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
AND:	**COMMONWEALTH OF AUSTRALIA**	First Respondent
AND:	**AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION**	Second Respondent
AND:	**JEFFREY ANDERSON**	Third Respondent

SUBMISSIONS OF THE RESPONDENTS

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PART I FORM OF SUBMISSIONS

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

PART II ISSUES

2 Section 7C(3) of the *Australian Crime Commission Act 2002* (Cth) (**Act**) empowers the Board of the Australian Criminal Intelligence Commission (**ACIC**) to make determinations that define the scope of a "special ACC investigation". Once a determination is made by the Board, an examiner may exercise certain compulsory powers. Those powers include the power to summon a person to appear to give evidence for the purposes of a special ACC investigation (s 28) and to issue a notice to require the person to produce a document or thing relevant to a special ACC investigation (s 21A).

3 On 28 June 2018, both a **Summons**[1] and a **Notice**[2] to attend and produce were served on the appellant. They were issued in relation to a special ACC investigation, the scope of which was defined by two determinations made under s 7C(3): the **2013 Determination**[3] and the **2016 Amendment Determination**.[4] The Full Federal Court upheld the validity of both **impugned determinations** and, consequently, upheld the validity of the Summons and Notice.[5] The Full Court also rejected a separate challenge to the validity of the Notice.[6]

4 Following the grant of special leave, the *Australian Crime Commission Amendment (Special Operations and Special Investigations) Act 2019* (Cth) (**Amendment Act**) was enacted and commenced on 10 December 2019. The Amendment Act has two substantive components: (a) a suite of provisions that amend, with prospective effect, various provisions of the Act — including by substituting a **new s 7C(3)**; and (b) two provisions that "validate" past actions of ACIC, one of which is **Item 55** of Sch 1.

5 Item 55 applies to any determination made or purportedly made under **old s 7C(3)**, which in the absence of Item 55 would be invalid "because it did not satisfy the requirements" of the Act. Where Item 55 applies, any such determination — and "any other thing done in relation to" such a determination — is deemed to be valid and to be taken always to have been valid.

6 In this Court, the appellant challenges the conclusion of the Court below that both the

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1 Appellant's Book of Further Materials (**ABFM**) **55**.
2 **ABFM 72**.
3 Australian Crime Commission Special Investigation Authorisation and Determination (Highest Risk Criminal Targets No 2) 2013: **ABFM 60**.
4 Australian Crime Commission Special Investigation Authorisation and Determination (Highest Risk Criminal Targets No 2) Amendment No 1 of 2016: **ABFM 58**.
5 Core Appeal Book (**CAB**) **70-83 [77]–[123], 60 [29], 52 [1]**.
6 **CAB 60 [29]–[32], 83-88 [124]–[149]**, but cf **52-59 [1]–[28]**.

Summons and Notice were valid. He also advances several new grounds relating to the construction and validity of the Amendment Act. None of those grounds should succeed:

6.1. The Summons and the Notice are valid because the impugned determinations, and any other thing done in relation to the determinations, are taken always to have been valid by force of Item 55 (**Ground 1A(i)**).

6.2. Item 55 does no more than attach legal consequences to certain historical facts. It is within the scope of Commonwealth legislative power to enact such a law (**Ground 1A(ii)**).[7]

6.3. If the appellant is entitled to raise the point, new s 7C(3) is valid. It is sufficiently connected to "as many heads of power as from time to time have been exercised by the Parliament to create offences against Commonwealth laws" (**Ground 1A(iii)**).[8]

6.4. Section 7C(4G)(b), which was inserted by the Amendment Act, did not have the effect of terminating the 2013 Determination (**Ground 1B**).

6.5. The Notice, when properly construed, was within the power conferred by s 21A of the Act and therefore valid (**Ground 2**).

7 Accordingly, the appeal should be dismissed with costs.

PART III SECTION 78B NOTICE

8 A notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) was filed by the appellant on 21 January 2020. That notice does not cover the proposed Intervener's constitutional argument.

PART IV FACTS

9 The respondents do not contest any of the material facts set out in the appellant's narrative of facts or chronology.

PART V ARGUMENT

APPROACH TO GROUND 1 AND GROUND 1A

10 There is a long line of authority dismissing challenges in respect of determinations under the Act, and equivalent instruments under the *National Crime Authority Act 1984* (Cth),

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

8 *R v Hughes* (2000) 202 CLR 535 at 555 [40] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (***Hughes***).

based on the alleged overbreadth of the investigations that they authorise.[9] Several such challenges to the validity of the 2013 Determination have previously been rejected.[10] In dismissing the argument that underlies Ground 1, the Full Court followed that line of authority (**CAB 79 [106]–[107]**).

11 Ground 1 asserts that, notwithstanding the authorities referred to above, the Board could not exercise the power to make a determination under old s 7C(3) unless that determination related to a "particular investigation". The appellant submits that the impugned determinations did not concern such an investigation, with the result that they are invalid (as are the Summons and Notice that depend on them). That argument draws upon *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (***Strickland***), where the plurality held that the availability of the examination power in s 24A of the Act depended "on the existence of an investigation in fact".[11] In effect, the Court held that the Act required the ACC to be conducting an "investigation in fact" before the power to conduct a coercive examination was enlivened. Absence such an investigation, a jurisdictional fact was missing.[12]

12 Ground 1 seeks to transplant that analysis from s 24A across to old s 7C(3) (see **AWS [19]–[20]**). The argument is that — as a matter of statutory construction — the Act required there to be an "investigation in fact" before a valid determination could be made under s 7C(3), and that in the absence of such an investigation the determination would be made "without the necessary statutory authority".[13]

13 Contrary to ACIC's understanding prior to *Strickland*, and to the settled position in the Federal Court authorities, the respondents accept that the reasoning in *Strickland* probably has the consequence that old s 7C(3) required a determination to relate to an "investigation in fact". The Full Court apparently accepted as much (**CAB 80 [109]**), but nevertheless unanimously found against the appellant on the basis that he had not proved that ACIC was

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9 See, eg, *National Crime Authority v A1* (1997) 75 FCR 274 at 295 (von Doussa and Sundberg JJ) (***NCA v A1***); *AB v National Crime Authority* (1998) 85 FCR 538 at 551–553 (Black CJ, Sundberg and North JJ); *Director of Public Prosecutions (Cth) v Galloway (a pseudonym)* [2017] VSCA 120 at [118]–[152] (Maxwell P, Redlich and Beach JJA); *R v Will* (2017) 13 ACTLR 81 at [226]–[231] (Refshauge J).

