IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

ON APPEAL FROM THE SUPREME COURT OF VICTORIA COURT OF APPEAL

**No. M174 of 2017**

BETWEEN: **DONALD GALLOWAY (a pseudonym)**
Appellant

and

**COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS**
Respondents

**No. M175 of 2017**

BETWEEN: **EDMUND HODGES (a pseudonym)**
Appellant

and

**COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS**
Respondents



**No. M176 of 2017**

BETWEEN: **RICK TUCKER (a pseudonym)**
Appellant

and

**COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS**
Respondents

**No. M168 of 2017**

BETWEEN: **TONY STRICKLAND (a pseudonym)**
Appellant

and

**COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS & ORS**
Respondents

# SUBMISSIONS OF THE AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION (THE SECOND RESPONDENT)

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## Part I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

## Part II STATEMENT OF ISSUES

2. The ultimate question is whether any of the Appellants (the **Accused**) are entitled to a permanent stay of proceedings because the Australian Criminal Intelligence Commission (the **ACIC**) disseminated to officers of the Australian Federal Police (the **AFP**) and the First Respondent (the **CDPP**) material obtained through the compulsory examination of each Accused before they were charged.

3. The argument that the Accused are entitled to a permanent stay depends, in part, on the ACIC having acted unlawfully. For that reason, the first issues that require determination are those raised by the ACIC's notice of contention, being:

   3.1. whether the examiner was bound to conclude that dissemination of the information provided by the Accused during their examinations (the **examination material**) might prejudice their fair trial, such that he was required to make a direction under s 25A(9) of the *Australian Crime Commission Act 2002* (Cth) (the **ACC Act**) preventing the dissemination of that material to AFP and CDPP officers (on the basis that, despite the fact that the Accused had not been charged at the time they were examined, they were persons who "may be charged"); and

   3.2. whether the examinations of the Accused were unlawful because they were:

      (a) not conducted "for the purposes of a special ACC investigation" within s 24A of the ACC Act; or

      (b) conducted for the purposes of assisting an AFP investigation.

## Part III NOTICES OF CONSTITUTIONAL MATTER

4. The ACIC agrees with the Accused that no notice is required under s 78B of the *Judiciary Act 1903* (Cth).

## Part IV MATERIAL FACTS

5. The ACIC adopts the statement of material facts in Part IV of the CDPP's

submissions. The key facts are as follows:

5.1. In December 2008, the ACIC received information from a source regarding allegations against "XYZ Limited". The ACIC conducted an initial assessment of the allegations and, in April 2009, referred the allegations to the AFP.[1]

5.2. An ACIC examiner, Mr Sage (the **Examiner**),[2] conducted an examination of the Accused under the ACC Act in April and May 2010 (in the case of "Galloway" and "Hodges") and November 2010 (in the case of "Strickland" and "Tucker").[3]

5.3. At time of examination, none of the Accused had been charged with an offence, although each Accused was regarded as a suspect by the AFP.[4]

5.4. At their respective examinations, the Accused were asked questions[5] the subject matter of which fell within the matters that had been determined by the Board of the ACC (the **Board**) under s 7C of the ACC Act to form the subject of two "special ACC investigations".[6] The trial judge, and the Court below, upheld the validity of those special investigations.[7]

5.5. At the conclusion of each of the Accused's examinations, the Examiner made a direction under s 25A(9) permitting the dissemination of a recording and summary of the examination to the AFP and the CDPP.[8] Acting under s 59(7) of the ACC Act, the authorised delegate of the CEO of the ACIC provided recordings and summaries to the AFP and the CDPP between July 2010 and January 2011.[9]

5.6. The Accused were subsequently charged.[10]

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1 See trial judge reasons, [356]-[361].

2 See trial judge reasons, [537].

3 See trial judge reasons, [533]-[536]. The trial judge's reasons do not use pseudonyms.

4 Reasons below, [27]; trial judge reasons, [851]-[852].

5 Trial judge reasons, [539], [621]-[622].

6 See trial judge reasons, [624]. There were two special investigations: *Australian Crime Commission Special Investigation Authorisation and Determination (Financial Crimes) 2008* (Cth) (**2008 Determination**); *Australian Crime Commission Special Investigation Authorisation and Determination (Money Laundering) 2010* (Cth) (**2010 Determination**). See Reasons below, [120], [126].

7 Reasons below, [152]; trial judge reasons, [309], [332].

8 Trial judge reasons, [652], [656], [670]-[671].

9 See trial judge reasons, [662], [667]-[668], [672]-[674]. The AFP provided the CDPP with transcripts of the examination in April 2012: trial judge reasons, [676].

10 Trial judge reasons, [2], [5]. Galloway, Strickland and Hodges were arrested and first charged in July 2011. Tucker was first charged in March 2013.

## Part V APPLICABLE STATUTORY AND CONSTITUTIONAL PROVISIONS[11]

6. **ACIC:** The ACIC[12] consists of the Chief Executive Officer (**CEO**), examiners, and staff (ACC Act, s 7(2)). Its functions are set out in s 7A, and include investigating "federally relevant criminal activity" (as defined in s 4(1)) when authorised by the Board to do so.

7. **Board of the ACC:** The Board consists of the members set out in s 7B(2), who include the Commissioner of the AFP, and the head of each State and Territory police force. Its functions are set out in s 7C(1), and include:

   7.1. authorising the ACIC to investigate matters relating to federally relevant criminal activity (s 7C(1)(c));

   7.2. determining whether such an investigation is a "special investigation" (s 7C(1)(d)), after considering whether ordinary police methods are likely to be effective (s 7C(3)); and

   7.3. disseminating to law enforcement agencies (as defined in s 4(1)) strategic criminal intelligence assessments provided to the Board by the ACIC (s 7C(1)(g)).

8. **Performance of ACIC functions:** If the ACIC obtains evidence of an offence against the law of the Commonwealth or a State or Territory, being evidence that would be admissible in a prosecution for the offence, the CEO must assemble the evidence and give it to (among others) the relevant law enforcement agency (s 12(1)(c)). Under s 59(7), the CEO may give to any law enforcement agency any information that is in the ACIC's possession that is relevant to the activities of that agency. Both s 12(1)(c) and s 59(7) are subject to directions under s 25A(9).

9. In performing its functions under the ACC Act, the ACIC is required, so far as is practicable, to work in co-operation with law enforcement agencies (s 17(1)).

10. **Examinations:** An examiner may conduct an examination "for the purposes of a special ACC operation/investigation" (s 24A). An examiner may summon a person to appear at an examination to give evidence and produce such documents as are

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11 The following uses the ACC Act consolidated as at 26 February 2010. The examinations and disseminations occurred between April 2010 and January 2011, but there were no relevant amendments in that period.

