HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

X & ORS APPELLANTS

AND

AUSTRALIAN PRUDENTIAL REGULATION AUTHORITY & ANOR RESPONDENTS

X v Australian Prudential Regulation Authority [2007] HCA 4
21 February 2007
S284/2006

ORDER

1. *Set aside Paragraph 1 of the orders of the Full Court of the Federal Court of Australia made on 22 March 2006 in each of matters numbered NSD 1793 of 2005 and NSD 1794 of 2005 and in its place order that:*

   (a) *Paragraph 2 of the orders made by Lindgren J on 16 September 2005 is varied to the extent necessary to provide that*

   > *Question B: "Does the use by the first or second respondent of the evidence of the first applicant before the HIH Royal Commission contravene ss 6DD or 6M of the* Royal Commissions Act *1902 (Cth)?"*

   is answered

   > *"The answer to the question is governed by the construction of s 6M alone, and so understood is 'No'."*

   (b) *The appeal is otherwise dismissed.*

2. *Otherwise, appeal dismissed with costs.*

On appeal from the Federal Court of Australia

Representation

D F Jackson QC with D Hogan-Doran for the appellants (instructed by Minter Ellison)

D M J Bennett QC, Solicitor-General of the Commonwealth with J W J Stevenson SC, M N Allars and V E Whittaker for the respondents (instructed by Sparke Helmore)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

X v Australian Prudential Regulation Authority

Administrative law – Judicial review – Injunction and declaratory relief – s 39B of the *Judiciary Act* 1903 (Cth) – Whether the appellants are entitled to an order restraining the Australian Prudential Regulation Authority ("APRA") from acting on a "preliminary view" formed by its Senior Manager that the first and third appellants were not "fit and proper" to act as senior managers of a foreign general insurer.

Administrative law – Royal Commissions – Protection of witnesses – s 6M of the *Royal Commissions Act* 1902 (Cth) – Appellants gave evidence at the HIH Royal Commission – Whether s 6M prevents the use of that evidence by APRA in deciding whether to disqualify the first and third appellants pursuant to s 25A of the *Insurance Act* 1973 (Cth) – Whether potential disqualification caused a "disadvantage" to the appellants – Whether potential disqualification arose "for or on account of" the first and third appellants' evidence to the Royal Commission – Whether the proper exercise of APRA's statutory powers and functions may constitute a "disadvantage" arising "for or on account of" evidence given before a Royal Commission.

Insurance — Prudential regulation – Disqualification – APRA may take steps pursuant to s 25A of the *Insurance Act* 1973 (Cth) where a person is not "fit and proper" to act as a senior manager of a foreign general insurer – Whether APRA may take into account evidence given at a Royal Commission by or about that person – Whether s 6M of the *Royal Commissions Act* 1902 (Cth) prevents the use of such evidence for the purposes of s 25A of the *Insurance Act* 1973 (Cth).

Statutes – Interpretation – Whether s 6M of the *Royal Commissions Act* 1902 (Cth) distinguishes between the giving of evidence and the content of the evidence so given.

Words and phrases – "for or on account of", "disadvantage".

Insurance Act 1973 (Cth), s 25A.
Royal Commissions Act 1902 (Cth), s 6M.

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ. By Letters Patent dated 29 August 2001 which were expressed to be issued by the Governor-General pursuant to the Constitution, the *Royal Commissions Act* 1902 (Cth) ("the Royal Commissions Act") and what were described as "other enabling powers", a Commissioner was appointed to inquire into the reasons for and circumstances surrounding the failure of the HIH Insurance Group ("HIH") prior to the appointment of provisional liquidators on 15 March 2001 ("the HIH Royal Commission")[1]. This litigation arises from steps taken by a federal regulatory body in reliance upon documentary and oral evidence presented to the HIH Royal Commission.

The parties

2 The second appellant ("Z") is a foreign corporation incorporated in Germany. Z conducts an international reinsurance business. It is authorised to carry on insurance business in Australia by the first respondent, the Australian Prudential Regulation Authority ("APRA"), pursuant to s 12(2) of the *Insurance Act* 1973 (Cth) ("the Insurance Act") and does so as a "foreign general insurer" within the meaning of s 3 of the Insurance Act. A foreign general insurer which, like Z, is a body corporate not incorporated in Australia is required by s 118 of the Insurance Act to be represented in Australia by an individual resident here and appointed as its agent for the purposes of that Act. However, this does not affect the position of the first appellant ("X") and the third appellant ("Y"). They are employed by Z in senior management positions outside Australia.

3 Z produced documents to the HIH Royal Commission in response to a notice issued pursuant to s 2 of the Royal Commissions Act. X and Y each travelled to Australia and furnished to the HIH Royal Commission a statement and gave oral evidence.

4 The first respondent, APRA, is established as a body corporate by ss 7 and 13 of the *Australian Prudential Regulation Authority Act* 1998 (Cth) ("the APRA Act"). The second respondent ("Mr Godfrey") is Senior Manager of APRA. Section 9 of the APRA Act states that APRA has the functions conferred upon it by the APRA Act and any other law of the Commonwealth. Section 8 of the Insurance Act vests in APRA the general administration of that statute. The

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1 The terms of reference were amended on 6 February 2002, 2 May 2002 and 23 January 2003, but nothing for present purposes turns upon those amendments.

main object of the Insurance Act is to protect the interests of policyholders and prospective policyholders under insurance policies issued by general insurers and Lloyd's underwriters and to do so "in ways that are consistent with the continued development of a viable, competitive and innovative insurance industry" (s 2A(1)).

The disqualification procedures

5 Reference should now be made to Pt III Div 5 (ss 24-27) of the Insurance Act. This Division confers on APRA powers to "disqualify" persons who then, under pain of criminal sanction, are not to act, among other capacities, as a senior manager or agent in Australia of a foreign general insurer (s 24(1)(b)). APRA may disqualify a person "if it is satisfied that the person is not a fit and proper person to be or to act" in such a capacity (s 25A(1)).

The "preliminary view" of APRA

6 On 18 February 2005, Mr Godfrey wrote letters to each of X and Y giving them the opportunity to make submissions as to why APRA should not decide to disqualify them under s 25A(1). The letters stated a "preliminary view" of Mr Godfrey that the addressee was not a fit and proper person to be the holder of the senior insurance roles referred to in s 24(1) of the Insurance Act.

7 Attached to each letter sent by Mr Godfrey was an annexure (with copies of documents) setting out information that Mr Godfrey had considered in reaching his preliminary findings. Detailed references were made to documentary evidence provided to the HIH Royal Commission and to various items of oral evidence given to that body by X and Y. Mr Godfrey wrote that, in forming his preliminary conclusion, he had had regard to the submissions of Counsel Assisting the HIH Royal Commission and the Commission's findings in its Final Report. He also noted that a complete transcript of the hearings was available on the HIH Royal Commission website.

8 The solicitors for the appellants responded on 4 May 2005 by detailed letter to Mr Godfrey. The solicitors noted that the Insurance Act provided a procedure for internal review within APRA and then for review by the Administrative Appeals Tribunal ("the AAT") of any decision that was made to disqualify X and Y. However, the solicitors stressed their view that the very publication of the initial decisions would cause detriment to their clients, including the need to meet obligations to inform regulatory authorities in other countries. The solicitors went on to contend that any subsequent decision to

disqualify X and Y pursuant to s 25A of the Insurance Act upon the bases put forward in the letters of 18 February 2005 would be beyond power and would be unlawful and involve the commission of an offence under the Royal Commissions Act.

The Federal Court proceedings

9 Something more should be said here respecting the avenues for administrative and judicial review of disqualification decisions by APRA made in exercise of its powers under the Insurance Act. A request for internal review by APRA may be made under s 63(2); applications then may be made to the AAT for review of decisions of APRA affirmed or varied under that procedure (s 63(7)). From the AAT, there is an "appeal" to the Federal Court on a question of law. This is provided by s 44(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth) ("the AAT Act"). In addition, disqualification decisions by APRA answer the definition of decisions to which the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act") applies, and are not excluded by Sched 1 thereof.

10 However, the appellants chose another avenue of judicial intervention to bring to a halt any further proceedings by APRA upon the preliminary views formed by Mr Godfrey. Section 39B of the *Judiciary Act* 1903 (Cth) relevantly confers original jurisdiction upon the Federal Court with respect to any matter in respect to which an injunction is sought against an officer of the Commonwealth (s 39B(1)) and in any matter arising under any laws made by the Parliament (s 39B(1A)(c)).

11 The appellants instituted proceedings in the Federal Court seeking, together with declaratory relief, an order restraining APRA from taking any further action with respect to X and Y pursuant to s 25A(1) of the Insurance Act[2]. The substance of the declaratory relief that was sought was that APRA did not have the power to disqualify X and Y pursuant to s 25A(1) of the Insurance Act, with the consequence that it was acting and proposing to continue to act in excess of its jurisdiction.

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2 Section 50 of the *Federal Court of Australia Act* 1976 (Cth) empowers that Court by order to forbid the publication of the name of a party. Where, as here, in proceedings in the court below a party was identified by use of initials or a pseudonym, that identification continues in this Court unless a contrary order is made by the Court or a Justice (Practice Direction No 1 of 1999).

12 The primary judge (Lindgren J)[3] described the case for the lack of power as resting upon two alternate grounds. The first was that the power of disqualification was so limited as to apply only to persons who have held senior insurance positions in Australia or intend to do so in the future, neither of which circumstance applied to X or Y. That submission was rejected by Lindgren J and on appeal by Emmett, Allsop and Graham JJ[4]. A special leave application to this Court to challenge that holding was unsuccessful but special leave was granted to test the holding on the second ground.

13 This appeal thus is concerned with the second of the grounds put forward in support of the case for the absence of power. Lindgren J identified this alternative basis as follows: were APRA to proceed to disqualify X or Y, APRA thereby would be causing to those persons a disadvantage "for or on account of" evidence given by that person to the HIH Royal Commission; this outcome would be an injury by APRA to these witnesses of the kind forbidden by s 6M of the Royal Commissions Act.

14 It should be remarked here that contravention of s 6M is an indictable offence which requires trial by jury pursuant to s 80 of the Constitution[5] and which attracts a penalty of $1,000, or imprisonment for one year. This second ground in support of the absence in APRA of a power of disqualification otherwise conferred by s 25A(1) of the Insurance Act thus makes several assumptions respecting the application to APRA of s 6M of the Royal Commissions Act. It would require the clearest of intentions that the penalties provided by s 6M would apply to the Commonwealth and none is apparent in the Royal Commissions Act[6]; and there may be a question whether a

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3 *Applicant X v Australian Prudential Regulation Authority* (2006) 14 ANZ Ins Cas ¶61-667.

4 *Y v Australian Prudential Regulation Authority* (2006) 150 FCR 469 at 484.

5 With the consent of the prosecutor and the defendant, the offence may be dealt with summarily: *Crimes Act* 1914 (Cth), s 4J.

