IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S100 of 2012

BETWEEN:

X7
Appellant

AND:

AUSTRALIAN CRIME COMMISSION
First Defendant

AND:

COMMONWEALTH OF AUSTRALIA
Second Defendant

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

I. CERTIFICATION

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

II. BASIS OF INTERVENTION

2. The Attorney-General for Queensland intervenes pursuant to s 78A of the *Judiciary Act 1903* (Cth) in support of the Defendants.

III. WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

IV. APPLICABLE LEGISLATION

4. The applicable legislation is identified in the submissions of the Commonwealth.

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Filed on behalf of: Attorney-General for the State of Queensland

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V. ARGUMENT

5. The Attorney-General adopts the submissions of the Commonwealth concerning the construction of the *Australian Crime Commission Act 2002* (Cth) ('the ACC Act').

6. The Attorney-General makes the following submissions in response to the Plaintiff's submissions on the constitutionality of Division 2 of Part II of the ACC Act.

7. The Plaintiff's case rests on two claims:[1]

   (a) for an examiner under the ACC Act to conduct an examination directed to the very offence with which a person has been charged would be an impermissible interference with the exercise of the judicial power of the Commonwealth; and
   (b) such an examination would breach s 80 of the Constitution.

8. Neither claim, however, is correct.

ACC Act does not interfere with the judicial power of the Commonwealth

9. The Plaintiff submits that *Hammond v Commonwealth* ('*Hammond*')[2] supports the first claim.[3] It does not. *Hammond* concerned an application for an interlocutory injunction to restrain a Royal Commission from proceeding further with the examination of an individual against whom charges were pending. The relevant legislation[4] made a refusal to answer questions put by the Commission an offence, although it provided that the evidence given could not be used in criminal proceedings against the person who gave it. The commissioner, mindful of the fact that charges were pending, proposed to continue the examination in private; but he had permitted the police officers who had charged Mr Hammond to be present[5] and had decided to provide a transcript of the examination to the prosecution.[6]

10. In circumstances of great urgency,[7] all members of the Court granted the injunction sought. Chief Justice Gibbs (with whose reasons Mason J agreed and Murphy J generally agreed[8]) wrote the leading judgment. His Honour framed the issue in these terms:[9]

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1 Plaintiff's submissions, paras 9 and 13.
2 (1982) 152 CLR 188.
3 Plaintiff's submissions, para 12.
4 *Royal Commissions Act 1902* (Cth), ss 6, 6DD and 7; *Evidence Act 1958* (Vic), ss 16, 29 and 30. The commissioner had been issued with two commissions, one by the Governor-General and one by the Governor of Victoria.
5 (1982) 152 CLR 188 at 194.
6 (1982) 152 CLR 188 at 192 (Ryan QC in argument).
7 See (1982) 152 CLR 188 at 19 (Gibbs CJ).
8 (1982) 152 CLR 188 at 199.
9 (1982) 152 CLR 188 at 196.

> The ground of the application for the injunction is that the further examination of the plaintiff, and the making of the report, would constitute a contempt of the County Court before which the criminal proceedings against the plaintiff are pending. To succeed in obtaining an injunction on that ground, the plaintiff must establish that there is a real risk, as opposed to a remote possibility, that justice will be interfered with if the Commission proceeds in accordance with its present intention. The tendency of the proposed actions to interfere with the course of justice must be a practical reality—a theoretical tendency is not enough.

11. His Honour found that the examination would be likely to prejudice Mr Hammond's defence. As he explained:[10]

> Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, *in the circumstances of this case*, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is *very likely to prejudice him in his defence*. In the *Builders Labourers' Case* I expressed the opinion that, if during the course of a commission's inquiries into allegations that a person had been guilty of criminal conduct, a criminal prosecution was commenced against that person based on those allegations, the continuance of the inquiry would, *generally speaking,* amount to a contempt of court, and that the proper course would be to adjourn the inquiry until the disposal of the criminal proceedings.

