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Continuing Legal Education for Criminal Lawyers

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COERCIVELY OBTAINED EVIDENCE: BLESSING OR CURSE?

"A COERCIVE POWERS UPDATE"

Introduction

1. Coercive questioning powers continue to proliferate. So too does the jurisprudence around their exercise and the impact they have on criminal proceedings.

2. This paper provides an update on current developments in the area with a particular focus on two authorities representing interesting developments in the law.

3. Firstly, it deals with a case that arises where a witness facing a coercive examination **refuses to answer or is considering refusing to answer**. In the case of *R v QX* [2015] VSC 784 (***QX***), King J of the Victorian Supreme Court provided an interesting new development in the law of a 'reasonable excuse' to refuse to answer questions in a coercive examination.

4. Secondly, it deals with some of the latest developments in the line of authority beginning in *X7 v Australian Crime Commission* (2013) 248 CLR 92 (***X7).*** In particular, I analyse the case of *XYN v The Chief Examiner* [2016] VSC 317 (***XYN***) in which Riordan J of the Victoria Supreme Court heard an attempt to

extend the *X7* principles to constitutional challenge of legislation authorising the coercive examination of a person facing charges.

***Debono, QX* and the 'reasonable excuse'**

5. In almost every statute setting up a coercive powers body, there is provision for the body itself to lay charges for contempt. These are usually treated in the same manner as contempt in the face of a court, with the charge laid immediately and the respondent then brought before a court to be dealt with.

6. Many statutes also provide for substantive offences that can be laid by the prosecuting authorities and proceed according to the ordinary criminal procedures of the jurisdiction.

7. The sorts of conduct that is contemptuous or separately criminalised invariably includes failing to take oaths or affirmations, failing to answer questions and obstructing or otherwise impeding the conduct of examinations.

8. In either case (either by contempt or ordinary criminal offence), it is common to have a 'reasonable excuse' clause as a means for avoiding liability. In the case of *QX*, King J dealt with a number of important questions that arise in the context of a reasonable excuse clause, particularly one found in a provision criminalising conduct for refusing to comply with coercive powers. There is precious little other authority available, although the NSW Crime Commission has given rise to a useful line of authority regarding reasonable excuse in this context.[1] However, that line of authority arises under the particular provisions in that jurisdiction enabling a person to have their reasonable excuse determined in civil proceedings and not in the context of an actual prosecution where different considerations arise.

[1] See e.g. *Ganin v New South Wales Crime Commission* (1993) 32 NSWLR 423; *Z v New South Wales Crime Commission [No 2]* [2005] NSWSC 1388; *SD v New South Wales Crime Commission* [2013] NSWCA 48.

9. In *QX*, King J was hearing a contempt charge pursuant to s 49(1)(b) of the *Major Crime (Investigative Powers) Act 2004* (the **MCIP Act**).

> **49 Contempt of Chief Examiner**
>
> (1) A person attending before the Chief Examiner in answer to a witness summons is guilty of a contempt of the Chief Examiner if the person—
>
> …
>
> (b) being called or examined as a witness at an examination, refuses to be sworn, or to make an affirmation or, without reasonable excuse, refuses or fails to answer any question relevant to the subject-matter of the examination; or
>
> …

10. The examinee attended the examination and refused to answer questions on the basis that to do so would pose a risk to his safety. He gave evidence in support of that assertion regarding shots fired at his house and similar matters. However, there was no evidence that provided a specific nexus between the answering of questions and the risk to his safety.

11. Accepting those matters, the Chief Examiner made a non-publication direction as he was bound to do when a failure to do so *might* prejudice the risk to the examinee's safety.

12. It was made clear to the examinee that, despite the non-publication direction, his evidence might become public through a mechanism in the Act whereby a court hearing criminal charges determines that the interests of justice require that to occur (as to which see further below).

13. The examination was adjourned for the examinee to indicate the account he would give to police (either by statement or a 'can say' statement) in response to which the police would attend to protective measures. Evidently none of that occurred, the examination resumed and the examinee refused to answer on the basis of a risk to his safety.

14. King J accepted that the examinee's reason for refusing to answer questions constituted a reasonable excuse and dismissed the contempt charge. Her Honour did so through a series of interesting and novel findings (some of which might be said to be against the weight of authority in the area).

15. Firstly, King J found that the absence of a reasonable excuse was an element of the offence that placed the burden of proof on the prosecution.

