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MICHEAL CAHILL, VIC

AICKIN CHAMBERS
VICE CHAIRMAN OF CRIMINAL BAR ASSOCIATION, VIC

PRESENTED AT LEGAL EAGLES CLE CONFERENCE
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AUSTRALIAN CRIME COMMISSION
Use of Coercive Powers of Examination

Introduction

The legislature has given the Australian Crime Commission extraordinary inquisitorial powers to assist in the investigation of serious crime. Among them, is a power to compel persons to answer questions, under oath, in secret, about criminal activity. There is no protection against self-incrimination. It is a criminal offence, punishable by imprisonment, to refuse to answer questions.

The person examined is afforded the protection of direct use immunity. That is, the answers cannot be used against him in a criminal proceeding. But there is no protection against derivative use. That is, investigators can use the person's answers to gather other information which can be used in evidence against him, and others.

A criminal trial is not an inquisitorial process but an accusatorial one. This means the prosecution must prove the charge it prefers against an accused. A corollary to this principle is the accused cannot be required to give evidence against himself.

Problems can arise when a compulsory examination is used to question a person, who is facing criminal charges, about matters relating to those charges.

Recently, the High Court, in three cases, has considered how the coercive questioning of an accused person fundamentally alters the accusatorial process of a criminal trial.

In one of them, French CJ articulated the tension between the exercise of compulsory examination powers given to various Australian crime commissions and the requirement to adhere to the common law principles of a fair trial. His Honour said: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". It is recognised as a human right in international instruments, which apply to both the common law and civil law legal traditions. In the United States, the

¹ *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 per French CJ at [1]-[3].

Fifth Amendment has clothed the privilege “with the impregnability of a constitutional enactment”.

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.

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 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.

Framework for ACC Examinations

The ACC is established by s 7(1) of the Act. Its functions are directed to the gathering and dissemination of criminal information and intelligence.

There is one exception. Under s 7C(3) the ACC has an investigative power to undertake a “special investigation.”

Before a special investigation can be undertaken the ACC Board must consider whether ordinary police methods of investigation into the matters are likely to be effective.

Effective means effective to permit the laying of charges against offenders

Effective does not embrace any larger task of deciding whether individual criminal guilt is demonstrated. That is the task for a court upon the hearing of a charge.

In one of the decisions I discuss below, the High Court has said:

The ACC may therefore execute its function of investigating matters relating to federally relevant criminal activity by using the extraordinary processes of compulsory examination only when the Board of the ACC has determined that ordinary police methods are not “likely to be effective” to lead to the laying of charges. The performance of that investigative function is in no way restricted or impeded if the power of compulsory examination does not extend to examination of a person who has been charged with, but not yet tried for, an indictable Commonwealth offence about the subject matter of the pending charge.²

Sections 24A-36 (Division 2 of Pt II of the Act) provide for the compulsory examination of a person for the purpose of a special ACC operation/investigation.

² X7 v ACC [2013] 248 CLR 92, per Hayne and Bell JJ at [147].

The examinations are secret. The summons to attend an examination must include a notation to the effect that disclosure of information about summons is prohibited (s 29A(1) and (2)(a)). An examination must be held in private (but) the examiner may permit persons to be present (s 25A(3)).

The person to be examined is obliged to answer questions asked and to produce documents sought (s 30(2)(b) and (c)). It is an offence to refuse to answer questions (s 30(2)(b)). It is an offence to give false or misleading evidence (s 33(1)).

If a person claims the privilege against self-incrimination the answer given or the document or thing produced, is not admissible in evidence against the person in a criminal proceeding or in a proceeding for the imposition of a penalty (s 30(4) and (5)). This is known as direct use immunity.

There is no derivative use immunity but the examiner can give a direction preventing or limiting the publication of:

- evidence given before the examiner
- the contents of documents produced, or
- the description of things given to the examiner (s 25A(9)).

The examiner is obliged to give such a direction *if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person* who has been, or might be, charged with an offence (s 25A(9)).

