

**IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY**

No. A30 of 2019

BETWEEN

CXXXVIII
Appellant

AND

THE COMMONWEALTH OF AUSTRALIA
First Respondent

AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION
Second Respondent

JEFFREY ANDERSON
Third Respondent



SUBMISSIONS OF CXXXVIX AS INTERVENER

Part I Certification

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

Part II Basis for application to be heard

2. The proposed intervener seeks leave to be heard as an intervener under the pseudonym CXXXVIX in support of the Appellant. Lest it be thought that the grant of leave to intervene would impede the efficient disposition of this appeal, CXXXVIX does not presently propose to make submissions concerning the validity of the determinations identified in Ground 1 of the Amended Notice of Appeal filed 21 January 2020 (“**the Determinations**”), having regard to the proper construction of s 7C of the ACC Act, as it appeared prior to the enactment of the *Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019* (Cth) (“**the Amendment Act**”). CXXXVIX will instead confine her submissions to the construction and validity of item 55 to Schedule 1 of the Amendment Act.

Part III Reasons for grant of leave to intervene

3. CXXXVIX was served with a purported summons dated 25 June 2018 (“**the Purported Summons**”) to appear before an examiner of the Second Respondent (“**the ACC**”). The Purported Summons was expressed to have been issued for the purposes of a special ACC investigation being conducted by the ACC under the *Australian Crime Commission Special Investigation Authorisation and Determination (Highest Risk Criminal Targets No. 2) 2013*, being the first of the two Determinations (“**the First Determination**”).
4. By an originating application for judicial review filed in the Federal Circuit Court on 16 July 2018, CXXXVIX sought declarations that the Summons and the First Determination were invalid. Among the grounds on which these declarations were sought was the following:

“The issue of the Summons is invalid, by reason that the Determination that forms the basis for its issue is *ultra vires* the power of the Board by reason that the nature and scope of the special investigation purportedly authorised by the Determination is so wide, varied and broad that it is not within the scope of the power in s 7C of the [*Australian Crime Commission Act 2002* (Cth)] (“**the ACC Act**”) and further it can be inferred that it discloses unreasonableness.”

Thus, the basis on which CXXXVIX seeks declaratory relief reflects, to no small degree, the argument foreshadowed in Ground 1 of the Amended Notice of appeal. As is made clear in the evidence of Mr Patsouris, the proceedings in the Federal Circuit Court remain adjourned, as the parties await the final resolution of this matter. There should be little doubt then that CXXXVIX, as a party to pending litigation, falls within the category of persons whose legal interests would substantially be affected by the outcome of this appeal.¹

5. Unlike questions concerning the proper construction of s 7C of the ACC Act, as it appeared prior to the enactment of the Amendment Act (**“the Pre-Amendment Act”**), the issues raised by item 55 of Schedule 1 to the Amendment Act have not been litigated in the courts below. The Court thus does not have the benefit of any reasons from the primary judge or the Full Court of the Federal Court on those issues. And given that the Amendment Act was enacted following the grant of special leave in this matter, the Appellant has had to act with some alacrity in formulating his position and developing his argument on the proper construction and validity of item 55. It is for this reason that the Court would likely be assisted by submissions from an intervener on those questions, particularly because, as will be apparent from what follows, the submissions sought to be made by CXXXVIX are not merely repetitive of the Appellant’s argument.

20 **Part IV Issues on which the intervener seeks to make submissions**

6. The notice to produce and the summons to appear impugned in this appeal were purportedly issued pursuant to ss 21A(1) and 28(1) of the *Australian Crime Commission Act 2002* (Cth) (**“the ACC Act”**). The first of these provisions empowers an examiner to require, by written notice served on a person, the production at a specified time and place of a specified document or thing “relevant to a special ACC operation/investigation”. The second confers upon an examiner the power to summon a person to appear at an examination to give evidence or to produce any documents or things referred to in the summons upon the examiner being satisfied of certain matters. Crucially, s 28(7) provides that “[t]he powers conferred by this section are not exercisable except for the purposes of a special ACC operation/investigation”.

¹ *Levy v Victoria* (1997) 189 CLR 579 at 602.

7. The expression “special ACC operation/investigation” is defined in s 4 of the ACC Act to include “an investigation into matters relating to federally relevant criminal activity that the ACC is conducting and the Board has determined to be a special investigation”.

8. Both this definition and s 7C(3), as it appeared in the form of the ACC Act prior to the enactment of the Amendment Act (“**the Pre-Amendment Act**”), make clear that the power of the Board of the ACC to designate an investigation as a “special investigation” was confined in terms to investigations “into matters relating to federally relevant criminal activity”. Subsection 7C(3) was in the following terms:

10 “The Board may determine, in writing, that an investigation into matters relating to federally relevant criminal activity is a special investigation. Before doing so, it must consider whether ordinary police methods of investigation into the matters are likely to be effective at understanding, disrupting or preventing the federally relevant criminal activity.”

