HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

COMMONWEALTH OF AUSTRALIA APPELLANT

AND

HELICOPTER RESOURCES PTY LTD & ORS RESPONDENTS

Commonwealth of Australia v Helicopter Resources Pty Ltd
[2020] HCA 16
Date of Hearing: 10 October 2019 & 5 February 2020
Date of Judgment: 24 April 2020
S217/2019

ORDER

1. *The first respondent's application for leave to file a notice of contention is refused.*

2. *Appeal allowed.*

3. *Set aside orders 1 and 2(a) of the orders of the Full Court of the Federal Court of Australia made on 15 February 2019 and, in their place, order that the appeal to the Full Court be dismissed.*

4. *The appellant pay the first respondent's reasonable costs on a solicitor/client basis.*

On appeal from the Federal Court of Australia

Representation

S P Donaghue QC, Solicitor-General of the Commonwealth, with T M Begbie and J D Watson for the appellant (instructed by Australian Government Solicitor)

J T Gleeson SC with T J Brennan and K I H Lindeman for the first respondent (instructed by Norton White)

Submitting appearances for the second and third respondents

CATCHWORDS

Commonwealth of Australia v Helicopter Resources Pty Ltd

Criminal practice – Accusatorial system of criminal justice – Companion rule – Where subpoena issued for employee to attend to give evidence at coronial inquest into manner and cause of another employee's death – Where employer and Commonwealth of Australia prosecuted for alleged failures to comply with duty to ensure worker health and safety – Where s 87(1)(b) of *Evidence Act 2011* (ACT) relevantly entailed that representation by employee of party relating to matter within scope of employment taken as admission by that party – Whether invocation of investigative power to compel employee to give evidence about matter with respect to which employer stands charged amounts to compelling employer to give evidence contrary to rule that accused not required to assist Crown in proving its case.

High Court – Appellate jurisdiction – Practice – Extension of time – Where first respondent sought leave to file notice of contention out of time alleging that compulsion of its employee to give evidence at coronial inquest would constitute contempt of court in parallel criminal proceedings by creating real risk of interference with justice according to law – Where criminal proceedings concluded and first respondent acquitted of offences – Whether extension of time should be granted to resolve question of whether compulsory examination of potential witness other than accused can amount to contempt of court.

Words and phrases – "accusatorial system of criminal justice", "admissions made with authority", "attribution", "companion rule", "compulsory investigative powers", "compulsory pre-trial examination", "contempt of court", "coronial inquest", "extension of time", "hypothetical circumstances", "practical reality", "real risk of improper interference with criminal proceedings".

Coroners Act 1997 (ACT), ss 36, 43, 58(6).
Evidence Act 2011 (ACT), s 87(1)(b).

1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ. This is an appeal from a judgment of the Full Court of the Federal Court of Australia concerning the operation of s 87(1)(b) of the *Evidence Act 2011* (ACT)[1]. That provision relevantly entails that a representation by an employee of a party may be taken as an admission by the party if the representation relates to a matter within the scope of the employee's employment.

2 The principal question is whether the provision has the effect that invocation of an investigative power to compel an employee to give evidence about a matter with respect to which his or her employer stands charged with a criminal offence amounts to compelling the employer to give evidence contrary to the rule that an accused cannot be required to assist the Crown in proving its case. For the reasons which follow, it does not. Thus, it is unnecessary to address the appellant's other appeal grounds.

Section 87(1)(b) of the *Evidence Act*

3 Section 87 of the *Evidence Act* provides as follows:

> "**Admissions made with authority**
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> (1) For the purpose of deciding whether a previous representation made by a person is also taken to be an admission by a party, the court must admit the representation if it is reasonably open to find that –
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> (a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter in relation to which the representation was made; or
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> (b) when the representation was made, *the person was an employee of the party*, or had authority otherwise to act for the party, *and the representation related to a matter within the scope of the person's employment* or authority; or
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> (c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the person had with the party or 1 or more people including the party.

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1 *Helicopter Resources Pty Ltd v The Commonwealth* (2019) 264 FCR 174.

(2) For this section, the hearsay rule does not apply to a previous representation made by a person that tends to prove –

(a) that the person had authority to make statements on behalf of someone else in relation to a matter; or

(b) that the person was an employee of someone else or had authority otherwise to act for someone else; or

(c) the scope of the person's employment or authority." (emphasis added)

The facts

4 The appellant ("the Commonwealth") engaged the first respondent ("Helicopter Resources") to provide helicopter services to the Commonwealth in connection with Commonwealth operations in the Australian Antarctic Territory. On 11 January 2016, Captain David Wood, a pilot employed by Helicopter Resources to provide some of those services, landed his helicopter at a point on the West Ice Shelf where, unbeknownst to him, a crevasse lay hidden by snow. After undertaking work on the ground, Captain Wood fell into the crevasse while attempting to reboard the helicopter and remained there for some hours. He died the following day from hypothermia.

5 By virtue of s 6 of the *Australian Antarctic Territory Act 1954* (Cth), applicable laws of the Australian Capital Territory including the *Coroners Act 1997* (ACT) apply in the Australian Antarctic Territory. Pursuant to the *Coroners Act*, on 19 September 2017 the Chief Coroner of the Australian Capital Territory commenced an inquest into the manner and cause of Captain Wood's death. The evidence before the Coroner included a statement by Helicopter Resources' Chief Pilot, Captain David Lomas, that was prepared for the purpose of the inquest.

6 By virtue of s 11 of the *Work Health and Safety Act 2011* (Cth) ("the WHS Act"), the WHS Act extends to every external Territory, including the Australian Antarctic Territory[2]. Under s 10 of the WHS Act, the Commonwealth is relevantly

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2 *Australian Antarctic Territory Acceptance Act 1933* (Cth); cf *Acts Interpretation Act 1901* (Cth), s 2B (definition of "Australia"); *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 331 [7] per Gleeson CJ, McHugh and Callinan JJ.

bound by, and may be liable for an offence against, the WHS Act. By information and summons laid on behalf of Comcare, the work health and safety regulator, in the Magistrates Court of the Australian Capital Territory on 20 December 2017, the Commonwealth (acting through the Department of the Environment and Energy) and Helicopter Resources were each charged as co-accused with three summary criminal offences against s 32 of the WHS Act.