Three recent decisions of the High Court

The High Court three cases I will examine in this paper are:

- *X7 v Australian Crime Commission* (2013) 248 CLR 92
- *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082
- *Lee v The Queen* (2014) 88 ALJR 656

In *X7* the majority held the federal *Australian Crime Commission Act 2002* (Cth) did not permit the ACC to examine a person charged with offences about those charges because such an examination, by compelling him to answer such questions, would fundamentally alter the accusatorial nature of the criminal trial process.

In *Lee (No 1)* the Court considered the same issue but under NSW legislation, the *Criminal Assets Recovery Act 1990* (NSW). The majority held the CAR Act did permit such questioning by the NSWCC while providing safeguards, against publication of the examination to those involved in the prosecution, to ensure any future trial was fair.

In *Lee (No 2)* the Court held unanimously the appellants' trial had miscarried because the release of transcripts of their NSWCC examinations, authorised under *Lee (No 1)*, to the DPP to assist it to prepare the prosecution case, fundamentally departed from the requirements of the accusatorial trial.

X7 v Australian Crime Commission

X7 was arrested and charged with conspiracies to import and traffic commercial quantities of narcotics. He faced possible life imprisonment. Whilst he was remanded in custody, awaiting his trial, the ACC summoned him for questioning. At the examination he was asked

and answered questions about the drug offending charged against him. Following an adjournment he refused to answer more questions. The examiner made a non-publication direction prohibiting dissemination of his examination to prosecutors and police associated with his prosecution. X7 applied to the High Court for an injunction to stop the examination.

The question for the court was whether the ACC Act authorised the compulsory examination of a person charged with an offence about the matters relating to charge against him.

The majority, Hayne and Bell JJ, with whom Justice Kiefel agreed, held the ACC Act did not permit the examination. The minority, the French CJ and Crennan J, held the provisions of the Act did contemplate the examination of someone after he had been charged.

All judges upheld the principle of legality, that is, the legislature does not intend to depart from or alter a fundamental principle without express words or necessary intendment.

The fundamental principle engaged was the principle the prosecution must prove the charge it brings against an accused. A consequence of the principle is the accused's right to silence, that is, he cannot be required to testify against himself.

The Act does not expressly state a person charged may be summoned to a coercive examination.

The majority held, in the absence of clear words, the ACC act does not empower and examiner to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerns the subject matter of the offence charged.

In their joint judgment, Hayne and Bell JJ, Kiefel J agreeing, made a number of important observations.

[70] "Permitting the Executive to ask, and requiring an accused person to answer, questions about the subject matter of a pending charge would alter the process of criminal justice to a marked degree, whether or not the answers given by the accused are admissible at trial or kept secret from those investigating or prosecuting the pending charge."

[71] "Requiring the accused to answer questions about the subject matter of a pending charge prejudices the accused in his or her defence of the pending charge (whatever answer is given). "Even if the answer cannot be used in any way at the trial, any admission made in the examination will hinder, or even prevent, the accused from challenging at trial that aspect of the prosecution case. And what would otherwise be a wholly accusatorial process, in which the accused may choose to offer no account of events, but simply test the sufficiency of the prosecution evidence, is radically altered."

[83] The ACC Act does not make such an alteration by either express words or necessary intendment. There is no express reference anywhere in the Act, to examination of the person who has been charged with, but not tried for, an offence about the subject matter of a pending charge.

[85] "...permitting the Executive to ask, and compelling answers to, questions about the subject matter of a pending charge (regardless of what use may be made of those answers at the trial of the accused person) fundamentally alters the process of criminal justice."

[101] "...the whole of the process for the investigation, prosecution and trial of an indictable Commonwealth offence is accusatorial. It is accusatorial in the sense that an accused person is not called on to make any answer to an allegation of wrong-doing, or to any charge that is laid, until the prosecuting authorities have made available to the accused particulars of the evidence on which it is proposed to rely on as proof of the accusation that is made. And even after that information has been provided, the accused person needs say or do nothing more than enter a plea of guilty or not guilty to the charge. If the accused person chooses to plead not guilty at trial, he or she is entitled to put the prosecution to proof of the charge and, as part of that process, to test the strength of the evidence which the prosecution adduces at trial."

