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CHIEF JUSTICE OF NEW SOUTH WALES
STATUTORY COMMISSIONS, COMPULSORY EXAMINATIONS AND
COMMON LAW RIGHTS
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Introduction

1. I would like to begin by respectfully acknowledging the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their elders, past and present.
2. It is a pleasure to be back at UNSW Law School. Although I studied at the University of Sydney, after hearing all of my horror stories, both of my daughters decided to go to this law school.
3. Today I was invited to speak on a topic of my own choosing. That, of course, is a dangerous invitation to give a judge. When I heard that this series was titled 'contemporary issues in the law', I thought it would be a good idea to give a long plug for the Supreme Court's Facebook and Twitter pages. However, I was informed that the current debate in my Chambers about whether the Court should use 'hashtags' might not be considered to

* I express thanks to my Research Director, Ms Sarah Schwartz, for her assistance in the preparation of this address.

be a 'contemporary issue in the law'. Incidentally, for those interested, our 'handle' is @NSWSupCt.

4. But on a more serious note, I have chosen to speak to you today about an issue that, over the past few years, has fallen to be dealt with more and more by courts in Australia. That is, the impact of statutory commissions conducting compulsory examinations of persons who have been charged, or will be charged, with a criminal offence, and the impact that this has on traditional common law rights.
5. Today I will provide an overview of some cases which have come before the courts in recent years dealing with this issue. But first, I will briefly outline what I mean by statutory commissions of inquiry.

Statutory Commissions of Inquiry

6. Traditionally, it is the role of police to investigate crime. Police have a number of powers which enable them to conduct such investigations, such as the power to engage in surveillance, obtain search warrants and interrogate persons suspected of criminal involvement. Due to the intrusive nature of these powers on the personal liberty of ordinary citizens, they are limited in a number of respects. Importantly for this address, throughout the criminal justice process, persons generally have the right to refuse to answer questions which may tend to incriminate them. This is referred to as the privilege against self-incrimination.

7. However, as criminal activity becomes more sophisticated, particularly in the areas of organised crime, tax evasion and corruption, there have been complaints that normal investigative methods are insufficient.
8. From around the early 1980s, various statutory commissions, with special investigatory and law enforcement powers, were established for the purpose of investigating corrupt conduct or serious and complex crime. They include the Australian Crime Commission, which I will refer to as the ACC, the New South Wales Crime Commission, the Independent Commission Against Corruption and royal commissions such as the Royal Commission into Institutional Responses to Child Sexual Abuse.
9. These bodies generally have vast coercive powers which greatly exceed the powers of police. For example, in addition to law enforcement powers such as applying for search warrants, using surveillance and intercepting communications, the ACC has a range of special law enforcement powers.¹ For example, statutory commissions generally have the power to require a person to attend an examination to give evidence under oath or affirmation. A failure to answer a question at the examination constitutes an offence. Generally, a person cannot refuse to answer a question on the basis that the answer might tend to incriminate that person. In other words, the right to silence and privilege against self-incrimination are expressly abrogated.
10. This abrogation is generally accompanied by restrictions being placed on the use of the examination transcript. Generally, where the witness has claimed the privilege, answers cannot be used against them in evidence in

¹ See *Australian Crime Commission Act 2002* (Cth) ('ACC Act') Pt II Div 2 s 30.

future criminal proceedings. This is referred to as 'direct use immunity'. In some instances, any evidence obtained as a consequence of the answers given cannot be used against the witness. This is referred to as 'derivative use immunity', and is less frequently provided for.

11. The coercive powers of statutory commissions have been the subject of heated debate in the legal community, particularly in regard to the impact of such commissions on the traditional rights afforded to accused persons.
12. On the one hand, their coercive powers provide a "useful tool for regulators unable to obtain information through informal, voluntary or cooperative methods".² As stated by the Parliamentary Joint Committee on the ACC, while it is clear that the ACC's powers may have a profound impact on an individual citizen's rights and freedoms,

[g]iven the particularly violent and pernicious nature of organised crime, history has shown the need to create specialist crime fighting bodies with significant powers to combat these organised crime networks.³
13. However, members of the legal community have expressed concerns. In 1984, when the predecessor to the ACC, the National Crime Authority, was established, Ronald Sackville, who is now an acting Judge of the Court of Appeal, published an article warning "that a Crimes Commission with extensive powers and a wide charter, although a superficially attractive solution, would intrude on basic civil liberties enjoyed by all Australians and

² Australian Law Reform Commission, 'Principled Regulation: Federal Civil and Administrative Penalties in Australia' (Report No 95, December 2002) [18.23]-[18.24].

