HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL, GAGELER AND KEANE JJ

JASON LEE (AKA DO YOUNG LEE) & ANOR APPELLANTS

AND

NEW SOUTH WALES CRIME COMMISSION RESPONDENT

Lee v New South Wales Crime Commission
[2013] HCA 39
9 October 2013
S29/2013

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with G A Bashir and S J Free for the appellants (instructed by Nyman Gibson Stewart)

I D Temby QC with E C Muston for the respondent (instructed by New South Wales Crime Commission)

Interveners

J T Gleeson SC, Solicitor-General of the Commonwealth with D F C Thomas for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with N J Adams SC and J E Davidson for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor (NSW))

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

CATCHWORDS

Lee v New South Wales Crime Commission

Statutes – Interpretation – Recovery of proceeds of crime – Examination orders – Appellants charged with offences – New South Wales Crime Commission applied for orders that appellants be examined on oath pursuant to s 31D of the *Criminal Assets Recovery Act* 1990 (NSW) – Subject matter of examination would have overlapped with subject matter of criminal proceedings – Whether s 31D empowered examination of person charged with offences where subject matter of examination would overlap with subject matter of offences charged.

Words and phrases – "accusatorial system of criminal justice", "derivative use immunity", "direct use immunity", "examination", "fair trial", "principle of legality", "privilege against self-incrimination", "real risk of interference with the administration of justice", "right to silence", "serious crime related activity".

Criminal Assets Recovery Act 1990 (NSW), ss 12, 13, 13A, 31D, 63.

FRENCH CJ.

Introduction

1 The presumption of innocence, the privilege against self-incrimination and the right to silence are important elements of the "accusatorial system of justice" which generally prevails in the common law world. The privilege against self-incrimination reflects the long-standing antipathy of the common law to compulsory interrogations about criminal conduct. It has been said to be partly a result of "a persistent memory in the common law of hatred of the Star Chamber and its works."[1] It is recognised as a human right in international instruments, which apply to both the common law and civil law legal traditions[2]. In the United States, the Fifth Amendment has clothed the privilege "with the impregnability of a constitutional enactment"[3].

2 Executive governments have found aspects of the accusatorial system an inconvenience in the investigation of criminal conduct. Parliaments have enacted laws conferring powers on courts and investigative bodies to require persons to answer questions in hearings which may be in public or in private, including questions about whether or not they have engaged in criminal conduct. Generally speaking, such laws provide that the answers are not admissible in subsequent criminal proceedings, that is to say they provide a "direct use immunity". However, absent a "derivative use immunity" the answers may be used to discover evidence which is admissible against the person providing the answer.

3 In some cases, a person under statutory examination may already be facing criminal charges and find himself or herself being asked questions touching matters the subject of those charges. Whether a statute authorises a compulsory interrogation of an accused person in those circumstances is a question of statutory interpretation. The courts do not interpret a statute to

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

2 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 498 per Mason CJ and Toohey J, 513–514 per Brennan J, 532 per Deane, Dawson and Gaudron JJ, 545 per McHugh J; [1993] HCA 74. Article 14(3)(g) of the International Covenant on Civil and Political Rights recognises the right of a person not to be compelled to testify against himself or to confess guilt. The privilege has been judicially interpreted as an element of fair trial procedure guaranteed by Art 6 of the European Convention on Human Rights: *Saunders v United Kingdom* (1996) 23 EHRR 313 at 337 [68].

3 *Brown v Walker* 161 US 591 at 597 (1896), quoted by Gibbs CJ in *Sorby v The Commonwealth* (1983) 152 CLR 281 at 292; [1983] HCA 10.

permit such questioning unless it is expressly authorised or permitted as a matter of necessary implication. When the text, context and purpose of a statute permit a choice to be made, the courts will choose that interpretation which avoids or minimises the adverse impact of the statute upon common law rights and freedoms. However, subject to constitutional limits, where a parliament has decided to enact a law which abrogates such a right or freedom, its decision must be respected.

4 The Parliament of New South Wales has enacted such a law, the *Criminal Assets Recovery Act* 1990 (NSW) ("CAR Act")[4]. It impinges upon the accusatorial system of criminal justice and, in particular, the privilege against self-incrimination and the right of a person to remain silent when accused of the commission of a crime. Section 31D of the CAR Act provides for the New South Wales Crime Commission ("NSWCC") to apply to the Supreme Court for the examination of persons in aid of confiscation orders, which include assets forfeiture orders, under the CAR Act. The appellants objected to such an examination on the basis that the CAR Act did not authorise their interrogation about conduct in respect of which there are pending criminal charges against them. A Judge of the Supreme Court of New South Wales, Hulme J, relying upon the decision of this Court in *Hammond v The Commonwealth*[5], refused to make the order sought by the NSWCC[6]. However, the Court of Appeal of the Supreme Court of New South Wales held that the examination was authorised, allowed the appeal against the decision of the primary judge[7], and ordered that the first appellant, Jason Lee, be examined on oath before a registrar concerning his own affairs and that the second appellant, Seong Won Lee, be examined on oath before a registrar concerning the affairs of Jason Lee or Elizabeth Park. The principal judgment was written by Basten JA, with whom Beazley, McColl and Macfarlan JJA agreed. Meagher JA wrote separate concurring reasons. The appellants have appealed by special leave to this Court[8]. The primary question of construction on the appeal was whether s 31D would authorise an order for the examination of a person touching the subject matter of criminal charges pending

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4 The legislative history of the CAR Act, the history of civil and criminal assets forfeiture laws generally, and similar laws of the Commonwealth and other States are outlined in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 344–345 [25]–[29] per French CJ; [2009] HCA 49.

5 (1982) 152 CLR 188; [1982] HCA 42.

6 *New South Wales Crime Commission v Lee* [2011] NSWSC 80.

7 *New South Wales Crime Commission v Lee* [2012] NSWCA 276.

8 [2013] HCATrans 027.

against that person. Assuming the answer to that question was in the affirmative, the second question was whether the Supreme Court had a discretion to refuse to make such an order. As a matter of implication the CAR Act does authorise an order for the making of an examination of a person on matters the subject of criminal charges pending against that person. There is a discretion in the Court to refuse to make such an order. There was no submission that the exercise of the discretion by the Court of Appeal miscarried. The appeal should be dismissed.

The CAR Act — an overview

5 More extensive accounts of the scheme and content of the CAR Act appear in the other judgments. It is sufficient for present purposes to direct attention to its salient features.

6 The first of the principal objects of the CAR Act is[9]:

> "to provide for the confiscation, without requiring a conviction, of property of a person if the Supreme Court finds it to be more probable than not that the person has engaged in serious crime related activities".

The last of the principal objects is "to enable law enforcement authorities effectively to identify and recover property."[10] The term "serious crime related activities", appearing in the first principal object, when applied to a person, encompasses[11]:

> "anything done by the person that was at the time a serious criminal offence, whether or not the person has been charged with the offence or, if charged:
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> (a) has been tried, or
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> (b) has been tried and acquitted, or
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> (c) has been convicted (even if the conviction has been quashed or set aside)."

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9 CAR Act, s 3(a).

10 CAR Act, s 3(c).

11 CAR Act, s 6(1).

The term "serious criminal offence" covers a wide range of offences including drug trafficking[12] and money laundering[13]. As appears from the first principal object and the definition of "serious crime related activity", it is an object of the CAR Act that the procedures it creates for the identification and confiscation of property be capable of application to a person who has been charged with a serious criminal offence whether or not the person so charged has been tried. That conclusion was reinforced by s 62 of that Act, which provided for the Supreme Court to make orders with respect to the publication of any matters arising under the CAR Act in cases in which:

- a person has been charged with an offence in relation to a serious crime related activity and proceedings on that charge have not commenced or, if the proceedings have commenced, they have not been completed; and

- proceedings are instituted under the CAR Act for a restraining order, or an assets forfeiture order, affecting an interest of the person in property, or for a proceeds assessment order or an unexplained wealth order against the person.

That section was repealed by the *Court Suppression and Non-publication Orders Act* 2010 (NSW)[14] and replaced by s 8 of that Act, which commenced on 1 July 2011.

7 The proposition that the procedures created by the CAR Act are capable of application to persons who have been charged with criminal offences is reinforced by s 63 of the CAR Act, which provides:

> "The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which the Supreme Court may stay proceedings under this Act that are not criminal proceedings."

The appellants submitted that s 63 has a narrow operation and does no more than preclude the Court from relying upon the fact of the institution of criminal proceedings as a ground for a stay of proceedings under the CAR Act. Its narrow operation would not prevent the Court from staying or adjourning proceedings on the basis of particular circumstances and risk of prejudice arising in relation to pending criminal proceedings. Importantly, s 63 rests upon the premise that proceedings under the CAR Act may be instituted or in train at the same time as

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12 CAR Act, s 6(2)(b).

13 CAR Act, s 6(2)(d).

14 Sched 2.2.

criminal proceedings touching the same matter. It strengthens the inference that a purpose of the CAR Act is to enable, although not to require, the proceedings for which it provides to be instituted and undertaken notwithstanding the subsistence of a cognate criminal prosecution. That purpose necessarily extends to substantive and ancillary processes.

8 The substantive processes for which the CAR Act provides are applications to the Supreme Court of New South Wales for "confiscation orders". The term "confiscation order" covers three classes of order[15]:

- an assets forfeiture order[16];
- a proceeds assessment order[17];
- an unexplained wealth order[18].

An assets forfeiture order, in respect of an interest in property of a person, is mandated if the Court finds it to be more probable than not that the person was, at any time not more than six years before the making of the application, engaged in a serious crime related activity involving an offence punishable by imprisonment for five years or more[19]. The Court is not required to make a finding as to the commission of a particular offence[20]. A finding which grounds the making of an assets forfeiture order may be based on a finding that some offence or other constituting a serious crime related activity and punishable by imprisonment for five years or more was committed[21].

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15 CAR Act, s 4(1).

16 CAR Act, s 22.

17 CAR Act, s 27.

18 CAR Act, s 28A.

19 CAR Act, s 22(2)(b). An alternative criterion mandating an assets forfeiture order is satisfied by a finding on the balance of probabilities that the person engaged in a serious crime related activity involving an indictable quantity of a prohibited plant or drug under the *Drug Misuse and Trafficking Act* 1985 (NSW): s 22(2)(a), read with the definition of "indictable quantity" in s 4(1).

20 CAR Act, s 22(3).

21 CAR Act, s 22(3)(a).

9 Similar criteria apply in relation to the making of proceeds assessment orders[22] and unexplained wealth orders[23]. A proceeds assessment order requires a person to pay to the Treasurer an amount assessed by the Court as the value of the proceeds derived by the person from an illegal activity or illegal activities of the person or another person that took place not more than six years before the making of the application for the order[24]. The "unexplained wealth" of a person is defined in the CAR Act as[25]:

> "the whole or any part of the current or previous wealth of the person that the Supreme Court is not satisfied on the balance of probabilities is not or was not illegally acquired property or the proceeds of an illegal activity."

An unexplained wealth order requires a person "to pay to the Treasurer an amount assessed by the Court as the value of the unexplained wealth of the person."[26]

10 It is a consequence of the definition of "serious crime related activity", mentioned earlier, that the substantive court processes outlined may be invoked against persons who have been charged with and are awaiting trial for serious criminal offences. This case is concerned with an ancillary process under s 31D of the CAR Act, the scope of which must be considered having regard to the substantive processes which it serves. Section 31D authorises the Court to make orders for the examination on oath of persons concerning their affairs or the affairs of another person, including the nature and location of any property in which such persons have an interest. The construction and application of s 31D in relation to persons who have been charged with and are awaiting trial for serious criminal offences is in issue. It is necessary now to refer to the relevant parts of the text of the section and other parts of the Act which affect the exercise of the power which the section confers on the Supreme Court.

The examination provisions

11 Part 3 of the CAR Act is entitled "Confiscation". Division 2B, which consists only of s 31D, is entitled "Ancillary orders relating to confiscation orders". Section 31D(1) provides:

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22 CAR Act, s 27(2).

23 CAR Act, s 28A(2).

24 CAR Act, s 27(1).

25 CAR Act, s 28B(2).

26 CAR Act, s 28A(1).

"(1) If an application is made for a confiscation order … the Supreme Court may, on application by the Commission, when the application for the confiscation order … is made or at a later time, make any one or more of the following orders:

(a) an order for the examination on oath of:

(i) the affected person, or

(ii) another person,

before the Court, or before an officer of the Court prescribed by rules of court, concerning the affairs of the affected person, including the nature and location of any property in which the affected person has an interest,

…

(3) Sections 13 and 13A apply in respect of a person being examined under an order under this section in the same way as they apply in respect of a person being examined under an order under section 12(1)."

12 Section 12 is ancillary to the power of the Supreme Court, conferred by s 10A of the CAR Act, to make restraining orders in respect of property or an interest in property[27]. That section empowers the Supreme Court, when it makes a restraining order and at any later time, to "make any ancillary orders … that the Court considers appropriate"[28]. Without limiting the generality of that power, it authorises the Court to make an order for the examination on oath of the owner of an interest in property that is subject to the restraining order, or another person, "concerning the affairs of the owner, including the nature and location of any property in which the owner has an interest"[29].

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27 That power, then contained in s 10, was considered in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319. The CAR Act has since been amended to authorise the Supreme Court to direct that notice be given to an affected person notwithstanding that an application for a restraining order is made ex parte: CAR Act, s 10A(4).

28 CAR Act, s 12(1).

29 CAR Act, s 12(1)(b).

13 For the purposes of an examination under s 12, ss 13 and 13A abrogate obligations of confidentiality[30], legal professional privilege[31] and the privilege against self-incrimination[32]. They also apply, by operation of s 31D(3), in respect of a person being examined under an order made pursuant to s 31D(1). Section 13A, which abrogates the privilege against self-incrimination, also provides for direct use immunity in respect of answers given or documents produced by the person examined where he or she objected at the time of answering the question or producing the document on the ground that the answer or document might incriminate the person[33]. However, further information obtained as a result of an answer given or a document produced in an examination is not inadmissible on the ground that the answer had to be given or the document had to be produced or that the answer given or the document produced might incriminate the person[34]. The protection afforded by s 13A(2) is therefore limited to direct use immunity and does not extend to derivative use immunity.

14 The appellants made a general submission that the exposure of an accused person to a compulsory examination touching the subject matter of the charge which that person was facing could give rise to unfair disadvantage in the criminal proceedings. It would give rise to a risk that the prosecution would have foreknowledge of defences or explanations for transactions the subject of the criminal charge[35]. In effect, this was a complaint that the compulsory examination process would deprive an accused person of some of the protections conferred by the accusatorial system of criminal justice. That may be accepted, at least in principle. The question is whether s 31D of the CAR Act, properly construed, empowers the Supreme Court to make an order for the examination of a person notwithstanding that the examination may touch matters the subject of pending criminal charges against the person. That question directs attention to a number of decisions in this Court concerning compulsory examinations relating to criminal offences, including the recent decision in *X7 v Australian Crime*

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30 CAR Act, s 13(1)(b).

31 CAR Act, s 13(1)(c).

32 CAR Act, s 13A(1).

33 CAR Act, s 13A(2)(a).

34 CAR Act, s 13A(3).

35 The appellants referred in this connection to observations of the Court of Criminal Appeal of New South Wales in *R v Seller* (2013) 273 FLR 155.

Commission[36]. In such cases, as in this case, when the scope of the examination power is in issue, its objects and character must be considered.

15 The *Australian Crime Commission Act* 2002 (Cth) ("ACC Act"), which was the subject of this Court's decision in *X7*, was directed to the gathering and dissemination of criminal information and intelligence by an executive authority. As pointed out in the joint judgment of Hayne and Bell JJ in that case, the only investigative function given to the Australian Crime Commission ("ACC") under the Act was the investigation, when authorised by the ACC Board, of "matters relating to federally relevant criminal activity"[37]. The term "federally relevant criminal activity" used in the ACC Act is the closest equivalent to the term "serious crime related activity" used in the CAR Act. The term "relevant criminal activity" is defined in the ACC Act to mean[38]:

> "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."

The term "relevant crime" includes "serious and organised crime" but the definition of that term, although inclusive, did not expressly cover matters the subject of pending charges. The general provisions of s 25A(12) and (13), which allowed for evidence given in an examination under the ACC Act to be made available to persons charged with offences, did not expressly cover the case in which the evidence had been given by the person charged. There was, as Hayne and Bell JJ observed in their joint judgment in *X7*, "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."[39] Words sufficiently general to include such a case had been used, but they did not deal directly or expressly with it[40]. However, the objects and character of a compulsory examination under the ACC Act differ materially from the objects and character of a compulsory examination under the CAR Act as the text of the ACC Act differs materially from that of the CAR Act.

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36 (2013) 87 ALJR 858; 298 ALR 570; [2013] HCA 29.

37 ACC Act, s 7A(c) and see *X7 v Australian Crime Commission* (2013) 87 ALJR 858 at 890–891 [144]; 298 ALR 570 at 609.

38 ACC Act, s 4(1).

39 (2013) 87 ALJR 858 at 880 [83]; 298 ALR 570 at 594.

40 (2013) 87 ALJR 858 at 880 [83]; 298 ALR 570 at 594–595.

16 Before turning to the earlier decisions of this Court, it is desirable to outline briefly the history of proceedings in the Supreme Court of New South Wales which have led to this appeal.

Proceedings in the Supreme Court

17 More comprehensive accounts of the proceedings in the Supreme Court of New South Wales appear in the other reasons for judgment. It is sufficient for present purposes to refer briefly to the history of those proceedings:

- On 28 February 2011, Hulme J declined to make orders sought by way of notice of motion by the NSWCC under s 31D of the CAR Act for the examination of the appellants[41]. He did so on the basis that the appellants had been charged with criminal offences and that the proposed examination would expose them to questioning about matters relevant to the charges[42]. His Honour held[43] that the matter was governed by the decision of this Court in *Hammond*[44], which is discussed later in these reasons. The NSWCC sought leave to appeal to the Court of Appeal against his Honour's decision.

- At the time of the NSWCC's application for leave to appeal, the appellants had each been convicted of drug and firearm offences. They had lodged appeals against their convictions which were listed for hearing on 23 August 2012[45]. In relation to the first appellant, a separate trial for money laundering was listed for 2 October 2012.

- On 6 September 2012, the Court of Appeal granted leave to appeal and allowed the appeal. The Court ordered that the first appellant, Jason Lee, be examined on oath before a registrar concerning his own affairs, including the nature and location of any property in which he has an interest. It ordered that the second appellant, Seong Won Lee, be examined on oath before a registrar concerning the affairs of the first appellant, Jason Lee, or Elizabeth Park, including the nature and location

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41 His Honour made no order formally dismissing the motion. That oversight was rectified in the Court of Appeal, which made the requisite order before allowing the appeal and setting that order aside: [2012] NSWCA 276 at [15]–[16].

42 [2011] NSWSC 80 at [19].

43 [2011] NSWSC 80 at [20].

44 (1982) 152 CLR 188.

45 [2012] NSWCA 276 at [4].

of any property in which the first appellant, Jason Lee, or Elizabeth Park has an interest.

- On 15 February 2013, this Court (Heydon, Bell and Gageler JJ) granted the appellants special leave to appeal to this Court from the whole of the judgment and order of the Court of Appeal of the Supreme Court of New South Wales.

Compulsory examination concerning criminal offences

18 The proposition is well established that, subject to statutory constraints, Australian governments, in the exercise of executive power, can establish inquiries for the purpose of determining whether an individual has committed a criminal offence. Whether such inquiries could be conducted at common law was the subject of an "ancient controversy which has ... been put to rest in Australia."[46] Dixon J, with close attention to legal history, said in *McGuinness v Attorney-General (Vict)*[47]:

> "while the principle that the Crown cannot grant special commissions, outside the ancient and established instruments of judicial authority, for the taking of inquests, civil or criminal, extends to inquisitions into matters of right and into supposed offences, the principle does not affect commissions of mere inquiry and report involving no compulsion, except under the authority of statute, no determination carrying legal consequences and no exercise of authority of a judicial nature *in invitos*."

Other members of the Court reached a similar conclusion[48]. In so holding, the Court followed what it had said earlier in its life in *Clough v Leahy*[49]. An attempt to revive the "ancient controversy" was rejected in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* ("the *BLF case*")[50].

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46 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 48 per Gibbs CJ; [1982] HCA 31.

47 (1940) 63 CLR 73 at 102; [1940] HCA 6.

48 (1940) 63 CLR 73 at 83–84 per Latham CJ, 86 per Rich J relevantly concurring, 91 per Starke J, 106 per McTiernan J.

49 (1904) 2 CLR 139 at 159–160 per Griffith CJ, Barton and O'Connor JJ concurring at 163; [1904] HCA 38.

50 (1982) 152 CLR 25.

19 Nevertheless, as pointed out by Griffith CJ in *Clough*, while a Royal Commission created under the prerogative power of a State executive government or under s 61 of the Commonwealth Constitution can inquire into the commission of criminal offences, such an inquiry cannot be conducted so as to interfere with the administration of justice. Conduct interfering with the administration of justice would not be protected on the basis that it was done on behalf of the Crown under the authority of a Royal Commission[51]. Latham CJ, in *McGuinness*, after quoting Griffith CJ, said[52]:

> "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. There are other circumstances in which such an inquiry might prejudice proceedings in the civil or the criminal courts. It is neither necessary nor desirable to attempt to enumerate in an exhaustive manner the circumstances which might raise a case of contempt of court."

None of the other Justices in *McGuinness* advanced a view contrary to that of Latham CJ and that proposition is not controversial in this appeal. It was reflected in the observation by Gibbs CJ in the *BLF case*, which he repeated in *Hammond*[53], that[54]:

> "if 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, the continuance of the inquiry would, speaking generally, amount to a contempt of court".

The reference to "contempt of court" identifies the basis of the *Hammond* decision — interference with the administration of justice by a non-judicial body. That is not this case.

20 *Clough* and *McGuinness* concerned the extent of the executive power to establish and conduct inquiries. In *Clough*, the Court held that a statute could be enacted to require a person to be sworn and to answer questions at a validly constituted Royal Commission and to make it an offence to refuse to do so

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51 (1904) 2 CLR 139 at 161.

52 (1940) 63 CLR 73 at 85.

53 (1982) 152 CLR 188 at 198.

54 (1982) 152 CLR 25 at 54.

without reasonable excuse. Absent such statutory support, the effectiveness of the inquiry, lacking coercive power, would have been limited[55]. As Ferguson J, in *Ex parte Walker*[56], said of a Royal Commissioner without statutory powers, "[l]ike Glendower he 'can call spirits from the vasty deep', and they are unlikely to come when he does call."[57] The Royal Commission in *McGuinness*, which was created pursuant to the prerogative by the Executive Government of Victoria, was empowered by the *Evidence Act* 1928 (Vic) to summon witnesses to answer questions material to the subject matter of its inquiry[58]. Clearly enough, a Royal Commission which, without clear statutory authority, inquired into allegations of criminal conduct the subject of pending charges would be at risk of committing a contempt of the court in which the charges were pending. The question whether such an inquiry could be conducted by any executive body would turn upon the scope of the powers conferred upon it by statute. That would be a matter of construction. A point of reference for the construction of such statutes is that class of statute which abrogates the privilege against self-incrimination. It may be accepted, as McHugh J observed in *Environment Protection Authority v Caltex Refining Co Pty Ltd*[59]:

> "that the privilege against self-incrimination is a natural, although not a necessary, consequence of the adversary system."

As Deane, Dawson and Gaudron JJ put it in their partly dissenting joint judgment, the right of an accused person to refrain from giving evidence and to avoid answering incriminating questions is explained by the principle, fundamental in the 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."[60]

That being so, the interaction of that broad principle with the interpretation of a statute said to qualify or abrogate its application raises questions analogous to

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55 (1904) 2 CLR 139 at 159–160.

56 (1924) 24 SR (NSW) 604.

57 (1924) 24 SR (NSW) 604 at 615.

58 The existence of such statutory powers, as Dixon J observed in *McGuinness*, was not relevant to the validity of the Royal Commission: (1940) 63 CLR 73 at 94, 99.

59 (1993) 178 CLR 477 at 550.

60 (1993) 178 CLR 477 at 527.

those raised in the interpretation of a statute which is said to qualify or abrogate the privilege against self-incrimination.

21 The constitutional validity of a Commonwealth law conferring a power of compulsory interrogation which might abrogate the privilege against self-incrimination was considered in 1909 in *Huddart, Parker & Co Pty Ltd v Moorehead* ("*Huddart Parker*")[61]. Abrogation of the privilege by the exercise of the power conferred upon the Comptroller-General of Customs by s 15B of the *Australian Industries Preservation Act* 1906 (Cth) was held not to interfere with the right to trial by jury provided for in s 80 of the Constitution. Griffith CJ pointed out that the privilege had entered English law long after trial by jury and that its application had frequently been excluded by statutes in the case of indictable offences. It was a rule that was "rather one of evidence than one relating to trial by jury."[62] Barton J agreed on that point[63]. Neither suggested it was simply a rule of evidence[64]. O'Connor J acknowledged that the principle had been "a principle of British criminal law, departed from no doubt in special instances, as in the case of offences against the bankruptcy laws, but still maintained and administered as part of the great body of British criminal jurisprudence."[65] It was, however, "no part of the system of trial by jury."[66] Subject to constitutional limits, Parliament had the power to modify "any principle of British criminal law, no matter how fundamental"[67]. Isaacs J also rejected the argument that s 15B interfered with trial by jury. He went further than Griffith CJ and Barton J, however, and characterised the privilege as "a mere evidentiary rule, applicable to all criminal offences ... and open like all rules of evidence to Parliamentary regulation."[68] Higgins J concurred with what the other Justices had said on the question of s 15B[69].

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61 (1909) 8 CLR 330; [1909] HCA 36.

62 (1909) 8 CLR 330 at 358.

63 (1909) 8 CLR 330 at 366.

64 A proposition expressly rejected in *Reid v Howard* (1995) 184 CLR 1; [1995] HCA 40, discussed below.

65 (1909) 8 CLR 330 at 375.

66 (1909) 8 CLR 330 at 375.

67 (1909) 8 CLR 330 at 375.

68 (1909) 8 CLR 330 at 386.

69 (1909) 8 CLR 330 at 418.

22 What was said in *Huddart Parker* on the question of trial by jury was reiterated in *Sorby v The Commonwealth*[70]. Gibbs CJ agreed "that the privilege against self-incrimination is not a necessary part of a trial by jury."[71] Mason, Wilson and Dawson JJ quoted and adopted with approval the passage from the judgment of O'Connor J referred to above[72].

23 In rejecting a submission that s 15B conferred a power in aid of judicial proceedings, O'Connor J in *Huddart Parker* made reference to the effect of pending criminal proceedings. He said[73]:

> "When the Comptroller makes his requirement under 15B there can be no proceeding pending in a Court. He is not empowered to use the section with reference to an offence when once it has been brought within the cognizance of the Court. The power to prevent any such interference by the Executive with a case pending before the ordinary tribunals is undoubtedly vested in this Court by the Constitution."

Gibbs CJ pointed out in *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission*[74] that the first two sentences in that passage were statements of the effect of s 15B on its proper construction, supported by the proposition in the third sentence that if the power were used once a prosecution had been commenced there might be an interference in the course of justice in the tribunal in which the prosecution was pending[75]. His Honour's analysis was generally consistent with the approach which had been taken to s 15B a few years after *Huddart Parker* in *Melbourne Steamship Co Ltd v Moorehead*[76].

24 The privilege against self-incrimination is not an essential element of the process of trial by jury. On the other hand, contrary to what Isaacs J said in *Huddart Parker*, it is not "a mere evidentiary rule". As this Court has

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70 (1983) 152 CLR 281.

71 (1983) 152 CLR 281 at 298.

72 (1983) 152 CLR 281 at 308–309.

73 (1909) 8 CLR 330 at 379–380.

74 (1982) 152 CLR 460; [1982] HCA 65.

75 (1982) 152 CLR 460 at 466.

76 (1912) 15 CLR 333 at 341 per Griffith CJ, 346 per Barton J, 350 per Isaacs J; [1912] HCA 69. See the reference to *Melbourne Steamship* by Gibbs CJ in *Pioneer Concrete* (1982) 152 CLR 460 at 466–467.

emphatically held, it is "a basic and substantive common law right."[77] It is distinct from but supports the presumption of innocence[78]. That connection was succinctly expressed by Gibbs CJ in *Sorby*[79]:

> "It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person, and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt."

25 The practical significance of a non-judicial, non-compulsory inquiry of persons charged with criminal offences was the subject of obiter observations in *R v Macfarlane; Ex parte O'Flanagan and O'Kelly*[80]. Section 8A of the *Immigration Act* 1901 (Cth) authorised a Board created under that Act to require a person to show cause why he or she, having been charged with a criminal offence, should not be deported. There was discussion in the judgments about whether injunctive relief would lie if, contrary to the fact, a constitutional challenge to the validity of s 8A had been successful. On that hypothesis, all of the Justices save for Higgins and Starke JJ would have granted injunctive relief because of the prejudice which would otherwise have been suffered by the plaintiffs. That prejudice was framed in terms of the "practical compulsion" which the plaintiffs would face before the Board to disclose their case against the criminal charges in order to avoid deportation[81]. Higgins J abstained from comment on the question of relief[82]. Starke J doubted that injunctive relief would

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77 *X7 v Australian Crime Commission* (2013) 87 ALJR 858 at 883 [104]; 298 ALR 570 at 599 per Hayne and Bell JJ, quoting *Reid v Howard* (1995) 184 CLR 1 at 11 per Toohey, Gaudron, McHugh and Gummow JJ; Kiefel J generally agreeing: 87 ALJR 858 at 892 [157]; 298 ALR 570 at 612. See also *Petty v The Queen* (1991) 173 CLR 95 at 99 per Mason CJ, Deane, Toohey and McHugh JJ, 106 per Brennan J; [1991] HCA 34.

78 *X7 v Australian Crime Commission* (2013) 87 ALJR 858 at 883 [102]; 298 ALR 570 at 599; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 503 per Mason CJ and Toohey J.

79 (1983) 152 CLR 281 at 294 — a passage quoted by Deane, Dawson and Gaudron JJ in *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 527. Although their Honours were in dissent in the result, the passage quoted was consistent with the reasoning of the majority.

80 (1923) 32 CLR 518; [1923] HCA 39.

81 (1923) 32 CLR 518 at 540 per Isaacs J, see also at 529–530 per Knox CJ, 578 per Rich J.

82 (1923) 32 CLR 518 at 568.

be appropriate. He accepted that unauthorised proceedings before the Board would probably prejudice the plaintiffs, but said[83]:

> "The King's Courts in the States are, as it seems to me, armed with ample powers to secure fair trials and the proper administration of justice in proceedings pending in the States, and to deal with persons within their territorial limits who, without any lawful authority, interfere with or obstruct those proceedings." (footnote omitted)

There was evidently no provision restricting the dissemination or use of any disclosure made to the Board. As a general proposition, the nature and extent of the prejudice to a person required to answer questions concerning matters the subject of pending criminal charges will depend in part upon the statutory context and, in particular, the protections which the statute affords in relation to the use which may be made of answers provided by the examinee. The extent of the prejudice may also depend upon whether, as in the present case, the examination is conducted by a judicial officer and the extent of the judicial officer's discretion to control and supervise the examination so as to limit prejudice to the examinee.