[118] If the provisions of the ACC Act, particularly s 28(1), "... were to permit the compulsory examination of a person charged with an offence about the subject matter of the pending charge, they will effect a fundamental alternation to the process of criminal justice."

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

[125] An alteration of that kind must be made clearly by express words or necessary intendment.

[136] "*Hammond* cannot be dismissed from consideration.

Gibbs CJ said (218):

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

The "circumstances of this case" included the fact "that the examination will take place in private and that the answers may not be used at the criminal trial."

The interference with the administration of justice, and thus the content, was identified (220) as lying in "the fact that [Mr Hammond] having been examined in detail, as to the circumstances of the alleged offence is very likely to prejudice him in his defence."

It would prejudice him in his defence because he could no longer determine the course he would follow at his trial according only to the strength of the case that the prosecution proposed to, and did, adduce in support of its case that the offence charged was proved beyond reasonable doubt (221)."

[142] The ACC Act does not provide expressly for the compulsory examination of a person charged with an indictable Commonwealth offence.

The purpose or purposes of the ACC Act generally, or of the examination provisions in particular, would not be defeated by reading the ACC Act's provisions as not permitting the examination of a person charged with an indictable Commonwealth offence about the subject matter of the charge.

[156] The ACC Act does not authorise an examiner appointed under s 46B(1) of the ACC Act to require a person charged with a Commonwealth Indictable offence to answer questions in regard to the subject matter of the charged offence.

[157] Kiefel J agreed, substantially *for the reasons given by their Honours*.

"The ACC Act can be seen neither expressly nor by necessary intendment to require or authorize the examination of a person with respect to offences with which that person is charged and whose trial is therefore pending."

[159] "Relevant to the question of legislative intention is not only the privilege of the person to refuse to answer questions which may incriminate him or her, but also a fundamental principle of the common law. The fundamental principle [is] the onus of proof rests upon the prosecution- ...as is its companion rule- that an accused person cannot be required to testify to the commission of the offence charged. The prosecution, in the discharge of its onus, cannot compel the accused to assist it."

[160] "The common law principle is fundamental to the system of criminal justice...which...is adversarial and accusatorial in nature. The accusatorial nature of the system of criminal justice involves not only the trial itself, but also pre-trial inquiries and investigations."

[162] The legislature has not directed its attention to:

- an examination of the person as to offences with which that person is presently charged and whose trial is pending;
- the effect of an examination in such circumstances on the fundamental principle which informs the criminal justice system;
- whether the examination may pose a real risk of interference with the administration of justice.

The minority, French CJ and Crennan J, having found, as a matter of statutory construction, the ACC Act authorised X7's examination then considered whether the Act provided safeguards against the risk of unfairness in the pending trial. That is to say, whether the Act protected the accused from indirect or derivative use of his answers on examination in the prosecution against him.

[53] "Compulsory examination by a member of the executive after a charge has been laid might prejudice the fair trial of the person examined where the prosecution is, as a result, afforded an unfair forensic advantage, being an advantage which would not otherwise be obtainable under ordinary rules of criminal procedure. A direct use immunity is a protection in that respect. However, a use immunity alone does not place an accused person in as good a position as he or she would be if able to rely on the privilege against self-incrimination, because material establishing that a person is guilty of an offence "may place [a person] in real and appreciable danger of conviction, notwithstanding that the answers themselves may not be given in evidence". (Sorby v The Commonwealth (1983) 152 CLR 281 at 294 per Gibbs CJ)

An unfair forensic advantage may therefore take the form of the prosecution making use of derivative evidence to obtain a conviction. The clearest example is when the prosecution tenders derivative evidence which could not have been obtained, or the

significance of which could not have been appreciated, but for the compulsorily obtained evidence.”