10 *XCIV v Australian Crime Commission* (2015) 234 FCR 274 at [101]–[113] (Wigney J) (***XCIV***); *XX v Australian Crime Commission (No 3)* (2016) 335 ALR 180 at [47]–[58] (Perry J); *LX v Commonwealth* (2016) 338 ALR 667. See also *XXVII v Commonwealth* (2018) 261 FCR 50.

11 (2018) 93 ALJR 1 at [71] (Kiefel CJ, Bell and Nettle JJ).

12 Cf *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at [28] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [57] (French CJ), [107]–[109] (Gummow, Hayne, Crennan and Bell JJ).

13 *Gedeon v Commissioner of the New South Wales Crime Commission* (2008) 236 CLR 120 at [43] (the Court).

not carrying out an "investigation in fact" of the kind authorised by para 4 of the Amended Determination (**CAB 76 [95], 80 [109]–[110], [112]**). That factual conclusion is not attacked, and should not be disturbed. The argument on Ground 1 is that the Act requires not just an investigation in fact, but a particular investigation in fact (**AWS [20], [24]**). The Full Court was correct in rejecting that argument, for the reasons it gave at **CAB 77–78 [100]–[102]**. Ground 1 should fail for that reason.

14 In addition to the factual answer to the appellant's claim upon which the Full Court relied, the legal foundation for the claim advanced in Ground 1 has now also been removed. That occurred when, following the grant of special leave in this matter, Parliament enacted Item 55. Its evident purpose was to confirm that, whether or not past determinations of the Board were invalid on the basis that they did not relate to "investigations in fact" ("particular" or otherwise), Parliament intended those determinations to be valid and effective. In those circumstances, the appellant's argument that Item 55 does not apply as a matter of construction is readily rejected (**FWS [8]–[16]**).[14] It would require the conclusion that, in enacting Item 55, Parliament missed its obvious target. If valid, Item 55 therefore means Ground 1 must fail, even if the Full Court erred (which is denied).

15 As to Ground 1A, there is an irreconcilable tension between the appellant's argument in support of that Ground and his argument in support of Ground 1, because the Court can accept the legal argument underlying Ground 1 only if the Act required, as a pre-condition for a valid determination under old s 7C(3), not just that the ACC be conducting an "investigation in fact", but that that investigation was a "particular investigation". However, if there was such a requirement for the purpose of deciding Ground 1, it is impossible to maintain that the existence of such an investigation was not a "requirement" of the Act for the purposes of Ground 1A(i) (**FWS [16]**). The appellant cannot have it both ways. There is no middle ground, whereby the impugned determinations can somehow be "invalid" under Ground 1 without that entailing a failure to "satisfy the requirements" of the Act. Accordingly, because the appellant can succeed in his attack on the impugned determinations only if he succeeds on Ground 1, he must fail unless he both successfully attacks the validity of Item 55 (Ground 1A(ii)) and demonstrates error in the reasons of the Full Court at **CAB 77-78 [100]–[102]** (Ground 1).

CONSTITUTIONAL VALIDITY OF ITEM 55 — GROUND 1A(II)

16 Item 55 adopts a long-standing drafting technique, the constitutional validity of which was

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[14] Appellant's Further Written Submissions, filed 21 January 2020.

most recently affirmed in *Duncan*.[15] In short, it takes as its premise certain historical facts — the making or purported making of determinations under old s 7C of the Act — and provides for the legal consequences of those facts.[16] Item 55 has three distinct components:

16.1. The *first* is Item 55(1), which identifies the historical determinations of the Board that, in the absence of Item 55(2), would have been made in excess of the power conferred on the Board because they failed "to satisfy the requirements" of the Act.[17]

16.2. The *second* is found in Item 55(2), which operates to "attach new legal consequences and a new legal status" to the determinations identified in Item 55(1), "which otherwise would not have had such legal consequences or status".[18]

16.3. The *third* is also found in Item 55(2) which, in addition to validating the historical determinations identified in Item 55(1), also validates retrospectively "any other thing done in relation to" those determinations. The appellant overlooks this component of Item 55, which extends to validating the Summons and the Notice to the extent that they might otherwise have been invalid because they were not supported by a determination that complied with the requirements of the Act.

17 Where Item 55 applies to validate an historical exercise of executive power, legal consequences are attached to the historical fact of the purported exercise of that power by the legislature through an exercise of legislative power (cf **FWS [22]**).[19] Accordingly, no question arises about what an executive decision-maker could or could not do at some point in time before the enactment of Item 55. Nor does any question arise about the present ability of a court, exercising judicial power, to police the boundaries of executive power (cf **FWS [18], [21]**). The only question is whether legislative power was validly exercised.

18 In any case, the appellant's assertion that the impugned determinations cannot be validated because the limits of the investigation that would thereby be authorised are incapable of ascertainment, or lack the minimum content of law, should be rejected. Those assertions

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[15] (2015) 256 CLR 83. See also *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 at 243–244 (Stephen J); *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at [107]–[111] (McHugh J); *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117 at [38], [53] (French CJ, Crennan and Kiefel JJ).

[16] *Duncan* (2015) 256 CLR 83 at [14], [15], [25] (French CJ, Kiefel, Bell and Keane JJ). See also *Lazarus v Independent Commission Against Corruption* (2017) 94 NSWLR 36 at [124]–[128], [137] (Leeming JA).

[17] *Duncan* (2015) 256 CLR 83 at [40] (Gageler J).

[18] *Duncan* (2015) 256 CLR 83 at [25] (French CJ, Kiefel, Bell and Keane JJ); see also at [45]–[46] (Nettle and Gordon JJ).