26 The interaction between administrative investigations and pending curial proceedings was briefly considered by Fullagar J, sitting alone, on an application for interim injunctive relief in *Lockwood v The Commonwealth*[84]. His Honour rejected a submission that the continuance of the Petrov Royal Commission in relation to a witness who had instituted defamation proceedings in this Court against senior counsel assisting the inquiry would be a contempt of this Court. He also rejected the general proposition that a Royal Commission could not inquire into and report upon a matter which was the subject of pending civil or criminal proceedings[85]. He said[86]:

> "The short answer to the whole argument seems to me to be that this commission is authorized and required, in pursuance of a statute, to undertake the inquiry in which it is engaged. No court could hold, in any circumstances which I find it possible to envisage, that what is expressly

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83 (1923) 32 CLR 518 at 584.

84 (1954) 90 CLR 177; [1954] HCA 31.

85 (1954) 90 CLR 177 at 185.

86 (1954) 90 CLR 177 at 185. Fullagar J also said, at 186, that *McGuinness* suggested that the position would have been the same if the Commission had been appointed without statutory authority. The generality of that observation was not accepted in the *BLF case*: (1982) 152 CLR 25 at 130–131 per Wilson J.

> authorized by or under a statute is a contempt, and it is a rule of the common law that the common law itself gives way to statute law."

27 *Lockwood* was distinguished by Gibbs CJ, Stephen and Mason JJ in the *BLF case* on the basis that Fullagar J's observations had been made in the context of a statute specifically authorising the particular inquiry — the *Royal Commission Act* 1954 (Cth), under which the Petrov Royal Commission was purportedly established[87]. That distinction effectively contained the application of the remarks made by Fullagar J to cases in which the empowering statutes expressly authorise conduct which would otherwise be a contempt. Apart from Gibbs CJ, Stephen and Mason JJ, who distinguished *Lockwood* on that basis, Wilson J thought the application of Fullagar J's remarks was problematic unless "the precise extent of the express authority to which reference is made" could be determined with confidence[88]. Brennan J did not think that what his Honour had said was correct[89]. Aickin J seemed to support the generality of Fullagar J's remarks. Referring to the *Royal Commissions Act* 1902 (Cth), he said[90]:

> "It is difficult to see how that which is expressly authorized by the Parliament can be regarded as capable of being a contempt of court, whether of a federal court or a State court."

His Honour, however, did not think it necessary to express a final opinion on that point[91].

28 What emerged from the critique of *Lockwood* in the *BLF case* was the uncontroversial but important proposition that, subject to constitutional constraints, a statute may authorise an investigative body to exercise its functions in circumstances in which, absent such authority, it would commit a contempt of a court. The kind of statutory authority contemplated by Fullagar J was express. Such authority might also be found as a matter of necessary implication.

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87 (1982) 152 CLR 25 at 55 per Gibbs CJ, 72 per Stephen J, 94 per Mason J — a distinction which may have been based on a wrong premise. Fullagar J held that the specific purpose 1954 Act only authorised the appointment of a single commissioner. He held that the appointment of the three Petrov Royal Commissioners was supported by the general power conferred by s 1A of the *Royal Commissions Act* 1902 (Cth): (1954) 90 CLR 177 at 183.

88 (1982) 152 CLR 25 at 131.

89 (1982) 152 CLR 25 at 160.

90 (1982) 152 CLR 25 at 120.

91 (1982) 152 CLR 25 at 120.

29 A statute said to affect important common law rights and procedural and other safeguards of individual rights and freedoms will be construed "as effecting no more than is strictly required by clear words or as a matter of necessary implication"[92]. That is a formulation, sufficient for present purposes, of the principle of legality, the origins and content of which are discussed in the reasons for judgment of Kiefel J[93] and in the joint reasons for judgment of Gageler and Keane JJ[94]. It is the application rather than the content of that principle which is in issue in this case. Legislative purpose, text and context have a role to play when considering its application.

30 A construction of a statute as abrogating the privilege against self-incrimination may be required, as a matter of necessary implication, by the clear purpose of the statute. Walsh J, who wrote the principal judgment in *Mortimer v Brown*[95], said of s 250 of the *Companies Act* 1961 (Q), which was held to abrogate the privilege[96]:

> "having regard to the purpose of s 250 and to the public interest which it is intended to serve, the contention should not be accepted that there should be applied to its construction the principle that a statute should not be construed as being intended to take away common law rights unless that intention is specifically stated."

In similar vein, Dawson J said of the implied abrogation of both the privilege against self-incrimination and legal professional privilege in *Corporate Affairs Commission (NSW) v Yuill*[97]:

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92 *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 252 per Deane, Dawson, Toohey and Gaudron JJ; [1992] HCA 24, citing, in relation to the privilege against self-incrimination, *Hammond v The Commonwealth* (1982) 152 CLR 188; *Sorby v The Commonwealth* (1983) 152 CLR 281 and *Hamilton v Oades* (1989) 166 CLR 486; [1989] HCA 21.

93 Judgment of Kiefel J at [171]–[173].

94 Judgment of Gageler and Keane JJ at [307]–[312].

95 (1970) 122 CLR 493; [1970] HCA 4.

96 (1970) 122 CLR 493 at 499.

97 (1991) 172 CLR 319 at 332–333, Toohey J agreeing at 337; [1991] HCA 28. See also at 327 per Brennan J, quoting Walsh J in *Mortimer v Brown* (1970) 122 CLR 493 at 499.

> "Obviously, the more specific the legislation the less difficult it will be to determine whether such an implication is justified, but the character or purpose of the legislation may of itself be a sufficient indication of legislative intent."

31 The *BLF case* focussed on whether a general statute could authorise an inquiry, by an executive body, which might be conducted in a way that, absent statutory authority, would constitute an interference with the administration of justice and thereby a contempt of court. It was contempt of court committed in an executive inquiry which was also in the forefront of consideration in *Hammond*[98]. That decision is relied upon by the appellants and followed immediately upon this Court's decision in the *BLF case*[99]. The focus in that case upon contempt of court committed in an executive inquiry puts *Hammond* in a different category from the present case and also in a somewhat different category from *Hamilton v Oades*[100], which is referred to later in these reasons and which concerned a compulsory examination in the exercise of a power conferred upon a court.

32 *Hammond* was concerned with the powers of a Royal Commission to require a witness before it to answer questions touching the subject matter of a criminal charge pending against him. There was a common assumption by the parties, which was doubted by the Court[101], that the relevant statutory powers abrogated the privilege against self-incrimination. Although the statutory powers were conferred by provisions of the *Royal Commissions Act* 1902 (Cth) and the *Evidence Act* 1958 (Vic), the Court did not, in terms, construe those provisions. The ground of the application to restrain the Royal Commissioner from examining the plaintiff in connection with the criminal offence with which he was charged was that it would constitute a contempt of the County Court, before which the criminal proceedings against the plaintiff were then pending[102]. The silent premise of the case seems to have been an assumption that, properly construed, the statutory powers in issue did not authorise conduct by the Royal Commission which would, absent such authority, constitute an interference with the administration of justice amounting to a contempt of court. The question

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98 (1982) 152 CLR 188.

99 (1982) 152 CLR 25.

100 (1989) 166 CLR 486.

101 (1982) 152 CLR 188 at 197–198 per Gibbs CJ, 199 per Mason J agreeing, 199 per Murphy J generally agreeing.

102 (1982) 152 CLR 188 at 196 per Gibbs CJ.

upon which the Court focussed was whether the continued examination would constitute such a contempt.

33 The criterion for relief, as stated by Gibbs CJ, was whether there was "a real risk, as opposed to a remote possibility, that justice will be interfered with if the Commission proceeds in accordance with its present intention"[103]. The Chief Justice held that although the proposed examination would be conducted in private and although the plaintiff's answers to the questions could not be used at the criminal trial, there was "a real risk that the administration of justice [would] be interfered with."[104] His Honour said[105]:

> "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."

Gibbs CJ referred to what he had said in the *BLF case* that the continuance, after the commencement of a criminal prosecution, of an inquiry into allegations that the accused person had been guilty of criminal conduct would, generally speaking, amount to a contempt of court, and that the proper course would be to adjourn the inquiry[106]. Mason J agreed with Gibbs CJ[107], as did Murphy J[108], who nevertheless wrote a separate judgment on the issue of the privilege against self-incrimination and whether the proposed examination would interfere with the plaintiff's right to trial by jury under s 80.

34 Brennan J supported the grant of injunctive relief on the basis that it was[109]:

> "a principle deep-rooted in our law and history that the Crown may not subject an accused person to compulsory process to obtain his answers upon the issue of his guilt of an offence with which he has been charged."

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103 (1982) 152 CLR 188 at 196.

104 (1982) 152 CLR 188 at 198.

105 (1982) 152 CLR 188 at 198.

106 (1982) 152 CLR 188 at 198.

107 (1982) 152 CLR 188 at 199.

108 (1982) 152 CLR 188 at 199.

109 (1982) 152 CLR 188 at 202–203.

His Honour spoke of statutory power in a way that, unlike the other Justices, was indicative of an underlying restrictive interpretive principle[110]:

> "Whether the Parliament could deprive him of that immunity when he stands charged with an offence against a law of the Commonwealth is a question which need not now be determined, for it is not to be thought that Parliament, in arming a Commissioner with the powers to be found in the respective Acts, intended that the power might be exercised to deny a freedom so treasured by tradition and so central to the judicial administration of criminal justice."

That observation did not itself, however, involve a construction of the provisions conferring the powers in issue in that case.

35 Deane J said that it was fundamental to the administration of criminal justice that a person the subject of pending criminal proceedings should not have his part in the matters involved in those criminal proceedings made the subject of a parallel inquisitorial inquiry by an administrative tribunal with coercive powers[111]. Such an investigation was "an improper interference with the due administration of justice in the proceedings against [the accused] in the criminal court and contempt of court."[112]

36 Gibbs CJ, in *Sorby*[113], described *Hammond* as a case in which there had been a "real possibility" of interference with the due administration of justice in the continuance of the examination[114]. The plurality in *Sorby* said that the examination in *Hammond* had amounted to a contempt of court[115]. Brennan J regarded *Hammond* as illustrative of the modern vitality of the common law's traditional objection to compulsory interrogation[116]. In the end, *Hammond* is a case which is of limited utility in the present appeal. It involved an investigation by an executive body, exercising powers conferred by statutes which differed significantly from the statute in issue in this appeal. It did not concern an

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110 (1982) 152 CLR 188 at 203.

111 (1982) 152 CLR 188 at 206.

112 (1982) 152 CLR 188 at 206.

113 (1983) 152 CLR 281.

114 (1983) 152 CLR 281 at 299.

115 (1983) 152 CLR 281 at 306.

116 (1983) 152 CLR 281 at 318.

examination subject to judicial control and discretion of the kind available under the CAR Act. The Court of Appeal in the present case held that the primary judge's reliance upon *Hammond* was in error[117]. It was correct so to hold.

37 In *Sorby*, the Court held that s 6A of the *Royal Commissions Act* 1902 (Cth), introduced into the Act by the *Royal Commissions Amendment Act* 1982 (Cth), validly abrogated the privilege against self-incrimination for witnesses appearing before a Commission under that Act. The section expressly preserved the privilege in cases in which the answer to a question might tend to incriminate a person in respect of an offence with which the person had been charged where the charge had not been finally dealt with by a court or otherwise disposed of[118]. A submission was nevertheless made that the abrogation of the privilege against self-incrimination by s 6A of the *Royal Commissions Act* effected an impermissible interference with the administration of justice. The plurality rejected that submission and distinguished *Hammond*, observing that[119]:

> "It is of the essence of contempt of court, except contempt scandalizing the court, that it be committed in relation to proceedings."

Even the strong probability that a witness before a Royal Commission would be charged with an offence provided "an unlikely basis for a finding of contempt against the Commission in the event that the witness is questioned about matters which are relevant to the offence."[120] Gibbs CJ enunciated an interpretive principle, saying that, if the legislature intended to render the privilege against self-incrimination unavailable, "it must manifest clearly its intention to do so."[121] That reflected his Honour's view of the privilege as supportive of the "cardinal principle" that the burden of proof of guilt of a person charged with a criminal offence rests upon the Crown[122]. That cardinal principle, and the privilege which supports it, are central to, although not exhaustive of, the accusatorial character of criminal proceedings as described in *X7*[123].

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117 [2012] NSWCA 276 at [58], [67].

118 *Royal Commissions Act* 1902 (Cth), s 6A(3).

119 (1983) 152 CLR 281 at 306.

120 (1983) 152 CLR 281 at 307.

121 (1983) 152 CLR 281 at 295.

122 (1983) 152 CLR 281 at 294.

123 (2013) 87 ALJR 858 at 883 [101] per Hayne and Bell JJ; 298 ALR 570 at 598.

38 Long-standing examples of the displacement of the privilege against self-incrimination may be found in statutes providing for compulsory examination of persons before judicial officers under bankruptcy and corporate insolvency laws. This reflects a public policy choice of the kind adverted to by Windeyer J in *Rees v Kratzmann*[124]:

> "If the legislature thinks that in this field the public interest overcomes some of the common law's traditional consideration for the individual, then effect must be given to the statute which embodies this policy."

That is a proposition of general application beyond the field of bankruptcy and corporate insolvency. Importantly, the existence of the power in those fields was subject to judicial control to ensure that the examination was "not made an instrument of oppression, injustice, or of needless injury to the individual."[125]

39 The proposition that s 250 of the *Companies Act* 1961 (Q) abrogated the privilege against self-incrimination was accepted in *Mortimer*[126]. Barwick CJ said[127]:

> "The common law cannot maintain a right in the citizen to refuse to make incriminating answers in the face of a statute which by its expression clearly intends, as does the present, that all questions allowed to be put shall be answered."

Walsh J observed that the character and purpose of s 250 were such that a construction which would curtail its operation in the manner and for the reasons suggested ought not to be adopted. Referring back to *Rees*, Walsh J pointed to the feature of judicial control[128]:

> "Although the need was recognized to take into account, when construing the provision, any infringement of individual rights and any injustice which could be caused by it, the provision was regarded as containing a safeguard against these evils, because it entrusted the control of the proceedings to a judge."

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124 (1965) 114 CLR 63 at 80.

125 (1965) 114 CLR 63 at 66 per Barwick CJ, see also at 78 per Menzies J, 74 per Taylor J agreeing, 80–81 per Windeyer J.

126 (1970) 122 CLR 493.

127 (1970) 122 CLR 493 at 495.

128 (1970) 122 CLR 493 at 499.

40 It is an important feature of the CAR Act, as it was of the provisions for examination considered in *Rees* and *Mortimer*, that the examination for which s 31D provides is a judicial process to be carried out pursuant to an order of the Supreme Court "before the Court, or before an officer of the Court prescribed by rules of court"[129]. The legislature having conferred the function of examination in aid of confiscation orders upon the Supreme Court, it may safely be inferred, as the majority observed in *Mansfield v Director of Public Prosecutions (WA)*[130], that in the absence of express words to the contrary or of reasonably plain intendment, it takes the court as it finds it with all its incidents[131]. As Gaudron J said in *Knight v FP Special Assets Ltd*[132], in words approved by the majority in *Mansfield*[133]:

> "Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle ... The necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including, for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse."

41 As was pointed out by Basten JA in the Court of Appeal, an examination under s 31D attracts the powers of the Supreme Court under the Uniform Civil Procedure Rules and its inherent power to supervise and control its own processes and to ensure that they are not abused[134]. Those powers include the power to take appropriate action to prevent injustice[135]. Basten JA correctly

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129 See *Rees v Kratzmann* (1965) 114 CLR 63 at 66 per Barwick CJ, 78 per Menzies J, 74 per Taylor J agreeing, 80–81 per Windeyer J.

130 (2006) 226 CLR 486; [2006] HCA 38.

131 (2006) 226 CLR 486 at 491 [7] per Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ, citing *Electric Light and Power Supply Corporation Ltd v Electricity Commission (NSW)* (1956) 94 CLR 554 at 560; [1956] HCA 22.

132 (1992) 174 CLR 178 at 205; [1992] HCA 28.

133 (2006) 226 CLR 486 at 492 [10] — a case concerning the exercise of functions by the Supreme Court of Western Australia under the *Criminal Property Confiscation Act* 2000 (WA).

134 [2012] NSWCA 276 at [53].

135 *Hamilton v Oades* (1989) 166 CLR 486 at 502–504 per Deane and Gaudron JJ; *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 25 per Mason CJ,

(Footnote continues on next page)

observed that if a real risk of prejudice were perceived in the conduct of the examination, the examining judicial officer would have powers available to diminish or prevent that prejudice to the extent that it is beyond the prejudice authorised by the CAR Act[136].

42 It should be acknowledged that, unlike the present case, the examination provision in question in *Mortimer* expressly permitted the notes of the examination to be used in evidence in any legal proceedings against the examinee[137]. *Mortimer* was described by Mason CJ in *Hamilton*[138] as "a striking illustration of statutory abrogation of the privilege [against self-incrimination] where the intention to abrogate was ascertained by necessary implication."[139] The necessary implication flowed from the evident purpose of the provision.

43 *Hamilton* is much closer to this case than *Hammond*. As the appellants' counsel submitted, it is not an authority to the contrary of *Hammond*. It is a different case. It concerned a compulsory examination of a director of a company in liquidation by an officer of the court under s 541 of the *Companies (New South Wales) Code*. The director was facing a number of criminal charges arising out of his association with the company. Accepting that such an examination might amount to an interference with the administration of criminal justice, Mason CJ referred back to *Hammond* and *Sorby* and said[140]:

> "But it is well established that Parliament is able to 'interfere' with established common law protections, including the right to refuse to answer questions the answers to which may tend to incriminate the person asked".

His Honour accepted that the privilege against self-incrimination could only be abrogated by the manifestation of a clear legislative intention. That intention could be demonstrated by express words or necessary implication. The term "necessary implication" required "a high degree of certainty as to legislative

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75 per Gaudron J; [1989] HCA 46; *Dietrich v The Queen* (1992) 177 CLR 292 at 364 per Gaudron J; [1992] HCA 57.

136 [2012] NSWCA 276 at [81].

137 (1970) 122 CLR 493 at 501.

138 (1989) 166 CLR 486.

139 (1989) 166 CLR 486 at 495.

140 (1989) 166 CLR 486 at 494.

intention."[141] The inherent powers of the court were retained, albeit they were not "a charter which enables a court to turn its back on the statute."[142] The court could order that an examination be held in private or that the publication of names or evidence be restricted. The court might find it necessary, in accordance with the statutory purpose, not to permit a particular question to be asked which would prejudice the examinee's fair trial.

44 In reference to the examinee's asserted "right" not to disclose defences to pending charges, Mason CJ said[143]:

> "The privilege against self-incrimination would not ordinarily protect a person against disclosure of his defence to a criminal charge. The so-called right not to disclose a defence is the result merely of the absence in ordinary circumstances of any statutory requirement that defences be revealed. In some instances there is such a specific requirement, eg, in relation to alibi defences. And there is implicit in the general words of s 541 such a general requirement. The possibility of disclosure of a defence is, accordingly, not a matter in respect of which a witness needs to be protected except perhaps in the most exceptional circumstances."

Dawson J held that the scheme of s 541 made the conclusion inevitable. He added[144]:

> "Nor, in my opinion, is there any basis for discerning a difference in intent according to whether or not criminal proceedings have actually been commenced."

Having regard to the protection given under the section, the effect of being required to answer a question after criminal proceedings had begun did not necessarily carry consequences more adverse than if the question were asked at an earlier time. Moreover, the purpose of the section remained the same whether charges had been laid or not[145]. His Honour distinguished *Hammond* on the basis that the legislation before the Court in that case was of a different kind "concerned in general terms with executive inquiry by means of a Royal Commission or Board of Inquiry without reference to subject-matter or

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141 (1989) 166 CLR 486 at 495.

142 (1989) 166 CLR 486 at 499.

143 (1989) 166 CLR 486 at 499.

144 (1989) 166 CLR 486 at 508.

145 (1989) 166 CLR 486 at 508.

purpose."[146] Toohey J similarly distinguished *Hammond*, noting that the basis for restraining the commissioner in that case lay in the fact that if the plaintiff were required to answer questions designed to establish that he was guilty of the offence with which he had been charged, there would be a real risk that the administration of justice would be interfered with[147].

45 What Mason CJ said in *Hamilton* concerning "a clear legislative intention" should be understood today in light of the Court's consideration of the concept of legislative intention in *Project Blue Sky Inc v Australian Broadcasting Authority*[148] and, more recently, in *Lacey v Attorney-General (Qld)*[149]. In *Project Blue Sky* the majority framed the object of statutory interpretation as "giv[ing] the words of a statutory provision the meaning that the legislature *is taken* to have intended them to have."[150] One of the canons of construction identified by the majority was the principle of legality[151]. In *Lacey* the Court held that the ascertainment of legislative intention does not involve discovery of an objective, collective mental state but is asserted as a statement of compliance with the applicable principles of construction, both common law and statutory, which are known to parliamentary drafters and the courts[152]. Identification of statutory purpose, a concept which is not logically congruent with that of legislative intention, although the two may coincide, is involved in the process of construction. As the majority observed in *Lacey*, statutory purpose[153]:

> "may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside

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146 (1989) 166 CLR 486 at 509.

147 (1989) 166 CLR 486 at 515, quoting his Honour's judgment in *Huston v Costigan* (1982) 45 ALR 559 at 563.

148 (1998) 194 CLR 355; [1998] HCA 28.

149 (2011) 242 CLR 573; [2011] HCA 10.

150 (1998) 194 CLR 355 at 384 [78] per McHugh, Gummow, Kirby and Hayne JJ (emphasis added).

151 (1998) 194 CLR 355 at 384 n 56 per McHugh, Gummow, Kirby and Hayne JJ.

152 (2011) 242 CLR 573 at 592 [43] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

153 (2011) 242 CLR 573 at 592 [44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

> the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction."

The differently expressed statutory purposes of the ACC Act and the CAR Act provide one basis upon which, without any questioning of the principles enunciated in *X7*, it can be concluded that the statute to which those principles were applied in that case differs materially from the statute to which they have to be applied in this case.

46 Judgment in *X7*[154] was delivered on 26 June 2013. It involved questions reserved on a case stated to the Full Court of this Court. The first of those questions was whether Div 2 of Pt II of the ACC Act, which provided for compulsory examination of persons by examiners of the ACC, empowered an examiner to conduct an examination of a person charged with a Commonwealth indictable offence. The Court, by majority (Hayne, Kiefel and Bell JJ), answered that question in the negative.

47 It is necessary in considering the implications of *X7* to have regard to the character of the examination which was under challenge in that case. Importantly, the examinations for which the ACC Act provided were to be conducted not by judicial officers but by officers of the ACC. While the executive character of the examination may not have been determinative of the majority's reasoning, it was an important, if not critical consideration. Their Honours' reasoning rested upon three propositions set out in the joint judgment of Hayne and Bell JJ:

1. There was no express reference anywhere in the ACC Act to examination of a person who had been charged with but not tried for an offence about the subject matter of the pending charge[155].

2. The legislative history of the ACC Act provided little or no assistance in dealing with the question of construction[156].

3. Permitting the executive to ask, and compelling answers to, questions about the subject matter of a pending charge (regardless of what use might be made of those answers at the trial of an accused person) fundamentally alters the process of criminal justice. Their Honours characterised that

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154 (2013) 87 ALJR 858; 298 ALR 570.

155 (2013) 87 ALJR 858 at 880 [83]; 298 ALR 570 at 594.

156 (2013) 87 ALJR 858 at 880 [84]; 298 ALR 570 at 595.

proposition as critical to the question of statutory construction to be answered in that case[157].

48 Kiefel J, who agreed substantially with the joint reasons, made the point that decisions of this Court, in particular *Clough*, *McGuinness* and *Hammond*, held 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."[158] The question of contempt, which was the focus of consideration in *Hammond*, is relevant to executive action likely to interfere with the due administration of justice. Both *Clough* and *McGuinness* concerned executive action. Analysis of a compulsory examination power conferred upon a court, by reference to whether the court is authorised to do that which would otherwise be a contempt of court, is inapposite. Nobody suggested that the Supreme Court of New South Wales in conducting an examination under the CAR Act could be in contempt of itself or any other court in relation to charges pending against the examinee if it were to exceed its statutory powers. Not surprisingly, there is no authority on the point, although the House of Lords has expressed the opinion on two occasions, albeit in a particular factual and statutory context, that a court could not be in contempt of itself[159].

49 It may be said, of course, that the same underlying issues relating to the effect of compulsory examinations upon the accusatorial process arise whether the examination is judicial or non-judicial. However, on the construction of the relevant provisions of the CAR Act, which define the scope of the power to examine in the face of pending charges, and for reasons already explained, the character of the examination as a concurrent judicial proceeding is relevant. It is also relevant because judicial examination under the Act is ancillary to a substantive judicial function under the Act, the scope of which is to be understood by reference to the objects of the Act and the definition of "serious crime related activity", together with the provisions of the former s 62 and the current s 63. Judicial sensitivity to the impact of an examination on the accusatorial character of pending criminal proceedings can be expected to inform whether an order should be made in the particular circumstances of the case and, if an order be made, the way in which any subsequent examination is conducted. Its judicial character will attract the inherent and express powers of the Supreme Court to protect against misuse of its process and against unfair prejudice to an examinee.

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157 (2013) 87 ALJR 858 at 880 [85]; 298 ALR 570 at 595.

158 (2013) 87 ALJR 858 at 893 [161]; 298 ALR 570 at 613.

159 *R v Mirza* [2004] 1 AC 1118 at 1153 [85], 1155 [90]; *Attorney General v Scotcher* [2005] 1 WLR 1867 at 1877 [25]; [2005] 3 All ER 1 at 13. See also *R v Young* [1995] QB 324; *R v Smith* [2003] EWCA Crim 3847 at [82].

50 Examinations in aid of bankruptcy and corporate insolvency administrations have a particular historical provenance. They cannot on that account be characterised as *sui generis*. Their provenance reflects policy considerations of the kind referred to by Windeyer J in *Rees* and by Walsh J in *Mortimer*. Policy considerations, which may or may not be analogous to those informing such examinations, may lead to the creation, by statute, of other classes of compulsory examination. Indeed, it might be said that there is some analogy to be drawn between an examination in aid of a possible confiscation order and an examination designed to determine the existence and location of assets which should be available to creditors of a bankrupt or a company in liquidation.

51 The preceding considerations point to a conclusion adverse to the appellants in this case. It is necessary, however, to refer to the submissions which they filed following the decision of this Court in *X7* in the context of their broader submissions at the hearing.

The contentions

52 The central contention reflected in the appellants' notice of appeal was that s 31D, properly construed, required the Supreme Court, in determining an application for an examination order, to consider the capacity of that order to prejudice the fair trial of the proposed examinee. An ancillary proposition was that the risk of prejudice could not be left to either the Court or a Court officer undertaking the examination to deal with by making suppression orders. Absent the propounded requirement to consider prejudice at the time the application for an order was made, s 31D was said to be invalid as conferring on the Supreme Court a function incompatible with its integrity as a court. The appellants eventually moved to the position that s 31D simply would not authorise an examination touching on matters the subject matter of pending criminal charges against the examinee. The NSWCC, while resisting that contention, accepted that there was a discretion on the part of the judge deciding whether or not to make an examination order to consider the risk that such an examination might pose to the fair criminal trial of the proposed examinee. As the respondent did not contend that s 31D excluded consideration of such matters, the constitutional point was not pursued.

53 The final position adopted by the appellants, no doubt informed by the earlier oral hearing, was most clearly set out in their supplementary submissions. They submitted, inter alia:

- As held by the majority in *X7*, even if answers given at a compulsory examination are kept secret, the requirement for a charged person to give such answers in relation to matters that are the subject of the charge would fundamentally alter the accusatorial judicial process. A statute authorises

a compulsory examination in those circumstances only if it does so clearly by express words or by necessary intendment.

- That intendment may be discerned only where it is manifest from the statute in question that the legislature has directed its attention to the question whether so to abrogate or restrict the general law and has determined to do so.

- In light of *X7*, the decisive question becomes whether the CAR Act clearly authorises, by express words or necessary intendment, the compulsory examination of a person who is charged with a criminal offence about matters which are the subject of the charge.

- The CAR Act contains no express words to the effect that an examination order may be made in such circumstances, nor can it be implied as a matter of necessary intendment that the power to order an examination under s 31D extends so far.

54 It may be accepted that the examination process under the CAR Act may, if it touches upon matters the subject of pending criminal charges against the examinee, affect the accusatorial character of the trial process. Even if the responses of the examinee to questions put to him or her were kept secret and were solely exculpatory or did no more than disclose defences to the charges, the examinee could be said to have suffered a forensic disadvantage. The nature of that disadvantage was discussed in the joint judgment of Hayne and Bell JJ in *X7*[160]. I do not, with respect, disagree with anything their Honours said in the description of that disadvantage.

55 In my opinion, however, those considerations did not deprive the Court of Appeal of power to make the orders it did in this case. In so saying, I observe that the grounds of appeal for which special leave was granted do not raise any question whether the Court of Appeal's discretion miscarried when it made the orders it did. The question is one of power. In my opinion, the following matters are determinative:

- the objects of the CAR Act, which expressly contemplate its application to persons facing criminal charges;

- the application of the substantive proceedings under the CAR Act to persons facing such charges;

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160 (2013) 87 ALJR 858 at 886–887 [124]; 298 ALR 570 at 604.

- the premises upon which the former s 62 and s 63 were framed, which contemplate the conduct of proceedings touching matters the subject of pending charges;

- the character of the examination under s 31D as ancillary to substantive confiscation proceedings under the CAR Act;

- the conferring of a power to make an order for an examination on the Supreme Court and the conferring of the examination power itself on the Court;

- the capacity of the Court to exercise its discretion to make or decline to make an examination order and to make directions affecting the conduct of any examination.

56 In considering the application of the principle of legality to the construction of the CAR Act it is also necessary to have regard to the following propositions:

- Where the public policy of a statute and its purpose are identified with sufficient clarity, the option of making a constructional choice protective of common law rights may be precluded[161].

- The fact that statutory powers are conferred upon a court to be exercised judicially tends in favour of a more liberal construction of those powers than in the case in which they are conferred on a non-judicial body[162].

The above matters, in the light of the authorities already discussed, in my opinion, are sufficient to support a conclusion that as a matter of necessary intendment the power to order an examination would extend to orders of the kind made by the Court of Appeal in this case.

Conclusion

57 For the preceding reasons the appeal should be dismissed with costs.

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161 *Mortimer v Brown* (1970) 122 CLR 493 at 499 per Walsh J.

162 *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at 492 [10] per Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ, quoting *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205 per Gaudron J.

58 HAYNE J. I agree with Kiefel J that, for the reasons her Honour gives, the appeal should be allowed and the orders of the Court of Appeal of the Supreme Court of New South Wales should be set aside.

59 The critical question in the appeal is whether the power given to the Supreme Court of New South Wales, by s 31D(1) of the *Criminal Assets Recovery Act* 1990 (NSW) ("the CAR Act"), to order the examination on oath of a person "concerning the affairs of the affected person" permitted the Court to order the examination of a person charged with, but not yet tried for, an offence about the subject matter of the pending charge. If s 31D(1) permitted the making of such an order, and an order was made, the person being examined would not be excused[163] from answering any question on the ground that the answer might incriminate, or tend to incriminate, the person, or make the person liable to forfeiture or penalty. Should the generally expressed language of s 31D(1) be construed as working such a fundamental alteration to the accusatorial process of criminal justice?

