

IN THE HIGH COURT OF AUSTRALIA  
ADELAIDE REGISTRY



No. A30 of 2019

ON APPEAL FROM THE FULL COURT OF THE  
FEDERAL COURT OF AUSTRALIA

BETWEEN:

CXXXVIII

Appellant

10

and

THE COMMONWEALTH OF AUSTRALIA

First Respondent

AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION

Second Respondent

JEFFREY ANDERSON

Third Respondent

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**APPELLANT'S FURTHER WRITTEN SUBMISSIONS**

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## APPELLANT'S FURTHER WRITTEN SUBMISSIONS

### Part I:

1. These submissions are in a form suitable for publication on the internet.

### Part II:

2. Amended grounds of appeal 1A (iv)-(vi) and 1B, which concern the effect and operation of the *Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019* ("the Amending Act"), raise the following questions:

- 10 a. Is the existence, at the time of making the making of the determination, of a particular investigation into identified "*federally relevant criminal activity*" one of the "*requirements of [the ACC Act]*" within the meaning of item 55(1) of Schedule 1 of the Amending Act ("item 55"), such that item 55(2) operates to validate a purported determination that does not relate to any "*particular*" investigation? (1A(iv))
- b. If so, is item 55 beyond the legislative power of the Commonwealth Parliament because it purports to give effect to a determination as an instrument the function of which is to identify the limits of both the powers conferred and criminal offences in circumstances where neither item 55 nor the determination itself supplies the content necessary to identify those limits, with the consequence that the limits on power are incapable of being ascertained:
- 20 (i) by a decision-maker exercising part of the executive power of the Commonwealth in the execution of the *ACC Act*; or
- (ii) by a Ch III court in the exercise of judicial power? (1A(v))
- c. Is item 55(2) invalid because s 7C of the Amending Act is not a valid exercise of legislative power because it does not identify or determine the content of a law as a rule of conduct or declaration as to power, right or duty which has a sufficient connection with a head of Commonwealth legislative power, and item 55(2) is inseverable from s 7C? (1A(vi))
- d. Had the First Determination as amended by the Second Determination expired at the time of the issue of the Second Summons and Second Notice by reason that item 54(3) of Amending Act applied s 7C(4G)(b)(i), such that it ceased to be in force on 4 September
- 30 2016? (1B)

### Part III and IV:

3. Notices have been issued in accordance with s 78B of the *Judiciary Act 1903* (Cth).

### Part V:

#### The construction and operation of item 55

4. Item 55 operates on a determination made or purportedly made under s 7C(3) prior to commencement of the Amending Act. Item 55(2) validates (prospectively and retrospectively) such a determination, and "*any other thing done in relation to the determination*".

5. The adoption in item 55 of a legislative formula similar to that considered in *Duncan v ICAC*<sup>1</sup> (and found to be valid in the context of the particular arguments advanced in that case) does not avoid the need to carefully and precisely analyse the terms of item 55 and its operation in the present statutory context. Unlike the law considered in *Duncan*, item 55:

- a. in its terms, purports to operate so as to validate a decision or part of an instrument only to the extent that the determination does not “*satisfy the requirements of that Act*”;
- b. in the case of the appellant, applies for the purposes of prospective administrative action pursuant to a summons that was issued under s 28 of the *ACC Act* as in force prior to the commencement of the Amending Act;

10 c. is asserted by the Commonwealth to result in a future examination (under s 28 of the *ACC Act*) being lawfully conducted, despite it being *impossible* to ascertain whether any particular question asked is in “*relation to any matter that relates to a special ACC operation/investigation*” (noting that failure to answer such a question is a criminal offence).

6. Unlike the legislation in *Duncan*, which retrospectively applied a new definition of “*corrupt conduct*”, by reference to which the validity of administrative action was now to be ascertained, the mechanism used in the Amending Act is to deem a determination to be valid as if any “*requirement*” of the *ACC Act* that was not in fact satisfied, was satisfied. The result is to relieve compliance with anything properly characterised as a “*requirement of [the ACC Act]*”.

7. Item 55 purports to validate past determinations made under s 7C(3) of the *ACC Act* as  
20 in force prior to the commencement of the Amending Act (the old s 7C(3)), so that the lawfulness of acts done in reliance upon such determinations — such as the issuing of the Second Summons, and the proposed future conduct of an examination of the appellant — falls to be assessed on the footing that the determinations were valid determinations made under the old s 7C(3).