³ Parliament of the Commonwealth of Australia, Parliamentary Joint Committee on the Australian Crime Commission, 'Review of the Australian Crime Commission Act 2002' (Report, November 2005) [5.86].

yet would not necessarily solve or even ameliorate the perceived problems.”⁴ This echoed the concerns expressed by Justice Kirby one year prior, who stated that:

Creating a new institution ... has obvious political advantages. It is seen to be doing something. And it is so much easier than tackling the hard questions [such as] improving the quality of our police services. ... I have an uneasy feeling that ... we would get the worst of both worlds. ... [W]e stand the risk of creating either the cosmetics of an ineffective agency or a too-powerful institution, unaccountable in practice to the course of our democratic institutions.⁵

14. Despite these warnings and despite the fact that such bodies have been described as “institution[s] of last resort”,⁶ there has, in recent years, been a proliferation of the use of coercive investigatory tactics by such commissions, resulting in courts being called upon to deal with the effect of these coercive mechanisms on the traditional rights afforded to accused persons in a criminal trial.
15. With that in mind, I will now provide a brief overview of the law regarding the privilege against self-incrimination.

The privilege against self-incrimination and the principle of legality

⁴ R Sackville, ‘Royal Commissions in Australia, What Price Truth?’ (1984) 60(12) *Current Affairs Bulletin* 3.

⁵ MD Kirby, ‘National Crimes Commission: Another ASIO?’ (Paper Presented to the National Crime Commission Conference, 1983), cited in Sackville, above n 2, 4.

⁶ See S Presser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths, 2006) p. 57.

16. The privilege against self-incrimination refers to the common law doctrine that a person cannot be obliged to answer any question or produce any document if the answer or document would tend to incriminate that person.⁷ The privilege is “a basic and substantive common law right”.⁸ It is related to the principle that, in a criminal trial, the prosecution must prove its case unassisted by the accused. This principle is a fundamental aspect of our accusatorial system of criminal justice.⁹
17. However, the privilege against self-incrimination does not hold absolute and, as described by two Justices of the High Court, there is “no free-standing or general right of a person charged with a criminal offence to remain silent.”¹⁰ Rather, the privilege is protected by what is called the principle of legality.
18. The principle of legality is the rule of statutory construction that “[c]ourts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms ... unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question.”¹¹

⁷ See *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 335.

⁸ *X7 v Australian Crime Commission* (2013) 248 CLR 92 ('X7') at [104].

⁹ *Lee v The Queen* [2014] HCA 20; (2014) 308 ALR 252; (2014) 88 ALJR 656 ('Lee (No 2)') at [32].

¹⁰ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 ('Lee (No 1)').

¹¹ *Al-Kateb v Godwin* (2004) 219 CLR 562 at [19]; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at [19]–[21]. See also *Coco v R* (1994) 179 CLR 427 at 437–8; *Bropho v Western Australia* (1990) 171 CLR 1; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [56]–[59]; *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 562 at 563; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492; *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337 at [12]–[15]; *Minister for Immigration and Citizenship v Haneef* (2007) 161 FCR 40 at [105]–[113].

19. In regard to the privilege against self-incrimination, the principle of legality dictates that, in the absence of clear words or necessary implication, the legislature will be presumed not to have abrogated the privilege and the associated common law rights of an accused in a criminal trial.