60 Kiefel and Bell JJ and I answer that question "No". Four points must be made about arguments advanced in support of the contrary conclusion.

61 First, and foremost, those arguments must deal with this Court's decision in *X7 v Australian Crime Commission*[164].

62 Of course this Court is not bound by its previous decisions. But the doctrine of precedent underpins the proper exercise of the judicial power of the Commonwealth. That doctrine requires that a relevant previous decision of the Court, even if reached by majority, be followed and applied unless it is to be overruled. Although the statutory provisions considered in this case differ from those considered in *X7*, the principles recognised and applied by the majority in *X7* apply with equal force to this case.

63 In *Queensland v The Commonwealth*[165], Gibbs J rightly said that "[n]o Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, *or as though the authority of a decision did not survive beyond the rising of the Court*" (emphasis added). That is why, as Gibbs J also pointed out[166], again rightly, "[i]t is only after the most careful and respectful consideration of the

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163 ss 13A(1) and 31D(3).

164 (2013) 87 ALJR 858; 298 ALR 570; [2013] HCA 29.

165 (1977) 139 CLR 585 at 599; [1977] HCA 60.

166 (1977) 139 CLR 585 at 599.

earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his [or her] own opinions in preference to an earlier decision of the Court".

64 These statements of principle were made in connection with constitutional issues. They are basic and indisputable and apply with equal (if not greater[167]) force in non-constitutional cases.

65 The foundations for application of these principles lie at the centre of this Court's performance of its function as the court of final appeal for the Australian judicial system. These foundations were identified[168] by Brennan J in his dissenting reasons in *Baker v Campbell*:

> "To regard the judgments of this Court as open to reconsideration whenever a new argument is found more attractive than the principle expressed in a standing decision is to overlook the function which a final court of appeal must perform in defining the law. In difficult areas of the law, differences of legal opinion are inevitable; before a final court of appeal, the choice between competing legal solutions oftentimes turns on the emphasis or weight given by each of the judges to one factor against a countervailing factor ... *In such cases, the decision itself determines which solution is, for the purposes of the current law, correct.* It is not to the point to argue in the next case that, leaving the particular decision out of account, another solution is better supported by legal theory. *Such an approach would diminish the authority and finality of the judgments of this Court.* As the function of defining the law is vested in the Court rather than in the justices who compose it, a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration." (emphasis added)

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167 See, for example, *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261 at 278 per Isaacs J; [1913] HCA 41; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 per Gibbs J.

168 (1983) 153 CLR 52 at 102-103; [1983] HCA 39. See also *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ, 451-452 per Brennan J; [1989] HCA 5; *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 352-353 [69]-[71] per French CJ; [2009] HCA 2. Cf *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 1345 at 1349 per Lord Wilberforce; [1977] 3 All ER 996 at 999.

66 Accordingly, as one commentator has put[169] the point: "the previous decision is to be treated as the primary premise from which other arguments follow, and not just as one potential premise amongst an aggregate of competing premises".

67 In *X7*, this Court held[170], as a step necessary to the reasoning of the majority decision, that *Hammond v The Commonwealth*[171] stated and applied established principles which determined the decision in *X7*. Those principles determine this case.

68 In *X7*, this Court held[172] that *Hammond* cannot be dismissed from consideration as decided in haste or improvidently. Nor can it be dismissed from consideration, as it was in the Court of Appeal in this case[173], as "not a case which lends itself to the extraction of principle". The decision in *Hammond* cannot be confined to its own facts. In *X7*, this Court held[174] that *Hammond* cannot be dismissed from consideration on the basis that it has somehow been "overtaken" by this Court's later decision in *Hamilton v Oades*[175].

69 As Bell J demonstrates, no relevant distinction between the CAR Act and the legislation at issue in *X7* has been identified. The division of opinion in this case stems from differing opinions about what was decided in *Hammond* and *Hamilton v Oades*. Those issues were settled by the decision in *X7*. No party or intervener suggested in this case that the decision in *X7* was given per incuriam. No party or intervener submitted that the majority in *X7* "failed to advert to any relevant consideration, or overlooked any apposite decision or principle"[176].

70 All that has changed between the decision in *X7* and the decision in this case is the composition of the Bench. A change in composition of the Bench is

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169 Horrigan, "Towards a Jurisprudence of High Court Overruling", (1992) 66 *Australian Law Journal* 199 at 208.

170 (2013) 87 ALJR 858 at 889 [136]-[137], 893 [161]; 298 ALR 570 at 607, 613.

171 (1982) 152 CLR 188; [1982] HCA 42.

172 (2013) 87 ALJR 858 at 889 [136]; 298 ALR 570 at 607.

173 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [26].

174 (2013) 87 ALJR 858 at 889 [137]; 298 ALR 570 at 607.

175 (1989) 166 CLR 486; [1989] HCA 21.

176 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 600.

not[177], and never has been, reason enough to overrule a previous decision of this Court.

71 Second, it would be a basic and serious legal error to treat the decision in *X7*, and the principles identified and applied in that case, as irrelevant in this, simply because the CAR Act provisions differ from the legislative provisions considered in *X7*. The principles identified and applied in *X7* are fundamental and generally applicable principles of very long standing.

72 It would be an equally basic and serious legal error to treat the present question of the construction of the CAR Act as resolved by identifying drafting similarities between the CAR Act and the legislation considered in *Hamilton v Oades* and declaring that, because the two Acts are drafted similarly, they have the same effect. A literal and mechanical approach of that kind would ignore the fundamental importance of considering statutory context when construing any Act. Companies legislation of the kind considered in *Hamilton v Oades* has a long pedigree which informed its construction. The CAR Act provisions are novel.

73 Nor can the principles applied in *Hammond* be put to one side, as irrelevant, on the basis that *Hammond* concerned the conduct of an executive inquiry but the CAR Act provided for examination on behalf of an arm of the Executive before a judicial officer pursuant to a court order. The question in this case turns ultimately upon the proper construction of the CAR Act. The principle applied in *Hammond* was that general statutory words (in that case authorising compulsory examination in an executive inquiry) are not to be construed as altering the accusatorial process of criminal justice. *Hammond* decided that, if the general words permitting compulsory examination were read as permitting the compulsory questioning of a person charged with an offence about the subject matter of the pending charge, they would alter the accusatorial process in a fundamental way. No different question arises here. Do the general words of the CAR Act alter the accusatorial process of criminal justice? *Hammond* cannot be put into any different category from the present case on the basis that it concerned an executive inquiry.

74 No less importantly, the effect on the accusatorial process cannot be measured by confining attention to issues of self-incrimination. The accusatorial process of criminal justice represents the balance that is struck between the power of the state and the individual in the prosecution of crime. The particular balance that is struck requires that the state formulate the charge that is to be prosecuted and then prove every element of that charge, beyond reasonable

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177 *The Tramways Case [No 1]* (1914) 18 CLR 54 at 69; [1914] HCA 15; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 600.

doubt, without the accused being required to make any answer to the charge at any stage of the process.

75 Third, the central question presented in this case is not addressed, let alone answered, by assuming its answer. Yet that is what is done when it is said that, because s 31D(1)(a) draws no distinction between circumstances where criminal proceedings have and have not been commenced, the provision reveals some deliberate or carefully integrated and elaborate legislative design. The asserted answer is assumed, not demonstrated. To assume the answer to the question is self-evidently wrong.

76 Similarly, the relevant question is neither addressed nor answered by asserting that s 63 of the CAR Act confirms that the CAR Act has adverted to the possibility of concurrence between proceedings under s 31D(1)(a) and criminal proceedings against the person being examined. Section 63 provided that:

> "The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which the Supreme Court may stay proceedings under this Act that are not criminal proceedings."

The generality of the words of s 63 presents the same question for consideration as s 31D(1). Do the general words used in the provision extend to the particular case of examination of a person charged with, but not yet tried for, an offence about the subject matter of the pending charge? Section 63 does not answer this question unless it is first assumed that it must. Yet that is the very issue to be determined. It must be recalled that, but for s 63, there may have been lively debate about whether the pendency of criminal charges against any person permitted or required an order staying civil proceedings touching upon issues that may arise at a criminal trial[178]. Section 63, therefore, has evident work to do without assuming that its general words mean that the CAR Act works a fundamental alteration to the process of criminal justice.

77 Fourth, beneath many, perhaps all, of the arguments deployed in favour of the conclusion that the CAR Act permits the compulsory examination of a person charged with, but not yet tried for, an offence about the subject matter of the pending charge lies an assumption that the innocent have nothing to fear from the processes of compulsory examination, and that those who are guilty will lose nothing that society can value if compelled to admit their guilt. The assumption is false. It is founded not only on presupposing what will be the outcome of the

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178 See, for example, *Smith v Selwyn* [1914] 3 KB 98; *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26; *P T Garuda Pty Ltd v Grellman* (1994) 48 FCR 252.

exclusively judicial process of adjudicating guilt, but also on dividing the relevant world into the guilty and the innocent. The assumption thus presupposes an outcome which has yet to be determined. Not only that, the assumption ignores both the burden and the standard of proof that must be applied in adjudging guilt. If the prosecution cannot prove guilt beyond reasonable doubt, the accused must be found not guilty. Guilt must be determined at trial, not assumed.

78 Whether or not the arguments in favour of construing the CAR Act as permitting compulsory examination of a person about the subject of a charge pending against that person proceed from an assumption of the kind just described, they were all arguments which accepted that the CAR Act does not authorise what would otherwise be a contempt of court. The CAR Act precluded[179] direct use at an accused's trial of an answer given at the examination. Section 13A(3) provided that "[f]urther information obtained as a result of an answer being given" at an examination was not inadmissible in criminal proceedings on the ground that the answer had to be given, or that the answer given might incriminate the person. Yet argument in this matter proceeded on the basis that indirect use of a compelled admission at trial may be unfair (giving the prosecution an advantage it should not have), or may interfere with the due administration of criminal justice and be a contempt of court.

79 The asking of questions and the compelling of answers about the pending charge inevitably interfere with the conduct of an accusatorial trial and embarrass the defence of the accused. The answers the accused has been compelled to give to the questions asked deprive the accused of forensic choices that otherwise would be legitimately open at trial to test the case which the prosecution advances. That is, the asking of questions about the pending charge and the compelling of answers to those questions work a fundamental alteration to the accusatorial process of criminal justice.

80 It is theoretically possible that, at the end of a trial, it may be said that the deprivation of those choices was anodyne in its practical effect. But that is not to the point. The issue is presented when it is sought to conduct the examination. The examination occurs *before* the trial has begun.

81 No doubt, it is important to notice that an examination under s 31D(1) was to be conducted before the Supreme Court or an officer of the Court prescribed by rules of court. It is to be assumed that the Court or its officer would act to prevent oppression of the person being examined and would act to prevent misuse or abuse of the process of examination, whether by limiting or precluding publication of what transpires at the examination, or otherwise. But if the trial of

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179 s 13A(2).

the person being examined is pending, the Court (or the officer of the Court) cannot know, and cannot predict, what might harm the defence of that person at trial. Those matters are unknown to, and unknowable by, the Court (or its officer) for the simple reason that the Court (or its officer) does not know, and cannot be told, what are or will be the accused's instructions to his or her lawyers at trial.

82 To suggest that preserving the legitimate forensic choices that are open to an accused at a criminal trial would permit, let alone encourage, the pursuit of falsehood misstates the fundamental character of a criminal trial. Reference to the pursuit of falsehood may suggest that a criminal trial is an inquisition into the truth of the allegation made. It is not[180]. Subject to the rules of evidence, fairness and admissibility, each of the prosecution and the accused is free to decide the ground on which to contest the issue, the evidence to be called and the questions to be asked. Reference to the pursuit of falsehood may suggest that legitimately testing the strength of the prosecution's proof is somehow dishonest. It is not.

83 Accepting either suggestion would set at nought the fundamental principle stated by this Court, nearly 80 years ago, in *Tuckiar v The King*[181], that counsel for an accused has "a plain duty, both to his [or her] client and to the Court, to press such rational considerations as the evidence fairly [gives] rise to in favour of complete acquittal" or conviction of a lesser charge. That "plain duty" arises because, whether an accused "be in fact guilty or not, [the accused] is, in point of law, *entitled* to acquittal from any charge which the evidence fails to establish that he [or she] committed"[182] (emphasis added).

84 The accusatorial process of criminal justice reflects the balance that is struck between the power of the state and the place of the individual. Legislative alteration to that balance may not be made without clear words or necessary intendment.

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180 See, for example, *Ratten v The Queen* (1974) 131 CLR 510 at 517 per Barwick CJ; [1974] HCA 35.

181 (1934) 52 CLR 335 at 346; [1934] HCA 49.

182 (1934) 52 CLR 335 at 346.

85 CRENNAN J. This is an appeal, by special leave, from a decision of the Court of Appeal of the Supreme Court of New South Wales allowing an appeal brought by the respondent, the New South Wales Crime Commission ("the NSWCC")[183]. The Court of Appeal (Beazley, McColl, Basten, Macfarlan and Meagher JJA) unanimously set aside an order dismissing so much of an application by the NSWCC under s 31D(1)(a) of the *Criminal Assets Recovery Act* 1990 (NSW) ("the CAR Act") as sought orders for the compulsory examination of the appellants, father and son, on the affairs of the first appellant, including the nature and location of any property in which he might have an interest[184].

86 Section 31D(1)(a) gives the Supreme Court a discretion to make an order for compulsory examination if an application for a confiscation order has been made under the CAR Act[185]. In this case, the NSWCC applied for orders for examination after an application for a confiscation order had been made in respect of the first appellant, in circumstances where each appellant had been charged with offences, and criminal proceedings thereby instituted[186] had not been completed.

87 The examination was to be on oath, and conducted before a Registrar of the Supreme Court. When the primary judge (RS Hulme J) delivered judgment, a money laundering charge was pending against the first appellant and both appellants were on trial in respect of drug supply and firearms offences. By the time the matter came before the Court of Appeal, money laundering charges were pending against the first appellant and both appellants had instituted appeals against conviction in respect of the offences upon which they had been tried. It was not contested that there was a risk that the subject matter of any examination ordered in respect of the appellants, and the subject matter of the pending criminal proceedings, would overlap.

88 The Court of Appeal made orders for the examination of the appellants by re-exercising the discretion under s 31D(1)(a) in favour of the NSWCC. In the Court of Appeal, McColl and Macfarlan JJA agreed with Basten JA, who wrote

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183 *New South Wales Crime Commission v Lee* [2012] NSWCA 276.

184 *NSW Crime Commission v Lee* [2011] NSWSC 80 at [21].

185 It can be noted that s 31D(1)(a) has been amended by the *Crime Commission Act* 2012 (NSW), Sched 5.2, which amendments commenced on 5 October 2012. The amendments do not alter s 31D(1)(a) in a manner which is material to this proceeding.

186 As to which see *Sorby v The Commonwealth* ("*Sorby*") (1983) 152 CLR 281 at 306; [1983] HCA 10, 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.

the leading judgment. Beazley and Meagher JJA gave separate reasons which were consistent with the reasons of Basten JA.

89 The principal issue before this Court is whether the Court of Appeal erred in its approach to s 31D(1)(a), which governed the making of the orders which the appellants seek to set aside on this appeal.

90 The Attorneys-General for the Commonwealth, New South Wales and Queensland intervened pursuant to s 78A(1) of the *Judiciary Act* 1903 (Cth) in support of the NSWCC.

91 As these reasons will show, the appeal must be dismissed.

The legislative scheme

Context and objects of the CAR Act

92 The CAR Act establishes a scheme for the confiscation or recovery of the property of a person where such property is derived from serious crime related activity or, in some instances, fraudulently and illegally acquired property. It operates on the basis that it is more probable than not that a person has engaged in such activity or that the property is fraudulently and illegally acquired; accordingly, its operation is not predicated on a person's conviction for an offence. The emergence in Australia and elsewhere of civil assets forfeiture laws as a means of deterring serious crime related activity, and the legislative history of the CAR Act, were both described by French CJ in *International Finance Trust Co Ltd v New South Wales Crime Commission*[187].

93 The principal objects of the CAR Act are expressed as follows[188]:

> "(a) to provide for the confiscation, without requiring a conviction, of property of a person if the Supreme Court finds it to be more probable than not that the person has engaged in serious crime related activities, and
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> (a1) to enable the current and past wealth of a person to be recovered as a debt due to the Crown if the Supreme Court finds there is a reasonable suspicion that the person has engaged in a serious crime related activity (or has acquired any of the proceeds of any such activity of another person) unless the person can establish that the wealth was lawfully acquired, and

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187 (2009) 240 CLR 319 at 344-346 [25]-[32]; [2009] HCA 49.

188 *Criminal Assets Recovery Act* 1990 (NSW), s 3.

(b) to enable the proceeds of illegal activities of a person to be recovered as a debt due to the Crown if the Supreme Court finds it more probable than not the person has engaged in any serious crime related activity in the previous 6 years or acquired proceeds of the illegal activities of such a person, and

(b1) to provide for the confiscation, without requiring a conviction, of property of a person that is illegally acquired property held in a false name or is not declared in confiscation proceedings, and

(c) to enable law enforcement authorities effectively to identify and recover property."

94 In the Second Reading Speech for the Bill which became what is now known as the CAR Act[189], the Premier of New South Wales said that the purpose of the legislation was "to deprive those involved in the drug trade of their illicit profits – profits earned at the expense of their victims and of the community generally"[190] and emphasised that the scheme for the confiscation of assets was intended to "operate outside and completely independent[ly] of the criminal law process"[191]. He then explained the rationale for confiscation[192]:

> "In the case of drug crime there is normally no identifiable victim with a recognised cause of action in the civil courts. In an important sense the whole community is the victim, and certainly those whose lives are destroyed by drugs are victims. What the proposed legislation will do is analogous to giving the Crown a civil right of action to recover, on behalf of the community, assets and profits obtained illicitly by people who benefit from the drug trade."

95 With the widening of the application of the Act to serious crime related activity and serious crime derived property[193], the illicitly obtained assets and

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189 Formerly the *Drug Trafficking (Civil Proceedings) Act* 1990 (NSW).

190 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1990 at 2527.

191 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1990 at 2529.

192 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 May 1990 at 2530.

193 By the *Drug Trafficking (Civil Proceedings) Amendment Act* 1997 (NSW), Sched 1.

profits with which the legislation is concerned are no longer confined to assets and profits obtained illicitly from the drug trade. The appellants did not challenge the general purpose and policy of the CAR Act as expressed in its principal objects. It cannot be doubted that deterring serious crime related activity is a matter of legitimate public interest and an important public object, and that it is within the legislative competence of the Parliament of New South Wales to deter such activity by confiscating its fruits.

Relevant provisions of the CAR Act

96 Part 2 (ss 10 to 21) of the CAR Act provides for restraining orders and Pt 3 (ss 22 to 32) provides for confiscation orders, both of which the Supreme Court is empowered to make. Under the CAR Act, a confiscation order includes an "assets forfeiture order, proceeds assessment order or unexplained wealth order"[194].

97 An "assets forfeiture order" is an order vesting in the Crown all, or any specified, interests in property of the person against whom such an order is made[195]. Such orders depend on the identification of property and are directed to the forfeiture of interests in property of a person who has engaged in "serious crime related activity"[196], or interests in fraudulently and illegally acquired property[197], unless a person affected by a proposed or extant order succeeds in having an interest in property, or a specified proportion of the value thereof, excluded from an assets forfeiture order as not being fraudulently or illegally acquired, or relevantly attributable to the proceeds of an illegal activity[198].

98 A "proceeds assessment order" is an order requiring a person "to pay to the Treasurer an amount assessed by the Court as the value of the proceeds derived by the person from an illegal activity, or illegal activities"[199].

99 In essence, the Supreme Court must make an assets forfeiture order or a proceeds assessment order if satisfied, on the civil standard of proof, that serious

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194 *Criminal Assets Recovery Act* 1990 (NSW), s 4(1).

195 *Criminal Assets Recovery Act* 1990 (NSW), ss 4(1) and 22(1).

196 *Criminal Assets Recovery Act* 1990 (NSW), s 22(2).

197 *Criminal Assets Recovery Act* 1990 (NSW), s 22(2A).

198 *Criminal Assets Recovery Act* 1990 (NSW), ss 25 and 26.

199 *Criminal Assets Recovery Act* 1990 (NSW), s 27(1).

crime related activity, or fraudulent and illegal activity in the case of an assets forfeiture order, is the source of the relevant interest in property[200].

100 The CAR Act defines "serious crime related activity" widely as "anything done by the person that was at the time a serious criminal offence", whether or not the person has been charged with the offence or, if charged, has been tried, or tried and acquitted, or convicted (even if the conviction has been quashed or set aside)[201]. A reference to a "serious criminal offence" includes drug supply and firearms offences[202] as well as fraud and money laundering offences[203]. An "illegal activity" is defined to include a "serious crime related activity", an offence against the laws of New South Wales or the Commonwealth, or an offence committed outside New South Wales which, if committed in that State, would have been an offence against the laws of that State or of the Commonwealth[204]. An "interest in property" is defined to include interests in "real or personal property" and "money"[205]. Further, the expressions "serious crime derived property" and "illegally acquired property" are defined respectively as including an interest in property which is "all or part of the proceeds of" either a serious crime related activity or an illegal activity[206].

101 The CAR Act stipulates that proceedings on an application for a restraining order or a confiscation order are not criminal proceedings[207] and that the rules of evidence applicable in civil proceedings apply to proceedings under the CAR Act[208]. After the first two working days of its operation, a restraining order remains in force in respect of an interest in property only while certain conditions are met[209], including that there is a pending application before the

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200 *Criminal Assets Recovery Act* 1990 (NSW), ss 22(2) and (2A) and 27(2) and (2A).

201 *Criminal Assets Recovery Act* 1990 (NSW), s 6(1).

202 *Criminal Assets Recovery Act* 1990 (NSW), s 6(2)(a) and (e).

203 *Criminal Assets Recovery Act* 1990 (NSW), s 6(2)(d).

204 *Criminal Assets Recovery Act* 1990 (NSW), s 4(1).

205 *Criminal Assets Recovery Act* 1990 (NSW), s 7(1) and (2).

206 *Criminal Assets Recovery Act* 1990 (NSW), s 9(1) and (4).

207 *Criminal Assets Recovery Act* 1990 (NSW), s 5(1).

208 *Criminal Assets Recovery Act* 1990 (NSW), s 5(2)(b).

209 *Criminal Assets Recovery Act* 1990 (NSW), s 10D(1).

Supreme Court for an assets forfeiture order in respect of that interest in property, or for a proceeds assessment order[210].

102 At times material to this appeal, the NSWCC, constituted under the *New South Wales Crime Commission Act* 1985 (NSW)[211], was empowered under that Act to "carry out investigations" in aid of the exercise of its functions under the CAR Act[212]. It was also empowered to disseminate information it acquired to such persons or bodies as thought appropriate[213]. The power to institute proceedings under the CAR Act for restraining or confiscation orders is confined to the NSWCC[214]. The Supreme Court may refuse to make a restraining order if the State refuses or fails to give to the Court such undertakings as the Court considers appropriate as to the payment of damages or costs, or both[215], and to that end the NSWCC is empowered to give such undertakings as the Supreme Court requires for the purposes of an application for a restraining order[216].

103 The Supreme Court is further empowered to make ancillary orders, including orders for the examination on oath of nominated persons. Such orders can be made either when making a restraining order[217] or, if an application is made for a confiscation order, when that application is made, or at a later time in either case[218]. Section 31D(1)(a) of the CAR Act provides that "[i]f an application is made for a confiscation order, the Supreme Court may, on application by the [NSWCC] ... make ... an order for the examination on oath of … the affected person, or … another person, before the Court, or before an officer of the Court ... concerning the affairs of the affected person, including the

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210 *Criminal Assets Recovery Act* 1990 (NSW), s 10D(1)(a) and (c).

211 Since re-enacted as the *Crime Commission Act* 2012 (NSW).

212 *New South Wales Crime Commission Act* 1985 (NSW), s 6(1A).

213 *New South Wales Crime Commission Act* 1985 (NSW), s 7(a).

214 *Criminal Assets Recovery Act* 1990 (NSW), ss 10A, 22 and 27.

215 *Criminal Assets Recovery Act* 1990 (NSW), s 10A(7).

216 *Criminal Assets Recovery Act* 1990 (NSW), s 10A(8).

217 *Criminal Assets Recovery Act* 1990 (NSW), s 12(1).

218 *Criminal Assets Recovery Act* 1990 (NSW), s 31D(1).

nature and location of any property in which the affected person has an interest". The first appellant is an "affected person" within the meaning of s 31D(4)[219].

104 Sections 13 and 13A provide for compulsory examination and the production of documents and other things. Section 13A, headed "Privilege against self-incrimination", and stated by s 31D(3) to apply to an examination conducted under s 31D (ancillary to a confiscation order) in the same way as s 13A applies to a person being examined under s 12(1) (ancillary to a restraining order), is critical to this appeal.

105 Section 13A(1) provides that a person being examined "is not excused from answering any question, or from producing any document or other thing, on the ground that the answer or production might incriminate, or tend to incriminate, the person or make the person liable to forfeiture or penalty". Under s 13A(2), any answer given or document produced "is not admissible in criminal proceedings (except proceedings for an offence under [the CAR] Act or the regulations)" if the person objected at the time of answering the question or producing the document on the ground that the answer or document might incriminate him or her, or the person was not advised that he or she might object on the ground that the answer or document might incriminate him or her. A statutory protection of that kind is often called a "direct use immunity".

106 Section 13A(3) provides that "[f]urther information" obtained as a result of an answer being given or the production of a document in an examination (in other words, derivative evidence) is not "inadmissible in criminal proceedings" on the ground that the answer or production was compelled or that the answer given or document produced might incriminate the person. This position can be expressed by noting that the person examined is not protected by a "derivative use immunity" in respect of compulsorily obtained evidence.

107 Section 62 of the CAR Act, subsequently repealed, provided that "the Supreme Court may make such orders as it thinks fit with respect to the publication of any matter arising under this Act" if a person had been charged

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219 Section 31D(4) of the *Criminal Assets Recovery Act* 1990 (NSW) provides:

> "***affected person*** means:
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> (a) in the case of an application for an assets forfeiture order, the owner of an interest in property that is proposed to be subject to the order, or
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> (b) in the case of an application for a proceeds assessment order or unexplained wealth order, the person who is proposed to be subject to the order."

with an offence in relation to a serious crime related activity, and criminal proceedings were not completed when proceedings were instituted under the CAR Act for a restraining order or a confiscation order.

108 From 1 July 2011, s 62 was replaced and thereafter the Court's power to restrict publication was to be found in the *Court Suppression and Non-publication Orders Act* 2010 (NSW), expressed not to affect the inherent jurisdiction of the Supreme Court[220]. The relevant grounds upon which orders restricting publication might be made include that an order is "necessary to prevent prejudice to the proper administration of justice" and "it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice"[221].

109 Section 63 of the CAR Act provides that "[t]he fact that criminal proceedings have been instituted or have commenced (whether or not under [the CAR] Act) is not a ground on which the Supreme Court may stay proceedings under [the CAR] Act that are not criminal proceedings".

110 Finally, it should be noted that s 32 provides for the establishment and use of a "Confiscated Proceeds Account" from which payments are to be made to, among others, the Victims Compensation Fund[222] and to aid "law enforcement, victims support programs, crime prevention programs, programs supporting safer communities, drug rehabilitation or drug education"[223].

Factual background

111 The first appellant was arrested on 25 February 2009 in New South Wales and charged with a number of drug offences[224], as well as with a number of offences relating to dealing with the proceeds of crime[225] and money laundering[226]. He was granted bail in respect of those charges and on

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220 *Court Suppression and Non-publication Orders Act* 2010 (NSW), s 4.

221 *Court Suppression and Non-publication Orders Act* 2010 (NSW), s 8(1)(a) and (1)(e).

222 Established under the *Victims Support and Rehabilitation Act* 1996 (NSW).

223 *Criminal Assets Recovery Act* 1990 (NSW), s 32(3)(c) and (3)(d).

224 Under s 10 of the *Drug Misuse and Trafficking Act* 1985 (NSW).

225 Under s 193B(2) of the *Crimes Act* 1900 (NSW).

226 Specifically, a goods in custody offence under s 527C(1)(c) of the *Crimes Act* 1900 (NSW).

14 December 2009, while on bail, he was arrested and charged with a number of firearms[227] and other offences, including a further money laundering offence[228] ("the second money laundering charge"). On 7 December 2009, the second appellant was charged with three firearms offences[229] and remanded in custody.

112 On 12 May 2010, all of the charges except for the possession of drugs offences laid on 25 February 2009 were withdrawn and dismissed. However, the following day the appellants were charged with drug supply offences contrary to the *Drug Misuse and Trafficking Act* 1985 (NSW). Those charges concerned certain substances which were allegedly found during the execution of a search warrant on 7 December 2009, at which time cash the subject of the second money laundering charge was also found.

113 On 13 May 2010, the NSWCC successfully applied *ex parte* to the Supreme Court for, among other things, orders under s 10A of the CAR Act restraining any disposal of or dealing with any interest in property of the first appellant and of Ms Elizabeth Park, an alleged associate of the appellants', confiscation orders under ss 27 and 22 of the CAR Act in respect of certain property of the first appellant and of Ms Park respectively, and examination orders under s 12. The appellants sought leave to appeal against those orders, which had been granted by Buddin J on the same day, on the basis, among others, that they had been made *ex parte*.

114 On 10 June 2010, the NSWCC, by notice of motion filed in the Supreme Court, sought, *inter partes*, orders under s 31D(1)(a) of the CAR Act for the compulsory examination of the appellants, which application was heard by the primary judge on 28 June 2010.

115 On 22 November 2010, the appellants were arraigned in the District Court of New South Wales, and on 17 January 2011 their trial for drug supply and firearms offences commenced. A separate trial had been granted on 23 November 2010 in respect of the second money laundering charge. As mentioned, the trial for drug supply and firearms offences was continuing when the primary judge delivered his judgment on 28 February 2011. On 14 March 2011, the charges laid on 25 February 2009 that were withdrawn on 12 May 2010 were reinstituted.

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227 Under s 7(1) of the *Firearms Act* 1996 (NSW).

228 Under s 527C(1)(c) of the *Crimes Act* 1900 (NSW).

229 Under s 7(1) of the *Firearms Act* 1996 (NSW).

116 At the time of the hearing of this appeal the Court of Criminal Appeal had dismissed the appellants' appeals from their convictions. Money laundering charges against the first appellant remained pending.

Proceedings below

Primary judge

117 Relying on *Hammond v The Commonwealth*[230], the primary judge declined to make the orders for examination sought by the NSWCC because his Honour considered that making such orders would, in the circumstances and at the time, create a real risk of interference with the administration of justice[231].

118 This appeal was heard shortly after the appeal in *X7 v Australian Crime Commission*[232]. What was said in the joint reasons for judgment of French CJ and Crennan J in *X7*[233], concerning *Hammond*, will need to be read in conjunction with these reasons for judgment. In *Hammond*, this Court restrained a Royal Commissioner 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. Gibbs CJ noted that the circumstances in which injunctive relief was granted gave rise to "a real risk that the administration of justice will be interfered with"[234].

