

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S100 OF 2012

BETWEEN:

AND

X7
Plaintiff
AUSTRALIAN CRIME COMMISSION
First Defendant
THE COMMONWEALTH OF AUSTRALIA
Second Defendant

10

SECOND DEFENDANT'S SUBMISSIONS



Filed on behalf of the Second Defendant by:

Australian Government Solicitor
50 Blackall Street
Barton ACT 2600
DX5678 Canberra

Date of this document: 23 October 2012

Contact: Simon Thornton
File ref: 12028159
Telephone: 02 6253 7287
Facsimile: 02 6253 7303
E-mail: simon.thornton@ags.gov.au

A982164

PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2. There are three issues in this case:

10 (a) whether, on its proper construction, Division 2 of Part II of the *Australian Crime Commission Act (ACC Act)* empowers an examiner appointed under the ACC Act to conduct an examination of a person who has been charged with a Commonwealth indictable offence where the examination concerns the subject matter of the offence so charged;

(b) if the answer to question (a) is "yes", whether Division 2 of Part II of the ACC Act is invalid as contrary to Chapter III of the Constitution because it interferes with the exercise of Federal judicial power; and

20 (c) if the answer to question (a) is "yes", whether Division 2 of Part II of the ACC Act is invalid because it interferes with the right to trial by jury in s 80 of the Constitution.

3. The second defendant (**the Commonwealth**) submits that the first issue should be answered "yes" and the second and third should be answered "no".

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (Cth)

4. The plaintiff has given notices pursuant to s 78B of the *Judiciary Act 1903* (Cth). The Commonwealth does not consider that any further notice under s 78B is required.

30 **PART IV FACTS**

5. The relevant facts are found at [1] – [16] in the Case Stated by Gummow J on 23 August 2012 under s 18 of the *Judiciary Act 1903* (Cth) and the documents exhibited to the Case Stated. They can be summarised as follows.

6. On 30 April 2009 the Board of the Australian Crime Commission (ACC) authorised the ACC to undertake a special investigation into certain matters relating to "federally relevant criminal activity" under s 7C(1)(c) of the ACC Act. [CSB 28-35] On 1 May 2009 the Chief Executive Officer (CEO) of the ACC made arrangements for specified ACC examiners to exercise

powers under the ACC Act in connection with that special investigation. [CSB 23 [4], 39] On 22 November 2010 one of those specified examiners issued a summons (**the summons**) under s 28(1) of the ACC Act requiring the plaintiff to attend before the examiner on 14 December 2010 to give evidence about certain federally relevant criminal activity. [CSB 23 [5], 41]

- 10
7. On 23 November 2010 the plaintiff was arrested by officers of the Australian Federal Police. While in custody he was served with the summons. The plaintiff was later charged with certain indictable offences under the *Criminal Code Act 1995* (Cth). [CSB 23-24 [6]]
8. After an adjournment, the plaintiff's examination by the ACC occurred on 1 February 2011. The examination was held in private and the attendees were the plaintiff, the examiner, an interpreter, counsel assisting the examiner and two other ACC staff. The plaintiff did not have a lawyer present. The plaintiff made a general claim of the privilege against self-incrimination in relation to all answers given by him at his examination. [CSB 24 [8]-[10]]
9. During his examination on 1 February 2011 the plaintiff was asked and answered detailed questions about matters concerning the subject matter of the offences with which he had been charged. [CSB 25 [11]]
- 20
10. The plaintiff's examination recommenced on 2 February 2011. On this occasion the plaintiff was represented by a lawyer, and he declined to answer any further questions. The examiner informed the plaintiff that he would, in due course, be charged with failing to answer questions. The examiner then made a direction under s 25A(9) of the ACC Act restricting the persons to whom the evidence given by the plaintiff at the examination could be published. The examiner expressly stated that officers of the Commonwealth Director of Public Prosecutions and the police officers associated with the prosecution of the offences with which the plaintiff had been charged at the time of the examination were not entitled to receive a copy of the evidence given by the plaintiff at the examination. [CSB 25 [12]-[14]]
- 30
11. Having regard to the above, although the plaintiff's examination occurred after he was charged, on the facts before the Court:
- 11.1. no direct use of the transcript of the plaintiff's examination will be permissible at his trial (because of s 30(5), and also by reason of the s 25A(9) direction);
- 11.2. there is no allegation or finding that the transcript of the plaintiff's examination has been used as a basis to locate further evidence that will be used at the plaintiff's trial;

11.3. there is no allegation that the transcript has been communicated to the prosecution or that it will be used more broadly to assist the presentation of the case against the plaintiff.

PART V LEGISLATIVE PROVISIONS

12. The Second Defendant submits that the applicable constitutional and statutory provisions are: Ch III of the Constitution; and s 12, Div 2 of Part II, ss 51 and 59 of the *Australian Crime Commission Act 2002* (Cth) as in force on 2 February 2011. Sections 12 and 59 of the ACC Act were subsequently amended by Schedule 2 to the *Crimes Legislation Amendment (Powers and Offences) Act 2012* (Cth). Part 1 of Schedule 2 to this Act came into force on 5 April 2012 and Part 2 commenced on 25 June 2012. These provisions are set out at Annexure A to these submissions.

PART VI ARGUMENT

Question 1: Does the ACC Act permit examination of a person who has been charged with an offence on the subject matter of that offence?

13. As a matter of statutory construction, the ACC Act does permit the examination of a person who has been charged with an offence on the subject matter of the offence charged. The Full Court of the Federal Court in *Australian Crime Commission v OK*¹ (*ACC v OK*), and the New South Wales Court of Criminal Appeal in *R v CB*,² were correct in so holding.³

14. The following features of the ACC Act support that conclusion.

15. **First**, the ACC Act expressly contemplates that a person may be compelled to attend an examination after being charged with an offence.⁴ Section 25A(9) provides that an examiner may direct that any evidence given before the examiner, any document or thing produced to the examiner, any information enabling a person who has given evidence before the examiner to be identified, or the fact that a person has given or may be about to give evidence at an examination, not be published or not be published except in such manner as or to persons the examiner specifies. It is an offence to make a publication in contravention of a direction by an examiner (s 25A(14)). The examiner *must* give such a direction if the failure to do so might prejudice the safety or reputation of a person or the fair trial of a

¹ [2010] FCAFC 61; 185 FCR 258.

² [2011] NSWCCA 264. Special leave to appeal against that judgment was refused: *CB v The Queen* [2012] HCA Trans 162.

³ As was accepted in *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [59].

⁴ *ACC v OK* [2010] FCAFC 61; 185 FCR 258 at 278 [110].

person *who has been*, or may be, *charged with an offence*.⁵ The obligation to give a direction under s 25A(9) to protect from prejudice the fair trial of a person who "has been ... charged with an offence" manifests a clear legislative intention that persons who have been charged with an offence may be the subject of an examination.⁶ The person summonsed is the person whose fair trial is most at risk of being prejudiced by the failure to give a direction. Accordingly, s 25A(9) cannot properly be read down to address only the fairness of the trial of a person other than the person charged with the offence.⁷

- 10 16. **Second**, there is nothing in the text of either ss 28 or 30 of the ACC Act (being the provisions that empower an examiner to summon a person to appear at an examination to give evidence and produce documents for the purposes of an ACC special operation or investigation, and that require a person who is summonsed to appear and answer questions) that restricts or qualifies the ability of an examiner to require a person to answer questions or produce documents after they have been charged with an offence. "There is nothing in the words ... themselves that suggests that the power which that section confers comes to an end once proceedings have been begun".⁸ Accordingly, if the ACC Act does not authorise questioning after charge, that must be the result of an implied limitation. But such an implication would be inconsistent with both the express terms of the Act (discussed above) and with the purpose of the Act. It would be inconsistent with the purpose of the Act because the ACC was created to investigate relevant criminal activity, which is defined by reference to "serious and organised crime" (as defined). It would inhibit the ability of the ACC to discharge that function if laying charges against one member of a criminal syndicate prevented the ACC from using its coercive powers to compel that person to provide evidence as to the subject matter of the offences charged, particularly as such an examination may often occur for the purpose of gathering evidence for use against other members of the criminal syndicate.⁹
- 20
- 30 17. **Third**, the ACC Act used to contain a provision, s 30(10), which expressly prevented the use of coercive powers to compel a witness to provide self-incriminating answers where those answer might tend to incriminate the person with respect to an offence with which the person

⁵ While the CEO may revoke such a direction (s 25A(10)), he or she must not do so if it might prejudice the safety or reputation of a person or the fair trial of a person *who has been*, or may be *charged with, an offence* (s 25A (11)).

⁶ *ACC v OK* [2010] FCAFC 61; 185 FCR 258 at [110]; *Hak v ACC* [2005] FCA 416; 138 FCR 51 at [19] - [20].

⁷ As Mansfield J appeared to do in *OK v Australian Crime Commission* [2009] FCA 1038; 259 ALR 507 at [60] and [64].

⁸ *Pioneer Concrete (Vic) Pty Limited v Trade Practices Commission* [1982] HCA 65; (1982) 152 CLR 460 at 465 per Gibbs CJ.

⁹ 185 FCR 258 at 277 [109]; *Hak v Australian Crime Commission* [2005] FCA 416; 138 FCR 51 (*Hak v ACC*) at 56 [20].

had been charged.¹⁰ Section 30(10) was repealed by the *National Crime Authority Legislation Amendment Act 2001* (Cth).¹¹ Contrary to the Plaintiff's submission, the qualification formerly found in s 30(10) is not "implicitly embedded" in s 25A(9).¹² The repeal of s 30(10) indicates an intention to remove the restriction preventing a witness from being compelled to give self-incriminatory answers with respect to an offence charged.¹³

10 18. **Fourth**, while the ACC Act abrogates the right of a person who has been summonsed to attend an examination to refuse to answer any questions on the grounds of self-incrimination,¹⁴ ss 30(4) and (5) of the ACC Act provide that where a witness, before answering a question or producing a document or thing, claims that the answer or document or thing might tend to incriminate him or her or make him or her liable to a penalty, the answer is not admissible in evidence against the person in a criminal proceeding or in proceedings for the imposition of a penalty other than confiscation proceedings or proceedings concerning the falsity of the answer or any statement in the document. The immunity provided by ss 30(4) and (5) (**direct use immunity**) eliminates the major way in which an ACC examination might otherwise affect the trial of a person who is subject to pending criminal proceedings.¹⁵ In that way, it removes a key foundation for any implication that the ACC Act does not authorise coercive questioning after charge.

20 19. **Fifth**, the ACC Act limits the extent to which an examination may affect a pending criminal trial in ways other than through the direct use of evidence that the accused is compelled to provide. It does so through a combination of measures, the most significant of which are:¹⁶

19.1. the requirement that examinations are held in private and the power of the examiner to give directions as to the persons who may be present (s 25A(3)), which address the risk that an examination will generate adverse pre-trial publicity, and that also assist in

¹⁰ Section 30(10) provided that subsections (5), (7) and (9) (which provided that in specified circumstances it was not a reasonable excuse for failing to provide information or documents that to do so would incriminate the person) "do not apply where the offence in respect of which the answer to a question or the production of a document or thing, as the case requires, might tend to incriminate a person is an offence with which the person has been charged and the charge has not been finally dealt with by a court or otherwise disposed of."

¹¹ Act No 135 of 2001; Item 12 of Schedule 1. The extrinsic materials do not discuss the reasons for its repeal of s 30(10).

¹² Plaintiff's submissions at VI.8 (p 11.8).

¹³ Repealed provisions may be taken into consideration as part of the context in which unrepealed provisions fall to be construed: see e.g., *London and West Australian Exploration Co Ltd v Ricci* [1906] HCA 72; (1906) 4 CLR 617 at 636-637; *R v Lavender* [2005] HCA 37; 222 CLR 67 at 80 [31]. See also *Hamilton v Oades* (1989) 166 CLR 486 at 498.6.

¹⁴ As the Plaintiff's submissions at VI.5 concede. See *A v Boulton* [2004] FCAFC 101; 136 FCR 420 at 434-439 [54] - [72] per Kenny J (Beaumont and Dowsett JJ agreeing); *ACC v OK* [2010] FCAFC 61; 185 FCR 258 at [72]; *R v CB* [2011] NSWCCA 264 at [73] and [97] (and the authorities there cited).

¹⁵ Compare *Hamilton v Oades* (1989) 166 CLR 486 at 496.

