HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL AND BELL JJ

X7 PLAINTIFF

AND

AUSTRALIAN CRIME COMMISSION & ANOR DEFENDANTS

X7 v Australian Crime Commission
[2013] HCA 29
26 June 2013
S100/2012

ORDER

The questions asked in the Case Stated dated 23 August 2012 be answered as follows:

1. *Does Div 2 of Pt II of the* Australian Crime Commission Act *2002 (Cth) ("the ACC Act") empower an examiner appointed under s 46B(1) of the ACC Act to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerns the subject matter of the offence so charged?*

   Answer: *The ACC Act does not authorise an examiner appointed under s 46B(1) of the ACC Act to require a person charged with a Commonwealth indictable offence to answer questions about the subject matter of the charged offence.*

2. *If the answer to Question 1 is "Yes", is Div 2 of Pt II of the ACC Act invalid to that extent as contrary to Ch III of the Constitution?*

   Answer: *This question does not arise.*

Representation

G D Wendler with A S G Cassels for the plaintiff (instructed John D Weller & Associates)

S P Donaghue SC with M J O'Meara for the defendants (instructed by Australian Government Solicitor)

Interveners

M G Sexton SC, Solicitor-General for the State of New South Wales with C L Lenehan for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

M G Hinton QC, Solicitor-General for the State of South Australia with C Jacobi for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor (SA))

S G E McLeish SC, Solicitor-General for the State of Victoria with R J Orr for the Attorney-General for the State of Victoria, intervening (instructed by Victorian Government Solicitor)

G R Donaldson SC, Solicitor-General for the State of Western Australia with I A Repper for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor (WA))

CATCHWORDS

X7 v Australian Crime Commission

Statutes – Interpretation – Plaintiff charged with three indictable Commonwealth offences – Plaintiff served with summons to attend examination by examiner appointed under *Australian Crime Commission Act* 2002 (Cth) ("Act") – Examiner asked plaintiff questions about subject matter of charged offences – Whether Act empowered examiner to conduct examination of person charged with indictable Commonwealth offence where examination concerned offence charged.

Words and phrases – "accusatorial process of criminal justice", "examination", "prejudice the fair trial of a person who has been, or may be, charged with an offence", "principle of legality", "privilege against self-incrimination", "right to silence", "trial according to law".

Australian Crime Commission Act 2002 (Cth), ss 7A, 7C, Pt II Div 2.

1 FRENCH CJ AND CRENNAN J. On 23 November 2010, the plaintiff, X7, was arrested by officers of the Australian Federal Police, charged with three indictable offences[1] and taken into custody. The offences, alleged to have been committed in New South Wales, are conspiracy to traffic in a commercial quantity of a controlled drug[2], conspiracy to import a commercial quantity of a border controlled drug[3], and conspiracy to deal with money that is the proceeds of crime[4]. If convicted, the plaintiff will be liable to a term of imprisonment. Whilst in custody, the plaintiff was served with a summons to appear, and give evidence, before an examiner of the first defendant, the Australian Crime Commission ("the ACC").

2 Established by s 7 of the *Australian Crime Commission Act* 2002 (Cth) ("the ACC Act")[5], the ACC has functions which include the collection of criminal information and intelligence, and the investigation of federally relevant criminal activity in relation to "serious and organised crime"[6]. Serious and organised crime covers offences which involve two or more offenders, substantial planning and organisation, and the use of sophisticated methods and techniques[7]. Division 2 of Pt II of the ACC Act (ss 24A to 36) ("the examination provisions") provides for examiners appointed under the ACC Act to conduct compulsory examinations for the purposes of operations or investigations which

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1 Three Court Attendance Notices (the charge sheets) were served on the plaintiff on 23 November 2010. At the time of hearing, no indictment had been presented.

2 *Criminal Code* (Cth), s 11.5(1), together with s 302.2(1).

3 *Criminal Code* (Cth), s 11.5(1), together with s 307.1(1).

4 *Criminal Code* (Cth), s 11.5(1), together with s 400.3(1).

5 The ACC comprises the Chief Executive Officer ("the CEO"), examiners, and members of staff of the ACC (s 7(2)).

6 *Australian Crime Commission Act* 2002 (Cth), s 7A(a) and (c). The expressions "federally relevant criminal activity" and "relevant criminal activity" are defined in s 4(1). The latter expression means "any circumstances implying, or any allegations, that a relevant crime may have been, may be being, or may in future be, committed against a law of the Commonwealth, of a State or of a Territory". "Relevant crime" is also defined in s 4(1) and includes "serious and organised crime".

7 *Australian Crime Commission Act* 2002 (Cth), s 4(1).

are designated by the Board of the ACC as "special" operations or investigations[8].

3 In response to the summons, the plaintiff attended a compulsory examination before an ACC examiner at which he was asked, and answered, questions relating to the subject matter of the offences with which he had been earlier charged. When the examination resumed the next day, the plaintiff declined to answer questions concerning the subject matter of the charges when he was directed by the examiner to do so. The examiner informed the plaintiff that he would, in due course, be charged with the offence of failing to answer questions[9].

4 The plaintiff subsequently commenced proceedings in the original jurisdiction of this Court. The plaintiff seeks declarations that, to the extent that Div 2 of Pt II of the ACC Act permits the compulsory examination of a person charged with an indictable Commonwealth offence, the relevant provisions are beyond the power of the Commonwealth Parliament; or that any such examination constitutes an impermissible interference with what was said to be his constitutional right to a fair trial under Ch III (including s 80) of the Constitution. The plaintiff also seeks injunctive relief against the ACC and its officers and examiners restraining further compulsory examination in respect of matters the subject of the offences with which he has been charged. Finally, the plaintiff seeks an order preventing the ACC and its officers and examiners from preserving any record of his examination.

5 On 23 August 2012, the parties agreed to state a case for the consideration of the Full Court, which included the following two questions of law:

> "1. Does Division 2 of Part II of the ACC Act empower an examiner appointed under section 46B(1) of the ACC Act to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerns the subject matter of the offence so charged?

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8 *Australian Crime Commission Act* 2002 (Cth), ss 4(1), definition of "special ACC operation/investigation", and 24A.

9 *Australian Crime Commission Act* 2002 (Cth), s 30(6) relevantly provides that a person who fails to answer a question as required by an examiner under s 30(2)(b) is guilty of an indictable offence, punishable on conviction by a fine not exceeding 200 penalty units or imprisonment for a period not exceeding five years.

2. If the answer to Question 1 is 'Yes', is Division 2 of Part II of the ACC Act invalid to that extent as contrary to Ch III of the Constitution?"

6 The questions were stated on the basis that the plaintiff's case did not involve any challenge to the sufficiency of the instrument authorising the relevant "special ACC investigation"[10]. Furthermore, the expression "subject matter of the offence" in question 1 was treated as including examination on the circumstances of the offence with which a person has been charged, which questions could establish that the person has committed a crime, or disclose defences upon which that person might rely at trial.

7 These reasons will demonstrate that question 1 must be answered "Yes" and that question 2 should be answered "No".

The facts and the legislative scheme

8 The ACC Act contains provisions which govern the sharing by the ACC of specific information with other government officers and agencies, both federal and State. Where, in carrying out its functions, the ACC obtains admissible evidence of an offence, whether Commonwealth, State or Territory, the CEO must assemble the evidence and give it to the relevant law enforcement or prosecutorial agency[11]. In appropriate circumstances, the CEO may also furnish information in its possession to other nominated persons, agencies or bodies[12]. At the conclusion of an examination, the examiner must give the head of the special ACC investigation a record of the examination and any documents or other things given to the examiner[13].

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10 *Australian Crime Commission Act* 2002 (Cth), s 7C(1)(c) and (d).

11 *Australian Crime Commission Act* 2002 (Cth), s 12(1). The CEO must also give the evidence to the Attorney-General of the Commonwealth or the State, as the case requires (s 12(1)(a)).

12 At the time of the examination, the relevant power was found in *Australian Crime Commission Act* 2002 (Cth), s 59. An equivalent power now exists in s 59AA, which was inserted by the *Crimes Legislation Amendment (Powers and Offences) Act* 2012 (Cth), but which commenced after the plaintiff was examined.

13 *Australian Crime Commission Act* 2002 (Cth), s 25A(15).

9 As required by the ACC Act, the plaintiff attended before an ACC examiner[14], in response to the summons issued under s 28 in connection with the relevant special ACC investigation[15].

10 Under the ACC Act, a person appearing at an examination is not permitted to refuse or fail to answer a question, or to produce a document or other thing, which is required by the examiner[16]. However, by reason of the combined operation of ss 30(4) and 30(5), where a person gives an answer or produces a document or thing, that answer or that document or thing is not admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty[17], provided that before answering the question or producing the document or thing, the person claims[18] that the answer, document or thing might tend to incriminate him or her or make him or her liable to a penalty. A prohibition of that kind on direct use is sometimes called a "direct use immunity" or, more usually, a "use immunity".

11 Section 25A, which is critical to the resolution of this stated case, governs the conduct of an examination, and the manner in which, and the persons to whom, publication of evidence and information obtained may be made. Section 25A relevantly provides:

> "(3) An examination before an examiner must be held in private and the examiner may give directions as to the persons who may be present during the examination or a part of the examination.
>
> ...
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> (9) An examiner may direct that:
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> (a) any evidence given before the examiner; or
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> (b) the contents of any document, or a description of any thing, produced to the examiner; or

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14 *Australian Crime Commission Act* 2002 (Cth), s 46B.

15 *Australian Crime Commission Act* 2002 (Cth), s 24A.

16 *Australian Crime Commission Act* 2002 (Cth), s 30(2).

17 Other than in a confiscation proceeding or a proceeding for perjury: *Australian Crime Commission Act* 2002 (Cth), s 30(5).

18 *Australian Crime Commission Act* 2002 (Cth), s 30(4).

(c) any information that might enable a person who has given evidence before the examiner to be identified; or

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

must not be published, or must not be published except in such manner, and to such persons, as the examiner specifies. The examiner must give such a direction if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be, charged with an offence."

12 At the beginning of the plaintiff's examination, the examiner advised the plaintiff of his rights in the following terms:

"[Y]our rights will be protected today. I want you to understand at the outset that I am not allowing anyone associated with the charges you face, anyone associated with the prosecution of those charges to either sit here [or] observe the proceedings and I'm not permitting any of those persons to get a copy of the record of these proceedings. And I will also be offering you what's known as the privilege against self-incrimination which I will explain to you shortly. So your rights will be protected because no-one associated with your prosecution or charges, investigation of your charges will be able to learn what you tell [the ACC] today, that's because you're facing current charges which haven't been dealt with. And the law is that in those circumstances your rights ought to be protected so that those persons associated with you, the investigation and prosecution do not either hear or learn subsequently what it is you told [the ACC] that is one protection. The next is the fact that you have available to you what's known as the privilege against self-incrimination."

13 The examiner then informed the plaintiff that he could not refuse to answer questions or produce documents sought by the examiner but that he could claim that his answers to questions, or production of documents or things sought, might tend to incriminate him. The plaintiff made such a claim in relation to all of the answers that he gave during the examination.

14 When the examination resumed the following day, the plaintiff was represented by a lawyer, and declined to answer any further questions. The examiner informed the plaintiff that he would be charged with the offence of

failing to answer questions[19]. The examiner then made an oral direction under s 25A(9) in the following terms:

> "I direct that the evidence given by you, [the plaintiff], the contents of documents produced to [the ACC] during this examination, any evidence that might enable you to be identified and the fact that you've given evidence at this examination shall not be published, except only to [the CEO], examiners and members of staff of [the ACC] and for the purposes only of any charges which may result from your evidence to the office of the Director of Public Prosecutions for the Commonwealth, to the staff of any court or courts in respect of which proceedings might be brought as a result of your evidence yesterday and today and to any legal representative or representatives you may care to engage to look after your interest in respect of any charge or charges."

15 Before concluding the examination, the examiner clarified the direction by stating that neither officers of the Commonwealth Director of Public Prosecutions nor police officers associated with the prosecution of the offences with which the plaintiff had been charged at the time of the examination were entitled by the direction to receive a copy of the evidence given by the plaintiff at the examination.

Origin of the ACC

16 The determination of the questions referred depends in part on an understanding of the predecessor legislation to the ACC Act: the *National Crime Authority Act* 1984 (Cth) ("the NCA Act"). In late 1983, in the Second Reading Speech for the Bill which became the NCA Act, the Attorney-General of the Commonwealth explained that reports by a series of Royal Commissions concerning organised crime and corruption led the federal Government to establish a standing authority – the National Crime Authority ("the NCA") – to deal with serious and organised crime[20]. The NCA was to have coercive investigative powers, including a power of compulsory examination, for the purposes of co-ordinating national investigation of serious and organised crime, and so as to supplement ordinary police methods of investigation, which do not include such powers.

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19 *Australian Crime Commission Act* 2002 (Cth), s 30(6).

20 Australia, Senate, *Parliamentary Debates* (Hansard), 10 November 1983 at 2492.

The NCA Act

17 The NCA Act provided for compulsory examination and production of documents and things[21], but subject to an examinee having a written immunity, in the form of an undertaking in writing from a person in authority[22] that "any information, document or thing obtained as a direct or indirect consequence" of any answer given (or document or thing produced) "will not be used in evidence in any proceedings against [the examinee] for an offence"[23]. A prohibition on indirect use, usually called a "derivative use immunity", is a concept which arose out of American jurisprudence dealing with the language of the Fifth Amendment to the United States Constitution[24]. Further, s 30(10) of the NCA Act provided that a person could claim the privilege against self-incrimination when charged with an offence, if the offence was one in respect of which the answer to a question or the production of a document or thing might tend to incriminate the person, and if the offence had not been finally dealt with by a court or otherwise disposed of, in which case the person was excused from answering the question or producing the document or thing.

18 These sections were among the provisions which, by the *National Crime Authority Legislation Amendment Act* 2001 (Cth), were repealed and replaced by the current provisions. The changes were explained in the relevant Explanatory Memorandum[25]:

> "Proposed subsection 30(5) will mean that, in the circumstances set out in proposed subsection 30(4), the answer, document or thing, cannot be used as evidence against the person, except in limited circumstances. However, contrary to the current position, any evidence that is derived from that answer, document or thing may be used against the person. The Authority is unique in nature and has a critical role in the fight against serious and organised crime. This means that the public interest in the Authority having full and effective investigatory powers, and to enable, in any

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21 *National Crime Authority Act* 1984 (Cth), s 30(2).

22 For example, the Commonwealth Director of Public Prosecutions in the case of a Commonwealth offence.

23 *National Crime Authority Act* 1984 (Cth), ss 30(4), 30(5) and 30(7).

24 *Sorby v The Commonwealth* ("*Sorby*") (1983) 152 CLR 281 at 292-294 per Gibbs CJ; [1983] HCA 10; see also *R v S (RJ)* [1995] 1 SCR 451 at 458.