6 *Cain v Doyle* (1946) 72 CLR 409 at 417-419, 423-426. There is, however, no power in the Crown to dispense its servants or agents from criminal liability for acts forbidden by law: *A v Hayden* (1984) 156 CLR 532 at 548, 562, 580-581, 593.

"Commonwealth authority" such as APRA[7] has the character of the Commonwealth for this purpose[8]. None of these matters was put in issue and they may be placed to one side.

15 Lindgren J noted that APRA had not yet decided to disqualify X or Y so that arguably the proceedings in the Federal Court were premature. Further, in order to succeed the appellants had to establish that APRA would not lawfully be able to be satisfied that X and Y were not fit and proper persons to be or to act as a senior manager of a foreign general insurer.

16 However, Lindgren J did not enter upon any questions of the inappropriateness of proceeding immediately to decide what appeared to be the basic issues in the case[9]. By consent of the parties his Honour ordered[10] that there be decided separately and before any other question in the proceedings two questions. That which is presently in issue on this appeal read (when later reframed by Lindgren J):

> "Does the use by [APRA or Mr Godfrey] of the evidence of [X and Y] before the HIH Royal Commission contravene sub-section 6DD or 6M of the [Royal Commissions Act]?"

In the absence of submissions respecting s 6DD, the answer to the question was treated by the primary judge as governed by s 6M alone. His Honour answered the question "No". The Full Court dismissed appeals.

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7 APRA Act, s 7; *Commonwealth Authorities and Companies Act* 1997 (Cth), s 7.

8 cf *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 270-271, 277, 294.

9 cf *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-356 [47]; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at 198 [113]; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 524-525 [7].

10 Pursuant to O 29 r 2 of the Federal Court Rules.

17 The question respecting s 6M was so framed as to embark the Federal Court upon the determination of issues of guilt of an indictable offence by means of a declaration in civil litigation. In *Sankey v Whitlam*, Gibbs ACJ remarked[11]:

> "Most of the cases in which declarations have been made in matters which could have been, or were, the subject of criminal proceedings were cases where the criminal offence consisted of a breach of a regulatory provision, such as a failure to comply with an administrative requirement, a planning provision or a by-law."

His Honour went on later in his reasons[12]:

> "The power to make declaratory orders has proved to be a valuable addition to the armoury of the law. The procedure involved is simple and free from technicalities; properly used in an appropriate case the use of the power enables the salient issue to be determined with the least possible delay and expense. But the procedure is open to abuse, particularly in criminal cases, and if wrongly used can cause the very evils it is designed to avoid."

18 In argument in this Court, reference was made to the declaratory relief granted against the respondent in *Ainsworth v Criminal Justice Commission*[13]. But, in *Ainsworth*, the jurisdictional error of the Commission lay in its denial of procedural fairness to the appellants, and in the circumstances mandamus was an inappropriate remedy and certiorari did not lie. The present case is not of that nature.

19 There was a real question as to the procedure adopted in this case, but because the appeal to this Court should be dismissed, the matter need not be further pursued here.

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11 (1978) 142 CLR 1 at 21.

12 (1978) 142 CLR 1 at 25.

13 (1992) 175 CLR 564 at 581-582.

The appeal to this Court

20 There were two applications for special leave to this Court, one by X and Z and the other by Y and Z. In each case, the grant of special leave was limited to grounds of appeal as follows:

> "a) The Full Court erred in construing section 6M(b) [of the Royal Commissions Act] as not having the effect of preventing [APRA and Mr Godfrey] from relying on evidence given by a person to a Royal Commission in exercising the power conferred by section 25A of the Insurance Act.
>
> b) The Full Court erred in finding that [Mr Godfrey's] proposal to recommend to the appropriate delegate of [APRA] that [X and] Y be disqualified pursuant to section 25A of the Insurance Act was not prevented by section 6M(b) of the [Royal Commissions Act]."

21 Pursuant to a further order made on the grant of special leave, the appellants have filed the one notice of appeal. Despite the terms of the separate question formulated by the primary judge, it will be apparent from the terms of the grant of special leave that no issue immediately arises concerning the operation of s 6DD of the Royal Commissions Act. The appellants seek to establish the absence of power in APRA to proceed with the question of disqualification by reliance upon what is said to be the impact of s 6M of the Royal Commissions Act.

Section 6M of the Royal Commissions Act

22 Section 6M states:

> "Any person who uses, causes or inflicts, any violence, punishment, damage, loss, or disadvantage to any person *for or on account of*:
>
> (a) the person having appeared as a witness before any Royal Commission; or
>
> (b) any evidence given by him or her before any Royal Commission; or
>
> (c) the person having produced a document or thing pursuant to a summons, requirement or notice under section 2;

is guilty of an indictable offence.

Penalty: $1,000, or imprisonment for 1 year." (emphasis added)

23 Lindgren J concluded:

"Neither APRA nor Mr Godfrey is displeased that [X and Y] gave evidence before [the HIH Royal Commission] in relation to [Z's] dealings with HIH or any other subject matter. Neither has caused or inflicted, or is causing or inflicting, any disadvantage on [X, Y or Z] on account of [X and Y] having given evidence before [the HIH Royal Commission] on that topic."

24 In dismissing the appeals, the Full Court construed s 6M as being[14]:

"directed to protecting a witness from detriment by reason of having given evidence about particular matters but [as] not intended to protect a witness from detriment by reason of the witness having admitted the pre-existing facts by giving such evidence".

25 The Full Court then applied this distinction to the instant case as follows[15]:

"If Mr Godfrey is causing damage, loss or disadvantage to X [and Y], it is for or on account of the facts, evidence of which was given by X [and Y] before the [HIH Royal Commission], not for or on account of X's [or Y's] evidence."

26 Their Honours added[16]:

"[Nor] do we need to consider the questions (which were not debated) as to the proper construction of the powers of APRA, the interrelationship of the two Acts and the relevant sections of the *Criminal Code Act 1995* (Cth), including the place of any defences to alleged breaches of s 6M founded on a statutory authority or bona fide exercise of public powers."

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14 (2006) 150 FCR 469 at 492.

15 (2006) 150 FCR 469 at 492.

16 (2006) 150 FCR 469 at 492-493.

27 Four things should be said immediately respecting this disposition of the matter by the Full Court. The first is that in this Court the appellants rightly criticise as illusory a distinction between detriment suffered by reason of a party having given evidence about particular matters and detriment suffered by reason of the content of that evidence. The point was made as follows by Lloyd LJ in *Attorney General v Royal Society for the Prevention of Cruelty to Animals*[17] when dealing with a contempt of court matter. His Lordship is reported as saying:

> "There was no difference between punishing a man for giving evidence and punishing him for the content of his evidence or the manner in which he gave his evidence. If one was contempt so must the other be. Both were calculated to interfere with the course of justice and to deter witnesses from coming forward and telling the truth plainly and frankly as they saw it."

28 Secondly, in its connection with activities of APRA, s 6M must be read in its setting in the Royal Commissions Act as a whole. APRA is an authority responsible for the administration of a law of the Commonwealth, namely, the Insurance Act. Where a Royal Commission obtains information that relates or may relate to a contravention of that law or evidence of a contravention, it may, if in the opinion of the Royal Commission it is appropriate to do so, communicate the information or furnish the evidence to APRA. This follows from s 6P of the Royal Commissions Act. That statute thus contemplates the taking by APRA of steps in its administration of the Insurance Act in reliance upon certain information or evidence obtained by the HIH Royal Commission.

29 Thirdly, s 6M cannot be construed divorced from its association with the contempt power provided by s 6O of the same statute and, more generally, with the law respecting contempt of court and contempt of Parliament.

30 Fourthly, when the legislation is considered in this fashion, the upshot is that the appeal fails and the question respecting s 6M is correctly answered adversely to the appellants but not for the reasons given by the Full Court. In particular, the appellants cannot demonstrate, within the meaning of s 6M, that Mr Godfrey has proceeded as he has, and that APRA will continue to proceed as

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17 *The Times*, Law Report, 22 June 1985.

proposed, "for or on account of" the appearance by X and Y at the HIH Royal Commission or any evidence they gave there.

The antecedents of s 6M

31 As enacted in 1902, the Royal Commissions Act contained but eight sections. Section 7(2) gave to every witness summonsed to attend or appearing "the same protection" as a witness in any case tried in this Court. What the statute then did not make clear was the means by which that protection was to be enforced.

32 The Royal Commissions Act was significantly amended by the *Royal Commissions Act* 1912 (Cth) ("the 1912 Act"). The 1912 Act at the time was described by Harrison Moore as "a very drastic act"[18]. Provision with respect to contempt was made by s 6O, which is referred to later in these reasons. The section, it should be noted, used the expression "wilful contempt". Section 6M was introduced in a form not greatly different from that which it presently takes[19]. Section 6M at that time stated:

> "Any person who uses, causes, inflicts, or procures, any violence, punishment, damage, loss, or disadvantage to any person for or on account of his having appeared as a witness before any Royal Commission, or for or on account of any evidence given by him before any Royal Commission, shall be guilty of an indictable offence.
>
> Penalty: Five hundred pounds, or imprisonment for one year."

33 Section 6DD made provision rendering inadmissible in subsequent civil or criminal proceedings in any Australian court (federal, State or Territory)[20]

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18 "Executive Commissions of Inquiry", (1913) 13 *Columbia Law Review* 500 at 508-509.

19 The repeal of the original s 6M and the substitution of the present section occurred by Sched 1, Item 4X of the *Royal Commissions and Other Legislation Amendment Act* 2001 (Cth); Item 4Q substituted s 6DD of the Royal Commissions Act in substantially its present form.

20 The validity of s 6DD with respect to evidence tendered in State courts exercising non-federal jurisdiction was upheld by Griffith CJ and Isaacs J in *Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth* (1912) 15 CLR 182 at

(Footnote continues on next page)

statements or disclosures by witnesses in answer to questions put by a Royal Commission[21]. As Lindgren J pointed out in the present case, s 6DD is not susceptible of "contravention" by any person; "it neither prohibits nor compels, but merely makes certain things inadmissible in evidence".

34 In his Second Reading Speech on the Bill for the 1912 Act, the Attorney-General (Mr W M Hughes) said of what became s 6M[22]:

> "A further provision in this Bill is that any person who injures, or causes a witness to be injured, *because of* his having appeared before a Royal Commission shall be liable to a penalty of £500, or imprisonment for one year." (emphasis added)

35 The side note to s 6M as it appeared in the 1912 Act read:

> "Injury to witness.
>
> Cf Act No 1, 1908 s 10."

196, 218-219; cf *Giannarelli v The Queen* (1983) 154 CLR 212 at 220; *Truong v The Queen* (2004) 223 CLR 122 at 162-163 [104]-[106].

