IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A30 of 2019

BETWEEN:

CXXXVIII
Appellant

and

COMMONWEALTH OF AUSTRALIA
First Respondent

AUSTRALIAN CRIME AND INTELLIGENCE COMMISSION
Second Respondent

JEFFREY ANDERSON
Third Respondent

APPELLANT'S REPLY

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PART I: Certification

1. These submissions are suitable for publication on the internet

PART II:

The arguments of the proposed intervener

2. Following the amendment of the *ACC Act*, the Respondents contended that item 55 of the Amending Act provided a new basis upon which the decision of the Full Court of the Federal Court could be supported. In answer to the Respondents' new contention, the Appellant argues both that as a matter of construction item 55 does not, and that constitutionally it validly could not, lead to the result for which the Respondents contend. While addressed by the Appellant as a new ground of appeal, strictly that was a matter for a notice of contention.

3. The Appellant, at the request of the Respondents (and for convenience) was prepared to, and did, lay out its response to that contention in the form of "grounds" in an Amended Notice of Appeal. The proposed intervener has provided a further, albeit related, answer to the Respondents' contention. For the Respondents to succeed, they must positively satisfy the Court that their contention is correct. It is thus irrelevant whether the proposed intervener's argument is within the "grounds of appeal" (contra *RWS*, [21]). What the intervener properly raises are arguments in response to the Respondents' contention. The Appellant adopts those arguments. Any issue that further notice must be given of them will be addressed by the issue of a further notice under s 78B of the *Judiciary Act*.

The construction of the former s 7C – Ground 1

4. The Appellant's argument is that it was necessary not just that there be an "investigation in fact" at some point, which fell within the scope of a description in the determination, but that the determination itself was required to identify and authorise a particular investigation. That is what the Appellant means by a "particular investigation" – simply an "investigation" as that term is used in s 7C (and as defined in s 5). There has been no transplantation of arguments from s 24A to another section (cf. *RWS*, [12]). Rather, the Appellant answers the question: *what did s 7C require the Board of the ACC to be addressing when it made a determination?* That is a question of construction – and it is precisely the question identified in the reasons of the plurality and left unresolved in Strickland. There is no "factual answer" to that question. The particular investigation in fact concerning the Appellant (and apparently others) was a "project" conceived of long after the making of the HRCT Determination. The Appellant's argument is that, for it to be a special investigation, the Board under s 7C had to authorise that particular

investigation, not merely to describe features of investigations in terms which happened later to apply to the investigation that came to exist in fact.

Construction of item 55 – Ground 1A(i)

5. As the AWS identifies, the issue that the construction of item 55 presents is what does the expression "*requirements of [the ACC Act]*" include. The RWS by arguing that there is "no middle ground" suggest that any deficiency in the determination must have been supplied by the amending Act. As a matter of logic that cannot be right. If, for example, the Board of the ACC made a determination that was in fact a parking ticket or a mining licence, no amount of relieving the requirements of the Act can be overcome by item 55 providing that it is valid *as a determination*. The problem, which the submissions of the Respondents do not confront, is that a determination may not (and the HRCT Determination does not) supply the content of the "investigation" that it authorises, which was the very function of a determination under s 7C. The legislature has not supplied that deficiency in the determination so that the *ACC Act* (as unamended) can operate in relation to it. This is why as a matter of construction item 55 cannot operate as the Respondents suggest. It is also why it is not enough for the Respondents to assert that because the Parliament "aimed at" the problem of the determination the subject of these proceedings, it must be taken to have hit its "target". The very essence of the argument is that it has not, and cannot achieve, the end by the means it has employed. The Appellant well understands that this analysis concerns legislative power (cf. *RWS*, [17]), but the Respondents' approach results in the Court having to supply the missing content, and the executive being unable to ascertain the limits of its power. That is why questions about judicial and executive power do arise on the issue of construction.

Validity of item 55 – Ground 1A(ii)

6. Earlier decisions considered legislation which sought to give legal effect to instruments or orders which, had they been valid, would have served the effective purpose. For example, in *Re Macks; Ex parte Saint* (2000) 204 CLR 158, legislation identifying rights by reference to invalid court orders would result in the creation of norms identifiable by the very terms of those orders. In *Duncan v ICAC* (2015) 256 CLR 83, legislation validating administrative acts done in relation to an investigation within the re-drawn boundaries of "corrupt conduct" were given the same effect they would have had under the *ICAC Act* had the statutory expression always had those boundaries.

7. The problem with the "validated" determination is that it cannot do the work that a determination was required to do within the limits of the *ACC Act*. In the absence of

item 55 designating or identifying a specific investigation, it does not attempt to supply the content necessary for a determination made under the pre-amendment s 7C(3).

8. The Respondents are incorrect in arguing (*RWS*, [16.3]) that item 55 might in addition to validating the Determination, *separately* and *further* validate the Summons and the Notice. First, that is not what item 55(2) does in its terms. Rather, s 55(2) provides that validity of any "other thing done in relation to a determination" will be valid as it would have been had the determination satisfied "*those requirements*" — not that a summons or notice will be valid as if all requirements for the issuing of a summons or notice were satisfied. "*[T]hose requirements*" are the requirements specified in item 55(1)(b), and are only requirements relating to the determination. Secondly, in any event, the scope and effect of the summons and notice depend upon the determination: absent its validity they cannot be validated and operate independently.