25 Australia, Senate, National Crime Authority Legislation Amendment Bill 2000, Explanatory Memorandum at 8.

subsequent court proceedings, the use against the person of incriminating material derived from the evidence given to the Authority, outweigh the merits of affording full protection to self-incriminatory material. The proposed provision is comparable to section 68 of the *Australian Securities and Investments Commission Act 1989*."[26]

19 These matters were repeated in the Second Reading Speech[27]:

"The bill will ... allow an investigatory body to derive evidence from self-incriminatory evidence given by a person at a hearing, and for a prosecuting authority to use that derived evidence against the person at a later trial.

In other words, a person's self-incriminatory admissions will not themselves be able to be used as evidence against that person, but will be able to be used to find other evidence that verifies those admissions or is otherwise relevant to proceedings.

However, the bill will specifically provide that once a witness has claimed that the answer to a question might tend to incriminate him or her, then any evidence that the person gives cannot be used against the person in any later trial.

The existing mechanism for a special undertaking by the DPP will not be required as this protection will be clearly set out in the legislation."

20 By virtue of the *Australian Crime Commission Establishment Act* 2002 (Cth), the ACC replaced the NCA and the NCA Act became the ACC Act.

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26 It can be noted that an immunity from derivative use of self-incriminating evidence in what is now the *Australian Securities and Investments Commission Act* 1989 (Cth) ("the ASIC Act") was abolished in 1992 after complaints by the Australian Securities Commission (now the Australian Securities and Investments Commission) that such an immunity made it difficult to prosecute examinees in subsequent criminal or penalty proceedings. See the ASIC Act, ss 68(3) and 76(1)(a). See also the Joint Submission of the Australian Securities Commission and The Commonwealth Director of Public Prosecutions for Amendment of s 68, ASC Law and s 597, Corporations Law to the Joint Committee on Corporations and Securities, 13 August 1991, referred to in Longo, "The Powers of Investigation of the Australian Securities Commission", (1992) 10 *Company and Securities Law Journal* 237 at 241-242.

27 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 24 September 2001 at 31304.

Submissions

21 The plaintiff proceeded on the basis that, as recognised in *Australian Crime Commission v Stoddart*[28], the common law privilege against self-incrimination has not been preserved in the ACC Act, but submitted that the powers of compulsory examination under the ACC Act are not exercisable after a charge has been laid, and that the privilege was preserved in this limited way. The plaintiff contended that the examination provisions did not clearly abrogate the privilege in respect of examination after charge, and relied on the settled principle that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or necessary implication to that effect[29]. It was contended that decisions of intermediate appellate courts to the contrary were wrong[30]. At a more fundamental level, the plaintiff's case was that the examination powers should be given a restricted meaning because their exercise after charge would otherwise constitute legislative authorisation of executive interference with pending criminal proceedings[31], and in particular an interference with due process entrenched by Ch III (including s 80) of the Constitution. As used by the plaintiff, "due process" encapsulated those rights of an accused, including the right to silence, designed to require the prosecution to prove its case without the

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28 (2011) 244 CLR 554 at 563 [8] per French CJ and Gummow J, 620 [173] per Crennan, Kiefel and Bell JJ; [2011] HCA 47.

29 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2002] HCA 49, citing *Potter v Minahan* (1908) 7 CLR 277 at 304 per O'Connor J; [1908] HCA 63; *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ, 446 per Deane and Dawson JJ; [1994] HCA 15. See also *Mortimer v Brown* (1970) 122 CLR 493 at 495, 498-499; [1970] HCA 4; *Sorby* (1983) 152 CLR 281 at 294-295, 309; *Hamilton v Oades* (1989) 166 CLR 486 at 495; [1989] HCA 21; *Environment Protection Authority v Caltex Refining Co Pty Ltd* ("*EPA*") (1993) 178 CLR 477 at 517, 533-534; [1993] HCA 74.

30 *Australian Crime Commission v OK* (2010) 185 FCR 258; *R v CB* [2011] NSWCCA 264. See also *R v Seller* [2013] NSWCCA 42.

31 "Proceedings" for the purposes of contempt of court includes pending proceedings because proceedings "must be given a sufficiently broad meaning in criminal cases to cover a person who has been arrested and charged", as to which see *Sorby* (1983) 152 CLR 281 at 306 per Mason, Wilson and Dawson JJ, citing *James v Robinson* (1963) 109 CLR 593 at 606; [1963] HCA 32 and *R v Daily Mirror; Ex parte Smith* [1927] 1 KB 845 at 851.

assistance of the accused. In the event that the examination provisions, on their proper construction, did authorise examination after charge, that was said to involve an invalid attempt to confer the judicial power of the Commonwealth on the examiner. On that basis, the plaintiff submitted that question 1 should be answered "No", in which case it would be unnecessary to answer question 2. Alternatively, if question 2 is reached, it should be answered "Yes".

22 The defendants submitted that the powers conferred by the examination provisions are not exhausted on the laying of charges. Further, there was no general principle that a person cannot be asked questions relating to a pending criminal charge. In submitting that question 1 should be answered "Yes", the defendants stated that the examination provisions do not authorise the dissemination of information obtained during the plaintiff's examination if that dissemination would create a real risk of interference with the administration of criminal justice. It was contended, therefore, that no question arises of the consistency of the examination provisions with Ch III (including s 80) of the Constitution. The defendants submitted that the answer to question 1 should be "Yes" and, if it be necessary to answer question 2, the answer should be "No".

23 The submissions in relation to statutory construction were informed by the Ch III submissions, and vice versa.

Construction

24 The rule of construction mentioned above, that statutory provisions are not to be construed as abrogating important common law rights and immunities in the absence of clear words or necessary implication to that effect, applies to the examination provisions, involving as they do an abrogation of the privilege against self-incrimination. The rule is based, in part, on "a working assumption about the legislature's respect for the law"[32], which in this case is evidenced in provisions protecting from prejudice the fair trial of an examined person who has been charged with an offence.

25 Beginning with the text of the ACC Act[33], the examination provisions contemplate the exercise of the examination powers after a charge has been laid. There is no relevant limitation on who may be summoned under s 28, and no explicit preservation of the privilege against self-incrimination, once charges are laid, comparable to the preservation which existed under s 30(10) of the NCA

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32 Gleeson, "Legality – Spirit and Principle", Second Magna Carta Lecture, New South Wales Parliament House, 20 November 2003.

33 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47] per Hayne, Heydon, Crennan and Kiefel JJ; [2009] HCA 41.

Act. The grant of an immunity from direct use by the prosecution in evidence against a person in a trial is another indication that an examination may occur, or continue, after a charge has been laid. That is because the immunity renders the consequences of answering questions the same whether a criminal charge has been laid or not.

26 More importantly, where a person examined has a trial pending, statutory directions regarding the disclosure and manner of use of any self-incriminating evidence and information obtained in the examination must be given so as to safeguard the person's fair trial. Section 25A(9) expressly provides that an examiner must direct that evidence and information obtained in an examination must not be published, or must not be published except in such manner and to such persons as the examiner specifies, if the failure to give such a direction "*might … prejudice the fair trial of a person who has been*, or may be, *charged with an offence*" (emphasis added). The CEO is empowered to vary or revoke such a direction in writing[34], but he or she must not do so if that "*might … prejudice the fair trial of a person who has been* or may be *charged with an offence*"[35] (emphasis added). Publication of evidence or information in contravention of such a direction, or presence at an examination in contravention of a direction as to the persons who may be present during the examination[36], is an offence[37]. A specific, protective direction under s 25A(9), the breach of which is subject to a penalty, overrides the general obligations imposed on the ACC, the CEO or the Board of the ACC by ss 12 and 59 of the ACC Act, described above, to assemble evidence and disseminate and furnish information or reports to nominated persons, bodies or agencies[38]. The same would also apply to the general power given to the ACC to make use of particular information and intelligence in the performance of any of its functions[39].

27 Not only do those safeguards clearly and unambiguously apply in relation to a pending (or a potential) trial, the plaintiff did not point to any provision in

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34 *Australian Crime Commission Act* 2002 (Cth), s 25A(10).

35 *Australian Crime Commission Act* 2002 (Cth), s 25A(11).

36 *Australian Crime Commission Act* 2002 (Cth), s 25A(5).

37 *Australian Crime Commission Act* 2002 (Cth), s 25A(14).

38 Now see *Australian Crime Commission Act* 2002 (Cth), s 12(2), which was inserted by the *Crimes Legislation Amendment (Powers and Offences) Act* 2012 (Cth).

39 *Australian Crime Commission Act* 2002 (Cth), s 12(6).

the ACC Act explicitly constraining the ability of a court to ensure a pending trial would be conducted according to law. Furthermore, nothing in the history of the examination provisions, including the matters referred to in the extrinsic materials, throws any doubt on the conclusion, based on the text and purpose of the provisions, that the examination powers may be exercised after charges have been laid.

28 Turning to the privilege against self-incrimination more generally, although this privilege has been described as "deep rooted"[40] in the common law, over the years it has not lacked critics[41] as "an unnecessary impediment to the detection and conviction of criminal offenders and as an obstacle to the judicial ascertainment of the truth"[42]. Legislatures have, in different settings, abrogated or modified the privilege when public interest considerations have been elevated over, or balanced against, the interests of the individual so as to enable true facts to be ascertained[43]. Longstanding examples such as the compulsory public examination of a bankrupt[44], or of a company officer (when fraud is suspected)[45], serve a public interest in disclosure of the facts on behalf of creditors and shareholders which overcomes some of the common law's traditional consideration for the individual[46]. Because disclosures of a bankrupt on a

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40 *Lam Chi-Ming v The Queen* [1991] 2 AC 212 at 222.

41 Bentham, *Introductory View of the Rationale of Evidence*, (1827), reproduced in Bowring (ed), *The Works of Jeremy Bentham*, (1843), vol 6 at 106-109; *Istel Ltd v Tully* [1993] AC 45 at 53 per Lord Templeman; *De Luna v United States* 308 F 2d 140 at 144-146 (1962) per Judge Wisdom; *Palko v Connecticut* 302 US 319 at 325-326 (1937) per Cardozo J; Wigmore, "Nemo Tenetur Seipsum Prodere", (1891) 5 *Harvard Law Review* 71 at 85. See generally, *United States v Garsson* 291 F 646 at 649 (1923) per Judge Learned Hand.

42 *EPA* (1993) 178 CLR 477 at 533 per Deane, Dawson and Gaudron JJ.

43 *EPA* (1993) 178 CLR 477 at 503 per Mason CJ and Toohey J; *Phillips v News Group Newspapers Ltd* [2013] 1 AC 1 at 68 [14] per Lord Walker of Gestingthorpe JSC.

44 Which can be traced back to Statute 5 Geo II c 30, s 16. See also Heydon, "Statutory Restrictions on the Privilege Against Self-Incrimination", (1971) 87 *Law Quarterly Review* 214.

45 *Mortimer v Brown* (1970) 122 CLR 493. See also *Companies Act* 1958 (Vic), ss 146(5) and 146(6).

46 *Rees v Kratzmann* (1965) 114 CLR 63 at 80 per Windeyer J; [1965] HCA 49.

compulsory examination can be used against him or her in other proceedings[47], a judge before whom such an examination is held will need to ensure the examiner does not cause "oppression, injustice, or ... needless injury to the individual"[48], and to disallow questions which would constitute an abuse of process[49]. In balancing public interest considerations and the interests of the individual, legislation abrogating the privilege will often contain, as in the case of the ACC Act, "compensatory protection to the witness"[50], by providing that, subject to limited exceptions, compelled answers shall not be admissible in civil or criminal proceedings.

29 The functions of the ACC, which include the investigation of serious and organised crime, serve a public interest which is apparent from the ACC Act. An examination cannot be held for a purpose other than the purpose of investigating serious and organised crime[51], which remains the same whether a criminal charge has been laid or not. It is consistent with the purpose of the compulsory examination powers, which aid the functions of the ACC, that those powers are not exhausted upon the laying of a charge against an individual[52]. The ACC Act reflects a legislative judgment that the functions of the ACC would be impeded if the laying of a charge against one member of a group by a prosecutor prevented continuing investigation of the group's activities by way of examination of that member by the ACC.

30 To summarise, the public interest in the continuing investigation of serious and organised crime is elevated over the private interest in claiming the privilege against self-incrimination. However, whilst a person examined under the ACC Act is compelled to give an answer, or produce a document or thing, which might otherwise be withheld because of the privilege against self-incrimination, the interest in that person being tried openly and fairly is protected both by the prohibition on direct use of answers given, or documents or things produced, and by the provisions safeguarding the fair trial of that person.

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47 *R v Scott* (1856) Dears & B 47 at 64 per Coleridge J [169 ER 909 at 916].

48 *Rees v Kratzmann* (1965) 114 CLR 63 at 66 per Barwick CJ; see also *Hamilton v Oades* (1989) 166 CLR 486 at 495 per Mason CJ.

49 *Hamilton v Oades* (1989) 166 CLR 486 at 498 per Mason CJ.

50 *Sorby* (1983) 152 CLR 281 at 295 per Gibbs CJ, 310-311 per Mason, Wilson and Dawson JJ.

51 *Australian Crime Commission Act* 2002 (Cth), ss 24A, 25A(6), 28(1) and 28(7).

52 See *EPA* (1993) 178 CLR 477 at 516-517 fn 62 per Brennan J.

Plaintiff's reliance on Hammond

31 The plaintiff relied on *Hammond v The Commonwealth*[53] in urging the Court to give the examination provisions a restrictive construction, notwithstanding their natural or ordinary meaning, in order to protect the "right to silence" of an accused person in respect of pending criminal proceedings.

32 In *Hammond*, in circumstances of some urgency, this Court restrained a Royal Commissioner[54] from compelling an accused person to answer questions which would tend to incriminate him in relation to an alleged conspiracy upon which he had been committed for trial. Whilst the questioning was to have been undertaken in private and the accused person had the benefit of provisions granting him a direct use immunity[55], it appears that the presence at the examination of the police officers who had investigated the matters upon which the accused person was to be examined was to be permitted. Furthermore, the record of argument shows that the transcript of the examination was to be made available by the Royal Commission to the prosecution. On the assumption that the privilege against self-incrimination had been abrogated by statute, it was stated by Gibbs CJ (with whom Mason and Murphy JJ agreed)[56]:

> "Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence."

His Honour went on to observe that continuing questioning in the circumstances described "would, generally speaking, amount to a contempt of court"[57]. In

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53 ("*Hammond*") (1982) 152 CLR 188; [1982] HCA 42.

54 Acting under two Commissions, one issued by the Governor-General of the Commonwealth, and the other by the Governor of the State of Victoria.

55 See *Royal Commissions Act* 1902 (Cth), s 6DD; *Evidence Act* 1958 (Vic), s 30.

56 (1982) 152 CLR 188 at 198.