12. The references to the 'circumstances of this case' and the *Builders Labourers' Case*[11] indicate that Gibbs CJ was not laying down a rule that every examination directed to an offence with which a person had been charged would amount to a contempt of court. His Honour instead recognised that a high likelihood of prejudice arose from circumstances in which the prosecution would be provided with the transcript of the compulsory examination and would obtain a forensic advantage from the examination that it otherwise would not obtain. To obtain such an advantage might well amount to a contempt of court.[12]

13. The legislation in *Hammond* had no counterpart to s 25A(9) of the ACC Act. That provision relevantly requires an examiner to give a direction that any evidence given before the examiner must not be published, except to specified persons, if the failure to do so might prejudice the fair trial of a person who has

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10 (1982) 152 CLR 188 at 198 (emphasis added).

11 *Victoria v Australian Building Construction Employees' and Builder Labourers' Federation* (1982) 152 CLR 25 at 54.

12 *Brambles Holdings Ltd v Trade Practices Commission [No 2]* (1980) 44 FLR 182 at 187-189 (Franki J); *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460 at 467-468 (Gibbs CJ); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 559 (McHugh J).

been, or may be, charged with an offence. It is designed to eliminate or minimise interference in the administration of justice by preventing the derivative use of evidence.[13] Furthermore, a failure to give a direction under s 25A(9) is judicially reviewable under s 75(v) of the Constitution.[14]

14. Given the features of the ACC Act, Chief Justice Gibbs' reasoning in *Hammond* suggests that the examination would pose no 'real risk' to the administration of justice and would not be a contempt of court.[15] The provisions of Division 2 of Part II of that Act therefore would not infringe Chapter III of the Constitution.

15. It is true that in *Hammond* Deane J took a different approach from that of Gibbs CJ. Justice Deane remarked:[16]

> Such an extra-curial inquisitorial investigation of the involvement of a person who has been committed for trial in the matters which form the basis of the criminal proceedings against him constitutes, in my view, an improper interference with the due administration of justice in the proceedings against him in the criminal court and contempt of court. Where a court is exercising the judicial power of the Commonwealth pursuant to s 71 of the Constitution, such interference involves a derogation of the constitutional guarantees that flow from the vesting of the judicial power of the Commonwealth in courts of law. Thus, in *Huddart, Parker & Co Pty. Ltd v Moorehead*, O'Connor J, in considering the validity of a notice given under s 15B of the *Australian Industries Preservation Act 1906* (Cth) which required that certain information be provided to the Comptroller-General of Customs, commented:
>
> > When the Comptroller makes his requirement under 15B there can be no proceeding pending in a Court. He is not empowered to use the section with reference to an offence when once it has been brought within the cognizance of the Court. The power to prevent any such interference by the Executive with a case pending before the ordinary tribunals is undoubtedly vested in this Court by the Constitution.

16. These remarks, however, were not accepted by any other member of the Court. They are inconsistent with the need to find a 'real risk' to the administration of justice in the particular circumstances of the examination.[17] Indeed, they do not

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13 Subsections 30(4)-(5) of the ACC Act prevent the direct use of the contents of the examination. Consequently, once a direction under s 25A(9) has been made, the person examined is 'effectively immunised from any direct or derivative use of the contents of [the] examination in [the] pending criminal trial': *R v CB* [2011] NSWCCA 264 at [110] (McClellan CJ at CL).

14 In addition, nothing suggests that a transcript of the examination would be provided to the prosecution notwithstanding the direction made by the examiner under s 25A(9): see the directions referred to in paras 13-16 of case stated [SCB 25].

15 This conclusion accords with that of the majority in *Australian Crime Commission v OK* (2010) 185 FCR 258 at [107] (Emmett and Jacobson JJ) and *R v CB* [2011] NSWCCA 264 at [100], [111] (McClellan CJ at CL).

16 (1982) 152 CLR 188 at 206.

17 (1982) 152 CLR 188 at 196 (Gibbs CJ). See also *Sorby v Commonwealth* (1983) 152 CLR 281 at 299 (Gibbs CJ) (explaining *Hammond* as a case in which there 'was a real possibility that [the

address how an examination could pose any risk to the administration of justice, and therefore amount to a contempt of court, in circumstances where the examination would be held in private,[18] the answers given could not be used directly against a person in criminal proceedings if the person claims that it might tend to incriminate them[19] and the information gained would not to be conveyed to the prosecution.

17. In addition, Justice Deane's remarks appear to assume that 'once the subject matter has passed into the hands of the courts it is immune from legislative and executive action'[20]—a position that was rejected by Gibbs CJ and Mason J in *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission*[21] and that does not appear to have been accepted since.[22]

18. Accordingly, the Plaintiff's reliance on *Hammond* is misplaced. For that reason alone, the Plaintiff's claim about Chapter III should be rejected.