12 Since 1 July 2016, the ACC may also be known by the name the ACIC: see ACC Act, s 7(1A); *Australian Crime Commission Regulations 2002* (Cth), reg 3A.

referred to in the summons (s 28(1)). A person appearing as a witness at an examination shall not refuse to take an oath or make an affirmation; refuse or fail to answer a question; or refuse or fail to produce a document or thing that he or she was required to produce by a summons (s 30(2)(a)-(c)). Those obligations implicitly override the privilege against self-incrimination.[13]

11. **Direct use immunity:** Section 30(4)-(5) of the ACC Act confers a "direct use immunity" in respect of any incriminating information given at an examination.

12. **Non-publication directions:** Section 25A(9) provides for an examiner to make confidentiality directions as follows:

10 12.1. An examiner may direct that examination material "must not be published, or must not be published except in such manner, and to such persons, as the examiner specifies."

12.2. 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."

## Part VI THE APPEAL

13. The premise of the appeals is that both the examinations, and the Examiner's failure to prohibit publication of the examination material, were unlawful. For the reasons developed below, the ACIC disputes that premise, and submits that both the
20 examinations and the publication of examination material were lawful. If that submission is accepted, there is no basis for granting a stay, as there was no misuse of the ACIC's examination powers,[14] and no basis to conclude that the Accused could not receive a fair trial according to law.[15] Separately, there was no unlawfulness in permitting AFP officers to attend the examinations,[16] and the AFP did not "dictate" the questioning in any improper way.[17]

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13 *A v Boulton* (2004) 136 FCR 420 at [72] (Kenny J, Beaumont and Dowsett JJ agreeing); *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [52]-[58] (French CJ and Crennan J) (*X7*).

14 Contra Hodges submissions, [92](a)-(c), (g); Galloway submissions, [6.2], [6.4] and [6.5].

15 Contra Hodges submissions, [92](f)-(g).

16 Contra Hodges submissions, [92](d). The AFP officers were either members of the staff of the ACC, or their presence was permitted by s 25A(3): trial judge reasons, [557], [572]. Further, any failure to inform the Accused of the presence of AFP officers did not invalidate the examination: see [615].

17 The AFP drafted the questions, but there was nothing improper with that: trial judge reasons, [537]; contra Hodges submissions [92](e). It is a gloss on the trial judge's reasons to say that the ACIC acted at the "behest" of the AFP: cf Hodges submissions, [92](k).

14. If the issue is reached, the ACIC adopts the CDPP's submissions as to why the appeals against the refusal of a permanent stay should be dismissed.

## Part VII THE NOTICE OF CONTENTION

15. Before turning to the three grounds in the notice of contention, it is useful to review matters concerning the history of the ACIC that are relevant to all three grounds.

### A. Legislative history

16. During the 1970s and early 1980s a series of Royal Commissions reported that organised crime existed in Australia and that there was a need to take more effective action to combat it, including by establishing a crime commission with the power to compel witnesses to give evidence which could then be provided to prosecutorial and law enforcement agencies.[18] As awareness of the problem grew, so did the belief that the traditional police methods of detection and investigation were ineffective in countering that problem, including because police lacked the power of Royal Commissions to require people to answer questions, produce documents or to access taxation records, and because Australian law enforcement had been fragmented and there had been a failure to exchange information between agencies or even within single agencies. [19]

17. The National Crime Authority (**NCA**) was established in 1984 by the *National Crime Authority Act 1984* (Cth) (**NCA Act**) to continue the work of the Royal Commissions on a standing basis. It was given coercive powers to enable it to pursue its "basic role" of "gathering and assembling evidence for transmission to other law enforcement agencies and for use ultimately in conducting prosecutions."[20] The

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18 Eg *Royal Commission of Inquiry into Drug Trafficking* (Justice Stewart, February 1983) pp 775, 783, 786-787; *Royal Commission on Activities of the Federated Ship Painters and Dockers Union* (Costigan), Interim Report 5, Vol 1 [3.07]-[3.08], [3.20]-[3.21] (1983) and Final Report, Vol 2 [14.007] (1984).

19 See Parliamentary Joint Committee on the National Crime Authority, *Third Evaluation of the National Crime Authority* (April 1998) (**JC Third Evaluation (1998)**), [1.1]-[1.2]. See *AA Pty Ltd v Australian Crime Commission* (2005) 219 ALR 666 at [6], [11]; *Australian Crime Commission v AA Pty Ltd* (2006) 149 FCR 540 at [12]-[14], [16]; Parliamentary Joint Committee on the National Crime Authority, *the National Crime Authority – An Initial Evaluation* (1988), [2.1], [2.23].

20 Second Reading Speech to the National Crime Authority Bill 1983, House of Representatives Debates, 7 June 1984, 3091 at 3093 (Minister Duffy). That reflected a conscious rejection of an alternative model that would have limited the NCA to gathering and analysis of criminal intelligence: Hon M J Young, Special Minister of State, and Hon Gareth Evans, Attorney-General, *A National Crime Commission?*

NCA was to work "in close cooperation" with the CDPP, and with police task forces, concentrating particularly on those parts of the evidence that could otherwise be expected to be difficult of proof with a view to providing the necessary evidence in admissible form.[21] It was intended to supplement the efforts of regular law enforcement bodies, not supplant them.[22] That was achieved in part by confining the use of coercive powers to situations where ordinary police methods of investigation were not likely to be effective.[23]

18. As enacted, s 30 of the NCA Act required the provision of both a "use" and "derivative use" immunity before incriminatory answers could be compelled at an examination. However, in 2001, s 30 was amended to remove the "derivative use" immunity.[24] The Explanatory Memorandum that accompanied that amendment explained:[25]

> The Authority is unique in nature and has a critical role in the fight against serious and organised crime. This means that the public interest in the Authority having full and effective investigatory powers, and to enable, in any subsequent court proceedings, the use against the person of incriminating material derived from the evidence given to the Authority, outweigh the merits of affording full protection to self-incriminatory material.

19. The Second Reading speech concerning the same amendment explained:[26]

> The National Crime Authority does not deal with simple street level crime, but with the web of complex criminal activity engaged in by highly skilled and resourceful criminal syndicates ... The Bill will ... allow an investigatory body to derive evidence from self-incriminatory evidence given by a person at a hearing, and for a prosecuting authority to use that derived evidence against the person at a later trial. In other words, a person's self-incriminatory admissions won't themselves be able to be used as evidence against that person, but will be able to be used to find other evidence that verifies those admissions or is otherwise relevant to the proceedings.

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(June 1983) [6.9] and Appendix II; Senate Standing Committee on Constitutional and Legal Affairs, *Report on the National Crime Authority Bill 1983* (1984) [2.11].

21 Hon M J Young, Special Minister of State, and Hon Gareth Evans, Attorney-General, *A National Crime Commission?* (June 1983) at [6.14], [6.16]-[6.17].

22 JC Third Evaluation (1998), [1.4], Ch 2, esp [2.12], [2.18]; Senate Standing Committee on Constitutional and Legal Affairs, *Report on the National Crime Authority Bill 1983* (1984) [1.6]-[1.9], [2.1], [2.19], [3.8].