[54] “Given the onus on the prosecution to prove an offence, and the non-compellability of an accused, in the absence of a factor such as the independent sourcing of evidence it is not possible to reconcile a fair trial with reliance on evidence against a person at trial which derives from compulsorily obtained material establishing that person's guilt, or disclosing defences.”

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

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

Where French CJ and Crennan J disagreed with the majority was in their conclusion:

[57] **“These safeguards are capable of preventing a compulsory examination from occasioning an unfair burden on the examinee when defending criminal charges. At trial, the onus remains on the prosecution to prove the guilt beyond reasonable doubt of the accused, without the assistance of the accused. The accused may remain silent at the trial, or not, and take whatever course is desired at the close of the prosecution case, without the risk of being confronted with compulsorily obtained evidence, the use of which is subject to statutory prohibition and safeguards.”**

Lee v New South Wales Crime Commission

The Commission summoned Jason Lee for questioning. He had not been charged with any offence. He answered questions. A non-publication direction was made. A week later, police executed a search warrant at Sydney premises. Lee's son, Seong Won Lee, was present. Police found firearms, cash and powder suspected to be narcotics. Father and son, Jason and Seong Won Lee, were charged with firearms and money laundering offences. Drug supply charges were pending analysis of the powder.

The Commission applied to the Supreme Court for an order, under the CAR Act, for the compulsory examination of both Lees about their financial affairs. The examinations were to be conducted in a judicial process before a Supreme Court Registrar.

(Like the ACC Act) the CAR Act abrogates the privilege against self-incrimination but provides for “direct use” immunity.

By the time the primary judge ruled, both Lees were facing drugs and firearms charges. The primary judge refused the application on the grounds it would expose the Lees to questioning about matters relating to the criminal charges.

The New South Wales Court of Criminal Appeal overturned the decision. The Lees appealed to the High Court.

As in *X7*, the question was whether the statute authorised the compulsory examination of a person who had been charged with a criminal offence about matters relating to the charge.

The Lees argued requiring them to answer questions about the subject matter of the pending charges wrongfully subverted their right to silence. They argued the CAR Act did not authorise this alteration to the fundamental principles of the accusatorial process.

The majority, French CJ and Crennan, Gageler and Keane JJ, held the Act did authorise the coercive examination of a person who had been charged with a criminal offence. They said the court, which conducted the examination, had inherent powers to control its own processes to prevent the prosecution from obtaining an unfair forensic advantage.

The minority, Hayne, Kiefel and Bell JJ (who were the majority in *X7*) held the provisions of the Act were not sufficiently clear to authorise such a departure from a fundamental legal principle. The minority view was that the risk of interference with the administration of justice was not mitigated by conducting the examination before a court because the risk lay not in asking any particular question but in the fact of the examination itself.

One academic commentator has said the different results in *Lee (No 1)* and *X7* may be explained by the different nature and objectives of the coercive examination scheme in each case.

Under the ACC Act an examiner, who is a member of the Executive, conducts the examination to obtain information about criminal activity.

Under the CAR Act a Court, which has inherent powers to ensure procedural fairness, not the Executive, conducts the examination for the purpose of recovery of proceeds of crime.

Hayne J was more direct. His Honour attributed the different outcome to a change in the composition of the Bench.

Lee v The Queen

In consequence of the decision in *Lee (No 1)* the Lees were examined at the NSWCC. Prior to trial the prosecution received transcripts of their examinations, in Jason Lee's case, contrary to the New South Wales Crimes Commission's non-publication order (The Crown accepted the Supreme Court should also have made a non-publication direction in Seong Won Lee's case).

At trial, the Lees were convicted. They appealed. The New South Wales Court of Criminal Appeal held the release of transcripts, whilst unlawful, did not lead to actual unfairness in the trial and upheld the convictions. The Lees appealed to the High Court.

Section 13(9) of the CAR Act required the Commission to make a direction prohibiting the publication of evidence given before it where publication might prejudice the fair trial of a person who may be charged with an offence.