#### **A particular investigation is not a “requirement of that Act” (1A(iv))**

8. The expression “*the requirements of that Act*”, in item 55(1), gives rise to a constructional choice. It can be readily accepted that the “*requirements of that Act*”, would include the various conditions on the exercise of the power to make a determination, such as those in s 7C(3) and (4), and the requirement in s 7G(4) for a special quorum for the making of  
30 determinations under s 7C(3). It does not, however, include the absence of a “*particular investigation*”.

9. First, as explained in the *AWS*, it is of the very essence of a “*determination*” that it must relate to an “*investigation*”; if there is no “*investigation*”, there is simply no content to the determination. The identification of a particular investigation is an essential, or integral, part of

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<sup>1</sup> *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83; See also *R v Humby; Ex parte Rooney* (1973) 129 CLR 231; *Re Macks; Ex parte Saint* (2000) 204 CLR 158.

the making of any determination. The existence of an investigation is not merely a “*requirement of [the ACC Act]*” of a kind that can sensibly be relieved by a “*validating*” provision; it is the very subject matter of such a determination. The concept of a “*requirement of that Act*” should not be construed as extending to the very content of the power itself, but only to the conditions on the exercise of the power.

10 10. Second, the actual First Determination and Second Determination do not and are not “*capable of themselves of constituting a special ACC investigation*”.<sup>2</sup> Nor does item 55 itself supply the content or terms of a “*particular*” ACC special investigation. The legislative device of providing that the determinations are “*as valid and effective as [they] would have been*” had they satisfied the requirements of the Act is not capable of identifying the particular  
 10 investigation to which that determination is taken to relate. In fact, it simply asserts a conclusion — that certain determinations are valid and effective. The assumption implicit in item 55 is that once any determination is “*validated*”, the provisions of the *ACC Act* (including in its pre-Amending Act form) can simply operate as though that determination had always been valid.

20 11. Put another way, a purported determination that does not relate to a particular investigation is not merely a “*determination*” that is invalid because it was affected by a failure to comply with some “*requirement*” of the *ACC Act*; it is an instrument that is not capable of performing the function of a determination made under the old s 7C(3) at all. To deem such a  
 20 purported determination to be, and always to have been, a valid determination, relating to a particular investigation, would be to attempt to give it work it cannot possibly perform.

12. Third, if the existence of a “*particular investigation*” were a “*requirement of that Act*” which item 55 had the effect of satisfying, then it would be necessary to make a counterfactual assumption (ie, a fiction) that there did exist a particular investigation at the time the determination was made. That would be necessary because the powers which the making of a determination enlivens were only exercisable in connection with the particular investigation to which the determination relates: see, eg, *ACC Act*, ss 21A(1)(b), 28(1)(d).

30 13. That is an implausible construction, because item 55 does not in its terms (and cannot be made to by means of statutory construction) supply any content to the particular investigation  
 30 that must, on this construction, be taken (counter-factually) to have existed.<sup>3</sup> Nor is the particular investigation a matter about which a court could sensibly make its own findings, because it is a fiction. It remains entirely unexplained as to how it would be possible for a decision-maker, such as an examiner to exercise any of the powers in ss 21A or 28 of the *ACC*

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<sup>2</sup> *Strickland v DPP (Cth)* (2018) 93 ALJR 1.

<sup>3</sup> Notably, this construction would require the existence of a particular investigation to have existed at the time of the determination, even in cases, like in *Strickland*, where the staff of the ACC had positively decided *not* to undertake any investigation.

*Act* in the absence of a particular identifiable investigation, or for a court to identify the limits of an examiner's powers.<sup>4</sup>

14. Fourth, such a construction should not be adopted because item 55 would be beyond the legislative power of the Commonwealth for the reasons identified at [17]-[22] below.

15. Fifth, given that the failure to comply with a summons is an indictable offence (s 30(6) of the *ACC Act*), the effect of item 55 on this construction would be to create retrospective criminal liability founded on a fiction as to the existence of a particular investigation. The principle of legality has obvious significance to that contention. That issue is far from hypothetical on the facts of this case, because objection was taken to the validity of the  
 10 Summons and the appellant did not personally answer to it, meaning that (if the Summons was, or is now deemed to be, valid) the appellant would find himself, retrospectively, placed in breach of s 30(1) of the *ACC Act*.