Early cases on the privilege against self-incrimination

20. For many years the principle of legality has applied so that statutes will be interpreted, as far as possible, not to abrogate the privilege against self-incrimination. For example, in the 1941 case of *Crafter v Kelly*,¹² an Act made it an offence for a person called before a Farmers Assistance Board to refuse to answer a 'lawful' question. The full court of the South Australian Supreme Court held that the legislation did not take away the examinee's right to refuse to answer a question which may incriminate him or her, as a 'lawful question' was "one which calls for an answer according to law".¹³
21. In contrast, the High Court has also held on many occasions that the privilege will be abrogated where the "character and purpose" or the express language of the legislation makes it clear that a person cannot refuse to answer questions on the basis that the answers are incriminating.¹⁴
22. However, just because a statute abrogates the privilege in the context of an examination before a statutory commission does not mean that the

¹² *Crafter v Kelly* [1941] SASR 237.

¹³ *Ibid* at 242.

¹⁴ See *Pynboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Sorby v Commonwealth* (1983) 152 CLR 281; *Hamdan v Callanan*; *Younan v Callanan* [2014] QCA 304.

legislation will always be interpreted as requiring a person to be examined. In the case of *Hammond*¹⁵ in 1982, the High Court held that if a person has already been charged with an offence, they cannot then be examined before a royal commission, even if a 'use' immunity is provided.¹⁶ Such an examination was held to constitute a contempt of court. This decision was later reinforced by the High Court in *X7*, which I will discuss in a moment.

23. Historically, cases dealing with bankruptcy and company liquidation have been treated differently from other criminal inquiries. The 1989 case of *Hamilton v Oades*,¹⁷ concerned the compulsory examination of a director of a company in liquidation regarding the affairs of the company, in circumstances where a criminal trial was pending against the director. The High Court distinguished the earlier line of authority concerning criminal commissions and found that Parliament had demonstrated an intention to override the privilege against self-incrimination. In making this finding, the Court focused on the fact that historically, proceedings in bankruptcy and insolvency have been regarded as an exception to the principle expounded in *Hammond*.¹⁸
24. Since these cases, there have been a plethora of cases considering whether statutes have displaced the privilege. I will not mention all of them today. Rather, I will provide you with some select examples of recent cases

¹⁵ *Hammond v Cth* (1982) 152 CLR 188.

¹⁶ *Hammond v Cth* (1982) 152 CLR 188.

¹⁷ *Hamilton v Oades* (1989) 166 CLR 486.

¹⁸ See *Ibid* at 494.

that highlight the issues that can arise when statutory commissions conduct compulsory examinations.

X7 v Australian Crime Commission

25. The first case I will discuss is *X7 v The Australian Crime Commission*. In November 2010, X7 was charged with three drug trafficking offences. While in custody awaiting trial, he was sent a summons to appear and give evidence before the ACC, who sought to examine him on matters related to the charges laid against him.
26. The ACC Act provides that a witness cannot refuse to answer a question during an examination on the ground that the answer might be incriminatory. The Act does, however, provide for direct use immunity, such that a compelled answer cannot be used against a witness in subsequent criminal proceedings.¹⁹
27. While at first, X7 answered questions put to him by the ACC examiner, he later refused to do so. The ACC informed him that they would charge him with failing to answer questions.
28. X7 commenced proceedings in the High Court's original jurisdiction. In June 2013, a majority of the High Court, Justices Hayne and Bell, with whom Justice Kiefel agreed, found that the ACC Act did not permit a person who had been charged with an offence to be compulsorily examined on the subject matter of the offence.

¹⁹ See ACC Act Pt II Div 2, s 30.

29. Importantly, the majority found that the compulsory examination of a witness on the subject matter of pending charges would fundamentally alter the accusatorial process of a criminal trial, regardless of protections given to the witness and use immunities.²⁰
30. In reaching this conclusion, the majority embarked on a conceptual analysis of what the accusatorial criminal justice system entails. They considered that at every stage of the process, from investigation to prosecution to trial, the process was accusatorial. As such, the ‘right to silence’ and privilege against self-incrimination encompassed more than an accused’s rights at trial, it included “the rights ... of a person suspected of, but not charged with, an offence, and the rights and privileges which that person has between the laying of charges and the commencement of the trial.”²¹
31. Therefore, as the examination would abrogate X7’s common law rights, the legislation would only allow for this if there were “express words or necessary intendment”.²²
32. The majority held that while the ACC Act did not place any limitation on examining persons who had already been charged, it also did not positively state that the ACC *could* examine a person who had already been charged with an offence.²³ Therefore, in absence of “express words or necessary intendment”, the legislation did not permit X7 to be examined on the subject of pending charges.