[19] See also Item 56 of Sch 1 to the Amendment Act; *Bainbridge v Minister for Immigration and Citizenship* (2010) 181 FCR 569 at [25] (Moore and Perram JJ).

go far beyond anything decided by *Strickland* (cf **FWS [18]–[19]**). The asserted difficulties ignore the fact that investigations that were understood to be governed by determinations in substantially the form of the impugned determinations have been carried out by ACIC (and its predecessor) for decades. There is no evidence that it was impossible for examiners to decide whether the summons they issued were for the purposes of investigating the matters identified in such determinations, or that it was impossible for the Federal Court to enforce the limits of the powers conferred by the Act as those limits were then understood (as very often occurred) (cf **FWS [21]**). Just as widely drawn terms of reference are capable of defining the permissible inquiries of a Royal Commission, a determination in the form of the impugned determinations is capable of doing the same. Accordingly, whether or not the impugned determinations complied with old s 7C, it was open to Parliament to legislate to maintain the status quo, in that way ensuring that past determinations had the legal effect that they were believed to have (and in many cases had been held by the Federal Court to have). That is a familiar function for legislation that validates administrative action, and it involves no attempt to delegate legislative power to the court (cf **FWS [22]**).

19 As to any future exercise of executive power that depends upon a determination validated by Item 55, that will be governed by the Act in its present form, because such a determination is taken to be a determination made under new s 7C(3).[20] However, contrary to the assumption made by the appellant (**FWS [19]–[20], [22]**), the Act in its new form does not require a determination to "relate to a particular investigation". So much is clear from the following:

19.1. The new definition of "special ACC investigation" provides that a special ACC investigation means simply an investigation relating to federally relevant criminal activity "that the Board has authorised to occur" (cf **FWS [10]**).

19.2. A determination made under new s 7C(3) can be made, and has effect, regardless of whether ACIC "is, at the time the determination is made, already investigating any or all of the federally relevant criminal activity to which the determination relates" (s 7C(4B)(a)).[21]

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[20] That is the consequence of Item 54(2), which provides that an "old determination" (one made under old s 7C(3)), which was in effect immediately before the commencement of Item 54, "is taken, on and after that commencement" to be a "new determination" (one made under new s 7C(3)). That language is apt to include a determination that, by force of Item 55(2), "is taken always to have been ... valid and effective".

[21] Cf *Strickland* (2018) 93 ALJR 1 at [71] (Kiefel CJ, Bell and Nettle JJ).

19.3. A determination under new s 7C(3) "may identify the federally relevant criminal activity to which the determination relates at whatever level of generality the Board considers appropriate", including by reference to categories of offence or offender (s 7C(4)).[22]

20 In any event, even if there were difficulties in ascertaining the limits upon executive power in the context of the Act as amended (which is denied, for the reasons addressed with respect to Ground 1A(iii) below), they are not difficulties that concern Item 55. That item has only the confined retrospective operation identified above. It is within the legislative power of the Commonwealth Parliament to enact such a provision.[23]

21 The proposed Intervener seeks to undermine that conclusion by attacking the validity of Item 55 on a new and distinct basis, not raised by the appellant's notice of appeal (cf **IS [5]**).[24] That argument, in effect, is that Item 55 is not sufficiently connected to any head of legislative power. The argument assumes, first, that under old s 7C(3) the power to make a determination was conditioned on the existence of an "investigation in fact" that met some degree of particularity; and, second, that this requirement was necessary to ensure that there was a sufficient connection between the Act and a head of legislative power (see **IS [19]–[20]**).

22 There is no basis for the second assumption. The sufficient connection between old s 7C(3) and a head of legislative power is supplied by the definition of "federally relevant criminal activity" (**IS [11]**).[25] The same constitutional basis supports Item 55, for the determinations it validates were necessarily (and as a matter of fact) confined to such investigations (cf **IS [19]**).

23 Even assuming that it was a requirement of old s 7C that a determination relate to a particular investigation (**IS [20]**), it is not correct to assert that Item 55 operates to deem such an investigation to exist, and then to define rights and obligations by reference to a "fictitious investigation" (cf **IS [18], [20]**). The terms of Item 55 are to the contrary. That item does not deem a determination to satisfy any requirements that it previously failed to satisfy. Instead, it removes the legal consequences that would otherwise have followed

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[22] Including, without limitation, by reference to: (a) categories of relevant criminal activities; or (b) categories of suspected offender; or (c) specific allegations of crime; or (d) specific offenders; or (e) any combination of (a) to (d). This was also the position prior to the Amendment Act: see *XCIV* (2015) 234 FCR 274 at [104] (Wigney J).

[23] As is established by the cases cited at n 15 above.

[24] Submissions of CXXXVIX as Intervener, filed 11 February 2020.

[25] See at [31] to [37] below.

from non-compliance, by equating the legal effect of the determinations to which it applies with the effect of a determination that satisfied the relevant requirement. As such, the premise for the proposed Intervener's submission is wrong. There is no connection to Commonwealth legislative power supplied by a fiction (cf **IS [18]**), because there is no fiction of compliance with the requirements of the Act. Parliament has instead specified the legal effect of a determination by reference to the effect it would have had if it had complied with those requirements. That deeming does not operate "irrespective of the language of the Determinations" (cf **IS [20]**), for it is that language that identifies the boundaries of the investigations that Parliament has retrospectively authorised ACIC to undertake. The effect is substantively the same as if Parliament had authorised ACIC to investigate anything identified in a schedule to a statute, and had then included all the past determinations of the Board in that schedule. The connection to power is revealed by the terms of the determinations.

CONSTITUTIONAL VALIDITY OF NEW SECTION 7C(3) — GROUND 1A(iii)

24 By Ground 1A(iii), the appellant contends that new s 7C(3) is invalid because it lacks sufficient content to be amenable to characterisation as a "law" with a "sufficient connection" with any head of Commonwealth legislative power (**FWS [28]–[30]**).