57 (1982) 152 CLR 188 at 198.

agreeing that an injunction should be granted as proposed by the Chief Justice, Brennan J said that a person committed to stand trial on a criminal charge "is not amenable to compulsory interrogation designed to obtain from him information as to the issues to be litigated at his trial: nemo tenetur seipsum prodere"[58]. It can be noted that the Latin maxim nemo tenetur seipsum prodere/accusare, "no one is obliged to produce [evidence against]/accuse himself" (part of a longer canon law rule), said to express the privilege against self-incrimination, came to be recognised both in common law courts and in Chancery from the seventeenth century onwards[59].

33 Whilst Deane J noted that the mere fact that there are pending proceedings does not mean that "any parallel or related administrative inquiry, conducted for proper administrative purposes, constitutes an interference with the due administration of justice in that court"[60], his Honour then said[61]:

> "On the other hand, it is fundamental to the administration of criminal justice that a person who is the subject of pending criminal proceedings in a court of law should not be subjected to having his part in the matters involved in those criminal proceedings made the subject of a parallel inquisitorial inquiry by an administrative tribunal with powers to compel the giving of evidence and the production of documents which largely correspond [to] (and, to some extent, exceed) the powers of the criminal court. Such an extra-curial inquisitorial investigation of the involvement of a person who has been committed for trial in the matters which form the basis of the criminal proceedings against him constitutes, in my view, an improper interference with the due administration of justice in the proceedings against him in the criminal court and contempt of court."

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58 (1982) 152 CLR 188 at 202.

59 *EPA* (1993) 178 CLR 477 at 526 per Deane, Dawson and Gaudron JJ; Blackstone, *Commentaries on the Laws of England*, (1769), bk 4 at 296; Tollefson, *The Privilege Against Self-Incrimination in England and Canada*, (1975) at 32-33. See also *Azzopardi v The Queen* (2001) 205 CLR 50 at 93-96 [125]-[135]; [2001] HCA 25; *Wigmore on Evidence*, McNaughton rev (1961), vol 8 at 268-269; Levy, *Origins of the Fifth Amendment: The Right against Self-Incrimination*, (1968) at 312-313.

60 (1982) 152 CLR 188 at 206.

61 (1982) 152 CLR 188 at 206.

34 On the basis that, on their proper construction, the examination provisions permit examination of a person after a charge has been laid, on the subject matter of the charge, the plaintiff relied on *Hammond* to support a proposition that such examination would cause a real risk of interference with the fair trial of an accused unless specific steps were taken to protect that accused's "right to silence" at trial, which was said to encompass a right to give or not to give evidence, and to reserve defences. The direct use immunity under ss 30(4) and 30(5) was said to be insufficient for those purposes, as in *Hammond*. The steps identified as necessary to protect the right to silence (in addition to the direct use immunity) included steps to prevent the prosecution from obtaining an unfair forensic advantage in the trial over and above what the prosecution would be accorded under normal trial procedure. This was said to require, among other things, directions under s 25A of the ACC Act, including directions ensuring that the prosecution made no derivative use of the evidence in the trial.

35 In response to the plaintiff's submission based on *Hammond*, the defendants accepted that the Commonwealth Parliament cannot require or authorise a court in which the judicial power of the Commonwealth is vested to exercise judicial power in a manner inconsistent with the essential character of a court or with the nature of judicial power[62]. The defendants also submitted that the examination provisions are constrained by the law of contempt. Thus the defendants avoided the plaintiff's argument, based on the separation of powers in Ch III, that the examination provisions are invalid as a legislative authorisation of executive interference with the curial process of a criminal trial. In so contending, the defendants relied on Mason J's explanation in *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission*[63] of a section conferring compulsory examination powers on the Trade Practices Commission[64]:

> "It is possible to read the section as conferring power on the Commission to act in accordance with its terms, but subject to the law of contempt, so that action taken under the section is subject to the exercise by the Federal Court of its contempt powers."

36 It is critical to appreciate that the injunctive relief in *Hammond* was granted in circumstances where criminal proceedings were pending and the prosecution was to have access to evidence and information compulsorily

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

63 (1982) 152 CLR 460; [1982] HCA 65.

64 (1982) 152 CLR 460 at 473. Cf *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 185 per Fullagar J; [1954] HCA 31.

obtained which could establish guilt of the offences, and which was subject only to a direct use immunity. By way of contrast, while the examination provisions contain no express statutory prohibition on derivative use of material obtained during an examination, s 25A empowers and requires the examiner to make directions safeguarding the fair trial of a person compulsorily examined. That protection is in addition to the protection in ss 30(4) and 30(5), being the prohibition against direct use. The practical operation of ss 25A(3), 25A(9) and 25A(11) is best understood by reference to certain common law rules and principles in relation to a fair trial, to which it is now necessary to turn.

Fair trial

37 Relevant authorities have given context to the concept and importance of the right of every accused person to a fair and impartial trial according to law[65]. Although Deane J pointed out in *Jago*[66] that an accused's right to a fair trial is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial, for no person can enforce a right to be tried by the state, "it is convenient, and not unduly misleading, to refer to an accused's positive right to a fair trial"[67].

38 An accused's right to a fair trial is commonly "manifested in rules of law and of practice designed to regulate the course of the trial"[68], but the right extends to the whole course of the criminal process[69]. The courts have long had inherent powers to ensure that court processes are not abused. Such powers exist to enable courts to ensure that their processes are not used in a manner giving rise

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65 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 541-542 per Isaacs J; [1923] HCA 39; *Barton v The Queen* (1980) 147 CLR 75 at 95-96 per Gibbs ACJ and Mason J, 103 per Stephen J, 107 per Murphy J, 109 per Aickin J, 109 per Wilson J; [1980] HCA 48; *Jago v District Court (NSW)* ("*Jago*") (1989) 168 CLR 23 at 25-31 per Mason CJ, 47-49 per Brennan J, 56-57 per Deane J, 71-72 per Toohey J, 75-76 per Gaudron J; [1989] HCA 46; *Dietrich v The Queen* (1992) 177 CLR 292 at 298-300 per Mason CJ and McHugh J, 324 per Brennan J, 326-328 per Deane J, 353-357 per Toohey J; [1992] HCA 57.

66 (1989) 168 CLR 23 at 56-57.

67 *Dietrich v The Queen* (1992) 177 CLR 292 at 299 per Mason CJ and McHugh J.

68 *Jago* (1989) 168 CLR 23 at 29 per Mason CJ, citing *Bunning v Cross* (1978) 141 CLR 54; [1978] HCA 22 and *R v Sang* [1980] AC 402; *Dietrich v The Queen* (1992) 177 CLR 292 at 299-300 per Mason CJ and McHugh J.

69 *Jago* (1989) 168 CLR 23 at 29 per Mason CJ.

to injustice, thereby safeguarding the administration of justice[70]. The power to prevent an abuse of process is an incident of the general power to ensure fairness[71]. A court's equally ancient institutional power to punish for contempt, an attribute of judicial power provided for in Ch III of the Constitution[72], also enables it to control and supervise proceedings to prevent injustice, and includes a power to take appropriate action in respect of a contempt, or a threatened contempt, in relation to a fair trial, as exemplified in *Hammond*.

Right to silence

39 In Australia, "the right to silence" is not "a constitutional or legal principle of immutable content"[73], which highlights the need to identify the nature and effect of the precise immunity upon which the plaintiff relies[74]. Nor is the closely related, but not coextensive, common law privilege against self-incrimination a right protected by the Constitution[75].

40 It may be that the expression "the right to silence" is often used to express compendiously the rejection by the common law of inquisitorial procedures

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70 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 265-266 [10]-[12] per Gleeson CJ, Gummow, Hayne and Crennan JJ; [2006] HCA 27, citing *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210 at 220-221; *Dupas v The Queen* (2010) 241 CLR 237 at 243 [14]-[15]; [2010] HCA 20.

71 *Jago* (1989) 168 CLR 23 at 31 per Mason CJ; see also at 46-47 per Brennan J, 56-57 per Deane J, 71 per Toohey J, 74-75 per Gaudron J; *Dietrich v The Queen* (1992) 177 CLR 292 at 332 per Deane J. See also *Barton v The Queen* (1980) 147 CLR 75 at 96 per Gibbs ACJ and Mason J, 103, 104-105 per Stephen J, 107 per Murphy J, 109 per Aickin J, 109, 111, 115-117 per Wilson J.

72 *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 395 [16] per Gleeson CJ and Gummow J, 429 [113] per Hayne J; [1999] HCA 57; *Dupas v The Queen* (2010) 241 CLR 237 at 243 [15].

73 *Azzopardi v The Queen* (2001) 205 CLR 50 at 57 [7] per Gleeson CJ.

74 *Carr v Western Australia* (2007) 232 CLR 138 at 152 [36] per Gummow, Heydon and Crennan JJ; [2007] HCA 47.

75 *Sorby* (1983) 152 CLR 281 at 298 per Gibbs CJ, 308-309 per Mason, Wilson and Dawson JJ; *Huddart, Parker & Co Pty Ltd v Moorehead* ("*Huddart, Parker*") (1909) 8 CLR 330 at 358 per Griffith CJ, 366 per Barton J, 375 per O'Connor J, 386 per Isaacs J, 418 per Higgins J; [1909] HCA 36. Cf *Sorby* (1983) 152 CLR 281 at 313 per Murphy J; *Hammond* (1982) 152 CLR 188 at 201 per Murphy J.

made familiar by the Courts of Star Chamber and High Commission[76]. Be that as it may, "the right to silence" has been described by Lord Mustill in *R v Director of Serious Fraud Office; Ex parte Smith*[77] as referring to "a disparate group of immunities, which differ in nature, origin, incidence and importance"[78]. Given the diversity of the immunities, and the policies underlying them, Lord Mustill remarked that it is not enough to ask simply of any statute whether Parliament can have intended to abolish the longstanding right to silence. The essential starting point is to identify which particular immunity or right covered by the expression is being invoked in the relevant provisions before considering whether there are reasons why the right in question ought at all costs to be maintained[79].

41 Two immunities or rights encompassed by the expression "the right to silence", which operate in different ways in the criminal justice system, were referred to in the plaintiff's submissions. The first was the immunity of a person suspected of a crime from being compelled on pain of punishment to answer questions put by the police or other persons in authority[80], which is no wider than the privilege against self-incrimination[81].

42 The second, upon which the plaintiff's submissions critically depended, was the specific immunity of an accused person at trial from being compelled to give evidence or to answer questions, which reflects not only the privilege against self-incrimination, but also the broader consideration that a criminal trial

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76 *EPA* (1993) 178 CLR 477 at 526 per Deane, Dawson and Gaudron JJ; *Rees v Kratzmann* (1965) 114 CLR 63 at 80 per Windeyer J. See also *Sorby* (1983) 152 CLR 281 at 317 per Brennan J; *Azzopardi v The Queen* (2001) 205 CLR 50 at 91 [119] per McHugh J.

77 [1993] AC 1.

78 [1993] AC 1 at 30.

79 [1993] AC 1 at 32.

80 *Petty v The Queen* (1991) 173 CLR 95 at 99 per Mason CJ, Deane, Toohey and McHugh JJ; [1991] HCA 34.

81 *R v Swaffield* (1998) 192 CLR 159 at 184-185 [33] per Brennan CJ; [1998] HCA 1; *Carr v Western Australia* (2007) 232 CLR 138 at 152 [37] per Gummow, Heydon and Crennan JJ.

is "an accusatorial process in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt"[82].

43 By reference to those two immunities, the balance between competing public and private interests is struck in the examination provisions by an abrogation, to an extent, of the first immunity, while simultaneously preserving the second immunity, to the extent of ensuring the fair trial of the person examined.

44 The recognition of the privilege against self-incrimination in relation to exposure to criminal liability is said to have been well-established by the second half of the seventeenth century[83]. The privilege was certainly treated as long-established at the time of procedural reforms in the nineteenth century which partly shaped the accusatorial process of the criminal trial[84].

45 Pre-trial examination of an accused by magistrates was still part of criminal procedure in England until the early decades of the nineteenth century[85]. In 1848, the investigative and judicial functions of the state were separated and the role of examining justices was altered[86]. Examining magistrates (and later investigating police officers of the professional police force[87]) were required by statute to caution a suspect about the right to remain silent[88]. In the late

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82 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22] per Gaudron ACJ, Gummow, Kirby and Hayne JJ; [2000] HCA 3; *Azzopardi v The Queen* (2001) 205 CLR 50 at 64 [34], 65 [38], 74 [64] per Gaudron, Gummow, Kirby and Hayne JJ.

83 *EPA* (1993) 178 CLR 477 at 497-498 per Mason CJ and Toohey J.

84 *R v Scott* (1856) Dears & B 47 at 61 [169 ER 909 at 915], cited by Brennan J in *Sorby* (1983) 152 CLR 281 at 316; *Orme v Crockford* (1824) 13 Price 376 [147 ER 1022], cited by Lord Esher MR in *Martin v Treacher* (1886) 16 QBD 507 at 511.

85 *Criminal Law Act* 1826 (UK), ss 2 and 3, extended the power of compelling pre-trial examination by justices to include misdemeanours as well as felonies. See also *Sorby* (1983) 152 CLR 281 at 319 per Brennan J.

86 *Indictable Offences Act* 1848 (UK). See also *Sorby* (1983) 152 CLR 281 at 319 per Brennan J.

87 Instituted in London by the *Metropolitan Police Act* 1829 (UK), followed thereafter by provincial police forces.

88 *Indictable Offences Act* 1848 (UK), s 18. For an example of a current cognate provision see the *Crimes Act* 1914 (Cth), s 23F.

nineteenth century and early twentieth century, concern about the admissibility of evidence resulting from police interrogation led to the issue of the Judges' Rules governing a suspect's right to silence[89]. In 1898 the abolition of the rule that an accused was not a competent witness in his own trial was accompanied by an express removal of the privilege against self-incrimination if the accused chose to give evidence[90]. There was a related provision precluding the prosecution from commenting upon a competent accused's exercise at trial of the right to remain silent[91]. Different considerations shaped the development of the privilege against self-incrimination in Chancery courts, in which an examinee (always a compellable witness) who incriminated himself would be exposed to a civil penalty or forfeiture of an estate[92].

46 The abovementioned developments, adopted in Australia[93], show the interweaving of interrelated rights and immunities into the criminal law, which shaped the accusatorial process of the criminal trial both by way of procedure and in substance[94]. In *EPA*, consideration was given to the accusatorial nature of a criminal trial and the interrelationship between an accused's right not to give evidence or answer incriminating questions on the one hand, and on the other, the fundamental principle stated in *Woolmington v Director of Public*

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89 *Practice Note (Judges' Rules)* [1964] 1 WLR 152; see also *R v Voisin* [1918] 1 KB 531 at 539 and *Carr v Western Australia* (2007) 232 CLR 138.

90 *Criminal Evidence Act* 1898 (UK), s 1(e).

91 *Criminal Evidence Act* 1898 (UK), s 1(b).