¹⁶ The efficacy of such measures has been accepted in other contexts: see *Hamilton v Oades* (1989) 166 CLR 486 at 499.

ensuring that an examiner can control the persons who have access to the answers given at an examination (thereby assisting the examiner to control the use to which such answers may be put);

19.2. the secrecy obligation imposed by s 51(2) of the ACC Act on an examiner and members of staff of the ACC with respect to information acquired by reason of, or in the course of, the performance of duties under the ACC Act;¹⁷ and

10 19.3. the obligation of an examiner under s 25A(9) to give a direction that any evidence given before the examiner, or the contents of any document or a description of any thing produced to the examiner, and any information that might enable a person who has given evidence before the examiner to be identified, not be published, if the failure to give such a direction might prejudice the fair trial of a person who has been, or may be, charged with an offence. The examiner has no discretion in this regard and the obligation to give a direction under s 25A(9) does not rest on an evaluative judgment by the examiner.¹⁸ A failure by an examiner to give any or adequate directions under s 25A(9) would be remediable by, at least, mandamus issued pursuant to s 75(v) of the Constitution or s 39B(1) of the *Judiciary Act 1903* (Cth). For that reason, the Plaintiff's submission that "the discretion given to the examiner by s 25A(9) of the ACC Act concerning publication of the Plaintiff's evidence is beyond the control of a court" is baseless. Of course, the requisite content of a direction under s 25A(9) depends upon the facts of the particular case. A pending appeal in the New South Wales Court of Appeal specifically concerns the necessary content of such a direction.¹⁹ There is no occasion to consider that issue in this case, because there is no argument in this proceeding that the direction made by the examiner under s 25A(9) was inadequate.²⁰

20. The above protections are not affected by the powers and obligations of the CEO of the ACC:

20.1. to assemble evidence of an offence against a law of the Commonwealth or a State or Territory that would be admissible in a prosecution for the offence and give it to the Attorney-General of the Commonwealth or a State, or the relevant law enforcement agency or other prosecutorial agency (s 12(1)); or

¹⁷ Even where the exceptions to s 51 apply, those exceptions do not create any exception to the obligation created by a direction under s 25A(9): see *ACC v OK* [2010] FCAFC 61; 185 FCR 258 at 278 [113].

¹⁸ *ACC v OK* [2010] FCAFC 61; 185 FCR 258 at [108]; *R v CB* [2011] NSWCCA 264 at [103].

¹⁹ The appeal from *R v Seller*; *R v McCarthy* [2012] NSWSC 934 (17 August 2012, Garling J). That case involved an examination conducted by the ACC prior to the examinee being charged.

²⁰ Plaintiff's submission at VI.9.

- 20.2. to give to Australian or foreign law enforcement agencies, or any other prescribed agency, information that is in its possession if it appears to the CEO appropriate to do so and it would not be contrary to a law of the Commonwealth, a State or Territory that would otherwise apply.²¹
21. As a matter of ordinary principle, the ACC's power to disseminate information to other persons or agencies should be read as being subject to the law of contempt, such that, irrespective of any direction under s 25A(9) of the ACC Act, the above provisions would not authorise the dissemination of information if that dissemination would create a real risk of interference with the administration of justice.
- 10 22. In addition, with respect to s 12(1), a direction given under s 25A(9) qualifies the obligation of the CEO to provide information to prosecutorial or law enforcement agencies.²² Section 25A(9) is to be regarded as the leading provision to which s 12(1) is subservient, because:²³
- 22.1. s 25A(9) of the ACC Act is a special provision and the power in s 12(1) of the ACC Act to provide information is a general provision;²⁴
- 22.2. the evident purpose of s 25A(9) is concerned to protect the conduct of a fair trial; and
- 22.3. s 25A(10) contains a power in the CEO to vary a direction given under s 25A(9), but that power cannot be exercised if to do so might prejudice the fair trial of a person charged with an offence.²⁵

20 The relationship between ss 12(1) and 25A(9) that is reflected in the above submission has been confirmed by the insertion of s 12(2) into the ACC Act by the *Crimes Legislation Amendment (Powers and Offences) Act 2012* (Cth) which commenced in April 2012. The Explanatory Memorandum to the Bill that became that Act states that this amendment was intended to make explicit the conclusion reached by the Federal Court in *ACC v OK*.²⁶

²¹ At the time of the Plaintiff's examination, that obligation was found in ACC Act s 59(7). Since the commencement of the *Crimes Legislation Amendment (Powers and Offences) Act 2012* in April 2012, an equivalent obligation is now found in ACC Act s 59AA.

²² *ACC v OK* [2010] FCAFC 61; 185 FCR 258 at 277 [108] and 278 [111]; cf Plaintiff's submissions at VI.5.

²³ *ACC v OK* [2010] FCAFC 61; 185 FCR 258 at 275 [102] and 277 [108]-[109], applying *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] - [71].

²⁴ *Malaysia Declaration Case* [2011] HCA 32; 244 CLR 144 at [50] per French CJ, at [236] per Kiefel J (and the authorities there cited).

²⁵ *R v CB* [2011] NSWCCA 264 at [109].

²⁶ Revised Explanatory Memorandum, *Crimes Legislation Amendment (Powers and Offences) Bill 2011*, p 52.

23. With respect to s 59(7) as in force at the relevant time (see footnote 21), the power of the CEO to supply information is subject to "any contrary law of the Commonwealth ... that would otherwise apply". That includes a direction made by an examiner under s 25A(9).²⁷

24. For the above reasons, the ACC Act should be construed as authorising an Examiner to examine a person who has been charged with an offence in relation to the subject matter of the charge. The text of the Act contemplates that such examinations may occur, and provides mechanisms to ensure that this does not result in any prejudice to the fairness of the pending trial. If there is a restriction on the capacity of the ACC to conduct such examinations, that restriction arises from the law of contempt of court, not from the construction of the ACC Act. As Mason J explained in *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission*, when speaking of the section that conferred coercive questioning powers on the Trade Practices Commission:²⁸

It is possible to read the section as conferring power on the Commission to act in accordance with its terms, but subject to the law of contempt, so that action taken under the section is subject to the exercise by the Federal Court of its contempt powers. This appeals to me as a more sensible construction of the sub-section, one which avoids locating the ambit of the power at the point, not readily identifiable, where contempt begins. There are advantages in keeping questions of power and contempt separate.

25. For the above reasons, question 1, which is concerned solely with the scope of the power conferred by the ACC Act, should be answered "yes".

Question 2: Is the ACC Act invalid because it interferes with the exercise of the judicial power of the Commonwealth?

26. The answer to this question is "no". The fact that the ACC Act authorises an examiner to examine a person who is charged with an offence on the subject matter of that offence does not, in itself, offend against Chapter III of the Constitution. There is no general principle that a witness cannot be asked questions that relate to the subject of a pending criminal charge. It therefore raises a false issue to ask whether the ACC Act "abrogates" such a principle.

27. The relevant framework for the analysis of the issue raised by the Plaintiff is the law of contempt of court. For the reasons developed below, in the context of executive inquiries concerning the subject-matter of pending court proceedings, such inquiries are impermissible only if:

²⁷ *ACC v OK* [2010] FCAFC 61; 185 FCR 258 at 277 [108]. From April 2012, the new ss 59AA and 59AB of the ACC Act are expressly subject to directions under s 25A(9): see s 59AC.

²⁸ (1982) 152 CLR 460 at 473. See also *ACC v OK* [2010] FCAFC 61; 185 FCR 258 at 276 [104].

27.1. first, the inquiries create, as a matter of practical reality, a real risk to the administration of justice; and

27.2. second, the substantive or procedural law has not been modified by statute in such a way that an inquiry that takes place pursuant to statute is permitted, even if that results in some departure from the ordinary course of the administration of justice.

Hammond v Commonwealth

28. An executive inquiry that is undertaken in circumstances that create a real risk, as a matter of practical reality, of interference with the administration of justice will be in contempt of court.²⁹ Such an inquiry may be restrained to prevent a threatened contempt.³⁰

10

29. *Hammond v Commonwealth (Hammond)* is an application of that principle.³¹ In that case, which was heard and determined in circumstances of extreme urgency (over a period of just three days),³² a Royal Commission proposed to examine Hammond in relation to matters that overlapped with the subject matter of pending criminal charges against him. This Court unanimously restrained that examination.

20

30. The leading judgment was given by Gibbs CJ (with whom Mason and Murphy JJ agreed³³). Gibbs CJ said "[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*".³⁴ Gibbs CJ referred to the private nature of the examination and the direct use immunity conferred on the witness, but

²⁹ See, e.g., *Hammond* [1982] HCA 42; (1982) 152 CLR 188 at 196.4 and 198.5; *Hinch v Attorney-General (Vic)* [1987] HCA 56; (1987) 164 CLR 15 at 70; *Victoria v Australian Building Construction Employees and Builders Labourers' Federation* (1982) 152 CLR 25 at 166 (*BLF case*). See also *ACC v OK* [2010] FCAFC 61; 185 FCR 258 at 276 [105]. In some of the authorities the test is stated more stringently as being whether the impugned questioning creates a "substantial risk of serious injustice": see *BLF Case* (1982) 152 CLR 25 at 99 per Mason J; see also, at 56 per Gibbs CJ; *New South Wales Food Authority v Nutricia Australia Pty Limited* [2008] NSWCCA 252; 72 NSWLR 456 at [178] per Spigelman CJ.

³⁰ *Hammond* (1982) 152 CLR 188; *Pioneer Concrete (Vic) Pty Limited v Trade Practices Commission* (1982) 152 CLR 460 at 466; *New South Wales Crime Commission v Jason Lee* [2012] NSWCA 276 at [24].

³¹ *Hammond* (1982) 152 CLR 188 at 196.3 per Gibbs CJ.

³² *Hammond* (1982) 152 CLR 188 at 196.

³³ (1982) 152 CLR 188 at 199, Murphy J agreed with Gibbs CJ, save with respect to Gibbs CJ's conclusion in relation to the publication of the Royal Commissioner's report (see at 202). However, Murphy J added reasons of his own that express the relevant principle in much wider terms than those of Gibbs CJ.

³⁴ (1982) 152 CLR 188 at 198 (emphasis added).

said that “[n]evertheless, 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”.³⁵

31. Gibbs CJ's focus on the presence of a “real risk that the administration of justice will be interfered with” and on the likelihood of “prejudice” demonstrates that *Hammond* is not authority for the proposition that coercive questioning on the subject matter of pending charges *in itself* interferes with the administration of justice. If the simple fact of such questioning was problematic, there was no call to speak of “risk” or “likelihood of prejudice”, because the interference or prejudice would already have eventuated.

10

32. The basis for the decision in *Hammond* was that the proposed questioning, *in the circumstances of the case*, gave rise to a real risk of interference with the administration of justice.³⁶ In identifying the risk with which the Court was concerned, it is of note that:

32.1. the Court assumed that the *Royal Commissions Act 1902* (Cth) abrogated the privilege against self-incrimination;³⁷

32.2. the examination was to be conducted in private, but the police officers involved in the investigation were allowed to be present;³⁸

20

32.3. the Commission had decided to permit the transcript of the examination to be made available to the Crown (that being the reason why Mr D.M. Ryan QC, in his reply on behalf of Hammond, submitted that “[p]roceeding in private is not a sufficient protection”).³⁹

33. Assuming the actual decision in *Hammond* to be correct,⁴⁰ it appears that the “real risk” to the administration of justice arose from the fact that the proposed questioning was expected to go directly to matters touching on Hammond's guilt of the offence charged, in circumstances where the transcript of the examination was to be available to the Crown, which would have given the prosecution such a forensic advantage in the pending criminal

³⁵ (1982) 152 CLR 188 at 198 (emphasis added). Brennan J likewise referred (at 202) to the fact that the questions asked in the Royal Commission were “designed” to establish the guilt of the plaintiff.

³⁶ See also Gibbs CJ's judgment in *Sorby v Commonwealth* (1983) 152 CLR 281 at 299. See also *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [95] per Meagher JA.

³⁷ (1982) 152 CLR 188 at 197-198. The Court made this assumption as a result of the manner in which the case was argued. The doubts expressed by the Court led to immediate amendments to the *Royal Commissions Act 1902* (Cth) to clarify the matter.

³⁸ (1982) 152 CLR 188 at 194.

³⁹ *Hammond* (1982) 152 CLR 188 at 192.

⁴⁰ The difficulty of extracting a principle from the decision in *Hammond* has been noted: see *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [26] per Basten JA.

trial as to prejudice Hammond in his defence.⁴¹ Use of compelled evidence to gain a forensic advantage of that kind should be distinguished from use of such evidence in order to locate other evidence that can be tendered at the trial (i.e. derivative evidence).

34. The judgments in *Hammond* do not locate the risk of interference with the administration of justice in the fact that Hammond was not protected from the derivative use of compelled evidence. Indeed, there is no reference in any of the judgments to derivative evidence.⁴²
- 10 35. Gibbs CJ identified the risk as arising in part from the requirement to answer questions “designed to establish that he was guilty of the offence with which he is charged”.⁴³ That language appears best understood as a reference to the objective nature of the proposed questions (assessed by reference to the type of answers the questions were naturally apt to produce), rather than to the subjective intention of the questioner.⁴⁴ This is because the relevant branch of the law of contempt is concerned with the risk that conduct will have a particular *effect* on the administration of justice.⁴⁵
- 20 36. Contrary to the view apparently held by Deane J in *Hammond*,⁴⁶ there is no principle that a coercive inquiry into facts, matters and circumstances the subject of extant judicial proceedings necessarily involves an impermissible interference with the exercise of federal judicial power.⁴⁷ The approach of the majority in *Hammond* is inconsistent with any such principle. Given that any such principle depends on the law of contempt, such an inquiry is impermissible only if, in the particular circumstances, it creates a real risk, as a matter of practical reality, to the administration of justice.