²⁰ X7 at [69]-[70], [87].

²¹ *Ibid* at [103]-[105], [118].

²² *Ibid* at [119].

²³ *Ibid* at [76].

33. Chief Justice French and Justice Crennan, in the minority, did not disagree that the compulsory examination altered the accusatorial process. Rather, they held that the text, structure and legislative history of the ACC Act demonstrated that the legislature intended to raise “the public interest in the continuing investigation of serious and organised crime over the private interest in claiming the privilege against self-incrimination.”²⁴
34. The High Court’s narrowly decided decision in *X7* is important for determining that the common law rights of an accused which are protected by the principle of legality extend to the pre-trial context.

New South Wales Crime Commission v Lee (Lee No 1)

35. After *X7*, the High Court appeared to have accepted the position that a compulsory examination by a statutory commission would interfere with the administration of justice if criminal proceedings were afoot. So when the High Court delivered its judgment in *Lee (No 1)*, three months later, allowing accused persons to be examined on the subject of pending charges, naturally, many were surprised.
36. In *Lee (No 1)*, the appellants were charged with drug, firearms and money laundering offences. While charges were pending, the New South Wales Crime Commission made an application in the Supreme Court under the *Criminal Assets Recovery Act*,²⁵ or CAR Act, for the appellants to be examined in Court concerning the nature and location of any property in

²⁴ *Ibid* at [30].

²⁵ *Criminal Assets Recovery Act 1990* (NSW) (‘CAR Act’).

which they had an interest. The CAR Act would have effectively denied them the privilege against self-incrimination in the examination.

37. At first instance, a single judge of the Supreme Court refused to make the orders sought by the Crime Commission.²⁶ However, the Court of Appeal held that, as a matter of construction, examinations under the Act could take place regardless of whether a trial was pending.²⁷ The judgment of the Court of Appeal was delivered almost a year before the High Court's judgment in *X7*. As a side note, it is interesting to consider whether the court would have reached a different conclusion if *X7* had been decided earlier.
38. On appeal, the three members of the High Court who made up the majority in *X7* found themselves in the minority in *Lee (No 1)*. The four judges in the majority delivered three separate judgments, all concluding that the relevant provisions of the CAR Act permitted the compulsory examination of a person on a subject related to pending charges against them.
39. The majority judges referred to the following factors as demonstrating a necessary intention to abrogate the common law rights of the accused. First, the CAR Act provided that examinations were to take place before the Supreme Court, not a member of the executive. Thus, the court would be able to "take appropriate action to prevent injustice", such as adjourning the proceedings, conducting them in private and disallowing certain questions.²⁸ This was said to be an important distinguishing feature from *X7*.²⁹ Second, a

²⁶ *NSWCC v Lee* [2011] NSWSC 80.

²⁷ *NSWCC v Lee* (2012) 84 NSWLR 1.

²⁸ *Lee (No 1)* at [31].

²⁹ *Ibid* at [40]-[51], [138].

stated purpose of the CAR Act was to provide for the confiscation of property “without requiring conviction”³⁰ and the jurisdiction to examine a person was enlivened regardless of whether they had already been charged, tried, convicted or acquitted.³¹ Further, the CAR Act expressly provided that the fact that criminal proceedings had been instituted was not a ground on which the Supreme Court could stay proceedings under the Act.