92 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 559 [31] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, citing *Naismith v McGovern* (1953) 90 CLR 336 at 341-342 per Williams, Webb, Kitto and Taylor JJ; [1953] HCA 59; *Rees v Kratzmann* (1965) 114 CLR 63 at 80 per Windeyer J.

93 *RPS v The Queen* (2000) 199 CLR 620 at 629-630 [20] per Gaudron ACJ, Gummow, Kirby and Hayne JJ, 655-656 [107]-[111] per Callinan J; *Azzopardi v The Queen* (2001) 205 CLR 50 at 70-71 [53]-[56] per Gaudron, Gummow, Kirby and Hayne JJ, 116-119 [189]-[195] per Callinan J; *Carr v Western Australia* (2007) 232 CLR 138 at 147 [18] per Gleeson CJ.

94 *EPA* (1993) 178 CLR 477 at 527 per Deane, Dawson and Gaudron JJ.

Prosecutions[95]: "that the prosecution must prove the guilt of the prisoner is part of the common law ... and no attempt to whittle it down can be entertained"[96].

47 Whilst in dissent on the main point, but not on this issue, Deane, Dawson and Gaudron JJ explained the interrelationship between the rules that an accused is not obliged to "testify or admit guilt"[97] or "to give evidence in defence of his or her plea of not guilty"[98], and the fundamental principle that the onus rests on the prosecution:

> "[A]n accused person (who is a competent witness only as a matter of fairly recent history) has the right to refrain from giving evidence and to avoid answering incriminating questions.
>
> The latter right is by no means wholly explained by reference to the maxim nemo tenetur seipsum prodere. Rather it is to be explained by the principle, fundamental in our criminal law, that the onus of proving a criminal offence lies upon the prosecution and that in discharging that onus it cannot compel the accused to assist it in any way."[99]

48 As has been stated in the context of abrogation of the privilege, the plaintiff's argument that an accused's rights to due process (including the right to refrain from giving evidence at trial) are entrenched by Ch III was too broadly stated. For example, the choice of the standard or burden of proof, at least in relation to specific issues, can be regulated by Parliament[100], and the rules of

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95 [1935] AC 462.

96 [1935] AC 462 at 481-482 per Viscount Sankey LC. See also *R v Swaffield* (1998) 192 CLR 159 at 170 [12] per Brennan CJ, quoting a reported address to the jury by Devlin J in *R v Adams*:

> "So great is our horror at the idea that a man might be questioned, forced to speak and perhaps to condemn himself out of his own mouth ... that we afford to everyone suspected or accused of a crime, at every stage, and to the very end, the right to say: 'Ask me no questions, I shall answer none. Prove your case.'"

97 *EPA* (1993) 178 CLR 477 at 501 per Mason CJ and Toohey J.

98 *EPA* (1993) 178 CLR 477 at 550 per McHugh J.

99 *EPA* (1993) 178 CLR 477 at 527.

100 See *Thomas v Mowbray* (2007) 233 CLR 307 at 356 [113] per Gummow and Crennan JJ; [2007] HCA 33; *Nicholas v The Queen* (1998) 193 CLR 173 at 190

(Footnote continues on next page)

evidence may be regulated, provided, as Hayne J remarked in *Nicholas v The Queen*, that any law effecting such a change does not "deal directly with ultimate issues of guilt or innocence"[101]. This Court has also rejected arguments that an alteration by Parliament of a substantive right usurps the judicial power of the Commonwealth[102]. Furthermore, legislatures commonly require pre-trial disclosure from an accused person, as exemplified by provisions in the *Criminal Procedure Act* 1986 (NSW)[103] requiring the giving of an alibi notice[104], the disclosure of expert reports relied on to support a defence of "substantial mental impairment"[105] and other disclosures relating to the case management of a criminal trial[106].

49 In *Hamilton v Oades*[107], a majority of this Court construed certain provisions of the *Companies (New South Wales) Code* relating to a liquidator's power to examine company officers while charges were pending as effectively

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[24] per Brennan CJ, 203 [55] per Toohey J, 225 [123] per McHugh J, 234-236 [152]-[156] per Gummow J; [1998] HCA 9; *Milicevic v Campbell* (1975) 132 CLR 307 at 316-317 per Gibbs J, 318-319 per Mason J, 321 per Jacobs J; [1975] HCA 20.

101 (1998) 193 CLR 173 at 277 [249].

102 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Australian Building Construction Employees' and Builders Labourers' Federation v The Commonwealth* (1986) 161 CLR 88 at 96; [1986] HCA 47.

103 Picked up by *Judiciary Act* 1903 (Cth), s 68.

104 *Criminal Procedure Act* 1986 (NSW), s 150. See also *Criminal Procedure Act* 2009 (Vic), s 190; *Criminal Law Consolidation Act* 1935 (SA), s 285C; *Criminal Code* (Q), s 590A; *Criminal Procedure Act* 2004 (WA), s 96(3)(a); *Criminal Code* (Tas), s 368A.

105 *Criminal Procedure Act* 1986 (NSW), s 151. See generally *Criminal Procedure Act* 2009 (Vic), s 189; *Criminal Law Consolidation Act* 1935 (SA), s 285BC; *Criminal Code* (Q), s 590B; *Criminal Procedure Act* 2004 (WA), s 96(3)(b).

106 *Criminal Procedure Act* 1986 (NSW), ss 141-147. See also *Criminal Procedure Act* 2009 (Vic), ss 183 and 184; *Criminal Law Consolidation Act* 1935 (SA), ss 285BA and 285BB; *Criminal Code* (Q), s 590C; *Criminal Procedure Act* 2004 (WA), ss 96(3)(c) and 96(3)(d).

107 (1989) 166 CLR 486.

abrogating the privilege against self-incrimination. Compared with the statutory provision considered in *Mortimer v Brown*[108], Mason CJ noted three critical aspects of the statute. First, the provisions expressly abrogated the privilege against self-incrimination by requiring a witness to answer questions after charges had been laid. Secondly, the legislature provided a use immunity. Thirdly, the legislative scheme explicitly empowered a court to give directions concerning the examination. There was no derivative use immunity under that statutory scheme.

50 In observing that "[i]mmunity from derivative use tends to be ineffective by reason of the problem of proving that other evidence is derivative"[109], Mason CJ commented that a direct use immunity achieves a protection equivalent to the privilege against self-incrimination; namely, that an examinee is not convicted "out of his own mouth"[110]. Importantly, however, it was noted that the court could restrain, as an abuse of process, questions directed to compel an examinee to disclose defences or to establish guilt[111], which would, in any given case, necessarily qualify the derivative evidence available to the prosecution. It was also noted that in its inherent jurisdiction the court could make orders, other than orders restoring the privilege, to safeguard an examinee's fair trial[112]. These observations highlight an important difference between a compulsory examination supervised by a court and one conducted by a member of the executive.

51 The examination provisions in the ACC Act work differently from those considered in *Hamilton v Oades*. The examination provisions do not contain a mechanism for limiting the questions asked or the documents or things sought in an examination. Rather, the person examined, and the administration of criminal justice, are protected by ss 25A(3), 25A(9) and 25A(11), and ss 30(4) and 30(5).

Examination provisions and derivative use

52 Section 25A of the ACC Act must be construed harmoniously within the entire scheme of the examination provisions. That scheme contains a statutory

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108 (1970) 122 CLR 493.

109 (1989) 166 CLR 486 at 496.

110 (1989) 166 CLR 486 at 496.

111 (1989) 166 CLR 486 at 498.

112 (1989) 166 CLR 486 at 498-499 per Mason CJ, 510 per Dawson J, 517 per Toohey J.

use immunity, and no express statutory prohibition on derivative use. The derivative use immunity as it existed under the NCA Act was repealed. In *R v Director of Serious Fraud Office; Ex parte Smith*[113], when discussing provisions structured to override the privilege but which left in place a statutory use immunity, Lord Mustill remarked that a statute which compels self-incrimination but which provides a use immunity may in some cases inferentially permit derivative use of the self-incriminating evidence for other purposes. This is an approach to the construction of such provisions which is exemplified by the decision in *Hamilton v Oades*. However, because of the express terms of the above-mentioned protective provisions, a similar inference is precluded under the ACC Act.

53 It is clear that, depending on their purposes, administrative or executive inquiries into offences under some statutory schemes are capable of prejudicing the fair trial of an accused person[114]. Compulsory examination by a member of the executive after a charge has been laid might prejudice the fair trial of the person examined where the prosecution is, as a result, afforded an unfair forensic advantage, being an advantage which would not otherwise be obtainable under ordinary rules of criminal procedure. A direct use immunity is a protection in that respect. However, a use immunity alone does not place an accused person in as good a position as he or she would be if able to rely on the privilege against self-incrimination, because material establishing that a person is guilty of an offence "may place [a person] in real and appreciable danger of conviction, notwithstanding that the answers themselves may not be given in evidence"[115]. An unfair forensic advantage may therefore take the form of the prosecution making use of derivative evidence to obtain a conviction. The clearest example is when the prosecution tenders derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the compulsorily obtained evidence.

54 Given the onus on the prosecution to prove an offence, and the non-compellability of an accused, in the absence of a factor such as the independent sourcing of evidence it is not possible to reconcile a fair trial with reliance on

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113 [1993] AC 1 at 40, followed in *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133.

114 *Clough v Leahy* (1904) 2 CLR 139 at 156, 161 per Griffith CJ; [1904] HCA 38; *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73; [1940] HCA 6; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 53 per Gibbs CJ, 71-73 per Stephen J; [1982] HCA 31.

115 *Sorby* (1983) 152 CLR 281 at 294 per Gibbs CJ; see also *Rank Film Ltd v Video Information Centre* [1982] AC 380 at 443 per Lord Wilberforce.

evidence against a person at trial which derives from compulsorily obtained material establishing that person's guilt, or disclosing defences.

55 Turning to the protective provisions, the content of the "fair trial" referred to in ss 25A(9) and 25A(11) must be informed by the fundamental principle that the onus of proof of the offence rests on the prosecution, whom the accused is not required to assist, and by the rule that an accused is not compellable at his or her trial. Section 25A(9) (and s 25A(11)) can protect a person compulsorily examined against both direct use (also the subject matter of the statutory use immunity under ss 30(4) and 30(5)), *and* indirect use, at trial of material obtained in a compulsory examination, by a direction restricting publication, or the manner of publication, of such material. A direction under s 25A(9) *must* be made *if* the failure to do so "might" prejudice a person's fair trial.

56 Similarly, s 25A(3) enables an examiner to protect the person examined against direct or indirect use of the material obtained, by controlling who may be present at the examination.

57 These safeguards are capable of preventing a compulsory examination from occasioning an unfair burden on the examinee when defending criminal charges. At trial, the onus remains on the prosecution to prove the guilt beyond reasonable doubt of the accused, without the assistance of the accused. The accused may remain silent at the trial, or not, and take whatever course is desired at the close of the prosecution case, without the risk of being confronted with compulsorily obtained evidence, the use of which is subject to statutory prohibition and safeguards. To the extent that the plaintiff will nevertheless be affected by compulsory examination after he has been charged with offences, that consequence is necessarily implied by the terms of the examination provisions, which have already been described.

58 It can be acknowledged that there may be some circumstances in which the fairness of a trial can be reconciled with the admissibility of derivative evidence[116]. Not all derivative evidence is of the same quality[117] and derivative evidence may emerge from multiple independent sources. At the outset of an investigation, it may not be clear what derivative evidence will be critical to proving offences, or from which independent sources such evidence might be obtained. However, to the extent that the prosecution may wish to rely on a piece of derivative evidence which was independently obtained, but which was the

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116 *R v Sang* [1980] AC 402 at 453-454 per Lord Scarman, citing *R v Warickshall* (1783) 1 Leach 263 at 300 [168 ER 234 at 235]. See also *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133 at 167-168 per Ribeiro PJ.

117 *R v Seller* [2013] NSWCCA 42 at [102]-[103] per Bathurst CJ.

subject of a protective direction, the CEO has a power to vary a direction given under s 25A(9), provided that the fair trial of the accused is not thereby prejudiced. In any event, the trial judge has a discretion in relation to the admissibility of such evidence, and the court has a power to control any use of derivative evidence which amounts to an abuse of process[118].

59 If there is some failure to employ the protective provisions such that the prosecution would obtain an unfair forensic advantage, a trial court's inherent power to punish for contempt[119], including a power to restrain a threatened contempt, would be available, as in *Hammond*. A failure by an examiner to give any, or any adequate, direction under s 25A(9), or an error by the CEO in exercising the power to revoke or vary a direction under s 25A(10), would also be remediable by recourse to the constitutional writs issued pursuant to s 75(v) of the Constitution or s 39B(1) of the *Judiciary Act* 1903 (Cth).

60 These considerations show that the examination provisions do not authorise executive interference with the curial process of criminal trials.

61 Whether a direction under s 25A will be sufficient to preclude the prosecution from obtaining an unfair forensic advantage in a trial cannot be stated in any categorical or exhaustive fashion. In considering the sufficiency of any such direction, it would be necessary to consider the nature of the self-incriminating evidence as well as the role of persons who had access to it, together with the use which such persons might make of it. Matters of sufficiency are not to be determined on the stated case. In any event, the plaintiff made no complaint about the sufficiency of the directions which were made in respect of his examination.

Other jurisdictions

62 The problem of reconciling a fair trial with the use, including derivative use, of material obtained during a compulsory examination has been considered by courts in the United Kingdom[120], Canada[121], Hong Kong[122] and Europe[123].

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118 See *R v Seller* [2013] NSWCCA 42 at [110] per Bathurst CJ.

119 *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 395 [16] per Gleeson CJ and Gummow J, 429 [113] per Hayne J.

120 *Brown v Stott* [2003] 1 AC 681.

121 *Thomson Newspapers Ltd v Canada* [1990] 1 SCR 425; *R v S (RJ)* [1995] 1 SCR 451; *British Columbia Securities Commission v Branch* [1995] 2 SCR 3.

122 *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133.

Differing results in those cases reflect the different balances struck under different statutory schemes between some identifiable public interest and the rights of the individual, and also reflect the different constitutional settings in which the statutes fell to be considered.

Chapter III

63 The plaintiff's main submission in relation to Ch III, that the examination provisions are invalid as a legislative authorisation of executive interference with the curial process of criminal trials for Commonwealth indictable offences, has been addressed, and answered, in the reasons above. There were two other submissions concerning Ch III which have not been dealt with so far.

64 The plaintiff's submission that the privilege against self-incrimination is a necessary part of trial by jury under s 80 of the Constitution must be rejected. In *Sorby*[124], members of the Court agreed with a unanimous conclusion reached earlier in *Huddart, Parker*[125], that the privilege against self-incrimination is not a necessary part of trial by jury. A view to the contrary expressed by Murphy J[126], which his Honour advanced earlier in *Hammond*[127], has not commanded any subsequent assent and must be rejected.