7 The charges were apparently prosecuted by the Commonwealth Director of Public Prosecutions on instructions from Comcare. They alleged that failures to comply with the duty to ensure worker health and safety[3] in three separate incidents had exposed workers to risks of serious injury or death. The second and third charges alleged breaches in relation to Captain Wood and another employee. The third charge arose directly out of the circumstances giving rise to Captain Wood's death.

8 As the Commonwealth and Helicopter Resources had different safety responsibilities in the Australian Antarctic Territory, they were likely to take different positions in both the coronial inquest and the criminal proceedings. By letter to the Coroner dated 31 January 2018, the Commonwealth requested that Captain Lomas be made available for cross-examination at the coronial inquest, on topics including Helicopter Resources' relationship with the Commonwealth in relation to responsibilities for risk identification and management.

9 Helicopter Resources applied to have the inquest adjourned, pursuant to s 36 or s 58(6) of the *Coroners Act*, pending the determination of the criminal proceedings. The Coroner refused that application and issued a subpoena for Captain Lomas to attend to give evidence pursuant to s 43 of the *Coroners Act*. Helicopter Resources then sought, but the Coroner refused, a direction that the examination of Captain Lomas not extend to matters arising in the criminal proceedings.

10 It is not in dispute that the matters on which it was proposed to cross-examine Captain Lomas at the coronial inquest were matters within the scope of his employment or authority within the meaning of s 87(1)(b) of the *Evidence Act*.

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3 WHS Act, s 19.

Proceedings at first instance

11 Helicopter Resources applied to the Federal Court for judicial review of the Coroner's decision to issue the subpoena. The basis of the application was that to compel Captain Lomas to give evidence at the coronial inquest on the proposed topics would prejudice Helicopter Resources in the criminal proceedings, and undermine the accusatorial nature of the criminal process, in two ways: first, by giving the Commonwealth, as co-accused, the forensic advantage of exploring the evidence that Captain Lomas might give if called in the criminal proceedings, which advantage would not be available under the ordinary rules of criminal procedure; and, secondly, by arming the prosecution with evidence and admissions, attributable to Helicopter Resources pursuant to s 87(1)(b) of the *Evidence Act*, which could be tendered in the criminal proceedings.

12 On 29 June 2018, the primary judge (Bromwich J) dismissed the application. His Honour reasoned[4] that, although the accusatorial nature of criminal proceedings prevents the rights and privileges of an accused from being overridden without clear statutory authority, it was Captain Lomas, not Helicopter Resources, who was proposed to be examined at the coronial inquest, and Captain Lomas was in no "different position [from] any other witness who may be called at any inquest". It followed, in his Honour's view, that the forensic disadvantages identified by Helicopter Resources did not constitute an improper interference of the kind required by the authorities[5]. Alternatively, Bromwich J held[6] that, even if

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4 *Helicopter Resources Pty Ltd v The Commonwealth [No 2]* [2018] FCA 991 at [114], [116]-[117].

5 *Helicopter Resources Pty Ltd v The Commonwealth [No 2]* [2018] FCA 991 at [115], [120], citing *Hammond v The Commonwealth* (1982) 152 CLR 188, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, *Lee v The Queen* (2014) 253 CLR 455, *X7 v Australian Crime Commission* (2013) 248 CLR 92, *R v OC* (2015) 90 NSWLR 134, *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 ("*BLF*") and *Royal Commission into Certain Crown Leaseholds [No 2]* [1956] St R Qd 239 ("*Townley Royal Commission [No 2]*").

6 *Helicopter Resources Pty Ltd v The Commonwealth [No 2]* [2018] FCA 991 at [147], [149].

a real risk to the administration of criminal justice had been established, Helicopter Resources' application to stay the subpoena was premature as any interference may not eventuate.

Proceedings before the Full Court

13 Helicopter Resources appealed to the Full Court on the ground that the primary judge had erred in failing to hold that the compulsory cross-examination of Captain Lomas at the coronial inquest would constitute an impermissible interference with the administration of criminal justice. Helicopter Resources argued that it is a fundamental feature of the accusatorial system of criminal justice in Australia that neither the prosecution nor a co-accused is permitted a process of compulsory pre-trial examination of persons who may be summonsed to give evidence at trial, as part of either the prosecution or a co-accused's case.

14 The Full Court (Rares, McKerracher and Robertson JJ) did not accept that argument. Their Honours observed[7] that the decision of this Court in *Environment Protection Authority v Caltex Refining Co Pty Ltd*[8] "stands against the proposition that, of itself, the accusatorial nature of a criminal trial of a corporation means that an officer of the corporation may not be required to answer questions which tend to incriminate the corporation". Their Honours also observed[9] that the so-called "companion rule" – "that an accused person cannot be required to testify" – "is not engaged [where] ... the prosecution is not seeking to compel the person charged with the crime ... to assist in the discharge of the prosecution's onus of proof".

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7 *Helicopter Resources Pty Ltd v The Commonwealth* (2019) 264 FCR 174 at 210 [143], see also at 216 [174].

8 (1993) 178 CLR 477.

9 *Helicopter Resources Pty Ltd v The Commonwealth* (2019) 264 FCR 174 at 217 [183].

15 But having so concluded, the Full Court then posed[10] for themselves the question "Does s 87 of the ... *Evidence Act* have the effect that [Helicopter Resources] is being so compelled?", which their Honours answered[11] as follows:

> "In our opinion, the crucial and dispositive consideration in relation to the issue of interference is that if Captain Lomas were compelled to give evidence in the inquest, as a matter of practical reality, [Helicopter Resources'] position as an accused corporation in the criminal proceedings would be altered fundamentally[12]. That is because s 87(1)(b) of the ... *Evidence Act* would make his evidence admissible, not merely as evidence of a witness of fact, but as evidence of an admission by [Helicopter Resources] itself."

No compulsion of the accused

16 The Full Court were correct not to accept the argument that compulsory pre-trial examination of a potential witness is inconsistent with the accusatorial system of criminal justice in Australia. Inquisitorial processes involving compulsory pre-trial examination by executive officers have formed part of English criminal procedure since the reign of Queen Mary[13], and the nineteenth century reforms which enshrined much that is fundamental to the accusatorial

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10 *Helicopter Resources Pty Ltd v The Commonwealth* (2019) 264 FCR 174 at 217 [184].

