquiry provided such commissions did not invade private rights, or interfere with the course of justice.

44 In *McGuinness v The Attorney-General of Victoria*,³⁰ the issue was whether, and to what extent, a Royal Commission could conduct an inquiry, using coercive powers, to investigate the commission of criminal offences. In that case, the editor of a newspaper wrote and published articles suggesting that certain persons were collecting funds for the purpose of bribing members of the Victorian Parliament to prevent the passing of specified legislation. As a consequence, a Royal Commission was established to enquire into those

relation to Commissions of Inquiry. The only protection afforded by s 19D is that a commissioner may exclude the public or specified persons from the examination.

²⁸ (1608) 12 Co Rep 31.

²⁹ (1904) 2 CLR 139.

³⁰ (1940) 63 CLR 73 ('*McGuinness*').



allegations.

45 The appellant editor was called before the Royal Commission and asked to reveal his sources. He declined to do so, and was charged with an offence under the relevant provision of the *Evidence Act 1928* (Vic). One of the issues raised before the High Court was whether the Royal Commission had been lawfully constituted. It was submitted that there was no power, either by statute or at common law, to permit an inquiry into the commission of a particular offence that was triable by the ordinary courts.

46 Dixon J explored this issue with great care. He noted that the source of the power to establish the Royal Commission was the prerogative, and that the statute assumed the existence of that power in creating the structures surrounding the conduct of the inquiry.

47 Having analysed the *Case of Commissions of Inquiry*, Dixon J observed that what coercive powers, if any, might be conferred under the prerogative had remained a matter of doubt up until the nineteenth century. However, gradually it had come to be understood that no power of compelling testimony could be so conferred, absent specific legislation. During the nineteenth century there had been attacks against the legality of a number of particular Commissions of Inquiry.³¹

48 Notwithstanding the uncertainty that had prevailed in relation to the use of coercive powers to investigate criminal activity, the High Court concluded that McGuinness' challenge should fail. It held, following the principles earlier laid down in *Clough v Leahy*, that the appointment of a Royal Commission to enquire into and report upon whether a criminal offence had been committed and, if so, by whom, was not an interference with or invasion of the ordinary course of justice and was not, therefore, invalid. Dixon J noted, in support of that conclusion, that a Royal Commission made no determination carrying legal consequences,

³¹ For example, the Inquiry, known as the 'Delicate Investigation', into the conduct of the Princess of Wales (afterwards, Queen Caroline) in 1806.



and in making its finding did not exercise judicial authority.³²

49 The decision in *McGuinness* was reaffirmed by the High Court in *Victoria v Australian Building Construction Employees' & Builders Labourers' Federation*.³³ This concerned a joint federal-state Royal Commission into the activities of the Builders Labourers' Federation, including, inter alia, an inquiry into whether the union or its officials had engaged in illegal activities. The union bought a challenge to the validity of the letters patent, claiming that the conduct of the Royal Commission would be a contempt of court in as much as it would interfere with the course of justice.

50 The High Court held, by majority, that, in the absence of any law to the contrary, the Crown could appoint a Commission of Inquiry into whether an individual had committed a criminal offence. However, the Court went on to say that unless expressly authorised by statute, the conduct of a Commission of Inquiry otherwise lawfully appointed could, in some circumstances, constitute a contempt of court.³⁴ In the particular circumstances of the case, it had not been shown that the conduct of the Royal Commission, in public, had a tendency to interfere with the course of justice.

51 Gibbs CJ said:

Although a commission of inquiry may lawfully be instituted and conducted into the guilt or innocence of individuals, the position will be different if its proceedings interfere with the course of justice and amount to a contempt of court. The very issue of the commission will be invalid if done with the purpose of interfering with the course of justice (*Clough v. Leahy* and *McGuinness v. Attorney-General (Vict.)*) and the case suggested by Latham C.J. in *McGuinness v. Attorney-General (Vict.)* of the establishment of a royal commission to inquire into the question whether an offence had been committed, when a prosecution for the offence was already pending, seems to be an example. However, the continuance of the proceedings of a commission may amount to a contempt of court even though the commission

³² (1940) 63 CLR 73, 102.

³³ (1982) 152 CLR 25 ('BLF Case').

³⁴ For a detailed discussion of the circumstances in which a commission could be in contempt of court, see Stephen Donaghue, 'Coercive Questioning After Charge' (2000) 28(1) *Federal Law Review* 1, 12–24.



was not established with any intention to interfere with the course of justice: see *Clough v. Leahy*, *McGuinness v. Attorney-General (Vict.)*, and *Johns & Waygood Ltd. v. Utah Australia Ltd.* For example, if during the course of a commission's inquiries into allegations that a person had been guilty of criminal conduct, a criminal prosecution was commenced against that person based on those allegations, the continuance of the inquiry would, speaking generally, amount to a contempt of court; the proper course would be to do as Townley J. did in *Royal Commission Into Certain Crown Leaseholds [No.2]* and adjourn the inquiry until the disposal of the criminal proceedings.³⁵

52 Mason J, agreeing with Gibbs CJ, observed:

More specifically it should be said that, when it has long been accepted in Australia that a commission can be established by the Crown in the exercise of its common law powers for the purpose of inquiring into and reporting on the commission of criminal offences, the conferring by statute of coercive powers on royal commissions generally must be taken to apply to commissions of the type described.³⁶

53 In *Hammond v The Commonwealth*,³⁷ the High Court was required to consider, as a matter of urgency, one of the very issues that had been flagged in the *BLF Case*, namely, whether a person who had been charged with a criminal offence, the trial of which was pending, and who had been called before a joint federal-state Royal Commission to be questioned about the very subject matter of that offence, could refuse to answer those questions.

54 The Court held that, notwithstanding the fact that a 'use' immunity had been provided by the relevant legislation (as compensation for the abrogation of the privilege against self-incrimination), the continuance of the individual's examination before the Royal Commission would interfere with the due administration of justice. Accordingly, injunctive relief was granted.

55 Gibbs CJ (with whom Mason and Murphy JJ agreed, on this point) said:

Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with

³⁵ (1982) 152 CLR 25, 53–4 (citations omitted).

³⁶ *Ibid* 88.

³⁷ (1982) 152 CLR 188 ('*Hammond*').



which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence. In the *Builders Labourers' Case* I expressed the opinion that, if during the course of a commission's inquiries into allegations that a person had been guilty of criminal conduct, a criminal prosecution was commenced against that person based on those allegations, the continuance of the inquiry would, generally speaking, amount to a contempt of court, and that the proper course would be to adjourn the inquiry until the disposal of the criminal proceedings ... It would be neither necessary nor right to adjourn this inquiry because a prosecution had been commenced against the plaintiff. But the public interest can be met, and the interest of justice at the same time safeguarded, if the inquiry proceeds to its conclusions without further examination of the plaintiff.³⁸

56 Deane J expressed the basic principle as follows:

[I]t is fundamental to the administration of criminal justice that a person who is the subject of pending criminal proceedings in a court of law should not be subjected to having his part in the matters involved in those criminal proceedings made the subject of a parallel inquisitorial inquiry by an administrative tribunal with powers to compel the giving of evidence and the production of documents which largely correspond (and, to some extent, exceed) the powers of the criminal court. Such an extra-curial inquisitorial investigation of the involvement of a person who has been committed for trial in the matters which form the basis of the criminal proceedings against him constitutes, in my view, an improper interference with the due administration of justice in the proceedings against him in the criminal court and contempt of court.³⁹

57 By the time *Hammond* was decided, the relevant legal principles seemed to have been well established. Once criminal proceedings had been initiated, it was no longer acceptable for any investigative body, whether created by statute or otherwise, to interrogate, under coercion, a person who had been charged as to the very matters that were the subject of that pending trial.

58 The reasoning in *Hammond* seemed clear and unequivocal. The judgment itself was, of course, delivered under great pressure of time. The decision was entirely consistent with

³⁸ Ibid 198–9.

³⁹ Ibid 206.



the earlier jurisprudence of the Court to the effect that a Royal Commission would be invalid if established for the purpose of interfering with the course of justice. *Hammond* was understood to have held that a Royal Commission, established to enquire whether an offence had been committed, when a prosecution for that offence had already been commenced, would be invalid.

59 Of course *Hammond* had its critics, some of whom thought it went too far. In *Hamilton v Oades*,⁴⁰ the validity of compulsory coercive questioning in circumstances where a criminal trial was pending again arose for determination. The case concerned an order made by the Supreme Court of New South Wales that a director of a company in liquidation be examined as to the affairs of that company pursuant to the relevant provision of the *Companies (New South Wales) Code*. As was the case with the various provisions governing the conduct of Royal Commissions to which I have earlier referred, the relevant legislation expressly abrogated the privilege against self-incrimination. It specifically provided a 'use' immunity as compensation.