21 Section 6DD in its present form states:

> "(1) The following are not admissible in evidence against a natural person in any civil or criminal proceedings in any court of the Commonwealth, of a State or of a Territory:
>
> (a) a statement or disclosure made by the person in the course of giving evidence before a Commission;
>
> (b) the production of a document or other thing by the person pursuant to a summons, requirement or notice under section 2 or subsection 6AA(3).
>
> (2) Subsection (1) does not apply to the admissibility of evidence in proceedings for an offence against this Act."

22 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 July 1912 at 1186.

The earlier statute referred to in the side note was s 10 of the *Excise Procedure Act* 1907 (Cth), which protected in similar terms witnesses appearing on an application under s 2(d) of the *Excise Tariff* 1906 (Cth) (No 16 of 1906)[23].

36 The provenance of the text of these Australian provisions lay in what was then recent United Kingdom legislation. This was the *Witnesses (Public Inquiries) Protection Act* 1892 (UK)[24] ("the 1892 Act"). The public inquiries with which that statute was concerned were identified as including those held by Royal Commissions and by committees of either House of Parliament and pursuant to any statutory authority (s 1).

37 It is convenient here to set out the text of s 2 of the 1892 Act, the affinity with s 6M being apparent:

> "Every person who commits any of the following acts, that is to say, who threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure, any person for having given evidence upon any inquiry, or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanor, and be liable upon conviction thereof to a maximum penalty of one hundred pounds, or to a maximum imprisonment of three months."

38 The side note to s 2 read:

> "Persons obstructing or intimidating witnesses guilty of misdemeanor."

39 Nineteenth century and earlier precedents in the Houses of Parliament at Westminster treated as a breach of privilege any molestation of witnesses on account of their attendance or testimony as witnesses of either House or before committees of either House. In the fifth edition of his work, *A Treatise on the*

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23 This provision excluded from excise duties certain agricultural machinery manufactured under conditions as to remuneration of labour which on application to the President of the Commonwealth Court of Conciliation and Arbitration were declared to be fair and reasonable.

24 55 & 56 Vict c 64.

Law, Privileges, Proceedings, and Usage of Parliament, published in 1863, Erskine May, having considered the precedents, wrote[25]:

> "Witnesses, petitioners, and others, being thus free from arrest while in attendance on Parliament, are further protected, by privilege, from the consequences of any statements which they may have made before either house; and any molestation, threats, or legal proceedings against them, will be treated by the house as a breach of privilege."

40 The 1892 Act provided a more convenient machinery for punishing those in contempt of Parliament, the procedure of bringing the parties to the bar of the House being too cumbrous; the substitute provided was to bring such persons before the courts of law. However, as Lord Denning MR emphasised in *Attorney-General v Butterworth*[26], the 1892 Act did not alter the nature of a contempt, but only the procedure for bringing contemnors to account.

41 In *Butterworth*, the Master of the Rolls asked why the 1892 Act was limited to contempts of the Parliament and of Royal Commissions, expressly excluding inquiries by courts, and answered the question[27]:

> "Not because the victimisation of witnesses before the court was any less reprehensible, but because the courts have their own machinery at hand for dealing with victimisation, namely, their power to bring offenders before them for contempt of court, and, I would add, the remedy to a person aggrieved of bringing an action for the wrong done."

42 In the same case, Donovan LJ observed[28]:

> "The exclusion of a court of justice from the definition of 'inquiry' contained in section 1 [of the 1892 Act] can be reasonably explained only on the ground that Parliament considered courts of justice as already possessing a corresponding jurisdiction."

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25 At 151-152.

26 [1963] 1 QB 696 at 720.

27 [1963] 1 QB 696 at 721.

28 [1963] 1 QB 696 at 724.

Royal Commissions and parliamentary privileges

43 Something now should be said of the position respecting commissions in England before the 1892 Act. The general history of that subject, with particular reference to the relationship with the criminal law and the judicial power and the need for statute to provide coercive means to supplement the prerogative, has been traced in earlier judgments in this Court, particularly by Griffith CJ in *Clough v Leahy*[29], by Dixon J in *McGuinness v Attorney-General (Vict)*[30] and by Brennan J in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*[31]. This appeal requires attention to a narrower subject, the protection afforded witnesses.

44 Specific commissions were established in the latter part of the nineteenth century by the *Trades Union Commission Act* 1867 (UK)[32], the *Belfast Commission Act* 1886 (UK)[33], the *Metropolitan Board (Commission) Act* 1888 (UK)[34] and the *Special Commission Act* 1888 (UK)[35]. The second and fourth of these acquired some fame as "the Belfast Riots" Commission and "the Parnell Commission"[36]. In each case, powers of punishment for contempt were conferred upon the Commissioners and were identified as corresponding to those of the High Court of Justice in England or Ireland as the case may be.

45 Provisions rendering statements by witnesses inadmissible in later proceedings in terms similar to those later found in Australia in s 6DD of the

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29 (1904) 2 CLR 139 at 155-161.

30 (1940) 63 CLR 73 at 93-102.

31 (1982) 152 CLR 25 at 147-158.

32 30 Vict c 8.

33 50 Vict c 4.

34 51 Vict c 6.

35 51 & 52 Vict c 35.

36 Harrison Moore, "Executive Commissions of Inquiry", (1913) 13 *Columbia Law Review* 500 at 507-508.

Royal Commissions Act also were made in this earlier English legislation. The occasion for such provision may have been a perceived need to overcome the ruling by Abbott J in *R v Merceron*[37]. On a trial of a magistrate for corruptly granting licences to public houses which were his own property, Abbott J ruled that there might be admitted evidence of what he had said in the course of his examination before a committee of the House of Commons. His Lordship overruled the objection that the evidence was inadmissible because it had been made under compulsory process from the House of Commons and under pain of punishment for contempt. Subsequently, in *McGuinness*[38], Latham CJ saw provisions such as s 6DD as avoiding usurpation of the functions of a court of justice.

46 The provision in the 1892 Act of additional means, through the criminal law, of dealing with conduct victimising witnesses which otherwise would be punishable only by the processes of contempt has been influential in framing the federal law of this country, not only the Royal Commissions Act[39]. The Final Report of the Joint Select Committee on Parliamentary Privilege[40] was presented in October 1984. Paragraph 9.5 stated:

> "We think the position of witnesses demands special attention, and that legislation to protect witnesses should be enacted. If this view is accepted, it would follow that there would co-exist with the power to treat interference with witnesses as contempt a specific sanction under the criminal law and a specific civil remedy. We do not think this presents a real practical difficulty. So far as we are aware the co-existence of sanctions available to Parliament and within the courts in the United Kingdom since 1892 has occasioned no difficulties."

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37 (1818) 2 Stark 366 [171 ER 675].

38 (1940) 63 CLR 73 at 84.

39 The colonial and State legislation in Australia at the time of the enactment of the Royal Commissions Act is detailed in Hallett, *Royal Commissions and Boards of Inquiry*, (1982) at 90-91 and McClemens, "The Legal Position and Procedure Before a Royal Commissioner", (1961) 35 *Australian Law Journal* 271 at 272-274.

40 Under the Chairmanship of Mr J M Spender, QC, MP.

47 The Committee went on to refer to specific provision of that nature already made by s 19 of the *Public Accounts Committee Act* 1951 (Cth)[41] and s 32 of the *Public Works Committee Act* 1969 (Cth)[42]. Section 12(2) of the *Parliamentary Privileges Act* 1987 (Cth) now states:

> "A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person *on account of* –
>
> (a) the giving or proposed giving of any evidence; or
>
> (b) any evidence given or to be given,
>
> before a House or a committee.
>
> Penalty: (a) in the case of a natural person, $5,000 or imprisonment for 6 months; or
>
> (b) in the case of a corporation, $25,000." (emphasis added)

The resemblance between s 12(2) of this statute and s 6M of the Royal Commissions Act will be apparent, in particular the use of the causal or connecting phrase "on account of".

48 It is upon the statutory criterion of cause or connection between the appearance as a witness or giving of evidence and the injury sustained by that person that the outcome of this appeal turns.

Contempt and the reasoning in *Butterworth*

49 In construing s 6M, regard must be paid to s 6O, dealing with contempt of a Royal Commission. A person "in any manner guilty of any intentional contempt of a Royal Commission" is guilty of an offence (s 6O(1)). The displacement of "wilful" by "intentional" by an amendment in 2001

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41 Now renamed the *Public Accounts and Audit Committee Act* 1951 (Cth).

42 In addition, the Petrov legislation, the *Royal Commission on Espionage Act* 1954 (Cth), had included in s 22 a restatement of s 6M of the Royal Commissions Act in substantially the same terms.

accommodates the operation of the *Criminal Code* (Cth) ("the Criminal Code"), to which further reference will be made[43]. A judicial officer who is president or chairman of a Royal Commission or the sole commissioner has in relation to an offence under s 6O(1) which is committed in the face of the Commission all the powers of a Justice of this Court sitting in open Court in relation to a contempt in the face of the Court (s 6O(2)).

50 It follows from the reasoning in *Butterworth*[44] that victimisation of witnesses of the nature identified in s 6M might also amount to an intentional contempt attracting the operation of s 6O. As *Butterworth* also indicates, there may be a measure of duality, if not overlapping, of legal norms in this area. What is significant, however, is the reference in s 6O to contempts which are intentional; this should be read conformably with the phrase "for or on account of" in s 6M.

51 A person has intention with respect to conduct if he or she "means to engage in that conduct" (Criminal Code, s 5.2(1)). When this is applied to s 6O of the Royal Commissions Act, the upshot is consistent with the construction of s 6O in its earlier form by Davies J in *R v O'Dea*[45]. His Honour adopted what had been said by Isaacs and Rich JJ in *Bell v Stewart*[46]:

> "It is clear to our minds that the word 'wilfully' does more than negative 'accidentally' or 'unconsciously'. The Legislature was, of course, not simply excluding acts done in sleep or hypnosis or under compulsion. To speak of a person 'wilfully insulting or disturbing the Court' means that he

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43 The amendment was made by Sched 1, Item 35 of the *Prime Minister and Cabinet Legislation Amendment (Application of Criminal Code) Act* 2001 (Cth). Item 33 removed from s 6M the reference to "procures".

44 [1963] 1 QB 696. See also as to punishment for contempt involving victimisation of witnesses *James v Robinson* (1963) 109 CLR 593 at 602, 615; *Morris v Wellington City* [1969] NZLR 1038; *R v Wright (No 1)* [1968] VR 164; Lowe and Sufrin, *Borrie and Lowe The Law of Contempt*, 3rd ed (1996) at 412-418; Miller, *Contempt of Court*, 3rd ed (2000), §§11.03–11.05; Eady and Smith, *Arlidge, Eady and Smith on Contempt*, 3rd ed (2005), §§11-197–11-215.

45 (1983) 72 FLR 436 at 447.

46 (1920) 28 CLR 419 at 427.

> intended to insult or disturb the Court, and not in the sense that his volition impelled the word or the act, but that his purpose was that his word or his act should have the effect of conveying the insult or causing the disturbance. And similarly with all the matters governed by the word 'wilfully'."