40. In a joint judgment, Justices Gageler and Keane went one step further and stated that the principle of legality would not operate to protect the rights of an accused infringed by a compulsory examination on the subject of pending charges. They classified the impact of such a compulsory examination as the “loss of a forensic advantage” and not as prejudicing the fair trial of an accused.³²
41. The minority maintained their view, which they had stated in *X7*, that a compulsory examination on the subject of pending charges would alter a criminal trial in a fundamental respect. They stated that while the relevant provisions of the CAR Act did evince an intention to remove the privilege, they did not evince an intention to do so in all circumstances, such as when an accused had charges pending against him or her.
42. There has been much debate surrounding whether the decisions in *X7* and *Lee (No 1)* can be reconciled. In *X7*, the High Court appeared to hold that where a person had been charged, but not tried, legislation would be

³⁰ CAR Act s 3(a).

³¹ CAR Act s 6; *Lee (No 1)* at [131].

³² *Lee (No 1)* at [323]-[324].

interpreted such that they could not be compulsorily examined on the subject of the pending charges. However, in *Lee (No 1)*, the High Court appeared to find that depending on the particular legislative regime, such an examination could take place and any prejudice could be overcome by procedural orders. I will leave it to you to think about whether the different wording of the legislation enables these decisions to be reconciled.

Lee v New South Wales Crime Commission (Lee (No 2))

43. There is a postscript to *Lee (No 1)*. In 2014, the appellants came back to the High Court regarding a compulsory examination which had taken place prior to the CAR Act proceedings. In 2009, prior to being charged, both appellants were compulsorily examined by the New South Wales Crime Commission. Under section 13(9) of the New South Wales Crime Commission Act,³³ which has since been repealed, the Commission was required to make a direction prohibiting the publication of evidence given before it where publication “might prejudice ... the fair trial of a person”. After the appellants’ examinations, a direction was made in these terms.
44. However, in breach of this direction, the Commission supplied the Director of Public Prosecutions, the DPP, a copy of the appellants’ examination transcripts before the Commission, for the purpose of identifying what they might say in their defence.
45. Ultimately, both appellants were convicted. They appealed their convictions to the New South Wales Court of Criminal Appeal on the basis that there

³³ *New South Wales Crime Commission Act 1985* (NSW) (‘NSWCC Act’).

was a miscarriage of justice caused by the communication of their examination transcripts to the DPP. While the Crown accepted that there had been a breach of the Act, it maintained that there was no miscarriage of justice. The Court of Criminal Appeal accepted this position and held that the provision of the transcripts to the DPP had no palpable effect on the appellants' defence.³⁴

46. The High Court disagreed. In a unanimous judgment, it found that the disclosure of the transcripts caused a miscarriage of justice and the appellants' convictions should be quashed and a retrial ordered.
47. The Court referred to *X7* as authority for the position that the compulsory examination of persons on the subject of pending charges was a departure from the accusatorial system for which legislation must clearly or necessarily provide for.³⁵ The Court found that section 13 of the Act had a protective purpose and "supported the maintenance of the system of criminal justice referred to in *X7* and the trial for which that system provides".³⁶ The Court held that the DPP's possession of the transcripts put the appellants' prospects of a fair trial at risk, "altered the position of the prosecution vis-à-vis the accused"³⁷ and thus, constituted a "fundamental departure" from the criminal trial process.³⁸
48. As a sidenote, it is interesting that in *Lee (No 2)*, *X7* was cited frequently throughout as supporting the conclusion reached, while *Lee (No 1)* was only

³⁴ *Lee v R* (2013) 232 A Crim R 337 at [163].

³⁵ *Lee (No 2)* at [16].

³⁶ *Ibid* at [34].

³⁷ *Ibid* at [51].

³⁸ *Ibid* at [46].

given a very brief mention, by way of a footnote, without any suggestion that the two judgments were irreconcilable.

49. The next cases I will speak about have all come before me in the Court of Criminal Appeal. These cases, *Seller*, X7 (No 2) and *OC*, might, at first blush, be thought to be at odds with the decision in *Lee* (No 2). However, they simply highlight that it is ultimately the prerogative of the legislature to determine whether and in what circumstances, fundamental common law rights can be abrogated. The first two also demonstrate the issues involved in balancing fundamental common law rights with the community interest in having serious criminal offences brought to trial.