119 The two considerations underpinning the primary judge's conclusion, which were based on *Hammond*, related directly to express provisions of the CAR Act[235]. First, his Honour was concerned that s 13A(3), to the extent that it might permit the derivative use of compulsorily obtained evidence in criminal proceedings, qualified or limited the statutory protection given to an examinee under s 13A(2), being the direct use immunity. Secondly, his Honour considered that, unlike s 25A of the *Australian Crime Commission Act* 2002 (Cth)[236], s 62 of the CAR Act did not compel the Supreme Court to give a direction to limit the

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

231 *NSW Crime Commission v Lee* [2011] NSWSC 80 at [16], [20]-[21].

232 ("*X7*") (2013) 87 ALJR 858; 298 ALR 570; [2013] HCA 29.

233 (2013) 87 ALJR 858 at 869-870 [32], 871 [36]; 298 ALR 570 at 581, 582-583.

234 (1982) 152 CLR 188 at 198.

235 *NSW Crime Commission v Lee* [2011] NSWSC 80 at [19].

236 Considered by this Court in *X7* (2013) 87 ALJR 858; 298 ALR 570.

publication of evidence given compulsorily, if a failure to do so might prejudice a fair trial[237]. On that basis, his Honour concluded that a person examined under the CAR Act was in the same position as the plaintiff in *Hammond*, because the potential for derivative use, by the prosecution in criminal proceedings, of evidence or information compulsorily obtained might prejudice the fair trial of the person examined[238].

The Court of Appeal

120 In setting aside the primary judge's decision and making the orders sought for the examination of the appellants, the Court of Appeal rejected the appellants' argument that they should not be subject to the examination because there were criminal proceedings against them which were not completed. The Court of Appeal construed the provisions in the CAR Act governing an examination, and specifically s 31D(1)(a), as empowering the Supreme Court to order examination, notwithstanding a risk of potential interference with pending criminal proceedings. Their Honours went on to find that the existence, or possibility, of such a risk was not a sufficient basis for declining to make an order because any real risk of interference with pending criminal proceedings could be managed by the Supreme Court, in which the examination would take place[239].

Submissions on the appeal

121 By their notice of appeal, the appellants contended that the Court of Appeal had erred in holding that s 31D of the CAR Act required the Supreme Court to consider an application for an examination order "without regard to the capacity of that order to prejudice the fair trial" of a proposed examinee. The error was said to be particularly based on a misconception of s 63 of the CAR Act. It was a short step then to contend that if the CAR Act authorises actions which are inconsistent with the appellants' fair trial, protective mechanisms under relevant statutes or in the inherent jurisdiction of the Supreme Court will be of little avail.

122 The appellants made four essential submissions in support of their application to have the orders of the Court of Appeal set aside. These submissions were directed in the first instance to the contention that the Court of Appeal wrongly exercised the discretion under s 31D(1)(a), on the basis that

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237 *NSW Crime Commission v Lee* [2011] NSWSC 80 at [19].

238 *NSW Crime Commission v Lee* [2011] NSWSC 80 at [19]-[20].

239 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [10]-[11] per Beazley JA, [81] per Basten JA, [99]-[101] per Meagher JA.

provisions in the CAR Act relevant to an examination *should not* operate when criminal proceedings are pending against a proposed examinee. The submissions were later developed in oral argument and deployed to support a discrete contention that the relevant provisions *could not* operate when concurrent criminal proceedings are on foot.

123 First, it was contended that the facts fell within the principle to be found in *Hammond*, said to be that compulsory examination about matters overlapping with the subject matter of pending criminal proceedings must be restrained as invariably posing a real risk of interference with those proceedings. Secondly, it was submitted that *Hamilton v Oades*[240] was distinguishable and did not support the Court of Appeal's construction of the CAR Act provisions governing an examination. It was noted that in *Hamilton v Oades* there was no challenge to the Supreme Court's power to order an examination and that the relevant legislative scheme had a distinct history and served a different public interest from any public purpose which could be identified as underpinning the CAR Act. In oral argument, those two submissions underpinned a critical contention about the operation of the provisions governing an examination. It was contended that the provisions are not sufficiently clear to abrogate an accused person's "right to silence" and right to reserve defences once a charge has been laid. That argument was further developed in the appellants' supplementary submissions filed after the publication of orders and reasons for judgment in *X7*. It was submitted that relevant provisions of the CAR Act did not authorise clearly, or by necessary intendment, compulsory examination of a person charged with a criminal offence in circumstances of overlap between the subject matter of the compulsory examination and the pending criminal proceedings. An assumption central to that argument was that an accused person could be compelled to admit his or her guilt or to disclose a defence in respect of charged criminal conduct when examined under the CAR Act. Thirdly, it was submitted that s 13A, and in particular s 13A(3), did not disclose a general legislative intention that an examination could be ordered without regard to the risk of prejudice to a criminal trial. As will be explained, that submission is correct. Finally, it was submitted that s 63 did not reflect a legislative intention that an examination could be ordered after a proposed examinee had been charged, because s 63 is no more than a statutory abrogation of the rule in *Smith v Selwyn*[241], which had in any event already occurred in the common law, as discussed later in these reasons.

124 The NSWCC and the interveners disputed the appellants' characterisation of the findings made by the Court of Appeal. It was contended that, in respect of pending criminal proceedings, the compulsory examination provisions under the

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240 (1989) 166 CLR 486; [1989] HCA 21.

241 [1914] 3 KB 98.

CAR Act did not authorise conduct which would otherwise constitute either a contempt of court or an abuse of process. It was submitted that the compulsory examination provisions in the CAR Act, including the express abrogation of the privilege against self-incrimination to be found in s 13A(1), were within the legislative competence of the Parliament of New South Wales. It was acknowledged that the accusatorial system of criminal justice formed an important backdrop to the CAR Act. It was further submitted that the Supreme Court, when conducting an examination ordered under s 31D, retains all the statutory and inherent powers necessary to prevent, or minimise, any real risk of interference with the administration of justice in concurrent criminal proceedings. In supplementary submissions, the NSWCC submitted that relevant provisions of the CAR Act and the legislative history do, by necessary intendment, authorise compulsory examination about the subject matter of charged offences.

Construction

125 It is undoubtedly within the power of the legislature of New South Wales to alter the common law in relation to answering incriminating questions[242]. Issues similar to those debated on this appeal were recently considered by this Court in *X7*. A number of considerations bearing on the construction of the examination provisions considered in *X7* apply equally to the provisions relevant to an examination under the CAR Act, because the task of construction in each case has to be approached bearing in mind the rights of an accused person which are protected by the common law[243]. For present purposes it is sufficient to refer to as applicable, rather than to repeat, what was said in *X7*, in the joint reasons for judgment of French CJ and Crennan J, with respect to: the disparate immunities covered by the expression "the right to silence"[244]; the privilege against self-incrimination[245]; the concept and importance of a fair trial[246]; and the development, and characteristics, of the accusatorial process of the criminal trial, notably the principle that the onus of proof rests on the prosecution, whom the

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242 *Sorby* (1983) 152 CLR 281 at 299, 308-309; *Hamilton v Oades* (1989) 166 CLR 486 at 494; *Environment Protection Authority v Caltex Refining Co Pty Ltd* ("*EPA*") (1993) 178 CLR 477 at 503, 533; [1993] HCA 74; *Azzopardi v The Queen* (2001) 205 CLR 50 at 57 [7]; [2001] HCA 25.

243 *Rees v Kratzmann* (1965) 114 CLR 63 at 66 per Barwick CJ; [1965] HCA 49; *Sorby* (1983) 152 CLR 281 at 288 per Gibbs CJ.

244 *X7* (2013) 87 ALJR 858 at 871-872 [39]-[43]; 298 ALR 570 at 584-585.

245 *X7* (2013) 87 ALJR 858 at 872-873 [44]-[45]; 298 ALR 570 at 585.

246 *X7* (2013) 87 ALJR 858 at 871 [37]-[38]; 298 ALR 570 at 583-584.

accused is not required to assist, and the rule that an accused is not compellable at his or her trial[247].

126 The CAR Act stipulates that the rules of construction applicable only in relation to the criminal law do not apply in the interpretation of its provisions[248]. Two important rules of construction do, however, apply. The first is the settled principle that statutory provisions are not to be construed as abrogating fundamental rights or important common law rights, privileges and immunities in the absence of clear words or necessary implication to that effect[249]. In *X7*, the Court divided over the application of that principle to the legislative scheme under consideration, but not over its importance or content. The development of this rule of construction, informed by long-established rules of the common law that protect substantive rights[250] and immunities, and often referred to as the "principle of legality", is considered in the joint reasons of Gageler and Keane JJ[251]. I agree that that rule does not exist to protect such rights and immunities from specific, clear and unambiguous alteration in pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature[252]. In some cases, a legislative object may involve a public interest which cannot be pursued without some impairment of some private right or immunity. An underlying legislative object is not necessarily to

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247 *X7* (2013) 87 ALJR 858 at 873-874 [46]-[48]; 298 ALR 570 at 586-587.

248 *Criminal Assets Recovery Act* 1990 (NSW), s 5(2)(a).

249 *Coco v The Queen* (1994) 179 CLR 427 at 437, 446; [1994] HCA 15; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11]; [2002] HCA 49, citing *Potter v Minahan* (1908) 7 CLR 277 at 304; [1908] HCA 63. 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; *EPA* (1993) 178 CLR 477 at 517, 533-534; *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 284 [36]; [2003] HCA 33; *X7* (2013) 87 ALJR 858 at 866-867 [21], 880-881 [86], 892 [158]; 298 ALR 570 at 577-578, 595-596, 612.

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

251 Reasons of Gageler and Keane JJ at [307]-[314].

252 Reasons of Gageler and Keane JJ at [313]. See also *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 298-299 [28]; [2001] HCA 14.

be achieved at any cost, but commonly by striking a balance between competing interests[253].

127 The second applicable rule of construction was described by Gummow and Bell JJ in *International Finance Trust Co Ltd v New South Wales Crime Commission*[254]:

> "[T]he legislature, in selecting the Supreme Court as the forum, may be taken, in the absence of contrary express words or of reasonably plain intendment, to take the Supreme Court as the legislature finds it, with all its incidents[255]."

128 The appellants' arguments, based on the first-mentioned principle of construction, urged in effect that the express abrogation of the privilege against self-incrimination, for which s 13A(1) of the CAR Act provides, must be construed as though it were subject to an implied qualification that the abrogation does not apply if a proposed examinee has been charged with an offence and criminal proceedings have not been completed.

129 The objects of the CAR Act are plain enough. The "mischief"[256] to which the legislation is directed is that persons engaged in serious crime related activity[257] can generate profits or proceeds from that activity, with which assets and wealth may be acquired. It is obvious that confiscation of such assets and wealth is intended to deter lucrative criminal activity in addition to, or instead of, the deterrence presented by the possibility of a jail sentence. A prerequisite for the making of orders under the CAR Act is the correct and effective identification of property which can be subject to confiscation, and the provisions governing an examination are directed to that object.

130 The text of the relevant provisions is also plain. The powers to grant an assets forfeiture order or a proceeds assessment order are framed without

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253 *Carr v Western Australia* (2007) 232 CLR 138 at 142-143 [5] per Gleeson CJ; [2007] HCA 47.

254 (2009) 240 CLR 319 at 360 [79].

255 *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at 491 [7]; [2006] HCA 38; *Thomas v Mowbray* (2007) 233 CLR 307 at 340 [55]; [2007] HCA 33.

256 *Heydon's Case* (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638].

257 Or, in the case of assets forfeiture orders made under s 22(2A) of the CAR Act, activity which generates fraudulently and illegally acquired property.

limitation as to the time when an application for such orders may be made[258]. The meaning of the term "serious crime related activity" is important because, with the exception of assets forfeiture orders made in respect of interests in fraudulently and illegally acquired property[259], only interests in property of a person who has engaged in serious crime related activity, or interests that are referable ultimately to such activity, can be the subject of a confiscation order[260]. The meaning of "serious crime related activity" is set out in s 6(1):

> "In this Act, a reference to a serious crime related activity of a person is a reference to anything done by the person that was at the time a serious criminal offence, whether or not the person has been charged with the offence or, if charged:
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> (a) has been tried, or
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> (b) has been tried and acquitted, or
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> (c) has been convicted (even if the conviction has been quashed or set aside)."

131 The evident purposes of examination, in respect of serious crime related activities, subsist irrespective of whether a person has been charged with, tried for, or convicted of an offence, or even acquitted of that offence. To delay an examination from the time when a charge for an offence has been laid until criminal proceedings have been completed could frustrate the objects of identifying and recovering property sourced from serious crime related activity. A person "affected" by an application for a confiscation order is identified as a person who may be examined compulsorily[261], pursuant to an order under s 31D(1)(a). This supports the conclusion that an examination by the NSWCC of an "affected person", or of another person, concerning the affairs of an "affected person", for the purposes of identifying and recovering property sourced from the criminal activity defined in the CAR Act, can occur concurrently with criminal proceedings against an examinee.

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258 *Criminal Assets Recovery Act* 1990 (NSW), ss 4(1), 22 and 27.

259 As discussed above, "illegally acquired property" is defined to include an interest in property which is "all or part of the proceeds of" illegal activity: *Criminal Assets Recovery Act* 1990 (NSW), s 9(1) and (4).

260 *Criminal Assets Recovery Act* 1990 (NSW), ss 22(1)-(2A), 27(1)-(2A) and 28A(2).

261 *Criminal Assets Recovery Act* 1990 (NSW), s 31D(1)(a)(i).

132 The statutory compulsion to answer questions or to produce documents or things, and the express abrogation of the privilege against self-incrimination in s 13A(1), serve the evident objects of the legislation, to which reference has been made. These requirements under s 13A(1) are not expressed to be limited in their application by reference either to whether a charge for an offence has been laid against an examinee, or to whether criminal proceedings have been completed[262].

133 The grant of a direct use immunity in s 13A(2) in respect of incriminating evidence which has been compulsorily obtained also supports the conclusion that an examination may be ordered notwithstanding that an examinee has been charged with an offence and criminal proceedings have not been completed. A direct use immunity is directed to the prospect of both pending and potential criminal proceedings, and protects an examinee from the consequences of the express abrogation of the privilege against self-incrimination.

134 Something needs to be said more generally about immunities which protect examinees from the consequences of compulsory self-incrimination, examples of which have been known to the law for a long time[263]. In different contexts, legislatures have abrogated or modified the privilege against self-incrimination, and the closely related but not co-extensive right to silence, when public interest considerations have been elevated over, or balanced against, the interests of an individual so as to enable the true facts to be ascertained[264]. Longstanding examples include statutes providing for the compulsory examination of a bankrupt[265] or a company officer when fraud or material non-disclosure is suspected[266]. In balancing an identified public interest against an individual examinee's interests, legislation abrogating the privilege against self-incrimination, thereby affecting the right to silence, will often contain, as here in s 13A(2), "compensatory protection to the witness"[267], by providing that subject to limited exceptions, compelled answers shall not be admissible in criminal proceedings. One of the rationales for the privilege against self-incrimination identified by Professor Wigmore was that the privilege

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262 Cf *Royal Commissions Act* 1902 (Cth), s 6A(3) and (4); see also *National Crime Authority Act* 1984 (Cth), s 30(10) (now repealed).

263 *R v Scott* (1856) Dears & B 47 at 60 [169 ER 909 at 914].

264 *EPA* (1993) 178 CLR 477 at 503 per Mason CJ and Toohey J.

265 Statute 5 Geo II c 30, s 16.

266 *Mortimer v Brown* (1970) 122 CLR 493.

267 *Sorby* (1983) 152 CLR 281 at 311 per Mason, Wilson and Dawson JJ. See also *Hamilton v Oades* (1989) 166 CLR 486 at 508 per Dawson J.

contributes to a fair State-individual balance[268]. The provision of a direct use immunity reflects a legislature's intention to recalibrate the State-individual balance, disturbed by a statutory abrogation of the privilege against self-incrimination. The legislation in *Hamilton v Oades*[269] is just one example of such a legislative scheme.

135 In the mid-19th century, the bankruptcy legislation[270] considered in *R v Scott*[271] contained no express protection of the bankrupt from the consequences of giving self-incriminating evidence under compulsion. Accordingly, when delivering the opinion of the majority confirming Scott's conviction of an offence, Lord Campbell CJ refused to imply any immunity precluding the use of the evidence against Scott on a criminal charge, and determined that a compulsory examination, reduced to writing and signed by the bankrupt, could be used in both criminal and civil proceedings against the bankrupt[272]. It was this circumstance – applied later, by analogy, to public examinations by liquidators in winding up proceedings – which distinguished provisions for compulsory examination in bankruptcy legislation from other contemporary schemes for compulsory examination[273], which contained a direct use (or other, related) immunity[274]. The specific provisions in the winding up legislation considered by this Court in *Rees v Kratzmann*[275] and *Mortimer v*

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268 As to which see *EPA* (1993) 178 CLR 477 at 499.

269 (1989) 166 CLR 486.

270 *Bankrupt Law Consolidation Act* 1849 (UK), s 117.

271 (1856) Dears & B 47 [169 ER 909].

272 (1856) Dears & B 47 at 60 [169 ER 909 at 914-915].

273 In contemporary legislation covering topics as diverse as gaming and elections.

274 *R v Scott* (1856) Dears & B 47 at 60 [169 ER 909 at 914]. See also *R v Robinson* (1867) LR 1 CCR 80; *R v Cherry* (1871) 12 Cox CC 32; *R v M'Cooey* (1879) 5 VLR (L) 38; *In re A Solicitor* (1890) 25 QBD 17; *R v Erdheim* [1896] 2 QB 260 at 269; *Barton v Official Receiver* (1977) 13 ALR 283 at 290. See also Tollefson, *The Privilege Against Self-Incrimination in England and Canada*, (1975) at 70; United Kingdom, Criminal Law Revision Committee, *Eighth Report: Theft and Related Offences*, (1966) at [200]-[205].

275 (1965) 114 CLR 63.

Brown[276] followed the pattern that a signed record of a compulsory examination could be used in proceedings against the examinee[277].

136 In *Hamilton v Oades*[278], a majority of this Court held that the Supreme Court could not excuse the defendant from a statutory compulsion to answer questions under s 541(3) of the *Companies (New South Wales) Code*, on the basis only that an answer might incriminate him in circumstances where he had already been charged with an offence, there were pending criminal proceedings against him, and an abrogation of the privilege against self-incrimination exposed him to the use of derivative evidence in criminal proceedings. While the objects of the legislation resembled the objects of predecessor legislation (including the provisions considered by this Court in *Rees v Kratzmann* and *Mortimer v Brown*), the scheme for compulsory examination, by comparison, was significant in three respects[279]. First, the privilege against self-incrimination was expressly abrogated. Secondly, that express abrogation was balanced by an immunity from direct use in criminal proceedings of incriminating evidence compulsorily obtained (other than in proceedings under the section or in respect of a false answer). That immunity also distinguished the scheme for compulsory examination from historical examples of bankruptcy legislation, to which reference has been made. Thirdly, the Supreme Court, in which the examination was conducted, was explicitly empowered to give directions concerning the examination. A further difference was that the objects of investigation went beyond fraud and material non-disclosure. It was noted by Mason CJ that a direct use immunity guards against the possibility that an examinee will convict himself "out of his own mouth", the principal matter to which the privilege against self-incrimination is directed[280].

137 Section 13A(3), which qualifies an examinee's protection against the use of compulsorily obtained incriminating evidence, was of particular concern to the primary judge. It can be accepted that without an immunity, not only from direct use but also from derivative use by the prosecution in criminal proceedings of compulsorily obtained incriminating evidence, an examinee is not in as good a position as he or she would have been if the privilege against self-incrimination

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276 (1970) 122 CLR 493.

277 *Companies Act* 1961 (Q), s 250.

278 (1989) 166 CLR 486.

279 *Hamilton v Oades* (1989) 166 CLR 486 at 495-496.

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

had not been abrogated[281]. However, in providing two grounds upon which derivative use is "not inadmissible in criminal proceedings", s 13A(3) did not oust a general discretion, whether statutory[282] or otherwise, to exclude evidence and achieves a position not dissimilar to the common law position whereby derivative evidence is not rendered inadmissible merely because of the circumstances in which it was obtained[283]. As explained in *X7* (in the joint reasons of French CJ and Crennan J), derivative evidence may vary greatly and may be available from multiple independent sources, which factors can bear on the relationship between the use of derivative evidence by the prosecution in criminal proceedings and a fair trial[284]. On this issue, Meagher JA in the Court of Appeal, echoing *Hamilton v Oades*, described s 13A(3) as encompassing a judgment by the legislature that specific protection against the risk of derivative use was not required. His Honour then said[285]:

> "The protection to the examinee against any such derivative use is provided by requiring that the examination take place before the Supreme Court, or an officer of the Court, having in addition to the [power to restrict publication[286]], the inherent power to ensure the proper administration of justice."

That approach is correct and should be followed.

138 In the light of these considerations, the appellants were right to contend that s 13A, and particularly s 13A(3), did not evince a legislative intention to occasion prejudice to the appellants' pending criminal proceedings. That conclusion is fortified, as Meagher JA recognised, by the legislature's choice of the Supreme Court as the forum for an examination.

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281 *Sorby* (1983) 152 CLR 281 at 294 per Gibbs CJ; *X7* (2013) 87 ALJR 858 at 875 [53] per French CJ and Crennan J; 298 ALR 570 at 588. See also *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380 at 443 per Lord Wilberforce.

282 *Evidence Act* 1995 (NSW), s 137.

283 *R v Warickshall* (1783) 1 Leach 263 [168 ER 234]; *R v Sang* [1980] AC 402 at 453-454; *Lam Chi-Ming v The Queen* [1991] 2 AC 212; *R v Hertfordshire County Council; Ex parte Green Environmental Industries Ltd* [2000] 2 AC 412 at 421.

284 *X7* (2013) 87 ALJR 858 at 876 [58]; 298 ALR 570 at 589.

285 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [99].

286 *Criminal Assets Recovery Act* 1990 (NSW), s 62 and, as of 1 July 2011, *Court Suppression and Non-publication Orders Act* 2010 (NSW), ss 4, 7 and 8.

139 In *Hamilton v Oades*, when noting that there was no distinction to be made between a case where questions were to be put before a charge was laid, and a case where they were to be put after a charge was laid, Mason CJ recognised the importance of the selection of the Supreme Court as the forum in which a compulsory examination took place and said[287]:

> "[I]f a liquidator were to conduct an examination directed to compel the examinee to disclose defences or to give pre-trial discovery, or to establish guilt, this examination may be restrained as an abuse of process".

140 His Honour also recognised that short of restoring the expressly abrogated privilege, the Court could order that the examination be conducted in private and could disallow any particular question which would prejudice the examinee's fair trial[288].

141 The grant of powers to the Supreme Court to make restraining orders and confiscation orders, and examination orders ancillary to either, confers on the Supreme Court powers to be exercised judicially, in accordance with legal principle, and so as to diminish the possibility of oppression and injustice in any examination[289]. The appellants conceded that the making of an order for a compulsory examination would fall within the scope of s 31D(1)(a) when there is any immediate question about the dissipation of assets. That was a proper concession. The Court, controlling an examination, has the power to conduct the examination in private, to adjourn and resume the examination, to disallow questions designed to establish the examinee's guilt or to elicit defences in respect of pending criminal charges, to make orders restricting publication of the examination or related information, and (other than restoring the abrogated privilege) to make such other orders as are necessary to safeguard an examinee's fair trial.

142 Dealing next with s 63 of the CAR Act, the appellants contended, correctly, that this section is a statutory abrogation of the rule in *Smith v Selwyn*[290]. Stated simply, the rule in *Smith v Selwyn* was that a civil action for damages, which could not succeed except by proof of a felony, should be stayed for so long as the defendant has not been prosecuted for that felony, unless a

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287 *Hamilton v Oades* (1989) 166 CLR 486 at 498.

288 *Hamilton v Oades* (1989) 166 CLR 486 at 499.

289 *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at 492 [10], citing *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205; [1992] HCA 28. See also *Rees v Kratzmann* (1965) 114 CLR 63 at 66 per Barwick CJ.

290 [1914] 3 KB 98.

reasonable excuse has been shown for his not having been prosecuted. That the rationale of the rule was likely based on "the public policy of a bygone age" was noted in *McMahon v Gould*[291], and was explained in an article urging the abrogation of the rule by statute[292].

143 Reflecting common law developments, the effect of s 63 is that a person charged with an offence is not entitled, as a matter of right, to have the civil proceedings stayed because of pending criminal proceedings[293]. Important as the concept of a fair trial is, as is also the accusatorial process of a criminal trial, the public interest in fair trials and the interests of individual accused persons are not the only interests which a legislature may take into account when seeking to deter serious crime related activity. Whilst s 63 recognises that the operation of the CAR Act may give rise to discrete and conflicting public and private interests in the completion of concurrent civil and criminal proceedings, it does not operate to override the Supreme Court's "undoubted power to stay criminal proceedings which will result in an unfair trial"[294].

144 The principal issue on this appeal is determined by the conclusion that the relevant provisions of the CAR Act clearly and unambiguously show that the privilege against self-incrimination is abrogated, irrespective of whether or not an examinee has been charged with a criminal offence, and that the legislature has directed its attention to the effect of that abrogation upon an examinee facing pending criminal proceedings. Accordingly, the legislative scheme for compulsory examination in the CAR Act may operate in respect of persons charged with an offence, notwithstanding overlap between the subject matter of

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291 (1982) 7 ACLR 202 at 205, quoting Roden J in *Ceasar v Sommer* [1980] 2 NSWLR 929 at 931.

292 Pannam, "Felonious Tort Rule", (1965) 39 *Australian Law Journal* 164.

293 *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898; [1979] 2 All ER 1108. See also *Rochfort v John Fairfax & Sons Ltd* [1972] 1 NSWLR 16 at 20.

294 *Dietrich v The Queen* (1992) 177 CLR 292 at 298 per Mason CJ and McHugh J, see also at 332 per Deane J; [1992] HCA 57. See also *Ibrahim v The King* [1914] AC 599 at 609-611; *McDermott v The King* (1948) 76 CLR 501; [1948] HCA 23; *R v Lee* (1950) 82 CLR 133; [1950] HCA 25; *Barton v The Queen* (1980) 147 CLR 75 at 96, 103-105, 107, 109, 111, 115-117; [1980] HCA 48; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31, 46-47, 56-57, 71-72, 74-75; [1989] HCA 46; *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 265-266 [10]-[12]; [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.

the compulsory examination and the subject matter of the pending criminal proceedings.

Contempt

145 In construing s 31D(1)(a) of the CAR Act as empowering the Supreme Court to make an order for examination of the appellants, notwithstanding that criminal proceedings were pending against them, the Court of Appeal referred to "the possibility of adverse consequences for criminal proceedings otherwise on foot"[295] arising from an examination on overlapping subject matter. Reference was also made to "the risk"[296] that evidence or information derived from an examination might be used in pending criminal proceedings. What was described in the Court of Appeal as being "authorised" by the CAR Act was the consequence of s 13A, particularly the "availability of derivative evidence" (despite the fact that it "might impinge on future criminal proceedings"[297]), which constituted "a degree of potential interference with a criminal trial"[298]. Read in context, these references show that the Court of Appeal recognised that consideration of whether an order for examination might prejudice the fair trial of a person proposed to be examined is relevant not only to the exercise of discretion under s 31D(1)(a) to order an examination, but also to the subsequent conduct of any examination in the Supreme Court.

146 In *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*[299] the issue before this Court was whether continued proceedings of a Royal Commission in public would occasion a degree of prejudice to the administration of justice in concurrent proceedings in the Federal Court of Australia. In finding that there was no real risk of interference, Gibbs CJ said:

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295 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [49] per Basten JA.

296 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [99] per Meagher JA.

297 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [55], [81] per Basten JA.

298 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [56] per Basten JA.

299 ("*BLF*") (1982) 152 CLR 25 at 56; [1982] HCA 31, citing *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 299.

> "There is a contempt of court of the kind relevant to the present case only when there is an actual interference with the administration of justice, or 'a real risk, as opposed to a remote possibility' that justice will be interfered with".

147 Read as a whole, the reasons of the Court of Appeal turn significantly on the distinction between "a real risk" and "a possibility" of interference with the administration of justice in pending criminal proceedings.

148 Contrary to the appellants' submission that the distinction between "a real risk, as opposed to a remote possibility" imposes an "unlikely constraint" on the discretion conferred in s 31D, the distinction is longstanding, practical and familiar, and the expression "real risk" was invoked by Gibbs CJ, after the *BLF* case, in *Hammond*[300]. As explained in the *BLF* case, a Royal Commission required to report upon specified matters does not commit a contempt of court when acting within its authority, notwithstanding that the Commission's proceedings may have a real or definite tendency to interfere with the administration of justice[301]. This is because the risk of interference is not intended, it is incidental to, and impliedly authorised by, the pursuit of a legitimate legislative purpose. Furthermore, compulsory examination powers conferred generally may be read as conferring power subject to the law of contempt[302].

149 On the basis of the operation of the CAR Act explained above, a question arises as to whether the legislature of New South Wales, unconstrained by the separation of powers, has thereby authorised what would otherwise be a contempt in respect of criminal proceedings[303].

150 Notwithstanding a similar express abrogation of the privilege against self-incrimination in *Hamilton v Oades*, Mason CJ noted that the inherent powers of the Supreme Court were retained and that it was the duty of the Court to ensure the proper administration of justice, and to avoid any abuse of process,

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300 (1982) 152 CLR 188 at 196, 198, 199.

301 *BLF* (1982) 152 CLR 25 at 55-56 per Gibbs CJ, 73 per Stephen J, 94-95 per Mason J, 161 per Brennan J. See also *Lockwood v The Commonwealth* (1954) 90 CLR 177; [1954] HCA 31.

302 *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460 at 473; [1982] HCA 65. Cf *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 185 per Fullagar J.

303 See generally Donaghue, *Royal Commissions and Permanent Commissions of Inquiry*, (2001) at 292-298 [10.38]-[10.44].

which duty might require orders other than orders which restored the abrogated privilege[304]. Those remarks are just as apt in relation to contempt. The Court's inherent power to punish for contempt includes a power to restrain a threatened contempt as in *Hammond.* Short of ordering that the abrogated privilege be restored, the Court, when controlling an examination under the CAR Act, will not permit an examiner either to abuse its processes or to occasion a real risk of interference with pending criminal proceedings.

151 Under the provisions of the CAR Act, the Supreme Court's powers to control any examination ordered, described above, can prevent the prosecution from obtaining an unfair forensic advantage, not obtainable under ordinary trial procedures[305], and the precise circumstances of *Hammond's* case can be avoided.

152 Relying on *Hammond*, as applying beyond those precise circumstances, the appellants identified a discrete risk of interference in the pending criminal proceedings as the loss of the forensic advantage to them of exercising the right to remain silent, before and at trial, and to reserve their defences until the close of the prosecution case. It was said that being compelled to give an answer, including making an admission or partial denial in respect of an offence, thereafter constrained or embarrassed an examinee in the conduct of a defence (including the making of a plea of not guilty) so long as the examinee is represented by lawyers subject to their ethical obligations. The loss of that forensic advantage is necessarily implied by the effect of the express abrogation of the privilege against self-incrimination.

153 Legislatures have from time to time qualified the right to remain silent before and at trial; for example, legislatures commonly require an accused person to give an alibi notice prior to trial[306], and have otherwise made changes to the accusatorial process of a criminal trial[307] which intrude upon the forensic or procedural advantages the common law accords to an accused person before or at trial.

154 If, without more, and notwithstanding the protections afforded to an examinee under the CAR Act, the loss of the identified forensic advantage

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304 *Hamilton v Oades* (1989) 166 CLR 486 at 498-499.