60 Mr Oades, the director who was sought to be questioned, had already been charged, in New South Wales, with a number of offences arising out of his involvement with the company. The examination that had been ordered commenced before a Deputy Registrar of the Court who refused an application for a direction that it be confined to matters that were not the subject of any pending criminal proceedings. The New South Wales Court of Appeal overturned that decision, and ordered that during the pendency of the charges, the director not be compelled to answer questions that related to those charges. The liquidator appealed to the High Court.

61 By a 3:2 majority (Mason CJ, Dawson and Toohey JJ, Deane and Gaudron JJ dissenting), the appeal was allowed.

⁴⁰ (1989) 166 CLR 486 (*'Hamilton'*).



62 Mason CJ, in distinguishing *Hammond*, and the earlier line of authority governing Royal Commissions and analogous bodies, commented:

It is plain that an examination under s. 541 while charges are pending may expose the witness to the risks mentioned. To the extent only that under the section rights of an accused person are denied and protections removed, an examination may even amount to an interference with the administration of criminal justice. But it is well established that Parliament is able to ‘interfere’ with established common law protections, including the right to refuse to answer questions the answers to which may tend to incriminate the person asked: see *Hammond v. The Commonwealth; Sorby*. There has been a long history of legislation governing examinations in bankruptcy and under the Companies Acts which abrogate or qualify the right of the person examined to refuse to answer questions on the ground that the answers may incriminate him ...⁴¹

63 Dawson J suggested that perhaps the principles in *Hammond* had been too widely stated, possibly because of the urgency with which the matter had been approached.

64 Other critics of *Hammond* have since commented upon the fact that the judgments in that case did not explain how the Royal Commission created a real risk of interference with the administration of justice, given that its hearings were to take place in private, and there was a ‘use’ immunity available to the person who was to be questioned.⁴²

65 To summarise, therefore, after *Hamilton* the position was essentially as follows. *Hammond* remained good law. However, proceedings in bankruptcy and insolvency were regarded, largely for historical reasons, as having created an exception to the principle expounded in *Hammond*.

X7 v Australian Crime Commission⁴³

⁴¹ Ibid 494 (citations omitted).

⁴² Stephen Donaghue, above n 4, 275–6. Donaghue contends that all that was required to avoid any real threat to the administration of justice in *Hammond*’s case was a ‘derivative use’, as well as a ‘use’ immunity. With respect, that does not meet the point that no such ‘derivative use’ immunity was available on the actual facts of that case.

⁴³ (2013) 248 CLR 92 (‘X7’).



66 The plaintiff in *X7* brought proceedings in the original jurisdiction of the High Court seeking declarations that, to the extent that div 2 of pt II of the ACC Act permitted the compulsory examination of a person charged with an indictable offence against a law of the Commonwealth, the relevant provisions were beyond the power of the Commonwealth Parliament. Alternatively, he sought a declaration to the effect that any such examination would constitute an impermissible interference with what was said to be his constitutional right to a fair trial under ch III of the Constitution. He also sought injunctive relief against the ACC and its officers restraining further compulsory examination in relation to the matters in question.

67 The facts giving rise to the plaintiff's challenge were essentially as follows. On 23 November 2010, he was arrested by officers of the Australian Federal Police and charged with three separate conspiracies involving drugs. Each charge was brought under the provisions of the *Criminal Code Act 1995* (Cth).

68 While still in custody, and awaiting trial, the plaintiff was served with a summons to appear and give evidence before the ACC. As the Court noted, the ACC has functions which include the collection of criminal information and intelligence and the investigation of federally relevant criminal activity in relation to 'serious and organised crime'. Serious and organised crime covers offences involving two or more offenders, substantial planning and organisation, and the use of sophisticated methods and techniques.⁴⁴

69 In response to the summons, the plaintiff attended a compulsory examination before an ACC examiner during which he was asked, and answered under compulsion, questions relating to the very matters which gave rise to the charges brought against him. When the examination resumed the next day, he declined to answer any further questions of that nature. He was told that he would, in due course, be charged with failing to answer

⁴⁴ ACC Act s 4.



questions.

70 The High Court was divided in its views regarding the points raised on behalf of the plaintiff. In a joint judgment, Hayne and Bell JJ (with whom Kiefel J agreed), found in favour of the plaintiff. French CJ and Crennan J dissented.

71 By way of overview, Hayne and Bell JJ said:

Could the examiner lawfully require the plaintiff to answer questions about the subject matter of the offences with which he had been charged but for which he had not then been tried? Could the examiner, for example, lawfully require the plaintiff to answer whether he had committed the offences charged?

These reasons will show that both the general and the more particular question should be answered 'No'. The relevant provisions of the ACC Act should not be construed as authorising the compulsory examination of a person charged with, but not yet tried for, an indictable Commonwealth offence about the subject matter of the pending charge. Permitting the Executive to ask, and requiring an accused person to answer, questions about the subject matter of a pending charge would alter the process of criminal justice to a marked degree, whether or not the answers given by the accused are admissible at trial or kept secret from those investigating or prosecuting the pending charge.

Requiring the accused to answer questions about the subject matter of a pending charge prejudices the accused in his or her defence of the pending charge (whatever answer is given). Even if the answer cannot be used in any way at the trial, any admission made in the examination will hinder, even prevent, the accused from challenging at trial that aspect of the prosecution case. And what would otherwise be a wholly accusatorial process, in which the accused may choose to offer no account of events, but simply test the sufficiency of the prosecution evidence, is radically altered. An alteration of that kind is not made by a statute cast in general terms. If an alteration of that kind is to be made, it must be made by express words or necessary intendment.⁴⁵

72 Their Honours referred to the provisions of the ACC Act which provided for examinations in connection with a special ACC operation/investigation,⁴⁶ which were said to be cast 'in general terms'. They said:

Because these provisions were expressed generally, they would permit, if

⁴⁵ (2013) 248 CLR 92, 127 [69]–[71].

⁴⁶ Sections 28(1) and 30(2).



read literally, the examination of a person who had been charged with an indictable Commonwealth offence about the subject matter of the charged offence. But neither the provisions authorising examination, nor any other provisions of the ACC Act, stated expressly that a person charged with an offence may be examined about the subject matter of that charge.⁴⁷

73 Their Honours observed that s 25A(9) of the ACC Act provided that the examiner could give a direction preventing or limiting the publication of, inter alia, evidence given before the examiner, the contents of documents produced, or the description of things given, as well as information that could enable a person who had given evidence to be identified, and the fact that a person had given or was about to give evidence at an examination. The examiner was obliged to give such a direction 'if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person' who had been, or might be, charged with an offence. The examiner had given a direction of this kind in relation to the plaintiff's examination.

74 The ACC had placed at the forefront of its submissions those provisions of the ACC Act which prevent the direct or, depending on the terms of a direction given under s 25A(9), indirect use of answers given in the prosecution of the person examined. In other words, a person subject to a coercive examination under the Act would receive both a 'use' and 'derivative use' immunity. That meant, so the ACC had submitted, that there could not be any prejudice to the fairness of the plaintiff's pending trial. Indeed, it meant that the Act itself contemplated that coercive powers could be used after charges had been laid.

75 Those submissions were rejected by the majority. Hayne and Bell JJ noted that the words used in s 25A(9) did not deal directly or expressly with the position of a person summoned to give evidence before the ACC, but who had already been charged in relation to those very matters. More fundamentally, their Honours concluded that permitting the Executive to ask, and compel answers to, questions about the subject matter of a pending charge (regardless of what use might be made of those answers at the trial of an accused

⁴⁷ (2013) 248 CLR 92, 129 [76].



person) ‘fundamentally alter[ed] the process of criminal justice’.⁴⁸ To construe the Act as the ACC contended would ‘alter to a marked degree the accusatorial nature of the criminal justice system’.⁴⁹

76 Hayne and Bell JJ also rejected a separate submission put forward on behalf of the ACC to the effect that the Act did not authorise a contempt because (a) the examination was conducted in secret and (b) the giving of directions about the use which might be made of the answers which the accused person was made to give would avoid what might otherwise be a contempt. Their Honours observed that the use of answers to assist the prosecution of pending charges was only one way in which there could be interference with the course of criminal justice. The very fact of being required to answer questions about the subject matter of a pending charge itself interfered with that process.

77 This entailed a conceptual analysis of what is meant by an accusatorial system. That analysis went far beyond the onus of proof. It included reference to the history of the privilege against self-incrimination, and the ‘right to silence’.

78 In their Honours’ words:

In this case, it is necessary to unpack the content of both the privilege against self-incrimination and the so-called ‘right to silence’ to identify whether compulsory examination of a person charged with an offence about the subject matter of the offence charged would be an impermissible interference with the due administration of criminal justice.