23 Senate Standing Committee on Constitutional and Legal Affairs, *Report on the National Crime Authority Bill 1983* (1984) [4.23]-[4.28].

24 *National Crime Authority Legislation Amendment Act 2001* (Cth).

25 Revised Explanatory Memorandum to the National Crime Authority Legislation Amendment Bill 2001 at 8 (emphasis added), cited in *A v Boulton* (2004) 204 ALR 598 at [97] (Weinberg J).

26 Commonwealth, *Parliamentary Debates*, Senate, 7 December 2000, 21027-21028 (Ian Campbell). This passage was cited in *A v Boulton* (2004) 136 FCR 420 at [69] (Kenny J, Beaumont and Dowsett JJ agreeing). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 2001, 31304 (Dr Sharman Stone).

20. The provisions in the NCA Act discussed in the above passages are still in force. Their validity is not challenged. They must therefore be given effect. They reveal a clear legislative intention to authorise the NCA (now the ACIC) to utilise coercive powers against persons who are suspected of having committed serious crimes, for the purpose of obtaining evidence that can be given to prosecutors and other law enforcement agencies and used against those suspects in a subsequent trial.

21. As is apparent, the NCA Act deliberately changed the balance between persons accused of serious crimes, on the one hand, and investigators and prosecutors, on the other. That change, which Parliament made decades ago to respond to the threat posed by serious and organised crime, would be defeated if the coercive examination of a suspect who has not been charged, or the dissemination of information obtained from such an examination, is held to require the stay of subsequent criminal proceedings.

22. As noted above, the NCA Act remains in force. In 2002, its title was changed to the ACC Act by the *Australian Crime Commission Establishment Act 2002* (Cth).[27] The ACC combined the functions of the NCA, the Australian Bureau of Criminal Intelligence and the Office of Strategic Crime Assessments.[28] As with the NCA, the ACC was not intended to duplicate the AFP's role, but rather to complement the activities of other law enforcement agencies.[29]

23. Two key points emerge from this legislative history. ***First***, the primary purpose of the ACIC is to obtain evidence that can be used to prosecute persons who have committed serious offences. The assertion of the Court below that "the securing of convictions is at best incidental" to the statutory functions of the ACIC is plainly incorrect.[30] ***Secondly***, the special powers conferred on the ACIC were designed to supplement the investigative powers of police forces in Australia,[31] rather than to constitute the ACIC as a self-contained investigative body. As explained below, this tends against the Court's conclusions that the examinations were unlawful because

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27 Sch 1 item 35; ACC Act, s 7(1).
28 *A2 v Australian Crime Commission* (2006) 155 FCR 456 at [7] (the Court).
29 Parliamentary Joint Committee on the National Crime Authority, *Review of the Australian Crime Commission Act 2002* (November 2005), [2.26].
30 Cf Reasons below, [66].
31 Cf Reasons below, [188].

the ACIC was not conducting its own investigation,[32] and because the examinations were conducted for the purpose of assisting an AFP investigation.[33]

## B. The Examiner was not required to make a direction under s 25A(9) – Notice of Contention [1]

24. Section 25A(9) of the ACC Act at all relevant times required an examiner to give a non-publication direction "if the failure to do so might[34] … prejudice the fair trial of a person who has been, or may be, charged with an offence".

25. The ACIC submits that the Court below erred in holding that the Examiner was required to issue a direction under s 25A(9) prohibiting publication to the AFP and the CDPP of the examination material relating to the Accused. It erred because, while it correctly recognised that whether an examination "might prejudice the fair trial of a person" within s 25A(9) will depend on the circumstances of the case, and "must be assessed objectively, having regard to the information available to the examiner at the time, regarding the nature and status of any relevant police investigation and the nature of any proposed derivative use",[35] the Court then failed to undertake that task.

26. Instead, the Court below held that dissemination of the examination material to investigators and prosecutors "might" prejudice the fair trial of the Accused,[36] by reason of the following three factors:[37]

26.1. the Examiner knew that each of the Accused was a person "against whom a substantial case had already been assembled";

26.2. AFP investigators had invited each of the Accused to participate in a cautioned record of interview; and

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

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32 Reasons below, [179], [188].

33 Reasons below, [209]-[211].

34 The word "might" in s 25A(9) means a real risk as distinct from one that is remote or fanciful: *R v Seller* (2013) 273 FLR 155 (***Seller (No 1)***) at [91] (Bathurst CJ).

35 Reasons below, [57]. See *Seller (No 1)* at [106] (Bathurst CJ).

36 Reasons below, [59].

37 Reasons below, [58].

27. Those three factors indicated that consideration of s 25A(9) was required. However, for the reasons that follow, they did not, either separately or in combination, require the Examiner to withhold the examination material from the AFP or the CDPP.

**The accusatorial system of justice**

28. The Court of Appeal's reasoning[38] with respect to s 25A(9) was heavily influenced by its understanding of the authorities concerning the accusatorial system of justice.[39] Those authorities recognise that it is a fundamental principle of the common law that it is for the prosecution to prove the guilt of an accused person.[40] It is a "companion" to that fundamental principle that "an accused person cannot be required to testify to the commission of the offence charged" (the **companion principle**).[41]

29. In *R v IBAC*, this Court unanimously rejected an argument that the compulsory examination of a person who was suspected of a crime was impermissible because such an examination would effect a fundamental alteration to the process of criminal justice by requiring a person to assist in his or her own prosecution.[42] The Court emphasised that the companion principle depended on "the judicial process having been engaged",[43] as the principle is a "companion" of criminal trials.[44] It observed that that "principle is not engaged because the appellants have not been charged; and there is no prosecution pending."[45] The Court emphasised that to extend the principle to persons who were suspects, but who had not been charged, would "extend its operation beyond the rationale identified in the authorities, namely, the protection of the forensic balance between prosecution and accused in the judicial process as it has evolved in the common law".[46] It also noted that such an extension

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38 Reasons below, [42]-[56].

39 See *X7* at [97]-[101] (Hayne and Bell JJ), and also [46], [104], [123], and [140]; *Lee v The Queen* (2014) 253 CLR 455 at [32] (the Court) (***Lee (No 2)***); *CFMEU v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 (***Boral***) at [36]-[37] (French CJ, Kiefel, Bell, Gageler, and Keane JJ, referring to *Lee (No 2)* at [32]).

40 *R v Independent Broad-based Anti-Corruption Commissioner* (2016) 256 CLR 459 at [44] (***R v IBAC***), citing *Lee (No 2)* at [33] (the Court).

41 *X7* at [159] (Kiefel J).

42 *R v IBAC* at [30].

43 *R v IBAC* at [43]-[44] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

44 *R v IBAC* at [46] (the Court), citing *Boral* at [37] (French CJ, Kiefel, Bell and Gageler and Keane JJ).

45 *R v IBAC* at [48]. See also *X v Callanan* [2016] QCA 335 at [25]-[27] (McMurdo P, Gotterson JA and Atkinson J agreeing); *A v Maughan* (2016) 50 WAR 263 at [65] (Martin CJ), [163]-[170] (McLure P), [191] (Corboy J).