R v Seller; R v McCarthy

50. In *Seller*, the applicants were charged with a conspiracy to commit tax offences. Prior to being charged, they had been examined by the ACC on matters relevant to these offences. In contravention of directions made under the ACC Act, their examination transcripts were disseminated to the Commonwealth DPP and stored electronically. In 2012, Justice Garling of the Supreme Court of New South Wales ordered that the applicants' trial be permanently stayed on the basis that their right to a fair trial had been compromised.³⁹
51. On appeal by the Crown, the Court of Criminal Appeal lifted the stay. The Court held that the ACC Act, by necessary implication, "abrogated the privilege against ... derivative self-incrimination" and did not prohibit

³⁹ *R v Seller; R v McCarthy* (2012) 232 A Crim R 146.

‘derivative use’ of the evidence obtained at a compulsory examination.⁴⁰

The Court found that a fair trial is not *always* prejudiced by the derivative use of such evidence, for example, to locate bank accounts. The question of whether the use by the prosecution of a compulsory examination transcript would compromise a fair trial “depended on the material in question and the circumstances of its use”.⁴¹

52. While a fair trial may be compromised where the evidence disclosed defences the accused might raise at trial, or tended to show that evidence supported the charges,⁴² the trial judge had failed to consider whether such prejudice had in fact occurred or whether there was any evidence that the trial would suffer a fundamental defect. The grant of a stay requires a finding of a positive fundamental defect, such that there is nothing that can be done by a trial judge to relieve its unfair consequences. As such, the trial judge had erred in ordering the stay.
53. As a side note, in my judgment, I added that “it would not be appropriate for the [prosecution] to make any use of the transcripts in the future conduct of th[e] case”.
54. In September 2013, the High Court heard and rejected an application for special leave, stating that there was no evidence that the trial would suffer from a fundamental defect as a result of the distribution of the transcripts to the DPP.⁴³

⁴⁰ Ibid at [80].

⁴¹ Ibid at [102].

⁴² Ibid at [104].

⁴³ *R v Seller; R v McCarthy* [2013] HCATrans 204.

55. The special leave application and the Court of Criminal Appeal judgment were all dealt with before the court had heard arguments in *Lee (No 2)*. While it may seem this decision conflicts with *Lee*, it should be recalled that in *Lee (No 2)*, there was cogent evidence that the prosecution had gained an advantage through access to the appellant's examination transcript.
56. However, there is also a postscript to this decision. The applicants were tried before Justice Button in 2014. A new prosecution team who had not been privy to their ACC examination transcripts had been appointed.
57. However, the Crown proposed to lead evidence from a Mr Tang, an officer of the ATO who had been present on some occasions during the compulsory examinations of the applicants.
58. At the trial, Justice Button held that the fundamental right of the applicants to a fair trial called for the exclusion of Mr Tang's evidence. However, his Honour refused to make other orders sought by the applicants to temporarily stay the proceedings pending the appointment of a new prosecution team or permanently stay the proceedings on the ground that the accusatorial process had been fundamentally altered.⁴⁴
59. The Court of Criminal Appeal dismissed both the Crown's and the applicants' appeals. The Court held that any risk of upsetting the balance of power between the State and the accused, caused by the dissemination of compulsorily acquired material, is open to be remedied by discretionary orders.⁴⁵

⁴⁴ *R v Seller; R v McCarthy* [2014] NSWSC 1290; [2014] NSWSC 1369.

⁴⁵ *R v Seller; R v McCarthy* [2015] NSWCCA 76 at [226].

60. While the fact that a proposed witness was present during an accused's compulsory examination would not always alter the accusatorial process, in this case, if Mr Tang gave evidence, the accusatorial process would in fact be altered in the fundamental sense described in *X7* and *Lee (No 2)*. This was because Mr Tang's evidence was informed by the compulsory examinations and the applicants may have been hindered in their ability to cross-examine Mr Tang based on his knowledge of the compulsorily acquired material.⁴⁶
61. Further, the unlawful dissemination of the transcripts had been remedied by the appointment of a new prosecution team who was not privy to them and the exclusion of Mr Tang, the only potential witness privy to the material. The mere fact of dissemination to persons from the DPP who had not been involved in the trial did not alter the accusatorial process to such an extent so as to warrant a stay.⁴⁷
62. In August 2015, the High Court refused a special leave application.