As four members of this court said in *Reid v Howard*, ‘[t]he privilege [against self-incrimination], which has been described as a “fundamental ... bulwark of liberty”, is not simply a rule of evidence, but a basic and substantive common law right’. The evolution of and rationale for the privilege against self-incrimination have been described in various ways. No single explanation has achieved universal acceptance, whether in judicial decisions or academic writings. But neither the existence nor the content of those controversies can be understood as denying that the privilege is now regarded as being ‘a basic and substantive common law right’, and not just a rule of evidence. That is, it is not a privilege which is concerned only with the use to which answers given

⁴⁸ Ibid 131 [85].

⁴⁹ Ibid [87].



may be put at, or in connection with, a trial. It is a privilege which permits the refusal to make an answer regardless of whether the answer is admissible as testimonial evidence. The accusatorial process of criminal justice and the privilege against self-incrimination both reflect and assume the proposition that an accused person need never make any answer to any allegation of wrong-doing.

The notion of an accused person's 'right to silence' encompasses more than the rights that the accused has at trial. It includes the rights (more accurately described as privileges) of a person suspected of, but not charged with, an offence, and the rights and privileges which that person has between the laying of charges and the commencement of the trial.⁵⁰

79 Having then gone on to consider the limits imposed upon ordinary powers of investigation, as a result of what they termed the 'accusatorial process', as well as the various pre-trial procedures that accommodate that process and the trial itself, their Honours observed:

The preceding description of the investigation, prosecution and trial of an indictable Commonwealth offence demonstrates that, at every stage, the process of criminal justice is accusatorial. It is against this background that the provisions of the ACC Act, particularly s 28(1), must be construed. If these provisions were to permit the compulsory examination of a person charged with an offence about the subject matter of the pending charge, they would effect a fundamental alteration to the process of criminal justice.⁵¹

80 They added that:

This is not to decide that statute can never effect fundamental alterations to the process of criminal justice. As explained earlier, it is not necessary to decide whether there is any relevant constitutional limitation to legislative power that would preclude such an alteration. But such an alteration can only be made if it is made clearly by express words or necessary intendment.

...

From time to time, legislation has been enacted which has qualified the generally accusatorial nature of the process of criminal justice. Some of the earliest of those modifications are to be found in legislation providing for the examination of bankrupts, and of persons who have 'taken part or been concerned in the promotion, formation, management, administration or winding up' of a corporation and who have been, or may have been, 'guilty of fraud ... or other misconduct in relation to that corporation'. Legislation provided for the examination of bankrupts, and those thought to have

⁵⁰ Ibid 136–7 [103]–[105] (citations omitted).

⁵¹ Ibid 140 [118].



defrauded companies, before the accused became a competent witness at trial.

...

These changes to the accusatorial process of criminal justice have been made directly and expressly. Neither the changes that have been made more recently, nor the existence of historical qualifications and exceptions of the kind exemplified by bankruptcy and companies examination procedures, deny that the existing process for the administration of criminal justice is properly described as an accusatorial process. The qualifications and exceptions stand as particular features of the process of criminal justice that have been separately created (in important respects before the emergence of organised police forces and the modern criminal justice system). Their existence shows no more than that the modern criminal justice system is the product of growth over time and is not the product of a decision to implement some single organising theory about the administration of criminal justice.⁵²

81 In dealing with the impact of coercive questioning upon the rights of an accused pending trial, their Honours summed up the position as follows:

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

As has been explained, if an alteration of that kind is to be made to the criminal justice system by statute, it must be made clearly by express words or by necessary intendment. If the relevant statute does not provide clearly for an alteration of that kind, compelling answers to questions about the subject matter of the pending charge would be a contempt.⁵³

⁵² Ibid 140–2 [119], [121] and [123] (citations omitted).

⁵³ Ibid 142–3 [124]–[125] (emphasis in original).



82 They concluded that earlier decisions of the High Court, and in particular *Clough v Leahy*, *McGuinness* and *Hammond*, which all held that the conduct of a coercive inquiry parallel to a criminal prosecution would ordinarily constitute a contempt of court because the inquiry would present a real risk to the administration of justice, should be followed. On the other hand, cases dealing with bankruptcy and company liquidation⁵⁴ where fraud is suspected should be understood as nothing more than an historical anomaly, emanating from the different approach taken by the Chancery Court to that of the common law, and ultimately being replicated through legislation.

83 French CJ and Crennan J, in their joint dissent concluded that the ACC Act, upon its proper construction raised the public interest in the continuing investigation of serious and organised crime above the private interest in claiming the privilege against self-incrimination. Their Honours said that the interest in a person subject to examination under the ACC Act being tried openly and fairly was protected by the prohibition on the direct use of answers given, or documents or things produced, and by the provisions safeguarding the fair trial of that person.

84 The dissenting judgment of the Chief Justice and Crennan J concluded that the examination provisions under the ACC Act implicitly contemplated the exercise of the examination powers after a charge had been laid. There was no relevant limitation on who could be summoned under s 28, and no explicit preservation of the privilege against self-incrimination once charges had been laid. This stood in stark contrast with the provisions of the forerunner to the ACC Act, the NCA Act, which in s 30(10) had provided that a person could claim the privilege against self-incrimination in respect of any answer to a question or the production of a document or thing which might tend to incriminate that person, if the offence had not been finally dealt with.

⁵⁴ *Hamilton* (1989) 166 CLR 486. See also *Rees v Kratzmann* (1965) 114 CLR 63; *Mortimer v Brown* (1970) 122 CLR 493.



85

Having referred to the fact that the ACC Act allowed for statutory directions regarding the disclosure and manner of use of any self-incriminating evidence and information obtained in the examination, so as to safeguard a person's fair trial, their Honours observed:

Not only do those safeguards clearly and unambiguously apply in relation to a pending (or a potential) trial, the plaintiff did not point to any provision in the ACC Act explicitly constraining the ability of a court to ensure a pending trial would be conducted according to law. Furthermore, nothing in the history of the examination provisions, including the matters referred to in the extrinsic materials, throws any doubt on the conclusion, based on the text and purpose of the provisions, that the examination powers may be exercised after charges have been laid.

Turning to the privilege against self-incrimination more generally, although this privilege has been described as 'deep rooted' in the common law, over the years it has not lacked critics as 'an unnecessary impediment to the detection and conviction of criminal offenders and as an obstacle to the judicial ascertainment of the truth'. Legislatures have, in different settings, abrogated or modified the privilege when public interest considerations have been elevated over, or balanced against, the interests of the individual so as to enable true facts to be ascertained. Longstanding examples such as the compulsory public examination of a bankrupt, or of a company officer (when fraud is suspected), serve a public interest in disclosure of the facts on behalf of creditors and shareholders which overcomes some of the common law's traditional consideration for the individual. Because disclosures of a bankrupt on a compulsory examination can be used against him or her in other proceedings, a judge before whom such an examination is held will need to ensure the examiner does not cause 'oppression, injustice, or ... needless injury to the individual', and to disallow questions which would constitute an abuse of process. In balancing public interest considerations and the interests of the individual, legislation abrogating the privilege will often contain, as in the case of the ACC Act, 'compensatory protection to the witness', by providing that, subject to limited exceptions, compelled answers shall not be admissible in civil or criminal proceedings.

The functions of the ACC, which include the investigation of serious and organised crime, serve a public interest which is apparent from the ACC Act. An examination cannot be held for a purpose other than the purpose of investigating serious and organised crime, which remains the same whether a criminal charge has been laid or not. It is consistent with the purpose of the compulsory examination powers, which aid the functions of the ACC, that those powers are not exhausted upon the laying of a charge against an individual. The ACC Act reflects a legislative judgment that the functions of the ACC would be impeded if the laying of a charge against one member of a group by a prosecutor prevented continuing investigation of the group's activities by way of examination of that member by the ACC.

To summarise, the public interest in the continuing investigation of serious



and organised crime is elevated over the private interest in claiming the privilege against self-incrimination. However, while a person examined under the ACC Act is compelled to give an answer, or produce a document or thing, which might otherwise be withheld because of the privilege against self-incrimination, the interest in that person being tried openly and fairly is protected both by the prohibition on direct use of answers given, or documents or things produced, and by the provisions safeguarding the fair trial of that person.⁵⁵

86 The Chief Justice and Crennan J then closely analysed *Hammond* upon which the plaintiff had, not surprisingly, relied. They noted that *Hammond* had been decided ‘in circumstances of some urgency’.⁵⁶ They said that it was critical to appreciate that the injunctive relief granted in *Hammond* had been given in circumstances where criminal proceedings were pending, and the prosecution was to have access to evidence and information compulsorily obtained which could, of itself, establish guilt of the offences, and in relation to which the only protection offered was a ‘use’ immunity. By way of contrast, s 25A of the ACC Act empowered and required the examiner to make directions safeguarding the fair trial of a person compulsorily examined, and that could entail a complete ‘derivative use’ immunity.