9. The expression “federal relevant criminal activity” is defined in s 4 to mean a “relevant criminal activity”, where:

(a) the “relevant crime” is an offence against the law of the Commonwealth or of a Territory; or

(b) the “relevant crime”, if an offence against a law of a State, has a “federal aspect”.

It is unnecessary to remark upon the respective definitions of “relevant criminal activity” and “relevant crime” beyond noting that they signify the actual or possible commission of “serious and organised crime” or crimes involving “Indigenous violence or child abuse”.

10. More important is the definition of “federal aspect”, which is drafted in terms that capture:

(a) offences against a State law that would nonetheless constitute, or be ancillary to, hypothetical offences for which it is within the power of the Commonwealth Parliament to legislate (s 4A(2)(a), (b) and (c)); or

(b) State offences, the investigation of which would be incidental to an investigation or intelligence operation conducted by the ACC into an offence against a law of the Commonwealth or of a Territory (s 4A(2)(d) and (e)).

11. It should be apparent then that the concept of “federally relevant criminal activity” was critical to the validity of s 7C(3) of the Pre-Amendment Act, as it supplied the requisite nexus between that provision and the various heads of Commonwealth legislative power.

12. It is against this background that item 55 of Schedule 1 to the Amendment Act was enacted. That provision relevantly states:

10 “(1) This item applies if, before the commencement of this item:

(a) the Board made, or purported to make, a determination under subsection 7C(2) or (3) of [the ACC Act], as in force immediately before the commencement of this item; and

(b) the determination would, apart from this item, be invalid or ineffective because it did not satisfy the requirements of that Act.

(2) The determination, and any other thing done in relation to the determination, is as valid and effective, and is taken always to have been as valid and effective, as it would have been had the

20 determination satisfied those requirements.”

13. Let it be assumed at this point that the Appellant is correct in his submission, pressed in Ground 1 of the Amended Notice of Appeal, that on the proper construction of s 7C of the Pre-Amendment Act, the Board could only determine that specific investigations into matters relating to federally relevant criminal activity were “special investigations”.

14. It is worth pausing to observe that there is no small difficulty in the notion of “validating” a determination which is required, but fails, to designate any such specific investigation as a special investigation. This is because, if the Appellant’s construction of s 7C of the Pre-Amendment Act were correct, the designation of a

30 specific or particular investigation as a special investigation would not be a pre-condition to the making of a valid determination under s 7C. It is instead the effect of a valid determination. In other words, to say that a determination under s 7C is “valid” is to say that it has the effect of identifying a specific investigation and

conferring upon it the status or character of a special investigation. The effect of item 55 would thus be to require that a potentially invalid determination be treated as valid only for the purpose of clothing a specific investigation or a set of specific investigations with the character of a special investigation. And if that were correct, then it would be difficult to see how that effect could possibly apply to a purported determination that speaks, not of a specific investigation or a set of specific investigations, but of a class of investigations defined by reference, not to particular facts or allegations, but to hypothetical or generic circumstances. There is accordingly force in the proposition, developed somewhat differently in the Appellant's further written submissions dated 21 January 2020 ("AFW"), that item 55 simply cannot overcome a failure by the Board to make a determination in respect of a particular investigation into matters relating to federally relevant criminal activity.

15. Nonetheless, let it further be assumed that it was a "requirement" of s 7C(3) of the Pre-Amendment Act that a determination made under that provision be concerned with a specific or particular investigation. The result is that where the Board has made a purported determination that does not relate to a specific investigation, item 55 would attach to that administrative act all the legal consequences of a determination that did relate to a specific investigation.

16. It is uncontroversial that a Commonwealth law may attach to a potentially invalid administrative act the legal consequences of validity, even in circumstances where the validity of that act is the subject of pending litigation.² This is so even where the act, if valid, would not produce legal consequences of the sort that might be set aside by the grant of certiorari.³ Nonetheless, the law in question must be supported by the legislative power of the Commonwealth, in the sense that its legal or practical operation must disclose a sufficient connection with those matters with respect to which the Commonwealth Parliament is empowered to make laws.

17. As the Appellant submits, the difficulty with construing item 55 in the manner posited at paragraph 15 above is that it would, in respect of the Determinations, define the rights, obligations and powers of the respective parties as if the Determinations concerned a specific investigation, when in truth, the making of the Determinations

² *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 243.

³ *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83.

was not accompanied by the Board having regard to any such investigation or any specific facts or allegations indicative of federally relevant criminal activity. And whatever else might be said about its purported effect, item 55 does not supply those facts or allegations.