X7 (No 2)

63. The next case I will speak about, *X7 (No 2)*,⁴⁸ can be dealt with very briefly. After the High Court declared the ACC examination of X7 to be illegal, X7 sought a permanent stay of the criminal proceedings brought against him in the District Court. The Court of Criminal Appeal upheld the primary judge's decision to refuse to grant a permanent stay. As in *Seller*, the Court held

⁴⁶ *Ibid* at [115]-[120], [122]-[123], [232]-[234].

⁴⁷ *Ibid* at [203], [208]-[209].

⁴⁸ *X7 v R* [2014] NSWCCA 273 ('*X7 (No 2)*').

that it was not persuaded that X7's compulsory examination did in fact lead to a fundamental defect in his trial. The Court noted that the examination transcript was not before the Court and the nature of the questions asked and answers given were unknown.⁴⁹ The Court held that although X7's examination constituted a contempt of court, it did not lead to the trial being an abuse of process, as the ACC had conducted the examination in the bona fide belief that it was authorised to do so.⁵⁰

64. In May 2015, the High Court dismissed an application for special leave from this decision.⁵¹

R v OC

65. The final case that I will discuss today relates to the investigatory provisions under the ASIC Act,⁵² which are different in a few crucial respects from the Crime Commission Acts.
66. In 2013, the respondent, OC, was charged with conspiracy to commit insider trading. Prior to that, he had been compulsorily examined by ASIC on matters relevant to this charge. Material relevant to his defence at trial was also revealed at the examination. OC's examination transcript, or a summary of it, was subsequently read by the Commonwealth DPP and by OC's prosecuting counsel.

⁴⁹ *Ibid* at [110], [115]

⁵⁰ *Ibid* at [111].

⁵¹ *X7 v The Queen* [2015] HCATrans 109 (15 May 2015).

⁵² *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act').

67. In the Supreme Court, the primary judge granted OC a temporary stay, pending the removal of any person from the prosecution team who had direct or derivative access to his ASIC examination transcript.⁵³
68. On appeal, the Court of Criminal Appeal set aside the stay and held that, as a matter of statutory interpretation, the ASIC Act permitted persons involved in OC's prosecution to have access to the transcript for the purpose of conducting the trial.⁵⁴
69. Neither party contested the claim that OC would be prejudiced at his trial by the prosecution team having access to the transcript. In line with *Lee (No 2)*, the provision of a compulsory examination transcript to those responsible for the prosecution of the examinee fundamentally alters the accusatorial process. Therefore, according to the principle of legality, this could only occur through clear words or necessary intention in the ASIC Act.⁵⁵
70. The court relied on a number of provisions in the Act in concluding that it did disclose such a necessary intention. First, the Act gave ASIC the power to make a copy of an examination transcript available to the Commonwealth DPP.⁵⁶ The respondent accepted that, in line with this power, and ASIC's prosecutorial role,⁵⁷ ASIC could make the examination transcript available to the DPP for the purpose of making an informed decision as to whether or not to institute criminal proceedings.⁵⁸ Therefore, the main issue was

⁵³ *OC v R* [2014] NSWSC 1392.

⁵⁴ *R v OC* [2015] NSWCCA 212 ('OC').

⁵⁵ *Ibid* at [98]-[99].

⁵⁶ See ASIC Act ss 17, 18, 27(1).

⁵⁷ See ASIC Act s 49.

⁵⁸ *OC* at [106].

whether the use of the transcript by the DPP was limited to this purpose, or whether it could also be used in the subsequent conduct of the prosecution.

