HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

Matter No S536/2007

GILBERT GEDEON — APPLICANT

AND

COMMISSIONER OF THE NEW SOUTH WALES CRIME COMMISSION AND ORS — RESPONDENTS

Matter No S544/2007

DAVID DARLEY DOWE — APPLICANT

AND

THE COMMISSIONER OF THE NEW SOUTH WALES CRIME COMMISSION AND ANOR — RESPONDENTS

Gedeon v Commissioner of the New South Wales Crime Commission
Dowe v Commissioner of the New South Wales Crime Commission
[2008] HCA 43
4 September 2008
S536/2007 & S544/2007

ORDER

Matter No S536/2007

1. *Application for special leave to appeal granted.*

2. *Appeal treated as instituted, heard instanter and allowed.*

3. *Set aside paragraphs 3 and 4 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 19 October 2007 and in their place order:*

   (a) appeal allowed;

(b) set aside the order of the Common Law Division of the Supreme Court of New South Wales made on 13 March 2007 and the order made on 10 January 2007 to the extent that it answered the second of the questions for separate determination and in their place:

(i) declare that the authority to conduct controlled operation No 05/00556 granted on 8 February 2005 and the authority to conduct controlled operation No 05/01792 granted on 17 March 2005 are invalid; and

(ii) order that the summons dated 17 July 2006 in the Common Law Division of the Supreme Court of New South Wales be otherwise dismissed.

4. The second respondent pay the costs of the appellant in this Court and in the courts below.

Matter No S544/2007

1. Application for special leave to appeal granted.

2. Appeal treated as instituted, heard instanter and allowed.

3. Set aside paragraphs 3 and 4 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 19 October 2007 and in their place order:

(a) appeal allowed;

(b) set aside the order of the Common Law Division of the Supreme Court of New South Wales made on 13 March 2007 and the order made on 10 January 2007 to the extent that it answered the second of the questions for separate determination and in their place:

(i) declare that the authority to conduct controlled operation No 05/01038 granted on 22 February 2005 is invalid; and

(ii) order that the summons dated 19 July 2006 in the Common Law Division of the Supreme Court of New South Wales be otherwise dismissed.

4. The second respondent pay the costs of the appellant in this Court and in the courts below.

On appeal from the Supreme Court of New South Wales

Representation

G O'L Reynolds SC with S B Lloyd and K A Stern for the applicant in S536/2007 (instructed by Matouk Joyners Lawyers)

A C Haesler SC with M A Robinson for the applicant in S544/2007 (instructed by Legal Aid Commission of New South Wales)

I D Temby QC with J G Renwick and P F Singleton for the second respondent in both matters (instructed by New South Wales Crime Commission)

Submitting appearance for the first and third respondents in S536/2007

Submitting appearance for the first respondent in S544/2007

CATCHWORDS

Gedeon v Commissioner of the New South Wales Crime Commission
Dowe v Commissioner of the New South Wales Crime Commission

Criminal law – Evidence – Unlawfully obtained – Part IAB of *Crimes Act* 1914 (Cth) ("Crimes Act") provided that person not liable for offences under Commonwealth, State or Territory law committed for purpose of controlled operation – Section 15M of Crimes Act provided for issue of certificate authorising controlled operation if authorising officer reasonably satisfied that, inter alia, unlawful activity in course of controlled operation would not seriously endanger health or safety of person – Section 16 of *Law Enforcement (Controlled Operations) Act* 1997 (NSW) ("LECO Act") provided that activity for purpose of controlled operation not unlawful despite other Act or law – Section 3(1) of LECO Act defined "controlled activity" as activity that would be unlawful but for operation of s 16 – Section 7 of LECO Act provided that authority to conduct controlled operation must not be granted if, inter alia, participant in proposed operation would engage in conduct likely to seriously endanger health or safety of person – Section 138 of *Evidence Act* 1995 (NSW) conferred upon trial judges discretion to exclude evidence obtained illegally.

Criminal law – Evidence – Unlawfully obtained – Commissioner issued authorities ("Authorities") under LECO Act authorising controlled operations – No authorities issued under Pt IAB of Crimes Act – Authorities authorised informer to sell cocaine to applicants – Cocaine not recovered by law enforcement officers – Applicants charged with taking part in supply of prohibited drug contrary to *Drug Misuse and Trafficking Act* 1985 (NSW).

Criminal law – Evidence – Unlawfully obtained – Whether Commissioner had power to issue Authorities where sale of cocaine without recovery strategy was decided at trial or upon judicial review to seriously endanger health or safety of person – Whether reference to "any other person" in s 7 of LECO Act confined to person in physical vicinity of authorised conduct or extended to person subject to foreseen and expected consequence of proposed controlled operation – Whether "controlled activity" within meaning of LECO Act extended to conduct unlawful by reason of contravention of Commonwealth law.

Judgments and orders – Judicial review – Declarations – Whether jurisdiction to entertain application to declare Authorities invalid – Whether discretion to do so should be exercised – Matters bearing on appropriateness of making declaration touching conduct of criminal proceedings.