25 There is a threshold issue as to whether that argument should be considered.[26] This appeal concerns only the validity of past exercises of power (the Summons and the Notice). While Item 55 can properly be put in issue in the appeal because it has retrospective operation that is relevant to the validity of the Summons and the Notice, new s 7C(3) operates only prospectively. As this appeal does not concern any exercise of power since the commencement of the Amendment Act, the validity of new s 7C(3) does not arise. Its validity is irrelevant to the validity of the Summons and the Notice, because even if new s 7C(3) were held to be invalid, that would not result in the invalidity of Item 55 (cf **FWS [41]**). Item 55 (and Item 56) is presumptively severable from the balance of the Amendment Act by reason of s 15A of the *Acts Interpretation Act 1901* (Cth), and there is nothing to displace that presumption. Indeed, the conclusion that Items 55 and 56 operate independently of the other provisions is confirmed by the fact that those two items appear only in the Amendment Act, whereas all of the other items made substantive amendments to the Act itself. Further, Item 55 (and Item 56) operates to validate things done by the Board and ACIC in the past, whereas the balance of the Amendment Act operates only

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[26] See *Clubb v Edwards* (2019) 93 ALJR 448 at [25]–[40] (Kiefel CJ, Bell and Keane JJ), [135]–[138] (Gageler J), [216]–[237] (Nettle J), [330]–[341] (Gordon J), [443] (Edelman J) (***Clubb***).

prospectively. There is no basis to find that Parliament intended to validate past determinations and related actions only if the new regime that it sought to put in place for the future was also valid: ie, that Parliament intended the Amendment Act "to operate fully and completely according to its terms, or not at all".[27] That being so, the validity of new s 7C(3) has no bearing on the validity of Item 55, no bearing on the validity of the Summons and the Notice, and therefore no bearing on the proper disposition of the appeal.[28] The appellant ought not be permitted to "roam at large" over the Act, and should be confined to grounds that bear upon its application to his pending appeal.[29]

The Act (as amended)

26 If, notwithstanding the above, the Court decides to consider the validity of new s 7C(3), that provision should be held to be valid.

27 Before turning to the constitutional argument, it is necessary to construe that provision in its statutory context.[30] The Board of the ACIC is comprised primarily of the heads of major Australian law enforcement agencies.[31] One of its functions is "to authorise, by determination, a special ACC investigation to occur".[32] The power to perform that function is conferred by new s 7C(3), which provides that the "Board may make a determination, in writing, authorising a special ACC investigation to occur". A special ACC investigation is defined as "an investigation relating to federally relevant criminal activity that the Board has authorised to occur".[33]

28 The definition of "federally relevant criminal activity" contains two distinct limbs.[34] The appellant has an interest only in the operation of the first limb (see paragraph 48 below). That limb defines the term to include: "a relevant criminal activity, where the relevant crime is an offence against a law of the Commonwealth or of a Territory".[35]

29 The term "relevant crime" is defined to include "serious and organised crime".[36] That term

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27 See *Knight v Victoria* (2017) 261 CLR 306 at [35] (the Court) (***Knight***).
28 *Knight* (2017) 261 CLR 306 at [32]–[33] (the Court); *Lambert v Weichelt* (1954) 28 ALJ 282.
29 *Knight* (2017) 261 CLR 306 at [33] (the Court).
30 See *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532 at [11] (Gummow, Hayne, Heydon and Kiefel JJ). Noting, of course, that "the Act which is amended and the amending Act are to be read together as a combined statement of the will of the legislature": *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463 (Brennan CJ, Dawson and Toohey JJ), 479 (McHugh and Gummow JJ). See also s 11B of the Acts Interpretation Act.
31 Act, s 7B(2).
32 Act, s 7C(1)(d), as amended.
33 Act, s 4(1), as amended (emphasis added).
34 Act, s 4(1). The second limb is set out in para (b) and is addressed briefly at [46] to [48] below.
35 Act, s 4(1) (emphasis added).
36 Act, s 4(1). The other limb of the definition is "Indigenous violence or child abuse".

is itself extensively defined in s 4, including by a requirement that the offence in question involves "2 or more offenders and substantial planning and organisation", and that it be of a kind that ordinarily involves "the use of sophisticated methods and techniques".

30 "[R]elevant criminal activity" is defined as "any circumstances implying, or any allegations, that a relevant crime may have been, may be being, or may in future be, committed".[37] That definition makes clear that special ACC investigations are concerned not merely with offences that have already been committed, but also with "possible, undiscovered and incomplete offences".[38] That distinguishes ACIC's investigative function from ordinary police investigations, which are "concerned essentially with particular offences known or reasonably believed to have been committed, with the starting point usually being the complaint of a victim or discovery by the police of the results of a crime".[39] Thus, like a Royal Commission, the investigative function of ACIC is properly described as "inquisitorial". To carry out that function, ACIC "must pursue lines of inquiry, and in doing so may find that other lines of inquiry appear profitable".[40] An investigation "may be, and ought to be, a searching investigation".[41] Ultimately, however, an investigation will fall within the first limb of "federally relevant criminal activity" only if it concerns actual or suspected offences against Commonwealth or Territory law. It is that requirement that ensures that there is a sufficient connection to Commonwealth legislative power.

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Sufficient connection

20 31 Reading the above definitions together, new s 7C(3) empowers the Board to authorise a special ACC investigation into circumstances and allegations linked to various Commonwealth and Territory offences, with the result that examiners will then be empowered to exercise coercive powers in investigating those matters (cf **FWS [34]**). While the definition of "serious and organised crime" is broad, its effect is that even a wide determination by the Board could authorise at most an investigation into a subset of Commonwealth and Territory offences. The size of that subset is not relevant to whether new s 7C(3) has a sufficient connection to legislative power, because Parliament could

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37 Act, s 4(1).

38 *NCA v A1* (1997) 75 FCR 274 at 285 (von Doussa and Sundberg JJ).

30 39 Second Reading Speech for the National Crime Authority Bill 1983 (Cth), quoted in *NCA v A1* (1997) 75 FCR 274 at 284 (von Doussa and Sundberg JJ).

40 *NCA v A1* (1997) 75 FCR 274 at 294 (von Doussa and Sundberg JJ).

41 *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 86 (Latham CJ) (***McGuinness***). See also *Ross v Costigan* (1982) 59 FLR 184 at 200–201 (Ellicott J); *Lloyd v Costigan (No 2)* (1983) 76 FLR 279 at 281 (Bowen CJ, Lockhart and Morling JJ).

have (had it wished to do so) empowered the Board to authorise ACIC to conduct investigations into any offences against Commonwealth and Territory criminal law.

32 So much is illustrated by s 1A of the *Royal Commissions Act 1902* (Cth), which empowers the Governor-General to authorise investigations into "any matter ... which relates to or is connected with" Commonwealth legislative power. That provision underpins the settled position that a Commonwealth Royal Commission may validly be empowered to utilise coercive powers to inquire into any matter within any Commonwealth head of legislative power,[42] including into matters concerning criminal conduct.[43] That Act makes no attempt to limit the Governor-General's discretion in specifying the terms of reference that define the scope of a Royal Commission's investigation. Such terms of reference are often expressed in very broad language, without that giving rise to any question of invalidity. If given wide terms of reference, a Royal Commissioner must exercise judgment in determining what inquiries will be made within the general framework provided by those terms of reference.[44] However, the need to select particular lines of inquiry does not mean that the Royal Commission is not complying with its terms of reference.