16. A construction of item 55 that would provide for the “*validation*” of a determination with these consequences ought not be adopted. It is to be avoided by construing the expression “*requirements of that Act*” as referring to the requirements for the making of a valid determination under s 7C(3).

#### **Item 55 is beyond the legislative power of the Commonwealth Parliament (1A(v))**

17. As a general proposition, the Commonwealth Parliament can make laws that alter  
 20 (prospectively or retrospectively) the legal consequences that attach to particular acts by the executive. That is, generally, the Parliament can make a law that “*validates*” an otherwise invalid administrative act.

18. However, if the Parliament chooses to give new legal effect to an otherwise invalid administrative act, the legal effect that is to be given to that act must be identified, either by the terms of the administrative act itself or by the validating law. The validating statute must answer the character of a “*law*”: the legal effect of the validating statute, and the limits of any administrative power that depends upon that legal effect, must be capable of ascertainment. Executive decision-makers (such as an examiner) are a creature of the law and must be able to ascertain the lawful limits of the power which they are empowered to exercise.<sup>5</sup> So must a court  
 30 in the exercise of judicial power. Importantly, a court cannot itself be required to create the content of the law (that is, to act legislatively) in order to ascertain its limits.<sup>6</sup>

19. The problem in the present case arises because item 55, on the construction which the Commonwealth apparently seeks to give it, purports to convert an ineffective instrument that

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<sup>4</sup> How, for example, could a court determine whether “*a document or thing*” was “*relevant to*” “*the investigation*”, meaning a particular special investigation that did not exist in fact?

<sup>5</sup> *Wotton v Queensland* (2012) 246 CLR 1 at 9 [10] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also, *Plaintiff M96A/2016 v Commonwealth of Australia* (2017) 261 CLR 582, at 596-7 [29]-[31].

<sup>6</sup> *Thomas v Mowbray* (2007) 233 CLR 307 at 345 [71] (Gummow and Crennan JJ).

does not in fact relate to any particular investigation into an instrument of a kind that, of its very essence, was required to relate to a particular investigation. Yet neither item 55 nor the determination itself identifies the particular investigation which the “*validated*” determination is to be taken to relate. That deficiency means that it defies the minimum content for a law conferring executive power by the Commonwealth Parliament. It lacks sufficient content to enable the ascertainment of the limits on power by the executive or the courts.

20. As submitted above, a validated determination must live and breathe in the *ACC Act* (particularly ss 24A and 28) in such a way as to supply the content to resolve the relational questions it poses. The problem is that item 55 does not supply the content or terms of a  
 10 “*particular*” ACC special investigation, and the Determination it validates is incapable of doing so on its terms. That is so for all of the reasons explained at [71] in *Strickland*.

21. Because item 55 does not supply the content of the necessary particular investigation, it is impossible (not just practically, but *in principle*):

- a. for an executive officer under the *ACC Act* (an examiner) to ascertain that they are “*satisfied*” that the examination is for “the purposes of a” special ACC investigation (s 24A), that the issue of a summons is “*reasonable in all the circumstances*” (s 28) and each of the other matters addressed in [31] of the *AWS*; and
- b. for a Ch III Court, as the ultimate arbiter of the lawfulness of administrative action, to ascertain the limits on the powers conferred by the *ACC Act*. Item 55 demands that a court  
 20 assume the validity of the declaration, but at the same time, in determining the lawfulness of any exercise of power under the *ACC Act* in reliance upon the determination, a court is incapable (in the exercise of judicial power) of resolving whether it is lawful because neither item 55 nor the validated determination supplies the content necessary to enable an answer to that question.

22. If item 55, on its proper construction, did have the effect of requiring a court to proceed on the basis that a particular investigation existed in circumstances where no such investigation did in fact exist then it would amount to “*an attempt to delegate to [the court] the essentially legislative task of determining ‘the content of a law as a rule of conduct or a declaration as to power, right or duty’*”.<sup>7</sup> That is, to extent that the court itself would be required to supply the  
 30 content and details of the fictional investigation (which is necessary in order to apply provisions like ss 21A and 28 of the *ACC Act*), s 55 impermissibly requires the court to perform an essentially legislative function.