Words and phrases – "controlled operation", "declarations", "seriously endanger health or safety".

Law Enforcement (Controlled Operations) Act 1997 (NSW).
Crimes Act 1914 (Cth).

GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ.

Introduction

1 These applications for special leave were heard together by a Court of six Justices under a referral made on 18 April 2008 when the applications first came before Gleeson CJ and Gummow J. The applicants seek to establish the invalidity of certain authorities for "controlled operations" which were issued under the *Law Enforcement (Controlled Operations) Act* 1997 (NSW) ("the LECO Act"). That statute, together with legislation in other jurisdictions[1], was a response to the decision of this Court in *Ridgeway v The Queen*[2].

2 The appellant in *Ridgeway* had been convicted of an offence under s 233B of the *Customs Act* 1901 (Cth) ("the Customs Act") in relation to the possession without reasonable excuse of a prohibited import, namely heroin. The heroin had been imported as part of a "controlled" importation involving law enforcement officers who acted "undercover". This Court quashed the conviction.

3 *Ridgeway* established two important propositions in the law of evidence as understood by the common law in Australia. The first proposition, negative in nature, is that the substantive defence of entrapment by government officers or agents, as applied in criminal trials in United States federal courts, has no application in Australia. The second proposition is that the discretion given trial judges by the common law to exclude evidence on the grounds of public policy extends to the exclusion of evidence of an offence, or an element of an offence, which has been procured by unlawful conduct by law enforcement officers. There was no attempt in these proceedings to reopen either of these propositions.

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1 *Crimes (Controlled Operations) Act* 2008 (ACT); *Police Powers and Responsibilities Act* 2000 (Q), Ch 11; *Criminal Law (Undercover Operations) Act* 1995 (SA); *Crimes (Controlled Operations) Act* 2004 (Vic) (not yet proclaimed); *Corruption and Crime Commission Act* 2003 (WA), Pt 6, Div 4. See also *Crimes Act* 1914 (Cth), Pt IAB, discussed at [5]-[7] below.

2 (1995) 184 CLR 19; [1995] HCA 66.

4 In the second reading speech on the Bill for the LECO Act, the Minister said[3]:

> "The bill now before the [Legislative Assembly] overcomes the Ridgeway problem. It legitimises the actions of undercover officers and permits evidence obtained in authorised controlled operations to be classified as legal and prima facie admissible. Ultimately, of course, the question of admissibility of evidence will remain an issue for the court to determine in accordance with section 138 of the [*Evidence Act* 1995 (NSW) ('the Evidence Act')].
>
> ...
>
> Importantly, there are limits to what can be authorised. Clause 7 expressly prohibits the approval of a controlled operation if there is likely to be any undue risk to the operatives involved or to any other person. Clause 7 also prevents approval of operations in which there is a risk of serious damage to the property of others. *It is not appropriate to authorise controlled operations when there is a high risk of liability for damages.*" (emphasis added)

5 At the federal level, the sequel to *Ridgeway* was the addition in 1996[4] to the *Crimes Act* 1914 (Cth) ("the Crimes Act") of Pt IAB (ss 15G-15X)[5]. A challenge to the validity of Pt IAB failed, in *Nicholas v The Queen*[6], and the parties to these proceedings accepted that decision. As Pt IAB stood at the time of the events giving rise to the present litigation it was headed "Controlled operations for obtaining evidence about Commonwealth offences". As first enacted, and before changes made by the *Measures to Combat Serious and Organised Crime Act* 2001 (Cth), Pt IAB was limited to offences relating to narcotic goods.

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3 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 20 November 1997 at 2322-2323.

4 By the *Crimes Amendment (Controlled Operations) Act* 1996 (Cth).

5 The Part was numbered 1AB when enacted. It was renumbered IAB by the *Measures to Combat Serious and Organised Crime Act* 2001 (Cth).

6 (1998) 193 CLR 173; [1998] HCA 9.

6 Section 15M provides for the issue of a certificate in respect of controlled operations under Pt IAB. The authorising officer may grant the certificate if "reasonably satisfied", among other matters, that:

> "(e) the operation will be conducted in a way that ensures that, to the maximum extent possible, any illicit goods involved in the operation will be under the control of an Australian law enforcement officer at the end of the operation; and
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> (f) any unlawful activity involved in conducting the operation will not:
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> (i) seriously endanger the health or safety of any person; or
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> (ii) cause the death of, or serious injury to, any person; or
>
> (iii) involve the commission of a sexual offence against any person; or
>
> (iv) result in loss of, or serious damage to, property (other than illicit goods)".

It will become apparent that s 7 of the LECO Act, the critical provision for this litigation, is cast in different terms to s 15M of the federal law.

7 The importation of and subsequent dealings in prohibited imports may give rise to the laying of charges under federal and State law. There is in the Crimes Act no "roll-back" provision of the kind applied in *Port MacDonnell Professional Fishermen's Assn Inc v South Australia*[7], whereby the operation of Pt IAB is withdrawn from any area in which the LECO Act operates. To the contrary, s 15GA of the Crimes Act provides for the concurrent operation with Pt IAB of State and Territory laws which are not "directly inconsistent" with Pt IAB[8].