46 *R v IBAC* at [48].

would fetter the capacity of the IBAC to achieve its statutory purposes.[47] Those observations were made in the context of a proposed coercive examination of allegations of crime, in a statutory context that included an equivalent to s 25A(9) of the ACC Act.[48]

30. It follows from the above observations that, in circumstances where (as here) the Accused had not been charged at the time of their examinations, principles concerning the accusatorial system of justice have no relevant application.

**Prejudice to a fair trial**

31. That is not to deny that s 25A(9) may require a non-publication direction to be given in relation to persons who have not yet been charged. Plainly it may.[49] However, it is not possible to establish a risk of prejudice to a fair trial simply by contending that to permit investigators or prosecutors to have access to examination material is inconsistent with the accusatorial system of justice. Nor is it possible to establish prejudice to a fair trial simply by establishing that a trial that follows an ACIC examination may differ in some respects from what would have occurred had there been no such examination. That follows because, like the privilege against self-incrimination,[50] at least to a significant extent the accusatorial system of justice is subject to modification by statute.[51] There are many examples of such modification.[52] For example, under the *Criminal Procedure Act 2009* (Vic):

31.1. an accused must not give or adduce evidence in support of an alibi unless the accused has given notice of the alibi, including particulars as to time and place

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47 *R v IBAC* at [51].

48 IBAC Act s 42, which is quoted in *R v IBAC* at [16], and relied upon at [54].

49 *Seller (No 1)* at [105].

50 See, e.g., *Huddart Parker & Co v Moorehead* (1909) 8 CLR 330 at 358 (Griffith CJ), 366 (Barton J), 375 (O'Connor J), 386 (Isaacs J), 418 (Higgins J); *Hammond* at 197-198 (Gibbs CJ), 200 (Murphy J); *Sorby* at 289-290, 294-295, 298-299 (Gibbs CJ), 308-309 (Mason, Wilson and Dawson JJ), 311 (Murphy J), 314 (Brennan J); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 503-504 (Mason CJ and Toohey J), 533-534 (Deane, Dawson and Gaudron JJ); *X7* at [28], [39], [64] (French CJ and Crennan J, dissenting in the result); *Lee (No 1)* at [3], [24], [30], [38], [55]-[56] (French CJ), [134], [144] (Crennan J), [334] (Gageler and Keane JJ); *R v IBAC* at [53]-[56] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ), [66] (Gageler J).

51 *Lee (No 2)* at [32] (the Court). The *Australian Securities and Investments Commission Act 2001* (Cth) abrogates the companion principle by necessary implication: *R v OC* (2015) 90 NSWLR 134; special leave refused: *OC v The Queen* [2016] HCA Trans 26.

52 Some examples are given in *X7* at [48] (French CJ and Crennan J), including the alibi notice provisions in other states, other case management disclosures that are required, and the capacity for Parliament to modify the standard of proof and rules of evidence.

of the alibi, and the name and address of any witness to the alibi (ss 51, 190); and

31.2. several weeks before trial, an accused must serve a response to the prosecution summary of opening and notice of pre-trial admissions, which "must identify the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken", the evidence that is agreed and, if evidence is in issue, the basis on which issue is taken (s 183).

32. Those examples illustrate that, even after charges have been laid, accused persons may be required to provide considerable information to the prosecution, including information that will assist the prosecution and constrain the forensic choices available to the defence at trial. Those requirements plainly modify the accusatorial system of justice. But the mere fact of such modification does not create a risk of prejudice to a fair trial, because a fair trial is simply a trial according to law.[53]

33. Section 25A(9) does not preserve every aspect of the accusatorial process untouched. Instead, as Gageler and Keane JJ explained in *Lee (No 1)* (in a case where the examinee had been charged prior to examination), a finding that there is a risk of prejudice to a fair trial: [54]

> 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.

34. Whether an examiner is required to make a direction under s 25A(9) with respect to any particular examination material depends upon a close analysis of the nature of the examination material, and its proposed use, in order to determine whether the requisite logical connection exists between the disclosure of that examination material and a real risk of interference with the administration of justice.

35. If the risk of prejudice to a fair trial is said to arise from the fact that the accused will be forced to confront derivative evidence at trial (being evidence that exists independently of the compelled evidence, but that was located because of that

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53 *X7* at [89] (Hayne and Bell JJ). The common law right to a fair trial is more accurately described as an immunity from a trial that is unfair: *Dietrich v The Queen* (1992) 177 CLR 292 at 299 (Mason CJ and McHugh J); contra Tucker submissions, [34].

54 *Lee v NSW Crime Commission* (2013) 251 CLR 196 (***Lee (No 1)***) at [322] (Gageler and Keane JJ).

evidence), interference with the administration of justice will ordinarily be difficult to demonstrate. That follows because there is no prejudice to a fair trial if material obtained from a compulsory examination is used to locate evidence which could have been obtained by other means (such as the location of bank accounts, relevant documents – including from amongst a large mass of documents – or a weapon).[55] Evidence of that kind is evidence that the accused would have been required to confront in any event. The examination simply enables it to be located more efficiently. It is possible that prejudice to a fair trial might arise if derivative evidence is of such a kind that it could not have been obtained, or its significance could not have been appreciated, but for the compulsory examination.[56] That possibility is examined in some detail in overseas jurisprudence,[57] but the issue does not arise in these appeals, and therefore need not be addressed.

36. If the risk of prejudice to a fair trial is said to arise from non-evidential consequences of the compulsory examination, the position is different. It may be, for example, that a real risk of prejudice to a fair trial might arise if an examiner were to fail to prohibit the disclosure to prosecutors of examination material that revealed an accused's defence.[58] But even in a case of that kind, legislation could authorise or require the disclosure, and in that event any subsequent trial would remain a trial according to law, and therefore could not properly be characterised as an unfair trial.[59]

37. Given the purpose and history of the ACC Act, the better view is that, like the *Criminal Procedure Act 2009* (Vic), the ACC Act elevates the public interest in the investigation of serious and organised crime over the common law rights of a person who has not been charged with a criminal offence. By enacting the ACC Act, Parliament modified the ordinary criminal investigative processes in areas where those ordinary processes have proved ineffective, by conferring special powers on investigators. At least where those powers are utilised prior to charges being laid, if

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55 *Seller (No 1)* at [102] (Bathurst CJ).

56 *X7* at [53] (French CJ and Crennan J, dissenting in the result).

57 *Thomson Newspapers Ltd v Canada (Director of Investigation and Research)* [1990] 1 SCR 425 at 549-550 (La Forest J). *R v S(RJ)* [1995] 1 SCR 451 at 552 [175], 561 [191] (Iacobucci J); *Her Majesty's Advocate v P (Scotland)* [2011] 1 WLR 2497 at [27]; *Ferreira v Levin* [1996] 1 SA 984 (CC); *Parbhoo v Getz* [1997] 4 SA 1095 (CC) at [9]-[10] (Ackermann J). Some of these cases are discussed in *DAS v Victorian Human Rights and Equal Opportunity Commission* (2009) 24 VR 415 at [156].