65 The plaintiff's further submission, that s 25A(9) empowers an examiner to exercise judicial power, must also be rejected. Executive inquiries into facts, the subject of pending proceedings, do not involve an exercise of judicial power – those conducting such inquiries are unable to make any final determination as to the facts or to apply the law to them. That was the position of the examiner and more broadly of other officers of the ACC. A statement of principle to that effect, in *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission*[128], involved rejecting earlier suggestions to the contrary in *Huddart, Parker*[129] and

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123 *Saunders v United Kingdom* (1997) 23 EHRR 313.

124 (1983) 152 CLR 281 at 298 per Gibbs CJ, 308-309 per Mason, Wilson and Dawson JJ.

125 *Huddart, Parker* (1909) 8 CLR 330 at 358 per Griffith CJ, 366 per Barton J, 375 per O'Connor J, 386 per Isaacs J, 418 per Higgins J.

126 *Sorby* (1983) 152 CLR 281 at 313.

127 (1982) 152 CLR 188 at 201.

128 (1982) 152 CLR 460 at 467 per Gibbs CJ, 474 per Mason J, 475 per Murphy J.

129 (1909) 8 CLR 330 at 379 per O'Connor J.

Melbourne Steamship Co Ltd v Moorehead[130]. No direction made by an examiner under s 25A(9) is determinative in respect of the fair trial of a person charged. The right to a fair trial is protected by a trial judge's discretion in relation to the admissibility of evidence and by a court's institutional powers to punish for contempt, including enjoining a threatened contempt, and to deal with an abuse of process[131].

Conclusions

66 For the reasons given, question 1 must be answered "Yes" and question 2 should be answered "No".

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130 (1912) 15 CLR 333 at 346 per Barton J; [1912] HCA 69.

131 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 265-266 [10]-[12] per Gleeson CJ, Gummow, Hayne and Crennan JJ; *Dupas v The Queen* (2010) 241 CLR 237 at 243 [14]-[15].

HAYNE AND BELL JJ.

The issue

67 The plaintiff was arrested and subsequently charged with three indictable Commonwealth offences: conspiracy to import a commercial quantity of a border controlled drug[132], conspiracy to traffic in a commercial quantity of a controlled drug[133], and conspiracy to deal with money that was the proceeds of crime[134]. The first two charges carried a maximum sentence of life imprisonment.

68 While in custody, the plaintiff was served with a summons, issued under s 28(1) of the *Australian Crime Commission Act* 2002 (Cth) ("the ACC Act"), requiring him to appear to be examined by an examiner appointed under s 46B(1) of the ACC Act for the purposes of a "special ACC operation/investigation"[135]. The plaintiff was asked, and answered, questions which included questions about the subject matter of the offences with which he had been charged. Following an adjournment of the examination, the plaintiff refused to answer further questions about that subject matter. He was told that he would be charged with the offence[136] of failing to answer a question that he was required to answer by the examiner.

69 Could the examiner lawfully require the plaintiff to answer questions about the subject matter of the offences with which he had been charged but for which he had not then been tried? Could the examiner, for example, lawfully require the plaintiff to answer whether he had committed the offences charged?

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132 Contrary to *Criminal Code* (Cth), ss 11.5(1) and 307.1(1).

133 Contrary to *Criminal Code*, ss 11.5(1) and 302.2(1).

134 Contrary to *Criminal Code*, ss 11.5(1) and 400.3(1).

135 Defined in s 4(1) of the ACC Act as:

> "(a) an intelligence operation that the ACC is undertaking and that the Board has determined to be a special operation; or
>
> (b) an investigation into matters relating to federally relevant criminal activity that the ACC is conducting and that the Board has determined to be a special investigation".

136 s 30(2)(b) and (6).

70 These reasons will show that both the general and the more particular question should be answered "No". The relevant provisions of the ACC Act should not be construed as authorising the compulsory examination of a person charged with, but not yet tried for, an indictable Commonwealth offence about the subject matter of the pending charge. Permitting the Executive to ask, and requiring an accused person to answer, questions about the subject matter of a pending charge would alter the process of criminal justice to a marked degree, whether or not the answers given by the accused are admissible at trial or kept secret from those investigating or prosecuting the pending charge.

71 Requiring the accused to answer questions about the subject matter of a pending charge prejudices the accused in his or her defence of the pending charge (whatever answer is given). Even if the answer cannot be used in *any* way at the trial, any admission made in the examination will hinder, even prevent, the accused from challenging at trial that aspect of the prosecution case. And what would otherwise be a wholly accusatorial process, in which the accused may choose to offer no account of events, but simply test the sufficiency of the prosecution evidence, is radically altered. An alteration of that kind is not made by a statute cast in general terms. If an alteration of that kind is to be made, it must be made by express words or necessary intendment.

The ACC Act

72 The Australian Crime Commission ("the ACC"), established by s 7(1) of the ACC Act, has functions which can generally be described as directed to the gathering and dissemination of criminal information and intelligence. These functions are considered in further detail later in these reasons. Division 2 (ss 24A-36) of Pt II of the ACC Act provided for the compulsory examination of persons for the purposes of a special ACC operation/investigation. The ACC Act required[137] that an examination for these purposes be held in private. Knowingly giving false or misleading evidence at an examination was an offence[138]. The person being examined was obliged[139] to answer questions asked and to produce documents sought. Refusal or failure to answer a question, that the person being examined was required by the examiner to answer, was an offence[140]. Refusal or failure to answer could also be dealt with (by the Federal Court or a Supreme

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137 s 25A(3).

138 s 33(1).

139 s 30(2)(b) and (c).

140 s 30(2)(b) and (6).

Court on an application by the examiner[141]) as a contempt of the ACC[142]. It is not necessary to explore how notions of "contempt" can properly be engaged in the case of an agency of the Executive like the ACC. Nor is it necessary to explore how this kind of "contempt" could intersect with, let alone coexist with, the exercise of the contempt powers of a court to prevent interference with the judicial processes of criminal justice.

73 If the person being examined claimed that the answer to a question asked, or the production of a document or thing sought, might tend to incriminate that person, or make him or her liable to a penalty, the ACC Act provided[143] that, subject to some exceptions which are not presently relevant[144], the answer given, or the document or thing produced, was not admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty.

74 Section 25A(9) of the ACC Act also provided that the examiner could give a direction preventing or limiting the publication of: evidence given before the examiner; the contents of documents produced, or the description of things given, to the examiner; information that could enable a person who had given evidence to be identified; and the fact that a person had given or was about to give evidence at an examination. The examiner was obliged[145] to give such a direction "if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person" who had been, or might be, charged with an offence. The examiner gave a direction of this kind in relation to the plaintiff's examination. The ACC Act also provided[146] that a summons requiring a person to attend an examination must include a notation to the effect that disclosure of information about the summons was prohibited if (among other reasons) a failure to include such a notation would reasonably have been expected to have one of the consequences just described. A notation of that kind was included in the summons issued to the plaintiff.

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141 s 34B(1).

142 s 34A.

143 s 30(4)(c) and (5).

144 s 30(5)(c) and (d).

145 s 25A(9).

146 s 29A(1) and (2)(a).

75 The provisions of the ACC Act which provided for examinations in connection with a special ACC operation/investigation were cast in general terms. Section 28(1) provided that:

> "An examiner may summon a person to appear before an examiner at an examination to give evidence and to produce such documents or other things (if any) as are referred to in the summons."

Section 30(2) provided that:

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

76 Because these provisions were expressed generally, they would permit, if read literally, the examination of a person who had been charged with an indictable Commonwealth offence about the subject matter of the charged offence. But neither the provisions authorising examination, nor any other provisions of the ACC Act, stated expressly that a person charged with an offence may be examined about the subject matter of that charge.

Questions reserved

77 The plaintiff commenced proceedings against the ACC and the Commonwealth, in the original jurisdiction of this Court, alleging that the ACC Act does not validly permit the examiner to ask the plaintiff about the matters which are the subject of the charges laid against him. Two questions have been reserved for the consideration of the Full Court. The Attorneys-General for the States of New South Wales, Queensland, South Australia, Victoria and Western Australia intervened in the hearing of the questions reserved in support of the ACC and the Commonwealth.

78 The first question asks:

> "Does Division 2 of Part II of the ACC Act empower an examiner appointed under section 46B(1) of the ACC Act to conduct an examination of a person charged with a Commonwealth indictable offence

where that examination concerns the subject matter of the offence so charged?"

The answer depends upon the construction of the provisions of the ACC Act which provide for compulsory examinations. If those questions of construction were to be resolved against the plaintiff, there would be a further question about the proper construction of the instruments establishing the relevant "special ACC operation/investigation".

79 The second question asks:

"If the answer to Question 1 is 'Yes', is Division 2 of Part II of the ACC Act invalid to that extent as contrary to Ch III of the Constitution?"

This second question must be considered only if the ACC Act would otherwise permit compulsory examination of a person charged with an indictable Commonwealth offence about the subject matter of the charge.

80 The ACC and the Commonwealth submitted that the second question reserved is not reached in this matter because the ACC Act incorporated "protections that ha[d] the effect that any questioning in relation to the subject matter of pending criminal charges [would] not create a 'real risk', as a matter of practical reality, to the administration of justice". More particularly, the ACC and the Commonwealth submitted that, because the examiner gave directions preventing those responsible for investigating or prosecuting the charges pending against the plaintiff from knowing what answers the plaintiff gave at his examination, there could be no contempt of court. It is convenient to deal at once with these submissions, which focused upon the use which might be made of answers given at an examination in the prosecution of the person examined.

Direct and indirect use of answers

81 The ACC and the Commonwealth placed at the forefront of their submissions those provisions of the ACC Act[147] which prevent the direct or, depending on the terms of a direction given under s 25A(9), indirect use of answers given at an examination in the prosecution of the person examined (otherwise than for an offence under the ACC Act). Particular emphasis was given to the obligation imposed by s 25A(9) to direct that there be no, or limited, publication of what was said or produced at an examination "if the failure to [give such a direction] might prejudice ... the fair trial of a person who has been, or may be, charged with an offence".

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147 Especially ss 25A(9) and 30(4) and (5).

82 The ACC and the Commonwealth submitted that, by preventing direct or indirect use of the answers given at an examination, the ACC Act "provide[d] mechanisms to ensure that [the examination did] not result in any prejudice to the fairness of the pending trial". Accordingly, so the argument continued, the ACC Act should be read as "specifically contemplat[ing] that examination powers may be used after charges have been laid". And this conclusion was said to be supported by consideration of the legislative history of the ACC Act.

83 Three points must be made. First, there is no express reference, anywhere in the ACC Act, to examination of a person who has been charged with, but not tried for, an offence about the subject matter of the pending charge. Contrary to the assumption that necessarily underpinned the submissions made by the ACC and the Commonwealth, the reference in s 25A(9) (and the similar reference in s 29A(2)) to prejudice to "the fair trial of a person who has been, or may be, charged with an offence" does not deal specifically with the case of the person being examined having also been charged with an offence. The words used are sufficiently general to *include* that case, but they do not deal directly or expressly with it. The words used in s 25A(9) (and in s 29A(2)) have ample work to do in respect of the examination of persons who may be suspected of wrong-doing but who, before examination, have not been charged with any offence. It is the generality of the words used in the ACC Act, including in ss 25A(9) and 29A(2), and the absence of *specific* reference to examination of a person who has been charged about the subject matter of the pending charge, which presents the issue for determination in this case.

84 Second, the legislative history of the ACC Act provides little or no assistance in dealing with the question of construction that arises in this case. The introduction[148] into the *National Crime Authority Act* 1984 (Cth) of a use immunity in respect of answers given at a compulsory examination, coupled with the repeal[149] of a provision of that Act permitting a person examined under the Act to claim the privilege when charged with an offence, sheds little, if any, light on the issue that must be decided in this case. The ACC Act must be construed according to its terms, not by reference to earlier legislation dealing with another body, no matter what similarities the two bodies may be thought to have in their constitution, powers or functions.

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148 *National Crime Authority Legislation Amendment Act* 2001 (Cth), Sched 1, item 12.

149 *National Crime Authority Legislation Amendment Act* 2001 (Cth), Sched 1, item 12.

85 Third, and more fundamentally, these reasons will show that permitting the Executive to ask, and compelling answers to, questions about the subject matter of a pending charge (regardless of what use may be made of those answers at the trial of an accused person) fundamentally alters the process of criminal justice. It is that observation which is critical to the question of statutory construction which must be answered in this case.

The applicable rule of statutory construction

86 The question of statutory construction which arises in this case requires the consideration and application of a well-established rule. That rule, often since applied[150], was stated by O'Connor J in *Potter v Minahan*[151] by quoting Maxwell's *On the Interpretation of Statutes*[152]:

> "It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, *or depart from the general system of law*, without expressing its intention with irresistible clearness[153]; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used." (emphasis added)

87 This rule of construction has found most frequent application in this Court with respect to legislation which may affect rights. In that context, it has come to be referred to as a "principle of legality"[154]. But the rule is not confined to legislation which may affect rights. It is engaged in the present case because of the effects which the asserted construction of the ACC Act provisions authorising

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150 See, for example, *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523, 532; [1987] HCA 12; *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18; [1990] HCA 24; *Coco v The Queen* (1994) 179 CLR 427 at 436-438, 446; [1994] HCA 15; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 540, 564-565, 567; [1997] HCA 3; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11], 562-563 [43], 576 [88]; [2002] HCA 49.

151 (1908) 7 CLR 277 at 304; [1908] HCA 63.

152 4th ed (1905) at 122.

153 *United States v Fisher* 6 US 358 at 390 (1805).

154 See, for example, *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ; [2004] HCA 40; *Momcilovic v The Queen* (2011) 245 CLR 1 at 46-47 [43] per French CJ; [2011] HCA 34.

compulsory examination would have not only on the rights, privileges and immunities of a person charged with an indictable Commonwealth offence, but also on a defining characteristic of the criminal justice system. In particular, it would alter to a marked degree the accusatorial nature of the criminal justice system. To hold that the general words of the relevant provisions of the ACC Act authorise compulsory examination of a person charged with an indictable Commonwealth offence about the subject matter of the offence charged would thus depart in a marked degree from the "general system of law".

The relevance of considerations of fairness

88 Applying this rule of construction does not depend upon classifying the result of the alteration to the general system of law as "unfair". To ask whether the compulsory examination of a person charged with an indictable Commonwealth offence about the subject matter of the charge is unfair, at best, would be unhelpful and, at worst, would be distracting. The result being considered could be described as "unfair" only by measuring it against some stated or unstated standard of what is fair. No relevant standard was identified.

89 Likewise, applying this rule of construction does not depend upon classifying the trial of the accused, after a secret and compulsory examination about the subject matter of the pending charge, as an "unfair" trial. At least as a general rule, the methods of criminal trial that are prescribed by legislation must be taken, for the purposes of legal debate, to provide a fair trial, and the relevant question to ask is whether the accused has had, or will have, a trial according to law.

Construction, power and fairness are different issues

90 Questions of fairness must be put to one side because they are not relevant. They are not relevant because, in considering the issues in this case, it is essential to distinguish between three different questions that may be asked about the relevant provisions of the ACC Act.