19. In any event, the Plaintiff's broad reading of *Hammond* is difficult to reconcile with subsequent authority on the privilege against self-incrimination.[23] It is well established that the abrogation of the privilege against self-incrimination does not infringe Chapter III of the Constitution.[24] In *Hamilton v Oades* ('*Hamilton*'),[25] the Court accepted that the result of abrogating that privilege might be to require a person to answer questions about pending charges. In that

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plaintiff] was required to answer incriminating questions the administration of justice would be interfered with').

18 ACC Act, s 25A(3).

19 ACC Act, s 30(4)-(5).

20 (1982) 152 CLR 460 at 474.

21 (1982) 152 CLR 460 at 466-468 (Gibbs CJ), 474 (Mason J).

22 See, for example, *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 558-559 (McHugh J).

23 It is submitted that it is not necessary to determine whether *Hammond* was correctly decided. If it were necessary to determine that issue, however, then it is respectfully submitted that it should be overruled for several reasons. First, it is hard to reconcile the finding of an interference with the administration of justice with *Hamilton v Oades* (1989) 166 CLR 486 and other cases dealing with the abrogation of the privilege against self-incrimination. Those cases recognise that abrogation of the principle against self-incrimination may require answers to be given about the subject matter of pending charges, even if it involves disclosure of the accused's defence. These cases were not considered in *Hammond* because of the urgency of the matter. Secondly, *Hammond* did not rest upon a principle carefully worked out in a succession of cases. Thirdly, there was a difference between the reasons of the justices. As explained in paragraphs 10 to 12 and 15 above, Gibbs CJ decided the case on a basis different from that of Deane J. Justice Brennan, moreover, decided the case on the basis that the continuation of the examination would have required Mr Hammond to incriminate himself. Justice Murphy, as discussed in paragraph 24 below, based his reasons at least partly on s 80 of the Constitution. Fourthly, the case has not produced a useful result, but has proved difficult for lower courts to apply: see *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [26] (Basten JA) (pointing out that *Hammond* is 'not a case which lends itself to the extraction of principle'). Finally, *Hammond* has not been independently acted upon in a manner that militates against reconsideration. On the contrary, as s 25A of the ACC Act demonstrates, the Commonwealth has sought to overcome its effect.

24 *Sorby v Commonwealth* (1983) 152 CLR 281 at 298-299 (Gibbs CJ), 306-308 (Mason, Wilson and Dawson J).

25 (1989) 166 CLR 486.

case, s 541 of the *Companies (New South Wales) Code* (NSW) relevantly provided that a liquidator who suspected that an individual may have been guilty of fraud, negligence or other misconduct in relation about the affairs of a corporation could apply to the Supreme Court to have that individual examined. The section abrogated any right to refuse to answer questions where the answer might tend to incriminate; however, it ensured that where objection had been taken before answering, the answer would not be admissible in evidence in criminal proceedings against that person. It also provided that the Supreme Court could give such directions as to the matters to be inquired into and as to procedure as it saw fit. The respondent was charged with criminal offences arising out of the collapse of a company of which he was a director. He submitted, among other things, that *Hammond* required orders to be made preventing him from being examined about matters that might tend to incriminate him, including by disclosing his defence. A majority of the Court rejected those submissions. Chief Justice Mason said:[26]

> The privilege against self-incrimination would not ordinarily protect a person against disclosure of his defence to a criminal charge. The so-called right not to disclose a defence is the result merely of the absence in ordinary circumstances of any statutory requirement that defences be revealed. In some instances there is such a specific requirement, for example, in relation to alibi defences. And there is implicit in the general words of s.541 such a general requirement. The possibility of disclosure of a defence is, accordingly, not a matter in respect of which a witness needs to be protected, except perhaps in the most exceptional circumstances. The second matter to be mentioned is [the] reference to the fact that an accused person is not required ordinarily to submit to pre-trial discovery. Granted that this is so, it is a consideration which must yield to the statutory abrogation of the privilege unless the circumstances of the particular case are so compelling as to call for an exercise of the statutory discretion.