58 See *Lee (No 2)* at [9]-[10], [15] (the Court). See also *X7* at [54] (French CJ and Crennan J, dissenting in the result); *Seller (No 1)* at [104] (Bathurst CJ)

59 See n 53 above.

their use results in the obtaining of derivative evidence that may support a conviction, it would be inconsistent with the statutory scheme to characterise the provision of that evidence to prosecutors as creating a risk of prejudice to a fair trial.[60]

38. Section 25A(9) must be construed harmoniously with the statutory scheme of which it forms part,[61] and in a manner which best achieves the purposes or objects of the Parliament.[62] So construed, it does not impose a universal or presumptive requirement on an examiner to ensure that law enforcement agencies and prosecutors do not become aware of evidence obtained from persons who have not been charged, simply because they "may be charged". To construe s 25A(9) as imposing such a universal or presumptive requirement would be inconsistent with Parliament's manifest intention to empower the ACIC to compel individuals to answer questions with respect to serious crimes for the very purpose of advancing the investigation and prosecution of those individuals. It would render the ACIC's examination powers largely nugatory, because whenever there was a real prospect that an examinee might be charged, the ACIC would be required to keep any useful information that related to the subject-matter of possible charges to itself. That would defeat the purpose of the ACIC acquiring the information.

**No directions under s 25A(9) were required in the Accused's cases**

39. For the above reasons, a direction under s 25A(9) is required only where it is possible to identify a logical connection between failure to prohibit the dissemination of the examination material and interference with the administration of justice. However, rather than identifying such a connection, the Court below focused on three matters that, on analysis, go only to whether the Accused were persons who "may be charged" (that being a matter not in fact in dispute[63]). None of those matters established prejudice (as is confirmed by the Court's ultimate conclusion that there was no basis for a permanent stay[64]).

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60 *X7* at [57]-[58] (French CJ and Crennan J); *SD v NSW Crime Commission* (2013) 84 NSWLR 456 at 465 [28]-[29] (Basten JA).

61 *X7* at [52]-[58] (French CJ and Crennan J).

62 *Acts Interpretation Act 1901* (Cth) s 15AA.

63 Reasons below, [27].

64 Reasons below, [266].

40. ***First***, the fact that a substantial case had already been assembled prior to the ACIC examination in fact reduced the chance of the examination causing prejudice to a fair trial (cf the factor set out in [26.1] above). As the Court below recognised (in refusing the permanent stay), the examinations of the Accused did not materially change the cases against them.[65]

41. ***Secondly***, the fact that a person has declined a cautioned interview with the AFP does not demonstrate that a coercive examination may prejudice the administration of justice in a future criminal trial (cf the factor set out in [26.2] above). To contend otherwise would deny Parliament's capacity to strike a different balance to that reflected in the common law "right to silence"[66] (that being the source of the right to decline to participate in an interview with police).

42. Indeed, a special ACC investigation can only be authorised when the Board considers that ordinary police methods are unlikely to be effective (see ACC Act, s 7C(3)). The purpose of establishing the ACIC with coercive powers was to facilitate the investigation of serious criminal activity in circumstances where an investigation of such activity by ordinary law enforcement hits a road block. As the Full Federal Court has recognised, "the purpose of an examination conducted under s 24A is to obtain information ... in circumstances where persons with relevant information would frequently be expected to refuse to volunteer that information."[67] There is therefore nothing remarkable about examining a person who has refused to participate in a voluntary interview.

43. ***Thirdly***, conducting a compulsory examination of persons who may be charged with an offence (but who have not yet been charged) is clearly within the contemplation of the ACC Act (cf the factor set out in [26.3] above). So much expressly appears from s 25A(9). Indeed, persons with knowledge of serious or organised crime will often have that knowledge because they were involved in such crime in some way, with the result that many persons examined by the ACIC will be persons who "may" be charged. It was within the contemplation of Parliament that evidence obtained

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65 Reasons below, [266].

66 That term referring to a collection of principles and rules, some substantive, and some procedural, which differ in incidence and importance: see *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1 at 30 (Lord Mustill), quoted with approval in *Lee (No 1)* at [318].

67 *A v Boulton* (2004) 136 FCR 420 at [57] (Kenny J, with Beaumont and Dowsett JJ agreeing).

from such examinations could be used in subsequent investigations and criminal proceedings (subject to the direct use immunity in s 30(5) and to any directions under s 25A(9)). Thus, s 12 of the ACC Act expressly requires, and s 59(7) expressly permits, the ACIC to provide admissible evidence to other law enforcement agencies, who may in turn lay charges (including charges against persons who have been examined).

44. Nor do the other matters relied upon by the Accused establish a logical connection between the ACIC examinations and any prejudice to the administration of justice, bearing in mind that there is only "prejudice" to a fair trial within s 25A(9) if the prosecution obtains an unfair forensic advantage.[68] Specifically:

44.1. No such unfairness arises from the use of examination material to assist investigators in extracting relevant documents from the mass of material in the possession of a law enforcement agency,[69] or to encourage investigators to look at the material in their possession more closely.[70] Indeed, that is precisely the kind of use of compelled material that the Canadian and South African authorities cited in footnote 57 above have held not to impinge on the right to a fair trial. Indeed, the use of examination material in this way may lead to a more focused brief of evidence and a more efficient trial.

44.2. Similarly, there is no relevant unfairness in an Accused being "locked into" a particular account.[71] That will be a necessary incident of any coercive examination.[72] Nevertheless, the answers given by an Accused in a coercive examination are not admissible against the Accused in the trial,[73] and the Accused will be able to put the prosecution to its proof in the usual way.[74] Even if an examinee is constrained in instructing counsel to put a different

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68 See *X7* at [53], [59] (French CJ and Crennan J, dissenting in the result); *Lee (No 1)* at [323]-[324] (Gageler and Keane JJ).

69 Cf Hodges submissions, [48]-[50].

70 Cf Tucker submissions, [16], [39]. Equally, there would be no difficulty with using the examination material to discover other evidence, at least if that evidence could have been discovered anyway: contra Strickland submissions, [17]-[21] and [36].

71 Contra Hodges submissions, [51]-[52], [60]-[66]; Tucker submissions, [31]-[33]; Galloway submissions, [6.5] and [6.8]; Strickland submissions, [39].