33 The function of the Board pursuant to new s 7C(3) is relevantly analogous to that of the Governor-General in issuing terms of reference to a Royal Commission. The Board, by making a determination that authorises an investigation "relating to" federally relevant criminal activity, creates an instrument that identifies from within a class of matters that have a sufficient connection to Commonwealth legislative power (the class being the subset of Commonwealth and Territory criminal offences that fall within the definition of "serious and organised crime") those matters that it authorises ACIC to investigate through the exercise of its coercive powers. That authorisation — like the terms of reference of a Royal Commission — may be broad or specific. Either course is permissible, because either way the authorisation necessarily relates to the investigation of actual or suspected offences against Commonwealth or Territory law.[45]

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[42] See *Lockwood v Commonwealth* (1953) 90 CLR 177 at 183 (Fullagar J); *Bercove v Hermes (No 3)* (1983) 51 ALR 109 at 113 (the Court).

[43] See generally *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 47–53 (Gibbs CJ). See also *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [130] (Hayne and Bell JJ).

[44] The need to select particular matters for investigation from amongst a wider field of possible investigations that would be authorised by a statute is commonplace. For example, ASIC "may make such investigations as it thinks expedient for the due administration of the corporations legislation ... where it has reason to suspect that there may have been committed ... a contravention of the corporations legislation": *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), s 13. Having decided to investigate, it may then exercise various compulsory powers for the purpose of obtaining information "relevant to a matter that it is investigating": ASIC Act, s 19.

[45] Focusing here just on the first limb of "federally relevant criminal activity".

34 For the above reasons, even if the Board makes a determination in wide terms, the investigation that is thereby authorised is necessarily confined to a subset of "federally relevant criminal activity". The head of power that supports new s 7C(3) is exactly the same as the power that could be used if a Royal Commission was given terms of reference that resembled the impugned determinations.[46]

35 Consistently with the above submissions, in *Hughes*,[47] this Court considered the constitutional basis of the *Director of Public Prosecutions Act 1983* (Cth) (**CDPP Act**). While the Commonwealth Parliament has no general legislative power in relation to criminal law, the Court recognised that the Parliament can create criminal offences in the areas of its enumerated legislative powers.[48] That being so, it held that the Commonwealth Parliament could also empower Commonwealth officers to prosecute Commonwealth offences. As six Justices explained, the CDPP Act "in a sense is supported by as many heads of power as from time to time have been exercised by the Parliament to create offences against Commonwealth laws".[49]

36 The same logic applies to s 7C(3), in its operation with respect to the first limb of "federally relevant criminal activity".[50] There is no relevant distinction between the investigation of possible offences against Commonwealth or Territory law, and the prosecution of those same offences.[51] Indeed, Commonwealth laws that empower any such investigation or prosecution are sufficiently connected not just to whatever heads of powers supported the enactment of the criminal offence in question, but also to s 51(xxxix) read with s 61 of the Constitution (cf **FWS [37]**), on the basis that both the investigation and prosecution of such offences involves the "execution and maintenance" of the criminal law.

37 Contrary to **FWS [39]** and **[40]**, the sufficient connection is not broken by the use of the expression "relating to" in the new definition of "special ACC investigation". Those words

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[46] The aptness of that analogy is confirmed as a matter of legislative history. The National Crime Authority (which was subsequently renamed the ACC) was established to continue the wide-ranging work (including by taking over outstanding investigations) of the Costigan Royal Commission: see Second Reading Speech to the National Crime Authority Bill 1983 (Cth), *Parliamentary Debates*, House of Representatives, 7 June 1984 at 3092 (Minister Duffy). A "determination" under s 7C(3) of the Act was the replacement instrument for a "notice of reference" under s 13 of the *National Crime Authority Act 1984* (Cth): see Revised Explanatory Memorandum for the Australian Crime Commission Establishment Bill 2002 (Cth) at 10, 14.

[47] (2000) 202 CLR 535.

[48] See *R v Bernasconi* (1915) 19 CLR 629 at 634–635 (Griffith CJ); *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 at 518 (Evatt J); *Viro v The Queen* (1978) 141 CLR 88 at 161 (Murphy J).

[49] *Hughes* (2000) 202 CLR 535 at [40] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also *S v Australian Crime Commission* (2006) 149 FCR 361 at [8] (Ryan J), [41] (Emmett J) (*S v ACC*).

[50] *XCIV* (2015) 234 FCR 274 at [140] (Wigney J).

[51] See also s 12 of the Act, which draws a direct link between investigation and prosecution of offences.

require the "existence of a connection or association" between two matters.[52] While the degree of connection that is required can vary depending on the relevant context,[53] in the context of the phrase "an investigation relating to federally relevant criminal activity" those words are properly construed as requiring a sufficient connection between the investigation and one or more Commonwealth or Territory offences, thereby ensuring that the investigation remains within the legislative power of the Commonwealth.[54] That is the correct construction of those words without any need to read them down. Plainly, however, the expression "relating to" is flexible enough that, if it were necessary to read it down to preserve the validity of new s 7C(3), that would be the proper course.[55]

38 Similarly, a sufficient connection to a head of power is not denied by the fact that witnesses may be asked a question "on any matter that the examiner considers relevant" to the special ACC investigation (cf **FWS [39](c)**).[56] To the contrary, the "relevance" requirement (which similarly limits the use of coercive powers by other Commonwealth investigative bodies[57]) ensures that questioning does not stray beyond the limits of Commonwealth power. The analogy with Royal Commissions is again helpful, for the Royal Commissions Act makes it an offence for a witness to fail to answer questions or produce documents "relevant" to the Commission's inquiries (without any additional or tighter nexus to Commonwealth power being required).[58] As was explained by Ellicott J in *Ross v Costigan*, in the context of the provision in the Royal Commissions Act:[59]

> In determining what is relevant to a Royal Commission inquiry, regard must be had to its investigatory character. Where broad terms of reference are given to it ... the Commission

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[52] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [87] (McHugh, Gummow, Kirby and Hayne JJ). The appellant's submissions in **FWS [39](c)** and **[40]** concerning other sections in the Act that contain "relational" concepts are irrelevant to the validity of new s 7C(3). If those provisions could be shown to operate too widely (which is denied), that would be relevant to the validity of those provisions. It would provide no basis to impugn new s 7C(3).