91 First, there is the question of what the legislation provides: *has* the legislature provided for the secret and compulsory examination of an accused person about the subject matter of the pending charge? That is a question of construction and it is the determinative question in this case.

92 Second, there may then be a question of legislative power: *can* the legislature provide for the secret and compulsory examination of an accused person about the subject matter of the pending charge? That question would call for consideration not only of Ch III of the Constitution, but also, and more particularly, of s 80 of the Constitution and what is meant by "trial on indictment" and the requirement that the trial on indictment of any offence

against any law of the Commonwealth shall be "by jury". But because the ACC Act, properly construed, does not permit examination of an accused person about the subject matter of a pending charge, the question of power is not reached in this case.

93 Third, there may very well have been an antecedent question of policy: *should* the legislature provide for an examination of the kind described? That would have been a question for the legislature. And it is a question which may well have been affected by notions of what is "fair" or "unfair". But in considering the first, and in this case determinative, question identified ("*has* the legislature provided for an examination of the kind described?"), debate about the fairness of the outcome would serve only to divert discussion into generally unproductive arguments of the kind which have attended discussion of the privilege against self-incrimination. More particularly, the debate would necessarily proceed from stated or unstated assumptions about how a balance should be struck in the criminal justice system between individual rights, privileges and immunities, and societal demands for the detection and punishment of crime, especially serious crime. It is neither right nor profitable to approach the questions of construction which must be decided in this case by describing one or other of the possible constructions as leading to "unfair" or "undesirable" results.

94 Instead, as has already been indicated, the debate about proper construction must direct attention to how the general words of the ACC Act are to be applied to a case with which those words do not deal explicitly: the secret and compulsory examination of a person charged with a crime about the subject matter of the charge. The undisputed premise for considering that question is that the general words of the ACC Act are not to be read as authorising what otherwise would be a contempt of court.

Answering the allegation of contempt

95 By arguments that a pleader would describe as "confession and avoidance", the Commonwealth and the ACC sought to meet the allegation that the secret and compulsory examination of a person charged with an indictable Commonwealth offence about the subject matter of the charge would be a contempt. The confession was that the ACC Act does not authorise a contempt. The avoidance was the argument that conducting the examination in secret, and giving directions about the *use* which may be made of the answers which the accused person was compelled to give, avoided what would otherwise have been a contempt. But the *use* of those answers to assist the prosecution of the pending charges is only one way in which the course of criminal justice may be disturbed. In this case, it is necessary to consider whether requiring the accused person to *answer* questions about the subject matter of a pending charge interferes with the process of criminal justice.

96 How would requiring a person charged with, but not yet tried for, an indictable Commonwealth offence to give secret answers to an agency of the Executive to questions about the subject matter of the pending charge so alter a basic characteristic of the process of criminal justice as to constitute an interference with its administration? It is necessary to begin by identifying the process of criminal justice.

The process of criminal justice

97 For some purposes, it is sufficient to consider only the nature of a criminal trial. Often enough, it is sufficient to observe that a criminal trial, including the trial of an indictable Commonwealth offence, is both accusatorial[155] and adversarial, and to observe that, subject to limited exceptions, a criminal trial is conducted in open court.

98 The trial process is adversarial in the sense described by Barwick CJ in *Ratten v The Queen*[156]:

> "It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility."

99 The criminal trial process is accusatorial in the sense that it is for the prosecution to decide what charge is preferred against the accused[157]. The trial process is accusatorial in the further sense that the prosecution bears the onus of proof of all elements of the charge that is laid. But describing these aspects of a criminal trial as "accusatorial" must not distract attention from the much wider and no less fundamental observation that the whole process of criminal justice, commencing with the investigation of crime and culminating in the trial of an indictable Commonwealth offence, is accusatorial.

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155 See, for example, *RPS v The Queen* (2000) 199 CLR 620 at 630 [22]; [2000] HCA 3; *Azzopardi v The Queen* (2001) 205 CLR 50 at 64-65 [34]; [2001] HCA 25.

156 (1974) 131 CLR 510 at 517; [1974] HCA 35.

157 See, for example, *Maxwell v The Queen* (1996) 184 CLR 501 at 512-514, 534; [1996] HCA 46; *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566 at 579-580 [21]; [1998] HCA 45; *Cheung v The Queen* (2001) 209 CLR 1 at 22 [47]; [2001] HCA 67.

100 It is also necessary, in this respect, to exercise some care in identifying what lessons can be drawn from the history of the development of criminal law and procedure. Questions about criminal trial process may be illuminated by reference to historical considerations. But there are some features of criminal trial process which, although now considered to be fundamental, are of relatively recent origin. So, for example, what now are axiomatic principles about the burden and standard of proof in criminal trials were not fully established until, in 1935, *Woolmington v The Director of Public Prosecutions*[158] decided that "[t]hroughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt". Any reference to the history of the privilege against self-incrimination, or its place in English criminal trial process, must also recognise that it was not until the last years of the nineteenth century that an accused person became a competent witness at his or her trial[159].

101 As will be shown, the whole of the process for the investigation, prosecution and trial of an indictable Commonwealth offence is accusatorial. It is accusatorial in the sense that an accused person is not called on to make any answer to an allegation of wrong-doing, or to any charge that is laid, until the prosecuting authorities have made available to the accused particulars of the evidence on which it is proposed to rely in proof of the accusation that is made. And even after that information has been provided, the accused person need say or do nothing more than enter a plea of guilty or not guilty to the charge. If the accused person chooses to plead not guilty at trial, he or she is entitled to put the prosecution to proof of the charge and, as part of that process, to test the strength of the evidence which the prosecution adduces at trial. The only relevant limit on the accused person's testing of the strength of the prosecution's case is provided by the accused person's instructions to his or her lawyer. The lawyer cannot test the prosecution case in a manner inconsistent with the accused person's instructions.

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158 [1935] AC 462 at 481.

159 *Azzopardi* (2001) 205 CLR 50 at 65-68 [39]-[44]. See also *Criminal Law and Evidence Amendment Act* 1891 (NSW), s 6; *Crimes Act* 1891 (Vic), s 34; *Accused Persons Evidence Act* 1882 (SA), s 1.

The privilege against self-incrimination and the "right to silence"

102 These features of the accusatorial system of criminal justice can be described as an accused having a "right to silence"[160]. And discussion of the "right to silence" must often proceed in conjunction with a discussion of the privilege against self-incrimination. But, as this Court's decision in *Environment Protection Authority v Caltex Refining Co Pty Ltd*[161] shows, the privilege against self-incrimination is distinct from what was there described as "[t]he fundamental principle that the onus of proof beyond reasonable doubt rests on the Crown" and its "companion rule that an accused person cannot be required to testify to the commission of the offence charged".

103 In this case, it is necessary to unpack the content of both the privilege against self-incrimination and the so-called "right to silence" to identify whether compulsory examination of a person charged with an offence about the subject matter of the offence charged would be an impermissible interference with the due administration of criminal justice.

104 As four members of this Court said in *Reid v Howard*[162], "[t]he privilege [against self-incrimination], which has been described as a 'fundamental ... bulwark of liberty'[163], is not simply a rule of evidence, but a basic and substantive common law right". The evolution of and rationale for the privilege against self-incrimination have been described in various ways[164]. No single explanation has achieved universal acceptance, whether in judicial decisions or academic writings[165]. But neither the existence nor the content of those controversies can

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160 *Petty v The Queen* (1991) 173 CLR 95 at 99; [1991] HCA 34; *RPS* (2000) 199 CLR 620 at 630 [22]. See also *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1 at 30-31.

161 (1993) 178 CLR 477 at 503 per Mason CJ and Toohey J; [1993] HCA 74.

162 (1995) 184 CLR 1 at 11 per Toohey, Gaudron, McHugh and Gummow JJ; [1995] HCA 40.

163 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 340; [1983] HCA 9.

164 See, for example, Roberts and Zuckerman, *Criminal Evidence*, 2nd ed (2010) at 542-563; Duff, "Adversarial Ideology and Police Questioning after Charge", (2013) *Juridical Review* 1 at 3.

165 Some of those disputes are referred to in this Court's reasons in *Australian Crime Commission v Stoddart* (2011) 244 CLR 554; [2011] HCA 47.

be understood as denying that the privilege is now regarded as being "a basic and substantive common law right", and not just a rule of evidence. That is, it is not a privilege which is concerned only with the *use* to which answers given may be put at, or in connection with, a trial. It is a privilege which permits the refusal to make an answer regardless of whether the answer is admissible as testimonial evidence[166]. The accusatorial process of criminal justice and the privilege against self-incrimination both reflect and assume the proposition that an accused person need never make any answer to any allegation of wrong-doing.

105 The notion of an accused person's "right to silence" encompasses more than the rights that the accused has at trial. It includes the rights (more accurately described as privileges) of a person suspected of, but not charged with, an offence, and the rights and privileges which that person has between the laying of charges and the commencement of the trial.

Accusatorial process of investigation

106 Part IC (ss 23-23W) of the *Crimes Act* 1914 (Cth) ("the Crimes Act") regulates the investigation of Commonwealth offences. Section 23A(2) provides that Pt IC "does not exclude or limit the operation of a law of a State or Territory so far as it can operate concurrently" with the Part. Section 23A(5) provides that:

> "The provisions of this Part, so far as they protect the individual, are in addition to, and not in derogation of, any rights and freedoms of the individual under a law of the Commonwealth or of a State or Territory."

107 Subject to s 23F(3), if a person is under arrest for a Commonwealth offence, "an investigating official" (which includes[167] a member of the Australian Federal Police and a member of the police force of a State or Territory) "must, before starting to question the person, caution the person that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence"[168]. Section 23F(3) provides that the obligation imposed by s 23F(1) to administer a caution does "not apply so far as another law of the Commonwealth requires the person to answer questions put by, or do things required by, the investigating official".

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166 *Sorby v The Commonwealth* (1983) 152 CLR 281 at 290-292 per Gibbs CJ; [1983] HCA 10.

167 s 23B(1).

168 s 23F(1).

108 Section 23F, with its requirement that, in general, persons under arrest for Commonwealth offences are to be cautioned that they need not say or do anything, is, of course, an important manifestation of an accused's right to silence. The importance of that general rule is reinforced by s 23S(a) of the Crimes Act, which provides that:

> "Nothing in this Part affects:
>
> (a) the right of a person to refuse to answer questions or to participate in an investigation except where required to do so by or under an Act".

109 These provisions of Pt IC of the Crimes Act both create and reflect one important element of the accusatorial nature of the process of criminal justice in respect of indictable Commonwealth offences: a person accused or suspected of having committed a crime is entitled to stay silent in response to the questions of investigating officials.

The laying of a charge

110 The laying of a charge marks the first step in engaging the exclusively judicial task[169] of adjudicating and punishing criminal guilt. A person who lays a criminal charge maliciously, and without reasonable and probable cause, commits the tort of malicious prosecution[170] if the prosecution has terminated in favour of the plaintiff. Ordinarily, then, a charge will be laid only when the informant has formed the view, on a sufficient basis, that there is a proper case for prosecution. And, having regard to the provisions of Pt IC of the Crimes Act to which reference has been made, the investigating official must decide whether there is reasonable and probable cause to charge a suspect, and thus engage the process of criminal justice, without the suspect being obliged to say anything in answer to the accusation made. Conversely, once it has been decided that there is reasonable and probable cause to commence the judicial process by laying a charge, the acquisition, before trial, of further information in proof of the accused person's guilt can serve no purpose unless it is to make that person's conviction more probable.

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169 See, for example, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27; [1992] HCA 64.

170 *A v New South Wales* (2007) 230 CLR 500; [2007] HCA 10.

Accusatorial pretrial procedures

111 It is next important to notice several statutory provisions governing the procedures, including pretrial procedures, for dealing with charges of indictable Commonwealth offences.

112 First, s 68(1) of the *Judiciary Act* 1903 (Cth) provides that:

> "The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:
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> ...
>
> (b) their examination and commitment for trial on indictment; and
>
> (c) their trial and conviction on indictment ...
>
> and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section."

113 Division 2 (ss 69-71A) of Pt X of the *Judiciary Act* makes further provision with respect to indictable offences against the laws of the Commonwealth. Section 71A provides power for the Attorney-General of the Commonwealth to file an indictment for any indictable Commonwealth offence in specified courts without preliminary examination or committal for trial. But subject to this ex officio power for direct presentment, s 68(1) of the *Judiciary Act* picks up and applies, as surrogate federal law, those provisions of State or Territory law which provide for the conduct of committal procedures before an indictment is filed against an accused.

114 Although a magistrate conducting committal proceedings is not exercising judicial power[171], committal proceedings have an important place in the system for the administration of criminal justice. Apart from the (rare) case where an ex officio indictment is filed directly, a person accused of an indictable Commonwealth offence will not be called on to plead to the indictment until the prosecution has assembled the evidence which it is proposed to lead at trial, and has given notice to the accused of the substance of that evidence.

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171 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 355-358, 366, 378; [1909] HCA 36; *R v Murphy* (1985) 158 CLR 596 at 610; [1985] HCA 50.

115 So fundamental is this rule that, if an indictment is filed directly, without any preliminary examination or committal, the court in which the indictment is filed may stay the proceedings as an abuse of process if it is necessary to do so to ensure that the accused receives a fair trial[172]. And the rule finds further reflection in the procedure which may be followed if there has been a committal and, as sometimes happens, the prosecution seeks to call at trial a witness whom the accused could not have sought to cross-examine before the decision to commit him or her for trial. In such a case, the court trying the accused may allow the witness to be cross-examined, on a voir dire, before the witness is called at trial by way of what has become known as a "*Basha*" inquiry[173].

An accusatorial trial

116 Two provisions of the *Evidence Act* 1995 (Cth) also create elements of, and reflect, the accusatorial nature of the trial of indictable Commonwealth offences. First, s 17(2) provides that a defendant in criminal proceedings is not competent to give evidence as a witness for the prosecution. Second, s 20(2) permits the judge at trial, and any party *other* than the prosecutor, to comment on a failure by the defendant to give evidence. But the judge must not suggest that the defendant failed to give evidence because the defendant was, or believed that he or she was, guilty of the offence concerned.

117 It follows that a person accused of an indictable Commonwealth offence may stand mute at his or her trial. The accused cannot be called to give evidence by the prosecution. The prosecution may not comment on the failure of the accused to give evidence. The judge may comment on the failure to give evidence, but not so as to suggest that the failure bespeaks guilt. The accused may therefore make the decision whether to give evidence free from the pressure that would be there if the judge could tell the jury that silence bespeaks guilt.

The accusatorial process of criminal justice

118 The preceding description of the investigation, prosecution and trial of an indictable Commonwealth offence demonstrates that, at every stage, the process of criminal justice is accusatorial. It is against this background that the provisions of the ACC Act, particularly s 28(1), must be construed. If these provisions were to permit the compulsory examination of a person charged with

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172 *Barton v The Queen* (1980) 147 CLR 75; [1980] HCA 48.