87 The dissentients were critical of the majority’s elevation of the ‘right to silence’ as an adjunct of the accusatorial system. They noted that this ‘right’⁵⁷ was not ‘a constitutional or legal principle of immutable content’.⁵⁸ Nor, of course, was the closely related, but not co-extensive, common law privilege against self-incrimination.⁵⁹

⁵⁵ (2013) 248 CLR 92, 111–12 [27]–[30] (citations omitted).

⁵⁶ *Ibid* 113 [32].

⁵⁷ See *R v Director of Serious Fraud Office; Ex Parte Smith* [1993] AC 1, 30 where the ‘right to silence’ was described by Lord Mustill as referring to ‘a disparate group of immunities, which differ in nature, origin, incidence and importance’. His Lordship identified no less than six different variations of that right: at 30–1.

⁵⁸ (2013) 248 CLR 92, 117 [39] citing *Azzopardi v The Queen* (2001) 205 CLR 50, 57 [7] (Gleeson CJ). For what seems to me to be a somewhat strained consideration of whether an infringement of the ‘right to silence’ is contrary to the requirements of the Australian Constitution, see Anthony Gray, ‘Constitutionally Heeding the Right to Silence in Australia’ (2013) 39(1) *Monash University Law Review*, 156.

⁵⁹ (2013) 248 CLR 92, 117 [39] citing *Sorby v The Commonwealth* (1983) 152 CLR 281, 298 (Gibbs CJ), 308–9 (Mason, Wilson and Dawson JJ) (*‘Sorby’*).



88 Contrary to the view of the majority, the Chief Justice and Crennan J did not regard cases such as *Hamilton* merely as historical anachronisms, but rather as representative of a stream of authority that had application to coercive questioning by all investigative bodies.

89 The net effect of *X7* was, by the narrowest possible majority, to reinforce the line of authority, long accepted in this country, that an investigative process, exercising coercive powers, is likely to constitute an interference with the administration of justice if there are criminal proceedings on foot. In that regard, an investigation of that kind would not, under this line of authority, give rise to a contempt if criminal proceedings have yet to be commenced. It would not be sufficient that such proceedings be 'imminent' or 'on the cards'.⁶⁰

Lee v New South Wales Crime Commission⁶¹

90 When, three months or so after judgment had been delivered in *X7*, the High Court pronounced judgment in *Lee v NSWCC*, the result came as a surprise to many. The respondent, the NSWCC had applied for orders seeking the compulsory examination of the appellants in relation to the affairs of one of their number. The application was made pursuant to s 31D of the *Criminal Assets Recovery Act 1990* (NSW) (CAR Act). At the time the orders were sought, a confiscation order had already been made against the first appellant. He had, by that stage, been charged with money laundering, and, together with the second appellant, with various drug and firearm offences. Their trial was pending.

91 At first instance, Hulme J, acting in accordance with what his Honour understood to

⁶⁰ *Sorby* (1983) 152 CLR 281, 306–7 (Mason, Wilson and Dawson JJ); *Edelsten v Richmond* (1987) 11 NSWLR 51, 58 (Hope JA, Priestly and Clarke JJA agreeing); *A v Boulton* (2004) 204 ALR 598, 620–3 [127]–[145] (Weinberg J); *Re Application Under The Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 431 [64] (Warren CJ); *Today FM (Sydney) Pty Ltd v Australian Communications and Media Authority* (2013) 207 ALR 130, 142 [55]–[56] (Edmonds J).

⁶¹ (2013) 302 ALR 363 ('*Lee v NSWCC*').



be well established authority, refused to make the orders sought by the NSWCC.⁶²

92 On appeal, that decision was reversed by a specially constituted Court of five, and an order was made for the first appellant's examination before a Registrar of the Supreme Court of New South Wales.⁶³

93 The leading judgment was delivered by Basten JA. His Honour observed that the CAR Act, in its current form, expressly abrogated the privilege against self-incrimination.⁶⁴ Secondly, it provided, by way of compensation, a 'use' immunity. Thirdly, it specifically rejected any 'derivative use' immunity. The CAR Act made no reference at all to the possibility that coercive questioning might take place pending the hearing of a criminal trial. In his Honour's view, that was because confiscation of assets, under the Act, did not depend upon a criminal conviction.⁶⁵

94 It was the express rejection by the Act of 'derivative use' that most powerfully influenced his Honour's analysis. The legislature had evidently appreciated that answers given under compulsion might 'set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character'.⁶⁶

95 In addition, Basten JA had regard to the presence in the CAR Act of s 63, which was in the following terms:

Stay of proceedings

The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which the Supreme Court may stay proceedings under this Act that are not criminal proceedings.

⁶² *New South Wales Crime Commission v Lee* [2011] NSWSC 80 (Hulme J).

⁶³ *New South Wales Crime Commission v Lee* (2012) 84 NSWLR 1 (Beazley, McColl, Basten, Macfarlan and Meagher JJA).

⁶⁴ *Ibid* 13 [43].

⁶⁵ *Ibid*.

⁶⁶ *Ibid* [44] citing *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380, 443 (Lord Wilberforce).



96 Plainly, that section provided support for the observation by Beazley JA (in her brief concurring judgment) that, as a matter of construction, the existence of criminal proceedings would rarely, if ever, be a basis, of itself, for the refusal to make an order for examination under the CAR Act.⁶⁷

97 Basten JA's analysis of the relevant provisions of the CAR Act, and how, as a matter of construction, that Act produced the result that it did, was carried out fully cognisant of the line of authority⁶⁸ that had developed over many years regarding the use of coercive powers in circumstances where a trial was pending.

98 Of course, the judgment of the Court of Appeal in *Lee v NSWCC*, which was delivered in September 2012, predated by the best part of a year, the decision of the High Court in *X7*, which was pronounced in June 2013. It is a nice question whether the Court of Appeal in *Lee v NSWCC* would have reasoned in quite the same way, had *X7* been decided earlier.

99 The answer to that question may lie in the ultimate disposition, by the High Court, of *Lee v NSWCC* when, in October 2013, judgment in that case was delivered.

100 Given the strongly divergent views expressed in *X7*, it was hardly surprising that special leave to appeal was granted in *Lee v NSWCC*. What was less predictable, however, was that the three members of the Court who were in the majority in *X7* (Hayne, Kiefel and Bell JJ) would now, less than four months after *X7* had been decided, find themselves in the minority in *Lee v NSWCC*.⁶⁹

⁶⁷ (2012) 84 NSWLR 1, 4 [9].

⁶⁸ *Ibid* 7–11 [24]–[36]. It should be noted that the Full Federal Court, by majority (Emmett and Jacobson JJ), had held in *Australian Crime Commission v OK* (2010) 268 ALR 281 that it would not be a contempt of court for the ACC to engage in coercive questioning of a person who had been charged with an offence and was facing trial. The High Court's decision in *Hammond* was said to be distinguishable. Spender J delivered a vigorous dissent, and would have upheld the decision of Mansfield J at first instance. In *NSWCC v Lee*, Basten JA referred to the decision of the majority of the Full Federal Court with apparent approval.

⁶⁹ It is perhaps of some interest to note that the three members of the High Court who were in



101 The four members of the Court who made up the majority in *Lee v NSWCC* delivered three separate judgments.

102 French CJ noted that the CAR Act, unlike legislation that conferred coercive powers on administrative bodies, provided for a judicial process for the conduct of examination of persons. The examination was to be conducted before the Supreme Court itself, through a prescribed officer of that Court. That function was to be carried out by the Court in aid of confiscation orders, and in accordance with all of the protective mechanisms available to the Court. These included its inherent powers to supervise and control its own processes. Accordingly, if the officer before whom the examination was to be conducted observed a real risk of prejudice through the conduct of the examination, he or she had a wide range of powers which could be used to diminish or prevent that prejudice. The fact that the examination was to be conducted as a concurrent judicial proceeding, rather than one conducted by the Executive, was said to be an important distinguishing feature from cases such as *Hammond* and *X7*.⁷⁰

103 French CJ added that the structure and text of the CAR Act showed that, as a matter of necessary implication, it was open to the Court to make an order for the examination of a person on matters that were the subject of pending criminal charges.⁷¹

104 Crennan J, in a separate concurring judgment, spoke of the policy behind the CAR Act in relation to serious crime related activities. The fact that such recovery could be

the minority in *Lee v NSWCC* happened to be the only members of that Court who had ever sat as judges in criminal trials. Hayne J had sat as a trial judge in the Supreme Court of Victoria before his appointment to the Court of Appeal. Kiefel J had, I believe, conducted criminal trials for a brief period whilst on the Supreme Court of Queensland, prior to her appointment to the Federal Court. Bell J, of course, had been a trial judge in the Supreme Court of New South Wales for the best part of a decade before being elevated to the New South Wales Court of Appeal. Certainly none of French CJ, Crennan J or Gageler J had done so. Keane J, although for some years a member of the Queensland Court of Appeal and thoroughly familiar, from an appellate perspective, with criminal trials, seems not to have sat as a trial judge in that State.