⁴¹ Compare *Environmental Protection Authority v Caltex Refining Co Ltd* [1993] HCA 74; (1993) 178 CLR 477 at 557-559; *Brambles Holdings Ltd v Trade Practice Commission (No 2)* (1980) 32 ALR 328 at 340.

⁴² That is, evidence obtained from other sources in consequence of answers given by a witness during an examination: see, e.g., *Hamilton v Oades* (1989) 166 CLR 486 at 496 per Mason CJ; *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 443.

⁴³ *Hammond* (1982) 152 CLR 188 at 198. At 202, Brennan J also used the word “designed”. In *Hamilton v Oades* (1989) 166 CLR 486 at 515, Toohey J explained *Hammond* on the basis that the questions were “designed to establish” Hammond “was guilty of the offence with which he is charged”, following his earlier decision in *Huston v Costigan* (1982) 45 ALR 559.

⁴⁴ That approach is supported by the facts of *Hammond*, where the Royal Commission had no interest in Hammond’s guilt or innocence for its own sake. Its purpose was to ask Hammond questions to assist in identifying “the existence of a malpractice, the methods used to carry out that malpractice and how the repetition of that malpractice can be prevented”: (1982) 152 CLR 188 at 194.

⁴⁵ See *BLF Case* (1982) 152 CLR 25 at 56 per Gibbs CJ

⁴⁶ (1982) 152 CLR 188 at 206-207. That view has been reflected in dissenting judgments since, most notably that of Spender J in *ACC v OK* at 260 [9], 261 [12]-[13]. See also *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564 at 571 (Foster J).

⁴⁷ *BLF Case* (1982) 152 CLR 25 at 71-72 per Stephen J, at 95 per Mason J, at 129-131 per Wilson J, at 149 and 152-155 per Brennan J; *Pioneer Concrete (Vic) Pty Limited v Trade Practices Commission* (1982) 152 CLR 460 at 468 per Gibbs CJ, at 474 per Mason J.

37. Unlike the legislative regime in issue in *Hammond*, the ACC Act operates to ensure that an examination into the subject matter of pending criminal charges does not create a real risk to the administration of justice. In particular, the protection conferred by the directions that are required to be given under s 25A(9) of the ACC Act where failure to do so might prejudice the fair trial of a person charged with an offence directly addresses the circumstances that appear to have underpinned the injunction in *Hammond*.⁴⁸ The operation of s 25A(9) is illustrated by the directions that were made in this case. [SCB 25 [13]-[14]] The effect of the directions actually made is to ensure that the conduct of the pending trial is not affected by the examination,⁴⁹ and that the prosecution gains no unfair advantage from the examination which would not have been available had the examination not occurred.⁵⁰ To the extent that any risk remains, it is so slight as to be outweighed by the public interest in the ACC performing its statutory function such that there is no contempt of court.⁵¹
- 10
38. Accordingly, contrary to the assumption made by the Plaintiff, the Commonwealth does not need to contend that the ACC Act "abrogates" the principle in *Hammond*. Instead, the Commonwealth's principal submission is that the ACC Act removes the occasion for the operation of that principle, by incorporating protections that have the effect that any questioning in relation to the subject matter of pending criminal charges will not create a "real risk", as a matter of practical reality, to the administration of justice. As the ACC Act prevents an examination under Part II from creating such a risk, that Act does not interfere with the exercise of the judicial power of the Commonwealth.
- 20

Hamilton v Oades

39. Before charges are laid, it is plain that legislation can authorise compulsory questioning into whether offences have been committed.⁵² Where such an inquiry takes place pursuant to legislation that has abrogated the privilege against self-incrimination, the inquiry may generate answers that are admissible in evidence against the accused, or that can be used to locate derivative evidence for use in a subsequent criminal trial.

⁴⁸ *ACC v OK* [2010] FCAFC 61; 185 FCR 258 at [109] and [113].

⁴⁹ *ABC v Sage* [2009] FCA 170; 175 FCR 319 at [29]-[31]; *ACC v OK* [2010] FCAFC 61; 185 FCR 258 at [107] and [109]; *R v CB* [2011] NSWCCA 264 at [97], [100] and [110].

⁵⁰ *Brambles Holdings Ltd v Trade Practices Commission* (1980) 44 FLR 182 at 187-189 per Franki J; *Pioneer Concrete (Vic) Pty Limited v Trade Practices Commission* (1982) 152 CLR 460 at 468 per Gibbs CJ; *Environmental Protection Authority v Caltex Refining Co Ltd* (1993) 178 CLR 477 at 537 per Deane, Dawson and Gaudron JJ, at 559 per McHugh J.

⁵¹ *Nutricia* [2008] NSWCCA 252; 72 NSWLR 456 at [188]-[192]; *BLF Case* (1982) 152 CLR 25.

⁵² *Sorby v Commonwealth* (1983) 152 CLR 281 at 299; *BLF Case* (1982) 152 CLR 25 at 50-52 per Gibbs CJ, at 63-69 per Stephen J (Aickin J agreeing, at 120), at 86-89 per Mason J, at 126 per Wilson J.

40. The position is no different after charges have been laid. That is illustrated by *Hamilton v Oades*,⁵³ where this Court permitted a liquidator to examine a witness who had been charged with an offence, notwithstanding the fact that the examination concerned the subject matter of the pending charge, the privilege against self incrimination had been abrogated, and the witness was given statutory protection from direct use of evidence over which a claim for the privilege against self-incrimination had been made but no protection against the derivative use of that evidence. Mason CJ,⁵⁴ Dawson J⁵⁵ and Toohey J⁵⁶ held that, once a statute abrogated the privilege against self-incrimination, a witness was required to answer questions whether or not Parliament chose to protect the witness from derivative use of the answers given. That was so both before and after criminal charges were laid. Further, their Honours held that it was not appropriate for the Court supervising the examination to give directions that would prevent the use of derivative evidence in the pending criminal trial, because to do so would be inconsistent with the statutory scheme.⁵⁷ It was, however, accepted that “the proper administration of justice may require that orders be made of types other than those which restore the privilege against self-incrimination” on a case by case basis, including orders to prevent the prosecution from gaining unfair forensic advantages.⁵⁸
- 10
41. *Hamilton v Oades* was decided after *Hammond*, and that case was addressed in argument and was mentioned in the reasons of each member of the Court.⁵⁹ *Hamilton v Oades* demonstrates that *Hammond* does not establish that compulsory questioning in relation to the subject matter of pending charges is necessarily impermissible. Indeed, it is authority for the proposition that legislation may authorise such questioning even where:
- 20
- 41.1. no protection is provided from the use of derivative evidence,⁶⁰ and
- 41.2. there is no legislative requirement that evidence given during an examination be heard in private, or be kept from the prosecution or investigators.

⁵³ (1989) 166 CLR 486.

⁵⁴ (1989) 166 CLR 486 at 498 – 499.

⁵⁵ (1989) 166 CLR 486 at 510.

⁵⁶ (1989) 166 CLR 486 at 516 – 517.

⁵⁷ In reaching the contrary view, Deane and Gaudron JJ (at 502 - 503) emphasised the public nature of the examination. It may well be that the protections in the ACC Act outlined above, including the private nature of the examination and the obligation to give non-publication directions, would have met the objections of Deane and Gaudron JJ.

⁵⁸ (1989) 166 CLR 486 at 498-499 per Mason CJ, 510 per Dawson J, 517 per Toohey J.

⁵⁹ See *New South Wales Crime Commission v Jason Lee* [2012] NSWCA 276 at [35]-[36].

⁶⁰ Indeed, it appears that not even direct use immunity is required. In *Mortimer v Brown* (1970) 122 CLR 493, this Court accepted that compulsory questioning was permissible even in circumstances where the legislation expressly permitted notes of the examination to be used “in any legal proceeding” against the person examined.

42. *Hamilton v Oades* is properly understood as forming part of a line of authority that recognises that, in determining whether contempt of court has occurred, a balance must be struck between competing public interests. Within limits, it is open to Parliament to define and adjust the balance between competing objectives, including by modifying substantive legal principles.⁶¹ It is for that reason that, once legislation has abrogated the privilege against self-incrimination, the proper administration of justice must take account of that abrogation, meaning that it would involve error for a court to make orders that undermined or reversed the operation of the statute.
- 10 43. If, contrary to the submission above, an examination after charge may give rise to a real risk to the administration of justice not just by conferring unfair forensic advantages on the prosecution (as in *Hammond*), but also by assisting the prosecution to obtain derivative evidence, any measure taken to reduce that risk should take account of the fact that derivative evidence, unlike compelled testimony, is not brought into existence by reason of the compulsory examination. Even if derivative evidence is obtained by following leads from a compelled disclosure, the use of such evidence cannot be unfair if the accused would have been required to confront that evidence in any event. Accordingly, no question could arise as to whether the use of derivative evidence at the trial interferes with the administration of justice unless the prosecution tenders derivative evidence which could not have been
20 obtained, or the significance of which could not have been appreciated, but for the compelled evidence.⁶²

Chapter III

44. Having regard to the submissions advanced above concerning the construction of the ACC Act, no issue concerning the validity of the ACC Act or Chapter III of the Constitution arises. In so far as steps may be required to prevent an ACC examination from affecting a pending trial, s 25A(9) contemplates that possibility. A direction under that section has been made in this case, and no complaint has been made about that direction. Further, in this case there is no allegation that the transcript of the examination is going to be tendered, or that any use
30 is being made of the evidence given to locate other evidence against the plaintiff. For those reasons, it is not necessary to examine the Chapter III issue.

⁶¹ *Hamilton v Oades* (1989) 166 CLR 486 at 509 per Dawson J; *Lockwood v Commonwealth* (1954) 90 CLR 177 at 185 per Fullagar J; *BLF Case* (1982) 152 CLR 25 at 120 per Aickin J, cf 105 and 160-162; *Commissioner of Taxation v De Vonk* (1995) 61 FCR 564 at 588 – 598 per Hill and Lindgren JJ. More recently, see *ACC v OK* [2010] FCAFC 61; 185 FCR 258 at 277 [107] and [109].

⁶² See *Thomson Newspapers Ltd v Director of Investigations and Research* (1990) 67 DLR (4d) 161 at 252-264; [1990] 1 SCR 425 at 548-563; *R v S(RJ)* (1995) 121 DLR (4d) 589 at [191]-[204]; [1995] 1 SCR 451 at [191]-[204]; 561-566; *Re Application under s82.28 of the Criminal Code* (2004) 240 DLR (4d) 81 at [70]-[74]; [2004] 2 SCR 248 at [70]-[74]; 282-285. These cases are analysed by Warren CJ in *Re Application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381; 24 VR 415 at [133] – [141].

45. If, however, the Court does find it necessary to consider the Chapter III issue, it should dismiss the challenge to the validity of Division 2 of Part II of the ACC Act.

46. This Court has long accepted that legislation can abrogate the privilege against self-incrimination without infringing Chapter III of the Constitution. For example, in *Sorby v Commonwealth*, Mason, Wilson and Dawson JJ said:⁶³

10 [T]he privilege against self-incrimination is not an integral element in the exercise of the judicial power reposed in the courts by Ch. III of the Constitution. It is a privilege that has been abrogated by legislative action in Australia, the United Kingdom and Canada without anyone having previously suggested that it involved the elimination of an integral element in the exercise of judicial power in a democratic society ... No doubt, like other features of our system of criminal justice, it has a long history and confers a very valuable protection. But it is quite another thing to say that it is an immutable characteristic of the exercise of judicial power.

47. By contrast with the position in the United States of America,⁶⁴ this Court has never required Parliament to provide compensatory protection as a condition of its capacity to abrogate the privilege against self-incrimination.⁶⁵ The matter has been left to the judgment of Parliament.

20 As Mason CJ said in *Hamilton v Oades* (where Parliament had provided direct but not derivative use protection):⁶⁶

[B]y enacting ... [the relevant provisions] without providing such specific protection, Parliament has made its legislative judgment that such action is not required and has limited specific protection to the possible consequences of direct use in evidence of the answers of the witness, thereby guarding against the possibility that the witness will convict himself out of his own mouth – the principal matter to which the privilege is directed. Thus the legislative resolution of the competition between public and private interest is to provide for a compulsory examination and to give specific protection in relation to the principal matter covered by the privilege but not otherwise ...

30 48. Parliament made a similar legislative judgment with respect to the ACC Act (save that it provided a greater level of a protection to an examinee by requiring examinations to take place in private and by enacting s 25A(9)). In 2001, Parliament repealed the derivative use protection that s 30 previously provided as a condition of the legislative abrogation of the privilege against self-incrimination, because that immunity was impairing the capacity of the (then) National Crime Authority to perform its functions in the public interest.⁶⁷

⁶³ (1983) 152 CLR 281 at 308. See also at 298-299 per Gibbs CJ; *Huddart Parker v Moorehead* (1908) 8 CLR 330.

⁶⁴ *Kastigar v United States* 406 US 441 (1972).