[53] See *Travelex Ltd v Commissioner of Taxation* (2010) 241 CLR 510 at [25] (French CJ and Hayne J), [82], [92] (Crennan and Bell JJ). See also *Saga Holidays Ltd v Commissioner of Taxation* (2006) 156 FCR 256 at [66] (Young J); *HP Mercantile Pty Ltd v Commissioner of Taxation* (2005) 143 FCR 553 at 563 (Hill J).

[54] Acts Interpretation Act, s 15A. See *Spence v Queensland* (2019) 93 ALJR 643 at [70] (Kiefel CJ, Bell, Gageler and Keane JJ), where the words "relating to" were given the equivalent meaning to "with respect to" in s 51, that latter expression of course being the source of the "sufficient connection" requirement.

[55] See *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Clubb* (2019) 93 ALJR 448 at [139] (Gageler J), [416] (Edelman J).

[56] Act, s 25A(6). Contrary to **FWS [39](c)**, s 28(3) of the Act does not define the scope of questions that may be asked at an examination. That provision is concerned only with the level of detail that must be included in a summons, as to which, see *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296 at 323–324 (Mason, Wilson and Dawson JJ), quoted in *S v Australian Crime Commission* (2005) 144 FCR 431 at [36] (Mansfield J) (cf **FWS [25]**).

[57] See also Royal Commissions Act, s 6; ASIC Act, s 19; *Competition and Consumer Act 2010* (Cth), s 155.

[58] See Royal Commissions Act, ss 1A, 2(1), 3(1)–(3), 6. If accepted, **FWS [39]** would appear to have the result that those longstanding provisions in the Royal Commissions Act are invalid.

[59] (1982) 59 FLR 184 at 200–201, upheld in *Ross v Costigan* (1982) 64 FLR 55 at 68–69 (Fox, Toohey and Morling JJ). See further *McGuinness* (1940) 63 CLR 73 at 86 (Latham CJ), 92 (Starke J), 105 (Dixon J).

> is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence ... All the links in a chain of evidence will usually be dealt with separately. Expecting to prove all the links in a suspected chain of events, the Commission or counsel assisting, may nevertheless fail to do so. But if the Commission bona fide seeks to establish a relevant connexion between certain facts and the subject matter of the inquiry, it should not be regarded as outside its terms of reference in doing so. This flows from the very nature of the inquiry being undertaken.

39 Those remarks are equally applicable to an examination conducted under s 24A of the Act,[60] as well as a notice to produce documents or things that are "relevant to a special ACC operation/investigation" issued under s 21A.

Public interest criterion

10 40 Section 7C(4A) provides that the "only condition" for the exercise of the power under new s 7C(3) 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" the special ACC investigation to occur. The "only condition" language makes plain that the Board "is not obliged to take any other matter into account" before it exercises the power to make a determination authorising a special ACC investigation (cf **FWS [26], [33]**). It prevents the implication of any other mandatory relevant considerations,[61] thereby ensuring that the "public interest" condition is the "singular condition"[62] that must be satisfied before the Board is permitted to exercise the power in new s 7C(3). However, it has no effect on the permissible content of a determination when it is made. As such, any exercise of the power in new s 7C(3) must still result in a determination "authorising an investigation relating to federally relevant criminal activity" (cf **FWS [26], [33]**). For that reason, the "only condition" language has no effect on the connection with legislative power identified above.

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41 There are evident parallels between new s 7C and the provision upheld by this Court in *Plaintiff S156*.[63] There, the Court rejected a constitutional challenge to s 198AB of the *Migration Act 1958* (Cth), which empowered the Minister to designate a country as a regional processing country. Section 198AB provided that "[t]he only condition for the exercise of [that] power ... is that the Minister thinks that it is in the national interest to

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30 [60] See *NCA v A1* (1997) 75 FCR 274 at 285–287 (von Doussa and Sundberg JJ); *Barnes v Boulten* (2004) 139 FCR 356 at [38] (Finn J).

[61] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39–40 (Mason J); *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at [40]–[41] (the Court) (***Plaintiff S156***).

[62] *Plaintiff S156* (2014) 254 CLR 28 at [41] (the Court).

[63] (2014) 254 CLR 28.

designate the country to be a regional processing country". The validity of s 198AB was challenged on the basis that it lacked a "sufficient connection" to any head of power in s 51 of the Constitution.[64] That challenge was unanimously rejected.[65] Three points of present relevance emerge from that conclusion.

42 *First*, the conferral of a broad discretionary power where the "only condition" for the exercise of power is the formation of an opinion by a member of the executive as to the satisfaction of broadly expressed criterion is not fatal to the establishment or maintenance of a sufficient connection between the law and a head of legislative power. As the Court noted, "[w]hat is in the national interest is largely a political question".[66] But that did not deny the connection to power.

10 43 *Second*, while the character of a law must doubtless "be determined by reference to the rights, powers, liabilities, duties and privileges which it creates",[67] that does not mean that an impugned provision should be read in isolation. Section 198AB did nothing other than provide for the making of an instrument, the only effect of which was to enliven other provisions under the Act (including s 198AD, which was also challenged). Quite obviously, however, that did not mean that it lacked "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" (cf **FWS [29]**). Modern legislative drafting techniques frequently make the effect of one legislative provision on rights, powers, liabilities, duties and privileges depend on the interaction of that provision with other parts of the relevant Act. For that reason, it is of no
20 significance that the legal effect of new s 7C(3) is simply to empower the Board to make a determination that enlivens the exercise of powers conferred by other provisions in the Act, rather than itself having a direct effect upon rights, powers, liabilities, duties and privileges. In that respect, it is much the same as s 198AB.

