

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF VICTORIA



Nos M168, M174, M175 and M176 of 2017

BETWEEN:

TONY STRICKLAND (a pseudonym)

DONALD GALLOWAY (a pseudonym)

EDMUND HODGES (a pseudonym)

RICK TUCKER (a pseudonym)

Appellants

and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION

Respondents

OUTLINE OF ORAL SUBMISSIONS OF THE SECOND RESPONDENT

PART I

Filed on behalf of the Australian Criminal Intelligence
Commission by:

The Australian Government Solicitor
Level 34, 600 Bourke St
Melbourne VIC 3000

Date of this document: 8 May 2018

Contact: Kylie McInnes

File ref: 17010749

Telephone: 03 9242 1291

Lawyer's E-mail: kylie.mcinnnes@ags.gov.au

Facsimile: 03 9242 1333

PART II INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART III PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

History and purpose of the Commission

2. The *Australian Crime Commission Act 2002* (Cth) (**ACC Act**) must be interpreted having regard to its object and purpose, and to the mischief it was intended to remedy. The legislative history demonstrates that the Commission was established to (**WS [15]-[18], [20]-[21], [23]**):

- (a) operate as another arm of the criminal investigation process, gathering and assembling evidence for transmission to other law enforcement agencies; and
- (b) work in co-operation with existing police forces, including by using special powers in circumstances where traditional law enforcements methods were considered unlikely to be effective to support the laying of charges.

2.1. Costigan, *Interim Report No 5* (July 1983) at [2.10], [2.12]-[2.13], [3.01], [3.07], [3.13], [3.20]-[3.21], [4.03].

2.2. Stewart, *Final Report of the Royal Commission into Drug Trafficking* (February 1983) at 771, 773, 775, 786.

2.3. *Sorby v Commonwealth* (1983) 152 CLR 281 at 282-283, 287, 299, 306-307.

2.4. Green Paper (Young and Evans), *A National Crime Commission?* (June 1983) at [1.1]-[1.2], [1.5], [2.1]-[2.5], [5.4]-[5.5], [5.11], [6.9], [6.12]-[6.14], [6.16]-[6.18], Appendix II.

2.5. Second Reading Speech, National Crime Authority Bill 1983, 7 June 1984, at 3092-3093.

2.6. Senate Standing Committee on Constitutional and Legal Affairs, *Report on the National Crime Authority Bill 1983* (May 1984) at [2.14]-[2.15], [2.18]-[2.19], [2.21].

3. That understanding of the Commission's role accords with the text of the Act and has been reinforced by subsequent legislative amendments (**WS [6]-[12], [18]-[19], [22]**).

- 3.1. *National Crime Authority Act 1984* (Cth) (as enacted) ss 11, 12, 17, 25, 30.
- 3.2. *National Crime Authority Legislation Amendment Act 2001* (Cth) Sch 1, items 11-12.
- 3.2.1. Revised Explanatory Memorandum at 10.
- 3.2.2. Second Reading Speech, 24 September 2001 at 31304.
- 3.3. Second Reading Speech, Australian Crime Commission Establishment Bill 2002, 26 September 2002, at 7328-7330.
- 3.4. ACC Act ss 7A, 7C, 12, 17, 25A, 30, 51.
- 10 4. Example of operation of ACC Act (attached).
5. Section 25A(9) must be interpreted conformably with the purpose of the ACC Act read as a whole (WS [37]-[38]).
- 5.1. *Lee v NSW Crime Commission* (2013) 251 CLR 196 at [317]-[318].

Disclosure was lawful (Notice of Contention [1])

6. The argument that the 2008 and 2010 Determinations are invalid is not within the scope of the grant of special leave: Vol 15, AB 4950 (WS [48]).
7. The accusatorial system of justice is subject to statutory modification. There is no
20 prejudice to an accused simply because he or she is required by legislation to reveal information that gives the prosecution assistance in the conduct of his or her trial trial (WS [31][32]).
- 7.1. *Criminal Procedure Act 2009* (Vic) ss 183, 190.
8. Where a person has *not been charged*, a risk of prejudice to a fair trial cannot be established by demonstrating that the person has been required to answer questions that may provide assistance to the prosecution in the event that the person is charged, because the “companion principle” has no application prior to charge (WS [28]-[30]).
- 8.1. *R v Independent Broad-based Anti-Corruption Commission* (2016) 256 CLR 459
30 at [1], [7], [37], [43]-[46], [48], [51]-[52]; [73]-[74], [76]-[77].
- 8.2. *Zanon v Western Australia* (2016) 50 WAR 1 at [144].