⁷⁰ (2013) 302 ALR 363, 384–8 [40]–[51].

⁷¹ *Ibid* 389–90 [55]–[56].



ordered irrespective of whether the person had been charged with, tried for, acquitted or convicted of an offence, was strongly suggestive of the need to enable such examinations to take place regardless of whether there were pending criminal charges. To delay the examination of a person until after any criminal proceedings had been completed would be to 'frustrate the objects of identifying and recovering property sourced from serious crime related activity'.⁷²

105 Her Honour added that, despite the absence of any statutory 'derivative use' immunity, the fact that the examination was to take place before a judicial officer would enable appropriate protective mechanisms to be invoked.⁷³ Indeed, the legislature had turned its mind to the effect of coercive questioning upon an examinee facing pending criminal proceedings. The Court controlling an examination had the power to conduct it in private, to adjourn and resume the examination, to disallow particular questions including those designed to elicit defences in respect of pending charges, and to make orders restricting publication.⁷⁴

106 Finally, her Honour observed that the Court had an inherent power to punish for contempt, and to restrain an apprehended contempt. When conducting an examination under the CAR Act, the Court would not permit an examiner to abuse the Court's processes or to occasion a real risk of interference with pending criminal proceedings. In that way, the Court could prevent the prosecution from obtaining an unfair forensic advantage.⁷⁵

107 In a joint judgment, Gageler and Keane JJ, the two members of the Court who had not participated in *X7*, concluded that the CAR Act enabled the Supreme Court to order the examination of a person against whom criminal proceedings had been instituted, but not yet

⁷² Ibid 406 [131].

⁷³ Ibid 409 [138].

⁷⁴ Ibid [140]–[141].

⁷⁵ Ibid 411–12 [150]–[151].



completed, even where the subject matter of the examination overlapped with the subject matter of the criminal proceedings. Their Honours rejected the contention, advanced on behalf of the appellants, that the principle of legality would operate to prevent the abrogation or curtailment of the particular right said to be infringed by the conduct of parallel proceedings.

108 In their joint judgment, their Honours effectively responded to what the majority had said in X7 in the following terms:

The fundamental principle in respect of which the principle of construction is sought to be invoked in the present case—that no accused person can be compelled by process of law to admit the offence with which he or she is charged—is not monolithic: it is neither singular nor immutable. While it has doubtless come to be a fundamental feature of the Australian legal system that ‘a criminal trial is an accusatorial process in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt’, it is also the reality that there is recognised within the Australian legal system no freestanding or general right of a person charged with a criminal offence to remain silent. What is often referred to as a ‘right to silence’ is rather ‘a convenient description of a collection of principles and rules: some substantive, and some procedural; some of long standing, and some of recent origin’, which differ in ‘incidence and importance, and also as to the extent to which they have already been encroached upon by statute’. The most pertinent for present purposes are: the right of any person to refuse to answer any question except under legal compulsion; the privilege of any person to refuse to answer any question at any time on the ground of self-incrimination; the right of any person who believes that he or she is suspected of a criminal offence to remain silent when questioned by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played; and the right of a person charged with a criminal offence to a fair trial, ‘more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial’.

Separate, but overlapping with the right of a person charged with a criminal offence to a fair trial and available to protect that right, is the power that inheres in a court to restrain as a contempt conduct giving rise to a real risk of interference with the administration of justice. There is a corresponding principle, itself an application of some general principle of statutory construction, that ‘[a] statute expressed in general terms should not be construed so as to authorise the doing of any act which amounts to a contempt of court’.

It is important to recognise, however, that a contempt of court of the relevant kind occurs ‘only when there is an actual interference with the administration of justice’ or ‘a real risk, as opposed to a remote possibility’ of such an interference and that the ‘essence’ of contempt of that kind is a ‘real and



definite tendency to prejudice or embarrass pending proceedings' involving 'as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case'. The finding of such a real risk or definite tendency necessarily requires more than abstract assertion: it requires the finding at least of some logical connection between the action that is impugned and some feared impediment to the conduct of the proceedings that are pending, which impediment can properly be characterised as an interference with the administration of justice or, more specifically in a particular case, as unfairness to an accused.⁷⁶

109 Gageler and Keane JJ went on to endorse the observation of the Chief Justice and Crennan J in *X7* to the effect that *Hammond* could be distinguished on the basis that had the injunctive relief not been granted the prosecution would have been able to gain 'access to evidence and information compulsorily obtained which could establish guilt of the offences, and which was subject only to a direct use immunity'.⁷⁷ That was not necessarily true of either *X7* or *Lee v NSWCC*, since greater protection was available in those cases.

110 Their Honours said that *Hammond* was not authority for the proposition that a real risk to the administration of justice necessarily, or presumptively, arises by reason only of the exercise of a statutory power to compel the examination on oath of a person against whom criminal proceedings have been commenced but not completed where the subject-matter of the examination will overlap with the subject-matter of the proceedings. The majority in *X7* does not appear to us to have embraced such a proposition.⁷⁸

111 Finally, their Honours said:

There is a variety of ways in which, as a matter of practical reality, the examination on oath of a person against whom criminal proceedings have been commenced may have a tendency to give rise to unfairness amounting to an interference with the due course of justice in a particular case. The deprivation of a legitimate forensic choice available to the person in those proceedings may be one of those ways. However, we are unable to regard as the deprivation of a legitimate forensic choice a practical constraint on the legal representatives of the person leading evidence or cross-examining or making submissions in the criminal proceedings to suggest a version of the facts which contradicted that given by their client on oath in the examination. The legal representatives would, of course, be prevented from setting up an

⁷⁶ Ibid 453–5 [318]–[320] (citations omitted).

⁷⁷ Ibid 455 [322] citing *X7* (2013) 248 CLR 92, 115 [36].

⁷⁸ (2013) 302 ALR 363, 455–6 [322].



affirmative case inconsistent with the evidence but they would not be prevented from ensuring that the prosecution is put to proof or from arguing that the evidence as a whole does not prove guilt.

The notion that any subtraction, however anodyne it might be in its practical effect, from the forensic advantages enjoyed by an accused under the general law necessarily involves an interference with the administration of justice or prejudice to the fair trial of the accused is unsound in principle and is not consistent with *Hamilton*.⁷⁹

112 The contrast between the approach taken by Gageler and Keane JJ in their joint judgment, and that taken by the three dissentients in *Lee v NSWCC*, could hardly be more stark.

113 Hayne J was obviously annoyed, if not positively livid, that *X7*, a recent decision of the Court, which he regarded as entirely dispositive of the issues raised in *Lee v NSWCC*, was being treated inappropriately. His Honour issued the following stern rebuke to his colleagues in the majority:

Of course this court is not bound by its previous decisions. But the doctrine of precedent underpins the proper exercise of the judicial power of the Commonwealth. That doctrine requires that a relevant previous decision of the court, even if reached by majority, be followed and applied unless it is to be overruled. Although the statutory provisions considered in this case differ from those considered in *X7*, the principles recognised and applied by the majority in *X7* apply with equal force to this case.

In *Queensland v Commonwealth*, Gibbs J rightly said that '[n]o Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the court' (emphasis added). That is why, as Gibbs J also pointed out, again rightly, '[i]t is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his [or her] own opinions in preference to an earlier decision of the court'.

These statements of principle were made in connection with constitutional issues. They are basic and indisputable and apply with equal (if not greater) force in non-constitutional cases.⁸⁰

⁷⁹ Ibid 456 [323]–[324] (citations omitted).

⁸⁰ Ibid 390–1 [62]–[64] (citations omitted).



114 Hayne J went on to say:

In *X7*, this court held, as a step necessary to the reasoning of the majority decision, that *Hammond v Commonwealth* stated and applied established principles which determined the decision in *X7*. Those principles determine this case.

In *X7*, this court held that *Hammond* cannot be dismissed from consideration as decided in haste or improvidently. Nor can it be dismissed from consideration, as it was in the Court of Appeal in this case, as ‘not a case which lends itself to the extraction of principle’. The decision in *Hammond* cannot be confined to its own facts. In *X7*, this court held that *Hammond* cannot be dismissed from consideration on the basis that it has somehow been ‘overtaken’ by this court’s later decision in *Hamilton v Oades*.

As Bell J demonstrates, no relevant distinction between the CAR Act and the legislation at issue in *X7* has been identified. The division of opinion in this case stems from differing opinions about what was decided in *Hammond* and *Hamilton*. Those issues were settled by the decision in *X7*. No party or intervener suggested in this case that the decision in *X7* was given per incuriam. No party or intervener submitted that the majority in *X7* ‘failed to advert to any relevant consideration, or overlooked any apposite decision or principle’.