Their Honours then went on to distinguish between "contempt" and "wilful contempt"[47]. In *Witham v Holloway*[48], the retention of that distinction attracted much criticism, but s 6O assumes that distinction is maintained and it is inappropriate here to consider any further that criticism and the distinction between "criminal contempt" and the contempt in procedure described as "civil contempt".

52 Section 1C of the Royal Commissions Act applies Ch 2 of the Criminal Code to offences including that provided in s 6M. Chapter 2 contains particular provisions for strict liability and absolute liability in cases where fault elements are not required (Ch 2, Pt 2.2, Div 6). Some offences, for example, the failure of witnesses to attend or produce documents which is proscribed by s 3(1) and (2) of the Royal Commissions Act, are identified by the section creating the offence as an offence of "strict liability". Section 6M (like s 6O) is not such a provision. Divisions 4 and 5 dealing with the fault elements or particular physical elements of the offence thus are applicable. A physical element may be conduct or the result of conduct, and the conduct must be voluntary (s 4.1, s 4.2); the fault element for a particular physical element may be intention, knowledge, recklessness or negligence (s 5.1). Section 5.1(2) provides that sub-s (1) does not prevent a law that creates a particular offence from specifying other fault elements (that is, other than intention, knowledge, recklessness or negligence) for a physical element of that offence.

53 The respondents correctly submit that in the alleged contravention by them of s 6M there are two "physical elements": first, the sending on 18 February 2005 to X and Y of the "show cause" letters and, secondly, the result of that conduct in causing disadvantage to X and Y. Further, the "fault element" for those requisite "physical elements" is supplied by the phrase "for or on account of".

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47 (1920) 28 CLR 419 at 427-429.

48 (1995) 183 CLR 525.

54 Assistance in construing those words in s 6M is provided by what was said in this Court in a contempt case, *Lane v Registrar of Supreme Court of NSW*[49]. That case concerned alleged contempt of the Supreme Court by reason of a failure to produce documents in answer to a subpoena after legal advice that the documents were outside the scope of the subpoena. This Court held that there had been no contempt. In the joint judgment of Gibbs CJ, Mason, Murphy, Wilson and Brennan JJ, reference was made to *Butterworth* and to the earlier decision in *Rowden v Universities Co-operative Association Ltd*[50]. Their Honours continued[51]:

> "In those cases, the purpose, intention or motive of the act was to do the very thing that would interfere with the course of justice – to keep the witness out of the way or to victimize the witness. The words 'purpose', 'motive', 'object' and 'intention' are used interchangeably in the judgments in *Attorney-General v Butterworth* and it is quite unnecessary for present purposes to distinguish between them; we shall use the word 'intention' to cover motive as well."

55 Their Honours then observed that an intention to interfere with the administration of justice was not necessary to constitute a contempt, the critical question being whether the act was likely to have that effect; nevertheless, the intention with which the act was done was said to be relevant and sometimes important. That certainly must be so where, as here, the court is concerned with specific criminal offences created by statute in the terms of s 6M and s 6O and with fault elements indicated by the Criminal Code.

56 What is of critical importance for the present case is the further statement in the joint judgment in *Lane*[52]:

> "A lawful act may constitute a contempt if done with the intention of interfering with the course of justice, but will *not become a contempt*

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49 (1981) 148 CLR 245.

50 (1881) 71 LT Jo 373.

51 (1981) 148 CLR 245 at 258.

52 (1981) 148 CLR 245 at 258-259.

> *simply because it was done to achieve some purpose or further some interest of the person doing it*. For one person to advise another who has been served with a subpoena to refrain from producing a document which the person giving the advice rightly believes falls outside the description of documents contained in the subpoena and therefore need not be produced does not become a contempt because the person giving the advice wishes to achieve some lawful purpose of his own by ensuring that the documents are not produced." (emphasis added)

57 An example of the distinction so drawn in *Lane* is provided by the decision of Eichelbaum CJ in *Dentice v Valuers Registration Board*[53]. The applicants were valuers who had prepared reports for use in an arbitration. In a subsequent proceeding before a statutory body, the Valuers Registration Board, they were charged with incompetent conduct. The applicants complained in the High Court that the disciplinary proceedings were an attempt to punish them for the evidence given by them at the arbitration and the disciplinary proceedings should be quashed as constituting a contempt of court. Eichelbaum CJ concluded[54]:

> "Any censure imposed by the board would be for providing evidence that fell below the minimum acceptable standards imposed by the profession and not for the mere fact of giving evidence itself.
>
> ... There is no evidence that the complaint was motivated by dissatisfaction over the arbitrator's award, but even if it had been, that would not suffice to pre-empt the statutory investigation which the board must carry out when the complaint procedure has reached this stage, except where satisfied there is no reasonable ground for the complaint."

Conclusions

58 Section 6P of the Royal Commissions Act, dealing with the communication of information, postulates the concurrent operation of that statute with the administration by authorities such as APRA of statutes including the Insurance Act. In the present case, on the material on which the question for separate decision was presented to the primary judge, there is no ground to reach

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53 [1992] 1 NZLR 720.

54 [1992] 1 NZLR 720 at 727.

any conclusion other than that Mr Godfrey was proceeding in discharge of the statutory powers of a regulatory nature conferred upon APRA by the Insurance Act. Nor was there any footing for a conclusion that a continuation by APRA of that process would be other than for the proper discharge of its statutory functions.

59 The expression in s 6M "for or on account of" involves notions of purpose, motive, object and intention identified in *Lane* with reference to what had been said in the judgments in *Butterworth*. It is, as it was in *Lane*, unnecessary to make any particular choice between these terms. The point is that none of them applies to identify what has happened in this case and what is proposed if the investigations by APRA continue. Once it is accepted, as it must be, that what Mr Godfrey has done, and what APRA proposes to do, are for the proper discharge of APRA's statutory powers and functions, it is then apparent that there is not the connection between the attendance of X and Y at the Commission, or the evidence they gave, with the past or threatened conduct of Mr Godfrey and APRA, that is captured by the expression "for or on account of". The evidence that X and Y gave at the HIH Royal Commission may provide some, or even all, of the material which APRA may consider, and upon which it may rely, in giving effect to the regulatory provisions of the Insurance Act. Any disadvantage suffered by X or Y, as a consequence of the proper application of those regulatory provisions, would not be "for or on account of" his attendance at the Royal Commission or the evidence he gave. Neither Mr Godfrey nor APRA has victimised, and neither proposes to victimise, the appellants in the sense required for the commission of an offence under s 6M of the Royal Commissions Act.

60 These conclusions do not depend upon any specific significance lent by s 6DD to the construction of s 6M. The inadmissibility of statements or disclosures made in answer to questions put in the course of a Royal Commission in certain subsequent curial civil or criminal proceedings does not bear upon the deliberations of APRA when exercising its powers of disqualification under the Insurance Act.

61 The provision made by s 6DD, like the protection afforded witnesses by s 6M, the intentional contempt provision of s 6O and the communication provision of s 6P, may be seen as assisting the effective operation of Royal Commissions. But s 6DD has no immediate bearing upon this appeal. This should be reflected in the order to be made in this Court. As Lindgren J pointed out in his reasons for judgment, in the proceedings before him the appellants abandoned an argument that there had been a contravention of s 6DD. That

earlier argument was taken up in the form of the question as originally framed by Lindgren J. The question should be answered in a way that reflects the appellants' case as it was finally put.

Orders

62 Order 2(b) made by the primary judge should be amended so that the answer to the question there stated reads: "The answer to the question is governed by the construction of s 6M alone, and so understood is 'No'." The appeal otherwise should be dismissed with costs.

63 KIRBY J. This is an appeal[55] against orders made by the Full Court of the Federal Court of Australia[56]. That Court dismissed appeals brought against earlier orders made by a single judge of the Court (Lindgren J)[57].

64 In disposing of the proceedings before him, Lindgren J separated two questions for prior determination and proceeded to answer those questions, as later amended, for the purpose of the continuation of the proceedings. Relevantly, the second question and answer were as follows[58]:

> "2B Does the use by the first or second respondent of the evidence of the first applicant before the Royal Commission contravene ss 6DD or 6M of the *Royal Commissions Act* 1902 (Cth)?
>
> Answer: No."

65 In their reasons, Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ ("the joint reasons") have concluded that the answer to that question should be qualified, such that "[t]he answer to the question is governed by the construction of s 6M alone, and, so understood is 'no'"[59]. This proposed amendment follows from their Honours' view that the answer to the problem of statutory construction presented by the appeal is to be found sufficiently within the words "for or on account of", which appear in s 6M of the *Royal Commissions Act* 1902 (Cth) ("the Royal Commissions Act")[60].

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55 Two applications for special leave were made to this Court: one by the first and second appellants (X and Z) and the other by the third and second appellants (Y and Z). The grant of special leave in each case was limited to identical grounds. The separate applications were reduced to one appeal in accordance with an order made on the grant of special leave. Subsequently, one notice of appeal was filed by the appellants. See the reasons of Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ ("the joint reasons") at [20]-[21].

56 *Y v Australian Prudential Regulation Authority* (2006) 150 FCR 469.

57 (2006) 150 FCR 469 at 493 [80]. The reasons of Lindgren J may be found in *Applicant X v Australian Prudential Regulation Authority* (2006) 14 ANZ Ins Cas ¶61-667.

58 See (2006) 14 ANZ Ins Cas ¶61-667 at 75,015 [7], 75,032 [100].

59 Joint reasons at [62].

60 Joint reasons at [59].

66 In my opinion, the primary judge and the Full Court were correct to seek an answer to the question presented by this case in something more than a verbal formula that compresses the puzzle into the statutory phrase to which the joint reasons give their emphasis. That phrase does, indeed, ultimately yield the answer to the puzzle. However, in finding that answer, and giving guidance for future cases, it was useful for the Federal Court to seek to identify, and explain, the meaning and purpose of s 6M of the Royal Commissions Act, read in its context. That context included, importantly, s 6DD of the Act. Moreover, the Federal Court correctly endeavoured to identify the line of demarcation between the permissible and impermissible use, in a subsequent action, of evidence given before a Royal Commission, where the use of that evidence causes damage, loss or disadvantage to the person who gave such evidence.

67 In short, I agree with the general analysis contained in the reasons of the primary judge and of the Full Court. I would therefore simply dismiss the appeal from that Court. Some of my reasons for doing so are similar to those stated in the joint reasons. However, in case the qualification to the orders proposed in those reasons might be read as suggesting that s 6DD of the Royal Commissions Act is irrelevant to the task of construction, I must state my reasons separately.

The facts, legislation and litigation

68 *The facts*: The background facts in this appeal are explained in the joint reasons[61]. The evidence which the first appellant (known by the initial "X") and the third appellant (known by the initial "Y"), officers of a foreign corporation incorporated in Germany (known by the initial "Z"), object to being used by the Australian Prudential Regulation Authority ("APRA") was adduced before a federal Royal Commission ("the HIH Royal Commission") established to inquire into the failure of the HIH Insurance Group ("HIH"). It was formerly a major Australian insurer.