11 *Helicopter Resources Pty Ltd v The Commonwealth* (2019) 264 FCR 174 at 218-219 [189].

12 *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 93 ALJR 1 at 18-19 [77]-[81] per Kiefel CJ, Bell and Nettle JJ; 361 ALR 23 at 42-43.

13 Statute 1 & 2 Ph & M c 13 (1554-5); Statute 2 & 3 Ph & M c 10 (1555). See *Grassby v The Queen* (1989) 168 CLR 1 at 11 per Dawson J; *Azzopardi v The Queen* (2001) 205 CLR 50 at 96-97 [136] per McHugh J; *Crawford v Washington* (2004) 541 US 36 at 43-44 per Scalia J for the Court; *Australian Crime Commission v Stoddart* (2011) 244 CLR 554 at 628 [204] per Crennan, Kiefel and Bell JJ.

system of criminal justice, here as in England[14], retained compulsory pre-trial examination of witnesses, as distinct from the accused, in committal proceedings[15].

17 The Full Court were also correct in holding that the compulsory pre-trial examination of a potential witness does not engage the general rule that an accused cannot be required to assist the Crown in proof of its case. That rule has been identified as a companion to the fundamental principle that the burden is upon the Crown to prove the guilt of an accused beyond reasonable doubt[16]. It applies to an accused, not a witness or potential witness other than the accused; and, self-evidently, the compulsory examination of a potential witness other than the accused does not in itself involve any compulsion of the accused to give evidence or otherwise to assist the Crown in proof of its case. Contrary to the Full Court's reasoning, however, that is so even where s 87(1)(b) of the *Evidence Act* has the effect that representations by the potential witness in the compulsory examination may be taken as admissions by the accused in the criminal proceedings.

18 Section 87(1)(b) of the *Evidence Act* departs from the common law primarily by extending the range of employees and agents whose representations may be treated as admissions against their employers or principals: from those having authority to make representations on the latter's behalf[17] to those not so

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14 See Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900* (2002) at 385-386; *X7* (2013) 248 CLR 92 at 135 [100] per Hayne and Bell JJ.

15 *Indictable Offences Act 1848* (UK) (11 & 12 Vict c 42). See Stephen, *A History of the Criminal Law of England* (1883), vol 1 at 220-221; *Sorby v The Commonwealth* (1983) 152 CLR 281 at 319 per Brennan J.

16 *Caltex Refining* (1993) 178 CLR 477 at 503 per Mason CJ and Toohey J; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 265-266 [175] per Kiefel J; *Lee v The Queen* (2014) 253 CLR 455 at 467 [33] per French CJ, Crennan, Kiefel, Bell and Keane JJ; *R v Independent Broad-Based Anti-Corruption Commissioner* (2016) 256 CLR 459 at 472 [44] per French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ.

17 eg *Fairlie v Hastings* (1804) 10 Ves Jun 123 at 126-127 per Grant MR [32 ER 791 at 792]; Starkie, *A Practical Treatise on the Law of Evidence, and Digest of Proofs, in Civil and Criminal Proceedings* (1824), vol 2, pt 4 at 60; *United States v Gooding*

authorised but whose representations relate to a matter within the scope of their employment or authority[18]. Thus, it may be accepted that, where an employee is compelled to give evidence about such matters, the employee is thereby compelled to give evidence that may be taken to be an admission by his or her employer. The provision does not, however, involve any "singular change" to the accusatorial system of criminal justice. To the contrary, the common law's "strict insistence upon the distinction between the agent's authority to act and his authority to speak concerning his action" was pilloried by Wigmore as making "a laughing-stock out of court methods"[19], and, for similar reasons, Sir Rupert Cross considered[20] it preferable to abandon the common law rule in favour of r 63(9) of the American *Uniform Rules of Evidence* as promulgated in 1953[21]. Hence, as the Australian Law

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(1827) 25 US 460 at 469 per Story J for the Court; *Garth v Howard* (1832) 8 Bing 452 at 453 per Tindal CJ [131 ER 468 at 468]; *Kirkstall Brewery Co v Furness Railway Co* (1874) LR 9 QB 468 at 472 per Archibald J; *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100 at 133-136 per Williams J.

18 cf *Langhorn v Allnutt* (1812) 4 Taunt 511 at 519 per Gibbs J [128 ER 429 at 432]; *The Great Western Railway Co v Willis* (1865) 18 CB (NS) 748 at 756-757 per Erle CJ [144 ER 639 at 642]; *Packet Co v Clough* (1874) 87 US 528 at 540-541 per Strong J for the Court; *New South Wales Country Press Co-operative Co Ltd v Stewart* (1911) 12 CLR 481 at 491 per Griffith CJ.

19 Wigmore, *Evidence in Trials at Common Law*, Chadbourn rev (1972), vol 4, §1078, n 2 at 166.

20 Byrne and Heydon, *Cross on Evidence*, 4th Aust ed (1991) at 935.

21 National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Evidence* (1954), s 63(9), relevantly providing an exception to the hearsay rule, "[a]s against a party", for "a statement which would be admissible if made by the declarant at the hearing if (a) the statement concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of such relationship". See and compare *Federal Rules of Evidence* (US), r 801(d)(2)(D).