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7 (1989) 168 CLR 340 at 373-374; [1989] HCA 49.

8 See, generally, *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545 at 563-564; [1977] HCA 34; *Master Education Services Pty Ltd v Ketchell* [2008] HCA 38 at [12].

8 Section 229 of the Customs Act, with certain immaterial exceptions, forfeits all prohibited imports to the Crown in right of the Commonwealth. The "controlled operations" with which this litigation is concerned involved dealings by State law enforcement officers in prohibited imports, namely large quantities of cocaine, which by force of s 229 had been forfeited to the Commonwealth. Before this Court no point is sought to be taken respecting inconsistency between the Customs Act and the LECO Act.

9 Part 2 of the LECO Act (ss 5-13A) provides for the giving by "the chief executive officer" for "a law enforcement agency" of an authority for that agency to conduct a "controlled operation". The second respondent in each proceeding ("the Commission") is such an agency (s 3(1)) and the first respondent ("the Commissioner") is its chief executive officer for the purposes of the LECO Act[9]. The Commission itself is constituted as a corporation by s 5 of the *New South Wales Crime Commission Act* 1985 (NSW) and the Commissioner is appointed by the Governor (s 5A).

10 The effect of an authority for a controlled operation is identified in s 13 as being that it:

> "(a) authorises each law enforcement participant to engage in the controlled activities specified in the authority in respect of the law enforcement participants, and
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> (b) authorises each civilian participant (if any) to engage in the particular controlled activities (if any) specified in the authority in respect of that participant".

A "civilian participant" is a participant who is not a law enforcement officer (s 3(1)).

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9 Other "chief executive officers" include the New South Wales Commissioner of Police, the Commissioner of the Independent Commission Against Corruption and the Commissioner of the Police Integrity Commission.

11 Section 16 of the LECO Act is a provision of central importance for this litigation[10]. It states:

> "Despite any other Act or law, an activity that is engaged in by a participant in an authorised operation in the course of, and for the purposes of, the operation is not unlawful, and does not constitute an offence or corrupt conduct, so long as it is authorised by, and is engaged in in accordance with, the authority for the operation."

12 Section 138 of the Evidence Act confers upon trial judges a discretion to exclude evidence obtained improperly or illegally. If s 16 of the LECO Act applies to a particular activity sought to be led in evidence, then the scope for the operation of s 138 is thereby diminished, but if there has been no authorised operation to which s 16 can apply, the scope for the operation of s 138 is increased.

13 It is with that prospect in mind that the applicants contend that s 16 can have no application to three authorities granted by the Commissioner on 8 and 22 February and 17 March 2005 ("the Authorities"). This is said to be because the Authorities are invalid, having been issued by the Commissioner in excess of the power conferred by the LECO Act.

The facts

14 For the purposes only of the present proceedings which seek to establish the invalidity of the Authorities, certain facts are agreed. On 8 October 2004 approximately 10 kilograms of cocaine were unlawfully imported into Australia. Thereafter the Commissioner authorised six controlled operations which utilised the services of an informer (codenamed "Tom"). He already had sold three kilograms of the imported cocaine. The first and sixth authorities (No 05/00556 granted 8 February 2005, and No 05/01792 granted 17 March 2005) were used to support sales by "Tom" to the applicant Mr Gedeon of, respectively, two kilograms and 750 grams of the imported cocaine. The second authority (No 05/01038 granted 22 February 2005) was used to support a sale by "Tom" to the applicant Mr Dowe of one kilogram of cocaine. None of the

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10 Part IAB of the Crimes Act contains (ss 15I, 15IA, 15IB) exculpatory provisions in respect of authorised controlled operations which are more detailed than s 16 of the LECO Act.

cocaine disposed of in these three operations was recovered by any law enforcement officer. Messrs Gedeon and Dowe are the applicants for special leave in these proceedings.

15 The controlled operations had been planned in circumstances where the Commissioner and other New South Wales senior law enforcement officers had been briefed that it was unlikely that the cocaine would be recovered because the cocaine would be sold on to end users. The briefing had been given on 2 February 2005 at a meeting at which no member of the Australian Federal Police ("the AFP") was present. The AFP had participated at earlier stages, but this participation did not continue. No authorities were issued under Pt IAB of the Crimes Act.

16 Before turning to consider the specific issues that are raised, something more should be said of the procedural history.

The procedural history

17 The applicants seek in this Court declarations that the Authorities are invalid. They also sought in the Supreme Court of New South Wales an order in the nature of certiorari, but do not appear to press for that relief in this Court. They failed to obtain any relief in the Supreme Court both before the primary judge in the Common Law Division (Hall J)[11], and in the Court of Appeal (Spigelman CJ and Handley AJA; Basten JA dissenting)[12]. Handley AJA agreed with the reasons of Spigelman CJ.