69 As the report of the HIH Royal Commission discloses, the failure of HIH caused huge losses to the investing public in Australia and beyond; substantial losses to those who had been insured by HIH, or who were entitled to the benefits of such insurance; widespread suffering and anxiety for many such persons; and damage to Australian business confidence generally, and to confidence in the insurance industry specifically. The establishment of a federal Royal Commission is not a trifling thing in Australia. A Royal Commission is a major investigatory mechanism that enjoys exceptional powers designed to achieve, outside the ordinary machinery of law enforcement and industry regulation, an inquiry that will reveal facts and permit executive governments to

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61 Joint reasons at [1]-[8].

take administrative, criminal and other measures to sanction any demonstrated wrongdoing and to prevent its repetition. The interpretation by this Court of the Royal Commissions Act should be undertaken so as to achieve, and not to frustrate, the provision by the Parliament of such exceptional powers[62].

70 *The legislation*: The issue for decision in this appeal is, primarily, the meaning of s 6M of the Royal Commissions Act. As the joint reasons point out, that Act, in its original form, was one of the first enactments of the Australian Federal Parliament. Its terms were greatly influenced by the legislation enacted in the latter part of the nineteenth century by the Imperial Parliament in the United Kingdom[63].

71 The provenance of the Australian provisions is made clear by an examination of the language of the *Witnesses (Public Inquiries) Protection Act* 1892 (UK)[64]. In the manner of Imperial legislative drafting of that time (familiar to Australians whenever they look at the sparse language of their Constitution, prepared for submission to the same Parliament) the language of the legislation was expressed with high compression. Packed into a single section were many words and concepts which today, in the style of contemporary drafting, would be divided up so as to deal separately with different ideas and to avoid the confusion and ambiguity that may attend such a compressed use of the English language.

72 The provisions of s 2 of the 1892 Act are set out in the joint reasons[65]. It is sufficient to notice that, in the text of that single section is contained a series of "acts" which are rendered misdemeanours against the public inquiry provided for. These are punishable, upon conviction, in accordance with specified penalties. The acts of the accused that attract the provision include where the accused "threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure, any person". The causes that enliven the section are the acts of any person (the accused) towards another person "for having given

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62 This is especially so in the case of the HIH Royal Commission because the *Royal Commissions and Other Legislation Amendment Act* 2001 (Cth) enlarged the powers of the Commission under the Royal Commissions Act. See Explanatory Memorandum issued by the Prime Minister on the Royal Commissions and Other Legislation Amendment Bill 2001 (Cth).

63 See joint reasons at [36]-[48], referring to the *Witnesses (Public Inquiries) Protection Act* 1892 (UK), *Trades Union Commission Act* 1867 (UK), *Belfast Commission Act* 1886 (UK), *Metropolitan Board (Commission) Act* 1888 (UK) and *Special Commission Act* 1888 (UK).

64 55 & 56 Vict c 64. See joint reasons at [36]-[42].

65 Joint reasons at [37]-[39].

evidence upon any inquiry, or on account of the evidence which he has given upon any such inquiry". The section is then still further complicated by an exemption where "such evidence was given", by inference by the subject of the section, "in bad faith". So within five lines of the statute book, three ideas were put into play. First, the forbidden conduct of the actor (accused); secondly, the conduct of the subject (witness) before the public inquiry; and thirdly, the exemption for evidence given in bad faith.

73 There is a like compression in the language of s 6M, in issue here. We must be grateful for small mercies because the Australian drafter has at least removed the third idea (evidence given in bad faith) and split up the presentation of the second. However, the collection of forbidden acts for forbidden purposes remains very tightly packed[66]. Section 6M states[67]:

> "Injury to witness
>
> Any person who uses, causes or inflicts, any violence, punishment, damage, loss, or disadvantage to any person for or on account of:
>
> (a) the person having appeared as a witness before any Royal Commission; or
>
> (b) any evidence given by him or her before any Royal Commission; or
>
> (c) the person having produced a document or thing pursuant to a summons, requirement or notice under section 2;
>
> is guilty of an indictable offence.
>
> Penalty: $1,000, or imprisonment for 1 year."

74 Immediately, the ambiguity that is inherent in this mode of drafting (a "minimalist" style of legal expression) is apparent. Is the collection of verbs intended to refer, in sequence, to the collection of nouns that follows? Thus, does the verb "uses" relate solely to the noun "violence"; "causes" to the noun "punishment"; "inflicts" to the nouns "damage, loss, or disadvantage"?

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66 Sir Robert Garran commented critically on this style of legislative drafting. See Garran, *Prosper the Commonwealth*, (1958) at 145-147.

67 Some of the relevant provisions of the Royal Commissions Act have since been amended by the *Royal Commissions Amendment Act* 2006 (Cth). Section 6M was unaffected by these amendments.

75 There is some internal support for this sequential approach to s 6M. Thus, "uses" scarcely relates comfortably to "punishment" or the subsequent nouns in the collection. On the other hand, "causes" could quite readily refer to "violence" and any of the other nouns used in the section. As well, "inflicts" could apply to "violence" and indeed to any of the nouns that follow. This analysis suggests that a sequential assignment of each verb to the successive nouns in the opening words of s 6M is not the way the section was intended to work. Once this conclusion is reached, the problem of ambiguity raised by the appellants' arguments is presented in stark relief. If the verb "causes" can relate to the noun "disadvantage", the ambit of conduct forbidden by s 6M is potentially very large. Does the section then forbid the conduct of "[a]ny person who … causes ... disadvantage to any [other] person for or on account of … any evidence given by him or her before any Royal Commission"? The phrase "for or on account of" can be defined to circumvent such a broad operation of the section. But how is that phrase to be given a meaning that permits the express use of evidence given by a person before any Royal Commission in a way that potentially "causes … disadvantage" to that person yet does not involve an offence against the Royal Commissions Act in the terms in which s 6M expresses that offence?

76 The words "for or on account of" in s 6M, without more, define the answer. However, they do not explain when and why the answer applies. Hence, the grant of special leave to the appellants on this point in their appeal.

77 *The litigation*: The course of the proceedings that now bring a limited issue to this Court is described in the joint reasons[68]. I will not repeat any of this material. The appellants had wished to challenge both of the answers given in the Federal Court in respect of the questions isolated for separate decision by the primary judge. However, special leave to appeal was refused on the answer to the first question which concerned the suggested lack of power of APRA to proceed as it contemplated in relation to the individual appellants[69]. The answer given by the primary judge on this issue, confirmed by the Full Court, is not, therefore, before this Court. Our only concern is with the answer to the second separated question. This relates to the use made, and intended to be made, by APRA and its senior manager, Mr Godfrey, of the evidence given by X and Y before the HIH Royal Commission.

78 There can be no doubt that, unless this Court forbids it by reversing the answer given by the primary judge to the second question, it is the intention of Mr Godfrey to use the evidence given by X and Y before the Royal Commission in support of a presently proposed recommendation that APRA should disqualify

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68 Joint reasons at [9]-[19].

69 Joint reasons at [12].

X and Y under the *Insurance Act* 1973 (Cth) ("the Insurance Act"). That this is so is made plain in the correspondence addressed to X and Y upon which they each relied to establish that APRA and Mr Godfrey planned to cause disadvantage to them, relevantly, for or on account of evidence given by them before the HIH Royal Commission, reading that phrase in a broad causative sense.

79 *The indicated use of the evidence*: The essential foundation, relied on in this respect by X and Y, was correspondence addressed to each of them by which Mr Godfrey gave them notice that he had come to a "preliminary view" that each "should be disqualified from being or acting as the holder of a senior insurance role, pursuant to [s] 25A(1) of the Insurance Act". The letter of notification stated that this "preliminary view" had been reached by Mr Godfrey "[o]n the basis of the information referred to in this letter". That information, and the preliminary finding relating to it, were included in an attachment to the letter of notification by which Mr Godfrey afforded X and Y the opportunity to make submissions as to why APRA should not make a decision to disqualify them under s 25A(1) of the Insurance Act as tentatively proposed by him.

80 It is enough to say that, in the attachment to the letter, there are repeated and express statements referring to, and quoting from, the evidence given by each of X and Y to the HIH Royal Commission. Thus, in par 5 of the attachment relating to X, Mr Godfrey states that "[e]vidence provided to the HIH Royal Commission ... demonstrates the following:". There follow 41 subparagraphs, each one cross-referenced to the transcript of the HIH Royal Commission and to evidence recorded there on identified days before the Commission.

81 Many of the subparagraphs that follow begin with words to the effect, "In your oral evidence to the HIH Royal Commission". The subparagraphs referring to the oral evidence of the individual appellants sometimes summarise, and on other occasions, directly quote, what that appellant "told the Royal Commission" as to his understanding of the relationship between HIH and Z on issues of reinsurance. The document is full of statements such as "You gave oral evidence that ..."; "You told the Royal Commission that …"; "You also stated ..."; "In oral evidence to the Royal Commission you admitted that you were aware …"; "In oral evidence you admitted that when you drafted the treaty wordings, you were aware …"; and "In cross-examination during the Royal Commission, you denied …".

82 It is essentially on the basis of these documents, therefore, that X and Y contend that APRA and Mr Godfrey will, unless restrained, "cause ... disadvantage" to each of them, by way of proceeding to give effect to the "preliminary view" (as they submit) "for or on account of … evidence given by [each of them] before [the] Royal Commission".

83 In this sense, X and Y did not contest before this Court the right of APRA and Mr Godfrey to proceed to consider any action that they might take pursuant to the Insurance Act based on:

(1) The evidence of persons other than X and Y given before the Royal Commission;

(2) The evidence uncovered by the Royal Commission or others in consequence of the inquiries of the Royal Commission; or

(3) Any opinion of the Royal Commission reached separately and independently of the evidence of X and Y.

84 What they objected to, relevantly, was the causing of the threatened disadvantage to them "for or on account of" their own evidence, as signalled in Mr Godfrey's letters which initiated their challenges.

Three preliminary questions

85 *Anonymity of the parties*: Before addressing the parties' arguments on the central issue in the appeal, I wish to say something about three preliminary questions, two of which are mentioned in the joint reasons[70].

86 First, as already noted, the names of the individual appellants (X and Y), and the German corporation of which they are officers (Z), were anonymised by order of the primary judge in the Federal Court. His Honour's order was made on 13 May 2005 and stated to be pursuant to the *Federal Court of Australia Act* 1976 (Cth)[71]. The truly exceptional circumstances under which such an order can be made may be understood when attention is addressed to the grounds for which the Parliament has expressly provided for the suppression or restriction of the publication of particular evidence or the name of a party or of a witness appearing in the Federal Court. The grounds stated in s 50 of that Act are limited to circumstances where such an order is "necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth"[72]. As the

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70 Joint reasons at [2], [6]-[8], [19]-[21], [60]-[61].