Reform Commission explained[22] in the recommendation that spawned s 87(1)(b), the change which it effected was to improve the fairness of the adversary process:

> "The primary argument for permitting an 'admission' by a third party to be proved against a party is based on the adversary nature of the trial system. It is fair to allow a party to be held responsible for an assertion made by a third party if that third party is an agent of the party acting under his authority. Thus, an admission made by a managing director should be admissible against the company, even if arguably unreliable, because he either had actual authority to make the admission or was put in a position where a reasonable observer would assume he had such authority. ... [I]t would seem that *the best approach is to impose a requirement of authority to speak or a requirement that the statement relate to an area of personal responsibility*." (emphasis added)

19 Certainly, s 87(1)(b) means that a previous representation made by an employee related to a matter within the scope of his or her employment and adverse to the interest of his or her employer in the outcome of the proceeding[23] may be taken as an admission by the employer. And such attribution may occur even where the representation is made under compulsion of law, rather than volunteered by the employee. But the fact that an employee can be compelled to give evidence that may be treated as an admission against the employee's employer does not mean that the employer is thus compelled *in effect* to give evidence or otherwise to assist the Crown in proof of its case. Section 87(1)(b) does not require the employer to make the employee available on behalf of the employer or to authorise him or her to make admissions on the employer's behalf. Essentially, it does no more than create a rule that an employee's representations as to matters within the scope of the employee's employment may be treated as admissions against the employer. In the circumstances postulated, the obligation to give evidence is a personal obligation of the employee, and the consequences of the employee so giving evidence are ordained by s 87(1)(b) on the basis of the nature of the relationship between employee and employer that was voluntarily created by the employer.

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22 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 422-423 [755].

23 *Evidence Act*, Dictionary, Pt 1 (definition of "admission").

20 Contrary to Helicopter Resources' submissions, there is nothing fundamental to the accusatorial system of criminal justice that requires that an accused employer be free to prevent statements of an employee from being used as evidence against the employer. And contrary to Helicopter Resources' submissions, it makes no difference that the employee in question may be of *central* importance to the employer's defence. An accused has no property in a witness or potential witness[24], even one who may be identified as the guiding mind of the accused or whose answers may be attributable to the accused. As Mason J explained in *A v Hayden*[25], the "interest in the enforcement of the criminal law" is "a fundamental head of public policy", and it implies "a powerful public interest in promoting and preserving the citizen's freedom to assist and co-operate with the authorities in the investigation and prosecution of crime". Thus, terms of employment and other contractual arrangements that purport to prohibit an employee from giving evidence in criminal proceedings, even as against his or her employer, are unenforceable as contrary to public policy[26].

21 Finally, the Full Court supported their decision with reference to the plurality's conclusion in *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)*[27] that the unlawful examination of accused persons about matters in relation to which they were likely to be charged would, as a matter of practical reality, fundamentally alter the position of those persons in subsequently instituted criminal proceedings. But the Full Court's reliance on that conclusion

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24 *Harmony Shipping Co SA v Saudi Europe Line Ltd* [1979] 1 WLR 1380 at 1384-1385 per Lord Denning MR; [1979] 3 All ER 177 at 180-181; *In re L (A Minor)* [1997] AC 16 at 34 per Lord Nicholls of Birkenhead. But see *New South Wales v Jackson* [2007] NSWCA 279 at [33], [59] per Giles JA (Mason P and Beazley JA agreeing at [1], [2]).

25 (1984) 156 CLR 532 at 553, 555.

26 *Collins v Blantern* (1767) 2 Wils KB 347 at 349 per Wilmot LCJ [95 ER 850 at 852]; *Harmony Shipping* [1979] 1 WLR 1380 at 1386 per Lord Denning MR; [1979] 3 All ER 177 at 182; *A v Hayden* (1984) 156 CLR 532 at 543 per Gibbs CJ, 554 per Mason J. See and compare *Weld-Blundell v Stephens* [1919] 1 KB 520 at 528 per Bankes LJ, 535 per Warrington LJ, 545, 547 per Scrutton LJ, affd *Weld-Blundell v Stephens* [1920] AC 956.

27 (2018) 93 ALJR 1; 361 ALR 23.

was misplaced. *Strickland* was concerned with grossly unlawful interrogation of persons who it was known or believed would shortly be charged with criminal offences. In holding that the administration of justice would be brought into disrepute unless the extraordinary remedy of a permanent stay of prosecution were granted, the plurality relied on that gross unlawfulness and the indeterminate element of incurable prejudice arising, as a matter of practical reality, from the widespread, uncontrolled dissemination of the examination product, including to federal prosecutors.

22 *Strickland* had nothing to do with the lawfulness of compulsory interrogation of potential third-party witnesses. In particular, the plurality in *Strickland* did not suggest, and the decision does not support, the notion that appears to have found favour with the Full Court that, because an otherwise lawful compulsory investigative procedure may result in a witness making representations that can be treated as an admission against an accused in subsequent criminal proceedings, the deployment of that procedure amounts, without more, to a breach of the companion rule or other interference with the accusatorial system of criminal justice. To the contrary, as this Court made clear in *R v Independent Broad-Based Anti-Corruption Commissioner*[28], if a compulsory investigative procedure is sufficiently authorised by statute, it may be invoked notwithstanding that, as a matter of practical reality, the result will fundamentally alter the ability of an accused to defend charges that may have been or may be laid against him or her.

Contempt

23 At first instance, Helicopter Resources' principal argument was that to compel Captain Lomas to give evidence at the coronial hearing, before the conclusion of the criminal proceedings, would constitute a contempt of court. The argument was based on a number of authorities[29] in which the courts have considered whether the examination of a person while parallel criminal

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28 (2016) 256 CLR 459.

29 *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73 at 84-85 per Latham CJ; *Townley Royal Commission [No 2]* [1956] St R Qd 239; *BLF* (1982) 152 CLR 25 at 53-54 per Gibbs CJ; *Hammond* (1982) 152 CLR 188 at 198-199 per Gibbs CJ; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.

proceedings against the person are pending involves an improper interference with the due administration of criminal justice.

24 The primary judge rejected the argument. His Honour observed[30] that the cases on which Helicopter Resources relied were all matters in which it was sought to compel an accused person to give evidence and none of them supported the broader proposition for which Helicopter Resources contended, that the compulsory examination of an employee of an accused person involves an improper interference with the due administration of justice. In turn, his Honour relied[31] on a critical distinction between something that rises to the level of interference with criminal proceedings and the mere potential for an executive or quasi-executive inquiry to have an effect on the interests of the accused in criminal proceedings. As no improper interference was established, his Honour concluded[32] that it was difficult to see how the compulsory examination could amount to contempt.

25 Before the Full Court, Helicopter Resources pressed its claim that the compulsory examination of Captain Lomas might amount to a contempt of court. But, as has been seen[33], the Full Court decided the matter on the narrower basis that, because s 87(1)(b) of the *Evidence Act* would make Captain Lomas' evidence before the Coroner admissible as evidence of an admission by Helicopter Resources, the effect of compelling Captain Lomas to give evidence was to compel Helicopter Resources to give evidence against itself.