> 50. The *Major Crime (Investigative Powers) Act 2004* contains a number of provisions relating to breaches of the Act. Sections 36(3), 37(1), (2), 38, 44, 48, 49 demonstrate within them the differences that exist in respect of how conduct will be treated under the Act. In the section being considered, the parliament has placed the words 'without reasonable excuse' in the description of the offence and it forms part of the definition of the grounds of liability under s 49(1)(b) of the Act. The words 'without reasonable excuse' do not introduce, as a new matter, in a separate section, an exception to the criminal liability that otherwise arises. Unlike the structure and form of sub-ss 36(3) and (4), considered in *Debono*, the definition of the grounds of liability include the relevant words. The distinct placement of the words within the grounds of liability, give a clear indication that parliament intended that it should be an element of the offence that the Chief Examiner must prove beyond reasonable doubt.[2]

16. The case of *Debono*[3] referred to there had previously dealt with this issue in relation to a substantive offence under the Act. The opposite result obtained. Her Honour relied heavily on the different form and structure of the respective offence provisions. In that case Kyrou J was faced with this offence provision:

> **36 Taking of evidence**
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> (1) At an examination –
>
> (a) the Chief Examiner; or
>
> (b) a legal practitioner representing the witness; or
>
> (c) any person authorized by the Chief Examiner to do so –

[2] *QX* at [50].
[3] *DPP v Debono* [2013] VSC 408 (***Debono***).

may, so far as the Chief Examiner thinks appropriate, examine or cross-examine any witness on any matter that the Chief Examiner considers relevant to the investigation of the organized crime offence to which the examination relates.

(2) The Chief Examiner may, at any examination, take evidence on oath or affirmation and for that purpose –

(a) the Chief Examiner may require a person appearing at the examination to give evidence either to take an oath or to make an affirmation in the prescribed form; and

(b) the Chief Examiner may administer an oath or affirmation to a person so appearing at the examination.

(3) A person appearing as a witness at an examination before the Chief Examiner must not, when required in accordance with subsection (2) either to take an oath or make an affirmation, refuse or fail to comply with the requirement.

17. As the quotation from *QX* above makes clear, King J relied heavily on the differing form and structure of the provisions in coming to a different conclusion as Kyrou J in *Debono*.

18. As to that, Kyrou J observed that:

> … However, while the form and structure of the exculpatory provision is important, ultimately **the question is to be determined by the substance of the provision rather than its form and structure**.[4]
>
> Where the subject matter of the exculpatory provision comprises facts that are ordinarily exclusively in the possession of an accused, this may indicate that it is an exception and that it is intended that the onus be on an accused to prove those facts.[5]
>
> (Emphasis added).

[4] *Dowling* (1952) 86 CLR 136, 140; *Chugg* (1990) 170 CLR 249, 258.
[5] *R v Douglas* [1985] VR 721, 724; *Chugg* (1990) 170 CLR 249, 259–61.

19. His Honour went on to analyse the authorities emphasising those propositions, discussing distinctions between the 'golden thread' and statutory exceptions to criminal liability. Ultimately, his Honour concluded that, in the case of s 36 of the Act, a 'reasonable excuse' was in substance an exception to criminal liability where the facts were ordinarily within the exclusive knowledge of the accused.

20. King J, by contrast, held the opposite regarding s 49(1)(b). Exactly how the two sections are distinguished in that regard, other than form and structure, was not made explicit in her Honour's judgment.

21. King J ultimately dismissed the charge on the basis that the respondent had a reasonable excuse based on their safety. In doing so, her Honour applied the other legal principles applying to a reasonable excuse in this context which were adopted from *Debono* and summarised this way:[6]

> In *De Bono* Kyrou J established a set of criteria for what may constitute a reasonable excuse.[7] That criteria is, in my view, non-exhaustive and it may be necessary to consider other criteria depending on the circumstances or reasonable excuse proffered by the person in the individual case being considered. His Honour stated:
>
> > 48 In my opinion a witness appearing at an examination by the Chief Examiner can be held to have a reasonable excuse for refusing or failing to take an oath or make an affirmation for the purposes of s 36(4) of the Act on the basis that he or she fears that he or she will be physically harmed if he or she takes an oath or makes an affirmation.
> >
> > However in the light of:
> > (a) The purpose of the Act to confer coercive powers for the investigation of organised crime offences;
> > (b) The need to avoid that purpose being frustrated; and
> > (c) The confidentiality and secrecy provisions in ss20(1), 35(1), 43(1) and 68 of the Act to which I have already referred.

[6] *QX* at [80] - [81].
[7] *R v DeBono* [2013] VSC 408 at [48] – [51].

In order for such a fear to qualify as a reasonable excuse, it must satisfy the requirements set out at [49]-[50] below

49. First there must be an objective basis for the fear of physical harm. The fear cannot be a mere subjective fear.

50 Secondly, the objective basis for the fear of physical harm must be reasonable in the circumstances of the particular case. The fear could be reasonable if it is based on a communication or conduct by another person which is objectively capable of conveying to the witness a threat of physical harm to him or her. Such a threat or other circumstance will not suffice if, objectively, in the practical world, the risk of physical harm is remote, negligible, imaginary or insubstantial.

51. Thirdly, the fear of physical harm must exist at the time of the refusal or failure to take an oath or make an affirmation and must be relevant to that refusal or failure. In other words there must be a nexus between the requirement to take an or affirmation and the fear of physical harm. Such a nexus could be satisfied if another person conveyed a threat to a witness that he or she would be physically harmed if he or she took an oath or made an affirmation.