### **Section 7C is beyond the legislative power of the Commonwealth (1A(vi))**

23. The effect of s 7C of the *ACC Act*, if valid, is to confer upon the Board of the ACC (a body constituted of police commissioners and various other officeholders: s 7B) a power to

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<sup>7</sup> *Thomas v Mowbray* (2007) 233 CLR 307 at 345 [71] (Gummow and Crennan JJ).

determine that, for a period of three years (unless earlier revoked), in relation to a potentially extremely broad class of conduct identified by the Board:

a. examiners appointed under the *ACC Act* may summons any person to appear before them, or to produce any documents or things, if satisfied that the issue of the summons is reasonably necessary for the purposes of an investigation in relation to any conduct of that kind (s 28(1));

b. examiners may ask any question of any person summonsed to appear, in relation to an extremely wide class of conduct or possible conduct, in the absence of any suspicion (reasonably held or otherwise) as to whether that conduct occurred or whether the person  
10 being questioned was involved in it, on the basis that the person may know something about “*any matter that relates to*” an investigation in some way relating to that conduct (ss 25A(6), 28(3));

c. a person so summonsed and who is asked such a question is under a duty to answer the question, and commits a criminal offence if they fail to answer the question (s 30).

24. The Board may identify the classes of conduct at any level of generality (subject only to the requirement that they be classes of conduct within the *ACC Act*’s extremely broad definition of “*federally relevant criminal conduct*”): new s 7C(4).

25. The person being questioned need not be told what actual or possible conduct, past, present or future, is the subject of the investigation, but must only be provided with an  
20 instrument that identifies the (extremely broad and convolutedly defined) class of conduct that the Board has selected (see s 28(2)). The person will thus have no way of knowing or assessing whether the question being asked actually has any connection to any investigation that is actually being conducted.

26. Can such a power lawfully be conferred on the Board under the Constitution? The appellant contends that it cannot because, having regard to the breadth of the “*only condition*” for the exercise of the power of the Board (the Board’s view of the “*public interest*”) and to the effect of such an exercise of power in the context of the legislative scheme, s 7C(3) cannot be characterised as a law with respect to any subject matter of Commonwealth legislative power.

27. In *Plaintiff S157/2002 v The Commonwealth*,<sup>8</sup> the plurality identified a class of law that  
30 does not involve a legislative determination of “*the content of a law as a rule of conduct or a declaration as to power, right or duty*” and absent delineation by the Parliament of “*factual requirements to connect any given state of affairs with the constitutional head of power*” it does not answer the character of a law. At issue here is not whether s 7C of the *ACC Act* resembles the hypothetical law postulated in *Plaintiff S157* but rather whether s 7C meets those twin,

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<sup>8</sup> *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 513, [102]; See also L Crawford, “*The Rule of Law and the Australian Constitution*” (2017, Federation Press), p90 and following.

inter-related, requirements of a valid law of the Commonwealth.

28. The following propositions are well established:

- a. In order to be valid, a law enacted by the Commonwealth Parliament must bear a sufficient connection with a head (or more than one head) of federal legislative power;<sup>9</sup>
- b. sufficiency of connection is to be evaluated by reference to the rights, powers, liabilities, duties and privileges which the law creates;<sup>10</sup> and
- c. it is for the courts, and ultimately for this Court, in the exercise of judicial power to determine whether a particular law is valid or invalid.<sup>11</sup>

29. It follows from those three propositions that, for a law enacted by the Commonwealth Parliament to be valid, it must have sufficient content, in the sense of creating or affecting rights, powers, liabilities, duties and/or privileges, for an assessment to be made by the Court of the law's connection with a head of Commonwealth legislative power. That is, in order to be a "law" of the kind contemplated and authorised by the *Constitution*, an enactment must have content of a kind that is amenable to characterisation by reference to subject matters of power. It is only by reference to the rights, powers, liabilities, duties and privileges which a law creates that it is possible to identify whether the law has a sufficient connection with a head (or more than one head) of federal legislative power.

30. Although s 7C obviously purports to confer on the Board a power, it lacks any content that is capable of providing the necessary connection with any particular subject matter of federal legislative power.

31. Section 7C(4) provides that the Board "*may identify the federally relevant criminal activity to which the determination relates at whatever level of generality the Board considers appropriate*". Section 7C(4) was obviously drafted in those terms in order to accommodate the kind of exceptionally broad determinations that were already in existence — including, relevantly, the First Determination.<sup>12</sup>

32. Then s 7C(4A) provides that the "*only condition*" for the application of the coercive powers in the Act is that "*the Board considers, on the basis of the collective experience of the Board members voting at the meeting when a determination is made*", that it is "*in the public interest*" that the Board authorise a special ACC investigation to occur.

