IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M175 of 2017

Between

EDMUND HODGES (a pseudonym)
Appellant

and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS
First Respondent

AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION
Second Respondent

DONALD GALLOWAY (a pseudonym)
Third Respondent

TONY STRICKLAND (a pseudonym)
Fourth Respondent

RICK TUCKER (a pseudonym)
Fifth Respondent

APPELLANT'S FURTHER REDACTED SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 Where a person whose fair trial is required to be protected by the making of directions under s 25A(9) of the *Australian Crime Commission Act* 2002 (Cth) (**the ACC Act**) is compelled to testify about their own criminality, contrary to the requirements of the ACC Act, and that examination is:

(a) not conducted for the purposes of an Australian Crime Commission (***ACC***) investigation;

(b) conducted unlawfully for the improper purpose of assisting another agency, such as the Australian Federal Police (***AFP***);

(c) conducted deliberately because the person had exercised their right to decline a cautioned police interview;

(d) conducted in the unlawful presence of numerous AFP officers involved in the investigation;

(e) recorded and transcribed, and the content of the examination is disseminated widely to AFP investigators and prosecutors with carriage of the person's criminal investigation and trial, in accordance with unlawful directions made by the Examiner permitting that dissemination; and

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24 January 2018
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(f) conducted for the purpose of achieving forensic disadvantage to the person, and advantage to the prosecution in foreseen legal proceedings against the person, which was achieved;

what more is necessary, if anything, to enliven and exercise the court's discretion to permanently stay the prosecution of the person to prevent the person from being tried unfairly?

3 Where a person exercising a statutory power, such as an Examiner, acts unlawfully in a number of ways, and for an improper purpose, can the person be found to have been reckless as to their obligations to an unacceptable degree without proof of conscious wrongdoing or dishonesty?

Part III: Section 78B of the *Judiciary Act 1903*

4 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given with the conclusion that this is not necessary.

Part IV: Citations

5 The citation of the reasons for judgement of the Court of Appeal (Vic) is *Director of Public Prosecutions (Cth) v Donald Galloway (a pseudonym) & Ors* [2017] VSCA 120. References in these submissions to paragraphs from the Court of Appeal's reasons have the prefix "CA".

6 The citation of the reasons for judgement of the trial judge at first instance, Hollingworth J of the Supreme Court of Victoria, is *Commonwealth Director of Public Prosecutions v* [redacted] *& Ors* [2016] VSC 334R. References in these submissions to paragraphs from her Honour's reasons have the prefix "SC".

Part V: Facts

7 On 25 June 2008 the ACC (as it then was, and now known as the Australian Criminal Intelligence Commission (***ACIC***)) purported to make a determination under sec 7C of the ACC Act. The determination, known as the *Special Investigation Authorisation and Determination (Financial Crimes) 2008* (**the Determination**), listed many federal offences, including money laundering, but not [redacted] {SC [257]-[261], [266]}.

8 [redacted]**:** The appellant is a former employee of [redacted]. At relevant times, [redacted] was a wholly-owned subsidiary, and [redacted] was a partially-owned subsidiary, of [redacted] {SC [1]}.

9 ***AFP Operation Thuja (a pseudonym):*** In late May 2009 the Chairman of the [redacted], was prompted by [redacted]

[redacted] to request that the AFP investigate allegations [redacted] {SC [362]-[363]}.

10 ***Warrants:*** In November 2009 the AFP executed search warrants at [redacted], and in mid-March 2010 at [redacted]. In each case, it took many weeks to load the seized material, which included an estimated 40 million electronic documents, onto the AFP's NUIX database. Electronic material seized from [redacted] did not become available for searching on the NUIX database until early May 2010; that is, after the coercive examination of the appellant {SC [780]}.

11 ***Record of Interview (ROI) requests, and summons for examination:*** On 7 April 2010 the appellant declined the offer to be questioned under caution. Papers had already been prepared to compel his attendance at an ACC examination {SC [459]-[466]}. On the afternoon of 7 April 2010, a summons was issued by the ACC's examiner, Tim Sage (**Sage**), to compel the appellant to attend an ACC examination under the Determination (**Summons**).

12 Mr Schwartz (a pseudonym), the Senior Investigating Officer (**SIO**) for Operation Thuja, gave evidence that the ACC was a facility used by the AFP for compulsory examinations of suspects {SC [388]}.

13 ***State of the AFP investigation's documentary analysis at time of examinations:*** At the time of the appellant's examination, Sage was well aware that the AFP had done very little by way of searching or analysing their documentary holdings {SC [781]}.