Distilling what His Honour said, and removing any exemplars contained within those categories, what is required to either be proved by an accused, on the balance of probabilities, or negated by the Chief Examiner, beyond a reasonable doubt, if the refusal is based on fear of physical harm to that person or another, is:

1. That he or she fears that he or she (or another person), will be physically harmed if he or she answers the questions.
2. That there is an objective basis for that fear.
3. That the objective basis for the fear is reasonable, not fanciful imaginary or negligible.
4. That there is a nexus between the objective fear and the refusal to answer questions.

22. However, in applying those principles, her Honour then cryptically held[8]:

> Although not specifically referred to in the decision of *Debono*, the nexus, in my opinion, does not have to be a fear that the person will be immediately physically harmed, or that the threat is one that was specific to giving evidence to that tribunal, but an objectively reasonable fear that the person (or another) may suffer physical consequences if that person answers those questions asked by the tribunal.

23. There appears to be a clear internal contradiction in that passage. What is the nexus between the fear and the refusal to answer if it is not 'specific to giving evidence to that tribunal' but the physical consequences that *may* occur *must* be as result of answering the questions?

24. Her Honour also uses the word 'may' when discussing the nexus between the answering of questions and the harm suffered whereas *Debono* quite clearly uses the language of 'would' in that regard.[9]

25. Her Honour also held that:[10]

> At no time was he assured that what he said at the hearing would not be passed onto any prosecuting authorities and could not be used to compel him to become a witness in a prosecution against the alleged perpetrators of the organised crime offence. Without such clear reassurance being provided by the Chief Examiner, I am of the view that not only has the Chief Examiner failed to prove that the respondent did not have a reasonable excuse for his refusal to answer the questions put to him, I am positively of the view that he did, at that time, have a reasonable excuse to refuse to answer those questions.

26. Her Honour's reasoning seems to support an argument that an examinee has a reasonable excuse for not answering questions where there are no guarantees that the product of an examination will not see the light of day *at some time in the future* and must therefore be reassured of that fact at the time of the refusal. It is

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[8] *QX* at [82].
[9] *Debono* at [51].
[10] *QX* at [87].

not clear how that reasoning sits with Kyrou J's requirement that the fear of physical harm must exist at the time of the refusal. (That requirement was quoted by King J but conveniently left out of her later synopsis of the passage – see above).

27. But certainly her Honour's reasons provide a basis to argue that one has a reasonable excuse where guarantees do not exist about what will occur with the product of examinations at a later date. That is certainly the position with coercive powers bodies where provisions allowing or requiring the quarantining of examination evidence do not exist[11] or are so loosely circumscribed as to offer no protection.[12]

28. However, in all cases, even where mandatory non-publication regimes are in place, they generally have clauses providing for publication in the context of criminal trials. An example is s 25A(12) and (13) of the ACC Act:

> (12) If:
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> (a) a person has been charged with an offence before a federal court or before a court of a State or Territory; and
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> (b) the court considers that it may be desirable in the interests of justice that particular evidence given before an examiner, being evidence in relation to which the examiner has given a direction under subsection (9), be made available to the person or to a legal practitioner representing the person;
>
> the court may give to the examiner or to the CEO a certificate to that effect and, if the court does so, the examiner or the CEO, as the case may be, must make the evidence available to the court.
>
> (13) If:
>
> (a) the examiner or the CEO makes evidence available to a court in accordance with subsection (12); and

[11] e.g. *Independent Broad-based Anti-Corruption Commission Act 2011* (Vic).
[12] e.g. *Independent Commission Against Corruption Act 1988* (NSW), s 112.

(b) the court, after examining the evidence, is satisfied that the interests of justice so require;

the court may make the evidence available to the person charged with the offence concerned or to a legal practitioner representing the person.

29. For the starkest example of how the interests of justice test that sections like this prescribe is resolved in cases where there is a serious issue about witness safety see: *Jean Ross (A pseudonym) v The Chief Commissioner of Police and the Chief Examiner* [2014] VSCA 254. In short, witness safety issues will almost always give way where the evidence is of significance to the issues in the trial.

30. *QX* is the most favourable authority available for practitioners advising a client facing a coercive examination and/or charged with an offence arising where there is a reasonable excuse clause. One of its great benefits is that it does not currently conflict directly with any appellate authority on point.

31. As such it assists with the following arguments.

    31.1. That the prosecution bears the onus of proof in negating a reasonable excuse.
    31.2. That a risk to safety can constitute a reasonable excuse even where that risk might arise at some future time.
    31.3. That a risk to safety can constitute a reasonable excuse even where the examination is in secret if there is no guarantee that it will not be publicised at a later date.