305 *EPA* (1993) 178 CLR 477 at 557-558 per McHugh J.

306 *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.

307 As to which see *X7* (2013) 87 ALJR 858 at 874 [48]; 298 ALR 570 at 586-587.

occasions a real risk of interference with pending criminal proceedings, that risk is incidental to the achievement of legitimate legislative objects, and to that extent is implicitly authorised by the legislature of New South Wales[308].

Conclusions

155 For the reasons given above, there was no error in the Court of Appeal's approach to s 31D(1)(a). The Court of Appeal was right to find that the primary judge erred in declining to grant the examination orders sought and right to re-exercise the discretion to order the examinations sought.

Orders

156 The appeal should be dismissed with costs.

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308 *Hamilton v Oades* (1989) 166 CLR 486 at 498-499, 510, 516-517.

157 KIEFEL J. One of the principal objects of the *Criminal Assets Recovery Act* 1990 (NSW) ("the CAR Act") is to provide for the confiscation of the property of a person, without requiring a conviction, if the Supreme Court of New South Wales finds it to be more probable than not that the person has engaged in serious crime related activities[309]. The New South Wales Crime Commission ("the Crime Commission") applied for various orders including an order in the nature of confiscation of the first appellant's property[310] and orders restraining any dealing with that property[311]. A confiscation order of the kind sought may be based upon a finding that the person committed an offence constituting a serious crime related activity in a specified period before the application is brought[312].

158 Section 31D of the CAR Act provides for the making of ancillary orders where an application is made for a confiscation order. By s 31D(1)(a), the Supreme Court may, on the application of the Crime Commission, make an order for the examination, on oath, of an "affected person"[313] or "another person" before the Court, or an officer of the Court, "concerning the affairs of the affected person". The Crime Commission sought such orders in respect of the appellants. Given that an order for confiscation must be made where the Supreme Court makes certain findings as to the person's involvement in a serious crime related activity[314], it follows that an examination may be directed to a person's involvement in serious crime. In the event that an examination is ordered, s 13A(1) of the CAR Act[315] provides that the person is not excused from answering any question, or producing any document, on the ground that the answer or production might incriminate, or tend to incriminate, the person. The provision may be taken to intend to abrogate the common law privilege of the person against self-incrimination, subject to a protective qualification which will be later mentioned.

159 It is also a common law principle that the prosecution cannot compel a person accused of a crime to assist in the discharge of its onus of proof. This is an essential aspect of an accusatorial system and is fundamental to the common

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309 *Criminal Assets Recovery Act* 1990 (NSW), s 3(a).

310 A "proceeds assessment order": see *Criminal Assets Recovery Act* 1990, s 27.

311 Under the *Criminal Assets Recovery Act* 1990, s 10A.

312 *Criminal Assets Recovery Act* 1990, s 27(2), (2A), (3).

313 See *Criminal Assets Recovery Act* 1990, s 31D(4).

314 See *Criminal Assets Recovery Act* 1990, s 27(2), (2A).

315 Pursuant to the *Criminal Assets Recovery Act* 1990, s 31D(3).

law. It lies at the heart of the system of criminal justice administered by the courts[316].

160 When the applications for the examination of the appellants were brought, each of the appellants had been charged with offences and their trials were therefore pending[317] in the courts of New South Wales. The first appellant had been charged with two offences of money laundering[318], two offences relating to the possession of a prohibited drug[319] and one offence in the nature of possessing stolen property[320]. The first appellant was also later charged with a further offence in the nature of money laundering, which related to a large amount of cash found following a search of premises. Based on that cash, each of the appellants was charged with the offence of supply of prohibited drugs[321] and with offences relating to firearms[322].

161 RS Hulme J heard the applications and reserved his decision. Whilst the decision was reserved, the appellants were arraigned in the District Court of New South Wales on an indictment of eight counts which related to the drug and firearm offences and the second money laundering offence. They pleaded not guilty. That money laundering offence was set down for a separate trial, but evidence of the money the subject of it was led in support of the drug and firearm offences. The trial for those offences was underway when RS Hulme J gave judgment[323]. His Honour refused to make orders for the examination of the appellants "at this stage"[324]. It is to be inferred from his Honour's reference to the decision of this Court in *Hammond v The Commonwealth*[325] that his Honour was concerned about the potential effect of the examinations upon the appellants'

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316 *X7 v Australian Crime Commission* (2013) 87 ALJR 858 at 883 [102], [104], 893 [159]; 298 ALR 570 at 599-600, 612; [2013] HCA 29.

317 *James v Robinson* (1963) 109 CLR 593 at 615; [1963] HCA 32.

318 *Crimes Act* 1900 (NSW), s 193B(2).

319 *Drug Misuse and Trafficking Act* 1985 (NSW), s 10(1).

320 *Crimes Act* 1900, s 527C(1)(c).

321 *Drug Misuse and Trafficking Act* 1985, s 25(2).

322 *Firearms Act* 1996 (NSW), s 7(1); *Weapons Prohibition Act* 1998 (NSW), s 7(1).

323 *NSW Crime Commission v Lee* [2011] NSWSC 80.

324 *NSW Crime Commission v Lee* [2011] NSWSC 80 at [20]-[21].

325 (1982) 152 CLR 188 at 198; [1982] HCA 42.

ongoing criminal trial. The Court of Appeal[326] allowed an appeal from that decision.

The issues on the appeal

162 There can be little doubt that, on any examination ordered, the appellants would be subject to questioning by the Crime Commission as to offences which are the subject of the charges. It would appear that the Crime Commission conceded as much in the course of related proceedings in the Supreme Court, pending the application for leave to appeal from the decision of RS Hulme J, and the Crime Commission did not suggest to the contrary on this appeal.

163 Given the functions of the Crime Commission[327], the role which it has in liaising with other bodies[328] and the constitution of its Management Committee[329], there can also be little doubt that the evidence obtained in an examination would be made available to investigating or prosecutorial authorities. As the cases explain, there are other effects upon an accused person's defence, and upon the conduct of his or her trial, which may follow as a result of an examination[330]. There is a real risk, if not a likelihood, that aspects of the appellants' trials will differ from a criminal trial as it is ordinarily conducted, especially in its accusatorial aspects. Rather than the prosecution being required to prove its case without assistance from the appellants, the examination is likely to result in the prosecution being advantaged in the conduct of its case and the appellants prejudiced.

164 The Supreme Court has inherent powers to prevent obstruction to the administration of criminal justice. It has powers which might be used in conjunction with an order for examination[331], such as the power to limit the publication of information or to require an examination to be in private, and it has powers to prevent a contempt. The extent and efficacy of these powers, to

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326 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 per Beazley, McColl, Basten, Macfarlan and Meagher JJA.

327 *Crime Commission Act* 2012 (NSW), ss 7(2), (3), 10, 11.

328 *Crime Commission Act* 2012, s 13.

329 *Crime Commission Act* 2012, s 50(1).

330 *X7 v Australian Crime Commission* (2013) 87 ALJR 858 at 886-887 [124]; 298 ALR 570 at 604.

331 See, for instance, *Hamilton v Oades* (1989) 166 CLR 486 at 498-499; [1989] HCA 21.

limit the effects of an examination upon the appellants' trials and the conduct of their defence, which may be relevant to an exercise of discretion under s 31D(1)(a), are not relevant to the principal issue on the appeal, which concerns the construction of the CAR Act.

165 The principal issue on this appeal is whether the CAR Act can be said to authorise the examination of the appellants given the circumstance that they have been charged and their trials are pending. The appellants submit that such an intention is not evident from the provisions of the CAR Act. An intention to abrogate or curtail a fundamental principle or to authorise conduct which constitutes a risk of prejudice to a fair trial must be clear and unambiguous. This submission draws upon the principle of legality.

166 The appellants submit that neither s 31D nor s 13A can be read as a legislative intention to displace fundamental features of a criminal trial. In the appellants' submission, the purported abrogation, in s 13A(1), of a person's privilege against self-incrimination is not, of itself, clearly expressive of such an intention, not the least because the use of material obtained at, or as a result of, a compulsory examination is but one aspect of the prejudice which may be suffered at trial. An examination conducted in these circumstances presents a real risk of interference with the administration of justice. According to the appellants, the CAR Act cannot be read so as to warrant that risk.

167 The appellants contend that, in the event that this Court finds that s 31D(1)(a) does authorise an order for examination in the circumstance where a person stands charged of offences which are to be the subject of examination, the provision nevertheless provides the judge hearing the application with a discretion to refuse an order, having regard to the capacity of the examination to prejudice the fair trial of that person.

168 The appellants' submissions focus on the question of authorisation and therefore legislative intention. They do not concern the question of legislative power, which is to say whether the CAR Act could deprive an accused person of the privilege against self-incrimination.

169 The appellants' notice of appeal contains an additional ground of appeal. It is that if s 31D(1)(a), on its proper construction, requires the Supreme Court to determine an application for examination without regard to the prejudice to an accused's trial, then s 31D(1)(a) is invalid because it confers on the Supreme Court a function which is incompatible with the institutional integrity of the Court. This ground would raise an issue concerning Ch III of the Constitution but, as the appellants observe, neither the respondent nor any intervener contends that s 31D(1)(a) bears that construction. No constitutional issue therefore arises on this appeal.

X7 v Australian Crime Commission

170 Following the hearing of this appeal, judgment was delivered in *X7 v Australian Crime Commission*. By a majority[332] it was held that the *Australian Crime Commission Act* 2002 (Cth) neither expressly nor by necessary intendment could be taken to authorise the examination of a person with respect to an offence with which that person is charged. The parties to this appeal were given the opportunity to and did file supplementary submissions addressed to that decision, as did the State of New South Wales.

The principle of legality

171 As Gleeson CJ observed in *Al-Kateb v Godwin*[333], the principle of legality is not new. In 1908, O'Connor J, in *Potter v Minahan*[334], referred to a passage from the fourth edition of *Maxwell on Statutes*[335] which stated that "[i]t 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"[336]. Absent that clarity of expression, the courts will not construe a statute as having such an operation[337]. In *Electrolux Home Products Pty Ltd v Australian Workers' Union*[338], Gleeson CJ said "[t]he presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of

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332 *X7 v Australian Crime Commission* (2013) 87 ALJR 858 at 891 [146], [148] per Hayne and Bell JJ, 892 [157], 893 [162] per Kiefel J; 298 ALR 570 at 610, 612, 613.

333 (2004) 219 CLR 562 at 577 [19]; [2004] HCA 37.

334 (1908) 7 CLR 277 at 304; [1908] HCA 63.

335 Maxwell, *On the Interpretation of Statutes*, 4th ed (1905) at 122.

336 Referred to in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19] per Gleeson CJ.

337 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523 per Brennan J; [1987] HCA 12.

338 (2004) 221 CLR 309 at 329 [21]; [2004] HCA 40.

the rule of law." The principle has been cited and applied on many occasions[339] as a rule of statutory construction. The principle was applied in *X7*[340].

172 In *Coco v The Queen*[341], it was explained that the insistence on express authorisation of an abrogation of a fundamental right, freedom or immunity must be understood as a requirement for a manifestation or indication that the legislature not only directed its attention to the question of abrogation, but has also determined to abrogate the right, freedom or immunity. General words will rarely be sufficient to show a clear manifestation of such an intention because they will often be ambiguous on the aspect of interference with fundamental rights. The same requirement must apply to any interference with fundamental principles or departure from the general system of law to which *Potter v Minahan* drew attention.

173 The applicable rule of construction recognises that legislation may be taken necessarily to intend that a fundamental right, freedom or immunity be abrogated. As was pointed out in *X7*[342], it is not sufficient for such a conclusion that an implication be available or somehow thought to be desirable. The emphasis must be on the condition that the intendment is "necessary", which suggests that it is compelled by a reading of the statute. Assumptions cannot be made. It will not suffice that a statute's language and purpose might permit of such a construction, given what was said in *Coco v The Queen*.

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339 *Bropho v Western Australia* (1990) 171 CLR 1 at 18; [1990] HCA 24; *Coco v The Queen* (1994) 179 CLR 427 at 437; [1994] HCA 15; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19]; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21]; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 520 [47]; [2009] HCA 4; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15]; [2010] HCA 23; *Momcilovic v The Queen* (2011) 245 CLR 1 at 46-47 [42]-[43], 200 [512]; [2011] HCA 34; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 134-135 [30]; [2012] HCA 19; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289 at 304 [42]; 295 ALR 197 at 211; [2013] HCA 3; *Monis v The Queen* (2013) 87 ALJR 340 at 405 [331]; 295 ALR 259 at 342; [2013] HCA 4.

340 (2013) 87 ALJR 858 at 881 [87], 892 [158], 893 [162]; 298 ALR 570 at 596, 612, 613.

341 (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.

342 (2013) 87 ALJR 858 at 890 [142]; 298 ALR 570 at 609, referring to *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; [2002] HCA 49, by way of example.

The fundamental principle and the criminal justice system

174 The golden thread of the system of English criminal law is that it is the duty of the prosecution to prove the prisoner's guilt[343]. This is consistent with the presumption of an accused's innocence. It finds expression as a fundamental principle of the common law of Australia.

175 In *Environment Protection Authority v Caltex Refining Co Pty Ltd*[344] ("*EPA v Caltex*"), the principle was stated to be that the onus of proof rests upon the Crown and its companion rule expressed to be that an accused person cannot be required to testify to the commission of the offence charged[345]. It is fundamental to the criminal law that the prosecution, in the discharge of its onus, cannot compel the accused to assist it[346]. In *Sorby v The Commonwealth*[347], this was described as "a cardinal principle".

176 I will continue to describe this principle – that the prosecution must discharge the onus of proof and cannot compel the accused to give evidence for it – as "the fundamental principle" of the common law; it is an essential aspect of the criminal trial in our system of criminal justice. In common with the civil trial, the criminal trial is adversarial in nature and it is accusatorial. As *X7* holds[348], it is the fundamental principle and the accusatorial system of criminal justice to which attention must be directed in construing a statute which requires a person charged with an offence to answer questions about the offence. As was said in *X7*, the question that must be addressed is whether the statute in question clearly intends to alter that system and that principle[349].

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343 *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 481.

344 (1993) 178 CLR 477; [1993] HCA 74.

345 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 503 per Mason CJ and Toohey J, 550 per McHugh J.

346 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 527 per Deane, Dawson and Gaudron JJ.

347 (1983) 152 CLR 281 at 294 per Gibbs CJ; [1983] HCA 10.

348 (2013) 87 ALJR 858 at 883 [102], [104] per Hayne and Bell JJ, 893 [159]-[160] per Kiefel J; 298 ALR 570 at 599-600, 612-613.

349 *X7 v Australian Crime Commission* (2013) 87 ALJR 858 at 891 [148], 892 [157], 893 [162]; 298 ALR 570 at 610, 612, 613.

177 Trials upon indictable offences take place before a jury, the function of which is to determine whether the prosecution has proved beyond a reasonable doubt that the accused committed the offence in question. The institution of trial by jury, by s 80 of the Constitution, serves to confirm the nature of a trial as accusatorial. In *R v Snow*[350], Griffith CJ said that the history of the law of trial by jury is sufficient to show that s 80 "ought prima facie to be construed as an adoption of the institution of 'trial by jury' with all that was connoted by that phrase in constitutional law and in the common law of England." It is therefore possible that a derogation, in a fundamental respect, from such a trial may raise a constitutional question. It is not necessary to further consider that possibility in this case.

178 The fundamental principle and the accusatorial system of criminal justice owe much to the reaction of the common law, and the people, to the interrogations conducted by the ecclesiastical courts and the Star Chamber. Those institutions claimed the power to summon a defendant with no warning of the charge to be made against him and to examine him on oath. In a notable case, decided even before the abolition of the Star Chamber, the Court of Common Pleas released a defendant who had been imprisoned for refusing to reply to questions put by the Court of High Commission on the principle that no-one is compelled to give himself away[351]. It is from these sources that the fundamental principle and the accusatorial system of criminal justice were developed.

179 In the mid-16th century, justices of the peace, who acted as part magistrate and part police officer, also conducted interrogations pre-trial, but this practice also gradually changed. By the early 19th century, some magistrates were telling accused persons that they were not bound to answer questions put during pre-trial interrogations[352]. In 1848, a statute[353] provided that the primary function of the justices was to hear the witnesses against the accused and, having done so, they

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350 (1915) 20 CLR 315 at 323; [1915] HCA 90.

351 Nemo tenetur seipsum prodere: Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial*, 3rd ed (1963) at 42-43, referring to *Leigh's Case*, quoted by Coke CJ in *Burrowes v The High-Commission Court* (1615) 3 Bulst 48 at 50 [81 ER 42 at 43].

352 Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial*, 3rd ed (1963) at 45.

353 *Indictable Offences Act* 1848 (UK), s 18.

were to warn the accused that he was not bound to say anything, although he was free to do so[354].

180 The requirement of the law, that the accused not be questioned, has had its critics, including Bentham[355]. Sir James Fitzjames Stephen was not wedded to the right to silence, but considered that it had virtue in that it encouraged the search for independent evidence[356]. The process and methods of police investigation have developed considerably since that time, but they have done so in accordance with the requirements of the system of criminal justice.

181 In *EPA v Caltex*[357], McHugh J expressed the view that the common law did not see the criminal trial, as it developed, as an inquiry into guilt. Consistently with the civil action, it was adversarial and the Crown had to prove its case. To require the accused to convict himself from his own mouth was regarded as oppressive. If the prosecution could force the accused to provide evidence, in the view of the common law, the differences between the accusatorial and inquisitorial systems would be theoretical rather than real[358].

182 The requirement of the law that an accused person cannot be compelled to give evidence for the prosecution has thus far been spoken of in the wider dimension of the accusatorial system of criminal justice. It is often described as the "right to silence", a term which suggests a right personal to the accused. It may be said that the fundamental principle results in a freedom or immunity for the accused, but it may not strictly be correct to call it a right. It is best understood in the context of the accusatorial system of criminal justice. That system reflects the balance struck between the power of the state to prosecute an individual and the position of the individual who stands accused. By way of contrast, the privilege against self-incrimination (which I will continue to refer to as "the privilege") is a personal right, one which applies in all courts, tribunals

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354 Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial*, 3rd ed (1963) at 45.

355 Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial*, 3rd ed (1963) at 53-57, referring to Bentham, *A Treatise on Judicial Evidence*, (1825) at 240-241.

356 Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial*, 3rd ed (1963) at 54, referring to Stephen, *A History of the Criminal Law of England*, (1883) at 441-442.

357 (1993) 178 CLR 477 at 544.

358 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 550-551.

and inquiries. The privilege is not to be equated with the inability to compel an accused person to give evidence. The privilege may be lost but the fundamental principle of the accusatorial system of criminal justice remains.

183 The privilege shares the same historical source as the fundamental principle[359] and is a further expression of the maxim upon which the fundamental principle is based. In *Sorby v The Commonwealth*[360], the privilege was also said to be "deeply ingrained in the common law"[361] and a "fundamental … bulwark of liberty"[362]. In its operation, it supports the fundamental principle and the system of criminal justice, although the privilege has a number of features which set it apart.

184 The privilege applies in all proceedings, criminal or civil. Although supporting the fundamental principle and the system of criminal justice, it is a basic and substantive common law right of the person[363]. It is the privilege of any witness in any proceedings to refuse to answer an incriminating question. It must be claimed by the witness when the question is first put to him or her whilst in the witness box. The privilege attaches to the answer which is sought. Because it is a privilege of the person, it may be waived. It has been said that, generally speaking, the privilege may be abridged by statute[364]. Whether that is so in connection with an accused person is, as has been observed, not a matter to be considered on this appeal[365].

185 An accused may elect to give evidence in his or her defence, although this has not always been the case. The right was provided in relatively recent history but it is now entrenched as an essential aspect of the criminal trial. More

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359 *Reid v Howard* (1995) 184 CLR 1 at 11-12; [1995] HCA 40.

360 (1983) 152 CLR 281 at 309.

361 See also *R v Associated Northern Collieries* (1910) 11 CLR 738 at 748 per Isaacs J, "a principle … deeply rooted and consistently enforced"; [1910] HCA 61; *Hammond v The Commonwealth* (1982) 152 CLR 188 at 202-203 per Brennan J, "a principle deep-rooted".

362 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 340; [1983] HCA 9; *Reid v Howard* (1995) 184 CLR 1 at 11.

363 *Reid v Howard* (1995) 184 CLR 1 at 11.

364 *Reid v Howard* (1995) 184 CLR 1 at 12; see also *Evidence Act* 1995 (NSW), s 128A.

365 See [168] above.

relevantly for present purposes, an accused cannot be compelled to enter the witness box at his or her trial. Therefore a question of an incriminating kind may never in fact be put[366].

186 Other inter-related rights and immunities have grown out of the system of justice which is founded upon the fundamental principle[367]. Substantive and procedural matters have become woven into the law. For example, persons suspected of having committed a crime are immune from having to answer, under compulsion, questions of the police[368]. This in turn led to rules about confessions that are involuntary and those obtained unfairly. In *R v Sang*[369], Lord Diplock observed that the role of the trial judge in relation to confessions had had a long history, dating back to the period when an accused was not entitled to give evidence in his own defence and therefore could not deny a confession. However, the underlying rationale of the trial judge's role, his Lordship said, was "now to be found in the maxim nemo debet prodere se ipsum, no one can be required to be his own betrayer or in its popular English mistranslation 'the right to silence'".

187 This passage from *R v Sang* was cited with approval in *Tofilau v The Queen*[370], where it was said that if an accused is convicted wholly or largely on the basis of a confession, a question would arise in some minds as to whether it could be said that the duty of the prosecution to prove guilt had been discharged. Reference was there made to what Frankfurter J had said in *Rogers v Richmond*[371]:

> "[O]urs is an accusatorial and not an inquisitorial system – a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."

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366 Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial*, 3rd ed (1963) at 37.

367 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 527.

368 See, for instance, the *Evidence Act* 1995, s 139(1), which requires a caution.

369 [1980] AC 402 at 436.

370 (2007) 231 CLR 396 at 485 [291] per Callinan, Heydon and Crennan JJ; [2007] HCA 39.

371 365 US 534 at 541 (1961).

188 Criminal proceedings are ordinarily regarded as commencing with a charge[372], or similar procedure, and continuing until conviction or acquittal[373]. They may extend to what occurs before the trial itself. It is the duty and function of the court in which the trial is pending to ensure that the trial will be in accordance with law. This requires, at a minimum, that it be conducted in accordance with the fundamental principle and the requirements that flow from it.

189 There are many aspects of the system of criminal justice administered by the courts. Some of them, referred to above[374], derive from the fundamental principle and reflect the requirement that the trial be accusatorial[375]. Other requirements are often spoken of as necessary to a "fair trial".

190 To ensure a "fair trial", it has been said, by way of example, that: sufficient particulars of an alleged offence should be provided[376]; the prosecution should make available material evidence[377]; and a judge should give such directions to the jury as are necessary to ensure a fair trial of the accused[378]. Although regarded as a concept which is fundamental to the system of criminal justice in Australia[379] and "so elementary as to need no authority to support it"[380], it is understandable that there has been no judicial attempt to list, exhaustively,

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372 *James v Robinson* (1963) 109 CLR 593 at 615; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 28; [1989] HCA 46.

373 *Packer v Peacock* (1912) 13 CLR 577 at 586; [1912] HCA 8.

374 At [176]-[177].

375 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22]; [2000] HCA 3; *Azzopardi v The Queen* (2001) 205 CLR 50 at 65 [38]; [2001] HCA 25.

376 *Johnson v Miller* (1937) 59 CLR 467 at 489-490; [1937] HCA 77; *S v The Queen* (1989) 168 CLR 266 at 274-275, 285; [1989] HCA 66; *Walsh v Tattersall* (1996) 188 CLR 77 at 84, 107; [1996] HCA 26; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 557-558 [26]; [2010] HCA 1.

377 *Grey v The Queen* (2001) 75 ALJR 1708 at 1713 [23]; 184 ALR 593 at 599-600; [2001] HCA 65.

378 *RPS v The Queen* (2000) 199 CLR 620 at 637 [41].

379 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29, 56, 75.

380 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 541; [1923] HCA 39.

the attributes of a fair trial[381]. It may, however, be said that the concept is not entirely one-sided. The public interest in the administration of justice also requires that the process be fair to the prosecution[382]. Thus, an accused is required to give notice of alibi and other evidence of particular kinds.

191 The questions on this appeal are not directed to whether the appellants will receive a "fair trial". Although that term is employed in submissions on the appeal, it is liable to distract from the real issues, the principal of these being whether the CAR Act authorises an alteration to, or interference with, the fundamental principle and, therefore, the system of criminal justice administered by the courts.

192 A reference to that principle and that system is not to be taken to deny that there are some aspects of the criminal trial process which have been altered over time, or to say that history does not furnish anomalies. The requirement of proof itself may seem to have been affected by the averment that has been applied to some, usually lesser, offences. And, as will be later discussed[383], the Chancery Court did not embrace the right of a person not to be questioned in bankruptcy cases.

193 Nevertheless, it cannot be doubted that the fundamental principle remains essential to the system of criminal justice administered by our courts, as does the accusatorial nature of the process. So much is confirmed by *X7*. The requirement of proof is recognised in various statutes relating to criminal evidence and procedure. Section 17(2) of the *Evidence Act* 1995 (NSW) provides that an accused person is not competent to give evidence as a witness for the prosecution. By s 139(1), evidence of a statement made by a person under arrest is taken to have been obtained improperly where the person was not cautioned. Section 141(1) provides that "the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt." The *Criminal Procedure Act* 1986 (NSW)[384] requires a magistrate hearing committal proceedings to discharge the accused if the magistrate considers that the evidence is not capable of satisfying a jury to the requisite standard that the accused has committed an indictable offence.

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381 *Dietrich v The Queen* (1992) 177 CLR 292 at 300; [1992] HCA 57.

382 *McKinney v The Queen* (1991) 171 CLR 468 at 488; [1991] HCA 6.

383 At [243]-[249].

384 Sections 62(2), 66.

The courts and the administration of justice

194 The law of contempt is concerned with judicial process[385] and the exercise of judicial power[386], and is the mechanism by which a court ensures the integrity of the system of justice which it administers. Conduct will amount to a contempt if there is a real risk, as opposed to a remote possibility, that justice will be interfered with[387]. The essence of contempt of this kind is a "real and definite tendency to prejudice or embarrass pending proceedings"[388]. To safeguard the proper administration of justice, the courts will curb conduct, including freedom of speech, to the extent necessary to prevent prejudice to proceedings[389].

195 In *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission*[390], Mason J adverted to the possibility that the Trade Practices Commission could, in exercising the power conferred by its statute, interfere with court proceedings. But, as his Honour pointed out, a statute expressed in general terms should not be construed so as to authorise the doing of an act which amounts to a contempt of court. The question which therefore arises in this appeal is whether the exercise of the powers conferred by the CAR Act, which are expressed in general terms, to compel answers to questions concerning an offence with which a person is charged could constitute a contempt. In *X7*, it was held that a series of cases, culminating in *Hammond v The Commonwealth*[391], provide the answer.

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385 *R v Taylor; Ex parte Roach* (1951) 82 CLR 587 at 598; [1951] HCA 22; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 161 per Brennan J; [1982] HCA 31; *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 294.

386 *R v Taylor; Ex parte Roach* (1951) 82 CLR 587 at 598; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 161 per Brennan J.

387 *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 299.

388 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 372; [1955] HCA 12; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 56 per Gibbs CJ.

389 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 56 per Gibbs CJ; *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 294.

390 (1982) 152 CLR 460 at 473; [1982] HCA 65.

391 (1982) 152 CLR 188.

196 In *Clough v Leahy*[392], Griffith CJ held that an inquiry, by the executive, could be conducted into the guilt or innocence of persons, so long as it did not involve a trial and did not have legal consequences. However, if, in the conduct of the inquiry, a person were to do an act constituting an interference with the course of justice, that person would not be protected from proceedings for contempt. His Honour also said[393], in terms later adopted by Latham CJ in *McGuinness v Attorney-General (Vict)*[394], that when a Royal Commission was established to inquire into a matter, at the same time as an offence arising from it was being criminally prosecuted, there would almost certainly be an interference with the course of justice and a contempt.

197 In *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*[395] ("the *BLF Case*"), proceedings were on foot in the Federal Court of Australia for the cancellation of the registration of a construction trade union when a Royal Commission commenced hearing evidence into various matters concerning that union. This Court held that the conduct of a commission of inquiry may be a contempt if it creates an actual interference with the administration of justice or a real risk of interference, or a tendency to interfere, with the administration of justice. The Court divided on the question whether the Royal Commission had that effect and as to what constituted an interference with the administration of justice.

198 Gibbs CJ considered that there was no risk of interference, since the Royal Commission's inquiry was not directed to the grounds relevant to the court proceeding and did not involve a prejudgment of those issues[396]. In the course of his reasons, his Honour said[397], by reference to *Clough v Leahy* and *McGuinness*, that the continuance of a commission may amount to a contempt, even if it was not established for the purpose of interfering with the course of justice. If, during the course of a commission of inquiry into allegations that a person was guilty of

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392 (1904) 2 CLR 139 at 156-157; [1904] HCA 38.

393 *Clough v Leahy* (1904) 2 CLR 139 at 161.

394 (1940) 63 CLR 73 at 85; [1940] HCA 6; see also *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 71 per Stephen J.

395 (1982) 152 CLR 25.

396 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 56.

397 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 54.

criminal conduct, a prosecution was commenced against the person based on those allegations, the continuance of the inquiry would, speaking generally, amount to a contempt of court. The proper course in those circumstances, his Honour said, would be to adjourn the inquiry until the conclusion of the criminal proceedings.

Hammond's case

199 There can be little doubt that these views informed the approach taken by Gibbs CJ when granting an injunction to restrain the Royal Commission in *Hammond*. The judgment in *Hammond* was delivered a few months after that in the *BLF Case*. Indeed, in *Hammond*, his Honour referred to what he had said in the *BLF Case*[398]. It will be recalled that it was to *Hammond* that the primary judge in this case referred, in coming to the conclusion that the examination of the appellants should not be ordered "at this stage"[399].

200 Mr Hammond had been committed for trial when a Royal Commission heard evidence implicating him in a conspiracy. The *Royal Commissions Act* 1902 (Cth)[400] made it an offence for a witness before the Commission to refuse to answer any relevant question put by a Commissioner, but also provided that the answer was not admissible against the person in civil or criminal proceedings. Provisions of the *Evidence Act* 1958 (Vic)[401], concerning witnesses before a board appointed by the Governor in Council, were to similar effect and stated that a witness could not refuse to answer any relevant question on the ground that it may incriminate the person or expose him or her to a penalty.

201 The Commission determined to proceed with its hearing of evidence, including the questioning of Mr Hammond, despite the request of his lawyers for an adjournment until the conclusion of his trial. Instead, the Commission undertook the questioning in private session. Despite that step being taken, this Court restrained the continuance of the examination until the conclusion of the criminal trial.

202 Gibbs CJ said[402] that even though Mr Hammond was to be examined in private, and the answers he gave could not be used at the criminal trial,

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398 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198.

399 *NSW Crime Commission v Lee* [2011] NSWSC 80 at [20]-[21].

400 Sections 6, 6DD.

401 Sections 16, 29; see also s 30.

402 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198.