72 As the trial judge accepted: see trial judge reasons, [427].

73 ACC Act, s 30(4)-(5), provided the Accused invoked the protection of those provisions.

74 See Reasons below, [297]-[298]; see also *R v Seller* (2015) 89 NSWLR 155 at [223] (Bathurst CJ, with Bellew J agreeing).

version of events at trial from the version of events admitted during the compulsory examination,[75] that would not deprive the examinee of a "legitimate" forensic choice.[76]

44.3. Galloway goes so far as to assert that the AFP knew what his defences were,[77] and that there is an "irresistible" inference that the AFP used knowledge obtained from his examination in taking witness statements from two witnesses.[78] However:

(a) neither of these assertions is supported by the findings of the trial judge;[79]

10 (b) the Court below held that the compulsory examination of the Accused did not prejudice their ability to obtain a fair trial;[80]

(c) in any event, Galloway gave a voluntary interview with the AFP after his examination, in which he effectively made full disclosure of the matters previously disclosed in his ACIC examination.[81] Accordingly, the use of material obtained from his examination could not possibly

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75 The existence of such a constraint is doubtful. If the Accused instructed counsel at the trial that he had given false evidence to the ACIC, which he now wished to correct, the trial could be conducted on the basis of the new instructions. In that event the Accused would, of course, be exposed to prosecution for giving false evidence to the ACIC. But that prospect would not prevent the Accused from defending the trial on the basis of the "true" version of events. It would simply mean that the Accused would face consequences for giving false evidence to the ACIC.

76 See *Lee (No 1)* at [324] (Gageler and Keane JJ); cf [82]-[83] (Hayne J), [266] (Bell J), both dissenting. The Court below expressly declined to decide whether Gageler and Keane JJ's remarks represent the law: Reasons below, [299]. However, two intermediate appellate courts have applied the joint reasoning of Gageler and Keane JJ: *Zhao v Commissioner of the Australian Federal Police* (2014) 43 VR 187, 204 [48] (Nettle, Tate, Beach JJA); *X7 v R* (2014) 246 A Crim R 402 at [102]-[108] (Bathurst CJ, with Beazely P, Hidden, Fullerton, Hulme JJ agreeing). Hodge's assertion at [61]-[62] that Gageler and Keane JJ's remarks are *obiter*, and that they do not represent the law, are therefore incorrect (as is particularly evident from *Lee (No 1)* at [335]).

77 Galloway submissions, [6.13].

78 Galloway submissions, [6.16]-[6.30].

79 The trial judge considered whether Galloway's forensic choices had been constrained at trial judge reasons, [741] ff. His account in the ACIC examination was "largely exculpatory": trial judge, [747]. The prejudice found by the trial judge was that Galloway was required to give answers at all and that, as with the other Accused, he suffered the forensic disadvantage of being denied his fundamental right to defend charges only on the basis of putting the prosecution to its proof and testing the strength of the prosecution evidence: trial reasons, [748].

80 See Reasons below, [276], [292], [297]-[298].

81 Trial judge reasons, [760], [765].

cause prejudice to his fair trial, as the AFP obtained that information voluntarily by other means;[82] and

(d) Galloway's submissions seek to rely on parts of the evidence given by Officer "Schwartz" at the committal that were not before the trial judge or the Court below.[83] That is impermissible, as this Court cannot receive new evidence on an appeal.[84]

**Examination post-charge**

45. The Accused seek to support their construction of the ACC Act principally by reference to *Hammond v Commonwealth*[85] and *X7*, both of which were concerned with whether a person could be subject to compulsory examination after the person had been charged.[86] Those cases are of limited relevance, because there is a clear distinction between the use of coercive powers to investigate criminal offending pre-charge, and the use of such powers after charges have been laid. That distinction was emphasised in *Sorby v Commonwealth*,[87] which was decided less than a year after *Hammond*, and where the Court distinguished *Hammond* on the basis that the exercise of coercive powers that was challenged in *Sorby* took place prior to any charges being laid.

46. The line between pre-charge and post-charge examinations partly reflects the fact that it is only once a person is charged that there is a possibility that a compulsory examination could constitute a contempt of court.[88] It also reflects the fact that the

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82 See Trial judge reasons, [762]-[763]. Contra Galloway submissions, [6.34]. The arguments at Galloway submissions, [6.35]-[6.37] do not answer this point.

83 See Galloway submissions, [6.32] and associated footnotes. Only certain extracts of the committal transcript were before the trial judge. The pages of committal transcript not before the trial judge or the Court below are: p 367 and 436-437 (Galloway submissions, footnote 84); pp 1429-1431 (footnote 85); pp 4287 and 4288 (footnotes 82 and 83); p 4289 (footnote 80); p 5389 (footnote 90); pp 5462-5463 (footnote 90); pp 5464-5466 (footnote 80); pp 5601-5603 (footnotes 87-89); pp 7344, 7355 (footnote 85). Separately, the pages of committal transcript of "Mitchell" referred to in Galloway submissions, footnote 51 were not before the trial judge or the Court below.

84 See eg *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 203 CLR 1.

85 (1982) 152 CLR 188 (***Hammond***).

86 The accused also rely on *Lee (No 2)*, which concerned a pre-charge investigation, but which must now be read in light of *R v IBAC*: see paragraph 29 above.

87 (1983) 152 CLR 281 (***Sorby***).

88 See *Sorby* at 307 (Mason, Wilson and Dawson JJ), holding that even the "strong probability" that a witness before a Royal Commission would be charged with an offence "provides an unlikely basis for a finding of contempt against the Commission in the event that the witness is questioned about matters

companion principle has no application until the judicial process has been engaged.[89] For those reasons, the cases upon which the Accused rely are not decisive.[90]

## D. The ACIC's examinations were for the purposes of a special ACC investigation – Notice of Contention [2]

47. The Court below erred in concluding that the examinations were unlawful because the ACIC was not conducting its own investigation, with the consequence that the examinations were not "for the purposes of a special ACC investigation" as required by s 24A of the ACC Act.[91]

**Validity of the Determinations**

10 48. The Board made two instruments (being the 2008 Determination and the 2010 Determination) that each authorised the ACIC to undertake an investigation into federally relevant criminal activity, and determined that that investigation was a "special ACC investigation".[92] The Court below held that those instruments were valid.[93] Hodges seeks to contend that the 2008 Determination was invalid, because the ACIC Board did not comply with s 7C(3) nor s 7C(4) of the ACC Act.[94] However, he was not granted special leave to agitate this point, which was not raised in his application for special leave. The consolidation of the ground of appeal at the special leave hearing was not an invitation by this Court to expand the issues raised on the appeal.[95]

20 49. In any event, the Court below was correct to hold that the ACIC Board complied with s 7C(3) and (4) of the ACC Act when making the relevant instruments. Contrary to Hodges' undeveloped assertion, there is no relevant difference in these respects between the 2008 Determination and the instruments upheld in *XCIV v*

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which are relevant to the offence". See also *Lee (No 1)* (2013) 251 CLR 196 at [37] (French CJ), [86] (Crennan J), [321], [325] (Gageler and Keane JJ).

89 *R v IBAC* at [43]-[44] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ); *X7* at [110] (Hayne and Bell JJ).

90 Contra Hodges submissions, [43]-[47]. In relation to the stay of proceedings issue, it should be emphasised that *Lee (No 2)* concerned whether there should be a re-trial, whereas the question here is whether there should be no trial at all: contra Hodges submissions, [68].