⁶⁵ See, e.g., *Sorby v Commonwealth* (1983) 152 CLR 281; *Mortimer v Brown* [1970] HCA 4; (1970) 122 CLR 493.

⁶⁶ (1989) 166 CLR 486 at 496.

⁶⁷ Subsections 30(5) and (7) of the *National Crime Authority Act 1984* provided for direct and derivative use immunity by the provision of a certificate by the Commonwealth or Territory Director of Public Prosecution or State Attorney-General or Director of Public Prosecution (as

49. If Chapter III does not prevent the abrogation of the privilege against self-incrimination, it must also accommodate the natural consequences of any such abrogation. One such consequence is that an accused may be confronted at his or her trial with evidence that the accused has been compelled to provide, or with evidence that has been located as a result of evidence that the accused was compelled to provide.
- 10 50. If a trial based on evidence of that kind is consistent with Chapter III when the evidence is obtained prior to charge, a trial based on exactly the same evidence that was obtained after the witness is charged must likewise be consistent with Chapter III. As Dawson J pointed out in *Hamilton v Oades*, coercive questioning after charge does not necessarily carry consequences more adverse than if questions were asked at an earlier time; the time at which charges are laid often being merely adventitious.⁶⁸ In the same case, Toohey J expressed the view that the law would have developed in "an unfortunate way" if it distinguished between evidence obtained before and after charges were laid.⁶⁹
- 20 51. To the extent that there are limits on the legislative capacity of the Commonwealth to authorise compulsory questioning after charge, those limits lie in the fact that the Commonwealth cannot require or authorize courts in which the judicial power of the Commonwealth is vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.⁷⁰ At least to the extent that it arises from the essential character of a court, the power to punish for contempt is inherent in Chapter III of the Constitution.⁷¹
52. But the ACC Act does not interfere with the character of any court, nor does it limit or exclude the capacity of a court to discharge its judicial functions in the ordinary way. While

appropriate). Upon the provision of such a certificate the privilege against self-incrimination ceased to be a "reasonable excuse" for a failure to answer questions at an examination by the NCA. Those provisions were repealed by item 12 of Schedule 1 to the *National Crime Authority Legislation Amendment Act 2001*, which gave effect to the Government Response to the Recommendations from the 3rd Evaluation of the National Crime Authority by the Parliamentary Joint Committee on the National Crime Authority. The differences between the previous scheme and the new scheme, being the absence of a defence of "reasonable excuse", the absence of the facility for the provision of a certificate, the inclusion instead of a general use immunity provision, but no protection from derivative use, are set out on p7 of the Explanatory Memorandum to the Bill that became the *National Crime Authority Legislation Amendment Act 2001*. The *National Crime Authority Act 1984* was amended and renamed the ACC Act in 2002.

⁶⁸ (1989) 166 CLR 486 at 508.

⁶⁹ (1989) 166 CLR 486 at 516.

⁷⁰ *Chu-Kheng Lim v Minister for Immigration* [1992] HCA 64; (1992) 176 CLR 1 at 27 per Brennan, Deane and Dawson JJ.

⁷¹ *Re Colina; Ex parte Torney* [1999] HCA 57; 200 CLR 386 at [15] – [25] per Gleeson CJ and Gummow J, at [113] per Hayne J; *Batistatos v Roads and Traffic Authority of New South Wales* [2006] HCA 27; 226 CLR 256 at [13]; *Hogan v Hinch* [2011] HCA 4; 243 CLR 506 at [86] per Gummow, Hayne, Heydon, Kiefel and Bell JJ.

the ACC Act may influence the evidence that is available to be tendered in a court (depending on the content of any directions given under s 25A(9)), the manner in which a court deals with that evidence remains a matter for the court.

53. In those circumstances, Chapter III does not provide any foundation for an attack on the validity of Division 2 of Part II of the ACC Act. It does not contain any provision that purports to direct the manner of the exercise of judicial power by any Chapter III court or require it to be exercised in a manner that is inconsistent with the essential character of a court or the nature of judicial power.⁷² In particular, the ACC Act has nothing to say about the manner in which a Chapter III court exercises judicial power in relation to the criminal trial of a person charged with an offence who is examined under the ACC Act after charge. The full range of powers that the court has to ensure the fairness of the criminal trial are unaffected by the ACC Act.⁷³ The Plaintiff is therefore wrong in submitting that "the court has no power to protect itself from the examiner".⁷⁴
54. For the same reason, nothing in the ACC Act requires a court to depart from the methods and standards which have characterised the exercised of judicial power in the past.⁷⁵ The accused cannot be made to testify at the trial to the commission of the offence charged. By reason of s 30(4) and (5) of the ACC Act, the evidence given by the accused at the examination is not admissible in evidence provided that the accused claims the privilege before answering questions. The accused's rights and privileges at the trial are preserved.⁷⁶
55. The Plaintiff's submission⁷⁷ that a long list of criminal justice process rights (including the "right to silence"⁷⁸) are entrenched by Chapter III is contrary to settled authority. In addition to the authority establishing that Chapter III does not prevent the abrogation of the privilege against self incrimination,⁷⁹ it is clear, for example, that there is no barrier in Chapter III to Parliament weakening or reversing the onus of proof in a criminal trial, at least in relation to specific issues.⁸⁰

⁷² *Nicholas v The Queen* [1998] HCA 9; 193 CLR 173 at [13], [26] and [146].

⁷³ *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23 at 25 – 26 per Mason CJ, at 46 – 47 per Brennan J, at 56 per Deane J, at 74-75 per Gaudron J; *Batistatos v Road and Traffic Authority of New South Wales* [2006] HCA 27; 226 CLR 256 at [8] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

⁷⁴ Plaintiff's submissions at VI.9.

⁷⁵ *Thomas v Mowbray* [2007] HCA 33; 233 CLR 307 at [111]; *International Finance Trust Company Limited v NSW Crime Commission* [2009] HCA 49; 240 CLR 319 at [52]; at [131] and [141] and [427].

⁷⁶ *R v CB* [2011] NSWCCA 264 at [100] and [110]-[111].

⁷⁷ Plaintiff's submission at VI.11.

⁷⁸ As to the dangers of reasoning from an undifferentiated concept of a "right to silence" see *Carr v Western Australia* [2007] HCA 47; 232 CLR 138 at [36].

⁷⁹ *Sorby v Commonwealth* (1983) 152 CLR 281 at 308.

⁸⁰ *Milicevic v Campbell* [1975] HCA 20; (1975) 132 CLR 307 at 317, 318-319; *Nicholas v R* [1998] HCA 9; 193 CLR 173 at [23] - [24], at [152]-[155], *Thomas v Mowbray* [2007] HCA 33; 233 CLR 307 at [113].

56. Finally, the plaintiff's apparent submission⁸¹ that the ACC (or an examiner), by conducting an interview with a person who has been charged with an offence on the subject matter of the charge, is purporting to exercise judicial power cannot be accepted. The comments of Barton J in *Melbourne Steamship Co Ltd v Moorehead*⁸² (on which it is apparently based), and the proposition that the exercise of executive investigatory powers in relation to subject matter which is the concern of extant proceedings is an exercise of power within the exclusive preserve of the judiciary, were rejected by all the members of the Court in *Pioneer Concrete (Vic) Pty Limited v Trade Practices Commission*.⁸³

10 **Question 3: Does the ACC Act interfere with the right to trial by jury?**

57. The answer to this question is "no". The ability of the ACC to conduct a compulsory examination at a time after a witness has been charged with an offence does not infringe the constitutional right to a trial by jury in s 80 of the Constitution.

58. The essential nature of the trial by jury for indictable offences mandated by s 80 of the Constitution was captured by O'Connor J in *Huddart Parker & Co Pty Limited v Moorehead*⁸⁴ 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 in civil litigation or a criminal process". O'Connor J's description was approved by this Court in *Cheatle v The Queen*,⁸⁵ by Gleeson CJ and McHugh J in *Brownlee v The Queen*,⁸⁶ and more recently by French CJ in *R v LK*.⁸⁷

20

59. In *Huddart Parker v Moorehead*, this Court rejected the contention that the conduct of a compulsory examination by the Comptroller-General of Customs pursuant to s 15B of the *Australian Industries Preservation Act 1906* infringed the right to trial by jury in s 80 of the Constitution, even though the examination occurred at a time when the Comptroller-General had formed the opinion that an indictable offence had been committed by the examinee. Griffith CJ said that the privilege against self-incrimination "was introduced into English law long after the institution of trial by jury" and that "its application has frequently been excluded by Statutes in the case of indictable offences". The rule, Griffith CJ continued, "is rather one

⁸¹ See Plaintiff's submission at II.2, VI.9, VI.10, VI.12 (p15), VI.14.

⁸² [1912] HCA 69; (1912) 15 CLR 333 at 346.

⁸³ (1982) 152 CLR 460 at 467 per Gibbs CJ (Brennan J agreeing), at 474 per Mason J, at 475 per Murphy J.

⁸⁴ [1989] HCA 36; (1909) 8 CLR 330 at 375.

⁸⁵ [1993] HCA 44; (1993) 177 CLR 541 at 549.

⁸⁶ [2001] HCA 36; 207 CLR 378 at [16].

⁸⁷ [2010] HCA 17; 241 CLR 177 at [36].

of evidence than one relating to trial by jury".⁸⁸ Barton J agreed with Griffith CJ.⁸⁹ O'Connor J said:⁹⁰

10 The principle that a witness shall not be compelled to incriminate himself has become a principle of British criminal law, departed from no doubt in special instances, as in the case of offences against the bankruptcy laws, but still maintained and administered as part of the great body of British criminal jurisprudence. But it is no part of the system of trial by jury, and the authority of the Parliament of the Commonwealth to create and punish offences as incidental to the exercise of the powers conferred by the Constitution would certainly extend to the modification of any principle of British criminal law, no matter how fundamental, so long as the modification is not forbidden expressly or impliedly by the Constitution.

60. Isaacs J similarly expressed the view "the rule as to self-incrimination is outside the scope of" s 80 of the Constitution which was "open like all rules of evidence to Parliamentary regulation".⁹¹ Higgins J came to the same conclusion.⁹²

20 61. The conclusion in *Huddart Parker v Moorehead* was confirmed in *Sorby v Commonwealth*. In that case, the plaintiffs were summonsed to appear before a Royal Commission into certain drug offences. They refused to answer questions on the grounds that their answers might incriminate them, but the Commissioner proposed to require them to answer. It was argued in this Court that to permit the Royal Commission to proceed as it proposed would infringe the plaintiffs' right to a trial by jury in s 80 of the Constitution. That submission was rejected. After referring to *Huddart Parker v Moorehead*, Gibbs CJ said "I agree with the view that the privilege against self-incrimination is not a necessary part of a trial by jury".⁹³ Mason, Wilson and Dawson JJ likewise referred with approval to *Huddart Parker v Moorehead* and, in particular, to O'Connor J's observations quoted above.⁹⁴ Murphy J's observations to the contrary effect should not be followed.⁹⁵

30 62. While the plaintiffs in *Huddart Parker v Moorehead* and *Sorby v Commonwealth* had not been charged with any offence at the time their compulsory examinations were conducted, that difference is irrelevant (particularly where the evidence given in the examination is not admissible in the criminal trial). The function of the jury as the tribunal of fact in the criminal trial is unaffected. The structural role of s 80 of mandating that federal indictable offences

⁸⁸ (1909) 8 CLR 330 at 358.

⁸⁹ (1909) 8 CLR 330 at 366.

⁹⁰ (1909) 8 CLR 330 at 375.

⁹¹ (1909) 8 CLR 330 at 386.

⁹² (1909) 8 CLR 330 at 418.

⁹³ (1983) 152 CLR 281 at 298.

⁹⁴ (1983) 152 CLR 281 at 308 – 309.

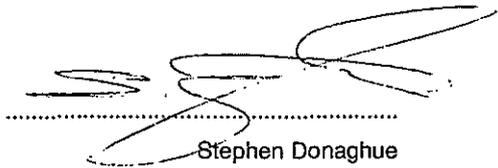
⁹⁵ (1983) 152 CLR 281 at 313.

are tried by jury is undiminished.⁹⁶ Further, the ACC Act self-evidently is not “inconsistent with the objectives of independence, representativeness and randomness of selection [of the jury], or with the need to maintain the prosecution's obligation to prove its case beyond reasonable doubt”.⁹⁷

PART VII ESTIMATED HOURS

63. It is estimated that between 1 and 2 hours will be required for the presentation of the oral argument of the Commonwealth.

10 Date of filing: 23 October 2012



.....
Stephen Donaghue

Telephone: (03) 9225 7919

Facsimile: (03) 9225 6058

Email: s.donaghue@vicbar.com.au

20

.....
Michael O'Meara

Telephone: (02) 9221 0069

Facsimile: (02) 9233 3902

Email: omeara@sixthfloor.com.au

Counsel for the Second Defendant

⁹⁶ *Brown v The Queen* [1986] HCA 11; (1986) 160 CLR 171 at 199 – 200 per Brennan J, at 214 – 215 per Dawson J. See also, J Stellios “The Constitutional Jury – A Bulwark of Liberty?” (2005) 27 *Syd LR* 113 at 135 – 137.