18 The proceedings in the Supreme Court were commenced by the applicants on 11 April 2006. Previously, on 9 May 2005, the applicants had been charged with taking part in the supply of a prohibited drug, contrary to the *Drug Misuse and Trafficking Act* 1985 (NSW).

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11 The two relevant judgments of Hall J were delivered on 12 December 2006 and 6 March 2007 and are reported respectively as *Dowe v Commissioner of the New South Wales Crime Commission* (2006) 206 FLR 1, and *Dowe v Commissioner of New South Wales Crime Commission* (2007) 169 A Crim R 43.

12 *Dowe v Commissioner of New South Wales Crime Commission* (2007) 177 A Crim R 44.

19 On 28 March 2006, at the committal proceedings in the Central Local Court, senior counsel for the Commissioner moved to have set aside a subpoena addressed to his client. He submitted that the Authorities had to be accepted for what they purported to be and that any question directed to the Commissioner which sought to "go behind" them could not be relevant. Counsel said that it might be possible to obtain declaratory relief in the Supreme Court, but that this was a matter for the applicants. There followed the institution of the Supreme Court proceedings.

20 On 13 April 2006 the applicants were committed for trial. The trial of Mr Gedeon has yet to take place. Mr Dowe was convicted on 15 November 2007 after a trial in the New South Wales District Court before Hulme DCJ and a jury and on 7 March 2008 he was sentenced to a term of imprisonment of 12 years with a non-parole period of eight years. His appeal to the New South Wales Court of Criminal Appeal is pending. It should be noted that the conviction of Mr Dowe occurred after the delivery of the decision of the Court of Appeal upholding the validity of the Authorities.

21 As Basten JA indicated in his dissenting reasons in the Court of Appeal, the applicants have an interest in challenging the validity of the Authorities. In the case of Mr Gedeon, this is the exclusion of evidence at his trial, pursuant to s 138 of the Evidence Act and, in the case of Mr Dowe, it is to found a complaint in his appeal against conviction that s 138 should have been applied in his favour at his trial.

Declaratory relief

22 The course of this litigation should not be taken as authority that the submissions made by counsel for the Commissioner on 28 March 2006 at the committal proceedings were correct. The reasoning in *Ousley v The Queen*[13] supports the contrary position at least where, as here, the argument is that the issue of the Authorities was an administrative act beyond the statutory power conferred on the Commissioner. Further, s 138 of the Evidence Act, in speaking of "evidence ... obtained ... improperly or in contravention of an Australian law"[14], in a situation such as that respecting the validity of the Authorities,

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13 (1997) 192 CLR 69 at 79-80, 87, 105, 124, 147-148; [1997] HCA 49.

14 "Australian law" means a Commonwealth, State or Territory law (Dictionary, Pt 1).

presents an issue under that section which calls for the trial judge to rule on a "collateral" attack.

23 With respect to the exercise of the power to make the declaratory orders now sought by the applicants, authority in this Court affirms an important general principle. This is that power to make declaratory orders should be exercised sparingly where the declaration would touch the conduct of criminal proceedings[15]. The fragmentation of the criminal process is to be actively discouraged. In any event, a declaration may be of limited utility where founded, as would be the case here, on facts admitted only for the purposes of the satellite litigation.

24 In *Sankey v Whitlam*[16] Gibbs ACJ remarked:

> "I would respectfully endorse the observations of Jacobs P (as he then was) in *Shapowloff v Dunn*[17], that a court will be reluctant to make declarations in a matter which impinges directly upon the course of proceedings in a criminal matter. Once criminal proceedings have begun they should be allowed to follow their ordinary course unless it appears that for some special reason it is necessary in the interests of justice to make a declaratory order."

25 However, as the outcome in this Court in *Sankey v Whitlam* itself indicates, in particular circumstances the interests of justice may militate in favour of the making of a declaratory order. In the present litigation none of the respondents has at any stage suggested that the proceedings for declaratory relief were inappropriate. Indeed, the applicants moved in the Supreme Court in apparent response to the stance taken by the Commissioner during the committal proceedings. That stance reflected an appreciation that what was at stake was more than a question of the admissibility of evidence in the ordinary sense

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15 *Sankey v Whitlam* (1978) 142 CLR 1; [1978] HCA 43. See also as to the undesirable fragmentation of the criminal process *R v Iorlano* (1983) 151 CLR 678; [1983] HCA 43; *Yates v Wilson* (1989) 168 CLR 338; [1989] HCA 68; *R v Elliott* (1996) 185 CLR 250; [1996] HCA 21.

16 (1978) 142 CLR 1 at 26.

17 [1973] 2 NSWLR 468 at 470.

mentioned by Stephen J in *Sankey v Whitlam*[18]. There is a considerable public interest in the observance of due process by law enforcement authorities by putting beyond doubt important questions of construction of the LECO Act[19].

26 *Sankey v Whitlam* reached this Court by removal of a cause pending in the Supreme Court of New South Wales, upon application by the Attorney-General of the Commonwealth made pursuant to s 40 of the *Judiciary Act* 1903 (Cth). No threshold question of the grant of special leave arose.