71 s 50. Within the Federal Court, the application of that section was considered in *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228 at 232-234. That authority was not examined in these proceedings.

72 The issue of suppression was the subject of a separate decision of the Full Court in this case. See *Applicant Y v Australian Prudential Regulation Authority* [2005] FCAFC 222. For that decision the Full Court was constituted by Emmett, Allsop and Edmonds JJ.

Federal Court explained in *Australian Broadcasting Commission v Parish*[73], "[o]pen justice is the underlying assumption of s 50". The suppression of names ought to be confined to cases in which disclosure "would prejudice the court's proper exercise of the function it was appointed to discharge, to do justice between the parties", or where disclosure "would destroy the subject-matter of the proceedings and render them nugatory"[74]. A case in which the use of names would seriously impede or discourage access to the courts might be another instance in which anonymity would be justified according to the statutory formula. The present certainly does not appear to have been such a case.

87 I realise that the identification of the names of X and Y and of the corporation, Z, with which they are associated, might be embarrassing to all of them. I accept that, in contemporary times, with the ready availability of the internet, the disclosure of their identities and of the proceedings designed to prevent APRA and Mr Godfrey from taking the administrative steps foreshadowed, might do some harm to individual and corporate reputations.

88 Perhaps Australian judicial process should provide more ample protection to witnesses from the revelation of their names in situations where they have simply invoked, or become involved in, proceedings in the courts. For particular, but limited, purposes, specific legislation, federal[75] and State[76], has been enacted requiring the suppression of the identity of a witness or party. Additionally, out of their implied or "inherent" powers, Australian courts sometimes anonymise proceedings to protect from needless harm the identity of persons who become involved in court process.

89 However, every day, in our courts, parties and witnesses must disclose their names and identities, although this is doubtless often uncongenial and even

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73 (1980) 29 ALR 228 at 234.

74 *Australian Broadcasting Commission v Parish* (1980) 29 ALR 228 at 233. See also *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 476-477; *John Fairfax Group Pty Ltd v Local Court (NSW)* (1991) 26 NSWLR 131 at 141; *Gianni Versace SpA v Monte* (2002) 119 FCR 349.

75 See eg *Migration Act* 1958 (Cth), s 91X (suppression of names of refugee applicants by the High Court, Federal Court and Federal Magistrates Court).

76 See eg *Juvenile Justice Act* 1992 (Q), s 288; *Child Protection Act* 1999 (Q), s 193; *Criminal Law (Sexual Offences) Act* 1978 (Q), ss 6, 10(3) (suppression of the names of juveniles and certain victims of sexual abuse). See *Phillips v The Queen* (2006) 80 ALJR 537 at 553 [81]-[87]; 224 ALR 216 at 236-237.

damaging. It is part of the strong tradition of open justice that characterises the courts of this country[77].

90 When, on the return of these proceedings, I sought an explanation for the anonymity order made in this case, the only reason advanced was that the primary judge had made such an order and that, by consent, the order had been continued thereafter, including in this Court. Congenial arrangements of this kind should, in my view, take into close account the basic principle of the open administration of justice in the courts. The proliferation of instances where courts suppress the identity of parties and witnesses (without specific legislative warrant) is undesirable. The naming of X, Y and Z did not prejudice the security of the Commonwealth. Nor is it apparent to me why it was necessary to suppress their names "to prevent prejudice to the administration of justice". It may cause some prejudice to the parties, perhaps, but ordinarily the administration of justice is strengthened by openness and full disclosure.

91 In any case, there is an air of unreality in the suppression of the names of X, Y and Z in these proceedings[78]. Their names were not suppressed during the HIH Royal Commission. They appear in the records of that Commission, including those to which Mr Godfrey made explicit reference in his letters foreshadowing administrative steps under the Insurance Act.

92 No one before this Court wanted to engage in this debate. However, it is up to the courts themselves to defend the general principle of openness and transparency of proceedings. Judicial suppression creates suspicion and sometimes concern. It should ordinarily be kept to a strict minimum. The appellants had arguable legal points by which to defend their rights. They should normally be expected to wear the burden of any publicity that attaches to that endeavour.

93 *Separated questions*: This is yet another case where a great deal of interlocutory litigation has unfolded as a result of the separation of questions, answered in the course of substantive proceedings without finally resolving those proceedings.

94 It is not entirely clear, in the present instance, how the primary judge came to separate the two questions, as he did on 13 May 2005. It is recorded that they

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77 *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 53, 58-59, referring to *Russell v Russell* (1976) 134 CLR 495 at 520; *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 at 316.

78 cf *A v Hayden* (1984) 156 CLR 532 at 550 per Mason J.

were separated "by consent"[79]. In earlier years, I was sympathetic to this procedure in the hope that it sometimes holds out that preliminary determinations of legal questions will resolve fundamental issues and, perhaps, save a great deal of court time in the process[80]. This may still be true in some cases. I do not deny the occasional utility of the procedure. However, the longer I observe litigation over separated questions, the more I am reinforced in the conclusion that the practice is commonly, or at least often, misguided, counter-productive and, ultimately, unduly expensive and burdensome to the courts and the parties alike[81]. It often seems to grow out of an inclination of parties and their advisers to postpone facing up to the irksome necessities of the trial.

95 There was an added reason, in the present case, why great care was needed before separating questions, however fundamental they might have seemed to the further prosecution of the proceedings. This was that the provisions of s 6M of the Royal Commissions Act are penal. If breached, they render a person potentially guilty of an indictable offence. Such an offence, by s 80 of the Constitution, carries an entitlement to trial by jury. This Court has said repeatedly that great care must be exercised before interlocutory challenges are permitted in such matters[82].

96 True it is that the proceedings brought by the appellants were civil in nature. They invoked s 39B of the *Judiciary Act* 1903 (Cth) to enliven the original jurisdiction of the Federal Court because they sought an injunction against Mr Godfrey, an officer of the Commonwealth[83]. However, the hypothesis at the heart of the appellants' contention on the second question separated by the primary judge was that Mr Godfrey was a person threatening to commit an indictable federal offence contrary to s 6M of the Royal Commissions Act. In the stated constitutional setting, special care was needed before separating that question and proceeding to make interlocutory findings and orders in relation to it. The subsequent chronicle of interlocutory appeals in these proceedings demonstrates, once again, the disadvantage of embarking on that course.

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79 (2006) 14 ANZ Ins Cas ¶61-667 at 75,015 [7].

80 See eg *R v Elliott* (1996) 185 CLR 250 at 257.

81 See eg *American Home Assurance Co v Ampol Refineries Ltd* (1987) 10 NSWLR 13 at 18-19; *Rajski v Carson* (1988) 15 NSWLR 84 at 88.

82 So too have other Australian courts. See eg *Dorney v Commissioner of Taxation* [1980] 1 NSWLR 404 at 417 per Mahoney JA (dissenting); *Sivakumar v Pattison* [1984] 2 NSWLR 78 at 83.

83 Joint reasons at [10].

97 As no party challenged the course taken (and indeed all were complicit in it) I can do no more than to suggest, with respect, that it was an unwise course of action. Despite doubtless good intentions, it involved the parties and the community in expense and delay in hearings and appeals that the normal process of proceedings in the courts tends to reduce and confine.

98 *Anticipatory orders and declarations*: There is a third point. It concerns the possible special imprudence of embarking on these proceedings, given that what was involved was an attempt by the appellants to gain a declaration and an injunctive order in relation to the operation of s 6M of the Royal Commissions Act, a penal provision, designated as indictable and carrying significant consequences for those convicted of a breach.

99 An immediate question is presented as to whether a court, asked in advance of the commission of any such offence, would, as a matter of discretion, grant a remedy by way of injunction, in effect, to restrain what would otherwise be a breach of penal provisions of the Royal Commissions Act. Would a court do so by acting on an hypothesis (as invited by the parties) which might, or might not, be fulfilled by subsequent events? Would the provision of an injunction in such circumstances, and more particularly the answer to separated questions or the provision of a judicial declaration, amount, effectively, to the provision of advice on the operation of penal provisions in federal legislation? Could it be said that the letters addressed by Mr Godfrey to X and Y already evidenced a breach of the Royal Commissions Act, if the appellants' argument about the meaning of s 6M of that Act were correct?

100 Even those who, like myself, are more sympathetic to the facultative use of judicial declarations[84], hesitate where what is claimed is, in effect, an anticipatory declaration on whether specified conduct could involve an indictable federal offence. The strong tradition of requiring precise proof of such offences and the constitutional provision in Australia reserving judgment on that proof to the verdict of a jury, constitute particular reasons why, in this case, there were special grounds for caution before embarking on the course of proceedings that unfolded.

101 For example, it might have been possible, had the proceedings concluded before the primary judge, without interlocutory interruption, for him to have decided them by wholly ignoring the evidence of X and Y before the HIH Royal Commission. The primary judge may have sustained the course proposed by Mr Godfrey, based on other evidence unaffected by any evidence given by X or

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84 See eg *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 371 [89]; contrast at 356-359 [48]-[56].

Y before the Royal Commission. The lesson of much litigation is that theoretical problems, of the kind which tend to be isolated for preliminary determination, and disjoined from a trial, disappear, or are avoided, in the way the trial typically proceeds to its conclusion.

102 I therefore agree with the joint reasons that there was a real question as to the procedure adopted in this case. However, I also agree that, no objection to that procedure having been raised in this Court, it is fruitless for us now to do more than to call attention to the imperfections in the procedure, but nonetheless to decide the appeal within the four corners in which it was argued.

The case for the appellants

103 *A textual argument*: If the appellants did not have an arguable construction of s 6M of the Royal Commissions Act, including as that section is read with s 6DD (referred to in the primary judge's second separated question), they probably would not have proceeded so far in the Australian judiciary. Thus, although their appeals were heard against interlocutory orders of the primary judge, they secured leave to appeal against his Honour's determinations to the Full Court[85]. Moreover, the appellants later obtained special leave to appeal to this Court.

104 The appellants' argument of error on the part of the Federal Court involved an appeal to a strict construction of s 6M of the Royal Commissions Act. Thus, they submitted that Mr Godfrey was a person intending to cause each of them disadvantage in the form of the administrative action that he was threatening, namely, the making of a recommendation to APRA that each of X and Y be disqualified from being a holder of a senior insurance role pursuant to s 25A(1) of the Insurance Act. In the global character that is now a feature of the insurance industry, it takes little imagination to infer that, although neither X nor Y is resident, employed or performing insurance functions in Australia, such a disqualification, if made by the Australian authority, would, at the least, cause disadvantage to persons such as X and Y. By inference, in an industry which depends heavily upon the reputation of insurance corporations and their officers for good faith, integrity and fair dealing, such a statutory finding and order, within a significant insurance market such as Australia, would need to be disclosed by X, Y and Z in various circumstances where disclosure was expressly required or impliedly expected.