⁹⁷ *Brownlee v The Queen* [2001] HCA 36; (2001) 207 CLR 378 at [22] per Gleeson CJ and McHugh J.

**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

NO S100 OF 2012

BETWEEN:

X7

Plaintiff

AND:

AUSTRALIAN CRIME COMMISSION

First Defendant

THE COMMONWEALTH OF AUSTRALIA

Second Defendant

ANNEXURE A TO THE SECOND DEFENDANT'S SUBMISSIONS

LEGISLATIVE PROVISIONS



Commonwealth of Australia Constitution Act (The Constitution)

This compilation was prepared on 25 July 2003
taking into account alterations up to Act No. 84 of 1977

**[Note: This compilation contains all amendments to the Constitution
made by the Constitution Alterations specified in Note 1
Additions to the text are shown in bold type
Omitted text is shown as ruled through]**

Prepared by the Office of Legislative Drafting,
Attorney-General's Department, Canberra

Chapter III—The Judicature

71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

72 Judges' appointment, tenure, and remuneration

The Justices of the High Court and of the other courts created by the Parliament:

- (i) shall be appointed by the Governor-General in Council;
- (ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;
- (iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years.

Section 73

The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment.

A Justice of the High Court or of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor-General.

Nothing in the provisions added to this section by the *Constitution Alteration (Retirement of Judges) 1977* affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation.

73 Appellate jurisdiction of High Court

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

- (i) of any Justice or Justices exercising the original jurisdiction of the High Court;
- (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;
- (iii) of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal

from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

74 Appeal to Queen in Council [*see* Note 12]

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

75 Original jurisdiction of High Court

In all matters:

- (i) arising under any treaty;
- (ii) affecting consuls or other representatives of other countries;
- (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- (iv) between States, or between residents of different States, or between a State and a resident of another State;

Section 76

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth; the High Court shall have original jurisdiction.

76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

- (i) arising under this Constitution, or involving its interpretation;
- (ii) arising under any laws made by the Parliament;
- (iii) of Admiralty and maritime jurisdiction;
- (iv) relating to the same subject-matter claimed under the laws of different States.

77 Power to define jurisdiction

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

- (i) defining the jurisdiction of any federal court other than the High Court;
- (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
- (iii) investing any court of a State with federal jurisdiction.

78 Proceedings against Commonwealth or State

The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

79 Number of judges

The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

80 Trial by jury

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence

Section 80

was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.



Australian Crime Commission Act 2002

Act No. 41 of 1984 as amended

This compilation was prepared on 12 January 2011
taking into account amendments up to Act No. 145 of 2010

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Division 1A—Performance of functions and exercise of powers

12 Performance of functions

- (1) Where the ACC, in carrying out an ACC operation/investigation, obtains evidence of an offence against a law of the Commonwealth or of 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:
- (a) the Attorney-General of the Commonwealth or the State, as the case requires; or
 - (b) the relevant law enforcement agency; or
 - (c) any person or authority (other than a law enforcement agency) who is authorised by or under a law of the Commonwealth or of the State or Territory to prosecute the offence.

Note: The CEO may also disseminate information in certain circumstances to law enforcement agencies and other bodies: see section 59.

- (1A) Where the ACC, in carrying out an ACC operation/investigation, obtains evidence that would be admissible in confiscation proceedings, the CEO may assemble the evidence and give it to:
- (a) the Attorney-General of the Commonwealth or the State, as the case requires; or
 - (b) a relevant law enforcement agency; or
 - (c) any person or authority (other than a law enforcement authority) who is authorised to commence the confiscation proceedings.
- (3) Where, as a result of the performance of any of the ACC's functions, the Board considers that a recommendation should be made to the Commonwealth Minister or to the appropriate Minister of the Crown of a participating State, being a recommendation:
- (a) for reform of the law relating to relevant offences, including:
 - (i) evidence and procedure applicable to the trials of relevant offences;
 - (ii) relevant offences in relation to, or involving, corporations;

- (iii) taxation, banking and financial frauds;
 - (iv) reception by Australian courts of evidence obtained in foreign countries as to relevant offences; and
 - (v) maintenance and preservation of taxation, banking and financial records;
- (b) for reform of administrative practices; or
 - (c) for reform of administration of the courts in relation to trials of relevant offences;
- the Board may make the recommendation to the Commonwealth Minister, or to that Minister of the Crown of that State, as the case may be.
- (6) Where the ACC has obtained particular information or intelligence in the course of performing one or more of its functions, nothing in this Act shall be taken to prevent the ACC from making use of the information or intelligence in the performance of any of its other functions.

16 Limitation on challenge to Board determination

If:

- (a) an intelligence operation is determined by the Board to be a special operation; or
- (b) an investigation into matters relating to federally relevant criminal activity is determined by the Board to be a special investigation;

then, except in a proceeding instituted by the Attorney-General of the Commonwealth or the Attorney-General of a State, any act or thing done by the ACC because of that determination must not be challenged, reviewed, quashed or called in question in any court on the ground that the determination was not lawfully made.

17 Co-operation with law enforcement agencies and co-ordination with overseas authorities

- (1) In performing its functions under this Act, the ACC shall, so far as is practicable, work in co-operation with law enforcement agencies.

Division 2—Examinations

24A Examinations

An examiner may conduct an examination for the purposes of a special ACC operation/investigation.

25A Conduct of examination

Conduct of proceedings

- (1) An examiner may regulate the conduct of proceedings at an examination as he or she thinks fit.

Representation at examination

- (2) At an examination before an examiner:
 - (a) a person giving evidence may be represented by a legal practitioner; and
 - (b) if, by reason of the existence of special circumstances, the examiner consents to a person who is not giving evidence being represented by a legal practitioner—the person may be so represented.

Persons present at examination

- (3) An examination before an examiner must be held in private and the examiner may give directions as to the persons who may be present during the examination or a part of the examination.
- (4) Nothing in a direction given by the examiner under subsection (3) prevents the presence, when evidence is being taken at an examination before the examiner, of:
 - (a) a person representing the person giving evidence; or
 - (b) a person representing, in accordance with subsection (2), a person who, by reason of a direction given by the examiner under subsection (3), is entitled to be present.
- (5) If an examination before an examiner is being held, a person (other than a member of the staff of the ACC approved by the examiner) must not be present at the examination unless the person is entitled

Section 25A

to be present by reason of a direction given by the examiner under subsection (3) or by reason of subsection (4).

Witnesses

- (6) At an examination before an examiner:
- (a) counsel assisting the examiner generally or in relation to the matter to which the ACC operation/investigation relates; or
 - (b) any person authorised by the examiner to appear before the examiner at the examination; or
 - (c) any legal practitioner representing a person at the examination in accordance with subsection (2);
- may, so far as the examiner thinks appropriate, examine or cross-examine any witness on any matter that the examiner considers relevant to the ACC operation/investigation.
- (7) If a person (other than a member of the staff of the ACC) is present at an examination before an examiner while another person (the *witness*) is giving evidence at the examination, the examiner must:
- (a) inform the witness that the person is present; and
 - (b) give the witness an opportunity to comment on the presence of the person.
- (8) To avoid doubt, a person does not cease to be entitled to be present at an examination before an examiner or part of such an examination if:
- (a) the examiner fails to comply with subsection (7); or
 - (b) a witness comments adversely on the presence of the person under paragraph (7)(b).

Confidentiality

- (9) An examiner may direct that:
- (a) any evidence given before the examiner; or
 - (b) the contents of any document, or a description of any thing, produced to the examiner; or
 - (c) any information that might enable a person who has given evidence before the examiner to be identified; or

(d) the fact that any person has given or may be about to give evidence at an examination;

must not be published, or must not be published except in such manner, and to such persons, as the examiner specifies. 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.

- (10) Subject to subsection (11), the CEO may, in writing, vary or revoke a direction under subsection (9).
- (11) The CEO must not vary or revoke a direction if 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.

Courts

- (12) If:
- (a) a person has been charged with an offence before a federal court or before a court of a State or Territory; and
 - (b) the court considers that it may be desirable in the interests of justice that particular evidence given before an examiner, being evidence in relation to which the examiner has given a direction under subsection (9), be made available to the person or to a legal practitioner representing the person;
- the court may give to the examiner or to the CEO a certificate to that effect and, if the court does so, the examiner or the CEO, as the case may be, must make the evidence available to the court.
- (13) If:
- (a) the examiner or the CEO makes evidence available to a court in accordance with subsection (12); and
 - (b) the court, after examining the evidence, is satisfied that the interests of justice so require;
- the court may make the evidence available to the person charged with the offence concerned or to a legal practitioner representing the person.

Section 26

Offence

- (14) A person who:
- (a) is present at an examination in contravention of subsection (5); or
 - (b) makes a publication in contravention of a direction given under subsection (9);
- is guilty of an offence punishable, upon summary conviction, by a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 12 months.

End of examination

- (15) At the conclusion of an examination held by an examiner, the examiner must give the head of the special ACC operation/investigation:
- (a) a record of the proceedings of the examination; and
 - (b) any documents or other things given to the examiner at, or in connection with, the examination.

26 Reimbursement of expenses

- (1) A witness appearing before an examiner shall be paid by the Commonwealth in respect of the expenses of his or her attendance an amount ascertained in accordance with the prescribed scale or, if there is no prescribed scale, such amount as the CEO determines.
- (2) The CEO may direct that a person producing a document or thing pursuant to a notice issued under section 29 shall be paid by the Commonwealth in respect of the expenses of his or her attendance an amount ascertained in accordance with the prescribed scale or, if there is no prescribed scale, such amount as the CEO determines.

27 Legal and financial assistance

- (1) A witness who is appearing or is about to appear before an examiner may make an application to the Attorney-General for the provision of assistance under this section in respect of his or her appearance.
- (2) A person who proposes to make, or has made, an application to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* for an order of review in respect of a matter

arising under this Act may make an application to the Attorney-General for the provision of assistance under this section in respect of the application to the Federal Court.

- (2A) A person who proposes to make, or has made, an application to the Federal Magistrates Court under the *Administrative Decisions (Judicial Review) Act 1977* for an order of review in respect of a matter arising under this Act may make an application to the Attorney-General for the provision of assistance under this section in respect of the application to the Federal Magistrates Court.
- (3) Where an application is made by a person under subsection (1), (2) or (2A), the Attorney-General may, if he or she is satisfied that:
- (a) it would involve substantial hardship to the person to refuse the application; or
 - (b) the circumstances of the case are of such a special nature that the application should be granted;
- authorize the provision by the Commonwealth to that person, either unconditionally or subject to such conditions as the Attorney-General determines, of such legal or financial assistance in respect of the appearance of that person before the examiner, or the application by that person to the Federal Court, as the case may be, as the Attorney-General determines.

28 Power to summon witnesses and take evidence

- (1) An examiner may summon a person to appear before an examiner at an examination to give evidence and to produce such documents or other things (if any) as are referred to in the summons.
- (1A) Before issuing a summons under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the summons. The record is to be made:
- (a) before the issue of the summons; or
 - (b) at the same time as the issue of the summons.
- (2) A summons under subsection (1) requiring a person to appear before an examiner at an examination must be accompanied by a copy of the determination of the Board that the intelligence operation is a special operation or that the investigation into

Section 29

matters relating to federally relevant criminal activity is a special investigation.

- (3) A summons under subsection (1) requiring a person to appear before an examiner at an examination shall, unless the examiner issuing the summons is satisfied that, in the particular circumstances of the special ACC operation/investigation to which the examination relates, it would prejudice the effectiveness of the special ACC operation/investigation for the summons to do so, set out, so far as is reasonably practicable, the general nature of the matters in relation to which the person is to be questioned, but nothing in this subsection prevents an examiner from questioning the person in relation to any matter that relates to a special ACC operation/investigation.
- (4) The examiner who is holding an examination may require a person appearing at the examination to produce a document or other thing.
- (5) An examiner may, at an examination, take evidence on oath or affirmation and for that purpose:
 - (a) the examiner may require a person appearing at the examination to give evidence either to take an oath or to make an affirmation in a form approved by the examiner; and
 - (b) the examiner, or a person who is an authorised person in relation to the ACC, may administer an oath or affirmation to a person so appearing at the examination.
- (6) In this section, a reference to a person who is an authorised person in relation to the ACC is a reference to a person authorised in writing, or a person included in a class of persons authorised in writing, for the purposes of this section by the CEO.
- (7) The powers conferred by this section are not exercisable except for the purposes of a special ACC operation/investigation.
- (8) A failure to comply with section 29A, so far as section 29A relates to a summons under subsection (1) of this section, does not affect the validity of the summons.