The High Court held the purpose of s 13(9) was to protect the fair trial of a person who may be charged. As referred to in *X7*, fundamental to a fair trial is the principle the prosecution must prove the guilt of an accused person. The Commission had failed to meet that purpose. Consequently, the Court said, the Lees were denied a fair trial because their

testimony was available to the prosecution to assist it. The High Court quashed the convictions and ordered a re-trial.

In a joint unanimous judgment the Bench of French CJ, Crennan, Kiefel, Bell and Keane JJ said:

[28] “The NSWCC Act provided extraordinary powers to the Commission to compel the giving of evidence by a person against the person's interest and which might incriminate the person. These powers were provided in order that the Commission could more effectively investigate serious and organised crime. But the NSWCC Act also provided safeguards. Section 13(9) obliged the Commission to make a direction prohibiting publication of evidence before it, if not to do so might prejudice the person's fair trial. If there was a risk of prejudice, s 13(9) required a direction to be made.

[29] “The making of a direction under s 13(9) was not the first, or the only, occasion on which the Commission was required to consider the possible effects of a compulsory examination on a person's trial. Section 13(5) required that the Commission determine who should (and, it would follow, who should not) be present at the private hearing. It could set at nought the protection afforded by s 13(9) if persons associated with the possible prosecution of the person giving evidence were present.”

[31] “In X7, a majority of this Court held that the powers of compulsory examination given to the Australian Crime Commission were not to be construed as applying to persons already charged with offences the subject of the examination. To do so would be to depart from the accusatorial nature of the criminal justice system in a fundamental respect. Clear words or those of necessary intendment were therefore necessary and neither were present in the legislation in question. ... the legislation, in providing for a direction regarding non-publication, did so in order to safeguard the examined person's trial as fair.”

[32] “Our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in X7. The principle is so fundamental that “no attempt to whittle it down can be entertained” albeit its application may be affected by a statute expressed clearly or in words of necessary intendment. The privilege against self-incrimination may be lost, but the principle remains. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice.”

[33] “The companion rule to the fundamental principle is that an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof.”

Importantly, the Court said it was not necessary to show some “practical unfairness” in the trial for the appeals to succeed.

[43] “This is a case concerning the very nature of a criminal trial and its requirements in our system of criminal justice. The appellants' trial was altered in a fundamental respect by the prosecution having the appellants' evidence before the Commission in its possession.”

The court further observed, at [44], *“the prosecution's possession of the appellants' evidence before the Commission put at risk the prospect of a fair trial.”*

The Court also made some significant observations about policy considerations.

- [50] “The wrongfulness of conduct on the part of the police or the prosecution has on occasions raised questions of policy, rather than questions of unfairness to an accused. ... In Bunning v Cross, Stephen and Aickin JJ said that “[i]t is not fair play that is called in question in such cases but rather society's right to insist that those who enforce the law themselves respect it”. Their Honours said that the executive should not be free to disregard safeguards built into regulatory interventions affecting the liberty of the subject. Moreover, the courts “should not be seen to be acquiescent in the face of the unlawful conduct of those whose task it is to enforce the law.”
- [51] “The circumstances of this case involve the wrongful release and possession of evidence. However, its effects cannot be equated with the use of evidence illegally or improperly obtained. The question whether such evidence should, as a matter of discretion, be admitted does not arise. Clearly, s 18B(2) of the NSWCC Act provided that the appellants' evidence before the Commission was inadmissible at their trial. Rather, these appeals concern the effect of the prosecution being armed with the appellants' evidence. It is not necessary to resort to questions of policy to determine whether a miscarriage of justice has occurred. What occurred in this case affected this criminal trial in a fundamental respect, because it altered the position of the prosecution vis-à-vis the accused. There was no legislative authority for that alteration. Indeed, it occurred contrary to the evident purpose of s 13(9) of the NSWCC Act, directed to protecting the fair trial of examined persons.”