All that has changed between the decision in *X7* and the decision in this case is the composition of the Bench. A change in composition of the Bench is not, and never has been, reason enough to overrule a previous decision of this court.⁸¹

115 Having reminded the majority of the fundamental role of precedent in our common law system, his Honour added that it would be a ‘basic and serious legal error’ to treat the decision in *X7* as ‘irrelevant’ in dealing with *Lee v NSWCC* simply because the CAR Act provisions differed from the legislative provisions considered in *X7*.⁸² He added that the principles identified and applied in *X7* ‘are fundamental and generally applicable principles of very long standing’.⁸³

116 Hayne J was particularly critical of the distinction drawn by the Chief Justice and

⁸¹ Ibid 391–2 [67]–[70] (citations omitted).

⁸² Ibid 392 [71].

⁸³ Ibid.



Crennan J between *Hammond*, and the instant case, on the basis that *Hammond* had concerned the conduct of an Executive inquiry whereas the CAR Act provided for examination on behalf of an arm of the Executive before a judicial officer pursuant to a court order.⁸⁴ His Honour considered that distinction to be illusory.

117 Finally, Hayne J addressed the following pointed remarks to his brethren, Gageler and Keane JJ:

Fourth, beneath many, perhaps all, of the arguments deployed in favour of the conclusion that the CAR Act permits the compulsory examination of a person charged with, but not yet tried for, an offence about the subject matter of the pending charge lies an assumption that the innocent have nothing to fear from the processes of compulsory examination, and that those who are guilty will lose nothing that society can value if compelled to admit their guilt. The assumption is false. It is founded not only on presupposing what will be the outcome of the exclusively judicial process of adjudicating guilt, but also on dividing the relevant world into the guilty and the innocent. The assumption thus presupposes an outcome which has yet to be determined. Not only that, the assumption ignores both the burden and the standard of proof that must be applied in adjudging guilt. If the prosecution cannot prove guilt beyond reasonable doubt, the accused must be found not guilty. Guilt must be determined at trial, not assumed.

Whether or not the arguments in favour of construing the CAR Act as permitting compulsory examination of a person about the subject of a charge pending against that person proceed from an assumption of the kind just described, they were all arguments which accepted that the CAR Act does not authorise what would otherwise be a contempt of court. The CAR Act precluded direct use at an accused's trial of an answer given at the examination. Section 13A(3) provided that '[f]urther information obtained as a result of an answer being given' at an examination was not inadmissible in criminal proceedings on the ground that the answer had to be given, or that the answer given might incriminate the person. Yet argument in this matter proceeded on the basis that indirect use of a compelled admission at trial may be unfair (giving the prosecution an advantage it should not have), or may interfere with the due administration of criminal justice and be a contempt of court.

The asking of questions and the compelling of answers about the pending charge inevitably interfere with the conduct of an accusatorial trial and embarrass the defence of the accused. The answers the accused has been compelled to give to the questions asked deprive the accused of forensic choices that otherwise would be legitimately open at trial to test the case which the prosecution advances. That is, the asking of questions about the pending charge and the compelling of answers to those questions work a

⁸⁴ Ibid [73].



fundamental alteration to the accusatorial process of criminal justice.

It is theoretically possible that, at the end of a trial, it may be said that the deprivation of those choices was anodyne in its practical effect. But that is not to the point. The issue is presented when it is sought to conduct the examination. The examination occurs *before* the trial has begun.

No doubt, it is important to notice that an examination under s 31D(1) was to be conducted before the Supreme Court or an officer of the court prescribed by rules of court. It is to be assumed that the court or its officer would act to prevent oppression of the person being examined and would act to prevent misuse or abuse of the process of examination, whether by limiting or precluding publication of what transpires at the examination, or otherwise. But if the trial of the person being examined is pending, the court (or the officer of the court) cannot know, and cannot predict, what might harm the defence of that person at trial. Those matters are unknown to, and unknowable by, the court (or its officer) for the simple reason that the court (or its officer) does not know, and cannot be told, what are or will be the accused's instructions to his or her lawyers at trial.

To suggest that preserving the legitimate forensic choices that are open to an accused at a criminal trial would permit, let alone encourage, the pursuit of falsehood misstates the fundamental character of a criminal trial. Reference to the pursuit of falsehood may suggest that a criminal trial is an inquisition into the truth of the allegation made. It is not. Subject to the rules of evidence, fairness and admissibility, each of the prosecution and the accused is free to decide the ground on which to contest the issue, the evidence to be called and the questions to be asked. Reference to the pursuit of falsehood may suggest that legitimately testing the strength of the prosecution's proof is somehow dishonest. It is not.

...

The accusatorial process of criminal justice reflects the balance that is struck between the power of the state and the place of the individual. Legislative alteration to that balance may not be made without clear words or necessary intendment.⁸⁵

118 Kiefel J, in an equally forceful but perhaps less acerbic judgment, argued in support of the reasoning that had underpinned X7. Her Honour said:

Given the functions of the Crime Commission, the role which it has in liaising with other bodies and the constitution of its Management Committee, there can also be little doubt that the evidence obtained in an examination would be made available to investigating or prosecutorial authorities. As the cases explain, there are other effects upon an accused person's defence, and upon the conduct of his or her trial, which may follow as a result of an examination. There is a real risk, if not a likelihood, that aspects of the appellants' trials will

⁸⁵ Ibid 393–5 [77]–[84] (emphasis in original) (citations omitted).



differ from a criminal trial as it is ordinarily conducted, especially in its accusatorial aspects. Rather than the prosecution being required to prove its case without assistance from the appellants, the examination is likely to result in the prosecution being advantaged in the conduct of its case and the appellants prejudiced.⁸⁶

119 Kiefel J noted that the Supreme Court had inherent powers to prevent obstruction to the administration of justice. The extent and efficacy of those powers might be relevant to the exercise of discretion, with regard to whether to order an examination, but as her Honour observed, were not relevant to the principal issue on the appeal which concerned the construction of the CAR Act.⁸⁷ That issue had to be resolved in accordance with what her Honour termed 'the principle of legality'.⁸⁸

120 In her Honour's opinion, it would not only be the privilege against self-incrimination that would be affected if the CAR Act compelled an accused person to give answers under examination to questions concerning the offence with which he or she was charged, it would alter the presumption of innocence (which she termed the 'fundamental principle'), and the very accusatorial system of criminal justice.⁸⁹ She criticised the reasoning of the New South Wales Court of Appeal for having failed to acknowledge that more was at stake than whether or not a statute had modified a particular set of common law protections.⁹⁰

121 Bell J agreed with the reasons given by Kiefel J. Her Honour noted that following the hearing of the appeal, judgment had been delivered in *X7*. Critical to that judgment was the rejection of an argument that *Hammond* had been 'overtaken' by *Hamilton*. The Court of Appeal had concluded in *Lee v NSWCC* that Hulme J's discretion had miscarried because his Honour had relied on the authority of *Hammond*. That conclusion could not be sustained. *Hammond* stood as good law.

⁸⁶ Ibid 414 [163] (citations omitted).

⁸⁷ Ibid 415 [164].

⁸⁸ Ibid 416 [171].

⁸⁹ Ibid 417 [174].

⁹⁰ Ibid 428 [222].



122 In language redolent of part of Hayne J's analysis, her Honour said:

The entitlement of a person accused of criminal wrongdoing to remain silent is a fundamental common law right and not a mere forensic advantage. The exercise of the right, and the election to put the prosecution to proof, are decisions which may be made for a variety of reasons. To acknowledge that to compel an accused to give an account of the circumstances of an alleged offence in parallel civil proceedings may limit the capacity of the accused to put the prosecution to proof at the criminal trial is not to condone the pursuit of falsehood. To characterise it in that way risks inverting the assumption upon which our adversarial system of criminal justice proceeds, which is to say that the accused is entitled to be acquitted of a charge of criminal wrongdoing unless *unaided by him or her* the prosecution proves guilt.⁹¹

Lee v The Queen⁹²

123 There is a postscript and sidenote to *Lee v NSWCC*. The appellants in that case eventually stood trial on various drug and firearm offences, as was to be expected. The first appellant had previously been required to give evidence before the NSWCC in 2009, but had not, at that stage, been charged with any of those offences. Section 13(9) of the NSWCC Act (since repealed) required the NSWCC to make a direction prohibiting the publication of evidence given before it where publication 'might prejudice ... the fair trial of a person who has been or may be charged with an offence'. A direction was given in those terms.