29 Power to obtain documents

- (1) An examiner may, by notice in writing served on a person, require the person:
-

- (a) to attend, at a time and place specified in the notice, before a person specified in the notice, being an examiner or a member of the staff of the ACC; and
 - (b) to produce at that time and place to the person so specified a document or thing specified in the notice, being a document or thing that is relevant to a special ACC operation/investigation.
- (1A) Before issuing a notice under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the notice. The record is to be made:
- (a) before the issue of the notice; or
 - (b) at the same time as the issue of the notice.
- (2) A notice may be issued under this section in relation to a special ACC operation/investigation, whether or not an examination before an examiner is being held for the purposes of the operation or investigation.
- (3) A person shall not refuse or fail to comply with a notice served on him or her under this section.
- (3A) A person who contravenes subsection (3) is guilty of an indictable offence that, subject to this section, is punishable, upon conviction, by a fine not exceeding 200 penalty units or imprisonment for a period not exceeding 5 years.
- (3B) Notwithstanding that an offence against subsection (3) is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.
- (3C) Where, in accordance with subsection (3B), a court of summary jurisdiction convicts a person of an offence against subsection (3), the penalty that the court may impose is a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 1 year.
- (4) Subsections 30(3) to (5) and (9) apply in relation to a person who is required to produce a document or thing by a notice served on him or her under this section in the same manner as they apply in relation to a person who is required to produce a document or thing at an examination before an examiner.
-

Section 29A

- (5) A failure to comply with section 29A, so far as section 29A relates to a notice under subsection (1) of this section, does not affect the validity of the notice.

29A Disclosure of summons or notice etc. may be prohibited

- (1) The examiner issuing a summons under section 28 or a notice under section 29 must, or may, as provided in subsection (2), include in it a notation to the effect that disclosure of information about the summons or notice, or any official matter connected with it, is prohibited except in the circumstances, if any, specified in the notation.
- (2) A notation must not be included in the summons or notice except as follows:
- (a) the examiner must include the notation if satisfied that failure to do so would reasonably be expected to prejudice:
 - (i) the safety or reputation of a person; or
 - (ii) the fair trial of a person who has been or may be charged with an offence; or
 - (iii) the effectiveness of an operation or investigation;
 - (b) the examiner may include the notation if satisfied that failure to do so might prejudice:
 - (i) the safety or reputation of a person; or
 - (ii) the fair trial of a person who has been or may be charged with an offence; or
 - (iii) the effectiveness of an operation or investigation;
 - (c) the examiner may include the notation if satisfied that failure to do so might otherwise be contrary to the public interest.
- (3) If a notation is included in the summons or notice, it must be accompanied by a written statement setting out the rights and obligations conferred or imposed by section 29B on the person who was served with, or otherwise given, the summons or notice.
- (4) If, after the ACC has concluded the operation or investigation concerned:
- (a) no evidence of an offence has been obtained as described in subsection 12(1); or

- (b) evidence of an offence or offences has been assembled and given as required by subsection 12(1) and the CEO has been advised that no person will be prosecuted; or
 - (c) evidence of an offence or offences committed by only one person has been assembled and given as required by subsection 12(1) and criminal proceedings have begun against that person; or
 - (d) evidence of an offence or offences committed by 2 or more persons has been assembled and given as required by subsection 12(1) and:
 - (i) criminal proceedings have begun against all those persons; or
 - (ii) criminal proceedings have begun against one or more of those persons and the CEO has been advised that no other of those persons will be prosecuted;
- all the notations that were included under this section in any summonses or notices relating to the operation or investigation are cancelled by this subsection.
- (5) If a notation is cancelled by subsection (4), the CEO must serve a written notice of that fact on each person who was served with, or otherwise given, the summons or notice containing the notation.
- (7) If:
- (a) under this section, a notation in relation to the disclosure of information about:
 - (i) a summons issued under section 28; or
 - (ii) a notice issued under section 29; or
 - (iii) any official matter connected with the summons or notice;has been made and not cancelled; and
 - (b) apart from this subsection, a credit reporting agency (within the meaning of section 11A of the *Privacy Act 1988*) would be required, under subsection 18K(5) of the *Privacy Act 1988*, to make a note about the disclosure of the information; such a note must not be made until the notation is cancelled.
- (8) In this section:
- official matter* has the same meaning as in section 29B.

29B Offences of disclosure

- (1) A person who is served with, or otherwise given, a summons or notice containing a notation made under section 29A must not disclose:
- (a) the existence of the summons or notice or any information about it; or
 - (b) the existence of, or any information about, any official matter connected with the summons or notice.

Penalty: 20 penalty units or imprisonment for one year.

- (2) Subsection (1) does not prevent the person from making a disclosure:
- (a) in accordance with the circumstances, if any, specified in the notation; or
 - (b) to a legal practitioner for the purpose of obtaining legal advice or representation relating to the summons, notice or matter; or
 - (c) to a legal aid officer for the purpose of obtaining assistance under section 27 relating to the summons, notice or matter; or
 - (d) if the person is a body corporate—to an officer or agent of the body corporate for the purpose of ensuring compliance with the summons or notice; or
 - (e) if the person is a legal practitioner—for the purpose of obtaining the agreement of another person under subsection 30(3) to the legal practitioner answering a question or producing a document at an examination before an examiner; or
 - (f) to the Ombudsman for the purpose of making a complaint under the *Ombudsman Act 1976*; or
 - (g) to the Australian Law Enforcement Integrity Commission for the purpose of referring to the Integrity Commissioner, under the *Law Enforcement Integrity Commissioner Act 2006*, an allegation or information that raises a corruption issue.
- (3) If a disclosure is made to a person as permitted by subsection (2) or (4), the following provisions apply:
- (a) while he or she is a person of a kind to whom a disclosure is so permitted to be made, he or she must not disclose the existence of, or any information about, the summons or

notice, or any official matter connected with it, except as permitted by subsection (4);

- (b) while he or she is no longer such a person, he or she must not, in any circumstances, make a record of, or disclose the existence of, the summons, notice or matter, or disclose any information about any of them.

Penalty: 20 penalty units or imprisonment for one year.

- (4) A person to whom information has been disclosed, as permitted by subsection (2) or this subsection, may disclose that information:
 - (a) if the person is an officer or agent of a body corporate referred to in paragraph (2)(d):
 - (i) to another officer or agent of the body corporate for the purpose of ensuring compliance with the summons or notice; or
 - (ii) to a legal practitioner for the purpose of obtaining legal advice or representation relating to the summons, notice or matter; or
 - (iii) to a legal aid officer for the purpose of obtaining assistance under section 27 relating to the summons, notice or matter; or
 - (b) if the person is a legal practitioner—for the purpose of giving or obtaining legal advice or legal representation, making representations, or obtaining assistance under section 27, relating to the summons, notice or matter; or
 - (c) if the person is a legal aid officer—for the purpose of obtaining legal advice or representation relating to the summons, notice or matter; or
 - (d) to the Ombudsman for the purpose of making a complaint under the *Ombudsman Act 1976*; or
 - (e) to the Australian Law Enforcement Integrity Commission for the purpose of referring to the Integrity Commissioner, under the *Law Enforcement Integrity Commissioner Act 2006*, an allegation or information that raises a corruption issue.
 - (5) This section ceases to apply to a summons or notice after:
 - (a) the notation contained in the summons or notice is cancelled by subsection 29A(4); or
 - (b) 5 years elapse after the issue of the summons or notice;whichever is sooner.
-

Section 30

(6) A reference in this section to disclosing something's existence includes disclosing information from which a person could reasonably be expected to infer its existence.

(7) In this section:

legal aid officer means:

- (a) a member, or member of staff, of an authority established by or under a law of a State or Territory for purposes including the provision of legal assistance; or
- (b) a person to whom the Attorney-General has delegated his or her powers and functions under section 27.

official matter means any of the following (whether past, present or contingent):

- (a) the determination referred to in subsection 28(2);
- (b) an ACC operation/investigation;
- (c) an examination held by an examiner;
- (d) court proceedings.

30 Failure of witnesses to attend and answer questions

Failure to attend

- (1) A person served, as prescribed, with a summons to appear as a witness at an examination before an examiner shall not:
- (a) fail to attend as required by the summons; or
 - (b) fail to attend from day to day unless excused, or released from further attendance, by the examiner.

Failure to answer questions etc.

- (2) A person appearing as a witness at an examination before an examiner shall not:
- (a) when required pursuant to section 28 either to take an oath or make an affirmation—refuse or fail to comply with the requirement;
 - (b) refuse or fail to answer a question that he or she is required to answer by the examiner; or
 - (c) refuse or fail to produce a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed.

- (3) Where:
- (a) a legal practitioner is required to answer a question or produce a document at an examination before an examiner; and
 - (b) the answer to the question would disclose, or the document contains, a privileged communication made by or to the legal practitioner in his or her capacity as a legal practitioner;
- the legal practitioner is entitled to refuse to comply with the requirement unless the person to whom or by whom the communication was made agrees to the legal practitioner complying with the requirement but, where the legal practitioner refuses to comply with the requirement, he or she shall, if so required by the examiner, give the examiner the name and address of the person to whom or by whom the communication was made.

Use immunity available in some cases if self-incrimination claimed

- (4) Subsection (5) limits the use that can be made of any answers given at an examination before an examiner, or documents or things produced at an examination before an examiner. That subsection only applies if:
- (a) a person appearing as a witness at an examination before an examiner:
 - (i) answers a question that he or she is required to answer by the examiner; or
 - (ii) produces a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed; and
 - (b) in the case of the production of a document that is, or forms part of, a record of an existing or past business—the document sets out details of earnings received by the person in respect of his or her employment and does not set out any other information; and
 - (c) before answering the question or producing the document or thing, the person claims that the answer, or the production of the document or thing, might tend to incriminate the person or make the person liable to a penalty.
- (5) The answer, or the document or thing, is not admissible in evidence against the person in:
- (a) a criminal proceeding; or

Section 31

- (b) a proceeding for the imposition of a penalty;
other than:
 - (c) confiscation proceedings; or
 - (d) a proceeding in respect of:
 - (i) in the case of an answer—the falsity of the answer; or
 - (ii) in the case of the production of a document—the falsity of any statement contained in the document.

Offence for contravention of subsection (1), (2) or (3)

- (6) A person who contravenes subsection (1), (2) or (3) is guilty of an indictable offence that, subject to this section, is punishable, upon conviction, by a fine not exceeding 200 penalty units or imprisonment for a period not exceeding 5 years.
- (7) Notwithstanding that an offence against subsection (1), (2) or (3) is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.
- (8) Where, in accordance with subsection (7), a court of summary jurisdiction convicts a person of an offence against subsection (1), (2) or (3), the penalty that the court may impose is a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 1 year.

Legal professional privilege

- (9) Subsection (3) does not affect the law relating to legal professional privilege.

31 Warrant for arrest of witness

- (1) Where, upon application by an examiner, a Judge of the Federal Court or of the Supreme Court of a State or Territory sitting in chambers is satisfied by evidence on oath that there are reasonable grounds to believe:
 - (a) that a person who has been ordered, under section 24, to deliver his or her passport to the examiner, whether or not the person has complied with the order, is nevertheless likely to

leave Australia for the purpose of avoiding giving evidence before the examiner; or

- (b) that a person in relation to whom a summons has been issued under subsection 28(1):
 - (i) has absconded or is likely to abscond; or
 - (ii) is otherwise attempting, or is otherwise likely to attempt, to evade service of the summons; or
- (c) that a person has committed an offence under subsection 30(1) or is likely to do so;

the Judge may issue a warrant for the apprehension of the person.

- (2) The warrant may be executed by any member of the Australian Federal Police or of the Police Force of a State or Territory, or by any person to whom it is addressed, and the person executing it has power to break into and enter any premises, vessel, aircraft or vehicle for the purpose of executing it.
- (2A) The warrant may be executed notwithstanding that the warrant is not at the time in the possession of the person executing it.
- (2B) A person executing a warrant under this section may only use such reasonable force as is necessary for the execution.
- (3) Where a person is apprehended in pursuance of a warrant under this section, he or she shall be brought, as soon as practicable, before a Judge of the Federal Court or of the Supreme Court of a State or Territory and the Judge may:
 - (a) admit the person to bail, with such security as the Judge thinks fit, on such conditions as he or she thinks necessary to ensure the appearance of the person as a witness before the examiner;
 - (b) order the continued detention of the person for the purposes of ensuring his or her appearance as such a witness; or
 - (c) order the release of the person.
- (4) Where a person is under detention in pursuance of this section, he or she shall, within 14 days after he or she was brought, or last brought, before a Judge of the Federal Court or of the Supreme Court of a State or Territory in accordance with this section, or within such shorter or longer time as a Judge has fixed upon the last previous appearance of the person before a Judge under this section, be again brought before a Judge and the Judge may

Section 33

thereupon exercise any of the powers of a Judge under subsection (3).

- (5) In this section, *Australia* includes the external Territories.

33 False or misleading evidence

- (1) A person shall not, at an examination before an examiner, give evidence that is to his or her knowledge false or misleading in a material particular.
- (2) A contravention of subsection (1) is an indictable offence and, subject to this section, is punishable, upon conviction, by imprisonment for a period not exceeding 5 years or by a fine not exceeding 200 penalty units.
- (3) Notwithstanding that an offence against subsection (1) is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.
- (4) Where, in accordance with subsection (3), a court of summary jurisdiction convicts a person of an offence against subsection (1), the penalty that the court may impose is a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 1 year.