Conclusion

The three cases affirm the common law right of an accused person to an accusatorial trial. The Court will not permit the inquisitorial process of crime commissions coercively gathering information into criminal activity to alter the accusatorial process. Fundamental to the accusatorial trial is the requirement the prosecution must prove the guilt of the accused who cannot be compelled to assist the prosecution by testifying against himself.

X7 and *Lee (No 1)* were concerned with the construction of statutory provisions which empower various crime commissions to undertake coercive examinations. They make it plain Parliament can authorise compulsory examination of a person who is charged with an offence for a particular purpose. However, because coercive questioning subverts an accused person's right to silence, the principle of legality requires the legislative intent to be clearly expressed.

Lee (No 2) focussed on the prosecution's responsibility to ensure its case is prosecuted fairly. The DPP had asked police for the transcripts to find out whether the accused would rely on a defence they did not know the seized washing powder contained narcotics. The police forwarded the request to the NSWCC which released the transcripts.

The High Court held, because the prosecution had information given by the accused under coercion, there was a fundamental departure from the accusatorial process. It did not matter whether or not there was actual unfairness in the conduct of the trial because the release of transcript to the DPP was plainly unlawful under the NSWCC Act.

Notwithstanding the unanimity of the Bench in *Lee (No 2)* there remains an obvious difference between the judgments in *X7* and *Lee (No 1)* on the point of interpretation of the relevant statutes. How that will be resolved remains to be seen.

Relevant ACC Provisions

The relevant provisions of the Australian Crime Commission Act 2002 are

Functions of the ACC

S 7A

- (b) *to undertake, when authorised by the Board, intelligence operations;*
- (c) *to investigate, when authorised by the Board, matters relating to federally relevant criminal activity;*

S 4

"federally relevant criminal activity" means:

- (a) *a relevant criminal activity, where the relevant crime is an offence against a law of the Commonwealth or of a Territory; or*
- (b) *a relevant criminal activity, where the relevant crime:*
 - (i) *is an offence against a law of a State; and*
 - (ii) *has a federal aspect.*

"intelligence operation" means an operation that is primarily directed towards the collection, correlation, analysis or dissemination of criminal information and intelligence relating to federally relevant criminal activity, but that may involve the investigation of matters relating to federally relevant criminal activity.

"special ACC operation/investigation" means:

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

The Board of the ACC

S 7C Functions of the Board

(1) *The Board has the following functions:*

...

- (c) *to authorise, in writing, the ACC to undertake intelligence operations or to investigate matters relating to federally relevant criminal activity;*
- (d) *to determine, in writing, whether such an operation is a special operation or whether such an investigation is a special investigation;*

Special operations

- (2) *The Board may determine, in writing, that an intelligence operation is a special operation. Before doing so, it must consider whether methods of collecting the criminal information and intelligence that do not involve the use of powers in this Act have been effective.*

Special investigations

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

Performance of Functions and Exercise of Powers

S 12 Performance of functions

- (1) *Where the ACC, in carrying out an ACC operation/investigation, obtains evidence of an offence against a law of the Commonwealth or of a State or Territory, being evidence that would be admissible in a prosecution for the offence, the CEO must assemble the evidence and give it to:*
- (a) *the Attorney-General of the Commonwealth or the State, as the case requires; or*
 - (b) *the relevant law enforcement agency; or*

S 19 Incidental powers of ACC

The ACC has power to do all things necessary to be done for or in connection with, or reasonably incidental to, the performance of its functions, and any specific powers conferred on the ACC by this Act shall not be taken to limit by implication the generality of this section.

Division 2 – Examinations

S 24A Examinations

An examiner may conduct an examination for the purposes of a special ACC operation/investigation.

S 28 Power to summon witnesses and take evidence

- (1) *An examiner may summon a person to appear before an examiner at an examination to give evidence and to produce such documents or other things (if any) as are referred to in the summons.*
- (1A) *Before issuing a summons under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so.
The examiner must also record in writing the reasons for the issue of the summons.*

...