91 Reasons below, [179], [188]-[189].

92 2008 Determination, [4], [6]; 2010 Determination, [4], [6]: Reasons below, [120], [126].

93 Reasons below, [148], [152].

94 Hodges submissions, [57]-[59].

95 See *Strickland v DPP (Cth)* [2017] HCA Trans 238 at pp 19-20.

*Australian Crime Commission*,[96] that being a judgment that is itself supported by a long line of authority.[97] As the Court below held, the language of s 7C(4) ("general nature of the circumstances") is deliberately non-specific, such that a determination need not identify "specific and confined criminal activity".[98]

**There was an ACC investigation**

50. Although the Court below held that the Determinations were valid, it also held that the examinations were not "for the purposes" of the special ACC investigation. That conclusion depended on the Court's view that, even when the ACIC Board had determined that an investigation was a special investigation, there was a separate question of fact whether an investigation was actually being undertaken by the ACIC itself ("in the sense of having its own project underway"[99]). The Court held that, unless such a "particular investigation" existed as a matter of fact, any exercise of coercive powers could not be for the purposes of a special investigation, and was therefore outside s 24A.[100] The Court below considered that there was no such investigation in this case, because the examinations were the only activity undertaken by the ACIC to investigate the allegations against the Accused.[101]

51. Contrary to the Court of Appeal's reasoning, s 24A does not require there to be a pre-existing or "particular" ACC investigation into the subject-matter that an examiner intends to explore at an examination.[102] It requires only that an examination be "for the purposes of a special ACC investigation". Under ss 7C(1)(d) and 7(3), the Board may determine, in writing, "that an investigation into matters relating to federally relevant criminal activity is a special investigation". That language conveys that, where such a determination is made, the "investigation" and the "special investigation" are one and the same. The investigation "is" the special investigation.

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96 (2015) 234 FCR 274 (***XCIV***), summarised in Reasons below, [135]-[139], applied in *LX* (2016) 259 A Crim R 1 at [32]-[36] (Besanko J) and approved in *XX v Australian Crime Commission (No 3)* (2016) 335 ALR 180 at [50]-[51] (Perry J).

97 Including *National Crime Authority v A1* (1997) 75 FCR 274; *AB v National Crime Authority* (1998) 85 FCR 538.

98 Reasons below, [145]-[147]; *XX v ACC (No 3)* (2016) 335 ALR 180 at [50]-[51] (Perry J), approving *XCIV* (2015) 234 FCR 274 at [101], [103]-[104] (Wigney J).

99 Reasons below, [164].

100 Reasons below, [171], [175], [179], [185].

101 Reasons below, [188].

102 Still less does s 24A require a pre-exiting ACC investigation into named individuals or identified offences: cf Reasons below, [181]. There are many authorities to that effect.

The Board's authorisation and determination both creates and evidences the existence of the investigation, because unless an investigation exists it logically cannot be determined under s 7C to be a "special investigation".

52. Consistently with that analysis, the Court below correctly accepted that the Board could perform the functions of "authorising" and "determining" a special investigation simultaneously.[103] Acceptance of that point is logically inconsistent with there being a requirement that an investigation must exist separately from, and in advance of, the determination of the Board.

53. There is no conceptual difficulty with an examination program (which, in this case, involved the coercive examination of 15 individuals) constituting the ACIC's investigation of particular allegations against particular individuals, being allegations of a kind that fall *within* a Determination (and thus within a special investigation). In that regard, it has long been recognised that examinations are the "engine room" of the ACIC's work.[104]

54. Nor does anything in the text of the ACC Act support the contrary conclusion.

54.1. A "special ACC investigation" is defined in s 4 as an investigation into matters relating to "federally relevant criminal activity" that "the ACC is conducting and that the Board has determined to be a special investigation" (emphasis added). In the phrase "is conducting", the meaning of "is" depends on the statutory context and purpose. That word can be used without any temporal connotation.[105] That is how it is used here.

54.2. In any event, the 2008 Determination was made well before the examinations of the Accused occurred, and it was not disputed that the ACIC had undertaken investigations pursuant to that determination (and therefore that, as a factual matter, an ACIC investigation existed). The Court below focused on the fact that there was no pre-existing ACIC investigation into the Accused.[106] But whether the ACIC had previously investigated those allegations is not to the point, because the word "investigation" in the definition of "special

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103 Reasons below, [169], [171].

104 Parliamentary Joint Committee on the National Crime Authority, *Review of the Australian Crime Commission Act 2002* (November 2005), [3.36].

105 Eg *Logan Park Investments Pty Ltd v DPP (Cth)* (1994) 122 FLR 1 at 3 (the Court).

106 Reasons below, [181]-[186].

investigation" is not used at the level of an existing investigation into particular allegations (for the investigation "is" the special investigation, and must therefore be co-extensive with it, and the scope of the "special investigation" is defined by the Determination). There is therefore no question of an investigation coming "into existence when the examination commences".[107] The investigation exists from the time the Board authorises it, and determines it to be a "special investigation".

54.3. The Court below erred in the reliance it placed on s 25A(6).[108] That provision, like s 28(2), recognises that a person can only be examined for the purposes of the special investigation for which they were summoned (that being the reason that the determination must be in writing, and that s 28(2) requires a copy of the determination to accompany every summons[109]). It does not impose any stricter or narrower limitation on permissible questioning. That is plain from s 28(3), which expressly provides that a person may be examined "in relation to any matter that relates to a special ACC investigation" even if that goes beyond the matters identified in the summons in relation to which the person is to be questioned. The Court below may have overlooked that provision. Whether or not that is so, its conclusion that the "limits of legitimate questioning"[110] were narrower than the matters determined by the Board to constitute a special investigation is incorrect.

55. The Court below also erred in treating *GG v ACC*[111] as authority for the proposition that there must be a "particular investigation" in existence before the examiner can act under s 24A.[112] *GG* held only that a summons under s 28 of the ACC Act must be issued for the purpose of an identified special investigation.[113] It did not even

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107 Reasons below, [176].
108 Contra Reasons below, [178].
109 See, eg, *A1 v National Crime Authority* (1996) 67 FCR 464 at 480; *P v Board of Australian Crime Commission* (2006) 151 FCR 114 at [29]; *XXVII v Commonwealth* [2017] FCA 320 at [52].
110 Reasons below, [178].
111 (2010) 182 FCR 513 at [31] (Jessup and Tracey JJ, with Dowsett J agreeing) (***GG***).
112 Contra Reasons below, [174]-[175].
113 That reflects s 28(7), which provides that the power to issue a summons is "not exercisable except for the purposes of a special ACC operation/investigation". This requires an examiner to direct his or her mind to the respects in which the issue of the summons will further the purposes of the special investigation or operation: *GG* (2010) 182 FCR 513 at [31].

suggest that there must be a more particular investigation on foot before s 24A is engaged.