26 When the Commonwealth's application for special leave to appeal from the Full Court's decision came on for hearing on 21 June 2019, it was anticipated that the criminal proceedings would be concluded before the appeal to this Court could be heard. Helicopter Resources thus opposed the application for special leave on the basis that, regardless of the outcome of the appeal, it would be devoid of

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30 *Helicopter Resources Pty Ltd v The Commonwealth [No 2]* [2018] FCA 991 at [115].

31 *Helicopter Resources Pty Ltd v The Commonwealth [No 2]* [2018] FCA 991 at [119].

32 *Helicopter Resources Pty Ltd v The Commonwealth [No 2]* [2018] FCA 991 at [115], [120].

33 See [14]-[15] above.

practical utility. But Helicopter Resources otherwise expressed no interest in opposing the appeal, so long as the Commonwealth agreed to pay its costs of the appeal on a solicitor/client basis, much less an intention to defend the Full Court's orders on any basis other than that the Full Court were correct as to the effect of s 87(1)(b). In the result, special leave to appeal was granted on amended grounds that the Full Court erred as to the meaning and effect of s 87 of the *Evidence Act*, and thus as to the scope and effect of the accusatorial principle, by treating that provision as preventing an employee of a corporation from being compelled to provide evidence relevant to pending criminal charges against that corporation; and the grant of special leave was conditioned on the Commonwealth paying Helicopter Resources' solicitor/client costs of the appeal.

27 Subsequently, Helicopter Resources sought leave to file a notice of contention, out of time, to the effect that, if the Full Court were not correct in their construction of s 87, the Full Court's decision should be upheld on the basis that compelling Captain Lomas to give evidence at the coronial inquest would constitute a contempt of court by creating a real risk of interference with justice according to law. The Commonwealth opposed the application as inappropriate given the circumstances in which, and the basis on which, special leave to appeal was granted. In order, however, to decide whether it was appropriate to extend time for the filing of the notice of contention, counsel for Helicopter Resources was allowed to present full argument in support of the contention and the Commonwealth was heard in reply.

28 Having heard the argument, we are not disposed to grant the extension of time that is sought. As was anticipated at the time of granting special leave, the criminal proceedings have now concluded; and Helicopter Resources was acquitted of the offences with which it was charged. Consequently, any decision as to whether the issue of the subpoena for the compulsory examination of Captain Lomas was a contempt of court is no longer of interest to Helicopter Resources, and Helicopter Resources will suffer no prejudice if that question remains undetermined.

29 Moreover, whether an exercise of compulsory investigative powers creates a real risk of improper interference with criminal proceedings, and thus amounts to a contempt of court, turns on questions of fact and degree dependent on all the

circumstances of the case[34]. In the result, any determination of whether the subpoena issued to Captain Lomas amounted to a contempt of the criminal proceedings in this case would be unlikely to provide any meaningful guidance for the determination of the issue in another, different case. Possibly, it might assist in resolving the fundamental question of whether the compulsory examination of a potential witness other than an accused can ever amount to a contempt of court. But it would be more likely to generate a perception of certainty that would not be warranted. It cannot be foretold what circumstances might arise in other proceedings, and it would be inappropriate for this Court to conjecture as to hypothetical circumstances in which contempt might be established by the compulsory examination of a third party[35].

Conclusion

30 For these reasons, leave to file the notice of contention should be refused, and the appeal should be allowed. Orders 1 and 2(a) of the Full Court should be set aside, and, in their place, it should be ordered that the appeal to the Full Court be dismissed. In accordance with the conditions on the grant of special leave, the Commonwealth shall pay Helicopter Resources' reasonable costs on a solicitor/client basis.

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34 See, eg, *Johns & Waygood Ltd v Utah Australia Ltd* [1963] VR 70 at 73-75 per Sholl J; *Brambles Holdings Ltd v Trade Practices Commission* (1980) 32 ALR 328; *BLF* (1982) 152 CLR 25 at 54 per Gibbs CJ; *Hammond* (1982) 152 CLR 188 at 198 per Gibbs CJ; *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460 at 467-468 per Gibbs CJ; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 275 [206]-[207] per Kiefel J.

35 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 356-357 [48] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; cf *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135 at 154-155 [33]-[34] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ.

EDELMAN J.

Introduction: a moot question of law

31 Captain Wood was a pilot employed by Helicopter Resources Pty Ltd. He had unknowingly landed a helicopter on a hidden crevasse of ice in the Australian Antarctic Territory. He later fell into the crevasse when attempting to board the helicopter and subsequently died of hypothermia. The laws of the Australian Capital Territory apply in the Australian Antarctic Territory[36].

32 A coronial inquest into Captain Wood's death was held by the Chief Coroner of the Australian Capital Territory. The bulk of the evidence in the inquest was taken between 19 September 2017 and 11 October 2017. On 20 December 2017, whilst the inquest was in progress but nearing its end, Helicopter Resources and the Commonwealth of Australia were charged by information and summons in the Magistrates Court of the Australian Capital Territory with three offences against s 32 of the *Work Health and Safety Act 2011* (Cth)[37]. The third charge arose from the circumstances of Captain Wood's death. The Chief Coroner invited the parties to the inquest to make any applications in respect of the progress of the inquest in light of the laying of those charges. By that time, only one, or possibly two, witnesses remained to be examined in the inquest. A remaining witness was Captain Lomas, the Chief Pilot of Helicopter Resources with control over all flight crew training and operational matters affecting the safety of the flying operations.

33 On 31 January 2018, at the heel of the hunt, the Commonwealth requested that Captain Lomas be made available for cross-examination at the inquest. Helicopter Resources applied for an adjournment of the inquest pending the determination of the criminal proceeding. The Chief Coroner refused the adjournment application but issued a subpoena for Captain Lomas to be available for cross-examination. The cross-examination was to include issues that were relevant to both the inquest and the criminal proceeding.