- (3) *A summons under subsection (1) requiring a person to appear before an examiner at an examination shall, unless the examiner issuing the summons is satisfied that, in*

the particular circumstances of the special ACC operation/investigation to which the examination relates, it would prejudice the effectiveness of the special ACC operation/investigation for the summons to do so, set out, so far as is reasonably practicable, the general nature of the matters in relation to which the person is to be questioned, but nothing in this subsection prevents an examiner from questioning the person in relation to any matter that relates to a special ACC operation/investigation.

- (4) *The examiner who is holding an examination may require a person appearing at the examination to produce a document or other thing.*
- (5) *An examiner may, at an examination, take evidence on oath or affirmation and for that purpose:*
 - (a) *the examiner may require a person appearing at the examination to give evidence either to take an oath or to make an affirmation in a form approved by the examiner; and*
 - (b) *the examiner, or a person who is an authorised person in relation to the ACC, may administer an oath or affirmation to a person so appearing at the examination.*

...

- (7) *The powers conferred by this section are not exercisable except for the purposes of a special ACC operation/investigation.*

S 30 Failure of witnesses to attend and answer questions

Failure to attend

- (1) *A person served, as prescribed, with a summons to appear as a witness at an examination before an examiner shall not:*
 - (a) *fail to attend as required by the summons; or*
 - (b) *fail to attend from day to day unless excused, or released from further attendance, by the examiner.*

Failure to answer questions etc.

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

Use immunity available in some cases if self-incrimination claimed

- (4) *Subsection (5) limits the use that can be made of any answers given at an examination before an examiner, or documents or things produced at an examination before an examiner. That subsection only applies if:*
- (a) *a person appearing as a witness at an examination before an examiner:*
 - (i) *answers a question that he or she is required to answer by the examiner; or*
 - (ii) *produces a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed; and*
 - (b) *in the case of the production of a document that is, or forms part of, a record of an existing or past business--the document sets out details of earnings received by the person in respect of his or her employment and does not set out any other information; and*
 - (c) *before answering the question or producing the document or thing, the person claims that the answer, or the production of the document or thing, might tend to incriminate the person or make the person liable to a penalty.*
- (5) *The answer, or the document or thing, is not admissible in evidence against the person in:*
- (a) *a criminal proceeding; or*
 - (b) *a proceeding for the imposition of a penalty;*
- other than:*
- (c) *confiscation proceedings; or*
 - (d) *a proceeding in respect of:*
 - (i) *in the case of an answer--the falsity of the answer; or*
 - (ii) *in the case of the production of a document--the falsity of any statement contained in the document.*

S 25A Conduct of examination

Conduct of proceedings

- (1) *An examiner may regulate the conduct of proceedings at an examination as he or she thinks fit.*

Representation at examination

- (2) *At an examination before an examiner:*
- (a) *a person giving evidence may be represented by a legal practitioner*

Persons present at examination

- (3) *An examination before an examiner must be held in private and the examiner may give directions as to the persons who may be present during the examination or a part of the examination.*

...

- (5) *If an examination before an examiner is being held, a person (other than a member of the staff of the ACC approved by the examiner) must not be present at the examination unless the person is entitled to be present by reason of a direction given by the examiner under subsection (3) or by reason of subsection (4).*

Witnesses

- (6) *At an examination before an examiner:*
- (a) *counsel assisting the examiner generally or in relation to the matter to which the ACC operation/investigation relates; or*
 - (b) *any person authorised by the examiner to appear before the examiner at the examination; or*
 - (c) *any legal practitioner representing a person at the examination in accordance with subsection (2);*

may, so far as the examiner thinks appropriate, examine or cross-examine any witness on any matter that the examiner considers relevant to the ACC operation/investigation.