71. The ASIC Act stated that unless a claim for privilege was made and a statement made in an examination might in fact tend to incriminate the examinee, statements made in ASIC examinations were admissible in criminal proceedings.⁵⁹ The time for determining whether these conditions were met was the time that the statements from the examination were sought to be tendered in evidence. It followed, as a matter of necessary implication, that the DPP officers responsible for the conduct of the proceedings were entitled to have access to the transcripts, not only to formulate charges, but to prosecute them. This would enable them to determine whether the privilege was properly claimed and whether the transcript could be tendered.⁶⁰

72. The Court also observed that “the legislature has, for many years made ‘special exceptions to the otherwise accusatorial process of the criminal law in respect of bankruptcy and companies examinations’”.⁶¹ For example, in the 1965 High Court case of *Rees v Kratzman*,⁶² Justice Windeyer stated that “[t]he honest conduct of the affairs of companies is a matter of great public concern .. If the legislature thinks that in this field the public interest overcomes some of the common law’s traditional consideration for the individual, then effect must be given to the statute which embodies this

⁵⁹ ASIC Act ss 68, 76, 79.

⁶⁰ OC at [119].

⁶¹ OC at [123]; X7 at [140]; *Lee (No 1)* at [317].

⁶² *Rees v Kratzman* (1965) 114 CLR 63.

policy.”⁶³ These remarks were reiterated by Justice Walsh, with whom Justice Owen agreed, in the 1970 High Court case of *Mortimer v Brown*.⁶⁴

73. The High Court dismissed an application for special leave against the decision in *OC* in February this year.⁶⁵

Conclusion

74. I will conclude by posing a few questions regarding the cases I have referred to and by noting some other issues that call for consideration.

75. First, what is the difference between the compulsory examination of a person who has already been charged as opposed to a person who is about to be charged?

76. Second, why should bankruptcy and companies examination cases be treated differently from cases involving serious organised crime? Indeed, why should cases involving organised crime and tax offences be treated differently from other criminal offences?

77. Third, an issue which has arisen in other jurisdictions outside of New South Wales is the effect of human rights legislation on the coercive powers of commissions. This issue was enlivened in Chief Justice Warren’s decision in *Re Application under the Major Crime (Investigative Powers) Act 2004*.⁶⁶ Chief Justice Warren held that an Act which abrogated the privilege and provided for direct but not derivative use immunity was in breach of the

⁶³ *Ibid* at 80.

⁶⁴ *Mortimer v Brown* (1970) 122 CLR 493.

⁶⁵ *OC v The Queen* [2016] HCATrans26 (12 February 2016).

⁶⁶ *Application under Major Crime (Investigative Powers) Act 2004; DAS v Victorian Human Rights & Equal Opportunity Commission* (2009) 24 VR 415.

Victorian Charter of Human Rights. Her Honour held that the relevant provisions of the Act did not meet the justification test in the Charter as being “demonstrably justified in a free and democratic society” as the purpose of the Act could be achieved while retaining some form of derivative use immunity.⁶⁷ The Chief Justice held that the Act should be interpreted such that derivative use of evidence obtained by compulsion was inadmissible unless it was discoverable through alternative means.⁶⁸

78. These are just a few of the issues that may arise in future cases dealing with this issue.
79. As you can see from the cases that I have mentioned, the increasing use of coercive investigatory techniques by statutory commissions has led to a number of intrusions on longstanding and fundamental common law rights and privileges.
80. The principle of legality provides a strong informal protection mechanism for the common law rights of an accused in a criminal trial. However, the devil is in the detail. Although the principle may provide a strong presumption against the abrogation of fundamental common law rights, it is not all that hard to get around it. The cases of *Lee (No 1)* and *OC* demonstrate this point.
81. The question of whether and to what extent statutory commissions can abrogate fundamental common law rights through compulsory examinations has not been completely answered. The privilege against self-incrimination

⁶⁷ *Ibid* at [144]-[164].

⁶⁸ *Ibid* at [177].

exists in order to maintain “a proper balance between the powers of the State and the rights and interests of citizens”⁶⁹ and to protect the adversarial system of criminal justice.⁷⁰ As such, as stated by Justice McDougall, “the privilege is susceptible to re-evaluation and evolution, in conformity with shifts in the complexity of society ... and in society’s identification of key values.”⁷¹

⁶⁹ *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118 at 127 (Gleeson CJ).

⁷⁰ See *Sorby* at 294 (Gibbs CJ).

⁷¹ R McDougall, ‘The Privilege Against Self Incrimination’ (Speech, 18 October 2008).