32. Of course, the applicability of the rationale in *QX* depends on the particular statutory context. Sometimes the drafters have got it so unambiguously correct, that the kind of issues that arose in *De Bono* and *QX* regarding onus of proof simply cannot arise.[13] Some provisions will be extremely well suited to the successful arguments in *QX*. [14] Others are of a form and structure somewhere in between those in *De Bono* and *QX* and liable to the rationales of either case for

[13] e.g. *Independent Commission Against Corruption Act 1988* (NSW), s 99(6).
[14] e.g. *Crime and Corruption Act 2001* (Qld), s 198(4); *Crime Commission Act 2012* (NSW), s 25.

different reasons.[15] In some cases, the arguments regarding a reasonable excuse defence based on safety has been limited or ousted entirely by legislative provision. [16]

33. No appeal lay from the decision in *QX*. However, two witnesses have recently refused to answer on the basis of their safety and been charged with contempt. The Victorian Court of Appeal is currently preparing to hear questions referred from both proceedings including questions arising the impact of the Victorian *Charter of Human Rights and Responsibilities Act 2006*, a matter not raised in *QX*.

XYN, X7, Lee No 1 **and** ***Lee No 2***

34. *XYN* represents the latest front in the battles between the courts and the bodies exercising coercive questioning powers (and their legislators) regarding the coercive examination of a person about the subject matter of extant or anticipated charges against the examinee themselves.

35. The High Court has laid down the principles applying to such situations in three significant, difficult and somewhat conflicting cases:

- *X7 v ACC* [2013] 248 CLR 92 (***X7***).
- *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 (***Lee No 1***).
- *Lee v The Queen* (2014) 308 ALR 252 (***Lee No 2***).

36. The purpose of this paper is not to analyse these cases which were considered at the equivalent conference last year by Michael Cahill in his paper 'Australian Crime Commission: Use of Coercive Powers of Examination'. However it is necessary to have some understanding of those cases.

[15] eg. *Crime and Corruption Act 2001* (Qld): s 190(1).
[16] e.g. *Crime and Corruption Act 2001* (Qld): s 190(4).

X7

37. In a 3-2 decision (Hayne, Kiefel and Bell JJ in the majority, French CJ and Crennan J dissenting), the court held that the ACC Act did not authorise the examination of a person about the subject matter of extant criminal charges against him, even where the answers would remain secret, because to do so would fundamentally alter the accusatorial judicial process. The accused could only advance a defence consistent with the self-incriminatory answers they gave. If the legislature wanted to effect so radical a change, it would need to do so by clear words or necessary intendment (which it had not in the terms of the ACC Act as it then was).

Lee No 1

38. In a 4-3 decision (French CJ, Gageler, Keane and Crennan JJ in the majority, Hayne, Kiefel and Bell JJ in in the minority)[17], the court came to the opposite result to *X7* regarding the NSW *Criminal Assets Recovery Act 1990* on the basis of the different features of that legislation.

39. There was a palpable sense of outrage in the judgment of Hayne J (in particular) that the majority had not followed *X7* which he regarded as dispensing with the issues in *Lee No 1*.

Lee No 2

40. In a unanimous decision of 5 (French CJ, Kiefel, Crennan, Bell and Keane JJ), approving *X7*, the court held that the dissemination of coercively obtained evidence disclosing the accused's defence to the prosecutors who had prosecuted them (in contravention of the statute authorising the examination) fundamentally altered the accusatorial judicial process. Their convictions were quashed and a retrial ordered.

[17] With six different written judgments.

41. Central to all three decisions (and the later cases) is the 'companion principle' to the onus of proof in criminal trials.

> 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.[18]

42. It is apparent that the principles laid down by the High Court potentially have application both at the time of the questioning of a person to prevent an examination (*X7* and *Lee No 1*) and at the time of their trial where they have previously been examined on the subject matter of the charges (*Lee No 2*).

43. As is to be expected when the High Court sets out significant matters of principle in contested decisions, the *Lee* and *X7* cases have led to all manner of litigation. There have been some extremely ambitious attempts to apply the principles to evidence not given under compulsion.[19]

44. There is the *Zhao*[20] line of authority. Broadly speaking, this is where litigants have (sometimes successfully) called in aid the principles in *Lee No 2* (particularly) in the context of applications to stay civil proceedings concurrent with criminal proceedings.[21] Those cases do not so much create anything new as use the decisions to supplement the existing law relating to stays of concurrent civil proceedings. However, the decision is significant for having (in somewhat glowing terms) endorsed the majority position in *X7*.

