

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S217 OF 2019

COMMONWEALTH OF AUSTRALIA

Appellant

and

HELICOPTER RESOURCES PTY LTD ACN

006 485 105

First Respondent

CORONER'S COURT OF THE

AUSTRALIAN CAPITAL TERRITORY

Second Respondent



OUTLINE OF ORAL SUBMISSIONS OF THE
COMMONWEALTH OF AUSTRALIA

Filed on behalf of the Appellant

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PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

I. Notice of Contention

2. HeliRes should be refused leave to file its proposed Notice of Contention because:
 - 2.1. filing the NOC is inconsistent with HeliRes's position that it has no continuing interest in this matter;
 - 2.2. no adequate explanation has been given for HeliRes's non-compliance with the Rules, which has caused prejudice to the Cth.

II. Full Court (FC) reasoning

3. The proceeding concerned the permissibility of a subpoena issued by the Coroner to require an employee of HeliRes to give evidence at the inquest at a time after HeliRes had been charged with summary offences (FC [29], [34], [50]-[51], [57], [59]).
4. The FC proceeded on the basis that, subject to s 87(1)(b) of the *Evidence Act 2011* (ACT), *Caltex* was inconsistent with the proposition that the accusatorial principle prevents an officer of a corporation being required to answer questions which tend to incriminate the corporation (FC [143], [150], [183]).
5. The FC held that s 87(1)(b) dictated a different result (FC [181]-[189]). It found that s 87(1)(b) would make Captain Lomas's evidence admissible, not merely as evidence against HeliRes, but as evidence of an admission by HeliRes itself (FC [189]). It was for that reason that the FC held that to compel Captain Lomas to give evidence would be contrary to the companion rule (FC [183]-[185]) and the fundamental principle (FC [186]-[188]).

III Ground 1 – s 87(1)(b) of the Evidence Act (CS [25]-[45])

6. Section 87(1)(b) is part of the Evidence Act regime for dealing with the "admissions" exception to the hearsay rule: ss 59, 81, 87, Dictionary ("admission") (Vol 1, Tab 3).
7. Nothing in the text of s 87(1)(b) equates the person who made the previous representation with the party against whom that representation may be admissible. To the contrary, it is

precisely because those persons are distinct that, in the particular circumstances in which s 87 applies, it facilitates the admissibility of statements made by one person (a non-party) against another (a party).

8. The fact that s 87(1)(b) does not deem a representation made by an employee to have been made by the employer is obvious in relation to employers who are natural persons. As s 87(1)(b) draws no distinction between corporate and natural employers, it follows that it equally involves no such deeming with respect to employers who are corporations.

9. The FC held that s 87(1)(b) altered the common law rule that “oral evidence given by an officer of a corporation is that of the witness, not that of the corporation” (FC [184]). That was incorrect, there being nothing in the text or extrinsic material to support the conclusion that it altered the settled common law position that evidence of an employee of a corporation is evidence of the witness, even when it is admissible against the corporation (cf RS [77(c)], [80]).

9.1. *Smorgon v ANZ Banking Group Ltd* (1976) 134 CLR 475 at 481 (Vol 3, Tab 34);

9.2. *Environmental Protection Authority v Caltex* (1993) 178 CLR 477 at 504, 512-513, 535, 551 (*Caltex*) (Vol 2, Tab 13).

10. An employee of a corporation can be compelled to give evidence against that corporation during a criminal trial. If that occurs, the evidence will be their own evidence, even if admissible against the company. Section 87(1)(b) cannot sensibly produce a different result where the same evidence is given prior to the trial (cf FC [189]).

11. The Full Court’s error in relation to s 87(1)(b) was critical to its conclusion, because it was the basis upon which it found that to compel Captain Lomas to give evidence would be to compel HeliRes itself to assist the prosecution, contrary to the accusatorial principle. For that reason, the appeal can be allowed on this ground alone.

IV. Ground 2 – the accusatorial principle (CS [46]-[55])

12. The accusatorial principle is concerned with the position of the accused in the criminal justice system. No authority has applied that principle to compulsory processes used to obtain evidence from persons other than the accused (FC [123], [155], [166]-[167]).

13. It is not contrary to the fundamental principle or the companion rule for statutory powers to be exercised to gather evidence for use in pending criminal proceedings involving a corporate accused. That is so at least to the extent that those powers are exercised to

compel an employee of the corporate accused to give evidence, or to require the corporate accused to produce documents.

13.1. *Caltex* (1993) 178 CLR 477 at 486, 489, 503-504, 507, 514-517, 538, 548, 550, 552, 559-560 (**Vol 2, Tab 13**);

13.2. *CFMEU v Boral* (2015) 256 CLR 375 at [2]-[3], [20], [24], [37]-[38], [57], [73], [76], [79], [81]-[83] (**Vol 1, Tab 11**).

10 14. The FC erred in concluding that it would be contrary to the fundamental principle for the Coroner to subpoena Captain Lomas because HeliRes had a common law right to decide how to meet the prosecution case without the prosecution or co-accused having any entitlement to know how it would defend the charge, or because it would force the HeliRes's hand prematurely (**FC [186]-[188]**). Those conclusions drew on authorities which concerned the application of the accusatorial principle to natural persons (who are entitled to the privilege against self-incrimination) and failed to take account of:

14.1. s 187 of the Evidence Act, which substantially reduces the capacity of a body corporate to refuse to produce information or documents that may be relevant to a prosecution case;

20 14.2. the long legislative history of compelling officers and employees of corporations to attend compulsory examinations and give evidence that may subsequently be admitted in criminal trials: *R v OC* (2015) 90 NSWLR 134 at [119], [121]-[123] (**Vol 4, Tab 33**);

14.3. the fact that evidence of an employee will not "lock in" a corporate accused, or limit the instructions that the corporate accused can give, because a corporate accused may lead contradictory evidence from other employees without risk of perjury, and need not conduct its case consistently with the evidence of any particular employee.

V. **Ground 3 – prematurity (CS[56]-[58])**

15. The primary judge's holding on prematurity was correct (**PJ [145]-[148]**).

30 Date: 10 October 2019

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