9. It is impossible to state generally the nature and type of disclosure that might prejudice a fair trial. It will depend in all cases on the nature of the material to be disclosed, the function of the person or body to whom the material is to be disclosed and in some cases the timing of the disclosure (WS [33]-[36]).

9.1. *R v Seller* (2013) 273 FLR 155 at [102]-[106].

10. Contrary the Court of Appeal's conclusion at AB4843 [58]-[59], none of the following circumstances, either separately or in combination, required the examiner to make a direction under s 25A(9) (WS [26]-[27], [39]-[44]):

10.1. that each of the accused was a person "against whom a substantial case had already been assembled";

10.2. that the point had been reached where AFP investigators considered it appropriate to invite each of the accused to participate in a cautioned record of interview; and

10.3. the subject-matter of the examination concerned the very matters on which the likely charges were to be based.

Examinations were for the purposes of a special ACC investigation and assisting an AFP investigation is not an improper purpose (Notice of Contention [2] and [3])

11. Once the Board has authorised an investigation and determined that it is a special investigation, an examiner may conduct an examination for the purposes of a "special ACC investigation" under s 24A (WS [50][56]). No more is required (cf VSCA at AB 4892-4893 [179], 4895 [188]-[189]).

12. It is not improper for the Commission to assist the AFP in its law enforcement purposes. The purposes of both agencies substantially overlap and are complementary (WS [57]-[63]).

12.1. ACC Act ss 4, 7B, 7C(1) and (3), 12(1), 17(1), 24A, 25A(6), 28(3), 49, 59(7).

12.2. *LHRC v Deputy Commission of Taxation (No 3)* (2015) 326 ALR 77 at [21], [23], [161]-[162].

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Stephen Donaghue

Sashi Maharaj

Graeme Hill

Counsel for the Australian Criminal Intelligence Commission

SECOND RESPONDENT'S EXAMPLE CONCERNING SECTION 25A(9)

1. A passenger is seen by customs officials waiting at an airport luggage carousel without any luggage. There is only one bag unclaimed. When the passenger sees the customs officials, she walks away and does not collect the bag. The bag is found to contain a significant quantity of heroin.
2. The passenger refuses to speak to law enforcement at the airport, where she is identified but not arrested. The name on the bag is not the name of the passenger. While the Australian Federal Police (AFP) strongly suspect that the passenger was intending to collect the bag, they are uncertain whether they have a sufficient basis to charge her, and they seek legal advice from the CDDP.
3. The ACC has a reference from its Board authorising it to investigate drug importation from overseas, and determining that that investigation is a special investigation. AFP informs the ACC about the above events and asks if the ACC can assist. An Examiner decides to issue a summons to the passenger pursuant to s 28 of the Act for the purpose of examining her about the heroin in the bag.
4. The Examiner does not know anything about the source of the heroin, and therefore does not know whether the ACC is already investigating that source.
5. When the passenger attends before the Examiner pursuant to the summons, she denies that the bag was hers, and denies any knowledge of drugs. She is asked about her associates, sources of income, and who she banks with. She answers those questions, but claims self-incrimination, triggering the s 30(5) use immunity.
6. The ACC adjourns the examination, and uses its coercive powers to obtain records from the passenger's bank. Those records disclose substantial deposits not aligning with any legitimate source of income.
7. At the resumed examination, the passenger is asked about the substantial deposits into her bank account. She makes admissions about previous drug importations for which she was paid. She also admits that she was intending to collect the bag at the airport, which had been checked in by a different passenger who was involved in the scheme. By reason of s 30(5), those admissions cannot be used against her.
8. The passenger says that, after the first importation, she participated only because a senior gang member threatened her with violence if she refused. She tells the Examiner the name of the person to whom she was to deliver the drugs. She also reveals that, because she was worried about what would happen if she stayed silent, she told the senior gang member that she had been questioned by the ACC, and that as a result of this information he is planning to flee overseas. She says that she believes that the senior gang member is in the process of concealing substantial amounts of cash and assets, and that he is also planning to dump drugs from a previous importation on to the market before he flees, including drugs with impurities he thinks might be associated with the recent death of a young man in Bondi.