105 The threatened action, at least if carried out, would not involve the use of "violence" or the infliction of "punishment" in the strict sense. But it would

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85 Leave was granted by the Full Court on 23 September 2005, a week after the orders of the primary judge.

inferentially, at the least, cause "disadvantage" to a person so disqualified and thus engage the opening words of s 6M. Moreover, the repeated reference, contained in Mr Godfrey's letters to X and Y, to the evidence given by each of them before the Royal Commission, would seem to engage par (b) of s 6M, so long as the necessary link, envisaged by that section, is established. That link appears in the phrase "for or on account of". It must be "for or on account of ... any evidence" of that kind, that the disadvantage[86] is caused by Mr Godfrey to X or Y or either one of them.

106 In their submissions to this Court, the appellants argued that the reading in the Federal Court of the phrase "for or on account of" was overly constricted and inconsistent with the actual terms of the Royal Commissions Act. The appellants contested the distinction drawn in the Federal Court between action taken based on evidence before a Royal Commission itself, and action taken based on the facts that pre-existed the Royal Commission, but which were disclosed by that evidence. Not only did that distinction lack an explicit textual foundation. According to the appellants, it overlooked the particular force and forensic utility of admissions and confessions made in the course of evidence before a Royal Commission. The statutory embargo on the use of evidence given before the Royal Commission was emphatic. The appellants submitted that the linking phrase "for or on account of" meant nothing more than "caused by". They argued that this Court should give the phrase its ordinary natural meaning. The preposition "for" was related to (and apt for) the offence (in s 6M(a)), occasioned to a person for having appeared as a witness at all. It was also related to (and apt for) the offence in s 6M(c), occasioned to a person for having produced a document or thing under s 2 of the Act. The words "on account of" were more apt to the language of s 6M(b) which did not refer to an event, as such, but to the content of evidence given before the Royal Commission. If "on account of" the content of such evidence, a disadvantage were caused to the person who gave the evidence, that would be a breach of the section. No more was required. The offence was complete.

107 *A contextual argument*: The appellants also relied on matters of context in the Royal Commissions Act to support their interpretation. Thus, the differentiation between the offence, relevantly, of causing disadvantage to a person "for or on account of" having appeared as a witness and "for or on account of … any evidence given" was significant for the appellants because it made it plain that the Royal Commissions Act was protecting, in the latter phrase, the actual *content* of evidence given before a Royal Commission and not simply the *fact* that evidence was given (or a document produced). According to the appellants, the differentiation between the paragraphs of s 6M lent emphasis

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86 cf *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at 146-147 [36]-[38], 148 [41].

to the special status of the content of their evidence. That emphasis was designed to protect them from having disadvantage caused to them, by reason of that content, that is, "for or on account of" it. Because it would be an indictable offence to use the evidence as such, by necessary implication it was unavailable for such use. Its use was forbidden by the Act.

108 Another contextual argument pressed by the appellants involved a reference to s 6N of the Royal Commissions Act, enacted at the same time as s 6M was introduced[87]. That section provides specific penalties for employers who prejudice employees in the context of Royal Commissions:

> "Dismissal by employers of witness
>
> (1) Any employer who dismisses any employee from his or her employment, or prejudices any employee in his or her employment, *for or on account of* the employee having:
>
> (a) appeared as a witness before a Royal Commission; or
>
> (b) given evidence before a Royal Commission; or
>
> (c) produced a document or thing pursuant to a summons, requirement or notice under section 2;
>
> is guilty of an indictable offence.
>
> Penalty: $1,000, or imprisonment for 1 year." (emphasis added)

109 There is a close similarity between the language of s 6M and of s 6N(1). However, there is also an important difference. Paragraph (b) in s 6N(1) refers only to the fact of having given evidence. It does not refer to the content of the evidence, as par (b) in s 6M does. The appellants submitted that the juxtaposition of the language of the two paragraphs lent emphasis to the breadth of the deliberate protection for the content of the evidence of a witness before a Royal Commission under s 6M. Thus, it was not, as such, the fact of giving evidence (probably encompassed by par (a)) that was protected. It was the actual evidence given that engaged the protection of s 6M(b). The appellants argued that the judges of the Federal Court had failed to give proper attention to this distinct expression in s 6M(b). They asked this Court to do so.

110 *A policy argument*: Ultimately, the appellants embraced the suggestion that the distinction for which they argued was supported by a policy that lay

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87 By the *Royal Commissions Act* 1912 (Cth). See also joint reasons at [31]-[35].

behind the protection of evidence given before a Royal Commission. According to this argument, Royal Commissions, although designed for the important object of arriving at the truth about conflicting factual matters (and deciding the better view of conflicting issues of opinion, social policy and future legislation), enlist onerous procedures for the ultimate purpose of serving the public interest. The coercive powers afforded to Royal Commissions include the power to summon witnesses and to take evidence on oath or affirmation[88]; to require witnesses to attend and produce documents[89]; to permit the issue of extensive search warrants[90]; and to punish persons who refuse to be sworn, make an affirmation or answer questions[91]. The appellants therefore suggested that the protection afforded by s 6M(b) of the Royal Commissions Act was in the nature of a "trade-off". It amounted, in effect, to a counter-balancing protection to a person obliged to give evidence in respect of any later use that might be made of that evidence and which might cause that person disadvantage.

111 In this way, to enhance the achievement of the objects of a Royal Commission and to further the public interest, individuals caught up in the coercive requirements of such a Commission, in respect of the evidence they gave, would be protected and thus encouraged to speak fully and openly without fear of damage, loss or disadvantage as an immediate consequence. They might be caused damage by other evidence revealed in the course of the Royal Commission. They might be caused damage by the evidence of other persons. They might be damaged by the findings, conclusions and recommendations of the Royal Commission itself. But they would not be caused damage from their own mouths by reason of ("for or on account of") the actual evidence which they themselves gave. That evidence would be immured from causing them damage, loss or disadvantage because of the greater public good of procuring their honest testimony before the Royal Commission.

112 *An argument of approach*: Finally, the appellants could point to the inherent arguability of most cases of statutory construction that reach a court such as this[92]. The defects and ambiguities of the language of s 6M of the Royal Commissions Act were candidly, and properly, conceded by the Solicitor-General. In such circumstances, the appellants urged this Court to avoid an

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88 Royal Commissions Act, s 2.

89 Royal Commissions Act, s 3.

90 Royal Commissions Act, s 4.

91 Royal Commissions Act, s 6.

92 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42].

artificial construction that would impose a non-textual, restrictive meaning on the phrase "for or on account of". They submitted that the fundamental duty of the Court was to give meaning to the legislative command according to the language in which the command was expressed[93]. Legislative history, and references to the pre-existing common law, may not deflect a court from its duty in resolving an issue of statutory construction, which is always ultimately a text-based activity[94]. Where the command is stated in a legislative provision of the Federal Parliament, the Court's duty is to give effect to that provision, primarily by reference to the language of the Act. If the language yields a conclusion that is considered undesirable, the Act could be changed, as the Royal Commissions Act has often and recently been[95].

Section 6M is concerned with victimisation

113 *Textual arguments*: Whilst the appellants' interpretation is not unarguable, it does not represent the preferable construction of s 6M of the Royal Commissions Act. Basically, that section is concerned to prevent, and where it occurs, to punish, victimisation of those who appear as witnesses, give evidence and produce documents to a Royal Commission. That is the mischief at which the section is targeted. The phrase "for or on account of", in the section, should be read accordingly.

114 There are several indications in the language of the Royal Commissions Act that this is the correct interpretation:

(1) The heading to the section (formerly the side-note) gives an indication as to its general purpose. It suggests that the section is concerned with "Injury to witness". Although the heading is not part of the Act[96] and although its provisions cannot constrain the detail contained in the full text of a section of an Act, it is not wholly immaterial when there is ambiguity

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93 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

94 *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310.

95 For example, the *Royal Commissions Amendment Act* 2006 (Cth) introduced ss 6AA and 6AB, which modified the operation of common law principles of legal professional privilege in relation to evidence produced to a Royal Commission. See also *Royal Commissions Amendment Act* 1982 (Cth); *Royal Commissions and Other Legislation Amendment Act* 2001 (Cth); *Royal Commissions Amendment (Records) Act* 2006 (Cth).

96 *Acts Interpretation Act* 1901 (Cth), s 13(3).

in the content of the section[97]. The words of a section heading cannot be used to restrict the terms of the section itself, if they are clear. But where, as here, those terms lend themselves to different meanings, I agree with what Lord Reid said in *Director of Public Prosecutions v Schildkamp*[98]:

> "[I]t may be more realistic to accept the Act as printed as being the product of the whole legislative process, and to give due weight to everything found in the printed Act. I say more realistic because in very many cases the provision before the court was never even mentioned in debate in either House, and it may be that its wording was never closely scrutinised by any member of either House. In such a case it is not very meaningful to say that the words of the Act represent the intention of Parliament but that punctuation, cross-headings and side-notes do not.
>
> … I would not object to taking all these matters into account, provided that we realise that they cannot have equal weight with the words of the Act … A cross-heading ought to indicate the scope of the sections which follow it but there is always a possibility that the scope of one of these sections may have been widened by amendment."

In this case, because the meaning of par (b) is unclear (potentially involving either protection of the specific content of evidence or merely the fact that evidence was given), it is useful to have regard to the heading of the section. In this case the heading tends to support the retaliatory view of the purpose of the section. The heading does not support throwing a cloak of protection over the entire content of the evidence given by a witness to a Royal Commission and punishing seriously any person for the later use of that evidence;

(2) Further support for treating par (b) as concerned with an offence of retaliation for "any evidence given" before a Royal Commission can be found in the several verbs used in the section concerned with "violence" and "punishment": this, and the fact that, immediately following s 6M, and enacted at the same time, is s 6N, a provision designed to protect

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97 *Toronto Corporation v Toronto Railway* [1907] AC 315 at 324-325; *Director of Public Prosecutions v Schildkamp* [1971] AC 1; *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594; *Director-General of the Department of Corrective Services v Mitchelson* (1992) 26 NSWLR 648 at 654, 657-658.

98 [1971] AC 1 at 10. See also *Maxwell on the Interpretation of Statutes*, 11th ed (1962) at 48-49; Singh, *Principles of Statutory Interpretation*, 9th ed (2004) at 152-153.

witnesses from retaliation by their employers. The presence of s 6N lends force to the view that s 6M was concerned with the specific mischief of victimisation of witnesses before Royal Commissions. Had the section enjoyed the purpose of providing the large protection to the content of the evidence argued by the appellants, two things would be surprising. No such purpose or "trade-off" was suggested in any of the speeches made in the Parliament at the time the predecessors to s 6M were entered in the federal statute book[99]. Moreover, when one such earlier provision was enacted, the reason given to the Parliament was that "[t]he clause deals with a very serious class of offences – the interference with witnesses summoned to give evidence … with the object of preventing them from giving their evidence, and so defeating the attainment of the objects for which the inquiry has been instituted"[100]. This language sustains, and reinforces, the accuracy of the heading to s 6M. It helps to identify the purpose of the section; and

(3) Finally, giving par (b) of s 6M this interpretation reconciles that paragraph with the language and plain operation of pars (a) and (c) of that section. It also reconciles the operation of s 6M with s 6N. It adopts the view that the mischief to which s 6M and s 6N were severally addressed was essentially the same, although s 6N is more particular and specific. The offending acts are then treated as the same and the difference of language is treated as immaterial or unimportant in the context.