Validity of the amended section 7C – Ground 1A(iii)

9. The Respondents contend that this Court ought not decide whether s 7C of the Act, as amended, is valid because the power in the new s 7C it has not been exercised and, even if it is invalid, the provisions of the amending Act which amended s 7C is severable from item 55. That is said to be so because item 55 is concerned with past matters, while s 7C is concerned with future matters. That overlooks that the provisions are "transitional" and their purpose is to carry into effect the former (validated) determinations into the amended Act and that the amended s 7C is crafted so as to permit the making of determinations of the very kind previously purportedly made. Any future determination under s 7C(3) would sit alongside any "old determinations" that became "new determinations". It is inconceivable that Parliament intended its transitional provisions to operate without the amended Act to which they were supposed to "transition".

10. The Respondents further claim that the Appellant "*has an interest only*" in one of the two basis upon a determination could be made in relation to "federally relevant criminal activity" under the amended s 7C (*RWS*, [28], [48]). But the Appellant's relevant interest in the validity of s 7C does not depend upon the terms of the summons that was issued to him (which was not issued under the amended s 7C but under the old s 7C) or the particular kind of criminal activity to which it referred. The validity of the amended s 7C is to be analysed independently of any particular exercise of power that occurred in the past, because the Appellant's interest in its validity is based upon the fact that the amended s 7C, if invalid, is inseverable from item 55. The Appellant thus has the same interest in both "limbs" of the definition of "*federally relevant criminal activity*".

11. To address the argument of the Appellant, that s 7C is not sufficiently connected with a head of power, the Respondents submissions seek to divide the definition of "federally relevant criminal activity" into its two limbs and deal with them separately.

12. As to the second limb (relating to State offences), the Respondents submissions contain no substantive argument that addresses the apparent breadth of the application of its criterion and the lack of sufficient connection with a head of power. Instead, the Respondents merely submit that it can be severed saving the first limb to permit the investigation of Commonwealth and Territory, but not State offences. That result is not easily supposed when regard is had to the constitution of the Board of the ACC and its role as part of a co-operative Commonwealth, Territory and State scheme. The scheme vests decision making authority in a Board constituted of the Police Commissioners of each of jurisdictions. It is obvious that the Commonwealth Parliament would not intend to confer, by s 7C, authority on State Police Commissioners (a majority) to make determinations based on their "*collective experience*" authorising (or not) the investigation of only Commonwealth and Territory offences.

13. Further, even as to the first limb, there are serious difficulties with ascertaining any definite connection between a head of power and the conduct that is said to be authorised.

14. The *first* arises from the inclusion of *possible future* criminal activity in the definition of "*relevant criminal activity*" because of the lack of relationship with actual events. "Criminal activity" is defined to include a "circumstance implying" or an "allegation" that a relevant crime "may" in the future be committed. Any connection with a head of Commonwealth power then depends entirely on an *implication* from circumstance to the possibility of conduct which has not yet occurred (and may not) which would (or may) be a crime against a law of the Commonwealth or a Territory.

15. The *second* is the notion of "*relating to*". Accepting that these are words of connection, the question is whether they supply a sufficient connection *between the operation of the ACC Act and a head of power*, not whether (as is said at *RWS*, [37]) there is a sufficient connection *between the investigation and federal relevant activity*. The problem is that "relating to" admits of connections which are not substantial and may be tenuous. It is not immediately clear how language of connection like "relating to" is to be read in a way ("read it down") that provides for a "sufficient connection" with a head of Commonwealth power — or, perhaps just as importantly, how the sufficiency of a connection could possibly be assessed and applied in the context of the issue of a particular summons or the asking of a particular question in the course of an examination.

16. The *third* arises from the ability of the examiner to require the answer to a question "on any matter that the examiner considers to be relevant" to the special investigation. This means that the connection with a head of power depends purely on the subjective assessment of the administrative decision-maker; cf the *Communist Party case* (1951) 83 CLR 1. The analogy drawn with Royal Commissions and the extracted passage from *Ross v Costigan* at RWS, [38] are inapposite. That passage was concerned with the scope of terms of reference, not with connection to a head of Commonwealth legislative power.

Operation of s 7C(4G) – Ground 1B

17. As to the issue of the expiration of the determination, the Respondents rely either on the argument that the Summons and Notice are validated by item 55 (which is addressed above at [7]) or on the basis that the Appellant's construction of item 54 produces an absurdity — an infinite loop (*RWS*, [52]). But in truth, there is no absurdity. Item 54 is applied once, at the outset, with no need to apply it again. As to the construction arguments, item 54 does not preserve a "status quo". It terminates determinations that were, in their terms, otherwise indefinite. The question it invites is: *when do they end?* The notion that s 7C(4G) is be read as meaning "*ceases to have effect 3 years after the date on which a determination was made only if that 3 year period ends after the commencement*" finds no support whatsoever in the text of the provision, and would defeat the evident purpose of restricting the temporal operation of existing (now validated) determinations. The argument that the 2016 Determination must be taken to have had effect as a new determination (*RWS*, [54]) simply does not reflect what the 2016 Determination did and is unsupported (indeed contradicted) by its very terms.

Validity of the Notice to Produce – Ground 2

18. As to the validity of the Notice, the Respondents (*RWS*, [57]) place store in either s 46(1)(c) or s 46(2) of *Acts Interpretation Act 1901* (Cth) to support either "reading down" or "severance". If ever there was a circumstance for the operation of s 2(2) of that Act, which provides that those provisions apply "subject to a contrary intention", this is such a case. The context of a notice, non-compliance with which creates a crime, where, on the approach of the Respondents, the recipient would be expected "forthwith" to engage in a process of statutory construction, ascertain partial invalidity and sever the correct portion, supplies that contrary intention. On the Respondents' approach the terms of the Notice would defy the Parliament's purpose of it *in fact* providing notice.

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