44 *Finally*, no constitutional difficulty arises from the use of the "public interest" as the only condition in new s 7C(3). There are many examples in Commonwealth legislation of a statutory power being conditioned on the decision-maker's satisfaction of the "public

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[64] (2014) 254 CLR 28 at [17] (the Court).
[65] (2014) 254 CLR 28 at [25], [38] (the Court).
[66] *Plaintiff S156* (2014) 254 CLR 28 at [40] (the Court).
[67] *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

interest" or "national interest".[68] As this Court has previously explained, it is "well established" that such provisions "import[] a discretionary value judgment to be made by reference to undefined factual matters".[69] Powers conditioned in that way are "neither arbitrary nor completely unlimited".[70] So, for example, ASIC may be directed to investigate certain matters where, "in the Minister's opinion, it is in the public interest" that such matters be investigated.[71] Given the long history of such provisions, it is not open to find that the "public interest" criterion is too vague to constitute a "law":[72] cf **FWS [27]**, calling in aid *Plaintiff S157/2002 v Commonwealth*.[73]

45 That is particularly true given the statutory context in which the reference to the "public interest" appears.[74] In new s 7C(3), that phrase is linked to the "collective experience" of the Board members who vote on a determination. As already noted, s 7B(2) requires the Board to comprise the Commissioner of the Australian Federal Police, the Commissioners of all State and Territory police forces, and the heads of the other Commonwealth law enforcement and intelligence agencies. The terms of new s 7C(3) reflects Parliament's judgment that, when at least nine such persons,[75] drawing on their collective law enforcement experience (including, of course, their knowledge of the capacities and resources of their own agencies) consider it to be in the public interest to authorise ACIC to utilise its coercive powers to investigate circumstances suggesting or allegations of contravention of some subset of Commonwealth or Territory offences, then that provides a proper basis to enliven those powers. To condition the availability of coercive powers in that way does not fail to delineate "factual requirements to connect any given state of affairs

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68 See, eg, *Maritime Powers Act 2013* (Cth), s 75H(6); *Migration Act 1958* (Cth), s 198AD(8); *Export Finance and Insurance Corporation Act 1991* (Cth), ss 27 and 29(4); *Special Broadcasting Service Act 1991* (Cth), s 12; *Australian Nuclear Science and Technology Organisation Act 1987* (Cth), s 11; *Law Enforcement Integrity Commissioner Act 2006* (Cth), s 209; *Fisheries Management Act 1991* (Cth), s 155.

69 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (***Pilbara***). See also *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ); *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336 at [39] (French CJ, Crennan and Bell JJ), [127] (Gageler J).

70 *Pilbara* (2012) 246 CLR 379 at [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J).

71 ASIC Act, s 14(1).

72 As to the content of a "law", see *New South Wales v Commonwealth* (2006) 229 CLR 1 at [416]–[417] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

30 73 (2003) 211 CLR 476. See generally Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) at 85–91, including the discussion of *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 (cf **FWS [36]**).

74 *Pilbara* (2012) 246 CLR 379 at [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ). See also *Wotton v Queensland* (2012) 246 CLR 1 at [9] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

75 Act, s 7G(4).

with the constitutional head of power".[76] It is, for example, far more prescriptive than s 1A of the Royal Commissions Act, which contains no limiting condition at all.

Second limb of "federally relevant criminal activity"

46 The appellant's submissions attack the validity of new s 7C(3) in part by reference to the inclusion within the second limb of the definition of "federally relevant criminal activity" of "a relevant criminal activity, where the relevant crime: (i) is an offence against a law of a State; and (ii) has a federal aspect": **FWS [39](a)**. The circumstances in which a State offence will have a "federal aspect" are identified in detail in s 4A of the Act.

47 The second limb was inserted into the Act in direct response[77] to certain reasoning in *Hughes*.[78] Applying that reasoning, in *S v ACC*[79] a Full Court of the Federal Court rejected a challenge to the validity of the second limb. It is not apparent how the amendments made by the Amendment Act are said to have any bearing on the correctness of that judgment (cf **FWS [39](b)**). If necessary, the respondents submit that that case was correct.

48 However, the respondents' primary submission is that this Court ought not allow the appellant to attack the Act based on the second limb, in circumstances where the Summons and Notice plainly relate to the first limb. The Summons identified offences in two different categories (see **ABFM 56 [3](b)**).[80] The first category is serious drug offences contrary to Pt 9.1 of the *Criminal Code* (Cth).[81] The second category is offences dealing with money or property contrary to various provisions of the *Criminal Code* (Cth).[82] Both of these categories of offences are likewise identified in the 2013 Determination.[83] While it is theoretically possible that the appellant could be asked a question about an offence against State law with a federal aspect (**ABFM 66 [3](m)**) that was related to the above Commonwealth offences, that possibility is at present entirely speculative. If it were to eventuate, it could be challenged at that point. In those circumstances, even if the second limb were to be invalid (which is denied), that would not affect the validity of the Summons

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76 Cf *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

77 See *S v ACC* (2006) 149 FCR 361 at [44]–[47] (Emmett J), cf [73]–[74] (Gyles J, in dissent)

78 (2000) 202 CLR 535 at [40] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

79 (2006) 149 FCR 361.

80 The Notice was issued having regard to the matters identified in the Summons, and was intended to be served simultaneously with the Summons: see **ABFM 109 [2], 118 [27]** (heading), **119 [30], 129-130.**

81 Those offences meet the definition of "serious offence", which appears in para (d) of the definition of "serious and organised crime". In the Act, "serious offence" is defined to mean "serious offence" in s 338 of the *Proceeds of Crime Act 2002* (Cth), where para (a)(ia) is relevant.

82 Those offences appear in Pt 10.2 of the Code, which is headed "Money laundering". Such offences are expressly identified in the definition of "serious and organised crime": see para (d)(iv).

83 **ABFM 64 [3](a), (g).**

and the Notice, because the second limb could be severed from the first, leaving ACIC free to investigate alleged Commonwealth and Territory offences. That being so, the validity or otherwise of the second limb has no effect on the appellant's rights or interests.[84] Once again, he should not be permitted to roam at large over the statute.

OPERATION OF SECTION 7C(4G) — GROUND 1B

49 By Ground 1B, the appellant contends that Item 54 of Sch 1 to the Amendment Act has the effect that the 2013 Determination ceased to be in force on 4 September 2016, and therefore could not support the Summons or the Notice because they were issued after that date. That argument depends on the following provisions:

49.1. Item 54(2), which provides that if an "old determination" was in effect "immediately before the commencement of Item 54", the old determination is taken, "on and after that commencement" to be a "new determination" made under new s 7C(3);

49.2. Section 7C(4G)(b)(i), inserted by the Amendment Act, which provides that a determination under new s 7C(3) ceases to be in force at "the end of the period of 3 years beginning immediately after the determination is made".