173 *Basha* (1989) 39 A Crim R 337 at 339; *R v Sandford* (1994) 33 NSWLR 172 at 180-181; *Director of Public Prosecutions (Cth) v Bayly* (1994) 63 SASR 97 at 119-120; *Director of Public Prosecutions v Denysenko* [1998] 1 VR 312 at 316.

an offence about the subject matter of the pending charge, they would effect a fundamental alteration to the process of criminal justice.

Statutory modification of an accusatorial process

119 This is not to decide that statute can never effect fundamental alterations to the process of criminal justice. As explained earlier, it is not necessary to decide whether there is any relevant constitutional limitation[174] to legislative power that would preclude such an alteration. But such an alteration can only be made if it is made clearly by express words or necessary intendment.

120 The process of criminal justice that can now be described as "accusatorial" has grown over time and has its origins in both statute and judge-made law. So, for example, rules requiring the police cautioning of suspects find their origins in the Judges' Rules (the first of which were formulated in 1912 by the judges of the King's Bench Division as a guide to police in the questioning of suspects[175]). In Australia, the rules were at one time set out only in internal police rules or orders[176], and the requirement to caution a suspect was not given direct statutory effect by Commonwealth legislation until the enactment of Pt IC of the Crimes Act in 1991[177].

121 From time to time, legislation has been enacted which has qualified the generally accusatorial nature of the process of criminal justice. Some of the earliest of those modifications are to be found in legislation providing for the examination of bankrupts, and of persons who have "taken part or been concerned in the promotion, formation, management, administration or winding up" of a corporation and who have been, or may have been, "guilty of fraud ... or other misconduct in relation to that corporation"[178]. Legislation provided for the

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174 cf *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 161-162 per Brennan J; [1982] HCA 31.

175 Referred to in *R v Voisin* [1918] 1 KB 531 at 539; cf *Practice Note (Judges' Rules)* [1964] 1 WLR 152.

176 See, for example, the Standing Orders promulgated by the Chief Commissioner of Police in Victoria discussed in *R v Lee* (1950) 82 CLR 133 at 142-144, 154-155; [1950] HCA 25.

177 *Crimes (Investigation of Commonwealth Offences) Amendment Act* 1991 (Cth).

178 See, for example, *Companies (New South Wales) Code*, s 541(2)(a); *Hamilton v Oades* (1989) 166 CLR 486; [1989] HCA 21.

examination of bankrupts[179], and those thought to have defrauded companies[180], before the accused became a competent witness at trial.

122 More recently, other changes have been made directly to the accusatorial system of criminal justice by express alteration of the laws governing criminal procedure. So, for example, State legislation, for some time, has required an accused to give notice of alibi[181]. Further, State criminal procedure legislation now requires an accused to give notice of intention to adduce some other kinds of evidence, such as evidence of substantial mental impairment[182], or expert evidence more generally[183]. Some State criminal procedure legislation requires the prosecution, before the trial begins, to serve on the accused, and file in court, a summary which must outline the manner in which the prosecution will put the case against the accused[184], and requires the accused to respond by identifying, again before the trial begins, "the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken"[185].

123 These changes to the accusatorial process of criminal justice have been made directly and expressly. Neither the changes that have been made more recently, nor the existence of historical qualifications and exceptions of the kind exemplified by bankruptcy and companies examination procedures, deny that the

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179 See, for example, *Bankruptcy Act* 1887 (NSW), s 18; *Bankruptcy Act* 1898 (NSW), s 18; *Insolvency Statute* 1871 (Vic), ss 132 and 133; *Insolvency Act* 1890 (Vic), ss 134 and 135; *Bankruptcy Act* 1883 (UK), s 17. See, also, *In re Atherton* [1912] 2 KB 251; *In re Paget; Ex parte Official Receiver* [1927] 2 Ch 85. Cf *Bankruptcy Act* 1924 (Cth), s 68; *Bankruptcy Act* 1966 (Cth), s 81.

180 See, for example, *Joint Stock Companies Winding-up Act* 1848 (UK), s 63; *Joint Stock Companies Act* 1856 (UK), s 77; *Companies Act* 1862 (UK), ss 115 and 117. See also, for example, *Companies Winding up Act* 1847 (NSW), s 13; *Companies Act* 1874 (NSW), ss 173 and 174; *Companies Act* 1899 (NSW), ss 123 and 124; *Companies Statute* 1864 (Vic), ss 106, 107 and 149; *Companies Act* 1890 (Vic), ss 109, 110 and 152.

181 See, for example, *Criminal Procedure Act* 1986 (NSW), s 150(2); *Criminal Procedure Act* 2009 (Vic), s 190(1).

182 *Criminal Procedure Act* 1986 (NSW), s 151(1).

183 *Criminal Procedure Act* 2009 (Vic), s 189.

184 *Criminal Procedure Act* 2009 (Vic), s 182(1) and (2).

185 *Criminal Procedure Act* 2009 (Vic), s 183(1) and (2).

existing process for the administration of criminal justice is properly described as an accusatorial process. The qualifications and exceptions stand as particular features of the process of criminal justice that have been separately created (in important respects before the emergence of organised police forces and the modern criminal justice system). Their existence shows no more than that the modern criminal justice system is the product of growth over time and is not the product of a decision to implement some single organising theory about the administration of criminal justice.

Impact on accusatorial process

124 Even if the answers given at a compulsory examination are kept secret, and therefore cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged, the requirement to give answers, after being charged, would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom. No longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according *only* to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused person is thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge.

125 As has been explained, if an alteration of that kind is to be made to the criminal justice system by statute, it must be made clearly by express words or by necessary intendment. If the relevant statute does not provide clearly for an alteration of that kind, compelling answers to questions about the subject matter of the pending charge would be a contempt.

Earlier decisions of this Court

126 It is necessary to say something about some earlier decisions of this Court, including, in particular, *Hammond v The Commonwealth*[186] and *Hamilton v Oades*[187].

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186 (1982) 152 CLR 188; [1982] HCA 42.

Hammond

127 *Hammond* concerned the compulsory examination of a person charged with an indictable Commonwealth offence about the subject matter of the charge. The examination was to be conducted under the *Royal Commissions Act* 1902 (Cth) and the *Evidence Act* 1958 (Vic). Both Acts provided[188] that it was an offence for a person being examined to refuse to answer any question relevant to the inquiry being conducted. Both Acts also provided[189] that answers given by the person being examined were not admissible in evidence against that person in any civil or criminal proceedings (except in proceedings for an offence against the Act in question). This Court assumed, but did not decide, that, as all parties to the litigation had submitted, a person charged with an offence was bound to answer questions designed to establish that he or she had committed the charged offence[190].

128 The Court held unanimously that continuing Mr Hammond's examination would interfere with the due administration of justice, even though the answers he gave would not be admissible in evidence against him. Accordingly, the Commissioner conducting the examination was restrained from further examining Mr Hammond until the determination of his trial.

129 The principal reasons of the Court were given by Gibbs CJ. Those reasons (with which Mason J agreed and Murphy J generally agreed) must be read in the light of the Court's comprehensive consideration of executive inquiries into alleged offences in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*[191] ("the *BLF Case*"). Judgment in the *BLF Case* was delivered less than three months before *Hammond* was argued and decided.

130 In the *BLF Case*, six members of the Court held[192], following earlier authority of this Court[193], that, in the absence of any law to the contrary, the

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187 (1989) 166 CLR 486.

188 *Royal Commissions Act* 1902 (Cth), s 6; *Evidence Act* 1958 (Vic), s 16(b).

189 *Royal Commissions Act* 1902, s 6DD; *Evidence Act* 1958, s 30.

190 (1982) 152 CLR 188 at 197-198 per Gibbs CJ.

191 (1982) 152 CLR 25.

192 (1982) 152 CLR 25 at 52-53 per Gibbs CJ, 66-68 per Stephen J, 86-91 per Mason J, 120 per Aickin J, 123-126 per Wilson J, 152-155 per Brennan J.

Crown *may* appoint a commission of inquiry into whether an individual has committed an offence. And the whole Court held[194] that the conduct of a commission of inquiry, to the extent that it creates a risk of interference with the administration of justice, may be a contempt of court. But the Court accepted that, subject to any applicable constitutional limitation[195], such a contempt might not arise if the conduct was specifically authorised by statute. It was not necessary to explore that question in the *BLF Case* and it is not necessary to do so in this case.

131 In the *BLF Case*, Gibbs CJ examined the various reasons that had been proffered in argument, and in the Full Federal Court below, for concluding that holding the proceedings of the inquiry in public would constitute a contempt. Those reasons ranged from the fact that the proceedings would be calculated to prejudice or bias the public mind, to alleged undesirable effects on possible witnesses or even the judges who might deal with the prosecution proceedings. In his reasons, Gibbs CJ emphasised the need to demonstrate either "an actual interference with the administration of justice, or 'a real risk, as opposed to a remote possibility' that justice will be interfered with"[196], and concluded (with Mason, Aickin and Wilson JJ) that contempt was not demonstrated by the conduct of the proceedings of the inquiry in public.

132 But of most immediate significance, Gibbs CJ gave[197], as an example of the continuance of a commission amounting to contempt, the case where, during the course of a commission's inquiries into allegations that a person had been guilty of criminal conduct, a criminal prosecution was commenced against that person based on those allegations. His Honour said[198] that "the continuance of the inquiry would, speaking generally, amount to a contempt of court", and that

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193 *Clough v Leahy* (1904) 2 CLR 139; [1904] HCA 38; *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73; [1940] HCA 6.

194 (1982) 152 CLR 25 at 53-55 per Gibbs CJ, 69-73 per Stephen J, 94-95 per Mason J, 105 per Murphy J, 119-120 per Aickin J, 129-132 per Wilson J, 158-162 per Brennan J.

195 (1982) 152 CLR 25 at 161-162 per Brennan J.

196 (1982) 152 CLR 25 at 56, citing *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 299 per Lord Reid. See also *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 372; [1955] HCA 12.

197 (1982) 152 CLR 25 at 54.

198 (1982) 152 CLR 25 at 54.

the proper course would be to "adjourn the inquiry until the disposal of the criminal proceedings". Stephen J was of the same opinion[199], but went further than Gibbs CJ by concluding that the continuance of the inquiry then under consideration would constitute a contempt of court. Other members of the Court expressed no view on the question of whether continuing an executive inquiry into matters the subject of pending charges would constitute contempt, this particular question not being squarely raised in the proceedings.

133 The conclusion expressed in the *BLF Case* by both Gibbs CJ and Stephen J, that continuing an inquiry into whether a person charged with an offence had committed that offence would be a contempt of court, reflected what had been said in earlier decisions of this Court. In *Clough v Leahy*, Griffith CJ, speaking for the Court, had said[200]:

> "Nor can the Crown interfere with the administration of the course of justice. It is not to be supposed that the Crown would do such a thing; but, if persons acting under a Commission from the Crown were to do acts which, if done by private persons, would amount to an unlawful interference with the course of justice, the act would be unlawful, and would be punishable."

And Griffith CJ had said[201] also that "[a]ny interference with the course of the administration of justice is a contempt of Court, and is unlawful". Some decades later, in *McGuinness v Attorney-General (Vict)*, Latham CJ adopted and repeated the views expressed by Griffith CJ in *Clough v Leahy* and continued[202]:

> "If, for example, a prosecution for an offence were taking place, the establishment of a Royal Commission to inquire into the same matter would almost certainly be held to be an interference with the course of justice and consequently to constitute a contempt of court."

134 Nothing said in the discussion of these matters in *Clough v Leahy* and *McGuinness v Attorney-General (Vict)*, or by Gibbs CJ and Stephen J in the *BLF Case*, suggested that the contemplated contempt could be avoided by continuing the inquiry in secret.

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199 (1982) 152 CLR 25 at 71-73.

200 (1904) 2 CLR 139 at 156.

201 (1904) 2 CLR 139 at 161.

202 (1940) 63 CLR 73 at 85.

135 What was said by Gibbs CJ and Stephen J in the *BLF Case* does not constitute any binding statement of the applicable principles. What their Honours said about executive inquiries into the facts and circumstances of pending charges was not essential to the decision reached in the *BLF Case*. But it is of the first importance to recognise that this Court's decision in *Hammond* was made very soon after, and in the light provided by, the examination of very closely related issues in the *BLF Case*.

136 Two consequences follow. First, the actual decision in *Hammond* cannot be dismissed from consideration on the basis that it was decided in haste or improvidently. Second, the identification by Gibbs CJ of *why* continued examination of Mr Hammond would be a contempt is not to be treated as if expressed too loosely. Gibbs CJ said[203] that:

> "Once it is accepted that [Mr Hammond] will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me *inescapably* to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with." (emphasis added)

The "circumstances of this case" to which Gibbs CJ referred were identified[204] as including the fact "that the examination will take place in private, and that the answers may not be used at the criminal trial". But the interference with the administration of justice, and thus the contempt, was identified[205] as lying in "the fact that [Mr Hammond having] been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence". It would prejudice him in his defence because he could no longer determine the course he would follow at his trial according only to the strength of the case that the prosecution proposed to, and did, adduce in support of its case that the offence charged was proved beyond reasonable doubt[206].

137 Nor can the decision in *Hammond* be dismissed from consideration on the basis that it was later "overtaken" in some relevant respect by the decision in *Hamilton v Oades*.

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203 (1982) 152 CLR 188 at 198.

204 (1982) 152 CLR 188 at 198.

205 (1982) 152 CLR 188 at 198.

206 cf (1982) 152 CLR 188 at 206-207 per Deane J.

Hamilton v Oades

138 The respondent in *Hamilton v Oades*, Mr Oades, had been charged with a number of offences arising out of his association with a company which had been ordered to be wound up. The appellant was the liquidator of the company. The liquidator obtained an order under s 541 of the *Companies (New South Wales) Code* for Mr Oades' examination in the Supreme Court of New South Wales as to matters relating to the promotion, formation, management, administration and winding up of the company. Mr Oades sought a direction under s 541(5) of the *Companies (New South Wales) Code* that the examination be restricted to matters not the subject of the pending charges. The Deputy Registrar before whom the examination was taking place refused that application. Mr Oades' application for review of the Deputy Registrar's decision was refused by a single judge of the Supreme Court. On appeal to the Court of Appeal, orders were made to the effect that, during the pendency of the charges, Mr Oades was not to be compelled to answer any questions which might tend to incriminate him and which concerned the facts that constituted ingredients of the pending charges, or any questions which would tend to disclose his defence to those charges. The Court of Appeal concluded[207] that it was necessary to restrict the examination "to avoid the possibility that there is any trespass upon the charged person's right to a fair trial".