34 Helicopter Resources sought judicial review in the Federal Court of Australia of the Chief Coroner's decision to issue the subpoena. It was not suggested that the request was made, or the subpoena issued, for the purpose of obtaining Captain Lomas' evidence for use in the criminal proceeding. Instead, Helicopter Resources submitted that the Chief Coroner had no power to issue the subpoena because doing so would give rise to a real risk of improper

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36 *Australian Antarctic Territory Act 1954* (Cth), s 6(1).

37 Applicable in the Australian Antarctic Territory: see *Work Health and Safety Act 2011* (Cth), s 11.

interference with the due administration of criminal justice. The application was dismissed by Bromwich J. The essence of his Honour's reasoning was that there can be no real risk of improper interference with the due administration of criminal justice if compulsion to give evidence in a forum external to an extant criminal process is exerted over a witness, provided that it is not asserted over the accused[38]. The Full Court of the Federal Court of Australia (Rares, McKerracher and Robertson JJ) allowed an appeal and ordered a stay of the operation of the subpoena and of any further subpoena issued to Captain Lomas.

35 Before the oral hearing in this Court had been completed, the coronial inquest concluded without the cross-examination of Captain Lomas. The criminal proceeding against Helicopter Resources and the Commonwealth was also completed, with the former being acquitted and the latter being convicted. It was clear during the oral hearing that the resolution of this issue no longer had any relevance for any party to this litigation, not even as to costs. Helicopter Resources appeared in this Court only to assist as a contradictor, without any liability for costs.

36 The Commonwealth has standing to appeal as it was the unsuccessful respondent to the appeal before the Full Court. But the Commonwealth's only practical interest is effectively to obtain advice from this Court relevant to future coronial inquests. Even then, any advice from this Court might have little utility in future cases other than potentially to endorse or to exclude only one possible path of reasoning in cases raising the same set of facts. The limited utility of reasons from this Court arises if the Commonwealth successfully resists an application by Helicopter Resources for leave to file a notice of contention out of time, which Helicopter Resources sought out of an abundance of caution to ensure only that it could address what Helicopter Resources submits is the better interpretation of the reasons of the Full Court.

37 In short, the position of the Commonwealth is to seek the advice of this Court as to a legal issue that will have no effect on the parties to this litigation and will not even be dispositive of the identical fact scenario in future cases. For this reason, I would have acceded to the submission of Helicopter Resources that special leave should be revoked. If special leave were maintained, I would have granted leave for Helicopter Resources to file its notice of contention out of time so that this Court could address the whole of the legal issue without distraction about the precise interpretation of the reasons of the Full Court on a point that no longer affects either party to this litigation.

38 Since neither of those courses is preferred by a majority of this Court, the preliminary question is the dispute between the Commonwealth and Helicopter

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38 *Helicopter Resources Pty Ltd v The Commonwealth [No 2]* [2018] FCA 991 at [114]-[115].

Resources concerning the interpretation of the reasons of the Full Court. Not without considerable hesitation, I agree with the interpretation adopted in the joint judgment in this Court, with the effect that the Full Court did not decide the primary submission which was raised before it by Helicopter Resources. Therefore, all that remains are the narrow legal issues, as expressed by the Commonwealth, (i) whether s 87(1)(b) of the *Evidence Act 2011* (ACT) has the effect that an admission by an employee in relation to a matter within the scope of their employment is taken to be an admission by the employer, and, if so, (ii) by reason of that alone, whether the employee of a corporation cannot be compelled to provide evidence that is relevant to pending criminal charges against the corporation. The answers are "yes" and "no".

The legal issue

The central issue raised before the primary judge and the Full Court

39 The principal argument made by Helicopter Resources before the primary judge, before the Full Court, and before this Court was that, in all the circumstances of the case, to compel Captain Lomas to give evidence at the coronial inquest would, as a matter of "practical reality"[39], create a real risk of improper interference with the due administration of criminal justice. This is not the legal issue that remains for determination in this Court.

40 The primary judge did not make findings about all the circumstances of the case, including the purpose or purposes for which the subpoena was sought by the Commonwealth. Instead, the reason the primary judge rejected the submission by Helicopter Resources was his Honour's division of interferences with the due administration of justice into categories of "direct" and "indirect" interferences, and his view that compulsion over a third party would only have an indirect effect on a criminal proceeding and could never interfere with the fair accusatorial trial of an accused person[40]. There are difficulties with this novel taxonomy. An enquiry into whether an act creates a real risk of improper interference with the due administration of justice always requires consideration of all the circumstances of the act, including its purpose[41]. There has never been a different test for interferences, or a sub-classification of them, according to the manner in which

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39 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 315 [323].

40 *Helicopter Resources Pty Ltd v The Commonwealth [No 2]* [2018] FCA 991 at [112]-[114].

41 *Clough v Leahy* (1904) 2 CLR 139 at 161-162; *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 53.

such a risk arises. Nor has this Court ever automatically excluded a consideration of a risk of improper interference based upon the source of the risk. For instance, in the context of considering an order for examination of a person against whom criminal proceedings are in progress, in *Lee v New South Wales Crime Commission*[42] Gageler and Keane JJ expressed the issue as whether the act would give rise to a real risk of interference with the administration of justice "by interfering with the right of the person to be examined *(or any other person)* to a fair trial".

41 Helicopter Resources appealed to the Full Court. The first ground of Helicopter Resources' appeal was expressed in a binary manner, abstracted from the particular circumstances of the case. It was asserted in that ground that an essential feature of the criminal justice system in Australia was that neither a prosecutor nor a co-accused on a summary charge be permitted to examine by compulsion persons who might be summoned to give evidence as part of the case against an accused person. Despite this, the appeal was argued by Helicopter Resources, quite properly, with a careful focus upon the particular circumstances of the case. As the Full Court explained, the issue raised by Helicopter Resources was whether, having regard to all of the circumstances, "there has been, or will be, an interference with the due administration of criminal justice amounting to contempt of court or otherwise constituting an impermissible interference with the criminal proceedings"[43].

42 Helicopter Resources submitted that the reasons of the Full Court in response to this submission contained four strands: (i) the compelled examination of Captain Lomas would involve the "locking in" of the account of a witness central to the defence; (ii) s 87(1)(b) of the *Evidence Act* has the effect that Captain Lomas' admissions in the examination would bind Helicopter Resources in the criminal proceeding; (iii) the compulsion would reveal the matters about which Captain Lomas will give evidence at the criminal trial, which could not otherwise be discovered without voluntary disclosure from Captain Lomas; and (iv) the compulsory examination would upset the balance in the criminal trial between the Commonwealth and its co-accused, Helicopter Resources.