56. **Uncertainty**: The approach of the Court below introduces uncertainty into the scope of the ACIC's examination powers. On the ACIC's approach, an examination is authorised provided its subject-matter is within a determination of the Board under s 7C (which operates in a manner akin to the terms of reference of a Royal Commission). That approach is supported by s 28(2), which requires a summons to be accompanied by a copy of the determination of the Board, and by s 28(3). By contrast, the approach of the Court below would condition an examiner's powers on an assessment of whether unspecified members of staff of the ACIC – perhaps including external agency personnel authorised under s 7C(1)(e) to "participate" in a special investigation – have conducted an unspecified amount of investigative activity, using unspecified methods, into activities at an unspecified level of generality, such as to warrant the conclusion that there is an ACC investigation into the subject-matter that is to be addressed during an examination. That is a manifestly unworkable approach to defining the circumstances in which coercive investigative powers are available.

## E. Assisting an AFP investigation is not an improper purpose – Notice of Contention [3]

57. The Court below erred in concluding that the examinations were unlawful because they were conducted for an improper purpose, being to assist an AFP investigation.[114]

58. The Court's reasoning on this point overlapped heavily with its conclusion that the ACIC was not conducting its own investigation. That conclusion is incorrect, for the reasons set out in Part D above.

59. To the extent that the "improper purpose" reasoning has any separate foundation, it appears to depend on the proposition that to allow the ACIC to assist the AFP to achieve the AFP's investigative purposes would "effectively obliterate" the "fundamental distinction" between the AFP's powers and the ACIC's powers (the

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[114] Reasons below, [210]-[211].

relevant distinction being that an ACIC examiner can compel a person to answer, whereas the AFP cannot).[115] That is not so. The checks and balances on the use of coercive powers under the ACC Act mean that the deployment of coercive powers by the ACIC cannot properly be treated as equivalent to the conferral of coercive powers on the AFP itself.

60. Further, the Court's conclusions misunderstand the history and purpose of the ACC Act, for the implicit premise of the reasoning below was that the ACIC was created to be a law enforcement agency that would conduct its own investigations, separately from the police.[116] That premise is inconsistent with the role that the ACIC was created to perform, as revealed in the extrinsic material summarised in [5]-[7] above.[117] In fact, the ACIC (like the NCA before it) is given coercive powers in order to assist law enforcement in addressing serious crime, in circumstances where ordinary police methods are likely to be ineffective. It was never intended to duplicate work that could adequately be performed by other law enforcement agencies, but instead to "complement rather than compete with existing law enforcement agencies".[118] As Frank Costigan QC explained during a review of the NCA, "I would see a lot of the investigation not being done by the Crime Authority at all but by law enforcement agencies and the Crime Authority exercising one of the roles it is given under the Act ... making itself available to collect additional evidence".[119] In the same vein, Justice JH Phillips (who chaired the NCA, prior to his appointment as Chief Justice of Victoria) said the Authority is "a body which should act as a partner to the other law enforcement agencies. It should not be – or appear to be – a competitor."[120]

61. The legislative intention that there be close co-operation between the ACIC and other law enforcement agencies is supported by the following provisions of the ACC Act:

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115 Cf Reasons below, [210].

116 See especially Reasons below, [209].

117 See also JC Third Evaluation (1998) [2.65]-[2.66]. See also *S v ACC* (2005) 144 FCR 431 at [6] (Mansfield J).

118 Second Reading Speech, Australian Crime Commission Establishment Bill 2002 (House of Representatives, 26 September 2002).

119 Parliamentary Joint Committee on the National Crime Authority, *Who is to Guard the Guards – An Evaluation of the NCA* (1991) [3.30].

120 Parliamentary Joint Committee on the National Crime Authority, *Who is to Guard the Guards – An Evaluation of the NCA* (1991) p 259 (annexed paper titled "Future Directions" dated 15 November 1990); JC Third Evaluation (1998) [1.4].

61.1. by s 7B, the ACIC is, as noted in [3] above, controlled by a Board composed predominantly of the Commissioners of every Australian police force, and that is chaired by the Commissioner of the AFP. The Board considers whether ordinary police methods are likely to be effective in determining that an investigation is a special ACC investigation (s 7C(3)), thereby enabling it to focus the ACIC's resources and activities on investigations that cannot be conducted effectively by other law enforcement agencies. Given the composition of the Board, there is no basis to ascribe different investigative purposes to the ACIC and other law enforcement agencies.

10 61.2. under s 17(1), the ACIC is expressly directed to work in cooperation with law enforcement agencies in performing its functions;

61.3. the ACC Act makes specific provision for the ACIC to disseminate admissible evidence to law enforcement agencies (ss 12(1), 59(7));[121] and

61.4. section 7C(1)(e), concerning the classes of person who may participate in a ACC special investigation, creates a mechanism by which staff of other law enforcement agencies can be authorised to participate directly in investigations undertaken by the ACC, showing that there is no requirement for a sharp division between ACIC special investigations and investigations by other law enforcement agencies.[122]

20 62. Given those features of the ACC Act, the Federal Court in *LHRC v Deputy Commissioner of Taxation (No 3)* was correct to recognise that "providing for a collaborative approach between government agencies in addressing serious organised crime is a fundamental plank of the legislative scheme."[123] As in that case,[124] it is not possible "to separate the purpose of disseminating information from the examination ... from the purpose of the investigation", because the purposes of the relevant ACIC Determinations include the dissemination of information and intelligence in accordance with the ACC Act.[125]

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121 See the discussion of the interaction of s 12 with other provisions of the ACC Act (particularly s 25A) in *Australian Crime Commission v OK* (2010) 185 FCR 258 at [107]-[111] (Emmett and Jacobson JJ).

122 See *LHRC v Deputy Commissioner of Taxation (No 3)* (2015) 326 ALR 77 at [169] (Perry J) (***LHRC***).

123 *LHRC* (2015) 148 ALD 32 at [23] (Perry J).

124 *LHRC* (2015) 148 ALD 32 at [162], [165].

125 See 2008 Determination, [9](a); 2010 Determination, [9](a). See Reasons below, [120], [126].

63. Finally, the history and purpose of the ACIC demonstrate that there is no foundation for the sharp distinction that the Court below sought to draw between the investigative purposes of the ACIC and the investigative purposes of the AFP.[126] Their purposes overlap, and are complementary. The Court of Appeal's conclusion would compel the ACIC to conduct its own self-contained investigations, including by undertaking investigative steps that could readily be undertaken by police, as it is only once the ACIC is undertaking such an investigation that its coercive powers would be available. That would require the ACIC to operate as a rival law enforcement agency. It would also introduce arbitrary distinctions whereby coercive powers could not be used to assist with particular aspects of an AFP investigation, but they could be used if the AFP officers were participating in an investigation of the same allegations whilst acting as members of staff of the ACIC (because then there would be an ACIC investigation).

## Part VIII ESTIMATE OF ORAL ARGUMENT

64. The ACIC estimates that it will require 2 hours to present its oral argument on the appeals and the notices of contention.

Dated: 19 January 2018

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[126] Cf Reasons below, [209].