27 However, the considerations referred to above in the present litigation favour the grants of special leave. Further relevant, albeit not imperative, considerations are that the grants of special leave are unopposed and that the Court of Appeal divided in its dismissal of the appeals to that Court.

28 The grounds advanced by the applicants before Hall J at first instance included the submission that critical provisions of the LECO Act were invalid by reason of inconsistency with provisions of the Customs Act, Pt IAB of the Crimes Act, and provisions of the *Criminal Code* (Cth). This submission was rejected and is not further pressed, but it did have the consequence that the federal jurisdiction of the Supreme Court was engaged[20]. The applicants, however, had in the circumstances outlined above the necessary interest for their standing to seek declaratory relief[21]. The contrary has not been submitted by the respondents.

29 Special leave to appeal should be granted to both applicants. It is necessary therefore to turn to consider the substantive issues on the appeals. Something more should be said of the terms of the LECO Act.

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18 (1978) 142 CLR 1 at 80.

19 cf the observations of Mason J in *Sankey v Whitlam* (1978) 142 CLR 1 at 83.

20 *Agtrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251; [2005] HCA 38.

21 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582, 595-596; [1992] HCA 10; *Croome v Tasmania* (1997) 191 CLR 119 at 126-127, 132-133; [1997] HCA 5.

The provisions of the LECO Act

30 The relevant provisions of s 5 of the LECO Act, which deals with the making of applications for authorities, are as follows:

> "(1) A law enforcement officer for a law enforcement agency may apply to the chief executive officer of the agency for authority to conduct a controlled operation on behalf of the agency.
>
> ...
>
> (3) The chief executive officer may require the applicant to furnish such additional information concerning the proposed controlled operation as is necessary for the chief executive officer's proper consideration of the application."

As indicated earlier in these reasons, the Commissioner is the relevant "chief executive officer" and the Commission is the "law enforcement agency".

31 The expression "controlled operation" is defined in s 3(1) of the LECO Act as meaning an operation conducted for the purpose of:

> "(a) obtaining evidence of criminal activity or corrupt conduct, or
>
> (b) arresting any person involved in criminal activity or corrupt conduct, or
>
> (c) frustrating criminal activity or corrupt conduct, or
>
> (d) carrying out an activity that is reasonably necessary to facilitate the achievement of any purpose referred to in paragraph (a), (b) or (c),
>
> being an operation that involves, or may involve, a controlled activity".

A "controlled activity" means "an activity that, but for section 16, would be unlawful" (s 3(1)). "[C]orrupt conduct" has the same meaning as in the *Independent Commission Against Corruption Act* 1988 (NSW) (s 3(1)). The Authorities were directed to the obtaining of evidence not of corrupt conduct but of criminal activity.

32 Section 6(1) of the LECO Act states:

"After considering an application for authority to conduct a controlled operation, and any additional information furnished under section 5(3), the chief executive officer:

(a) may authorise a law enforcement officer for the law enforcement agency concerned to conduct the operation, either unconditionally or subject to conditions, or

(b) may refuse the application."

The chief executive officer "may not" grant an authority "unless ... satisfied" of the matters listed in pars (a)-(d) of s 6(3). These are as follows:

"(a) that there are reasonable grounds to suspect that criminal activity or corrupt conduct has been, is being or is about to be conducted in relation to matters within the administrative responsibility of the agency,

(b) that the nature and extent of the suspected criminal activity or corrupt conduct are such as to justify the conduct of a controlled operation,

(c) that the nature and extent of the proposed controlled activities are appropriate to the suspected criminal activity or corrupt conduct,

(d) that the proposed controlled activities will be capable of being accounted for in sufficient detail to enable the reporting requirements of this Act to be fully complied with".

In considering the matters referred to in pars (a)-(d) of s 6(3), the chief executive officer "must have regard" to pars (a)-(c) of s 6(4). These are:

"(a) the reliability of any information as to the nature and extent of the suspected criminal activity or corrupt conduct,

(b) the likelihood of success of the proposed controlled operation compared with the likelihood of success of any other law enforcement operation that it would be reasonably practicable to conduct for the same purposes,

(c) the duration of the proposed controlled operation".

33 The critical provision, the construction of which is disputed, appears in s 7 of the LECO Act. This deals with certain matters which are not to be authorised. In particular sub-s (1) states:

> "An authority to conduct a controlled operation must not be granted in relation to a proposed operation that involves any participant in the operation:
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> (a) inducing or encouraging another person to engage in criminal activity or corrupt conduct of a kind that the other person could not reasonably be expected to engage in unless so induced or encouraged, or
>
> (b) *engaging in conduct that is likely to seriously endanger the health or safety of that or any other participant, or any other person, or to result in serious loss or damage to property,* or
>
> (c) engaging in conduct that involves the commission of a sexual offence against any person." (emphasis added)

34 The effect of s 13A of the LECO Act is that the Authorities are "not invalidated by any procedural defect, other than a defect that affects the substance of [the Authorities] in a material particular". It will be apparent that if the Authorities were granted contrary to s 7(1), they suffer from more than a procedural defect, and that a matter of substance is involved. The contrary was not suggested and the respondents did not rely upon s 13A to save the Authorities if they were invalid.