43 Each of these strands appears in the reasons of the Full Court[44]. But they do not feature in the seven dispositive paragraphs of the Full Court's reasoning.

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42 (2013) 251 CLR 196 at 319 [335] (emphasis added).

43 *Helicopter Resources Pty Ltd v The Commonwealth* (2019) 264 FCR 174 at 198-199 [90].

44 *Helicopter Resources Pty Ltd v The Commonwealth* (2019) 264 FCR 174 at 215-216 [172]-[177], 217-218 [184]-[185], 218 [187]-[188].

Those paragraphs are the concluding paragraphs of the Full Court's consideration of this issue[45]. They begin with the Full Court rejecting the submission by Helicopter Resources that the prosecution was "seeking to compel [Helicopter Resources] to assist in the discharge of the prosecution's onus of proof". That rejection is expressed to be subject only to the reasoning that followed. The Full Court then asks whether "s 87 of the ACT *Evidence Act* [has] the effect that [Helicopter Resources] is being so compelled". After examining the operation of s 87(1)(b), and its consequences, the Full Court then concludes[46]:

> "In our opinion, the crucial and dispositive consideration in relation to the issue of interference is that if Captain Lomas were compelled to give evidence in the inquest, as a matter of practical reality [Helicopter Resources'] position as an accused corporation in the criminal proceedings would be altered fundamentally. That is because s 87(1)(b) of the ACT *Evidence Act* would make his evidence admissible, not merely as evidence of a witness of fact, but as evidence of an admission by [Helicopter Resources] itself. We therefore conclude that the primary judge erred in this respect".

44 For these reasons, although the primary submission by Helicopter Resources was one that focussed upon all of the circumstances of the case, and although the Full Court addressed central strands in that submission, I conclude, not without considerable hesitation and contrary to my initial impression, that the Full Court decided the issue by reasoning which did not depend upon those strands.

45 Since a majority of this Court has refused leave for Helicopter Resources to file its notice of contention out of time, and since I have concluded that the reasons of the Full Court of the Federal Court ultimately rest entirely upon the operation of s 87(1)(b) of the *Evidence Act*, the operation of that provision is the only matter that remains for consideration.

The operation of s 87(1)(b) of the *Evidence Act 2011* (ACT)

46 Under the *Evidence Act*, admissions, together with contemporaneous representations that are reasonably necessary to understand the admission, are an exception to hearsay[47]. An admission is defined in the Dictionary to the *Evidence*

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45 *Helicopter Resources Pty Ltd v The Commonwealth* (2019) 264 FCR 174 at 217-218 [183]-[189].

46 *Helicopter Resources Pty Ltd v The Commonwealth* (2019) 264 FCR 174 at 218-219 [189] (reference omitted).

47 *Evidence Act 2011* (ACT), s 81.

Act[48] as a "previous representation that is – (a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and (b) adverse to the person's interest in the outcome of the proceeding".

47 Prior to the *Evidence Act*, the position at common law was that an admission of an agent would be attributable to a principal who was party to the proceeding if the admission were made with authority, either actual (express or implied) or apparent[49]. The admission would be attributed to the principal if it were made in the course of acting with apparent authority such as where "the agent is authorized to represent the principal in any business, and the admissions are made in the ordinary course of, and with reference to, such business"[50]. Hence, an admission would be attributed if it were made as part of a communication which the agent was authorised to have with a third party[51]. Such an admission was, and was treated as, part of the course of acting with authority and thus binding upon the principal.

48 This common law approach naturally applies to attribute to an employer those admissions made by an employee within the scope of authority. As Dixon CJ expressed the common law in *Nominal Defendant v Hook*[52], the employee needs to be "the agent of the master to make admissions". The concept of an employee as an "agent to make admissions" means that the attribution to an employer of an employee's representations is difficult, because an employee generally has an authority to do acts that is far wider than an authority to speak about them[53].

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48 *Evidence Act 2011* (ACT), Dictionary, Pt 1, definition of "admission", read with s 3.

49 *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100 at 112-113; *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 481.

50 Phipson, *The Law of Evidence* (1892), bk 2 at 138. See also *United States v Gooding* (1827) 25 US 460 at 470.

51 Cross, *Evidence* (1958) at 433; 5th ed (1979) at 524-525, citing *Great Western Railway Co v Willis* (1865) 18 CB (NS) 748 [144 ER 639] and *Kirkstall Brewery Co v Furness Railway Co* (1874) LR 9 QB 468.

52 (1962) 113 CLR 641 at 645.

53 Cross, *Evidence* (1958) at 434-435, referring to *Johnson v Lindsay* (1889) 53 JP 599 and *Burr v Ware Rural District Council* [1939] 2 All ER 688. See also Cross, *Evidence*, 5th ed (1979) at 526, referring to *Price Yards Ltd v Tiveron Transport Co Ltd* (1957) 11 DLR (2d) 669.

49 The common law approach has been criticised. Wigmore criticised it as making a "laughing-stock of court methods"[54], and the author of a note on the leading English decision asked why, if authorisation is irrelevant to vicarious liability, "should it be vital in connexion with the admissibility of the servant's statement?"[55]. However, there were also defenders of the common law distinction as a matter of principle. Professor Morgan argued that it is "important to distinguish between authority to do an act and authority to talk about it". He added that B giving authority for A to do an act, X, "adds no whit of trustworthiness to A's narratives about X; nor does it furnish any grounds for depriving B of the usual protection against unexamined testimony"[56]. In a more restrained English style, and prior to a change of heart following the legislative amendment to hearsay in s 2 of the *Civil Evidence Act 1968* (UK), Sir Rupert Cross said of the distinction between attributing statements and attributing acts that[57]:

> "there is, perhaps, a little more to be said for it on the score of public policy than is sometimes supposed to be the case. If the servant's admission is made immediately after the accident it may often be admissible as part of the *res gestae*. The possibility of the reception of an admission made at a later date would be a temptation to a servant with nothing to lose from a finding of negligence against him."