49.3. Item 54(3), which provides that, for the purposes of s 7C(4G)(b)(i), a "new determination is taken to have been made when the old determination was made".

50 The appellant contends by reason of Item 54(3) the 2013 Determination was taken to be made on 4 September 2013 and, therefore, ceased to be in force on 4 September 2016 by reason of s 7C(4G)(b)(i). It follows, according to the appellant, that the 2013 Determination could not have supported the Summons or the Notice because each was issued after 4 September 2016 (**FWS [44]**). The answer to that argument depends on whether Item 55 is needed to support the validity of the impugned determinations.

51 **If Item 55 is engaged**, then the simple answer is that, even if s 7C(4G)(b)(i) had the effect contended for by the appellant, that would not result in the invalidity of the Summons or the Notice. That is because the Notice and Summons are directly "validated" by Item 55(2).

52 **If Item 55 is not engaged**, the effect of the appellant's contention would give the provisions an entirely circular operation. Item 54(2) applies *only* where an old determination "was in effect immediately before the commencement of this item". On the appellant's contention, that provision was initially engaged (because the 2013

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[84] *Knight* (2017) 261 CLR 306 at [37]; *Clubb* (2019) 93 ALJR 448 at [36] (Kiefel CJ, Bell and Keane JJ), [136]-[137] (Gageler J), [230] (Nettle J), [330] (Gordon J), [441]–[443] (Edelman J).

Determination was valid), but the engagement of that provision immediately and retrospectively caused the 2013 Determination to cease to be in effect because of Item 54(3) and s 7C(4G)(b)(i). But that retrospective termination of the 2013 Determination would mean that Item 54(2) did not apply to that Determination at all, meaning that it could not have caused the retrospective termination of the 2013 Determination, which would mean that 2013 Determination actually was in effect immediately before Item 54(2) commenced (and thus the loop would continue).

53 That construction is absurd, and is readily avoided.[85] Item 54 is a transitional provision, designed to maintain the status quo. It expressly applies only "on and after the commencement" of Item 54. That language can be contrasted with the words "taken always to have been" used in Items 55 and 56, that being language evidently intended to have retrospective effect. The contrast confirms that Item 54(3) and s 7C(4G)(b)(i) should be read to operate prospectively, meaning that s 7C(4G)(b)(i) will cause a determination to cease to have effect 3 years after the date on which a determination was made only if that 3 year period ends after the commencement of Item 54.

54 An additional (or alternative) route to the same outcome is to recognise that the 2013 Determination was in effect "immediately before the commencement of Item 54" only because it had been amended to extend its duration by the 2016 Amendment Determination. For that reason, and consistently with the approach that has been taken to related issues in the Full Federal Court (cf **FWS [43]**),[86] the reference to the "old determination" in Item 54 is to the two determinations together (ie to the 2013 Determination as amended). Read in that way, the old determination was made was 8 June 2016.[87] On that approach, even if the appellant's construction of Item 54 was otherwise correct, the "old determination" would have been in effect at the time the Summons and Notice were issued.

VALIDITY OF NOTICE — GROUND 2

55 Ground 2 is independent of the matters addressed above. It asserts that, because of the particular wording of the Notice, it was outside the power conferred by s 21A of the Act, the argument being that the Notice imposed an "incoherent requirement" to produce a thing "forthwith at the time and place of service" in circumstances where it also required the

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85 See *Cooper Brooks (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 305 (Gibbs CJ), 320 (Mason and Wilson JJ). See also Acts Interpretation Act, s 15AB(1)(b)(ii).

86 *P v Board of Australian Crime Commission* (2006) 151 FCR 114 at [34]–[38] (Mansfield, Dowsett and Lander JJ), approved in *XXVII* (2018) 261 FCR 50 at [188] (Bromwich J), see also at [92], [95] (Wigney J).

87 Being the date on which the 2016 Amendment Determination was made, that therefore being the first date on which the amended Determination existed: **ABFM 58**.

appellant to produce items within the appellant's "possession, custody or control".[88]

56 Consistently with the conclusion reached by the majority below (**CAB 60 [30], 87 [144]**), the Notice should not be construed to impose an obligation with which it was impossible to comply. Instead, if the language permits, a construction that makes compliance possible should be preferred. Here, the language readily permits such a construction, because the phrase "at the time and place of service" narrows the obligation imposed by the Notice. It points to the meaning of "forthwith" being the first meaning given in the Macquarie Dictionary — "immediately; at once; without delay".[89] On that construction the Notice should be construed as requiring the production only of such things identified in the Schedule as the appellant had the power to produce at the time that he was served with the Notice. That is, the Notice should be construed so that it only required the production of the things identified in the Schedule that were in the "immediate" possession of the appellant at the time and place the Notice was served. There is no necessary inconsistency between that construction and the phrase "possession, custody or control", because that phrase is a flexible one. As Kiefel CJ, Bell, Gageler and Gordon JJ said in *Comptroller General of Customs v Zappia*, the phrase is a "compendious reference to that degree of power or authority which is sufficient to enable a person to meet the obligations".[90]

57 If necessary, the above construction can be supported by applying the principle of "reading down" contained in s 46(1)(c) of the Acts Interpretation Act[91] — ie, by preferring a construction that is within power over a construction that would be outside power.[92] Alternatively, the same result would be achieved by applying the principle of "severance" contained in s 46(2) of the Acts Interpretation Act[93] so as to strike out the words "custody or control" from the chapeau in the Schedule to the Notice, leaving only "possession".

PART VI TIME ESTIMATE FOR ORAL ARGUMENT

58 Approximately 2 hours will be required to present the oral argument of the respondents.

Dated: 26 February 2020

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88 **ABFM 75.**
89 *Macquarie Dictionary* (7th ed, 2017) at 597.
90 (2018) 92 ALJR 1053 at [32].
91 See *Caratti v Commissioner of the Australian Federal Police (No 2)* [2016] FCA 1132 at [227]–[237] (Wigney J).
92 See the authorities cited in n 55 above.
93 See *Clubb* (2019) 93 ALJR 448 at [141] (Gageler J), quoting *R v Poole; Ex parte Henry (No 2)* (1939) 61 CLR 634 at 651 (Dixon J).