The submissions

35 In their draft notices of appeal the applicants make three principal submissions. Two of them fix upon the words emphasised above in par (b) of s 7(1) of the LECO Act. First, it is said that the prohibition in that sub-section against controlled operations involving "conduct that is likely to seriously endanger the health or safety of ... any other person" turns, contrary to the unanimous view of the Court of Appeal[22], not upon the state of mind of the chief executive officer of the agency but, rather, upon the objective determination of

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22 *Dowe v Commissioner of New South Wales Crime Commission* (2007) 177 A Crim R 44 at 57, 65, 68.

this criterion as a "jurisdictional fact". In the course of oral argument, the submission was refined so as to treat par (b) of s 7(1) as concerned with the existence of power rather than the exercise of discretion. The second principal submission is that the reference in par (b) to "any other person" is not, contrary to the view taken by the majority in the Court of Appeal[23], confined to persons in the physical vicinity of the authorised conduct; rather, that phrase encompasses harm to other persons which is the foreseen and expected consequence of the conduct in question.

36 The third submission is that the majority in the Court of Appeal erred in finding that a "controlled activity" within the meaning of the definition in the LECO Act extends to conduct which continues to be unlawful by reason of contravention of a law of the Commonwealth[24]. Rather, it is submitted that "controlled activity" for the purpose of the LECO Act is confined to unlawful activity which is capable of being, and is in fact, rendered lawful by s 16 of the LECO Act; that section does not render lawful conduct which, while unlawful at common law or under New South Wales statute law, is also made unlawful by federal law[25].

Federal-State overlap

37 In this Court, an earlier attempt by the applicants to argue that the authorising provisions of the LECO Act, a State law, were invalid by the operation of s 109 of the Constitution was not pressed. Accordingly, we put that consideration to one side and assume (as it appears safe to do) that there is no constitutional inconsistency. It is convenient, then, to notice first the applicants' third submission, although, in the result, we are of the view that the applicants are entitled to succeed on the propositions advanced in their interrelated first and second submissions.

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23 *Dowe v Commissioner of New South Wales Crime Commission* (2007) 177 A Crim R 44 at 61, 68.

24 It may be assumed, without deciding, that s 16 does render lawful activity in New South Wales which is unlawful under the statute law of another State or of a Territory.

25 *Dowe v Commissioner of New South Wales Crime Commission* (2007) 177 A Crim R 44 at 53, 68.

38 In his dissenting reasons, Basten JA accepted the applicants' third submission. He concluded that the activities the subject of the Authorities were not "controlled activities" within the meaning of the LECO Act because, "despite any putative operation of s 16"[26], they would remain "unlawful". Possession of a prohibited import was an offence against s 233B of the Customs Act[27]; there was no certificate under s 15M of the Crimes Act; and there would be no defence of "reasonable excuse" to the offence under s 233B of the Customs Act.

39 Basten JA expressed his conclusion as follows[28]:

> "The definition of 'controlled activity' [in s 3(1) of the LECO Act] should thus be construed to mean 'an activity that, but for section 16, would be unlawful, but would be rendered lawful by the operation of section 16, when engaged'. In other words, the definition implicitly embraces the effect of s 16, which is to render the activity lawful. If, because of a Commonwealth law, s 16 does not have that effect, and the activity remains unlawful, the definition of 'controlled activity' is not engaged. It follows, to the extent that authority is purportedly given for a controlled operation that involves or may involve a controlled activity, the authority will be invalid."

40 The contrary construction accepts that in some instances approval will be required under both the federal and State controlled operations provisions if there is to be a fully effective dispensation for conduct unlawful under both federal and State legislation. No party contends that of its own force State legislation could dispense with the operation and requirements of a federal law and remove from its operation conduct which the federal law proscribes. No party contends that the LECO Act purports to do so upon its proper construction. The phrase in s 16

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26 *Dowe v Commissioner of New South Wales Crime Commission* (2007) 177 A Crim R 44 at 67.

27 Section 233B(1)(a)(iv).

28 *Dowe v Commissioner of New South Wales Crime Commission* (2007) 177 A Crim R 44 at 62.

"[d]espite any other Act or law" does not extend to the operation of a law of the Commonwealth[29]. The "other Act" must be a New South Wales statute[30].

41 However, it does not follow that an authority given under the LECO Act will be beyond the power of the Commissioner or other "chief executive officer" because there has been a failure to obtain concurrently a certificate under s 15M of the Crimes Act where federal criminal law may also be engaged by commission of the proposed "controlled activity". There is a need for approval under both statutory regimes if full protection for those involved is to be obtained. Further, the absence of a necessary approval under either scheme will be sufficient to raise at trial the operation of s 138 of the Evidence Act. But, s 138 apart, the State authority, within the scope of the State law and for its purposes (should that issue arise), will be effective without a certificate under s 15M of the Crimes Act.

42 The third submission of the applicants, in the terms in which it was expressed, should not be accepted. There remain the first and second linked submissions, respecting par (b) of s 7(1) of the LECO Act.

