

LEE & ANOR v NEW SOUTH WALES CRIME COMMISSION (S29/2013)

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 276

Date of judgment: 6 September 2012

Special leave granted: 15 February 2013

During 2009 and 2010 the Appellants were charged with various offences pertaining to the possession of prohibited drugs, prohibited firearms and stolen property. In June 2010 the Respondent (“the Crime Commission”) sought orders compelling each of the Appellants to be examined before the Supreme Court pursuant to s 31D(1) of the *Criminal Assets Recovery Act* 1990 (NSW) (“the Act”). Section 13A(1) of that Act provides that a person being examined cannot be excused from answering any question on the ground that their answer might tend to incriminate them.

On 28 February 2011 Justice R S Hulme refused the Crime Commission’s application. (At that time the Appellants’ trial was underway and a separate trial of the First Appellant on one charge had not commenced.) His Honour held that the removal of the right to avoid giving self-incriminating answers during an examination by s 13A(1) of the Act created a risk of prejudice to a fair trial of the Appellants. That risk was not overcome by the limited protections provided by ss 13A(2) and 62 of the Act. Those protections were the non-admissibility in criminal proceedings of answers (to which objection could have been taken) given during examination and the power to make non-publication orders.

On 6 September 2012 the Court of Appeal (Beazley, McColl, Basten, Macfarlan & Meagher JJA) unanimously allowed the Crime Commission’s appeal. Their Honours held that effect must be given to Parliament’s intention, manifested in s 13A(1) of the Act, to abrogate the common law privilege against self-incrimination. Such an intention was supported by s 63 of the Act, which provides that the mere existence of criminal proceedings is not a ground for a stay of proceedings under the Act. The Court of Appeal found that the Registrar had appropriate powers to minimise any risk of prejudice that might arise during an examination. It then ordered that each of the Appellants be examined pursuant to s 31D(1) of the Act.

On 14 March 2013 the Appellants filed a Notice of a Constitutional Matter in accordance with s 78B of the *Judiciary Act* 1903 (Cth). The Attorneys-General for the Commonwealth, New South Wales and Queensland have advised this Court that they will be intervening in this matter.

The grounds of appeal include:

- The Court of Appeal erred in holding that Hulme J had erred in declining to make orders allowing the examination on oath of Jason (Do Young) Lee and Seong Won Lee to proceed.

- The Court of Appeal erred in holding that s 31D of the Act requires the Court to determine an application for an examination order without regard to the capacity of that order to prejudice the fair trial of the person proposed to be examined.