115 *Contextual arguments*: These conclusions are further reinforced by reference to one further provision of the Royal Commissions Act that throws light on the meaning of s 6M.

116 The time has long passed when this Court will construe particular words out of context and give meaning to them divorced from the relevant parts of the legal document in which the words appear. That was the former way in which statutes were construed in Australia and elsewhere. It caused many statutory provisions to miss their target[101] by an excessively narrow and literal

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99 See, for example, *Excise Procedure Act* 1907 (Cth), s 10. See Australia, Senate, *Parliamentary Debates* (Hansard), 24 October 1907 at 5129.

100 Australia, Senate, *Parliamentary Debates* (Hansard), 28 September 1905 at 2910 (Senator Keating).

101 cf *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-426 approved *Bropho v Western Australia* (1990) 171 CLR 1 at 20; cf *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105; Diplock, "The Courts as Legislators", in Harvey (ed), *The Lawyer and Justice,* (1978) 263 at 274.

interpretation of statutory language, read in isolation. This is not the way meaning is attributed to words in ordinary life. Such meaning is ordinarily derived from the text, viewed in its context. It is therefore crucial to have regard to other provisions of the legal text, as such provisions cast light on ambiguous words or phrases in a particular provision[102].

117 Here, the relevant context includes those other sections of the Royal Commissions Act that were introduced by the 1912 Act. Those amendments included the introduction of s 6N, including what is now s 6N(1)(b), to which reference has already been made. But they also included s 6DD, which is the other provision to which the primary judge specifically referred, for good reason, in his second separated question.

118 In fact, s 6DD of the Royal Commissions Act is significant to the meaning of s 6M(b). Section 6DD provides:

> "Statements made by witness not admissible in evidence against the witness
>
> (1) The following are not admissible in evidence against a natural person in any civil or criminal proceedings in any court of the Commonwealth, of a State or of a Territory:
>
> (a) a statement or disclosure made by the person in the course of giving evidence before a Commission;
>
> (b) the production of a document or other thing by the person pursuant to a summons, requirement or notice under section 2 or subsection 6AA(3).
>
> (2) Subsection (1) does not apply to the admissibility of evidence in proceedings for an offence against this Act."

119 It is true that s 6DD is addressed to the admissibility of evidence in a court. To this extent, it is not immediately relevant to the intended use of the evidence given before the Royal Commission which the appellants are contesting in this appeal. Their contest is addressed to the use of the evidence of X and Y not in a court but in an administrative decision made ultimately by APRA on the basis of a recommendation made to it by its officer, Mr Godfrey.

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102 *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1925) 35 CLR 449 at 455; *Scott v Federal Commissioner of Taxation* (1966) 117 CLR 514 at 524; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397, applying *R v Brown* [1996] AC 543 at 561 per Lord Hoffmann.

120 Nevertheless, s 6DD, enacted by the 1912 Act at the same time as s 6M, is highly relevant to the meaning to be given to s 6M(b). If, as the appellants submitted, s 6M(b) threw a cloak of unuseability over "any evidence given by [X and Y] before [the] Royal Commission", s 6DD of the Royal Commissions Act would be substantially redundant. There would be no need for the more specific and finely tuned provisions of s 6DD(1)(a). Any such "statement or disclosure made by the person in the course of giving evidence" would amount to "evidence given by him or her before any Royal Commission". On the appellants' proposed meaning, to the extent that such evidence caused disadvantage (and was objected to), it was already inadmissible because the proffering of it would constitute the commission of an indictable offence. It either would not be proffered or, if proffered, would be rejected by a court as inadmissible.

121 If s 6M is taken to be limited to punishing retaliation or victimisation against a person for giving evidence before a Royal Commission, that leaves substantive work for s 6DD to perform. Such a construction is necessary to avoid a legislative redundancy. It is consistent with the longstanding principle that all statutory provisions are prima facie significant and taken to have a field of operation[103]. Indeed, it is "improbable that the framers of [the Royal Commissions Act] could have intended to insert a provision which has virtually no practical effect"[104]. Such a construction is also consistent with the presumption that, where the Parliament has enacted a wide and general provision (such as s 6M(b)), not limited to the admissibility of evidence in a court, such a provision should not take priority over a narrower and more specific provision (like s 6DD)[105].

122 This construction provides a more nuanced and limited prohibition on the later use of witness statements and evidence or documents before Royal Commissions. It affords the "trade-off" of which the appellants spoke. But it is

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103 *The Commonwealth v Baume* (1905) 2 CLR 405 at 414; *Beckwith v The Queen* (1976) 135 CLR 569 at 574; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 12-13; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71].

104 *Minister of State for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565 at 574 per Gummow J. See also *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321 at 331-332; *Bistricic v Rokov* (1976) 135 CLR 552 at 561.

105 *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1 at 29; *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47 at 50, 58-59.

one confined to court proceedings. It is not addressed to administrative decisions, such as those made by Mr Godfrey or APRA.

123 *Avoiding absurd constructions*: In addition to the foregoing, there are at least two reasons of principle or policy why the ambit of protection argued for by the appellants should be rejected:

(1) It would produce absurd results that could not readily be attributed to the Parliament in enacting the Royal Commissions Act[106]. If, as a result of the evidence of a witness before a Royal Commission, an insurer learned from that witness's own admission that he or she had been involved in an act of arson that destroyed premises insured by the insurer, and if that were the only evidence of the offence and of his involvement in it, it would be absurd to deny the insurer the opportunity to refuse indemnity. A different consideration arises in respect of the admission of the evidence in later court proceedings. But the use, directly and indirectly, of evidence before the Royal Commission for non-court purposes is sensible. It is fully within the provisions of s 6DD. "[A] Court is entitled to pay the Legislature the not excessive compliment of assuming that it intended to enact sense and not nonsense"[107]; and

(2) As well, s 6M must be given meaning in the context of the Act in which it appears. That Act is concerned with the procedures of Royal Commissions. The very purpose of such inquiries typically includes securing evidence, both oral and documentary, which can lead to criminal and civil proceedings, as the Royal Commission will often recommend and as legal entitlements and justice require. In this context, without a much clearer provision, it would be astonishing to impose an embargo on the direct and indirect use of the evidence of witnesses, the calling of whom is inferentially for the purpose of fulfilling the mandate of the Royal Commission. That mandate, typically, extends to the identification of legal proceedings, criminal and civil, that should be brought in consequence of the Royal Commission's report. It would be a needless, self-inflicted wound for the Royal Commissions Act to immunise the evidence of witnesses completely and, moreover, to forbid the use of such evidence for any purpose. This is especially so as the outcome of a Royal Commission is commonly the bringing of criminal and civil proceedings

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106 *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-323; *Australian Tea Tree Oil Research Institute v Industry Research and Development Board* (2002) 124 FCR 316 at 330 [43]-[44].

107 *Hall v Jones* (1942) 42 SR (NSW) 203 at 208.

that typically cause justifiable damage, loss or disadvantage to those whose wrongdoing the Royal Commission exposes.

124 The foregoing considerations set the mind searching for a different construction to s 6M(b) of the Royal Commissions Act. That search is reinforced when regard is paid to s 6DD, which contradicts the "trade-off" for witnesses who make statements or disclosures and produce documents before Royal Commissions. This is why the presence of s 6DD is so important in casting light on the meaning of s 6M(b). It is why, in my view, it is not appropriate for this Court now to excise consideration of s 6DD when offering its explanation of the meaning of s 6M(b). Least of all is it appropriate to bury the meaning of s 6M(b) in the opaque phrase "for or on account of".

125 Having regard to the statutory purpose of establishing Royal Commissions and of the limited and specific principle contained in s 6DD, the broad cloak of immunity which the appellants argued for s 6M(b) should be rejected. It would produce absurd outcomes and undermine the achievement of some of the main objects of Royal Commissions. These results are avoided if s 6M is read as addressed only to offences of victimisation of witnesses, and if s 6DD is left to perform the work of the "trade-off" in respect of court evidence, deemed necessary by the Parliament in more limited terms to promote the provision of honest evidence to Royal Commissions.

126 This interpretation does not entirely explain the variation between the language of s 6M(b) and s 6N(1)(b). It may still be the case that a witness is victimised for giving evidence before a Royal Commission not, as such, for having turned up but for the content of particular evidence given by him or her. Thus, par (a) of s 6M exists to punish those who would victimise the person for having appeared. And s 6M(b) exists for the added, and different, offence of victimising the person because of the content of "any evidence given by him or her".

The phrase "for or on account of"

127 When the foregoing purpose of s 6M is clearly identified, the meaning of the phrase "for or on account of", which links the cause of disadvantage by one person to another, and, relevantly, any evidence given by that other person before a Royal Commission, becomes clear.

128 Questions of causation and of causal connection between events for legal purposes are notoriously contestable[108]. They can only ever be solved in a given

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108 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 596-598 [97]-[100].

context. Where what is at stake is the attribution of legal responsibility, liability or blame, it is impermissible, and unhelpful, to attempt a resolution of the problem in a conceptual vacuum. As Gleeson CJ remarked in *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd*[109], approved in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd*[110], charting the bounds of statutory expressions concerned with causation:

> "is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case. Those requirements are not determined by a visceral response on the part of the judge … but by the judge's concept of principle and of the statutory purpose."

129 Where the evidence given by a person before a Royal Commission is used to prove disputed facts in ways that cause damage, loss or disadvantage to the witness, this does not forbid the use of that evidence for administrative, disciplinary or other purposes of the law. Such use is not treated as "for or on account of" the evidence as such (or a document that is produced). It is, instead, "for or on account of" the pre-existing state of affairs which such evidence or document may help to prove or disprove. That pre-existing state of affairs has a reality independent of the evidence. The limitation on the use that may be made of the evidence itself, as expressed in the Royal Commissions Act, is that stated in s 6DD.

130 This is the view of the meaning of s 6M which both the primary judge and the Full Court adopted[111]. In my opinion, it was the correct view. It is the one that ensures that s 6DD and s 6M(b) work sensibly together, according to their respective language and in the context of the Royal Commissions Act, read as a whole. The interpretation of s 6M(b) urged by the appellants should be rejected.

Orders

131 The appeal should be dismissed with costs.

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109 (2002) 210 CLR 109 at 119 [26].

110 (2005) 221 CLR 568 at 597-598 [100].

111 *Applicant X v Australian Prudential Regulation Authority* (2006) 14 ANZ Ins Cas ¶61-667 at 75,031-75,032 [92]-[100]; *Y v Australian Prudential Regulation Authority* (2006) 150 FCR 469 at 491-492 [74].