

## **X7 v AUSTRALIAN CRIME COMMISSION & ANOR (S100/2012)**

Date case stated referred into the Full Court: 21 August 2012

The Australian Crime Commission (“ACC”) is established under the *Australian Crime Commission Act 2002* (“the Act”). Pursuant to section 46B(1) of that Act, the Chief Executive Officer (“CEO”) of the ACC appointed specified examiners in relation to a special ACC investigation. By a summons issued on 22 November 2010, the Plaintiff was required to attend to give evidence before such an ACC examiner on 14 December 2010.

Following his arrest on 23 November 2010, the Plaintiff was charged by the Australian Federal Police with the following offences:

- a) conspiracy to import a commercial quantity of a border controlled drug contrary to sections 11.5 and 307.1 of the Criminal Code;
- b) conspiracy to traffic in a commercial quantity of a controlled drug contrary to sections 11.5 and 302.2 of the Criminal Code; and
- c) conspiracy to deal with money being the proceeds of crime contrary to sections 11.5 and 400.3(1) of the Criminal Code.

Following a request from the Plaintiff’s then lawyer, the examination scheduled for 14 December 2010 was adjourned until 1 February 2011. Before that later examination could commence however, the Plaintiff (who was by that stage unrepresented) requested a further adjournment. In refusing that request, the Examiner reassured the Plaintiff that his rights during the examination would be protected and that no-one associated with his criminal prosecution would have access to the information that he (the Plaintiff) may disclose. The Plaintiff was also advised about the privilege against self-incrimination. The Examiner then advised the Plaintiff that he could not refuse to answer any questions or refuse to produce any documents. The Plaintiff then claimed the privilege against self-incrimination with respect to all of the answers given by him that day.

On 2 February 2011 the examination of the Plaintiff resumed. By this stage the Plaintiff was represented and he refused to answer any further questions concerning the subject matter of his charges. The Examiner then advised the Plaintiff that he would be further charged with failing to answer questions. The Examiner also made an oral direction pursuant to section 25A(9) of the Act concerning, inter alia, the limited use that could be made of the Plaintiff’s evidence. It was also concerned with protecting his identity. That direction was subsequently varied by the CEO’s delegate under section 25A(10) of the Act. Nothing in that varied direction however authorised the publication to any person connected with the Plaintiff’s criminal prosecution of any evidence (or documents) given by him to the Examiner. It also did not permit any information to be disclosed that might enable the Plaintiff to be identified, or even the fact that he had given evidence at the examination.

On 20 April 2012 the Plaintiff filed a writ of summons in which he sought, inter alia, a declaration that the ACC examination was an impermissible interference with his constitutional right to a fair trial on the drugs charges. On 23 August 2012 Justice Gummow referred a case stated into the Full Court for its consideration.

On 23 August 2012 the Plaintiff filed a Notice of Constitutional matter. The Attorneys-General for NSW, Victoria, Queensland, Western Australia and South Australia have all advised the Court that they will be intervening in this matter.

The questions stated for the consideration of the Full Court are:

- Does Division 2 of Part II of the Act empower an examiner appointed under section 46B(1) of the Act to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerns the subject matter of the offence so charged?
- If the answer to the question above is “Yes”, is Division 2 of Part II of the Act invalid to that extent as contrary to Chapter III of the Constitution?