34 Protection of witnesses etc.

Where it appears to an examiner that, by reason of the fact that a person:

- (a) is to appear, is appearing or has appeared at an examination before the examiner to give evidence or to produce a document or thing; or
- (b) proposes to furnish or has furnished information, or proposes to produce or has produced a document or thing, to the ACC otherwise than at an examination before the examiner;

the safety of the person may be prejudiced or the person may be subjected to intimidation or harassment, the examiner may make such arrangements (including arrangements with the Minister or with members of the Australian Federal Police or of the Police Force of a State) as are necessary to avoid prejudice to the safety of

the person, or to protect the person from intimidation or harassment.

34A Contempt of the ACC

A person is *in contempt of the ACC* if he or she:

- (a) when appearing as a witness at an examination before an examiner:
 - (i) refuses or fails to take an oath or affirmation when required to do so under section 28; or
 - (ii) refuses or fails to answer a question that he or she is required to answer by the examiner; or
 - (iii) refuses or fails to produce a document or thing that he or she was required to produce by a summons or notice under this Act that was served to him or her as prescribed; or
- (b) is a legal practitioner who is required to answer a question or produce a document at an examination before an examiner, and both of the following apply:
 - (i) the answer to the question would disclose, or the document contains, a privileged communication made by or to the legal practitioner in his or her capacity as a legal practitioner;
 - (ii) he or she refuses to comply with the requirement and does not, when required by the examiner, give the examiner the name and address of the person to whom or by whom the communication was made; or
- (c) gives evidence at an examination before an examiner that he or she knows is false or misleading in a material particular; or
- (d) obstructs or hinders an examiner in the performance of his or her functions as an examiner; or
- (e) disrupts an examination before an examiner; or
- (f) threatens a person present at an examination before an examiner.

34B Federal Court or Supreme Court to deal with contempt

- (1) If an examiner is of the opinion that, during an examination before the examiner, a person is in contempt of the ACC, the examiner

Section 34C

may apply to either of the following courts for the person to be dealt with in relation to the contempt:

- (a) the Federal Court;
 - (b) the Supreme Court of the State or Territory in which the examination to which the contempt relates is being conducted.
- (2) Before making the application, the examiner must inform the person that the examiner proposes to make the application.
 - (3) The application must be accompanied by a certificate that states:
 - (a) the grounds for making the application; and
 - (b) evidence in support of the application.
 - (4) A copy of the certificate must be given to the person before, or at the same time as, the application is made.
 - (5) If, after:
 - (a) considering the matters specified in the certificate; and
 - (b) hearing or receiving any evidence or statements by or in support of the ACC; and
 - (c) hearing or receiving any evidence or statements by or in support of the person;the Court to which the application was made finds that the person was in contempt of the ACC, the Court may deal with the person as if the acts or omissions involved constituted a contempt of that Court.
 - (6) For the purposes of determining whether a person is in contempt of the ACC under subsection (1), Chapter 2 of the *Criminal Code* applies as if:
 - (a) contempt of the ACC were an offence; and
 - (b) references to a person being criminally responsible for an offence were references to a person being responsible for contempt of the ACC.

34C Conduct of contempt proceedings

- (1) This section applies if an application for a person to be dealt with in relation to a contempt of the ACC is made to the Federal Court or to the Supreme Court of a State or Territory under section 34B.

- (2) Proceedings in relation to the application are, subject to this Act, to be instituted, carried on, heard and determined in accordance with the laws (including any Rules of Court) that apply in relation to the punishment of a contempt of the Court to which the application was made.
- (3) In proceedings in relation to the application, a certificate under subsection 34B(3) is prima facie evidence of the matters specified in the certificate.

34D Person in contempt may be detained

- (1) If an examiner proposes to make an application under subsection 34B(1) in respect of a person, he or she may, during the hearing concerned, direct a constable to detain the person for the purpose of bringing the person before the Court to which the application was made for the hearing of the application.
- (2) If the person is detained under subsection (1):
 - (a) the examiner must apply to the Court as soon as practicable under subsection 34B(1) in respect of the person; and
 - (b) the person must, subject to subsection (3) of this section, be brought before the Court as soon as practicable.
- (3) The Court may:
 - (a) direct that the person be released from detention on condition that he or she will appear before the Court in relation to the application; or
 - (b) order that the person continue to be detained until the application is determined.
- (4) The Court may also impose any other condition on the release, for example:
 - (a) that the person surrenders his or her passport; or
 - (b) that the person gives an undertaking as to his or her living arrangements; or
 - (c) that the person reports as required to a law enforcement agency.
- (5) The Court may at any time vary or revoke a condition imposed under subsection (4).

Section 34E

34E Examiner may withdraw contempt application

- (1) An examiner may at any time withdraw an application in relation to a person under subsection 34B(1).
- (2) If:
 - (a) the examiner does so; and
 - (b) the person is in detention under section 34D;the person must be released from detention immediately.

34F Relationship with section 12

To avoid doubt, evidence relating to an application under subsection 34B(1) is not required to be given to a person or authority under subsection 12(1).

35 Obstructing or hindering the ACC or an examiner etc.

- (1) A person must not:
 - (a) obstruct or hinder:
 - (i) the ACC in the performance of its functions; or
 - (ii) an examiner in the performance of his or her functions as an examiner; or
 - (b) disrupt an examination before an examiner; or
 - (c) threaten any person present at an examination before an examiner.
- (2) A person who contravenes subsection (1) is guilty of an indictable offence that, subject to this section, is punishable, upon conviction, by a fine not exceeding 200 penalty units or imprisonment for a period not exceeding 5 years.
- (3) Notwithstanding that an offence against subsection (1) is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.
- (4) Where, in accordance with subsection (3), a court of summary jurisdiction convicts a person of an offence against subsection (1), the penalty that the court may impose is a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 1 year.

35A Double jeopardy

- (1) Where an act or omission by a person is an offence against this Act and is also an offence against a law of a State, the person may be prosecuted and convicted under this Act or under that law of that State in respect of that act or omission, but nothing in this Act renders a person liable to be punished twice in respect of the same act or omission.
- (2) If:
 - (a) an application is made to the Federal Court or a Supreme Court under subsection 34B(1) in respect of an act or omission by a person; and
 - (b) the person is dealt with by the Court under that section in respect of the act or omission;the person is not liable to be prosecuted for an offence in respect of that act or omission.
- (3) If a person is prosecuted for an offence in respect of an act or omission referred to in subsection 34B(1), an application must not be made under subsection 34B(1) in respect of that act or omission.

36 Protection of examiners etc.

- (1) An examiner has, in the performance of his or her functions or the exercise of his or her powers as an examiner in relation to an examination before the examiner, the same protection and immunity as a Justice of the High Court.
- (2) A legal practitioner assisting the ACC or an examiner or representing a person at an examination before an examiner has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.
- (3) Subject to this Act, a person summoned to attend or appearing before an examiner as a witness has the same protection as a witness in proceedings in the High Court.
- (4) To avoid doubt, this section does not limit the powers of the Ombudsman under the *Ombudsman Act 1976*.

Section 48

- (2) For the purposes of the *Public Service Act 1999*:
- (a) the CEO and the APS employees assisting the CEO together constitute a Statutory Agency; and
 - (b) the CEO is the Head of that Statutory Agency.

48 Employment of consultants etc.

- (1) The CEO may, on behalf of the Commonwealth, engage, under agreements in writing, persons having suitable qualifications and experience as consultants to, or to perform services for, the ACC.
- (2) The terms and conditions of engagement of persons engaged under subsection (1) are such as are from time to time determined by the CEO.

49 Staff to be seconded to ACC

In addition to the members of the staff referred to in subsection 47(1) and persons engaged under subsection 48(1), the ACC shall be assisted in the performance of its functions by:

- (a) members of the Australian Federal Police whose services are made available to the ACC;
- (b) officers and employees of authorities of the Commonwealth whose services are made available to the ACC; and
- (c) persons whose services are made available to the ACC pursuant to arrangements made under section 58.

50 Counsel assisting ACC

The CEO may appoint a legal practitioner to assist the ACC as counsel, either generally or in relation to a particular matter or matters.

Subdivision D—Secrecy

51 Secrecy

- (1) This section applies to:
 - (a) the CEO; and
 - (aa) a member of the Board; and
 - (b) a member of the staff of the ACC; and

- (c) an examiner.
- (2) A person to whom this section applies who, either directly or indirectly, except for the purposes of a relevant Act or otherwise in connection with the performance of his or her duties under a relevant Act, and either while he or she is or after he or she ceases to be a person to whom this section applies:
- (a) makes a record of any information; or
 - (b) divulges or communicates to any person any information; being information acquired by him or her by reason of, or in the course of, the performance of his or her duties under this Act, is guilty of an offence punishable on summary conviction by a fine not exceeding 50 penalty units or imprisonment for a period not exceeding 1 year, or both.
- (3) A person to whom this section applies shall not be required to produce in any court any document that has come into his or her custody or control in the course of, or by reason of, the performance of his or her duties under this Act, or to divulge or communicate to a court a matter or thing that has come to his or her notice in the performance of his or her duties under this Act, except where the ACC, or the CEO, the acting CEO, a member of the Board or an examiner in his or her official capacity, is a party to the relevant proceeding or it is necessary to do so:
- (a) for the purpose of carrying into effect the provisions of a relevant Act; or
 - (b) for the purposes of a prosecution instituted as a result of an operation or investigation carried out by the ACC in the performance of its functions.
- (4) In this section:
- court* includes any tribunal, authority or person having power to require the production of documents or the answering of questions.
- member of the staff of the ACC* means:
- (a) a person referred to in the definition of *member of the staff of the ACC* in subsection 4(1); or
 - (b) a person who assists, or performs services for or on behalf of, a legal practitioner appointed under section 50 in the performance of the legal practitioner's duties as counsel to the ACC.

Section 51

produce includes permit access to, and *production* has a corresponding meaning.

relevant Act means:

- (a) this Act; or
- (b) a law of a State under which the ACC performs a duty or function, or exercises a power, in accordance with section 55A; or
- (c) the *Law Enforcement Integrity Commissioner Act 2006* or regulations under that Act; or
- (d) the *Parliamentary Joint Committee on Law Enforcement Act 2010* or regulations under that Act.

58 Administrative arrangements with States

- (1) The Minister may make an arrangement with the appropriate Minister of the Crown of a State under which the State will, from time to time as agreed upon under the arrangement, make available a person who is an officer or employee of the State or of an authority of the State or a member of the Police Force of the State, or persons who are such officers, employees or members, to perform services for the ACC.
- (2) An arrangement under subsection (1) may provide for the Commonwealth to reimburse a State with respect to the services of a person or persons to whom the arrangement relates.

59 Furnishing of reports and information

- (1) The Chair of the Board must keep the Minister informed of the general conduct of the ACC in the performance of the ACC's functions. If the Minister requests the Chair to provide to him or her information concerning a specific matter relating to the ACC's conduct in the performance of its functions, the Chair must comply with the request.
- (1A) Subject to subsection (2), if a Minister of the Crown of a State who is a member of the Inter-Governmental Committee requests the Chair of the Board to provide him or her with information concerning a specific matter relating to the ACC's conduct in the performance of its functions, being conduct that occurred within the jurisdiction of that State, the Chair of the Board must comply with the request.
- (2) If the Chair of the Board considers that disclosure of information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the Chair must not provide the information under subsection (1A).
- (3) Subject to subsection (5), the Chair of the Board:
 - (a) shall, when requested by the Inter-Governmental Committee to furnish information to the Committee concerning a specific matter relating to an ACC operation/investigation that the ACC has conducted or is conducting, comply with the request; and

Section 59

- (b) shall when requested by the Inter-Governmental Committee to do so, and may at such other times as the Chair of the Board thinks appropriate, inform the Committee concerning the general conduct of the operations of the ACC.
- (4) Subject to subsection (5), the Chair of the Board shall furnish to the Inter-Governmental Committee, for transmission to the Governments represented on the Committee, a report of the findings of any special ACC operation/investigation conducted by the ACC.
- (5) The Chair of the Board shall not furnish to the Inter-Governmental Committee any matter the disclosure of which to members of the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies and, if the findings of the ACC in an investigation include any such matter, the Chair of the Board shall prepare a separate report in relation to the matter and furnish that report to the Minister.
- (6) The Chair of the Board may include in a report furnished under subsection (4) a recommendation that the report be laid before each House of the Parliament.
- (7) The CEO may give to:
 - (a) any law enforcement agency; or
 - (b) any foreign law enforcement agency; or
 - (c) any other agency or body of the Commonwealth, a State or a Territory prescribed by the regulations;any information that is in the ACC's possession and that is relevant to the activities of that agency or body if:
 - (d) it appears to the CEO to be appropriate to do so; and
 - (e) to do so would not be contrary to a law of the Commonwealth, a State or a Territory that would otherwise apply.
- (8) The CEO may, whenever it appears to the CEO to be appropriate to do so, furnish to authorities and persons responsible for taking civil remedies by or on behalf of the Crown in right of the Commonwealth, of a State or of a Territory any information that has come into the possession of the ACC and that may be relevant for the purposes of so taking such remedies in respect of matters

connected with, or arising out of, offences against the laws of the Commonwealth, of a State or of a Territory, as the case may be.