"[n]evertheless, the fact that [he was] examined, in detail, as to the circumstances of the alleged offence, [was] very likely to prejudice him in his defence." His Honour said that if one assumed that Mr Hammond was bound to answer questions designed to establish that he was guilty of the offence with which he had been charged, it must "inescapably" follow that there was "a real risk that the administration of justice [would] be interfered with." His Honour said, by reference to what he had earlier said in the *BLF Case*, that the continuance of the inquiry would, generally speaking, amount to a contempt and the proper course would be to adjourn it until the disposal of the criminal proceedings.

203 Mason and Murphy JJ agreed[403] with Gibbs CJ's reasons, although Murphy J would not have ordered an injunction postponing the examination to the completion of the criminal trial; rather, his Honour would have wholly restrained the Commissioner from directing Mr Hammond to answer any incriminatory question[404].

204 Deane J[405] also considered that the inquiry constituted an improper interference with the due administration of justice in the criminal proceedings. His Honour said that it was "fundamental" to the administration of criminal justice that a person not be made the subject of a parallel inquisitorial inquiry concerning the matters with which he or she was charged. His Honour also viewed the interference as a derogation from the judicial power of the Commonwealth vested by the Constitution, a subject which does not arise on this appeal.

205 Brennan J[406] agreed that an injunction should be granted, but his Honour was disposed to think that the immunity the common law provides an accused was not to be regarded as displaced by the relevant legislation. His Honour's approach may be given to involve the application of the principle of legality and will require further attention.

206 Little weight was given to the views expressed in *Hammond* in the judgments in the Court of Appeal in this case. It was said[407] that no principle

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403 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 199.

404 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 201-202.

405 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 206.

406 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 202-203.

407 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [26] per Basten JA.

could be discerned from it. That was not the view of the majority in *X7*[408]. It seems clear enough that the injunction was granted in *Hammond* because examination of Mr Hammond, in a parallel inquiry, concerning the offence with which he was charged constituted a real risk of interference with the administration of criminal justice and that must be taken to refer to the system of criminal justice referred to above and the principle which is fundamental to it. It is not as if *Hammond* was the first occasion on which this Court had expressed the view that the continuance of such an inquiry would usually constitute a contempt. That view may be traced from *Clough v Leahy*, through *McGuinness*, to the *BLF Case*.

207 True it is, as Gibbs CJ explained[409], that the circumstances in *Hammond* were urgent. Judgment was delivered in a matter of days. Not all issues were fully canvassed. Nevertheless, this Court had earlier addressed the question whether a parallel inquiry might constitute a real interference with justice in the *BLF Case*. To the extent that references in the reasons of the Court of Appeal to the urgency which attended *Hammond*[410] suggest that it lacks the reasoning necessary for an authoritative decision, they are not well founded.

208 The respondent in this appeal suggests that the outcome in *Hammond* might be explained by the particular circumstances of that case, including the fact that investigating police officers were present when Mr Hammond was examined and that the transcript was to be provided to them. Neither factor is mentioned by Gibbs CJ as relevant to his Honour's decision. The former fact was referred to by his Honour only as part of the background[411] and he did not advert to the latter fact at all.

209 In the Court of Appeal, little consideration appears to have been given to the nature and extent of the prejudice identified in *Hammond* as giving rise to a risk of interference with justice in this case. This risk was discounted because the registrar before whom the examinations would take place could limit the potential prejudice[412]. The only risk the Court of Appeal identified and considered was that answers given in the examination might be the source of information used in the trials of the appellants[413]; which is to say the derivative

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408 See [213] below.

409 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 196.

410 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [26], [35], [95].

411 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 194.

412 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [81].

413 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [100].

evidence referred to in s 13A(3) of the CAR Act, which is not the subject of the protection given under s 13A(2). Meagher JA considered the risk arising from the use of such evidence to be an insufficient basis for declining an order for examination[414].

210 The reasoning of Gibbs CJ, in *Hammond* and in *Sorby v The Commonwealth*[415], shows that the use of material obtained as a result of a compulsory examination is but one aspect of the risk of interference with the criminal trial. In *Hammond,* his Honour obviously thought there was more at stake than merely the loss of the privilege when his Honour said that "the fact that [Mr Hammond] had been examined, in detail … is very likely to prejudice him in his defence."[416] In *R v Seller*[417], the New South Wales Court of Criminal Appeal referred to other effects an examination may have on a criminal trial, such as the prosecution being forewarned of defences, and explanations, that are not otherwise apparent, being provided of transactions[418]. At first instance a further effect was identified, namely the provision of information which assists the prosecution in preparing its witness statements and presenting its case[419].

211 It is likely that the prosecution will be advantaged at trial by the examination of the appellants in a way for which the system of criminal justice would not otherwise provide. The attainment of such an advantage through the exercise of statutory powers may in itself amount to an interference with the administration of justice[420]. Such an advantage may, to an extent, correspond with the prejudice caused to an accused person. It may be more extensive. But, as it will be recalled[421], it was not the advantage gained by the prosecution which was identified in *Hammond* to follow "inescapably"[422] from an examination of a

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414 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [100].

415 (1983) 152 CLR 281 at 294.

416 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198.

417 (2013) 273 FLR 155.

418 *R v Seller* (2013) 273 FLR 155 at 183-184 [104] per Bathurst CJ.

419 *R v Seller* (2012) 269 FLR 125 at 167 [243] per Garling J.

420 *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460 at 467-468; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 559.

421 See [202] above.

422 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198.

person charged with an offence about that offence. The interference, and thus the contempt, identified by Gibbs CJ in *Hammond* lay in the fact that if Mr Hammond were examined, in detail, as to the circumstances of the alleged offence, he was likely to be prejudiced in his defence. Mr Hammond would have been prejudiced 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"[423].

212 What was identified in *Hammond* was not the loss of some forensic advantage in an accused person. In any event, to describe the effects of an examination for an accused person in this way tends to trivialise both them and the fundamental principle in its practical operation. The choices open to an accused person with respect to the conduct of that person's defence result from the requirement of the fundamental principle that the prosecution prove its case. It is therefore not correct to cast doubt upon the importance of those choices or whether the accused should be entitled to them. Neither *Hammond* nor the cases preceding it considered the prejudice occasioned to an accused to be insubstantial.

213 The conclusion that was reached in *Hammond* was that an examination of an accused person risks an interference with the administration of justice because it may prejudice the person in his or her defence. It follows that if general legislation which provides for compulsory examination was to be read as permitting the examination of an accused person, the principle fundamental to the accusatorial system of justice would be altered. That proposition was accepted and applied by a majority of this Court in *X7*[424]. *Hammond* is not to be distinguished on the basis that the legislation there in question concerned an examination by the executive, whereas the CAR Act involves an examination by the executive before the Supreme Court or an officer of the Court. As will be explained later in these reasons[425], the same conclusion as to the risk to the administration of justice is reached in each case. Given the need for continuity and consistency in judicial decisions[426], *X7* should be followed.

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423 *X7 v Australian Crime Commission* (2013) 87 ALJR 858 at 889 [136]; 298 ALR 570 at 607.

424 (2013) 87 ALJR 858 at 888-889 [134]-[136] per Hayne and Bell JJ, 893 [161] per Kiefel J; 298 ALR 570 at 606-607, 613.

425 At [237]-[240].

426 *The Tramways Case [No 1]* (1914) 18 CLR 54 at 69; [1914] HCA 15, applied in *Queensland v The Commonwealth* (1977) 139 CLR 585 at 600; [1977] HCA 60.

The CAR Act – a clear intention?

214 The question whether the *Royal Commissions Act* could be said to have intended to abrogate Mr Hammond's privilege against self-incrimination, or to affect the operation of the fundamental principle in a criminal trial, did not directly arise in his case. It appears from the reasons of Gibbs CJ[427] that a concession was made by all present at the hearing that the effect of the relevant legislation was that a witness was not entitled to refuse to answer an incriminating question put in the course of an examination. The matter proceeded upon that assumption, but Gibbs CJ expressed himself as by no means satisfied that it was correct. His Honour said that "[i]t would be necessary to find a clear expression of intention before one could conclude that the legislature intended to over-ride so important a privilege"[428].

215 Brennan J[429] referred to the "principle deep-rooted in our law and history that the Crown may not subject an accused person to compulsory process to obtain his answers upon the issue of his guilt of an offence with which he has been charged." It was not necessary, his Honour said, to determine in *Hammond* whether Parliament could deprive a person of that immunity when he or she stands charged with an offence[430], "for it is not to be thought that Parliament, in arming a Commissioner with the powers … intended that the power might be exercised to deny a freedom so treasured by tradition and so central to the judicial administration of criminal justice."[431]

216 In these statements, Gibbs CJ and Brennan J may be taken to have had in mind the principle of legality. Gibbs CJ spoke of the need for clarity of expression if the privilege is to be overridden; Brennan J spoke of the presumption of the law that the legislature does not intend to deny or restrict a fundamental principle which is essential to the criminal justice system. It will be recalled that their Honours were referring to legislation which, on its face, appeared to deny the privilege, but was not explicitly made applicable to accused persons. As was explained earlier in these reasons[432], by reference to *Potter v*

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427 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 197.

428 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 197-198.

429 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 202-203.

430 Brennan J appears to refer here to the question whether there is legislative power to abrogate the privilege.

431 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 203.

432 See [171] above.

Minahan, a statutory provision will be taken to have intended such an effect only if that intention is unambiguously clear. This is not a low standard.

217 Section 31D(1)(a) of the CAR Act provides for an order for examination "concerning the affairs" of a person affected by an application for a confiscation order. The affairs of the person may include the nature and location of any property in which that person has an interest. It is to be inferred from ss 27(2) and 27(2A) that the examination may be directed to the examinee's participation in serious criminal offences. Section 27(2) provides that the Supreme Court must make an order in the nature of confiscation of property if it finds it to be more probable than not that the person against whom the order is sought was, in the six years prior to the application being brought, engaged in a serious crime related activity, involving an indictable quantity of prohibited drugs[433] or an offence punishable by imprisonment for five years or more. By s 27(2A), the Supreme Court must make such an order if it finds it more probable than not that the person derived proceeds from an illegal activity, or the illegal activities, of another person. Either conclusion may be based upon a finding that: "some offence or other" (rather than a particular offence), which constitutes a serious crime related activity and is punishable by imprisonment for five years or more, was committed; or "some offence or other" constituting a serious crime related activity, involving an indictable quantity of drugs, was committed[434].

218 The legislature may therefore be taken to have intended that a person may be asked questions, on examination, concerning his or her participation in serious crime and derivation of the proceeds from illegal activities. It is intended that a person may be asked questions as to the commission of an offence by that person or in conjunction with others. Section 13A confirms this to be the case.

219 Section 13A is directed to the answers given to such questions. It applies to a person being examined under a s 31D(1) order, in the same way as it applies to a person being examined under s 12(1)[435], which provides for an examination order to be made when a restraining order, pursuant to s 10A, has been made. Section 13A(1) provides that a person being examined under s 12 is not excused from answering any question, or producing any document, on the ground that that answer or document might incriminate, or tend to incriminate, the person. Section 13A(2) then provides that the answer or document is not admissible in criminal proceedings, except in proceedings for an offence under the CAR Act, if the person made an objection at the time he or she was questioned, or was not advised that he or she might do so. However, by s 13A(3), further information

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433 Pursuant to the *Drug Misuse and Trafficking Act* 1985.

434 *Criminal Assets Recovery Act* 1990, s 27(3).

435 *Criminal Assets Recovery Act* 1990, s 31D(3).

obtained as a result of an answer, which is to say derivative evidence, is so admissible.

220 What question must the legislature's attention have been directed to in order for the respondent to succeed in this Court? The question is not simply whether it intended to abrogate the privilege and redefine the evidentiary effects flowing from that abrogation. Such a question may readily be answered in the affirmative. Nor is it a correct approach to assume, on the basis of that answer, a wider intention on the part of the legislature, namely that the abrogation of the privilege is to apply in all circumstances including where an examinee's trial is pending. To make that assumption is to render inoperative the presumption on which the principle of legality is based: that the legislature does not intend to abrogate or restrict a fundamental right or freedom except by words of clear intendment.

221 It is not only the personal privilege which is affected if the CAR Act applies so as to compel an accused person to give answers under examination to questions concerning the offence. If the CAR Act is to be understood to so apply, it must manifest an intention to affect other fundamental principles. There must be an intention to alter the fundamental principle and the accusatorial system of criminal justice. Moreover, since such an examination clearly risks interfering with the administration of criminal justice, and therefore a contempt, as *Hammond* and *X7* hold, the CAR Act, at the very least, must be seen to have addressed that problem. If the CAR Act does purport to so apply, other questions may arise. But it will be seen that in no respect has the CAR Act addressed itself to these questions. The necessary intention is not apparent.

222 In the Court of Appeal, Beazley, McColl and Macfarlan JJA agreed[436] with the reasons of Basten JA. His Honour reasoned, essentially, that statute law may vary the general law and, in particular, constrain the right not to answer incriminating questions[437]. On the assumption that a scheme of investigation may diminish the protections afforded by the common law to an accused person in criminal proceedings, the question, in his Honour's view, becomes only whether it does so authorise[438]. However, the question of construction posed by the principle of legality actually resides in the assumption stated. Does the CAR Act intend to alter the positions of an accused person and the prosecution in criminal proceedings? The reasons of the Court of Appeal do not acknowledge that a fundamental principle of the law is at stake and that the administration of justice will be affected. Significantly, they do not apply the requirement of the

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436 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [1], [13], [84].

437 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [25], [30].

438 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [34].

principle of legality that such effects must be seen as intended "with irresistible clearness".

223 Consideration of whether the CAR Act manifests the requisite clarity of intention may commence with s 31D(1)(a), which is in general terms. It provides the Supreme Court with a discretion to order an examination. Section 31D(1) does not impose any constraint upon that discretion. Obviously, the discretion must be exercised in accordance with the objects of the CAR Act. The objects include the confiscation of property of a person where the Court is satisfied that the person has engaged in serious crime related activities[439]. An examination of a person believed to have engaged in such activities will clearly assist that objective, but examination is not itself stated as an objective. It is but one method whereby information may be obtained. The examination of an accused person pending his or her trial cannot be said to be required by necessary implication[440] because the CAR Act's purposes would otherwise be frustrated. There are other methods of investigation and proof. The objects of the CAR Act cannot be seen to depend upon when an examination is conducted. The CAR Act nowhere suggests as necessary, in every case, the examination of a person against whom a confiscation order is sought, or that an examination should be ordered regardless of the person's circumstances and whether the criminal justice system is engaged. The latter question is reserved to a judge's discretion under s 31D(1)(a).

224 Section 27(2) does not suggest any urgency in the making of a confiscation order. It does not limit the offences upon which the order may be based to a period assessed from the making of the order, but to a period (six years) before the making of the application for the order. In the interim, a situation of urgency might arise where property the subject of the application is being dissipated. This might necessitate a discrete examination as to the existence and state of the property. But there does not seem to be, in the ordinary course, any urgency attending proof of a person's engagement in serious crime related activity for the purposes of a confiscation order. The CAR Act provides no reason why a judge should not, consistently with *Hammond*, refuse an order or adjourn an examination where criminal proceedings are pending.

225 Because s 31D(1)(a) is in general terms, it cannot be read as authorising a contempt. *Hammond* holds that to compel answers about an offence with which a person is charged poses a real risk of interference with the administration of justice. *X7* also holds that it would alter the fundamental principle. It follows that s 31D(1)(a) cannot be taken to authorise an examination in such

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439 *Criminal Assets Recovery Act* 1990, s 3(a).

440 *Hamilton v Oades* (1989) 166 CLR 486 at 495 per Mason CJ.

circumstances. A judge would be compelled in such circumstances to refuse an order for an examination.

226 Neither the terms of s 31D(1)(a) nor any other provision of the CAR Act suggest that the prospect of a contempt being committed, as a result of the making of an order for examination of an accused person, was addressed. Rather, s 31D(1)(a) is to be understood as leaving that possibility to the consideration of the judge hearing the application.

227 Meagher JA in the Court of Appeal clearly considered that a judge hearing the application retained a discretion to refuse an order for examination[441]. His Honour no doubt had the possibility of contempt in mind when he referred to the risk that the examination might present to the trial of an accused person. However, as observed earlier[442], his Honour identified solely the risk posed by the use of derivative evidence and considered that to be an insufficient basis for declining an order for examination[443]. This is to underestimate the risks presented by the examination. The risks are more than the possible use of derivative evidence. They are sufficient for this Court to have consistently held that a continuance of an examination will usually constitute a contempt.

228 In the course of his reasons, Basten JA discussed what the legislature may be taken to have addressed in s 13A. His Honour observed[444] that the possibility of criminal charges was addressed by the provision made in s 13A(2) for "use immunity" at trial, and that the possibility that answers given under compulsion might lead to further evidence of an incriminating kind was addressed in the rejection of a "derivative use immunity" in s 13A(3).

229 It may be accepted that sub-ss (2) and (3) of s 13A address the prospect of the use of evidence gained as a result of the examination in a criminal trial. Of course, such a trial would occur after that evidence was obtained. Those provisions do not suggest that the criminal proceedings spoken of are pending at the time of the examination. Nor do they suggest that the examinee is a person who stands charged with the offences upon which he or she is to be examined. In its terms, s 13A may be taken to refer to criminal proceedings which could occur in the future. It cannot therefore be said that it speaks unambiguously, or at all, of the circumstance of pending charges.

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441 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [91].

442 See [209] above.

443 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [100].

444 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [43].

230 It was also observed in the reasons of the Court of Appeal[445] that there was no attempt by the legislature to condition the removal of the privilege upon the existence or otherwise of outstanding criminal charges. But this is to treat the fact that the legislature said nothing about the existence of charges as being determinative. It proceeds upon an assumption that it is necessary, in the legislative scheme, for an accused person to be excepted from the operation of s 13A; whereas neither the terms of that section nor its context permit a construction which necessarily includes an accused person. The fact that the CAR Act did not address the position of an accused goes no way to providing the requisite certainty and clarity of intention to affect that person's trial. Given the fundamental principle and the risk the CAR Act poses to the criminal process, it was incumbent upon the legislature to make plain its intention. It has not done so.

231 Had the legislature turned its mind to the circumstance of a person already charged with an offence and whose trial is pending when an examination is to take place, it would have had to direct its attention to the problem of possible contempt and it does not appear to have done so. The provision made in s 13A(2) for the non-use of evidence is equivocal in this regard. It does not address the whole risk to a criminal trial to which Gibbs CJ adverted in *Hammond*. The protection provided by sub-s (2) and denied by sub-s (3) reflects a balance struck as a policy choice. But s 13A cannot be read as going so far as to address the question of contempt, let alone purporting to authorise it.

232 It is the privilege, which is personal, to which s 13A is directed and which is sought to be abrogated. The section is not directed to the fundamental principle, which, it will be recalled, prevents an accused being compelled to give evidence or to answer questions put to him or her. It cannot be taken to be directed to the fundamental principle and its wider operation because the matter of a person being on trial is not mentioned in the section, yet the fundamental principle requires that the person cannot be compelled to enter the witness box, and statutory provisions confirm this as an essential aspect of the criminal process.

233 Basten JA was of the view that the primary judge, in holding that the decision in *Hammond* governed this case, "failed to consider the extent to which the [CAR Act] permitted a degree of potential interference with a criminal trial and precluded judicial intervention to prevent such interference."[446] His Honour should not be taken to have been suggesting that the provisions of the CAR Act prevented the Supreme Court from exercising its inherent powers to prevent a

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445 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [43].

446 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [56].

contempt. Neither the respondent nor any intervener suggested that the CAR Act should be read in this way. It would appear that his Honour was referring to s 63 of the CAR Act[447]. Section 63 provides that the fact that criminal proceedings have been instituted or commenced is, without more, not a ground on which the Supreme Court may stay proceedings under the CAR Act.

234 Basten JA considered s 63 to be of some importance to the question of legislative intention, a view in which Meagher JA concurred[448]. Basten JA said that "[i]f the fact of criminal proceedings is 'not a ground' to stay an examination under s 31D it should not be an available ground for resisting or delaying examination on any other procedural basis. Further, the purpose is not avoided by arguing that the real ground is the risk of prejudice to a criminal proceeding, rather than the fact that such a proceeding is on foot." [449]

235 The appellants submit that reliance upon s 63 is misplaced. In their submission, s 63 is directed to a narrow proposition, namely that "the fact" of the institution of criminal proceedings does not provide a ground for a stay. In that regard, s 63 does no more than reflect the position at common law and merely precludes the Supreme Court from relying on the fact of the institution of criminal proceedings, without more, as a reason for staying existing proceedings under the CAR Act. Those submissions should be accepted. On an application for a stay of other proceedings generally, no assumption arises from the existence of criminal proceedings; rather, the risk of prejudice to those criminal proceedings is to be considered having regard to all the circumstances.

236 Section 63 cannot be taken as a statement of intention of some broad statutory purpose respecting criminal proceedings. It does not manifest a general intention that the various powers conferred by the CAR Act are to be exercised without regard to their impact on criminal proceedings. It cannot be said, by reference to s 63, that the legislature intended that an accused person be examined or that the legislature turned its mind to the risk of interference with a criminal trial if an examination was ordered in such circumstances.

237 Under the CAR Act, any examination ordered under s 31D(1)(a) is to be conducted before the Supreme Court or an officer of the Court (in this case a registrar). As earlier mentioned[450], that fact does not alter the requirement that

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447 See *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [46]-[47], [56].

448 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [98].

449 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [47].

450 At [213].

the CAR Act be seen clearly to have addressed certain considerations, before it can be concluded that it intended to authorise the examination of an accused person. The considerations are whether there will be a risk to the administration of justice and a consequential alteration to the fundamental principle.

238 How are these considerations addressed by the provision that an examination be conducted before the Court – even taking account of its powers, including its inherent powers? The requirement that the examination be conducted before the Court is a general one, one which is intended to apply to the examinations of all persons, accused or not. As explained at the outset of these reasons[451], the fact that the Court is able to exercise its powers to ameliorate the effects of an examination does not answer the question of legislative intention, which is one of construction.

239 No assumption about whether these considerations were addressed can be imputed to the legislature. No party suggested that there was no risk to the administration of justice by virtue of the requirement that the examination be conducted before the Court, nor could such a suggestion sensibly be made. The examination is conducted before, not by, the Court. It is conducted by the Crime Commission. A risk is therefore possible. The Court will not be in a position to appreciate when an accused's defence will be prejudiced for the reason that it will not know what it is. That is why, as *Hammond* holds, an examination should not proceed.

240 It is necessary to keep well in mind the nature of the risk in question. The occasion for the risk is not whether a particular question might be asked, which the Court can identify as prejudicial and address. The occasion for the risk is an examination in the circumstance where a person is charged with an offence. The risk arises because an examination is likely to prejudice the conduct of the accused in the accused's defence. In these circumstances, as earlier explained[452], the Court would almost certainly be obliged to refuse an order for examination under s 31D(1)(a). The question of the extent to which the Court's powers might ameliorate that prejudice will therefore not arise. There will be no inquiry parallel to the substantive proceeding under the CAR Act, at least until the criminal trial is concluded.

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451 At [164].

452 At [225].

Hamilton v Oades

241 In concluding that the CAR Act authorises conduct which is likely to present risks to an accused's criminal trial, Basten JA drew largely upon the decision in *Hamilton v Oades*[453] rather than upon that in *Hammond*.

242 *Hamilton v Oades* was concerned with an examination occurring in the context of the liquidation of a company. Mr Oades was charged with offences arising out of his association with that company. Section 541(2) and (3) of the *Companies (New South Wales) Code* provided, in part, that if it appeared to the Corporate Affairs Commission of New South Wales that a person had taken part in the affairs of a company and had been or may have been guilty of fraud or other misconduct, the Commission could apply to the Supreme Court, which could order that person to be examined as to the affairs of the company. By sub-s (5), the Court could give directions as to the matters to be inquired into and the procedure to be followed. Sub-section (12) provided, in effect, that a person was not excused from answering an incriminating question. The ratio of *Hamilton v Oades* is that sub-s (12) was effective to abrogate the privilege against self-incrimination and that the directions power in sub-s (5) could not be utilised to overcome the effect of sub-s (12). The Court divided on the latter issue: Mason CJ, Dawson and Toohey JJ were in the majority; Deane and Gaudron JJ dissented.

243 Basten JA considered the legislation in *Hamilton v Oades* to be similar in terms and effect to that in the present case[454]. It is also not far removed from the legislation considered in *Hammond*. The difference between them is that the legislation in *Hamilton v Oades* had a special historical context and was to be understood by reference to it. Mason CJ said in *Hamilton v Oades*[455] that there has been a long history of legislation governing examinations in bankruptcy which abrogates or qualifies the right of an examinee to refuse to answer. In *Ex parte Willey; In re Wright*[456], Jessel MR spoke of the "grave power" that was then provided to examine and which was "found nowhere except in bankruptcy and the winding-up of companies".

244 An earlier history, derived from the Chancery Court, informed legislation in those areas. With respect to the right not to be interrogated, the Chancery

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453 (1989) 166 CLR 486.

454 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [33]; see also at [92] per Meagher JA.

455 (1989) 166 CLR 486 at 494.

456 (1883) 23 Ch D 118 at 128.

Court took a view different from the common law. In *Rees v Kratzmann*[457], Windeyer J referred to the traditional objection of the common law to compulsory interrogation, connected to the processes of the Star Chamber and the idea that English methods were more just than the inquisitorial processes of other jurisdictions. But, his Honour observed, "strong as has been the influence of this attitude upon the administration of the common law, of the criminal law especially, it must be admitted that in the Chancery Court it had less place: and in bankruptcy jurisdiction it has been largely displaced." In that jurisdiction, a debtor could not refuse to answer questions on the ground that to do so might incriminate him.

245 In *Ex parte Cossens; In the Matter of Worrall*[458] Lord Eldon LC said that it could not be doubted that "one of the most sacred principles" of the law is that "no man can be called on to criminate himself". His Lordship went on: "I have always understood that proposition to admit of a qualification with respect to the jurisdiction in bankruptcy". This, his Lordship said, was "because a bankrupt cannot refuse to discover his estate and effects, and the particulars relating to them". That is so even if, in the course of giving information to his creditors about his property, "that information may tend to shew he has property which he has not got according to law".

246 The early bankruptcy legislation indicates that the purpose of the qualification to the privilege was the discovery and prevention of fraud. By way of example, a provision of the *Bankrupt Law Consolidation Act* 1849 (UK)[459], which was held in *R v Scott*[460] to affect a debtor's privilege, provided that a bankrupt could be examined by the court "touching all matters relating to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts". It was further explained by Lord Hanworth MR in *In re Paget; Ex parte Official Receiver*[461] that the object of the examination provided for in bankruptcy legislation was the protection of the public and to ensure the bankrupt was entitled to a discharge. The legislation at that time[462] provided that the court could refuse a discharge on the receipt of the official receiver's report into the

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457 (1965) 114 CLR 63 at 80; [1965] HCA 49.

458 (1820) 1 Buck 531 at 540.

459 Section 117.

460 (1856) Dears & Bell 47 [169 ER 909].

461 [1927] 2 Ch 85 at 87-88.

462 *Bankruptcy Act* 1914 (UK), ss 26(2), 73.

bankrupt's conduct and must in all cases refuse discharge where the bankrupt had committed any misdemeanour connected with his bankruptcy.

247 A similar approach was taken to examinations conducted in connection with the winding up of companies. It was observed in *Bishopsgate Investment Management Ltd v Maxwell*[463] that public examination was introduced into the field of company winding up by an Act of 1890[464]. The critical limitation, which was applied to the examination of a promoter, director or other officer of a company, was that it could occur only when the official receiver had named that person as a person who had committed fraud in the projects of the company since its formation. In order to give the court jurisdiction to make such an order, there had to be a finding of fraud against the person, who was then summoned before the court and compelled to answer, regardless of whether the answer incriminated him or not. It was further observed in *Bishopsgate*[465] that a similar conclusion was reached by this Court in *Mortimer v Brown*[466] regarding comparable provisions in the then Queensland companies legislation.

248 The legislation in question in each of *Rees v Kratzmann*, *Hamilton v Oades* and *Mortimer v Brown*, which was also referred to by the Court of Appeal[467], was directed to the possibility of fraud affecting the property of the company. Kitto J observed in *Mortimer v Brown*[468] that the purpose of the provision in question was to allow the possibility of a fraud in connection with a company's affairs to be fully investigated. Of its nature, such an investigation will involve incriminating questions and therefore the intention of the legislature was clear[469]. When *Hamilton v Oades* was decided, it had already been determined in *Mortimer v Brown* that a person suspected of misconduct in the nature of corporate fraud was obliged to answer all relevant questions put to him or her.

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463 [1993] Ch 1 at 23-24 per Dillon LJ.

464 *Companies (Winding up) Act* 1890 (UK), s 8.

465 [1993] Ch 1 at 24.

466 (1970) 122 CLR 493; [1970] HCA 4.

467 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [33] per Basten JA, [94]-[96] per Meagher JA.

468 (1970) 122 CLR 493 at 496.

469 See also *Mortimer v Brown* (1970) 122 CLR 493 at 502 per Walsh J.

249 *Hamilton v Oades* is not a warrant for extending the view of the operation of such legislation in these areas of the law to legislation operating in different spheres where the fundamental principle operates and the system of criminal justice is maintained. *Hammond* and the earlier cases confirm this to be so. The only way that this trilogy of cases can be reconciled with *Hammond* and its predecessors is to recognise the trilogy as the result of an historical anomaly, as the majority in *X7* held[470].

250 Gibbs CJ, in *Hammond*, was aware of the decisions in *Rees v Kratzmann* and *Mortimer v Brown* and noted that they had not been discussed in argument[471], likely because the parties assumed Mr Hammond was obliged to answer[472], an assumption that his Honour doubted. It seems highly unlikely that his Honour and Brennan J would have suggested that there was a real question about the clarity of intention expressed in the legislation considered in *Hammond* and its effect upon the privilege had their Honours considered that those decisions had foreclosed that inquiry.

251 It is of interest to observe that in *Hamilton v Oades* Mason CJ also acknowledged[473] that the risk of interference with criminal justice arose not only from answers which might be given at the examination in the absence of the privilege. His Honour pointed out that the Supreme Court otherwise retained the power to ensure the proper administration of justice and could therefore restrain an examination which sought the disclosure of defences or pre-trial discovery and could disallow a question which would prejudice an examinee's fair trial.

252 Insofar as Mason CJ considered that the legislation there in question could be taken to have intended to apply to a person whether charged or not, such a conclusion was possible only because the areas of legislation, historically, have operated outside the criminal justice system and without regard to the fundamental principle. *Hamilton v Oades* can provide no answer to a case such as this. Its irrelevance is confirmed by *X7*. As the majority there explained[474], it is not to the point to seek to draw out whatever drafting similarities might be found in legislation concerned with companies examination cases and the relevant provisions of a piece of legislation which may affect the criminal justice

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470 (2013) 87 ALJR 858 at 890 [140], 893 [161]; 298 ALR 570 at 608, 613.

471 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198.

472 See [214] above.

473 *Hamilton v Oades* (1989) 166 CLR 486 at 498-499.

474 *X7 v Australian Crime Commission* (2013) 87 ALJR 858 at 890 [141] per Hayne and Bell JJ, Kiefel J agreeing at 893 [161]-[162]; 298 ALR 570 at 609, 613.

system. The view expressed in *X7* concerning *Hamilton v Oades* should be adhered to.