139 The liquidator appealed to this Court. By majority (Mason CJ, Dawson and Toohey JJ, Deane and Gaudron JJ dissenting), the appeal was allowed and the orders made by the Court of Appeal were set aside. Mason CJ recognised[208] that an examination of the kind in question might expose a person who had been charged with, but not yet tried for, offences concerning the affairs of the company to "real and appreciable danger of conviction, notwithstanding that the answers themselves may not be given in evidence"[209] because of the indirect use that might be made of the answers given. Mason CJ further recognised[210] that "[t]o the extent only that under the section [authorising an order for examination] rights of an accused person are denied and protections removed, an examination may even amount to an interference with the administration of criminal justice". Whether the legislation had brought about that result was to be judged in light of "a long history of legislation governing examinations in bankruptcy and under

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207 *Oades v Hamilton* (1987) 11 NSWLR 138 at 154 per Clarke JA (Mahoney and Priestley JJA agreeing).

208 (1989) 166 CLR 486 at 494.

209 *Sorby* (1983) 152 CLR 281 at 294 per Gibbs CJ.

210 (1989) 166 CLR 486 at 494.

the Companies Acts which abrogate or qualify the right of the person examined to refuse to answer questions on the ground that the answers may incriminate him"[211]. And, as Mason CJ noted[212], this Court had earlier twice rejected, in *Rees v Kratzmann*[213] and *Mortimer v Brown*[214], arguments to the effect that a person subject to compulsory public examination in a court, under the companies legislation, could decline to answer a question on the ground that its answer might tend to incriminate that person.

140 Each of *Hamilton v Oades*[215] and the earlier decisions in *Rees v Kratzmann*[216] and *Mortimer v Brown*[217] emphasised the fact that the compulsory examinations would be conducted in court and that, accordingly, the court would retain the power to prevent abuse of its process. In each decision, however, this Court rejected the submission that examination on matters which otherwise might attract the privilege against self-incrimination would, *without more*, amount to an abuse of process. But all three decisions, including, in particular, *Hamilton v Oades*, necessarily depended on the historical pedigree of the legislation being construed. That is, each of those decisions answered particular questions about the construction of the relevant statute in light of the fact that the legislature had, for very many years, made special exceptions to the otherwise accusatorial process of the criminal law in respect of bankruptcy and companies examinations.

141 It is then not to the point to seek to draw out whatever drafting similarities might be found between the legislation considered in the companies examination cases and the relevant provisions of the ACC Act. The question presented by the provisions of the ACC Act is whether those provisions made a *new* exception to the accusatorial process of the criminal law.

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211 (1989) 166 CLR 486 at 494.

212 (1989) 166 CLR 486 at 494-495.

213 (1965) 114 CLR 63; [1965] HCA 49.

214 (1970) 122 CLR 493; [1970] HCA 4.

215 (1989) 166 CLR 486 at 498-499 per Mason CJ, 510 per Dawson J, 516-517 per Toohey J.

216 (1965) 114 CLR 63 at 78 per Menzies J (Barwick CJ and Taylor J agreeing).

217 (1970) 122 CLR 493 at 495 per Barwick CJ, 502 per Walsh J (Windeyer and Owen JJ agreeing).

Necessary intendment

142 It is important, but not determinative, to observe that the ACC Act does not provide expressly for the compulsory examination of a person charged with an indictable Commonwealth offence. The applicable rule of construction recognises, however, that legislation may necessarily imply that its provisions work some fundamental alteration to the general system of law, or the qualification of some fundamental right, even though the Act does not expressly provide for that effect[218]. But the implication must be necessary, not just available or somehow thought to be desirable. It is, therefore, important to consider whether the purpose or purposes of the ACC Act generally, or of the examination provisions in particular, would be defeated by reading the ACC Act's provisions as not permitting the examination of a person charged with an indictable Commonwealth offence about the subject matter of the charge.

143 Consideration of that question must begin by identifying the functions the ACC Act gives to the ACC, and also the role that a special ACC operation/investigation has in the ACC carrying out its statutory functions.

The ACC's functions

144 As noted at the start of these reasons, with one or two possible exceptions, the functions of the ACC are sufficiently described as functions directed to the gathering and dissemination of criminal information and intelligence. The first, and principal, exception to that general proposition is provided by s 7A(c) of the ACC Act. Section 7A(c) provides that it is a function of the ACC "to investigate, when authorised by the Board [of the ACC], matters relating to federally relevant criminal activity". The second possible exception to the proposition that the ACC is concerned with the gathering and dissemination of criminal information and intelligence is found in s 7A(g), which provides that the ACC has "such other functions as are conferred on the ACC by other provisions of this Act or by any other Act". No mention was made in argument of the conferral of any other relevant function on the ACC, whether by the ACC Act or some other Act. It may therefore be assumed that the only investigative function given to the ACC is that described in s 7A(c).

145 The particular nature and extent of the investigative function of the ACC is elucidated by the prescription, in s 7C, of the functions of the Board of the ACC. Section 7C(3) provides that:

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218 See, for example, *Daniels Corporation* (2002) 213 CLR 543 at 553 [11], 559-560 [32], 562-563 [43].

> "The Board may determine, in writing, that an investigation into matters relating to federally relevant criminal activity is a special investigation. *Before doing so, it must consider whether ordinary police methods of investigation into the matters are likely to be effective*." (emphasis added)

146 It is to be recalled that the examination powers which are in issue in this case are powers that relate expressly[219] to a "special ACC operation/investigation", which, in the context of this case, refers[220] to "an investigation into matters relating to federally relevant criminal activity that the ACC is conducting and that the Board has determined to be a special investigation". Although s 7C(3) provides that a "special investigation" cannot be undertaken without the Board of the ACC first *considering* "whether ordinary police methods of investigation into the matters are likely to be effective", it must be read as requiring the Board of the ACC not only to consider this question, but also to determine that ordinary police methods are not "likely to be effective". In the context of the ACC Act, "effective" can and must be understood as meaning "effective to permit the laying of charges against offenders". The word "effective" cannot and should not be read, in the context of the ACC Act generally, or in the particular context of s 7C(3), as embracing any larger task of deciding whether individual criminal guilt is demonstrated. It is only by the engagement of judicial power consequent upon the laying of a charge that individual criminal guilt will be determined.

147 The ACC may therefore execute its function of investigating matters relating to federally relevant criminal activity by using the extraordinary processes of compulsory examination only when the Board of the ACC has determined that ordinary police methods are not "likely to be effective" to lead to the laying of charges. The performance of that investigative function is in no way restricted or impeded if the power of compulsory examination does not extend to examination of a person who has been charged with, but not yet tried for, an indictable Commonwealth offence about the subject matter of the pending charge. The general provisions made for compulsory examination, when read in their context, do not imply, let alone *necessarily* imply, any qualification to the fundamentally accusatorial process of criminal justice which is engaged with respect to indictable Commonwealth offences.

148 Thus the provisions of the ACC Act which authorise compulsory examination do not permit compulsory examination of the plaintiff about the

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219 Section 24A provides: "An examiner may conduct an examination for the purposes of a special ACC operation/investigation."

220 s 4(1), definition of "special ACC operation/investigation", par (b).

subject matter of the offences with which he has been charged. Question 1 in the Case Stated should be answered accordingly.

The authority to conduct the compulsory examination

149 Although it is not necessary to decide the point, the better view may be that, on its proper construction, the determination made by the Board of the ACC, on which the ACC relied as permitting the examination of the plaintiff ("the Determination"), did not extend to permitting examination of the plaintiff about the subject matter of his pending charges.

150 The Determination relied on in this case was constituted by the Australian Crime Commission Special Investigation Authorisation and Determination (High Risk Crime Groups No 2) 2009 (Cth), as amended by the Australian Crime Commission Special Investigation Authorisation and Determination (High Risk Crime Groups No 2) Amendment No 1 of 2010 (Cth).

151 The Determination was not directed to the investigation of any named individuals or groups. It was intended to authorise investigations into the matters specified in Sched 1 from its commencement on 30 April 2009 until 30 June 2010, but was later extended, by the amending instrument, to 30 June 2011. The Determination was cast in very general terms which hinged on the expression "high risk crime groups". That expression was defined in a way that encompasses any "group" of two or more persons who were engaged in any of a wide variety of criminal acts in more than one jurisdiction. The definition of "high risk crime groups" contained a number of other criteria expressed disjunctively which not only did not confine further the application of the definition, but extended its operation.

152 The investigation which was authorised was identified in cl 1 of Sched 1 to the Determination. It was described as:

> "An investigation to determine whether, in accordance with the allegations mentioned in clause 3 and in the circumstances mentioned in clause 2, federally relevant criminal activity:
>
> (a) was committed before the commencement of this Instrument; or
>
> (b) was in the process of being committed on the commencement of this Instrument; or
>
> (c) may in future be committed."

One of the allegations mentioned in cl 3 of Sched 1 to the Determination was that "from 1 January 1990 certain persons, in concert with one another or with other persons, may be engaged in" any of a very wide variety of activities, including

certain serious drug offences contrary to Pt 9.1 of the *Criminal Code* (Cth) and proceeds of crime offences.

153 The Determination authorised an investigation "to determine whether" federally relevant criminal activity had been, was being, or may in the future be committed. Divorced from its context, that expression might suggest that the ACC was called on to perform some adjudicative function and, as has already been pointed out, it could not validly be given a function that required it to exercise the judicial power of the Commonwealth. When the expression "to determine whether" is read in the context provided by the statutory specification of the ACC's functions in s 7A of the ACC Act, the better view may well be that it does not encompass the criminal activity (federally relevant or not) of any person which is activity the subject of pending charges against that person, or activity which the person has admitted or been proved to have undertaken. The laying of charges against the person (or a subsequent guilty plea or verdict by or against the person with consequent conviction) sufficiently "determine[s] whether" that person has been engaged in the relevant conduct. Conviction evidently determines the question. But the charging of the individual also determines that question sufficiently for the purposes of the ACC Act because it must be assumed that there was reasonable and probable cause to lay the charge.

154 Adopting this construction of the Determination would be an additional reason to conclude that Question 1 in the Case Stated should be answered "No". It is, however, not necessary to reach that issue.

155 Question 2 in the Case Stated does not arise.

Conclusion and answers to questions reserved

156 The ACC Act does not permit the examiner to require the plaintiff to answer questions about the subject matter of the charges laid against him. The questions reserved for the opinion of the Full Court should be answered as follows:

1. Does Div 2 of Pt II of the ACC Act empower an examiner appointed under s 46B(1) of the ACC Act to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerns the subject matter of the offence so charged?

   Answer: The ACC Act does not authorise an examiner appointed under s 46B(1) of the ACC Act to require a person charged with a Commonwealth indictable offence to answer questions about the subject matter of the charged offence.

2. If the answer to Question 1 is "Yes", is Div 2 of Pt II of the ACC Act invalid to that extent as contrary to Ch III of the Constitution?

59.

Answer: This question does not arise.

157 KIEFEL J. I agree with the answers which Hayne and Bell JJ propose be given to the questions stated, substantially for the reasons given by their Honours. The *Australian Crime Commission Act* 2002 (Cth) ("the ACC Act") can be seen neither expressly nor by necessary intendment to require or authorise the examination of a person with respect to offences with which that person is charged and whose trial is therefore pending.

158 The requirement of the principle of legality is that a statutory intention to abrogate or restrict a fundamental freedom or principle or to depart from the general system of law must be expressed with irresistible clearness[221]. That is not a low standard. It will usually require that it be manifest from the statute in question that the legislature has directed its attention to the question whether to so abrogate or restrict and has determined to do so[222].

159 Relevant to the question of legislative intention is not only the privilege of the person to refuse to answer questions which may incriminate him or her, but also a fundamental principle of the common law. The fundamental principle – that the onus of proof rests upon the prosecution – is as stated in *Environment Protection Authority v Caltex Refining Co Pty Ltd*[223], as is its companion rule – that an accused person cannot be required to testify to the commission of the offence charged. The prosecution, in the discharge of its onus, cannot compel the accused to assist it[224].

160 The common law principle is fundamental to the system of criminal justice administered by courts in Australia, which, as Hayne and Bell JJ explain, is adversarial and accusatorial in nature. The accusatorial nature of the system of criminal justice involves not only the trial itself, but also pre-trial inquiries and investigations. This is recognised by the statutory provisions to which their Honours refer. It may be added, as to the trial itself, that the concept of an accusatorial trial where the prosecution seeks to prove its case to the jury has a constitutional dimension[225].

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221 *Potter v Minahan* (1908) 7 CLR 277 at 304; [1908] HCA 63.

222 *Coco v The Queen* (1994) 179 CLR 427 at 437; [1994] HCA 15.

223 (1993) 178 CLR 477 at 503, 550; [1993] HCA 74.

224 *Sorby v The Commonwealth* (1983) 152 CLR 281 at 294 per Gibbs CJ ("a cardinal principle"); [1983] HCA 10.

225 *R v Snow* (1915) 20 CLR 315 at 323 per Griffith CJ, referring to s 80 of the Constitution; [1915] HCA 90.

161 Decisions of this Court, and in particular *Clough v Leahy*[226], *McGuinness v Attorney-General (Vict)*[227] and *Hammond v The Commonwealth*[228], hold that the conduct of an inquiry parallel to a person's criminal prosecution would ordinarily constitute a contempt because the inquiry presents a real risk to the administration of criminal justice. The proper course, Gibbs CJ said in *Hammond*[229], is to adjourn the inquiry until the conclusion of the criminal proceedings. These decisions, and particularly that in *Hammond*, are not to be underestimated in their importance to this area of discourse. On the other hand, the trilogy of cases dealing with examinations in the context of bankruptcy or company liquidation where fraud may be suspected[230] are to be understood as the result of an historical anomaly, commencing with the divergent view taken by the Chancery Court from that of the common law and continuing through the series of legislation which preceded that dealt with in those cases[231].

162 Can it be said, by reference to the terms of the ACC Act, its purposes and its operation, that the legislature has directed its attention to an examination of a person as to offences with which that person is presently charged and whose trial is pending? Has it directed its attention to the effect of an examination in such circumstances on the fundamental principle which informs the criminal justice system, and to whether the examination may pose a real risk of interference with the administration of criminal justice? The answer to each must be "no" for the reasons given by Hayne and Bell JJ.

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226 (1904) 2 CLR 139; [1904] HCA 38.

227 (1940) 63 CLR 73; [1940] HCA 6.

228 (1982) 152 CLR 188; [1982] HCA 42.

229 (1982) 152 CLR 188 at 198, referring to his earlier comments in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 54; [1982] HCA 31.

230 *Rees v Kratzmann* (1965) 114 CLR 63; [1965] HCA 49; *Mortimer v Brown* (1970) 122 CLR 493; [1970] HCA 4; *Hamilton v Oades* (1989) 166 CLR 486; [1989] HCA 21.

231 See for example *Ex parte Cossens; In the Matter of Worrall* (1820) 1 Buck 531 at 540; *In re Paget; Ex parte Official Receiver* [1927] 2 Ch 85 at 87-88; *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1 at 23-24; *Rees v Kratzmann* (1965) 114 CLR 63 at 80; *Mortimer v Brown* (1970) 122 CLR 493 at 496.