124 A week or so after the first appellant was questioned, members of the New South Wales police force executed a search warrant at premises in Sydney and a number of incriminating items (including a quantity of powder) were found. It was strongly suspected that the powder seized was drugs, but no drug charges could be laid until the tests of the powder had been completed.

125 The second appellant, who was the first appellant's son, was present at the premises when the search warrant was executed and he was charged with firearms offences. He was

⁹¹ Ibid 438 [266] (emphasis in original) (citations omitted).

⁹² (2014) 308 ALR 252 (French CJ, Crennan, Kiefel, Bell and Keane JJ).



examined on 16 September 2009. At that time, charges against both appellants relating to the supply of prohibited drugs were imminent, but had not yet been laid.

126 Pseudoephedrine was subsequently detected in some of the powder. In May 2010 the appellants were charged with supply of the drugs. The transcripts of their evidence before the NSWCC were published by the Commission to the police and provided to the DPP. In addition, documents which the first appellant had produced under coercion were also made available to the police and the DPP.

127 In July 2010, a DPP solicitor, who was preparing the prosecution of the charges against the appellants, emailed a police officer who had been seconded to the NSWCC and had laid the charges. The solicitor asked if she could see the transcripts of the appellants' evidence given before the Commission, 'especially if it is something that defence are going to try & rely on – specifically that they had no knowledge that the washing powder was actually drugs'.⁹³

128 The request was forwarded to the Commissioner, who approved it. The transcripts were subsequently made available to the DPP.

129 The prosecutor, in the course of a pre-trial hearing in November 2010, made it plain that although the Crown could not rely upon any of the material provided to the NSWCC, because of the 'use' immunity that had been invoked, he had every intention of using that material derivatively, it having provided the Crown with considerable insight into the nature of the defence case.

130 It was at that point that senior counsel for the first appellant interrupted, and complained about the prosecution apparently having been provided with transcripts of evidence given before the NSWCC.

⁹³ Ibid 254 [9].



131 Accordingly, the appellants' legal representatives were made aware, before the trial, that the Crown was in possession of these transcripts. Indeed, the second appellant's solicitor later said that the publication of the transcript of his client's evidence foreclosed the possibility that the second appellant would give evidence at trial. However, the appellants' legal representatives did not know that the transcripts had been supplied to the DPP, at the DPP's request, in order that the DPP could ascertain any defences that the appellants might raise.

132 The communication of the transcripts to the DPP formed the basis of a ground of appeal to the New South Wales Court of Criminal Appeal. That Court⁹⁴ dismissed the appeals.

133 The Court of Criminal Appeal heard evidence from the prosecutor who had conducted the trial against the appellants. While he agreed that the transcripts which had been provided gave the Crown an indication of what defences may be relied upon by the appellants, he said that he believed, at all times, that he was entitled to read them, despite thinking it 'unusual' that he had in his possession materials disclosing the defence case.⁹⁵

134 The Crown conceded, before the Court of Criminal Appeal, that there had been a breach of s 13(9) of the NSWCC Act and accepted that, as a consequence, the appellants' trial had miscarried in respect of the drug charges. However, the Crown declined to make a similar concession in respect of the weapon charges.⁹⁶ The Court of Criminal Appeal expressed reservations as to whether the Crown's concession should be accepted. That, in turn, led the Crown to withdraw its concession, in part. The Crown continued to accept that the publication had been unlawful, but it no longer conceded that there had been a miscarriage of justice in relation to the drug convictions.

⁹⁴ *Lee v The Queen* [2013] NSWCCA 68 (Basten JA; Hall and Beech-Jones JJ).

⁹⁵ (2014) 308 ALR 252, 256 [16].

⁹⁶ *Ibid* 256–7 [17].



135 The High Court was of the view that the Crown's original position had been correct, but that its concession failed to go far enough.⁹⁷ It held that the trial had miscarried in a 'fundamental respect', and that because the Crown case involved offences that were all interconnected, including the firearms, the money and the drugs, there should have been orders quashing the convictions on all charges, and a retrial ordered.

136 The Court, in a unanimous judgment, referred to *X7*, noting the majority position in that case, that powers of compulsory examinations given to the ACC were not to be construed as applying to persons already charged with offences the subject of the examination. To do so would be to

depart from the accusatorial nature of the criminal justice system in a fundamental respect. Clear words or those of necessary intent were therefore necessary and neither were present in the legislation in question. As such, it was not necessary for the majority in *X7* to consider the protective purpose of a provision similar to s 13(9). However, French CJ and Crennan J, who were in dissent, did so. It was a matter of some significance to their Honours' reasoning that the legislation, in providing for a direction regarding non-publication, did so in order to safeguard the examined person's trial as fair.⁹⁸

137 The Court continued:

Our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in *X7*. The principle is so fundamental that 'no attempt to whittle it down can be entertained' albeit its application may be affected by a statute expressed clearly or in words of necessary intent. The privilege against self-incrimination may be lost, but the principle remains. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice.⁹⁹

138 The Court went on to note that the purpose of s 13(9) of the NSWCC Act was to ensure the fair trial of someone who may be charged with an offence. In that sense, it 'supported the maintenance of the system of criminal justice referred to in *X7* and the trial for

⁹⁷ Ibid 257 [19].

⁹⁸ Ibid 259 [31] (citations omitted).

⁹⁹ Ibid 260 [32] (citations omitted).



which that system provides'.¹⁰⁰ The protective purpose of s 13(9) would normally require the NSWCC to 'quarantine' evidence provided by a person to be charged from persons involved in prosecuting those charges.¹⁰¹ That purpose was clearly not met.

139 The question for determination, according to the High Court, was not whether the publication of the transcripts was unlawful or wrongful, but whether, as a result of the Crown obtaining the appellants' evidence, there was a miscarriage of justice.

140 The Court of Criminal Appeal had held that the provision of the transcripts to the DPP had no palpable effect on the appellants' defence. Basten JA (with whom the other members of the Court agreed), also considered it fatal to the appeal that the defence failed to object, when it first became aware that the prosecution had the transcripts, to the apparent possession of those transcripts. An initial complaint at the pre-trial hearing had not been pursued.

141 The High Court disagreed. It was not to the point that the defence did not object or seek a stay of proceedings. It was more to the point that the Crown's 'possession of the appellants' evidence before the Commission put at risk the prospect of a fair trial, which s 13(9) sought to protect'.¹⁰² In this respect, there was a 'fundamental departure' from the criminal trial 'comprehended by our system of criminal justice'.¹⁰³ The Court did not deem it necessary to resort to questions of policy to determine whether a miscarriage of justice had occurred. The criminal trial was affected in a fundamental respect because the provision of the transcripts to the Crown simply 'altered the position of the prosecution vis-à-vis the accused'.¹⁰⁴

¹⁰⁰ Ibid [34].

¹⁰¹ Ibid.

¹⁰² Ibid 262–3 [44].

¹⁰³ Ibid 263 [46].

¹⁰⁴ Ibid 264 [51].



142 It is perhaps not surprising that the High Court found in favour of the appellants in *Lee v The Queen*. What is odd is that *X7* was cited repeatedly, and with obvious approval, whereas *Lee v NSWCC* rated only the briefest of mentions, by way of footnote, and with no indication that the Court considered the two cases to be in any way irreconcilable. Clearly, any mechanisms thought to protect the appellants against prejudice were significantly eroded by the DPP when it obtained the transcripts, and from them a detailed understanding of the defences upon which the appellants were likely to rely in their trial.

Seller v The Queen; McCarthy v The Queen¹⁰⁵

143 I wish to refer only briefly to *Seller*, a decision of the High Court which, at first blush, might be thought to be at odds with *Lee v The Queen*. The facts in the two cases were, in some respects, not dissimilar. The applicants in *Seller* were charged with having conspired to dishonestly influence a Commonwealth public official, the Commissioner of Taxation, in the exercise of his duties contrary to s 135.4(7) of the *Criminal Code Act 1995* (Cth). In August 2012, Garling J, the trial judge to whom the case had been assigned, ordered that the prosecution be permanently stayed on the basis that the ACC had disclosed to the Commonwealth DPP certain transcripts of evidence given by the applicants at an examination, contrary to a direction made by the examiner at the conclusion of the examination. Garling J found that the applicants' right to a fair trial, in accordance with the adversarial process, had been compromised.¹⁰⁶

144 The Commonwealth DPP brought an interlocutory appeal against that decision.¹⁰⁷ The appeal was purportedly brought as of right under s 5F(2) of the *Criminal Appeal Act 1912* (NSW). The central legislative provision considered by the Court of Criminal Appeal was s 25A of the ACC Act which relevantly provided:

¹⁰⁵ [2013] HCATrans 204 ('*Seller*').

¹⁰⁶ [2012] NSWSC 934.

¹⁰⁷ [2013] NSWCCA 42.



- (3) An examination before an examiner must be held in private and the examiner may give directions as to the persons who may be present during the examination or a part of the examination.