45. There has been the unsuccessful attempt to extend the companion principle to restrain public coercive examinations.[22] That attempt was unsuccessful as the examinations were *prior to charges being laid* even though the examinee was a

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[18] *Lee No 2* at 260, [33].
[19] *Investrix Pty Ltd v Commissioner of Taxation* [2015] FCA 1427; *Re JWTT and Commissioner of Taxation* [2015] AATA 587; Allen v DO [2014] WASC 67.
[20] *Commissioner of the Australian Federal Police & Ors v Zhao & Anor* [2015] HCA 5.
[21] See also: *Ritchie v State of Western Australia* [2016] WASCA 134; *CFMEU v ACCC* [2016] FCAFC 97; *Director of Fair Work Building Industry Inspectorate v CFMEU* (2015) 323 ALR 294.
[22] *R v IBAC* (2016) 329 ALR 195 (***R v IBAC***).

person reasonably suspected of a crime and conducted by those with the power to prosecute for those crimes. It can safely be essayed that the companion principle is not engaged unless criminal proceedings are on foot.[23]

46. That distinction was also critical when the principles were sought to be invoked where a witness sought to be excused from giving evidence in a criminal trial on the basis of the privilege against self-incrimination (notwithstanding the protection of an Evidence Act certificate).[24] However, the principles will be relevant to the question of where the interests of justice lie when deciding whether a person ought to be fully excused from giving evidence for that reason.[25]

47. And while the *X7*/*Lee* principles would appear to be ineffective to prevent an examination from proceeding before charges are laid or where the legislation clearly authorises the examination to proceed notwithstanding charges have been laid, they may have a bearing on who is allowed to be present at the examination and what protective measures must be put in place at the time of the examination.[26] A failure of Examiners to make those sorts of decisions correctly is likely to trigger judicial review at the time the decision is made or some other later relief in the context of a trial.

48. Relief at the time of trial based on the application of *Lee No 2* may include restraint of witnesses giving evidence or prosecution teams from continuing to act.[27] Alternatively, the principles can be called in aid of stay applications (permanent or pending other remedies).

49. In terms of stay applications, courts have been understandably reluctant to prevent prosecutions based on *X7* and *Lee No 2*.[28] Each case will depend on its own facts

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[23] Although Gageler J left that matter open: *R v IBAC* (2016) 329 ALR 195 at [73] *ff*. cf *R v OC* (2015) 90 NSWLR 134.
[24] *R v Simmons (No 6)* [2015] NSWSC 418. See also *R v Cowan; Ex parte Attorney-General (Qld)* [2016] 1 Qd R 433.
[25] Ibid.
[26] See e.g. *QAAB v Australian Crime Commission* (2014) 227 FCR 293.
[27] See e.g. *R v Seller; R v McCarthy* (2015) 89 NSWLR 155.
[28] See e.g. *R v Seller and Anor* (2013) 273 FLR 155, *R v X* [2014] NSWCCA 168; *A v Maughan* [2016] WASCA 128.

and legislative context and an automatic stay is not granted just because distribution has occurred even if it is unlawful in some way. The granting of a stay will depend on the extent to which the dissemination of the coerced evidence has coopted the accusatorial judicial process and produced actual unfairness.

50. Even when *X7* himself applied for a permanent stay he failed on the basis that no actual unfairness could be demonstrated.[29] That result might be seen as highly unsatisfactory given what the majority in *X7* said, however in that case the court did not have the actual answers in the examination hearing before them to determine how substantial they were in the context of the trial. Their inability to gauge the specific impact that the coercive evidence would have on the fairness of the trial appeared to be determinative.[30]

51. It seems using coerced evidence to obtain other derivative admissible evidence or to coerce the production of documents without questioning will usually be lawful (depending on the terms of the legislation).[31]

52. Following *R v IBAC,* where public examinations are clearly authorised by the Act a stay has been held not to follow where the prosecutors have access to the product of the examination.[32] That is a Western Australian decision that could be regarded as suspect and having made too much of what was decided in *R v IBAC*. It does seem to conflict with decisions in other jurisdictions, albeit pre-dating *R v IBAC*.[33]

53. Certainly there will be more stay applications where suspects were coercively examined prior to charge and where the prosecutors or investigators then have access to the product of their examinations. That may particularly be the case for prosecutions after corruption bodies have conducted public examinations and the confidentiality regimes are deficient or non-existent. However, as noted in the first

[29] *X7 v R* [2014] NSWCCA 273.
[30] Ibid at [115] (Beazley P).
[31] *R v Seller and Anor* (2013) 273 FLR 155.
[32] *A v Maughan* [2016] WASCA 128.
[33] *R v OC* [2015] NSWCCA 212.

section of this paper, a reasonable excuse for refusing to answer questions might more readily be found in that context.

54. In addition to judicial developments, legislatures around the country have acted to address the decisions. Most comprehensively, the Commonwealth Parliament enacted a fairly elaborate amendment to the ACC Act in response.[34]

55. One of the most interesting areas still to develop out of the *Lee* and *X7* decisions is the convergence of the principles in those cases and constitutional doctrine. Assuming there is still some appetite for the fight in the High Court (and that might be doubtful), this is where the battle lines are likely to be drawn between the judiciary and the legislature. The court should take a dim view of the legislature whittling down something as fundamental as the accusatorial system of criminal justice and its answer is to find such provisions unconstitutional.

56. The recognition of that issue is evidenced most obviously by the legislative amendments to the ACC Act which are replete with severance clauses to preserve as much of that legislation as possible in the event of constitutional invalidity.