18. That being so, it must be asked how item 55, when operating in this fashion, could possibly be said to be a law with respect to any of the matters identified in ss 51, 52 and 122 of the *Constitution*. It cannot be sufficient that in the context of this appeal, item 55 takes as a starting point for its operation a fictitious investigation into matters relating to federally relevant criminal activity, and then by reference to that fiction, defines the rights and obligations of the ACC and the Appellant. After all, it is one thing to recognise that the validity or scope of a law may turn on a matter of fact; it is another to assert that a law is valid because its connection with a head of Commonwealth legislative power is supplied by a fiction that the Commonwealth Parliament has deemed to have the character of fact. Just as a “[a] power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse”,⁴ so does that power not authorise the making of a law that purports, say, to define the rights and obligations of the parties to all contracts made in Australia *as if* those contracts related to lighthouses. Thus, if it were relied on by the Commonwealth as a complete answer to Ground 1 in the Amended Notice of Appeal, item 55 would afford a paradigm example of a purported law in which Parliament has delineated “no factual requirements to connect any given state of affairs with [a] constitutional head of power”.⁵

19. Nor can the Commonwealth and the ACC be heard to say that because s 7C(3) of the Pre-Amendment Act was valid, and because item 55 is simply parasitic upon that provision, item 55 is in turn valid. This is because item 55 purports to extend the operation of s 7C(3) of the Pre-Amendment Act, and the compulsory powers conferred upon the ACC, beyond situations in which a determination under s 7C(3) is linked to a head of Commonwealth legislative power by reason of its being concerned with a specific and actual investigation into matters relating to federally relevant criminal activity.

⁴ *Communist Party Case* (1951) 83 CLR 1 at 258.

⁵ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513 [102].

20. Moreover, this difficulty cannot be avoided simply because the Determinations were, as a matter of fact, drafted in terms that confined their reach to investigations into matters relating to federally relevant criminal activity. It must be recalled, at the risk of repetition, that this branch of the argument proceeds upon the assumption that it was a requirement of s 7C of the Pre-Amendment Act that a determination made under that provision relate to a specific investigation. It follows then that the effect of item 55 would, irrespective of the language of the Determinations, be to adopt the fiction of a specific investigation into matters relating to federally relevant criminal activity as the basis of a new charter of rights and obligations. There would thus be no avoiding the question whether that fiction could supply the necessary link between item 55 and the heads of Commonwealth legislative power.

21. It is for a similar reason that the difficulties outlined above cannot be overcome by reading down item 55. If the vice in that provision is that, in its application to the circumstances of this appeal, its only connection with the heads of Commonwealth legislative power is a legislative fiction, then that simply cannot be obviated by giving some word or set of words in item 55 a more limited meaning. In any event, it is by no means obvious what those words and what that more limited meaning might be.

22. Accordingly, even if the Court were minded not to accept the Appellant's submission that item 55:

- (a) does not answer the description of a law (AFS [18]-[19]); or
- (b) represents "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'"⁶ (AFS [22]),

there would still be a basis for concluding that item 55 could not validly attach the legal consequences of validity to the Determinations if they were invalid for the reasons urged in Ground 1.

⁶ *Thomas v Mowbray* (2007) 233 CLR 307 at 345 [71].

Part V Estimate of time

23. CXXXVIX requires no more than 20 minutes to elaborate upon these submissions in oral argument.

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ANNEXURE

Relevant Constitution and Statutory Provisions

Australian Crime Commission Act 2002 (Cth), Compilation No. 63 dated 3 May 2018, ss 4, 4A, 7C, 21A and 28

Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019 (Cth), as enacted, s 3 and item 55 of Schedule 1

ANNEXURE

Relevant Constitution and Statutory Provisions

Australian Crime Commission Act 2002 (Cth)

Section 4

“(1) In this Act, unless the contrary intention appears:

...

federal aspect, in relation to an offence against a law of a State, has the meaning given by subsection 4A(2).

...

federally relevant criminal activity means:

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

...

relevant crime means:

- (a) serious and organised crime; or
- (b) Indigenous violence or child abuse.

relevant criminal activity means any circumstances implying, or any allegations, that a relevant crime may have been, may be being, or may in future be, committed against a law of the Commonwealth, of a State or of a Territory.

...

special ACC operation/investigation means:

- (a) an intelligence operation that the ACC is undertaking and that the Board has determined to be a special operation; or

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

However, a *special ACC operation/investigation* does not include an integrity operation.”