- (7) *If a person (other than a member of the staff of the ACC) is present at an examination before an examiner while another person (the witness) is giving evidence at the examination, the examiner must:*
- (a) *inform the witness that the person is present; and*
 - (b) *give the witness an opportunity to comment on the presence of the person.*
- (8) *To avoid doubt, a person does not cease to be entitled to be present at an examination before an examiner or part of such an examination if:*
- (a) *the examiner fails to comply with subsection (7); or*
 - (b) *a witness comments adversely on the presence of the person under paragraph (7)(b).*

Confidentiality

- (9) *An examiner may direct that:*
- (a) *any evidence given before the examiner; or*
 - (b) *the contents of any document, or a description of any thing, produced to the examiner; or*
 - (c) *any information that might enable a person who has given evidence before the examiner to be identified; or*

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

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

- (10) *Subject to subsection (11), the CEO may, in writing, vary or revoke a direction under subsection (9).*
- (11) *The CEO must not vary or revoke a direction if to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been or may be charged with an offence.*

Statutory Framework for ACC Examinations

The ACC is established by s 7(1) of the Act.

Its functions are directed to the gathering and dissemination of criminal information and intelligence.

There is one exception.

Under s 7C(3) the ACC has an investigative power to undertake a “special investigation.”

Before a special investigation can be undertaken the ACC Board must consider

- 1) *whether ordinary police methods of investigation into the matters are likely to be effective; and*
- 2) *Whether ordinary police methods are not likely to be effective*

Effective means effective to permit the laying of charges against offenders

Effective does not embrace any larger task of deciding whether individual criminal guilt is demonstrated. That is the task for a court upon the hearing of a charge.

The ACC may therefore execute its function of investigating matters relating to federally relevant criminal activity by using the extraordinary processes of compulsory examination only when the Board of the ACC has determined that ordinary police methods are not “likely to be effective” to lead to the laying of charges. The performance of that investigative function is in no way restricted or impeded if the power of compulsory examination does not extend to examination of a person who has been charged with, but not yet tried for, an indictable Commonwealth offence about the subject matter of the pending charge.³

Sections 24A-36 (Division 2 of Pt II of the Act) provide for the compulsory examination of the person for the purpose of a special ACC operation/investigation.

An examination must be held in private (s 25A(3)).

The person to be examined is obliged to answer questions asked and to produce documents sought (s 30(2)(b), (c)).

It is an offence to knowingly give false or misleading evidence (s 33(1)).

If a person claims the privilege against self-incrimination the answer given or the document or thing produced, is not admissible in evidence against the person in a criminal proceeding or in a proceeding for the imposition of a penalty (s 30(4)(c),(5)).

The examiner can give a direction preventing or limiting the publication of

- Evidence given before the examiner
- The contents of documents produced, or
- The description of things given to the examiner (s 25A(9)).

The examiner is obliged to give such a direction *if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or might be, charged with an offence.*

³ X7 v ACC [2013] 248 CLR 92, per Hayne and Bell JJ at [147].

The summons to attend an examination must include a notation to the effect the disclosure of information about summons is prohibited (s 29A(1),(2)(a)).

Section 28(1) provides:

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

Section 30(2) provides

A person appearing as a witness in an examination for an examiner shall not:

- (a) When required pursuant to s 28 either to take an oath or make an affirmation-refuse or fail to comply with the requirements;*
- (b) Refuse or fail to answer a question that he or she is required to answer by the examiner; or*
- (c) Refuse or fail to produce a document or thing that he or she was required to produce by a summons under this Act served on him or her has prescribed.*

Section 25A provides:

(3) An examination before an examiner must be held in private and the examiner may give directions as to the persons whom may be present during the examination or part of the examination

...

(9) An examiner may direct that:

- (a) Any evidence given before the examiner; or*
- (b) The contents of any document, or a description of anything, produced to the examiner; or*
- (c) Any information that might enable a person who was giving evidence before the examiner to be identified; or*
- (d) The fact that any persons given or may be about to give evidence at an examination;*
must not be published, or much not be published, except in such manner, and to such persons, as the examiner specified.

The examiner must give such direction if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of that person who has been, or may be, charged with an offence.