...

- (9) An examiner may direct that:
- (a) any evidence given before the examiner; or
 - (b) the contents of any document, or a description of any thing, produced to the examiner; or
 - (c) any information that might enable a person who has given evidence before the examiner to be identified; or
 - (d) the fact that any person has given or may be about to give evidence at an examination;

must not be published, or must not be published except in such manner, and to such persons, as the examiner specifies. The examiner must give such a direction if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence.

- (10) Subject to subsection (11), the CEO may, in writing, vary or revoke a direction under subsection (9).
- (11) The CEO must not vary or revoke a direction if to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been or may be charged with an offence.

145 Bathurst CJ (with whom McClellan CJ at CL and Rothman J agreed) concluded that the section should not be construed as prohibiting 'derivative use' of the material obtained under coercive questioning. His Honour said:

I do not believe a fair trial generally will be prejudiced by the use of information obtained during the course of an examination to obtain admissible evidence. Thus, answers which would tend to indicate the availability of admissible evidence could properly be used for this purpose. For example, in cases such as the present this may include the location of bank accounts. Further, it does not seem to me that the use by the prosecution of documents produced during the course of an examination which supported the Crown case, usually would compromise a fair trial. However, the question of whether derivative use of such material could have that effect will always depend on the material in question and the circumstances of its use.¹⁰⁸

¹⁰⁸

Ibid 47 [102].



146 Bathurst CJ continued:

The position is different in my opinion if the provision of the material in question discloses defences or explanations of transactions by the accused which he or she may raise at a trial, and possibly evidence or information which would tend to show that documents or transactions apparently regular on their face in fact tend to support the proposed charges. This would be contrary to the principles ... that the onus is on the Crown to prove its case and that the prosecution must prove it without reliance on incriminating answers. To provide to prosecutorial authorities material compulsorily obtained relating to such matters could compromise a fair trial in accordance with these principles.¹⁰⁹

147 His Honour concluded that Garling J had erred in ordering a stay of proceedings despite having correctly concluded that there was a risk of prejudice, arising out of the conduct of the hearing, such that a direction should have been given. The judge, however, had failed to consider whether such prejudice had in fact occurred.

148 Accordingly, Bathurst CJ considered that Garling J had taken the erroneous view that ‘a stay should be granted whenever there was communication of a person’s defence in any form including derivative information to prosecutorial authorities, or where there was a real risk that such communication would occur’.¹¹⁰ There was no evidence before Garling J to justify his conclusion that the trial would suffer from a fundamental defect as a result of the delivery of the transcripts to the Commonwealth DPP.

149 On 6 September 2013, the High Court heard and rejected an application for special leave in this matter.¹¹¹ That application was dealt with some eight months or so before the Court heard argument regarding the somewhat similar scenario which arose in *Lee v The Queen*.

150 Counsel for the first applicant in *Seller* argued before the High Court that the Court of Criminal Appeal had erred in principle by failing to recognise that his client had suffered

¹⁰⁹ Ibid 48 [104].

¹¹⁰ Ibid 50 [112].

¹¹¹ [2013] HCATrans 204.



actual and not potential prejudice. Essentially, it was argued, the applicant's choices at trial were affected, thereby leading to advantages to the prosecution. Upon a review of the transcript of the special leave hearing, it seems that the first applicant was incapable of articulating those perceived advantages as, counsel conceded, the extent of the use of the transcripts by the prosecution remained unknown.

151 Senior counsel for the second applicant argued, in support of special leave, that the Court of Criminal Appeal had failed properly to perform the appellate function by misunderstanding the analysis that had been undertaken by Garling J at first instance. It was submitted that his Honour had not reasoned, as the Court of Criminal Appeal had found, that merely because there had been a compromise of the right to a fair trial, a stay had to be ordered.

152 The High Court refused special leave on the basis that there was no evidence that the trial would suffer from a fundamental defect as a result of the wrongful delivery of the transcripts to the DPP. The Court held that no wider question of general principle would fall for consideration if special leave to appeal were granted.

153 It may seem odd that in *Lee v The Queen*, the Court found that a wider question of general principle did arise in circumstances which, in many respects, were not dissimilar to those in *Seller*. The facts in *Lee v The Queen* were, perhaps, more compelling, and there was cogent evidence in that case that the prosecution had gained a definite advantage by being made aware of the details of the defence upon which the appellants would rely. It may be that the High Court was less willing to consider the point in *Seller* because it involved what was in essence, at that stage, an interlocutory appeal, rather than an appeal against conviction.¹¹²

Conclusion

¹¹² I understand that the trial is currently scheduled to be held in October 2014.



154 Until relatively recently, the impact of Royal Commissions and Commissions of Inquiry on pending criminal trials was thought to be well understood in this country.

155 The High Court, in *X7*, proceeded along a well-trodden path. It made clear that where a person had been charged with an offence, but not yet tried, he or she could not be compulsorily examined about the subject matter of the pending charge.

156 A few months later the High Court found in *Lee v NSWCC* that, depending upon the particular legislative regime governing the use of coercive investigative powers, this course could be acceptable. The majority considered that any prejudice arising as a result could be adequately overcome by appropriate procedural orders.

157 Clearly, reasonable minds may differ as to whether *X7* can truly be reconciled with *Lee v NSWCC*. On the assumption that they cannot, they may also differ as to which approach is preferable. For what it is worth, my own view is that the majority in *X7* were correct, and that *Lee v NSWCC* reflects an unfortunate departure from basic principle.

158 I have real difficulties with the approach taken by the majority in *Lee v NSWCC* so far as the doctrine of precedent is concerned. I think Hayne J was correct to say that the principle in *X7* was wholly applicable to the resolution of the issue raised in *Lee v NSWCC*.

159 In my opinion, it is unfair, and quite wrong, to allow the Executive, using statutory coercive powers, to force an accused facing pending trial to answer questions about the very subject matter of the charges brought against him or her. To do so sharply tilts the balance between the interests of the state in bringing to justice those who have committed serious criminal offences, and the right of the accused to a fair trial.

160 It is one thing to say that an accused should no longer be permitted, as he once was, to withhold from the prosecution even the barest indication of the nature of the defence to be advanced at the trial. Sensibly, we have moved well beyond trial by ambush.



161 It is altogether another thing to say that an accused should be compelled, under threat of imprisonment, to reveal, in detail, each and every aspect of his or her defence, before the trial commences. There can be no doubt that having ‘locked the defence in’ to a specific version of events provides the prosecution with an invaluable advantage to which it was never, traditionally, entitled. Not only does this prevent the accused, as a practical matter,¹¹³ from giving evidence in his or her own defence at trial, at least in some cases. It also enables the prosecution to discover any weaknesses in its case, and to seek to overcome them. That is not what our accusatorial system of justice is all about. Indeed, it might be thought to be the very antithesis of that system.

162 In *Lee v NSWCC*, the majority spoke of a series of ‘protections’ afforded to the accused by the relevant statute as compensation for compelling him, possibly, to incriminate himself. In my opinion, a number of these ‘protections’ are more illusory than real. Of course, the decision of the Court of Criminal Appeal in *Seller*, as upheld by the High Court, illustrates that very point.

163 This is not to understate the importance of investigative bodies being armed with coercive powers. Such bodies can, and do, serve a valuable role. Their existence can be justified when their powers are used appropriately. They can, in many cases, promote democratic accountability.

164 Traditionally, such bodies have been described as ‘institution[s] of last resort’.¹¹⁴ As

¹¹³ By ‘practical matter’, I mean that counsel appearing for the accused is put in an invidious position, effectively forced to conduct the defence on the basis that the prosecution is put to proof, and nothing more. Gageler and Keane JJ, in *Lee v NSWCC*, viewed this as nothing more than an anodyne difficulty. With respect, it is surely far more than that. Moreover, the problem cannot be overcome by ensuring that counsel is kept in ignorance of what his or her client said during the course of coercive questioning. For one thing, the accused faces the risk of being prosecuted for perjury in relation to answers given under coercion, despite any ‘use’ immunity. Counsel must be aware of that risk. In addition, as a matter of reality, the accused’s previous account, as given under coercion, will almost inevitably ‘leak’, not merely to law enforcement authorities, but more generally.

¹¹⁴ Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths, 2006) 6.



they proliferate, that may no longer be an apt description. On any view, they are not, and should never become, tools by which the prosecution in a trial can gain an unfair advantage over an accused.

165 In my opinion, the High Court's decision in *Lee v NSWCC* casts something of a shadow over that basic precept. Curiously, that Court's decision in *Lee v The Queen*, with its powerful endorsement of some aspects of X7, raises the possibility that the Court may be having second thoughts about the wisdom of its decision in *Lee v NSWCC*. Frankly, I doubt that even now, the last word on this subject has been spoken.