Section 4A

“Object

- (1) The object of this section is to identify State offences that have a federal aspect because:
 - (a) they potentially fall within Commonwealth legislative power because of:
 - (i) the elements of the State offence; or
 - (ii) the circumstances in which the State offence was committed (whether or not those circumstances are expressed to be elements of the offence); or
 - (b) either:
 - (i) the ACC investigating them is incidental to the ACC investigating an offence against a law of the Commonwealth or a Territory; or
 - (ii) the ACC undertaking an intelligence operation relating to them is incidental to the ACC undertaking an intelligence operation relating to an offence against a law of the Commonwealth or a Territory.

Federal aspect

- (2) For the purposes of this Act, a State offence has a *federal aspect* if, and only if:
 - (a) both:
 - (i) the State offence is not an ancillary offence; and
 - (ii) assuming that the provision creating the State offence had been enacted by the Parliament of the Commonwealth instead of by the Parliament of the State—the provision would have been a valid law of the Commonwealth; or
 - (b) both:

- (i) the State offence is an ancillary offence that relates to a particular primary offence; and
 - (ii) assuming that the provision creating the primary offence had been enacted by the Parliament of the Commonwealth instead of by the Parliament of the State—the provision would have been a valid law of the Commonwealth; or
- (c) assuming that the Parliament of the Commonwealth had enacted a provision that created an offence penalising the specific acts or omissions involved in committing the State offence—that provision would have been a valid law of the Commonwealth; or
- (d) both:
 - (i) the ACC is investigating a matter relating to a relevant criminal activity that relates to an offence against a law of the Commonwealth or a Territory; and
 - (ii) if the ACC is investigating, or were to investigate, a matter relating to a relevant criminal activity that relates to the State offence—that investigation is, or would be, incidental to the investigation mentioned in subparagraph (i); or
- (e) both:
 - (i) the ACC is undertaking an intelligence operation relating to an offence against a law of the Commonwealth or a Territory; and
 - (ii) if the ACC is undertaking, or were to undertake, an intelligence operation relating to the State offence—that operation is, or would be, incidental to the operation mentioned in subparagraph (i).”

Section 7C, as at 28 June 2018

“Special investigations

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

Further details

- (4) A determination under subsection (2) or (3) must:
 - (a) describe the general nature of the circumstances or allegations constituting the federally relevant criminal activity; and

- (b) state that the relevant crime is, or the relevant crimes are or include, an offence or offences against a law of the Commonwealth, a law of a Territory or a law of a State but need not specify the particular offence or offences; and
- (c) set out the purpose of the operation or investigation.”

Section 21A

“(1) An examiner may, by issuing a written notice served on a person, require the person:

- (a) to attend, at a specified time and place, before an examiner or member of the staff of the ACC; and
- (b) to produce to that person at that time and place a specified document or thing relevant to a special ACC operation/investigation;

if the examiner is satisfied that issuing the notice is reasonable in all the circumstances.

...

- (3) A notice may be issued under subsection (1) whether or not an examination is being held for the purposes of the special ACC operation/investigation.
- (4) A person commits an offence if:
 - (a) the person is served with a notice under subsection (1); and
 - (b) the person fails to comply with a notice.”

Section 28

“(1) An examiner may summon a person to appear before an examiner at an examination to do either or both of the following:

- (a) give evidence;
- (b) produce any documents or other things referred to in the summons;

if the examiner is satisfied that issuing the summons is:

- (c) in all cases—reasonable in all the circumstances; and
- (d) in the case of a post-charge, or post-confiscation application, summons—reasonably necessary for the purposes of the relevant special ACC operation/investigation even though:

- (i) the person has been charged or the confiscation proceeding has commenced; or
- (ii) that charge or proceeding is imminent.

...

- (2) A summons under subsection (1) requiring a person to appear before an examiner at an examination must be accompanied by a copy of the determination of the Board that the intelligence operation is a special operation or that the investigation into matters relating to federally relevant criminal activity is a special investigation.

...

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

Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019 (Cth)

Section 3

“Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.”

Item 55 of Schedule 1

- “(1) This item applies if, before the commencement of this item:
 - (a) the Board made, or purported to make, a determination under subsection 7C(2) or (3) of the *Australian Crime Commission Act 2002*, as in force immediately before the commencement of this item; and
 - (b) the determination would, apart from this item, be invalid or ineffective because it did not satisfy the requirements of that Act.
- (2) The determination, and any other thing done in relation to the determination, is as valid and effective, and is taken always to have been as valid and effective, as it would have been had the determination satisfied those requirements.
- (3) If, and to the extent that, this item would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph), the Commonwealth is liable to pay a reasonable amount of compensation to the person.

- (4) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court of Australia for the recovery from the Commonwealth of such reasonable amount of compensation as the Court determines.
- (5) This item does not affect rights or liabilities arising between parties to proceedings heard and finally determined by a court on or before the commencement of this item, to the extent that those rights or liabilities arose from, or were affected by, a determination referred to in subitem (1).
- (6) In this item, *determination* includes purported determination.”