30 33. The undefined requirement of the "*public interest*" does not assist. As it is used in the

<sup>9</sup> *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

<sup>10</sup> *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16].

<sup>11</sup> *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 at 24-5 [39]-[40] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

<sup>12</sup> Item 54(2) of Amending Act (which provides that existing determinations are taken to be determinations made under s 7C(3)) confirms the Parliament's intention and understanding that determinations in the terms of the existing determinations, including the First Determination, would be authorised by s 7C(3).

context of s 7C, it is necessarily vague, broad and subjective (being based on “the *collective experience*” of those who happen to be present). The particular principles or values to be weighed in assessing what is “*in the public interest*” are incapable of being supplied by the legislative context because of the breadth and hypothetical nature of the subject matter. The terms of s 7C(4) make it clear that the Board’s consideration of what is in the public interest need have no connection at all with any actual or suspected conduct, matter or thing. The terms of the First Determination confirm that. In that sense, the discretion conferred on the Board lacks any identifiable content, and certainly any identifiable content having any necessary connection with one or more heads of legislative power.

10 34. Once the breadth of the power in s 7C(3) – expressly identified by ss 7C(4) and (4A) – is appreciated, it is apparent that, in enacting s 7C, the Parliament has not enacted a law “*with respect to*” any particular subject matter, or subject matters, of power. The function of the Board conferred by s 7C(3), to determine, in effect, whether it is in the public interest that the coercive powers in the *ACC Act* should apply to the investigation of sweeping classes of conduct, identified in the abstract, does not itself have any connection with any of the subject matters of power identified in ss 51 and 52 of the *Constitution*. That is, s 7C(3) does not create any right, power, liability, duty or privilege that has any practical operation with respect to any of the subject matters of federal legislative power.

20 35. Rather, s 7C(3) creates a power in the Board to define the subject matter to which the *ACC Act* is to apply; it is (only) a law with respect to defining the circumstances in which the coercive powers in the *ACC Act* are to be available.

36. This is the same kind of distinction as was made by Evatt J in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*<sup>13</sup> between a hypothetical valid law with respect to trade and commerce and an invalid law which is “*in substance and operation not such a law, but a law with respect to the legislative power to deal with the subject of trade and commerce with other countries or among the States*”, and highlighted by Fullagar J in *The Communist Party Case*.<sup>14</sup>

30 37. Under s 7C as amended, it was apparently assumed that the requisite connection with a head of power would be supplied, automatically as it were, by the fact that the power of the Board under s 7C(3) is a power to authorise “*an investigation relating to federally relevant criminal activity*”. If the power of the Board under s 7C(3) was a power to authorise an investigation by reference to some particular (alleged or actual) conduct amounting to “*federally relevant criminal activity*”, then such a contention might have substance. There would then be an actual connection between the power exercised by the Board and matters

<sup>13</sup> *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 7 at 119-20.

<sup>14</sup> *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262 (Fullagar J).

falling within one or more subject matter of federal legislative power. The power conferred on the Board would then have a connection (and arguably a sufficient connection) with the subject matters of the investigation. But the new s 7C(3) does not confer a power of that kind.

38. Further, attention must also be paid to the role that a determination under s 7C(3) plays in relation to the substantive provisions of the *ACC Act*.

39. The definitional and operative provisions of the *ACC Act* (notably ss 4A, 24A, 28 and 30) contain a cumulative series of relational concepts which serve ultimately to distance the rights, powers, liabilities, duties and privileges for which the substantive provisions of the *ACC Act* provide from any subject matter in the heads of Commonwealth legislative power. The  
 10 consequence is that the connection between the failure or refusal of a person to answer a question which is made a criminal offence punishable by five years' imprisonment (s 30(6)), by reason of the determination under s 7C(3), and any subject matter of federal legislative power, is stretched to the point that it need not be more than "*insubstantial, tenuous or distant*"<sup>15</sup>:

a. First, s 4A defines the concept of a State offence with a "*federal aspect*" (and thus "*federally relevant criminal activity*") in the broadest possible terms, extending it to the very outer reaches of the heads of Commonwealth legislative power.<sup>16</sup>

b. Secondly, it is an offence to refuse to answer an examiner's question: s 30;

c. Thirdly, an examiner may question a person "*in relation to any matter that relates to*" a special ACC investigation (s 28(3)), and others may also ask questions "*so far as the examiner thinks appropriate*" on "*any matter that the examiner considers relevant*" to the  
 20 special ACC investigation (s 25A(6)).