57. In that regard, this part of the paper particularly focuses on the case of *XYN* that deals with an unsuccessful attempt to strike down provisions of this kind. Before turning to that case, it is important to understand a little more about *X7*.

58. *X7* was a case stated regarding two questions.

> *Does Div 2 of Pt II of the* Australian Crime Commission Act *2002 (Cth) ("the ACC Act") empower an examiner appointed under s 46B(1) of the ACC Act to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerns the subject matter of the offence so charged?*
>
> *If the answer to Question 1 is "Yes", is Div 2 of Pt II of the ACC Act invalid to that extent as contrary to Ch III of the Constitution?*

[34] *Law Enforcement Legislation Amendment (Powers) Act 2015* (Cth).

Due to the majority holding that the statute did not authorise the examination, the second did not arise.

59. The minority (French CJ and Crennan J), who answered the first question affirmatively, held that the provision was constitutionally valid. However, their conclusions in that regard depended largely on their conclusions regarding question one. The question of the constitutional validity of provisions conflicting with the majority reasoning in *X7* were not really addressed and have not been considered by the High Court since.

60. *XYN* essentially revisited the second question in the following circumstances.

60.1. *XYN* had been summonsed to an examination before the Chief Examiner pursuant to the MCIP Act.

60.2. The subject matter of the examination was to overlap with the subject of charges for which XYN had been committed for trial.

60.3. The Chief Examiner was obliged to, and did, enact protective measures to protect the product of the examination from making its way to those prosecuting *XYN*. (In other words, the *Lee No 2* situation had been foreclosed).

60.4. It was common ground that the relevant provisions of the MCIP Act did clearly or necessarily authorise the examination. (In other words, the first question in *X7* did not arise - the statute authorised the examination). The relevant provision was s 29(2).

> (2) The Chief Examiner may commence or continue to conduct an examination of a person despite the fact that any proceedings (whether civil or criminal) are on foot, or are instituted, in any court or tribunal that relate to or are otherwise connected with the subject-matter of the examination, including criminal proceedings against the person in respect of that subject-matter.

61. The examinee sought judicial review of the summons to examine him seeking relief in the nature of:

    61.1. A declaration that s 29(2) of the MCIP Act was invalid.

    61.2. An order prohibiting the Chief Examiner from examining him until after his criminal proceeding had concluded.

62. He failed on both counts.

63. His argument was summarised as follows:[35]

> 21 The plaintiff contended that the Compulsory Examination of an Accused constitutes a contempt either because:
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> (a) the Compulsory Examination of an Accused per se; or
>
> (b) the Compulsory Examination of an Accused with the safeguards provided by the Act;
>
> had been determined to constitute a contempt by the majority in *X7*. In particular, the plaintiff relied upon the following statement by Hayne and Bell JJ:
>
> > 'As has been explained, if [a fundamental alteration to the accusatorial judicial process] is to be made to the criminal justice system by statute, it must be made clearly by express words or by necessary intendment. If the relevant statute does not provide clearly for an alteration of that kind, *compelling answers to questions about the subject matter of the pending charge would be a contempt*.'

64. In rejecting that argument, Riordan J said:

> Accordingly, the plaintiff's submission in this case that the statement of Hayne and Bell JJ in paragraph 125 of *X7* as cited at [21] above, is binding authority that a Compulsory Examination of an Accused is necessarily a contempt, is premised on the contention that a fundamental alteration to the process of criminal justice must necessarily equate to, or constitute, a contempt of court. This contention must be rejected for the following reasons:
>
> (a) The ratio of the majority in *X7* was based on statutory construction.

[35] *XYN* at [21].

(b) The majority in X7 did not find that conduct which fundamentally altered the accusatorial process of criminal justice necessarily constituted a contempt.

(c) The minority in *X7* found that a Compulsory Examination of an Accused, with the safeguards under the ACC Act, did not constitute a contempt.

(d) Gageler and Keane JJ in *Lee No 1* found that a Compulsory Examination of an Accused, with the safeguards under the *Criminal Assets Recovery Act 1990* (NSW) ('the CAR Act') did not constitute a contempt.

65. Regarding the majority in *X7* his Honour's analysis was brief. He stated that:[36]

The ratio of the majority in X7 was based on statutory construction

33 The critical finding of Hayne and Bell JJ was that the relevant statutory provision fundamentally altered the process of criminal justice to a marked degree; and whether or not the examination of X7 would constitute a contempt was not a necessary finding or the subject of any analysis by their Honours. In fact, their Honours specifically eschewed the question of whether a compulsory examination about the subject matter of a pending charge would result in an 'unfair' trial;[41] and did not consider the provisions which provided protection for a fair trial under the ACC Act because it was not appropriate or necessary for the purpose of statutory construction.[42]

The majority in X7 did not find that conduct, which fundamentally altered the accusatorial process of criminal justice, necessarily constituted a contempt

34 Hayne and Bell JJ recognised that there had been statutory provisions, which effected changes made directly to the accusatorial system of criminal justice, and gave as examples:

(a) the requirement of an accused to give notice of alibi;[43]

(b) the requirement of an accused to give notice of his/her intention to adduce expert evidence at trial;[44] and

(c) the requirement of the accused to respond to the prosecution's summary of how it will put its case against the accused, by identifying 'the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken'.[45]

It was not suggested:

(a) that these alterations were other than fundamental changes to the accusatorial process of criminal justice; nor

[36] *XYN* at [33] – [35].