Paragraph (b) of s 7(1) of the LECO Act

43 The expression "jurisdictional fact" was used somewhat loosely in the course of submissions. Generally the expression is used to identify a criterion the satisfaction of which enlivens the exercise of the statutory power or discretion in question. If the criterion be not satisfied then the decision purportedly made in exercise of the power or discretion will have been made without the necessary statutory authority required of the decision maker.

44 The concept appears from the following passage in the reasons of Latham CJ in *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd*[31]:

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29 See *Love v Attorney-General (NSW)* (1990) 169 CLR 307 at 322-323; [1990] HCA 4.

30 *Solomons v District Court (NSW)* (2002) 211 CLR 119 at 130 [9]; [2002] HCA 47.

31 (1944) 69 CLR 407 at 429-430; [1944] HCA 42. See also the discussion by Mason J in *R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd* (1978) 142 CLR 113 at 125; [1978] HCA 60, using the expression "a preliminary question on the answer to which … jurisdiction depends".

> "The subject matter with which the Industrial Authority deals is, *inter alia*, rates of remuneration. There is power to deal with this subject matter in respect of rates of remuneration which existed on the specified date only if the authority is satisfied that the rates in question are anomalous. Unless this condition is fulfilled, the authority cannot act – it is a condition of jurisdiction."

45 An instance in the LECO Act is the requirement in s 6(1) that the chief executive officer first have considered an application made under s 5 for the authority to conduct a controlled operation. The text of these provisions is set out earlier in these reasons.

46 Section 7(1) of the LECO Act is expressed in the terms of prohibition and thus stands rather differently. The provision does not stipulate any criterion the satisfaction of which enlivens the exercise of a power or discretion. Rather, s 7(1) delimits the scope for any exercise of authority by a chief executive officer. There is no statutory power to grant an authority where the proposed operation involves any participant in the operation of any of the activities identified in pars (a), (b) and (c). That is the force of the expression "must not be granted" in s 7(1). It conveys the notion of a contraction in the content of what would be the power otherwise conferred by s 6.

47 If it be established upon a "collateral" attack which is decided in a ruling at trial under s 138 of the Evidence Act, or other form of "collateral" attack or (if the proceeding be appropriate) upon judicial review, that, for example, the authority in question was in relation to a proposed operation involving any participant engaging in conduct that was likely to seriously endanger the health or safety of that or any other participant or any other person, then the grant of the authority was beyond power. No question of abuse of discretion or unreasonable decision making arises. The question is answered at an earlier stage of legal analysis. The contrary conclusion by the Court of Appeal[32] appears to have proceeded from a misconstruction of the statutory provisions, in particular of the interrelation between ss 5, 6 and 7.

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32 *Dowe v Commissioner of New South Wales Crime Commission* (2007) 177 A Crim R 44 at 57, 65, 68.

48 The remaining issue concerns the expression in par (b) of s 7(1), "to seriously endanger the health or safety of ... any other person". The majority in the Court of Appeal held[33]:

> "The words 'any other person' should be read ejusdem generis with the reference to 'participants' in the controlled operation so as to be confined to persons proximate to, that is, in the physical vicinity of, the operation upon whom the authorised conduct directly impinges."

49 In this Court, counsel for the Commission did not support that construction. Rather, counsel submitted that the expression "any other person" is limited to those involved in the operation in question. This submission was developed by counsel as follows:

> "Now, the operational plan here did not go beyond the supply by [an officer of the Commission] to Tom and by Tom to Gedeon and thereafter the matter was beyond the control of this operation. It was a matter which may have caused harm at some point down the track, depending upon the quantities in which and the circumstances in which cocaine was ingested by end users, which end users would of course have been involving themselves in what might be described as 'interposed criminal conduct'."

50 By way of contrast, in his dissenting reasons Basten JA contended that the Authorities could not properly have been granted because of the prohibition imposed by par (b) of s 7(1)[34].

51 The question of construction of par (b) of s 7(1) is not resolved by the application of any particular maxim or canon of statutory construction selected from among those which may jostle for acceptance. The preferable starting point appears from what was said by Dixon J in *Cody v J H Nelson Pty Ltd*[35]:

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33 *Dowe v Commissioner of New South Wales Crime Commission* (2007) 177 A Crim R 44 at 61, 68.

34 *Dowe v Commissioner of New South Wales Crime Commission* (2007) 177 A Crim R 44 at 67.

35 (1947) 74 CLR 629 at 647; [1947] HCA 17. See also the discussion by Mahoney JA in *Mattinson v Multiplo Incubators Pty Ltd* [1977] 1 NSWLR 368 at 376-377.

> "In the modern search for a real intention covering each particular situation litigated, however much help and guidance may be obtained from the principles and rules of construction, their controlling force in determining the conclusion is likely to be confined to cases where the real meaning is undiscoverable or where the court of construction, sceptical of the foresight of the draftsman or of his appreciation of the situation presented, is better content to supply the meaning by a legal presumption than subjectively."