50 In 1983, in a research paper prepared for the Australian Law Reform Commission during the development of the uniform evidence laws, Odgers suggested that the position was "uncertain where the admission, although unauthorised and not made in the course of an authorised communication, was made in the course of the [speaker's] employment"[58]. He referred to the breadth of Rule 801 of the United States *Federal Rules of Evidence*, which permitted as an exception to hearsay a statement by an agent or servant "concerning a matter within the scope of his agency or employment, made during the existence of the

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54 Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 2nd ed (1923), vol 2, §1078 at 586 fn 2. See also Cross, *Evidence* (1958) at 435; 5th ed (1979) at 527.

55 DWL, "Note" (1939) 55 *Law Quarterly Review* 490 at 491.

56 Morgan, "The Rationale of Vicarious Admissions" (1929) 42 *Harvard Law Review* 461 at 464.

57 Cross, *Evidence* (1958) at 435. Compare, after the 1968 legislation, Cross, *Evidence*, 5th ed (1979) at 527.

58 Odgers, *Admissions*, Australian Law Reform Commission Research Paper No 15 (1983) at 17 [21].

relationship", and recommended that the concept of "authorised admissions" be retained, but observed that the existing law was too strict and proposed an extension of the concept to capture admissions made with apparent authority[59].

51 The Law Reform Commission followed this approach. The Commission recommended that "[t]he present category of 'authorised admissions' ... be modified and expanded" by adoption of a rule that attributed admissions without authority if "the statement relate[s] to an area of personal responsibility"[60]. The Commonwealth *Evidence Act* was "based substantially on the recommendations of the Law Reform Commission in its report on Evidence"[61].

52 Section 87 of the *Evidence Act* is based upon the identically numbered equivalent provision of the *Evidence Act 1995* (Cth), with some modifications to "accord with the drafting style of the ACT" which were "not intended to change the meaning"[62] of the provision. The explanatory memorandum to the *Evidence Act 1995* (Cth) described the equivalent provision as setting out "the circumstances in which a representation made by another person is treated as being an admission made by a party"[63]. Amendments made after the issue of that explanatory memorandum were described as "drafting changes ... to clarify its operation"[64].

53 Section 87(1), as adopted in the Australian Capital Territory *Evidence Act*, provides as follows:

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59 Odgers, *Admissions*, Australian Law Reform Commission Research Paper No 15 (1983) at 115 [18], 278 [15].

60 Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985), vol 1 at 423.

61 Australia, House of Representatives, *Evidence Bill 1993*, Explanatory Memorandum at 1. See also Law Reform Commission, *Evidence*, Report No 38 (1987), Appendix A at 170-171.

62 Australian Capital Territory, Legislative Assembly, *Evidence Bill 2011*, Explanatory Statement at 3.

63 Australia, House of Representatives, *Evidence Bill 1993*, Explanatory Memorandum at 24.

64 Australia, House of Representatives, *Evidence Bill 1993*, Supplementary Explanatory Memorandum at 8.

"**Admissions made with authority**

(1) For the purpose of deciding whether a previous representation made by a person is also taken to be an admission by a party, the court must admit the representation if it is reasonably open to find that –

(a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter in relation to which the representation was made; or

(b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person's employment or authority ..."

54 Section 87(1)(a) is an attempt to state the common law concerning authority to make admissions. The effect of s 87(1)(b) is to extend the common law concerning apparent authority by treating a previous representation by an employee that is adverse to the employer's interest in the outcome of the proceeding as attributable to the employer if the representation "related to a matter within the scope of the person's employment".

55 The effect of s 87(1)(b) can be illustrated by reference to the circumstances of Captain Lomas. If Captain Lomas had made previous representations at a time and place other than the criminal trial, such as at the coronial inquest, and if those representations were related to a matter within the scope of his employment at that time and were adverse to the interest of Helicopter Resources in the criminal proceeding, then evidence could be led of those representations in the criminal proceeding. It would not matter if the representations were made without the authority of Helicopter Resources to make statements of that nature.

56 Contrary to the reasons of the Full Court, s 87(1)(b) did not have the effect that "requiring Captain Lomas to answer questions at the inquest would be compelling [Helicopter Resources] to answer questions", nor did it have the effect of compelling Helicopter Resources "to assist in the discharge of the prosecution's onus of proof"[65].

57 Section 87(1)(b) was not a source of compulsion for Captain Lomas or Helicopter Resources to say anything. It operated whether or not those previous representations were the subject of lawful compulsion. Further, although s 87(1)(b) permitted the attribution of particular previous representations to Helicopter

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65 *Helicopter Resources Pty Ltd v The Commonwealth* (2019) 264 FCR 174 at 211 [150], 217-218 [183]-[184], 218-219 [189].

Resources as employer, the answers to questions at the coronial inquest remained the answers of Captain Lomas. Previous representations, if given as the evidence of an employee in an inquest or as interrogatories, remain the evidence of that employee even if they are able to be later attributed to the employer. As Willmer LJ said in *Penn-Texas Corporation v Murat Anstalt*[66] of answers to interrogatories:

> "I do not think it helps to say that when interrogatories are answered by the proper officer of a company, his answers are the company's answers and bind the company. I do not think that touches the question whether an officer can go into the witness-box and give oral evidence which can be said to be that of the company. The answers given by him would be his answers, based upon his own memory and knowledge; and though any admission by him would no doubt be binding on the company, the evidence would still be his evidence and not that of the company."

58 For these reasons, s 87(1)(b) of the *Evidence Act* does not have the effect that, without more, the compulsion at an inquest of an employee of a corporation to provide evidence that is relevant to pending criminal charges against the corporation involves a real risk of improper interference with the due administration of criminal justice. By itself, s 87(1)(b) did not create a real risk that the subpoena to Captain Lomas to give evidence at the coronial inquest would be an improper interference with the due administration of criminal justice.

Conclusion

59 The appeal must be allowed. It suffices to reiterate that allowing this appeal will have no effect on the parties and will not provide an answer to the primary manner in which Helicopter Resources put its case before the primary judge or before the Full Court.

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66 [1964] 1 QB 40 at 56. See also *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 481; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 504.