(b) that a person enforcing these provisions would be in contempt.

35 It may be accepted that conduct, which is fundamentally inconsistent with the accusatorial process of criminal justice, may in some circumstances interfere with the due administration of justice and constitute a contempt. However, in X7, Hayne and Bell JJ did not equate a fundamental alteration to the process of criminal justice with a contempt. Gageler and Keane JJ concluded as much in Lee No 1 when their Honours said:

> *Hammond*[46] is not authority for the proposition that a real risk to the administration of justice necessarily, or presumptively, arises by reason only of the exercise of a statutory power to compel the examination on oath of a person against whom criminal proceedings have been commenced but not completed where the subject matter of the examination will overlap with the subject matter of the proceedings. *The majority in X7 does not appear to us to have embraced such a proposition*.[47]

66. That passage is extremely difficult to reconcile with the passage following the paragraph on which XYN relied from the majority judgment in *X7*:

> Earlier decisions of this Court
>
> 126 It is necessary to say something about some earlier decisions of this Court, including, in particular, *Hammond v The Commonwealth*[37] and *Hamilton v Oades*[38].
>
> *Hammond*
>
> 127 *Hammond* concerned the compulsory examination of a person charged with an indictable Commonwealth offence about the subject matter of the charge. The examination was to be conducted under the *Royal Commissions Act* 1902 (Cth) and the *Evidence Act* 1958 (Vic). Both Acts provided[39] that it was an offence for a person being examined to refuse to answer any question relevant to the inquiry being conducted. Both Acts also provided[40] that answers given by the person being examined were not admissible in evidence against that person in any civil or criminal proceedings (except in proceedings for an offence against the Act in question). This Court assumed, but did not decide, that, as all parties to the litigation had submitted, a

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[37] (1982) 152 CLR 188; [1982] HCA 42.
[38] (1989) 166 CLR 486.
[39] *Royal Commissions Act* 1902 (Cth), s 6; *Evidence Act* 1958 (Vic), s 16(b).
[40] *Royal Commissions Act* 1902, s 6DD; *Evidence Act* 1958, s 30.

person charged with an offence was bound to answer questions designed to establish that he or she had committed the charged offence[41].

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

129 The principal reasons of the Court were given by Gibbs CJ. Those reasons (with which Mason J agreed and Murphy J generally agreed) must be read in the light of the Court's comprehensive consideration of executive inquiries into alleged offences in *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation*[42] ("the *BLF Case*"). Judgment in the *BLF Case* was delivered less than three months before *Hammond* was argued and decided.

130 In the *BLF Case*, six members of the Court held[43], following earlier authority of this Court[44], that, in the absence of any law to the contrary, the Crown *may* appoint a commission of inquiry into whether an individual has committed an offence. And the whole Court held[45] that the conduct of a commission of inquiry, to the extent that it creates a risk of interference with the administration of justice, may be a contempt of court. But the Court accepted that, subject to any applicable constitutional limitation[46], such a contempt might not arise if the conduct was specifically authorised by statute. It was not necessary to explore that question in the *BLF Case* and it is not necessary to do so in this case.

131 In the *BLF Case*, Gibbs CJ examined the various reasons that had been proffered in argument, and in the Full Federal Court below, for concluding that holding the proceedings of the inquiry in public would constitute a contempt. Those reasons ranged from the fact that the proceedings would be calculated to prejudice or bias the public mind, to alleged undesirable effects on possible witnesses or even the judges

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[41] (1982) 152 CLR 188 at 197-198 per Gibbs CJ.
[42] (1982) 152 CLR 25.
[43] (1982) 152 CLR 25 at 52-53 per Gibbs CJ, 66-68 per Stephen J, 86-91 per Mason J, 120 per Aickin J, 123-126 per Wilson J, 152-155 per Brennan J.
[44] *Clough v Leahy* (1904) 2 CLR 139; [1904] HCA 38; *McGuinness v Attorney-General (Vict)* (1940) 63 CLR 73; [1940] HCA 6.
[45] (1982) 152 CLR 25 at 53-55 per Gibbs CJ, 69-73 per Stephen J, 94-95 per Mason J, 105 per Murphy J, 119-120 per Aickin J, 129-132 per Wilson J, 158-162 per Brennan J.
[46] (1982) 152 CLR 25 at 161-162 per Brennan J.

who might deal with the prosecution proceedings. In his reasons, Gibbs CJ emphasised the need to demonstrate either "an actual interference with the administration of justice, or 'a real risk, as opposed to a remote possibility' that justice will be interfered with"[47], and concluded (with Mason, Aickin and Wilson JJ) that contempt was not demonstrated by the conduct of the proceedings of the inquiry in public.