52 The first point to be made here is that the provision in par (b) of s 7(1) uses the expression "seriously endanger" health or safety and does not speak of damage to health or the sustaining of injury. The emphasis is upon exposure to danger or peril rather than upon the materialisation of that risk.

53 The primary judge accepted evidence that a consequence foreseen by a senior officer of the Commission of the conduct of the controlled operations using the services of "Tom" was that, depending upon the extent of dilution, between 70,000 and 100,000 discrete dosage units of the cocaine would reach the streets[36]. With the agreement of Basten JA[37], Spigelman CJ said[38]:

> "If the subsequent distribution to end users of the cocaine fell within the scope of the prohibited 'conduct' in which a participant would engage pursuant to an authority, within the meaning of s 7(1)(b), it was not, and could not be, contended that the health of those users was not 'seriously endangered'."

54 In this Court, counsel for the Commission was asked:

> "Is the position of the [Commission] in this Court that it wishes to contend that delivery of six kilograms of cocaine to a variety of end users is not

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36 *Dowe v Commissioner of New South Wales Crime Commission* (2007) 169 A Crim R 43 at 50.

37 *Dowe v Commissioner of New South Wales Crime Commission* (2007) 177 A Crim R 44 at 66.

38 *Dowe v Commissioner of New South Wales Crime Commission* (2007) 177 A Crim R 44 at 60.

> likely to seriously endanger the health or safety of any end user? Is that the position of the [Commission]?"

Counsel responded:

> "We submit that it will not necessarily do so. There is a factual decision to be made in that respect and it is better made back in the Supreme Court."

55 The difficulty with that submission is that par (b) of s 7(1) uses the term "likely" and does not speak in terms of the serious endangerment as a necessary consequence of engagement in the conduct authorised.

56 That the term "likely" was employed advisedly in s 7(1) appears from the passage in the second reading speech in the Legislative Assembly which has been set out earlier in these reasons. The Minister spoke of "a high risk of liability for damages" as a reason for the express prohibition to be imposed by par (b) of s 7(1). That approach was consistent with the well-known statement of general principle which had been made in 1980 in *Wyong Shire Council v Shirt* by Mason J[39]. His Honour's statement begins[40]:

> "In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk."

57 A reasonable person in the position of the defendant would have foreseen that the conduct of the activities the subject of the Authorities would involve a risk of seriously endangering the health of some at least of the numerous class of end purchasers of the cocaine. The contrary is impossible to reconcile with the legislative judgment, reflected both in federal and State law, prohibiting respectively the importation, supply and possession of such drugs. That prospect

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39 (1980) 146 CLR 40 at 47-48; [1980] HCA 12.

40 (1980) 146 CLR 40 at 47.

was sufficient to attract, as the legislative response to such a situation of risk, the prohibition in par (b) of s 7(1) of the LECO Act.

58 The submission by the Commission that the phrase "any other person" is limited to participants in the operation reads down the ordinary meaning of that phrase and does so with the consequence of leaving the State exposed to the possibility of civil liability to a range of third parties, a hazard the legislature wished to avoid.

59 Hypothetical examples of what might be thought to be extreme situations cannot determine the particular issue of the validity of the Authorities in the present litigation. It may, however, be said that in some of those situations issues of sufficiency of the causal link to the conduct authorised might be important. The point sought to be made here appears from what was said by Basten JA as follows[41]:

> "It is often helpful to test a proposed construction of a statute by reference to its possible operation in other circumstances. Nevertheless, there are risks in taking that exercise too far. The need to consider possible harm which might occur due to criminals seeking to 'escape from the crime scene' would also need careful analysis. It is at least possible that those circumstances would flow from the attempt to arrest the criminals, rather than from some conduct involved in the controlled operation. By analogy with conferral of immunity in other circumstances, it might be wrong to treat the controlled operation as continuing to the stage of an attempted arrest which would otherwise be authorised by law: cf *Board of Fire Commissioners (NSW) v Ardouin*[42].
>
> Similarly, retaliatory acts by a person targeted in the operation, which may endanger the safety of participants or third parties might properly be said to flow, not from the authorised conduct, but from a belief of the person targeted that he or she had been betrayed to the authorities. Whether such a conclusion is open would need to be

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41 *Dowe v Commissioner of New South Wales Crime Commission* (2007) 177 A Crim R 44 at 67.

42 (1961) 109 CLR 105; [1961] HCA 71.

considered in specific circumstances as they arose, as would findings as to whether the risk were likely or unlikely to eventuate."

We agree with these observations. The applicants are entitled to succeed on their interrelated first and second submissions.

Orders

60 Special leave to appeal should be granted and the appeals taken as heard instanter. Each appeal should be allowed with costs against the Commission; orders 3 and 4 of the Court of Appeal of the Supreme Court of New South Wales should be set aside and in their place (a) the appeal to that Court should be allowed with costs against the Commission and (b) a declaration should be made that the relevant Authorities are invalid and (c) the summons in the Common Law Division of the Supreme Court of New South Wales otherwise should be dismissed but with an order for costs against the Commission.