40. The combined effect of these provisions is that a determination of the Board under s 7C(3) of the Act could (as a determination of the kind in the First Determination shows) have the effect of making it a criminal offence for a person summonsed by an examiner, for example:

a. to fail to answer a question "*in relation to*" "*any matter*" that "*relates to*" an "*investigation into*" the commission of an ancillary offence that "*relates to*" a primary offence which is not an offence against a law of the Commonwealth but which could (hypothetically) validly have been enacted by the Commonwealth Parliament (even if the Commonwealth Parliament could not itself have enacted the ancillary offence);

30 b. to fail to answer a question "*on*" "*any matter*" that "*the examiner considers relevant to*" an "*investigation into*" the commission of conduct that amounts to an offence against a law

<sup>15</sup> *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1 at 143 [275]; *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79 (Dixon J).

<sup>16</sup> Yet more distancing relational concepts are introduced in section 4A(2)(b), (c) and (d) of the *ACC Act* which extend the concept to include any State offence the Commonwealth Parliament could *hypothetically* enact (whether by reference to the elements of the State offence, or the circumstances of some particular instance of its commission, or even where there is no connection other than that the investigation of the State offence would be incidental to an investigation being undertaken by the ACC in relation to some other offence).

of a State that “*affects the interests of*” any trading corporation.

These are but two of a range of a number of possibilities that show the remoteness of connection between the operation of the Act and any subject matter of federal legislative power.

### Severance

41. Item 55 and s 7C are so inter-related that one cannot sensibly operate without the other; the invalidity of one gives rise to the invalidity of the Amending Act as a whole. The presumption of severability in s 15A of the *Acts Interpretation Act 1901* (Cth) is rebutted, because the same underlying policy informs the preservation of old determinations in item 54(2), the validation of purported old determinations by item 55(2), and the making of new  
10 determinations under the new s 7C. Moreover, item 55 is part of a suite of transitional provisions which includes item 54, the object of which is to transform determinations purportedly made under the old s 7C(3) into valid determinations under the new s 7C(3).

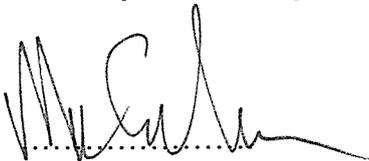
### The First Determination as amended had ceased to be in force by operation of law (1B)

42. Finally, item 54 of Schedule 1 to the Amending Act provides for “*old determinations*” (which is defined to be inclusive of the First Determination, as amended by the Second Determination) to become “*new determinations*”. New determinations are made subject to subsections 7C(4G)(a) and (b) of the *ACC Act* which provide for their expiry: item 54(3).

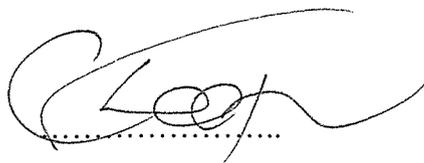
43. The First Determination was created on, and from, 4 September 2013 and lasted “*until 30 June 2016*”. The Second Determination was not a new determination but was, rather, an  
20 amendment of the First Determination. The amendment deleted the stated expiry date from the First Determination, but did not affect the date of its commencement. As the terms of the Second Determination explain, it did not create a new investigation or a new determination about an investigation: “*the investigation authorised ... remains a special investigation*”.<sup>17</sup>

44. As a consequence of the operation of s 7C(4G) of the Amending Act, the First Determination as amended expired on 4 September 2016. Consequently, it is now taken to have ceased to be in force at the date of the issue of the Second Summons and Second Notice. There being no relevant determination in existence at the relevant time, there was no foundation on which the examiner could lawfully issue the Second Summons and Second Notice.

30 **Tuesday, 21 January 2020**



**M Abbott QC**  
Gilles Street Chambers



**C Jacobi**  
Edmund Barton Chambers



**S McDonald**  
Hanson Chambers

<sup>17</sup> Appellant’s Book of Further Materials, p. 26-27, 58-59.