Conclusion and orders

253 It is not necessary to consider the appellants' submissions concerning the exercise of the discretion under s 31D(1). The construction of the relevant provisions of the CAR Act provides the answer to the appeal. An intention to abrogate an examinee's privilege against self-incrimination, without more, does not evidence an intention that the CAR Act is to apply to a person charged with a serious crime whose trial is pending or in progress.

254 The appeal should be allowed with costs and the orders of the Court of Appeal set aside. In lieu of those orders there should be orders dismissing the appeal to that Court with costs.

255 BELL J. I agree with Kiefel J's reasons and the orders that her Honour proposes.

256 Following the hearing of the appeal, judgment was delivered in *X7 v Australian Crime Commission*[475]. In issue in *X7* was the power of an examiner appointed under the *Australian Crime Commission Act* 2002 (Cth) ("the ACC Act") to require the plaintiff to answer questions on the subject matter of offences with which the plaintiff had been charged but for which he had not been tried. By majority, it was held that the ACC Act did not authorise an examination of that kind[476].

257 Critical to the majority's reasons in *X7*[477] was the rejection of an argument that the decision in *Hammond v The Commonwealth*[478] had been "overtaken" by *Hamilton v Oades*[479]. The New South Wales Court of Appeal held that RS Hulme J's discretion miscarried because his Honour relied on the authority of *Hammond*[480]. The New South Wales Crime Commission ("the Commission") supported those reasons on the hearing of the appeal. In the circumstances, the parties were invited to file supplementary submissions addressed to the significance of the decision in *X7* to the issues in the appeal. The Attorney-General for New South Wales ("NSW") sought and was given leave to also file supplementary submissions on this issue.

258 Neither the Commission nor NSW submitted that *X7* was wrongly decided. The Commission's principal argument was that the *Criminal Assets Recovery Act* 1990 (NSW) ("the CAR Act") manifests the clear intention to authorise the compulsory examination of a person about the subject matter of a charged offence. The Commission also argued that, in the event that the CAR Act is found not to manifest that intention, RS Hulme J should nonetheless have made the examination orders. His Honour should have assumed, so the argument goes, that the Registrar conducting the examination would not permit questioning

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475 (2013) 87 ALJR 858; 298 ALR 570; [2013] HCA 29.

476 *X7 v Australian Crime Commission* (2013) 87 ALJR 858 at 891 [147]-[148] per Hayne and Bell JJ, 892 [157] per Kiefel J; 298 ALR 570 at 610, 612.

477 (2013) 87 ALJR 858 at 889 [136]-[137] per Hayne and Bell JJ, 893 [161] per Kiefel J; 298 ALR 570 at 607, 613.

478 (1982) 152 CLR 188; [1982] HCA 42.

479 (1989) 166 CLR 486; [1989] HCA 21.

480 *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [5], [6] per Beazley JA, [13] per McColl JA, [56] per Basten JA, [84] per Macfarlan JA, [95] per Meagher JA.

on the subject matter of the criminal charges. There was asserted to be "abundant scope" for questioning the appellants on other topics. This was not the way the argument was put below. Counsel for the Commission informed the Supreme Court in related proceedings that "the [s 31D] examination would be directed to [a quantity of cash] as well as other assets and matters and that cash is the subject of the outstanding money laundering charge".

259 No nice issue is presented as to whether the subject matter of a proposed s 31D examination is common to pending criminal proceedings. Nor does the appeal raise the question of whether a s 31D examination order may be made, notwithstanding the pendency of a criminal proceeding, where it is confined to the identification of property to give efficacy to a restraining order[481].

260 The issue presented by the appeal is correctly stated in the appellants' supplementary submissions as whether the CAR Act clearly authorises the compulsory examination of a person who is charged with a criminal offence about matters which are the subject of the charge. As the appellants also submit, the orders made by the Court of Appeal for their examination were premised on the assumption that ss 31D, 13A and 63 authorised their examination and, in the light of the reasoning of the majority in *X7*, that was a false premise.

261 The Commission's principal argument seeks to draw the inference of necessary intendment from ss 13A, 31D and 63 interpreted in the context of the CAR Act's principal objects[482]. The Commission argues that those objects will be frustrated if the general words of s 31D are not interpreted as applying to the examination of persons about the subject matter of a charged offence. NSW makes the same submission. As the Commission's submission recognises, orders restraining a person's interests in property are made under s 10A(5) on evidence of reasonable suspicion. A predicate for the making of an examination order under s 12(1) is that the Supreme Court has made a restraining order. A predicate for the making of a s 31D examination order is that an application has been made for a confiscation order, which may be an assets forfeiture order, proceeds assessment order or unexplained wealth order[483]. The suggested frustration of the CAR Act's objects identified by the Commission and NSW is the delay in the making of assets forfeiture orders[484] and proceeds assessment orders[485]. The making of an order of either kind requires proof on the balance of

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481 CAR Act, s 3(c), s 10A(5), s 12(1), s 31D(1)(a).

482 CAR Act, s 3(c).

483 CAR Act, s 4.

484 CAR Act, s 22(2).

485 CAR Act, s 27(2).

probability that at any time not more than six years before the making of the application the person engaged in a serious crime related activity. The Commission puts its necessity argument in this way: "[i]n cases in which evidence obtained through a s 31D examination is required to convert a reasonable suspicion into proof, the objects of [the CAR Act] will be frustrated if the examination is long delayed".

262 Desirable as the prompt completion of confiscation proceedings may be, the inference should not be drawn that the legislature intended to pursue that object at all costs[486].

263 Neither the Commission nor NSW submitted that the general words of the CAR Act are to be understood as authorising what would otherwise be a contempt. The Commission relied on the fact that the s 31D examination is conducted before an officer of the Supreme Court as a relevant point of distinction from examination of Mr Hammond before the Royal Commission. The submission failed to address the nature of the contempt identified in that case. NSW sought to distinguish *Hammond* by contending that because the CAR Act is not directed at the conduct of the criminal investigation, the s 31D examination is not "designed to establish that [the person] is guilty of the offence with which he is charged"[487]. On the facts of the appeal the submission has a sophistical quality to it. However, more to the point, it, too, fails to address the nature of the contempt identified in *Hammond*.

264 The contempt with which *Hammond* was concerned was of a kind that presented "a real risk that the administration of justice will be interfered with"[488]. A "real risk" in this context is to be distinguished from "a remote possibility"[489]. In the case of the exercise of a coercive statutory power, that test does not have a rider confining the risk to the conferral of an advantage on the prosecution that the rules of procedure would otherwise deny. In *Hammond* Gibbs CJ did not rest his conclusion that the continued examination of Mr Hammond would be a contempt on the fact that the investigating police were to be present at the hearing. The real risk to the administration of justice was stated in terms. It lay in the examination of Mr Hammond, in detail, as to the circumstances of the

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486 *Carr v Western Australia* (2007) 232 CLR 138 at 143 [5] per Gleeson CJ; [2007] HCA 47.

487 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198 per Gibbs CJ.

488 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198 per Gibbs CJ.

489 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 56 per Gibbs CJ; [1982] HCA 31, citing *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 299 per Lord Reid.

offence[490]. The reference in the succeeding sentence to the opinion that his Honour had earlier stated in the *Builders Labourers' Case* makes it abundantly plain that the risk was of the examination being conducted in circumstances in which criminal proceedings had been commenced[491]. Compelling Mr Hammond to give an account of the circumstances alleged to constitute the offence was "very likely to prejudice him in his defence"[492] because, as *X7* explains, it would have deprived Mr Hammond of forensic choices legitimately available to him[493]. The idea that compelling a person to give an account of the circumstances of a criminal charge pending before the courts creates a real risk to the administration of justice is not a novel one[494]. An understanding of the conduct of a trial under our adversarial system of criminal justice suggests that the prejudice flowing from such an examination is not remote or fanciful.

265 It is not to the point to observe, as NSW does, that the CAR Act is not directed to the conduct of the criminal investigation. Nor is it to the point to observe that s 13A abrogates the privilege against self-incrimination subject to a "use immunity". The vice here, as in *X7*, is in the compulsion to give an account of the subject matter of allegations that are the subject of pending proceedings. It is simply wrong to conclude that a s 31D examination on the subject matter of the offence does not compromise the capacity of the accused to put the prosecution to proof at the subsequent trial. Compelling an accused to give an account of the circumstances of alleged wrongdoing may substantially reduce the areas in which the prosecution case may be tested in accordance with counsel's obligations. Whether that will be the case is not, and cannot be, known at the time the application for the examination order is made.

266 The entitlement of a person accused of criminal wrongdoing to remain silent is a fundamental common law right and not a mere forensic advantage[495].

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490 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198 per Gibbs CJ.

491 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198 per Gibbs CJ, citing *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25.

492 *Hammond v The Commonwealth* (1982) 152 CLR 188 at 198 per Gibbs CJ.

493 *X7 v Australian Crime Commission* (2013) 87 ALJR 858 at 889 [136] per Hayne and Bell JJ, 893 [161] per Kiefel J; 298 ALR 570 at 607, 613.

494 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 379-380 per O'Connor J; [1909] HCA 36.

495 *Petty v The Queen* (1991) 173 CLR 95 at 99-101 per Mason CJ, Deane, Toohey and McHugh JJ; [1991] HCA 34.

The exercise of the right, and the election to put the prosecution to proof, are decisions which may be made for a variety of reasons. To acknowledge that to compel an accused to give an account of the circumstances of an alleged offence in parallel civil proceedings may limit the capacity of the accused to put the prosecution to proof at the criminal trial is not to condone the pursuit of falsehood. To characterise it in that way risks inverting the assumption upon which our adversarial system of criminal justice proceeds, which is to say that the accused is entitled to be acquitted of a charge of criminal wrongdoing unless *unaided by him or her* the prosecution proves guilt.

GAGELER AND KEANE JJ.

Introduction

267 The outcome of this appeal turns on the answers to two questions about the power of the Supreme Court of New South Wales under s 31D(1)(a) of the *Criminal Assets Recovery Act* 1990 (NSW) ("the CAR Act") to order the examination of a person on oath concerning the affairs of that person or of another person who is suspected of, or alleged to have engaged in, criminal activity.

268 Can the Supreme Court order the examination of a person against whom criminal proceedings have been commenced but not completed where the subject-matter of the examination will overlap with the subject-matter of those proceedings? Our answer is that it can.

269 Can the Supreme Court refuse to order the examination of a person for reasons only that criminal proceedings against that person have been commenced but are not completed and that the subject-matter of the examination will overlap with the subject-matter of those proceedings? Our answer is that it cannot.

270 Before explaining our reasons for those answers, we summarise the relevant legislation and the circumstances of the appeal.

Legislation

271 The legislative context of s 31D(1)(a) of the CAR Act at times relevant to the appeal included the *New South Wales Crime Commission Act* 1985 (NSW) ("the NSWCC Act"). The NSWCC Act has since been replaced by the *Crime Commission Act* 2012 (NSW).

272 The NSWCC Act constituted the New South Wales Crime Commission ("the Commission")[496] and provided for the functions of the Commission to include functions conferred or imposed on the Commission by the CAR Act[497]. The NSWCC Act contained a secrecy provision, making it an offence for a member of, or a member of the staff of[498], the Commission to divulge or communicate any information acquired by reason of or in the course of the exercise of a function under that Act except where the divulgence or

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496 Section 5.

497 Section 6(1A).

498 See s 32.

communication was for the purposes of that Act or otherwise in connection with the exercise of the person's functions under that Act[499]. However, the NSWCC Act permitted the Commission, with the approval of its Management Committee (which included the Minister for Police, the Commissioner of Police and the Chair of the Board of the Australian Crime Commission[500]), to "disseminate intelligence and information to such persons or bodies as the Commission thinks appropriate"[501].

273 The long title of the CAR Act is:

"An Act to provide for the confiscation of interests in property that are interests of a person engaged in serious crime related activities; to enable proceeds of serious crime related activities to be recovered as a debt due to the Crown; and for other purposes."

274 The CAR Act states as its principal objects[502]:

"(a) to provide for the confiscation, without requiring a conviction, of property of a person if the Supreme Court finds it to be more probable than not that the person has engaged in serious crime related activities, and

(a1) to enable the current and past wealth of a person to be recovered as a debt due to the Crown if the Supreme Court finds there is a reasonable suspicion that the person has engaged in a serious crime related activity (or has acquired any of the proceeds of any such activity of another person) unless the person can establish that the wealth was lawfully acquired, and

(b) to enable the proceeds of illegal activities of a person to be recovered as a debt due to the Crown if the Supreme Court finds it more probable than not the person has engaged in any serious crime related activity in the previous 6 years or acquired proceeds of the illegal activities of such a person, and

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499 Section 29(2).

500 Section 24.

501 Section 7(a).

502 Section 3.

(b1) to provide for the confiscation, without requiring a conviction, of property of a person that is illegally acquired property held in a false name or is not declared in confiscation proceedings, and

(c) to enable law enforcement authorities effectively to identify and recover property."

275 The CAR Act provides[503]:

"In this Act, a reference to a serious crime related activity of a person is a reference to anything done by the person that was at the time a serious criminal offence, whether or not the person has been charged with the offence or, if charged:

(a) has been tried, or

(b) has been tried and acquitted, or

(c) has been convicted (even if the conviction has been quashed or set aside)."

A "serious criminal offence" for this purpose is any of a number of specified offences[504]. Those specified offences include drug trafficking offences[505], and specifically include the offence of supplying a prohibited drug[506]. Specified offences also include offences punishable by imprisonment for five or more years which involve one or more particular types of conduct, including money laundering[507].

276 The CAR Act defines "illegal activity" to include a serious crime related activity and an act or omission that constitutes an offence against the laws of New South Wales or the Commonwealth[508]. It defines "proceeds", in relation to an activity, to include any interest in property, and any service, advantage or

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503 Section 6(1).

504 Section 6(2).

505 Section 6(2)(b).

506 Section 6(3)(c).

507 Section 6(2)(d).

508 Section 4(1).

benefit, that is derived or realised as a result of the activity by the person engaged in the activity or by another person at the direction or request of the person engaged in the activity[509]. An interest in property is "illegally acquired property" within the meaning of the Act if it is all or part of the proceeds of illegal activity or of the disposal of or other dealing in illegally acquired property, or if the interest was wholly or partly acquired using illegally acquired property[510]. Similarly, an interest in property is "serious crime derived property" within the meaning of the Act if it is all or part of the proceeds of serious crime related activity or of the disposal of or other dealing in serious crime derived property, or if the interest was wholly or partly acquired using serious crime derived property[511]. An interest in property is "fraudulently acquired property" within the meaning of the Act if it is held in a false name and a false instrument, a false signature or an identity document of another person was knowingly used for the purposes of acquiring or dealing with that property[512].

277 The CAR Act sets out to achieve the first and fourth of its principal objects in part by allowing the Commission to apply to the Supreme Court for an "assets forfeiture order": forfeiting to and vesting in the Crown in right of New South Wales "specified interests, a specified class of interests or all the interests, in property of a person"[513]. The application must specify that the interest in property is: of a person suspected by an authorised officer, at the time of application, of having engaged in serious crime related activity; suspected by an authorised officer, at the time of application, of being serious crime derived property because of serious crime related activity of the person or another person; or held in a false name and suspected by an authorised officer, at the time of application, to be fraudulently acquired property that is illegally acquired property[514]. The Supreme Court must make an assets forfeiture order if the Supreme Court finds it more probable than not that the person whose suspected serious crime related activity formed the basis of the application was, at any time not more than six years before the making of the application, engaged in a serious crime related activity involving either a quantity of a prohibited plant or drug that is an indictable quantity under the *Drug Misuse and Trafficking Act*

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509 Section 4(1).

510 Section 9.

511 Section 9.

512 Section 9A.

513 Section 22(1).

514 Section 22(1A).

1985 (NSW) ("an indictable quantity") or an offence punishable by imprisonment for five years or more[515]. The Supreme Court must also make an assets forfeiture order if the Supreme Court finds it to be more probable than not "that interests in property subject to an application are fraudulently acquired property that is also illegally acquired property"[516].

278 The CAR Act sets out to achieve the second of its principal objects in part by allowing the Commission to apply to the Supreme Court for an "unexplained wealth order": requiring a person to pay to the Treasurer an amount assessed by the Supreme Court to be the value of "the whole or any part of the current or previous wealth of the person that the Supreme Court is not satisfied on the balance of probabilities is not or was not illegally acquired property or the proceeds of an illegal activity"[517]. The "current or previous wealth" of a person for this purpose is the sum of the values of all interests in property that the person has, effectively controls or has at any time expended, consumed or otherwise disposed of as well as any service, advantage or benefit provided at any time for the person or, at the person's request or direction, to another person[518]. The Supreme Court must make such an unexplained wealth order if the Supreme Court finds that there is a reasonable suspicion that the person against whom the order is sought has, at any time before the making of the application for the order, engaged in serious crime related activity or acquired serious crime derived property from any serious crime related activity of another person[519].

279 The CAR Act sets out to achieve the third of its principal objects in part by allowing the Commission to apply to the Supreme Court for a "proceeds assessment order": requiring a person to pay to the Treasurer an amount assessed by the Supreme Court to be the value of "proceeds derived by the person from an illegal activity, or illegal activities, of the person or another person that took place not more than 6 years before the making of the application"[520]. The Supreme Court must make such a proceeds assessment order if the Supreme Court finds it more probable than not that the person whose suspected serious crime related activity formed the basis of the application was, at any time not

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515 Section 22(2).

516 Section 22(2A).

517 Section 28A(1) read with s 28B(2).

518 Section 28B(4).

519 Section 28A(2).

520 Section 27(1).

more than six years before the making of the application, engaged in a serious crime related activity involving either an indictable quantity or an offence punishable by imprisonment for five years or more[521]. The Supreme Court must also make such a proceeds assessment order against a person (other than a minor) if the Supreme Court finds it more probable than not that: the person derived proceeds from illegal activity of another person; the person knew or ought reasonably to have known that those proceeds were derived from illegal activity of another person; and the other person was, at any time not more than six years before the making of the application, engaged in a serious crime related activity involving either an indictable quantity or an offence punishable by imprisonment for five years or more[522].

280 The CAR Act uses the expression "confiscation order" to mean an assets forfeiture order, an unexplained wealth order or a proceeds assessment order[523].

281 The CAR Act also allows the Commission, together with or in anticipation of an application for a confiscation order, to apply to the Supreme Court for a "restraining order": "that no person is to dispose of or attempt to dispose of, or to otherwise deal with or attempt to otherwise deal with, an interest in property to which the order applies except in such manner or in such circumstances (if any) as are specified in the order"[524]. The Supreme Court must make a restraining order on application by the Commission if two conditions are satisfied: that the application is supported by an affidavit of an authorised officer stating the existence of, and grounds for, a suspicion on the part of the authorised officer that the person whose interest is the subject of the application has engaged in serious crime related activity or has acquired serious crime derived property because of serious crime related activity of the person or another person or that the interest is serious crime derived property; and that the Supreme Court considers that there are reasonable grounds for such suspicion. The Supreme Court must also make a restraining order on the Commission's application in respect of interests in property held in a false name if the application is supported by an affidavit of an authorised officer stating the existence of, and grounds for, a suspicion on the part of the authorised officer that the interest is fraudulently acquired property that is illegally acquired property, and the Supreme Court considers that there are reasonable grounds for such suspicion[525]. Unless earlier

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521 Section 27(2).

522 Section 27(2A).

523 Section 4(1).

524 Sections 10 and 10A.

525 Section 10A(5).

revoked[526] or later extended[527], a restraining order remains in force in respect of an interest in property after two working days of the operation of the restraining order only while there is an application for an assets forfeiture order pending before the Supreme Court in respect of that interest or while there is pending an application for, or there remains in force and unsatisfied, a proceeds assessment order or unexplained wealth order against the person whose suspected serious crime related activity formed the basis of the restraining order[528].

282 Within that context, ss 12(1) and 31D are designed to achieve in part the last of the identified principal objects of the CAR Act – to enable law enforcement authorities effectively to identify and recover property under the Act. That object, of its nature, is ancillary to the other identified principal objects of the CAR Act.

283 Section 12(1) relevantly provides:

> "The Supreme Court may, when it makes a restraining order or at any later time, make any ancillary orders (whether or not affecting a person whose interests in property are subject to the restraining order) that the Court considers appropriate and, without limiting the generality of this, the Court may make any one or more of the following orders:
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> …
>
> (b) an order for the examination on oath of:
>
> (i) the owner of an interest in property that is subject to the restraining order, or
>
> (ii) another person,
>
> before the Court, or before an officer of the Court prescribed by rules of court, concerning the affairs of the owner, including the nature and location of any property in which the owner has an interest".

284 Sections 13 and 13A of the CAR Act address the application of common law immunities to a person examined under an order made under s 12.

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526 Section 10C.

527 Section 20.

528 Section 10D.

Section 13 deals, amongst other things, with client legal privilege. Section 13A deals, amongst other things, with the privilege against self-incrimination.

285 Section 13A relevantly provides:

> "(1) A person being examined under section 12 is not excused from answering any question, or from producing any document or other thing, on the ground that the answer or production might incriminate, or tend to incriminate, the person or make the person liable to forfeiture or penalty.
>
> (2) However, any answer given or document produced by a natural person being examined under section 12 is not admissible in criminal proceedings (except proceedings for an offence under this Act or the regulations) if:
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> (a) the person objected at the time of answering the question or producing the document on the ground that the answer or document might incriminate the person, or
>
> (b) the person was not advised that the person might object on the ground that the answer or document might incriminate the person.
>
> (3) Further information obtained as a result of an answer being given or the production of a document in an examination under section 12 is not inadmissible in criminal proceedings on the ground:
>
> (a) that the answer had to be given or the document had to be produced, or
>
> (b) that the answer given or document produced might incriminate the person."

The section, in conjunction with abrogating by s 13A(1) the privilege against self-incrimination of a person being examined under s 12(1)(b), confers on that person by s 13A(2) what is sometimes labelled "direct use immunity", limiting the admissibility in criminal proceedings against that person of answers given or documents produced under objection. However, it is plain from s 13A(3) that the section does not further restrict the use that can be made of answers given or documents produced under objection so as to confer on that person what is sometimes labelled "derivative use immunity". In particular, the section does not constrain the exercise of such power as the Commission has under the NSWCC Act to disseminate those answers or documents to such persons or bodies as the Commission thinks appropriate.

286 Section 31D, at times relevant to the appeal, relevantly provided:

"(1) If an application is made for a confiscation order, the Supreme Court may, on application by the Commission, when the application for the confiscation order is made or at a later time, make any one or more of the following orders:

(a) an order for the examination on oath of:

(i) the affected person, or

(ii) another person,

(b) before the Court, or before an officer of the Court prescribed by rules of court, concerning the affairs of the affected person, including the nature and location of any property in which the affected person has an interest,

...

(3) Sections 13 and 13A apply in respect of a person being examined under an order under this section in the same way as they apply in respect of a person being examined under an order under section 12(1).

(4) In this section:

affected person means:

(a) in the case of an application for an assets forfeiture order, the owner of an interest in property that is proposed to be subject to the order, or

(b) in the case of an application for a proceeds assessment order or unexplained wealth order, the person who is proposed to be subject to the order."

287 For the purposes of the CAR Act, proceedings on an application for a restraining order or a confiscation order are not criminal proceedings[529]. The relationship between those proceedings and concurrent criminal proceedings is addressed in part by s 63 of the CAR Act and, at different times relevant to the appeal, was also addressed in part by s 62 of the CAR Act and in part by the

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529 Section 5(1).

general provisions of the *Court Suppression and Non-publication Orders Act* 2010 (NSW) ("the Suppression Orders Act").

288 Section 63 of the CAR Act provides:

> "The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which the Supreme Court may stay proceedings under this Act that are not criminal proceedings."

There is no dispute that the reference in s 63 to "proceedings under this Act" encompasses applications for examination orders under ss 12(1)(b) and 31D(1)(a). The consequence is that s 63 is to be read as expressly providing that the fact that criminal proceedings have been instituted or have commenced is not a ground on which the Supreme Court may stay an application for an examination order under s 12(1)(b) or s 31D(1)(a).

289 Section 62 of the CAR Act provided until its repeal on 1 July 2011:

> "If:
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> (a) a person has been charged with an offence in relation to a serious crime related activity and proceedings on the charge have not commenced or, if the proceedings have commenced, they have not been completed, and
>
> (b) proceedings are instituted under this Act for a restraining order, or an assets forfeiture order, affecting an interest of the person in property, or for a proceeds assessment order or unexplained wealth order against the person,
>
> the Supreme Court may make such orders as it thinks fit with respect to the publication of any matter arising under this Act."

290 From 1 July 2011, the Suppression Orders Act has conferred a general power on the Supreme Court to make a suppression order or a non-publication order prohibiting or restricting the publication or other disclosure of information that comprises evidence, or information about evidence, given in proceedings before the Supreme Court or information that tends to reveal the identity of or otherwise concerns any party to or witness in proceedings before the Supreme Court[530]. The grounds on which such an order may be made include that the

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530 Section 7.

order "is necessary to prevent prejudice to the proper administration of justice"[531] and that it "is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice"[532]. The Suppression Orders Act is expressed not to affect the inherent jurisdiction of the Supreme Court[533].

The proceeding and the decision of Hulme J

291 On 13 May 2010, the appellants, Jason Lee and Seong Won Lee, were charged with offences of supplying a prohibited drug. They had each earlier been charged with firearms offences and Jason Lee had also earlier been charged with an offence of money laundering.

292 On the same day, the Commission applied by originating summons to the Supreme Court for orders which included: restraining orders in respect of interests in property of Jason Lee and another person, Elizabeth Park; an assets forfeiture order in respect of an identified interest in property of Elizabeth Park, being an interest in property suspected by an authorised officer at the time of the application of being serious crime derived property because of serious crime related activity of Jason Lee; and a proceeds assessment order requiring that Jason Lee pay to the Treasurer an amount assessed by the Supreme Court as the value of the proceeds derived by him from illegal activities that took place not more than six years before the making of the application. An affidavit of an authorised officer filed in support of the application deposed to a suspicion that Jason Lee had engaged in serious crime related activity identified as the supplying of prohibited drugs the subject of the offence with which he was charged. The restraining orders were made on that day.

293 On 10 June 2010, the Commission applied by notice of motion to the Supreme Court for orders which included orders for the examination on oath of Jason Lee (concerning his own affairs) and for the examination on oath of Seong Lee (concerning the affairs of Jason Lee or Elizabeth Park). There is no dispute that Jason Lee was an "affected person" as defined in s 31D(4) so as to fall within the terms of s 31D(1)(a)(i) and that Seong Lee fell within the terms of s 31D(1)(a)(ii).

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531 Section 8(1)(a).

532 Section 8(1)(e).

533 Section 4.

294 The motion was heard by Hulme J, who, on 28 February 2011, published reasons for judgment declining to make those orders "at this stage"[534]. In his reasons for judgment, Hulme J noted that there was no challenge to the fact that the Commission had established that Jason Lee and Seong Lee were prima facie capable of giving evidence on the topics referred to in the proposed orders against them[535]. He nevertheless found that "the scope for self incrimination is wide"[536] and that "the consequences of providing an answer that is or is potentially incriminating may not all be avoided by the protection given to an examinee by s 13A(2)" or by the making of a non-publication order under s 62 of the CAR Act[537]. The case was, in his view, "governed" by the decision in *Hammond v The Commonwealth*[538].

Decision of the Court of Appeal

295 On 9 August 2012, the Court of Appeal of the Supreme Court of New South Wales (Beazley, McColl, Basten, Macfarlan and Meagher JJA) heard concurrently an application for leave to appeal and an appeal by the Commission from the decision of Hulme J. Evidence before the Court of Appeal showed that, in the period between the hearing before Hulme J and the hearing before the Court of Appeal, Jason Lee and Seong Lee had been tried in the District Court of New South Wales on all of the charges against them which had been current at the time of the hearing before Hulme J except for the charge of money laundering against Jason Lee. Jason Lee had been convicted of a firearms offence and offences of supplying drugs, and had been acquitted on other charges. Seong Lee had been convicted of firearms offences and an offence of being knowingly concerned in the supply of drugs by Jason Lee, and had been acquitted on other charges. Both had lodged appeals against their convictions, which were pending in the Court of Criminal Appeal. The charge of money laundering against Jason Lee current at the time of the hearing before Hulme J had been made the subject of an order for a separate trial, which was yet to commence. In addition, an ex officio indictment had been filed charging Jason Lee with further offences of money laundering.

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534 *NSW Crime Commission v Lee* [2011] NSWSC 80 at [21].

535 [2011] NSWSC 80 at [11].

536 [2011] NSWSC 80 at [21].

537 [2011] NSWSC 80 at [19].

538 [2011] NSWSC 80 at [20], referring to *Hammond v The Commonwealth* (1982) 152 CLR 188; [1982] HCA 42.

296 On 6 September 2012, the Court of Appeal granted the application for leave to appeal and, applying the principles governing appellate review of an exercise of judicial discretion articulated in *House v The King*[539], allowed the appeal and set aside the decision of Hulme J. The Court of Appeal went on itself to make an order in the following terms[540]:

> "Pursuant to s 31D(1)(a) of the [CAR Act], order that:
>
> (a) Jason Lee … be examined on oath before a registrar concerning his own affairs, including the nature and location of any property in which he has an interest, on a date and at a time to be fixed by the registrar.
>
> (b) Seong Won Lee be examined on oath before a registrar concerning the affairs of Jason Lee … or Elizabeth Park, including the nature and location of any property in which Jason Lee … or Elizabeth Park has an interest, on a date and at a time to be fixed by the registrar."

297 The principal reasons for judgment of the Court of Appeal were given by Basten JA and by Meagher JA. Beazley JA gave short additional reasons, agreeing with each of them. McColl JA agreed with Basten JA, and Macfarlan JA agreed with each of Beazley, Basten and Meagher JJA. Basten and Meagher JJA each likened the scheme of the CAR Act to that considered in the decision in *Hamilton v Oades*[541] and drew attention to the centrality of s 31D(1)(a) to fulfilment of the principal objects of the CAR Act[542]. Each expressly accepted that s 31D(1)(a) conferred a discretion to order an examination, and that the possibility of prejudice to the fair trial of a proposed examinee is a consideration relevant to the exercise of that discretion[543]. Each found that Hulme J erred in failing to consider the significance to the exercise of the discretion conferred by s 31D(1)(a) of the express abrogation by s 13A(1) of the privilege against self-incrimination being combined with the express rejection in s 13A(3) of the conferral of derivative use immunity[544] and of s 63 preventing

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539 (1936) 55 CLR 499; [1936] HCA 40.

540 *New South Wales Crime Commission v Lee* [2012] NSWCA 276.

541 [2012] NSWCA 276 at [45]-[48], [50]-[54], [92], [99], referring to *Hamilton v Oades* (1989) 166 CLR 486; [1989] HCA 21.

542 [2012] NSWCA 276 at [39]-[41], [87]-[88].

543 [2012] NSWCA 276 at [10], [20], [49], [67]-[75], [81], [100]-[101].

the ordering of a stay merely by reason of the fact of criminal proceedings having been instituted[545].

298 As to the significance of s 63, Basten JA said[546]:

> "[T]he refusal of orders effected a de facto stay. The statutory purpose revealed by s 63 is not to be ignored because the procedure in a particular case involves an adjournment application, an application to revoke or set aside an order, or the resistance to the making of the order in the first instance, rather than a stay. If the fact of criminal proceedings is 'not a ground' to stay an examination under s 31D, it should not be an available ground for resisting or delaying examination on any other procedural basis. Further, the purpose is not avoided by arguing that the real ground is the risk of prejudice to a criminal proceeding, rather than the fact that such a proceeding is on foot. The latter should be understood to encompass the former and any variation on it."