20. Justices Dawson's approach was similar. His Honour pointed out that the effect of being required to answer a question after criminal proceedings had begun did not necessarily carry more adverse consequences than if the question was asked at an earlier time. He stated that, in the context of a public examination, when charges were laid would often be 'merely adventitious'.[27] After referring to the judgment of Gibbs CJ in *Hammond*, his Honour also observed that the Court in that case had had to issue its decision immediately and several cases regarding the abrogation of the privilege on self-incrimination had not been discussed.[28]

21. Justice Toohey distinguished *Hammond* on the basis that the questions in that case were 'designed' to establish the person's guilt.[29] His Honour suggested that *Hammond* should not be given a wider operation, expressing the view that the law would have developed in an 'unfortunate way' if a persons could be asked any questions, no matter how incriminating, before charges were laid but

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26 (1989) 166 CLR 486 at 499-500.
27 (1989) 166 CLR 486 at 508.
28 (1989) 166 CLR 486 at 509.
29 (1989) 166 CLR 486 at 515.

once charges were pending, an incriminating question could not be asked no matter how important it was to an examination and even if any harm to the person examined was minimal.[30] His Honour considered that any unfairness in the particular case could be dealt with by the Supreme Court using its discretion under s 541.

22. As *Hamilton* demonstrates, it is incorrect to claim that an examination directed to an offence with which a person has been charged necessarily amounts to a contempt of court.

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23. Accordingly, given the features of the ACC Act, the claim that Division 2 of Part II would impermissibly interfere with judicial power and breach Chapter III of the Constitution is unfounded.

ACC Act does not infringe section 80 of the Constitution

24. The Plaintiff's second submission is that the ACC Act is inconsistent with s 80 of the Constitution. The submission is based on the judgment of Murphy J in *Hammond*. In that case, his Honour said:[31]

> [I]t is assumed that the plaintiff has no privilege against self-incrimination. He is awaiting his trial on indictment for conspiracy against the laws of the
20 Commonwealth. He has a constitutional right to trial by jury (see Constitution, s. 80). *It is inconsistent with that right that he now be subject to interrogation by the executive government or that his trial be prejudiced in any other manner.* I would take this view whether or not he has privilege against self-incrimination.

25. It is respectfully submitted that these statements about s 80 of the Constitution should not be followed.

26. First, Murphy J cited no authority to support them.

30 27. Secondly, his Honour's statements are inconsistent with authorities on the privilege against self-incrimination. In *Huddart, Parker & Co Pty Ltd v Moorehead*[32] and *Sorby v Commonwealth*,[33] the Court held that the abrogation of that privilege did not infringe s 80 of the Constitution. As *Hamilton*[34] makes clear, moreover, the abrogation of the privilege can result in a person having to answer questions about matters subject to pending charges. Section 80 of the Constitution therefore does operate to prevent an examination when charges are pending.

28. Finally, in any event, it is difficult to see how the provisions of Division 2 of
40 Part II adversely affect the constitutional function of a jury under s 80 of the

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30 (1989) 166 CLR 486 at 516.
31 (1982) 152 CLR 188 at 201 (emphasis added).
32 (1909) 8 CLR 330 at 358 (Griffith CJ), 375 (O'Connor J), 385-386 (Isaacs J), 418 (Higgins J).
33 (1983) 152 CLR 281 at 298 (Gibbs CJ), 308-309 (Mason, Wilson and Dawson JJ).
34 (1989) 166 CLR 486.

Constitution. The jury has been described as the 'method of trial in which laymen selected by lot ascertain under the guidance of a Judge the truth in questions of fact arising either in civil litigation or in a criminal process'.[35] The provisions regulating examinations under the ACC Act do not affect the jury's capacity to consider the evidence presented at the trial and its ability to find facts. Nor do they deprive the jury of any of its essential characteristics such as unanimity.[36]

29. For these reasons, the Plaintiff's submissions on s 80 should be rejected.

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30. It follows that Division 2 of Part II to ACC Act are valid laws of the Commonwealth. The second question in the case stated should be answered 'no'.

VI. ESTIMATE OF TIME REQUIRED FOR ORAL ARGUMENT

31. The Attorney-General estimates that oral argument should take 30 minutes.

Dated: 26 October 2012

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35 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375 (O'Connor J). See also *Cheatle v The Queen* (1993) 177 CLR 541 at 549.

36 See *Cheatle v The Queen* (1993) 177 CLR 541.