132 But of most immediate significance, Gibbs CJ gave[48], as an example of the continuance of a commission amounting to contempt, the case where, during the course of a commission's inquiries into allegations that a person had been guilty of criminal conduct, a criminal prosecution was commenced against that person based on those allegations. His Honour said[49] that "the continuance of the inquiry would, speaking generally, amount to a contempt of court", and that the proper course would be to "adjourn the inquiry until the disposal of the criminal proceedings". Stephen J was of the same opinion[50], but went further than Gibbs CJ by concluding that the continuance of the inquiry then under consideration would constitute a contempt of court. Other members of the Court expressed no view on the question of whether continuing an executive inquiry into matters the subject of pending charges would constitute contempt, this particular question not being squarely raised in the proceedings.

133 The conclusion expressed in the *BLF Case* by both Gibbs CJ and Stephen J, that continuing an inquiry into whether a person charged with an offence had committed that offence would be a contempt of court, reflected what had been said in earlier decisions of this Court. In *Clough v Leahy*, Griffith CJ, speaking for the Court, had said[51]:

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

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[47] (1982) 152 CLR 25 at 56, citing *Attorney-General v Times Newspapers Ltd* [1974] AC 273 at 299 per Lord Reid. See also *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351 at 372; [1955] HCA 12.
[48] (1982) 152 CLR 25 at 54.
[49] (1982) 152 CLR 25 at 54.
[50] (1982) 152 CLR 25 at 71-73.
[51] (1904) 2 CLR 139 at 156.

private persons, would amount to an unlawful interference with the course of justice, the act would be unlawful, and would be punishable."

And Griffith CJ had said[52] also that "[a]ny interference with the course of the administration of justice is a contempt of Court, and is unlawful". Some decades later, in *McGuinness v Attorney-General (Vict)*, Latham CJ adopted and repeated the views expressed by Griffith CJ in *Clough v Leahy* and continued[53]:

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

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

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

136 Two consequences follow. First, the actual decision in *Hammond* cannot be dismissed from consideration on the basis that it was decided in haste or improvidently. Second, the identification by Gibbs CJ of *why* continued examination of Mr Hammond would be a contempt is not to be treated as if expressed too loosely. Gibbs CJ said[54] that:

"Once it is accepted that [Mr Hammond] will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me *inescapably* to follow, in the

[52] (1904) 2 CLR 139 at 161.
[53] (1940) 63 CLR 73 at 85.
[54] (1982) 152 CLR 188 at 198.

> circumstances of this case, that there is a real risk that the administration of justice will be interfered with." (emphasis added)
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> The "circumstances of this case" to which Gibbs CJ referred were identified[55] as including the fact "that the examination will take place in private, and that the answers may not be used at the criminal trial". But the interference with the administration of justice, and thus the contempt, was identified[56] 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[57].

67. No doubt the majority decided *X7* on the basis of statutory construction and they did not 'equate a fundamental alteration to the process of criminal justice with a contempt'. However, reading this passage above in combination with the critical finding in the majority judgment – that the companion principle prevents the examination of a charged person on the subject matter of their charges even where the examination is entirely secret – compels the conclusion that underpinned XYN's argument, namely that it is a contempt to conduct such an examination and a provision that authorises it infringes the court's contempt power.

68. It is instructive that Riordan J derived much assistance from the minority judgment in *X7* and the judgments of Keane and Gageler JJ in *Lee No 1* in rejecting the argument. The latter came in for vicious criticism by Hayne J in his judgment in *Lee No 1* where he held that *X7* compelled the result in *Lee No 1*. Many aspects of the Keane and Gageler JJ judgment in *Lee No 1* have gone considerably further than any other judge of the court and has not necessarily found favour in later decisions.

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[55] (1982) 152 CLR 188 at 198.
[56] (1982) 152 CLR 188 at 198.
[57] cf (1982) 152 CLR 188 at 206-207 per Deane J.

69. Elsewhere it has been observed that the minority in *X7* and majority in *Lee No 1* were judges with little or no experience appearing in or presiding over criminal trials. The opposite being true for the majority in *X7*.

70. Surprisingly, XYN did not appeal. No doubt these matters will be argued in other contexts and there is a strong chance that the decision in XYN will be reversed. Due to his first finding Riordan J discussed but did not decide the subsidiary question of whether the interference with the court's contempt power would have (had he decided the first argument differently) rendered s 29(2) invalid.

71. It is not clear what effect the changes to the High Court bench since *Lee No 1* might have on the outcome of the jurisprudence. The only decision of any note involving Nettle and Gordon JJ was *R v IBAC* and was limited in its consideration of the relevant issues.

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