299 As to the significance of s 13A, Meagher JA said[547]:

> "Section 13A gives no specific protection to the examinee against the use in criminal proceedings of further information obtained as a result of answers given or documents produced. However, by not providing specific protection against that use (and by providing expressly that such information is 'not inadmissible'), the Parliament has made its legislative judgment that specific protection against the risk of that use is not required. The protection to the examinee against any such derivative use is provided by requiring that the examination take place before the Supreme Court, or an officer of the Court, having in addition to the express power given by s 62, the inherent power to ensure the proper administration of justice. The orders which the Court, or any officer of the Court, could make are (with the repeal of s 62 and its replacement by the [Suppression Orders Act]), a suppression or non-publication order … or an order restricting the publication of evidence in exercise of its inherent jurisdiction; which is not affected by that Act".

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544 [2012] NSWCA 276 at [55], [92], [101].

545 [2012] NSWCA 276 at [56], [92], [101].

546 [2012] NSWCA 276 at [47]. See also at [98].

547 [2012] NSWCA 276 at [99].

300 Meagher JA concluded[548]:

> "The exercise of the discretion arises in a context where the Act provides for an examination to take place notwithstanding that there remain risks of adverse consequences in relation to criminal proceedings which have been commenced but not completed. In such circumstances, the Act gives protection to the examinee in the form of the Court's power to control and supervise the examination. The discretion to order an examination should not be exercised on the basis that the Court, or officer of the Court before whom the examination takes place, may in the conduct of the examination decline to make a non-publication order in respect of specific questions or subject matter. To do so would disregard the legislative intent that any such risks be addressed in that way … In not approaching the matter on this basis the primary judge erred."

301 Turning to the re-exercise of the discretion, Basten JA (with whose reasons in this respect Meagher JA specifically agreed[549]) characterised the submissions of Jason Lee and Seong Lee as amounting in the final analysis to no more than that they should not be subject to compulsory examination because, in the case of Jason Lee, his trial on money laundering charges was still outstanding and, in the case of each of them, there were pending appeals against conviction in respect of drug supply charges, which, if successful, might result in a retrial[550]. Concluding that there was, in the circumstances, "no reason not to make the order sought by the Commission"[551], Basten JA said[552]:

> "The possibility that an examination at this stage could interfere with the trial of ... Jason Lee, which is apparently listed for hearing in October, and the possible retrial of both in respect of the drug supply charges, is speculative. If a real risk of prejudice is revealed in the course of the conduct of the examination, there is no reason to suppose that the registrar before whom the examinations take place will not have powers available to diminish or prevent that prejudice, to the extent that it is beyond the prejudice authorised by the [CAR Act]."

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548 [2012] NSWCA 276 at [101].

549 [2012] NSWCA 276 at [103].

550 [2012] NSWCA 276 at [74].

551 [2012] NSWCA 276 at [82].

552 [2012] NSWCA 276 at [81].

302 When Basten JA spoke of prejudice "beyond the prejudice authorised by the" CAR Act, the authorised prejudice to which he referred was the effect of s 13A on the appellants' privilege against self-incrimination. His Honour proceeded on the footing that s 13A was apt to abrogate each appellant's privilege against self-incrimination whether or not he had been charged with a crime at the time of the examination[553]; and apart from the effect of s 13A, the appellants had not shown that the examinations sought by the Commission and ordered by the Court of Appeal were likely to affect adversely the fair determination of the issues in the pending appeals and criminal trial in such a way as to warrant a refusal of the order for examination.

Arguments in this Court

303 The initial focus of the argument of the appellants in their appeal, by special leave, to this Court was on the factors that permissibly inform the exercise of the discretion conferred on the Supreme Court by use of the word "may" in s 31D(1)(a) of the CAR Act[554]. Their argument was that Basten and Meagher JJA erroneously construed s 31D(1)(a) as "requiring the Supreme Court to determine an application for an examination order without taking into account the risk that such an examination may pose to the fair criminal trial of the proposed examinee" and that their Honours erred in particular in relying on s 63 "as compelling [that] conclusion".

304 As the argument of the appellants was developed in oral submissions, however, it became refocused on the scope of the power conferred by s 31D(1)(a). The argument in the form in which it then emerged invoked the principle of statutory construction that has come in recent years often to be referred to as the "principle of legality"[555]. The argument became that, in light of the "elementary principle that no accused person can be compelled by process of law to admit the offence with which he or she is charged"[556], s 31D(1)(a) is to be construed as conferring no power to order the examination on oath of a person against whom criminal proceedings have been commenced but not completed to the extent that the subject-matter of the examination would overlap with the subject-matter of those proceedings.

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553 [2012] NSWCA 276 at [43]-[44].

554 See s 9(1) of the *Interpretation Act* 1987 (NSW).

555 See Spigelman, "Principle of legality and the clear statement principle", (2005) 79 *Australian Law Journal* 769 at 774.

556 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 501; [1993] HCA 74.

305 In support of that refocused argument, it was put for the appellants that (even if answers given and documents produced in an examination could be quarantined from all knowledge or use by the prosecution) the compulsory examination on oath of a person against whom criminal proceedings are pending on a matter touching or concerning the subject-matter of those criminal proceedings is inherently prejudicial to the person's conduct of those proceedings. That was said to be because the answers given and documents produced by the person in the examination would inevitably constrain the instructions on which the legal representatives of the person could act in the criminal proceedings: the legal representatives would be ethically bound not to lead evidence or cross-examine or make submissions to suggest a version of the facts which contradicted that given by their client on oath in the examination.

306 To the argument as refocused we now turn.

Scope of the power

307 The principle of construction now sought to be invoked can be traced to a statement of Marshall CJ in the Supreme Court of the United States in 1805[557]:

> "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness, to induce a court of justice to suppose a design to effect such objects."

That statement, amongst others, was relied on in successive editions of *Maxwell on the Interpretation of Statutes*, first published in 1875, in support of the existence of a "presumption against any alteration of the law beyond the specific object of the Act"[558].

308 In Australia, the principle is generally traced to the adoption and application in *Potter v Minahan*[559] of a passage in the fourth edition of *Maxwell*, published in 1905. After stating that "[t]here are certain objects which the Legislature is presumed not to intend" and that "a construction which would lead

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

558 *Maxwell on the Interpretation of Statutes*, 4th ed (1905) at 121-122. See also (1875) at 65-66; 2nd ed (1883) at 95-96; 3rd ed (1896) at 112-113.

559 (1908) 7 CLR 277 at 304; [1908] HCA 63. See eg *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11]; [2002] HCA 49.

to any of them is therefore to be avoided"[560], the passage as quoted and applied continued[561]:

> "One of these presumptions is that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by implication; or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. 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; 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." (footnotes omitted)

The passage concluded[562]:

> "General words and phrases, therefore, however wide and comprehensive in their literal sense, must be construed as strictly limited to the actual objects of the Act, and as not altering the law beyond." (footnote omitted)

309 Modern exposition of the principle in this Court is to be found in the joint reasons for judgment in *Bropho v Western Australia*[563] and the joint reasons of four Justices of the Court in *Coco v The Queen*[564]. The joint reasons for judgment in *Bropho*, after referring to the existence of various "'rules of construction' which require clear and unambiguous words before a statutory provision will be construed as displaying a legislative intent to achieve a particular result"[565], stated that "[t]he rationale of all such rules lies in an assumption that the legislature would, if it intended to achieve the particular effect, have made its intention in that regard unambiguously clear"[566]. The joint

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560 *Maxwell on the Interpretation of Statutes*, 4th ed (1905) at 121.

561 At 122.

562 At 122.

563 (1990) 171 CLR 1; [1990] HCA 24.

564 (1994) 179 CLR 427; [1994] HCA 15.

565 (1990) 171 CLR 1 at 17.

566 (1990) 171 CLR 1 at 18.

reasons for judgment described the passage in *Maxwell* adopted and applied in *Potter* as articulating "the rationale of the presumption against the modification or abolition of fundamental rights or principles"[567].

310 The joint reasons for judgment in *Coco* repeated that rationale, adopting again the same quotation[568]. Consistently with that rationale, the joint reasons for judgment in *Coco* introduced the principle by stating[569]:

> "The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them."

Reflecting again the same rationale, the joint reasons for judgment made the additional observation that "curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights"[570].

311 The additional observation in *Coco* was echoed in a later, and now frequently cited, statement of Lord Hoffmann which explains the principle of legality as meaning that "Parliament must squarely confront what it is doing and accept the political cost" and goes on to explain that "[f]undamental rights cannot be overridden by general or ambiguous words … because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process"[571].

312 More recent statements of the principle in this Court do not detract from the rationale identified in *Potter*, *Bropho* and *Coco* but rather reinforce that

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567 (1990) 171 CLR 1 at 18.

568 (1994) 179 CLR 427 at 437.

569 (1994) 179 CLR 427 at 437.

570 (1994) 179 CLR 427 at 437-438.

571 *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131, quoted, for example, in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 520 [47]; [2009] HCA 4 and cited in *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30]; [2003] HCA 2.

rationale[572]. That rationale not only has deep historical roots; it serves important contemporary ends. It respects the distinct contemporary functions, enhances the distinct contemporary processes, and fulfils the shared contemporary expectations of the legislative and the judicial branches of government. As put by Gleeson CJ in *Electrolux Home Products Pty Ltd v Australian Workers' Union*[573], in terms often since quoted with approval[574], the principle:

> "is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted."

Gleeson CJ pointed out that the principle is to be applied against the background that "modern legislatures regularly enact laws that take away or modify common law rights" and that the assistance to be gained from the principle "will vary with the context in which it is applied"[575].

313 Application of the principle of construction is not confined to the protection of rights, freedoms or immunities that are hard-edged, of long standing or recognised and enforceable or otherwise protected at common law. The principle extends to the protection of fundamental principles and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.

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572 See *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [20]-[21]; [2004] HCA 40; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19]-[20]; [2004] HCA 37; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 134-136 [28]-[32]; [2012] HCA 19.

573 (2004) 221 CLR 309 at 329 [21].

574 See eg *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15]; [2010] HCA 23; *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at 135 [30].

575 See *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 328 [19], citing *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269 at 284 [36]; [2003] HCA 33.

314 The principle of construction is fulfilled in accordance with its rationale where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed. The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked. The simple reason is that "[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve"[576].

315 *Hamilton v Oades*, on which reliance was placed in the Court of Appeal in the present case, is in point. There this Court, by majority (Mason CJ, Dawson and Toohey JJ, Deane and Gaudron JJ dissenting), set aside an order of the Court of Appeal of New South Wales that a person the subject of an order for examination on oath under s 541 of the *Companies (New South Wales) Code* before a Deputy Registrar of the Supreme Court not be compelled in the course of the examination to answer any questions the answers to which may tend to incriminate him in respect of pending criminal charges and which would either concern those facts constituting the ingredients of the offences charged or tend to disclose a defence to the charges. Mason CJ observed that "[t]o the extent only that under the section rights of an accused person are denied and protections removed, an examination may … amount to an interference with the administration of criminal justice", but went on to observe that it is "well established that Parliament is able to 'interfere' with established common law protections, including the right to refuse to answer questions the answers to which may tend to incriminate the person asked"[577]. In that respect, four aspects of the section were treated as being of particular significance: that it specifically abrogated the privilege against self-incrimination; that it specifically provided that answers which may otherwise have been privileged were not admissible in criminal proceedings; that it drew no distinction between pending and future proceedings; and that it explicitly empowered the Supreme Court to give directions concerning the examination[578]. In relation to the third of those aspects, Mason CJ quoted with approval the observation that[579]:

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576 *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321 at 340 [43]; [2000] HCA 7.

577 (1989) 166 CLR 486 at 494.

578 (1989) 166 CLR 486 at 496, 498.

579 (1989) 166 CLR 486 at 498, quoting *Re Gordon* (1988) 18 FCR 366 at 372.

> "There would have been no difficulty, had that been the legislature's true intention, in adding a qualification that the express requirement to answer questions though they might tend to incriminate should not apply where charges had actually been laid, as opposed to being merely expected. The statute … contains no such qualification".

In relation to the fourth, Mason CJ observed that it may be that the Supreme Court in conducting the examination "may feel it necessary, in accordance with the statutory purpose, not to permit a particular question to be asked which would prejudice the examinee's fair trial"[580].

316 The holding of the House of Lords in *R v Director of Serious Fraud Office; Ex parte Smith*[581] was to similar effect. There it was held that a statutory power to compel a person to answer questions in the investigation of serious or complex fraud did not come to an end when the person was charged with a criminal offence[582]. Without doubting that "there is a strong presumption against interpreting a statute as taking away the right of silence, at least in some of its forms", Lord Mustill pointed out that "[n]evertheless it is clear that statutory interference with the right is almost as old as the right itself"[583].

317 Quoted with approval and treated as applicable to the legislation in issue both in *Hamilton v Oades*[584] and in *R v Director of Serious Fraud Office; Ex parte Smith* [585] was the observation of Windeyer J in *Rees v Kratzmann*[586] (like *Hamilton v Oades*, a corporate insolvency case) that "[i]f the legislature thinks that in this field the public interest overcomes some of the common law's traditional consideration for the individual, then effect must be given to the statute which embodies this policy". It may be accepted that, in *Hamilton v Oades*, the history of the truncation of enjoyment of the right to silence in the case of examination of bankrupts and company directors influenced Mason CJ in coming to the conclusion that the legislation there in question did indeed intend,

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580 (1989) 166 CLR 486 at 499.

581 [1993] AC 1.

582 [1993] AC 1 at 43-44.

583 [1993] AC 1 at 40.

584 (1989) 166 CLR 486 at 494.

585 [1993] AC 1 at 44.

586 (1965) 114 CLR 63 at 80; [1965] HCA 49.

not only to curtail the privilege against self-incrimination, but also to deprive an examinee of the benefit of the right to silence at trial. It may also be said, however, that these considerations are but historical examples of legitimate legislative judgments that, for compelling reasons of public interest, some diminution in the procedural advantages enjoyed by an accused person must be accepted. The interpretative strictures of the legality principle should not be applied so rigidly as to have a sclerotic effect on legitimate innovation by the legislature to meet new challenges to the integrity of the system of justice.

318 The fundamental principle in respect of which the principle of construction is sought to be invoked in the present case – that no accused person can be compelled by process of law to admit the offence with which he or she is charged – is not monolithic: it is neither singular nor immutable. While it has doubtless come to be a fundamental feature of the Australian legal system that "a criminal trial is an accusatorial process in which the prosecution bears the onus of proving the guilt of the accused beyond reasonable doubt", it is also the reality that there is recognised within the Australian legal system no free-standing or general right of a person charged with a criminal offence to remain silent[587]. What is often referred to as a "right to silence" is rather "a convenient description of a collection of principles and rules: some substantive, and some procedural; some of long standing, and some of recent origin", which differ in "incidence and importance, and also as to the extent to which they have already been encroached upon by statute"[588]. The most pertinent for present purposes are: the right of any person to refuse to answer any question except under legal compulsion; the privilege of any person to refuse to answer any question at any time on the ground of self-incrimination; the right of any person who believes that he or she is suspected of a criminal offence to remain silent when questioned by any person in authority about the occurrence of an offence, the identity of the participants and the roles which they played[589]; and the right of a person charged with a criminal offence to a fair trial, "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"[590].

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587 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22]; [2000] HCA 3. See also *Azzopardi v The Queen* (2001) 205 CLR 50 at 64 [34]; [2001] HCA 25; *Carr v Western Australia* (2007) 232 CLR 138 at 152 [36]-[37]; [2007] HCA 47.

588 *Azzopardi v The Queen* (2001) 205 CLR 50 at 57 [7], quoting in part *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1 at 30.

589 *Petty v The Queen* (1991) 173 CLR 95 at 99, 106-107, 118; [1991] HCA 34.

590 *Dietrich v The Queen* (1992) 177 CLR 292 at 299; [1992] HCA 57. See also at 326-328, 362.

319 Separate, but overlapping with the right of a person charged with a criminal offence to a fair trial and available to protect that right, is the power that inheres in a court to restrain as a contempt conduct giving rise to a real risk of interference with the administration of justice. There is a corresponding principle, itself an application of same general principle of statutory construction, that "[a] statute expressed in general terms should not be construed so as to authorize the doing of any act which amounts to a contempt of court"[591].

320 It is important to recognise, however, that a contempt of court of the relevant kind occurs "only when there is an actual interference with the administration of justice" or "a real risk, as opposed to a remote possibility" of such an interference[592] and that the "essence" of contempt of that kind is a "real and definite tendency to prejudice or embarrass pending proceedings" involving "as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case"[593]. The finding of such a real risk or definite tendency necessarily requires more than abstract assertion: it requires the finding at least of some logical connection between the action that is impugned and some feared impediment to the conduct of the proceedings that are pending, which impediment can properly be characterised as an interference with the administration of justice or, more specifically in a particular case, as unfairness to an accused.

321 *Hammond v The Commonwealth*, on which Hulme J relied in the present case, is properly seen as an application of that principle of contempt. As later explained by Gibbs CJ[594]:

> "That was a case in which the plaintiff, who was called to give evidence before a Royal Commission, was awaiting trial for a criminal offence, *and* there was a real possibility that if he was required to answer incriminating questions the administration of justice would be interfered with." (emphasis added)

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591 *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460 at 473; [1982] HCA 65.

592 *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 56; [1982] HCA 31, citing *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 299.

593 *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 370, 372; [1955] HCA 12, quoted in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 56, 166.

594 *Sorby v The Commonwealth* (1983) 152 CLR 281 at 299; [1983] HCA 10.

The conclusion of Gibbs CJ, with whom Mason J agreed, was that "in the circumstances of [that] case" there was "a real risk that the administration of justice will be interfered with" by reason that, notwithstanding that the examination was to be conducted in private and that the answers could not be used in evidence in the criminal trial, "the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, [was] very likely to prejudice him in his defence"[595]. That conclusion cannot be divorced from his Honour's earlier finding that "the police officers who had investigated the matters upon which the plaintiff was to be examined were permitted to be present"[596]. That finding, it can be inferred, reflected the way the examination, the timing and scope of which was restrained by the injunction granted by the High Court, was proposed to be conducted. The finding also puts in context the reference by Brennan J to the "principle deep-rooted in our law and history that the Crown may not subject an accused person to compulsory process to obtain his answers upon the issue of his guilt of an offence with which he has been charged"[597] and the explanation by Deane J of injustice or prejudice to the plaintiff lying in the facts that "[t]he pending criminal proceedings against the plaintiff are brought by the Commonwealth" and that "[t]he parallel inquisitorial inquiry into the subject matter of those proceedings is being conducted under the authority of the Commonwealth"[598].

322 We agree with the observation of French CJ and Crennan J in *X7 v Australian Crime Commission* that[599]:

> "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 obtained which could establish guilt of the offences, and which was subject only to a direct use immunity."

Hammond is illustrative of the proposition that a real risk to the administration of justice can arise where there is a real risk that the practical consequence of an exercise of a coercive statutory power would be to give to the prosecution in criminal proceedings "advantages which the rules of procedure would otherwise

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595 (1982) 152 CLR 188 at 198.

596 (1982) 152 CLR 188 at 194.

597 (1982) 152 CLR 188 at 202-203.

598 (1982) 152 CLR 188 at 207.

599 (2013) 87 ALJR 858 at 871 [36]; 298 ALR 570 at 582-583; [2013] HCA 29.

deny"[600]. *Hammond* is not authority for the proposition that a real risk to the administration of justice necessarily, or presumptively, arises by reason only of the exercise of a statutory power to compel the examination on oath of a person against whom criminal proceedings have been commenced but not completed where the subject-matter of the examination will overlap with the subject-matter of the proceedings. The majority in *X7* does not appear to us to have embraced such a proposition.

323 There is a variety of ways in which, as a matter of practical reality, the examination on oath of a person against whom criminal proceedings have been commenced may have a tendency to give rise to unfairness amounting to an interference with the due course of justice in a particular case. The deprivation of a legitimate forensic choice available to the person in those proceedings may be one of those ways. However, we are unable to regard as the deprivation of a legitimate forensic choice a practical constraint on the legal representatives of the person leading evidence or cross-examining or making submissions in the criminal proceedings to suggest a version of the facts which contradicted that given by their client on oath in the examination. The legal representatives would, of course, be prevented from setting up an affirmative case inconsistent with the evidence but they would not be prevented from ensuring that the prosecution is put to proof or from arguing that the evidence as a whole does not prove guilt[601].

324 The notion that any subtraction, however anodyne it might be in its practical effect, from the forensic advantages enjoyed by an accused under the general law necessarily involves an interference with the administration of justice or prejudice to the fair trial of the accused is unsound in principle and is not consistent with *Hamilton v Oades*. To accept that a criminal trial "does not involve the pursuit of truth by any means"[602] is not to condone as legitimate the pursuit of falsehood. The words of Lord Scarman in *R v Sang*[603], concerning the judicial discretion to exclude legally admissible evidence on the ground of unfairness, resonate more widely:

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600 *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460 at 467-468; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 559.

601 Rule 79 of the New South Wales Barristers' Rules; *Tuckiar v The King* (1934) 52 CLR 335 at 346; [1934] HCA 49.

602 *R v Apostilides* (1984) 154 CLR 563 at 576; [1984] HCA 38.

603 [1980] AC 402 at 456.

> "The test of unfairness is not that of a game: it is whether … the evidence, if admitted, would undermine the justice of the trial. Any closer definition would fetter the sense of justice, upon which in the last resort all judges have to rely: but any extension of the discretion … would also undermine the justice of the trial. For the conviction of the guilty is a public interest, as is the acquittal of the innocent. In a just society both are needed."

325 Brennan J said in *Environment Protection Authority v Caltex Refining Co Pty Ltd*[604]:

> "When an investigative power to require the giving of information is conferred by statute, the power will ordinarily be construed as exhausted when criminal proceedings to which the information relates have been commenced and are pending. That is because the power is understood to be conferred for the purpose of the performance of the administrative function of determining whether proceedings should be instituted." (footnote omitted)

That proposition, amply supported by previous authority, was explained by his Honour as itself reflecting an aspect of the right of a person charged with a criminal offence to remain silent[605]. However, the proposition did not govern that case. Nor does it govern this case. That is because we are not concerned here with a power that is conferred for the purpose of determining whether criminal proceedings should be instituted.

326 The power of the Supreme Court to make an order for the examination on oath of a person under s 31D(1)(a) of the CAR Act is a power that can be exercised only in proceedings for a confiscation order. Proceedings for a confiscation order under the CAR Act are not criminal proceedings or proceedings preliminary to or in aid of criminal proceedings. They are separate civil proceedings, able to be commenced and continued to completion independently of any criminal proceedings that might be brought in respect of the criminal activity the suspicion or probability of which is alleged to form the basis of the confiscation order sought.

327 The power of the Supreme Court to make such an examination order can be invoked only for the purpose of enabling the Commission to obtain information for use in the proceedings in which the order is sought. The

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604 (1993) 178 CLR 477 at 516-517, citing, amongst other cases, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; [1909] HCA 36 and *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333; [1912] HCA 69.

605 (1993) 178 CLR 477 at 517.

administrative power of the Commission to apply for such an order would be used for an improper purpose, foreign to the CAR Act, were the Commission to seek to use that power for a purpose of determining whether criminal proceedings should be commenced or for a purpose of assisting in the conduct of contemplated or pending criminal proceedings. The same is true of the administrative power of the Commission to conduct an examination pursuant to an examination order: for the Commission to ask a question or seek the production of a document for such a purpose would be an abuse.

328 Recognition of the ancillary and purposive nature of an examination order directs attention to the nature and purpose of the principal proceedings in which such an order can be sought and made. The CAR Act is about recovering the fruits of criminal activity; that is why the principal proceedings are brought. The making of the confiscation order ultimately sought in the principal proceedings in which an examination order can be sought and made necessitates (in the case of an assets forfeiture order or a proceeds assessment order) a finding on the balance of probabilities of serious crime related activity or (in the case of an unexplained wealth order) a finding of a reasonable suspicion of serious crime related activity and a finding on the balance of probabilities of illegal activity. Information of use to the Commission in proceedings for a confiscation order will therefore always encompass information about the criminal activity alleged in the proceedings as the basis of the confiscation order sought.

329 The language of s 31D(1)(a) is framed on its face to encompass information about that criminal activity. In the reference to examination "concerning the affairs of the affected person, including the nature and location of any property in which the affected person has an interest", the word "including" makes plain that the subject-matter of the affairs of the affected person is not confined to the nature and location of any property in which the affected person has an interest. Once that is accepted, it would strain against the plain meaning of the words in the context in which they appear not to read "affairs of the affected person" as extending to the totality of the circumstances that give rise to that person having the status of an "affected person".

330 In the case of an affected person within either limb of the definition in s 31D(4), the scope of the related definition of "serious crime related activity" indicates that the scope for examination concerning the affairs of that person extends to anything done by the person that was a serious criminal offence at the time it was done irrespective of whether the person has been charged with the offence and irrespective of whether the person, if charged, has been tried for the offence. In addition, in the case of an affected person within the definition in s 31D(4)(a) where the interest in property referred to in that provision is held in a false name, as well as in the case of an affected person within the definition in s 31D(4)(b), the scope of the related definition of "illegal activity" indicates that

the scope for examination extends to things done by that person that constituted an offence at the time they were done.

331 That the power conferred by s 31D(1)(a) of the CAR Act authorises an examination covering criminal activity quite independently of whether or not criminal proceedings are pending in respect of that criminal activity is confirmed by s 31D(3). Its application of s 13A in respect of a person being examined under an order under s 31D(1)(a) shows that the power conferred by s 31D(1)(a) is to make an order that requires the person against whom the order is made to give answers and produce documents that might incriminate that person. What is of particular significance for present purposes is that, in specifically providing that answers given or documents produced which may otherwise have been privileged are not admissible in criminal proceedings and that information obtained as a result of an answer being given or the production of a document is not inadmissible in criminal proceedings, s 13A as applied by s 31D(3) draws no distinction between pending and future criminal proceedings.

332 Nor can s 63 be ignored in interpreting the scope of the power conferred by s 31D(1)(a). That is especially so given that it is not disputed that s 63 is to be read as expressly providing that the fact that criminal proceedings have commenced is not a ground on which the Supreme Court may stay an application for an order under s 31D(1)(a). Section 63 as so read is unequivocal confirmation that the CAR Act has adverted to the possibility of concurrence between proceedings under s 31D(1)(a) and criminal proceedings against the examinee.

333 That the terms in which the power is conferred by s 31D(1)(a) draw no distinction between circumstances where criminal proceedings have and have not been commenced does not reflect legislative inadvertence. It is deliberate. It is an aspect of a carefully integrated and elaborate legislative design. It is akin to the studied indifference of the legislation in *Hamilton v Oades.*

334 Contrary to the argument as refocused in the oral hearing in the appeal to this Court, the power conferred on the Supreme Court by s 31D(1)(a) of the CAR Act to make an order for the examination on oath of a person concerning the affairs of an affected person therefore extends to the making of an order for the examination of a person against whom criminal proceedings have been commenced but not completed notwithstanding that the subject-matter of the examination will overlap with the subject-matter of those criminal proceedings.

335 The power conferred by s 31D(1)(a) does not authorise the making or implementation of an examination order where to do so would give rise to a real risk of interference with the administration of justice including by interfering with the right of the person to be examined (or any other person) to a fair trial. For reasons already given, however, the making of such an order does not give

rise to a real risk of interference with the administration of justice by reason only that the subject-matter of the examination will overlap with the subject-matter of criminal proceedings that have commenced but that have not been completed.

Exercise of the power

336 There remains finally to consider the argument that the Court of Appeal erroneously construed s 31D(1)(a) as requiring the Supreme Court to determine an application for an examination order without taking into account the risk that such an examination may pose to the fair criminal trial of the proposed examinee. It did not. Nor did it treat s 63 as compelling any such conclusion.

337 The reasons for judgment of the Court of Appeal do not suggest that the CAR Act indicates a legislative intention that the Supreme Court should allow any proceedings under that Act to proceed if the circumstances of the case, other than the mere pendency of criminal proceedings against the examinee, were such as to reveal a real, as opposed to a speculative or theoretical, risk that the administration of justice would be adversely affected. The exigencies of criminal proceedings might well afford a ground for a refusal to make an order under s 31D(1)(a). For example, the timing of an application may be such as to prejudice the fair trial of a criminal charge because of the likely disruption of the preparation for, or conduct of, a trial which is imminent. As Beazley JA specifically noted[606], that possibility was not raised before the Court of Appeal as a consideration having a claim upon the discretion in the circumstances of this case. Had it been raised, it would obviously be a consideration which might properly be taken into account in exercising the discretion.

338 The significance attributed to s 63 by the Court of Appeal was correct. The discretion conferred on the Supreme Court by s 31D(1)(a) must be exercised consistently with the scheme of the CAR Act. The discretion would not be exercised consistently with the scheme of the CAR Act were the Supreme Court to decline to make an order under s 31D(1)(a) by reference only to circumstances in respect of which s 63 would prevent the making of an order staying proceedings on the application for an order under s 31D(1)(a). Section 63 prevents the staying of proceedings on an application for that order for the reason only that criminal proceedings against the person against whom the order is sought have been commenced but are not completed. The discretion conferred by s 31D(1)(a) would therefore not be exercised consistently with the scheme of the CAR Act if the Supreme Court declined to make the order sought for the reason only that criminal proceedings against the person in respect of whom the order was sought had been commenced but not completed.

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606 [2012] NSWCA 276 at [10]-[11].

339 The fact that the subject-matter of an examination would overlap with the subject-matter of existing criminal proceedings is a factor additional to that to which s 63 of the CAR Act is addressed. The existence of that additional factor, however, is not alone a sufficient reason to decline to make an order under s 31D(1)(a) where there is reason to consider that the making of the order might enable the Commission to obtain information about the criminal activity the suspicion or probability of which forms the basis of a confiscation order that is sought.

340 The additional factor alone gives rise to no more than a possibility that the implementation of the examination order might give rise to an interference with the administration of justice. That is the significance of the ability of the Supreme Court, or officer of the Supreme Court before whom the examination is conducted, to control the course of questioning and to make suppression or non-publication orders limiting the timing and scope of any use or dissemination by the Commission of answers given or documents produced. When it is appreciated that the conduct of the examination remains at all times subject to the supervision and protection of the Supreme Court, the possibility that the implementation of the examination order might give rise to an interference with the administration of justice does not rise to the level of a real risk merely because the subject-matter of the examination will overlap with the subject-matter of pending criminal proceedings against the person to be examined.

341 In finding that Hulme J erred in declining to make orders for the examination on oath of the appellants, the Court of Appeal was therefore correct to conclude that the Supreme Court cannot properly exercise the discretion conferred by s 31D(1)(a) to refuse to make an examination order for reason only that the subject-matter of the examination will overlap with the subject-matter of criminal proceedings against the person to be examined that have commenced but that are not completed.

342 Given that Hulme J accepted that Jason Lee and Seong Lee were prima facie capable of giving evidence on the topics referred to in the orders sought by the Commission (concerning respectively the affairs of Jason Lee and the affairs of Jason Lee and Elizabeth Park, including the nature and location of any property in which they had an interest), there was no reason for his Honour not to make those orders.

Orders

343 The appeal should be dismissed with costs.