- (9) Where any information relating to the performances of the functions of:
- (a) a Department of State of the Commonwealth or of a State;
 - (b) the Administration of a Territory; or
 - (c) an instrumentality of the Commonwealth, of a State or of a Territory;
- comes into the possession of the ACC in the course of any operations or investigations conducted by it, the CEO may, if he or she considers it desirable to do so:
- (d) furnish that information to the Department, the Administration or the instrumentality; and
 - (e) make to the Department, the Administration or the instrumentality such recommendations (if any) relating to the performance of the functions of the Department, of the Administration or of the instrumentality as the CEO considers appropriate.
- (10) A report under this Act that sets out any finding that an offence has been committed, or makes any recommendation for the institution of a prosecution in respect of an offence, shall not be made available to the public unless the finding or recommendation is expressed to be based on evidence that would be admissible in the prosecution of a person for that offence.
- (11) The CEO may, whenever it appears to the CEO to be appropriate to do so, furnish to the Australian Security Intelligence Organisation any information that has come into the ACC's possession and that is relevant to security as defined in section 4 of the *Australian Security Intelligence Organisation Act 1979*.

59A Delegation

The CEO may, by writing, delegate to a member of the staff of the ACC who is an SES employee, or an acting SES employee, all or any of the CEO's powers or functions under this Act.



Crimes Legislation Amendment (Powers and Offences) Act 2012

No. 24, 2012

An Act to amend various Acts relating to the enforcement of the criminal law, and for other purposes

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)

Schedule 2—Amendments relating to disclosure of ACC information

Part 1—Amendments commencing on day after Royal Assent

Australian Crime Commission Act 2002

1 Section 59 (heading)

Repeal the heading, substitute:

59 Providing reports and information to members of Parliament

2 Before subsection 59(1)

Insert:

Information for Minister

3 Subsection 59(1)

After “the Chair of the Board”, insert “and the CEO”.

4 Subsection 59(1)

After “requests the Chair”, insert “or the CEO”.

5 Subsection 59(1)

After “functions, the Chair”, insert “or the CEO (as the case requires)”.

6 Before subsection 59(1A)

Insert:

Information for Inter-Governmental Committee

7 Subsection 59(1A)

After “the Chair of the Board” (first occurring), insert “or the CEO”.

8 Subsection 59(1A)

After “the Chair of the Board” (second occurring), insert “or the CEO (as the case requires)”.

9 Subsection 59(2)

After “the Chair of the Board”, insert “or the CEO (as the case requires)”.

10 Subsection 59(2)

Omit “the Chair” (second occurring), substitute “he or she”.

11 Subsection 59(3)

After “the Chair of the Board” (first occurring), insert “or the CEO”.

12 Paragraph 59(3)(b)

After “the Chair of the Board”, insert “or the CEO”.

13 Subsection 59(5)

After “the Chair of the Board” (first occurring), insert “or the CEO (as the case requires)”.

14 Subsection 60(4)

After “the Board”, insert “or the CEO”.

15 Subsection 60(5)

Omit “the Board shall”, substitute “the Board and the CEO must”.

16 Application of this Part

The amendments made by this Part apply to any information in the possession of the ACC, whether the information comes into the possession of the ACC before or after this item commences.

Part 2—Amendments commencing on Proclamation

Australian Crime Commission Act 2002

17 Subsection 4(1)

Insert:

ACC information means information that is in the ACC's possession.

18 Subsection 4(1)

Insert:

permissible purpose means one or more of the following purposes:

- (a) performing functions referred to in section 7A or 7C;
- (b) preventing, detecting, investigating, prosecuting or punishing:
 - (i) criminal offences or activities that might constitute criminal offences (including under a law of a foreign country); or
 - (ii) contraventions of a law of the Commonwealth, a State or a Territory imposing a penalty or sanction (including taking civil remedies in relation to contraventions of such laws); or
 - (iii) seriously improper conduct (including professional misconduct or misconduct by a public official);
- (c) preventing, detecting or investigating threats to national security;
- (d) preventing serious threats to an individual's life, health or safety, or to public health or public safety;
- (e) enforcing laws (including laws of foreign countries) relating to proceeds of crime;
- (f) enforcing laws (including laws of foreign countries) relating to unexplained wealth;
- (g) protecting public revenue;
- (h) developing government policy;
- (i) researching criminology;

(j) any other purpose prescribed by the regulations.

19 Subsection 12(1) (note)

Omit “Note”, substitute “Note 1”.

20 Subsection 12(1) (note)

Omit “section 59”, substitute “sections 59AA and 59AB”.

21 At the end of subsection 12(1)

Add:

Note 2: This subsection is subject to any relevant direction given under subsection 25A(9) (see subsection (2) of this section).

22 At the end of subsection 12(1A)

Add:

Note: This subsection is subject to any relevant direction given under subsection 25A(9) (see subsection (2) of this section).

23 After subsection 12(1A)

Insert:

(2) Subsections (1) and (1A) are subject to any relevant direction given under subsection 25A(9) (confidentiality in relation to examinations).

24 Subparagraph 47A(1)(b)(ii)

Omit “a law enforcement agency or a foreign law enforcement agency”, substitute “a person or body (however described) to whom the CEO may disclose ACC information under section 59AA”.

25 At the end of subsection 59(1)

Add:

Note: This section is subject to any relevant direction given under subsection 25A(9) (see section 59AC).

26 Subsections 59(7) to (11)

Repeal the subsections, substitute:

Information for members of Parliament

- (7) The Chair of the Board or the CEO may inform one or more of the following persons of the general conduct of the operations of the ACC if the Chair or the CEO (as the case requires) considers that it is in the public interest to do so:
- (a) a member of either House of the Parliament;
 - (b) a member of the Parliament of a State.

Note: A reference to the Parliament of a State includes a reference to the Legislative Assemblies of the Australian Capital Territory and the Northern Territory (see paragraph 4(3)(a)).

27 After section 59

Insert:

59AA Disclosing information to government bodies

Commonwealth, State, Territory and foreign agencies etc.

- (1) The CEO may disclose ACC information to:
- (a) a body of the Commonwealth, a State or a Territory; or
 - (b) a person who holds an office or appointment under a law of the Commonwealth, a State or a Territory; or
 - (c) an agency that has responsibility for:
 - (i) law enforcement in a foreign country; or
 - (ii) intelligence gathering for a foreign country; or
 - (iii) the security of a foreign country; or
 - (d) an international body that:
 - (i) has functions relating to law enforcement or gathering intelligence; and
 - (ii) is prescribed by the regulations for the purposes of this paragraph; or
 - (e) an international judicial body that is prescribed by the regulations for the purposes of this paragraph;
- if:
- (f) the CEO considers it appropriate to do so; and
 - (g) the CEO considers that the information is relevant to a permissible purpose; and

- (h) disclosing the ACC information would not be contrary to a law of the Commonwealth, a State or a Territory that would otherwise apply.

Note 1: For the definition of *body*, see subsection (3).

Note 2: This section is subject to any relevant direction given under subsection 25A(9) (see section 59AC).

ASIO

- (2) The CEO may disclose ACC information to the Australian Security Intelligence Organisation if:
 - (a) the CEO considers it appropriate to do so; and
 - (b) the information is relevant to security (as defined in section 4 of the *Australian Security Intelligence Organisation Act 1979*); and
 - (c) disclosing the ACC information would not be contrary to a law of the Commonwealth, a State or a Territory that would otherwise apply.

Definitions

- (3) In this section:

body includes:

- (a) a body however described; and
- (b) a Department of State; and
- (c) a body (whether incorporated or not) established for a public purpose by or under a law of the Commonwealth, a State or a Territory; and
- (d) a law enforcement agency.

59AB Disclosing information to private sector bodies

- (1) The CEO may disclose ACC information to a body corporate that is prescribed, or is included in a class of bodies corporate that is prescribed, by the regulations for the purposes of this section if:
 - (a) the CEO considers it appropriate to do so; and
 - (b) the CEO considers that disclosing the information to the body is necessary for a permissible purpose; and
 - (c) the body has undertaken, in writing, not to use or further disclose the information except:
-

- (i) as referred to in subsection (3); or
 - (ii) as required by a law of the Commonwealth, a State or a Territory; and
- (d) the body has undertaken, in writing, to comply with any conditions the CEO specifies under subsection (4) or (5); and
- (e) disclosing the ACC information:
- (i) would not prejudice the safety of a person, or prejudice the fair trial of a person who has been charged with an offence; and
 - (ii) would not be contrary to a law of the Commonwealth, a State or a Territory that would otherwise apply.

Note: This section is subject to any relevant direction given under subsection 25A(9) (see section 59AC).

Limitations on disclosing information under subsection (1)

- (2) The CEO may disclose ACC information to a body corporate under subsection (1) only if:
- (a) for information that is personal information (within the meaning of the *Privacy Act 1988*)—the CEO considers that disclosing the information is necessary for the purposes of:
 - (i) preventing criminal offences or activities that might constitute criminal offences (including under a law of a foreign country); or
 - (ii) detecting criminal offences or activities that might constitute criminal offences (including under a law of a foreign country); or
 - (iii) facilitating the collection of criminal information and intelligence in relation to criminal offences or activities that might constitute criminal offences (including under a law of a foreign country); and
 - (b) in any case—the information is not confidential commercial information relating to another body or person.

Specifying purposes and conditions etc.

- (3) The CEO must specify, in writing, any permissible purpose for which the ACC information may be used or further disclosed.

- (4) If the CEO discloses ACC information that is personal information (within the meaning of the *Privacy Act 1988*) to a body corporate, the CEO must specify, in writing:
- (a) one or more conditions that the body corporate must meet in relation to monitoring and controlling any further disclosure of that information by an employee or officer of the body corporate; and
 - (b) a condition that the information is not to be disclosed to a person who is not an employee or officer of the body corporate, other than in any circumstances specified; and
 - (c) one or more conditions that the body corporate must meet in order to ensure that the information is not used or disclosed in a way that might prejudice the reputation of a person.
- (5) The CEO may specify, in writing, any other conditions that the CEO considers appropriate in relation to ACC information that is disclosed under, or in accordance with, this section (whether in relation to personal information or any other ACC information).
- (6) An instrument made under subsection (3), (4) or (5) is not a legislative instrument.

Offence—disclosure etc. for unauthorised purposes

- (7) A person commits an offence if:
- (a) ACC information is disclosed to the person under, or in accordance with, this section; and
 - (b) the person (directly or indirectly):
 - (i) makes a record of the information; or
 - (ii) discloses the information to any other person; and
 - (c) the record or disclosure referred to in paragraph (b) is not:
 - (i) for a purpose specified under subsection (3) in relation to the information; or
 - (ii) required by any other law.

Penalty: 50 penalty units, or imprisonment for 12 months, or both.

Note: For a defence to this offence, see subsection (9).

Offence—breach of conditions

- (8) A person commits an offence if:
-

- (a) ACC information is disclosed to the person under, or in accordance with, this section; and
- (b) the CEO specifies a condition under subsection (4) or (5) in relation to the information; and
- (c) the person does an act or omits to do an act in relation to the information; and
- (d) the act or omission breaches the condition.

Penalty: 50 penalty units, or imprisonment for 12 months, or both.

Note: For a defence to this offence, see subsection (9).

Defence—information legitimately made public

- (9) Subsections (7) and (8) do not apply to a person in relation to ACC information if:
 - (a) the information is in the public domain before the person:
 - (i) makes the record, or discloses the information (if subsection (7) applies); or
 - (ii) does the act or omits to do the act in relation to the information (if subsection (8) applies); and
 - (b) the original disclosure of the information into the public domain (before the person does the thing referred to in subparagraph (a)(i) or (ii) of this subsection) was not:
 - (i) in contravention of section 51 or subsection (7) or (8) of this section; or
 - (ii) in breach of an undertaking given under subsection (1) of this section.

Note: A defendant bears an evidential burden in relation to the matter in subsection (9) (see subsection 13.3(3) of the *Criminal Code*).

59AC Confidentiality in relation to examinations

Sections 59, 59AA and 59AB are subject to any relevant direction as in force under subsection 25A(9) (confidentiality in relation to examinations).

59AD Publication of reports in relation to offences

A report under this Act that:

- (a) sets out a finding that an offence has been committed; or

(b) makes a recommendation to institute a prosecution in respect of an offence;

must not be made available to the public unless the finding or recommendation is expressed to be based on evidence that would be admissible in the prosecution of a person for that offence.

28 After paragraph 61(2)(d)

Insert:

(da) the general nature and the extent of any information disclosed by the CEO during that year to a body corporate under section 59AB;

29 Application of this Part

The amendments made by this Part apply to any ACC information, whether the information comes into the possession of the ACC before or after this item commences.