14 The examinations of the appellants were unlawful, because the ACC was not conducting an investigation and the examinations were therefore not authorised by sec 24A of the ACC Act {CA [187]-[189]}.

15 The examinations were also unlawful because they were conducted for an improper purpose. At [209] the Court of Appeal (**CA**) held:

> The ACC's coercive powers, conferred on the Commission in order for it to pursue its own investigative purposes, were enlisted by and for the benefit of the AFP, solely in order to enable that separate statutory agency to pursue its own investigative purposes.

16 ***Examination:*** On 13 April 2010 the appellant appeared at the ACC in answer to the Summons. The Summons referred to money laundering, and made no mention of [redacted] {SC [491]-[493]}.

17 Under compulsion, the appellant was questioned about matters concerning [redacted] that now form the basis of the cases against him {SC [722]}. None of the appellants were asked a single question about money laundering at their examinations, as is evident from over 750 pages of examination transcript {SC [398], [623]}.

18 Sec 25A(3) and (9) of the ACC Act require the examiner to regulate who attends and has access to examinations and examination material, so as to protect the fair trial of an examinee. In the appellants' circumstances, the ACC Act required the examiner to give directions preventing investigators and prosecutors of the appellants from attending the examinations and being provided with knowledge of the content of the examinations. The examiner failed to make such directions, and instead gave directions permitting numerous AFP investigators to attend the examinations (and dictate questioning) and permitting the subsequent widespread dissemination of examination content to investigators and prosecutors {CA [32], [58]-[60]}.

19 It was not disclosed to the appellants that their examinations were being watched from a nearby room by large numbers of AFP officers who were involved in Operation Thuja, with the facility to secretly communicate electronically with those in the room. {SC [539]-[560]}.

20 Sage was well aware that the examinations were intended to further the investigation and prosecution of the appellants. He knew that the AFP wanted to have them locked in to their account on oath, for use against them in relation to a future prosecution. {SC [597]}.

21 In evidence, Sage offered no satisfactory explanation for ignoring a provision of the ACC Act which was clearly designed to protect examinees, particularly examinees who may be charged. He demonstrated an extraordinary approach to the protective provisions of sec 25A(3) and (9), one which completely disregarded his obligations to the protections towards a person being examined under the ACC Act {SC [616]}.

22 ***Distribution of examination material:*** Following the appellants' examinations, the content of the examinations in video, transcript and summary form were disseminated widely to the AFP and the Commonwealth Director of Public Prosecutions (**CDPP**) {SC [648]-[698], [709]}. As at 2017 some 41 AFP agents and 3 members of AFP legal were identified by the AFP as having unlawfully had access to the examination material of the appellants {see AB 818, email dated 14 July 2017 from Evan Evagorou of AGS to all parties and to her Honour's associate, sent in compliance with Orders of Hollingworth J made 30 June 2017}.

23 ***Conclusion of appellant's examination:*** On 17 May 2010 the AFP emailed the ACC advising that as a result of additional evidence discovered on the [redacted] database, it was likely that the appellant would be charged {Statement of Webb (a pseudonym) at [40], ECB 203}. It was decided to discontinue the appellant's examination.

24 In an *ex parte* hearing on 25 May 2010 on the application of Bonnici, Sage discharged the appellant from further attendance, and made a direction that permitted dissemination of the

content of his examination to the AFP and prosecutors. The appellant and his lawyers were not given notice of the application {SC [656]}.

25 The trial judge, Hollingworth J, found Sage's explanation for why that occurred to be unsatisfactory and his conduct in plain contravention of the clear words of sec 25A {SC [657]}.

26 **Content of the appellant's examination:** The appellant's examination extended over some 500 questions, predominantly concerning [redacted], being the subjects of the two proposed trials involving the appellant. Her Honour summarised the examination at [722]-[727]. Her Honour recorded that:

> [redacted] evidence at the ACC examination covered essential aspects of the prosecution case on the current charges. In that circumstance, the capacity of his counsel to test the strength of the prosecution case, in a manner consistent with the evidence he gave on oath, is severely, if not completely, curtailed.
>
> The actual giving of evidence by [redacted] seems not to be a viable option. Further, [redacted] would have to decide what plea to enter, what evidence to challenge, and what evidence (including character evidence) to lead at trial, according to the answers he gave at the examination about the subject matter of the current charges.

27 ***Charging of the appellants:*** The appellant and the third and fourth respondents were first charged on 1 July 2011. The fifth respondent was first charged on 13 March 2013.

28 ***Indictments and Supreme Court proceedings:*** The current proceedings in the Supreme Court were commenced by the filing of indictments by the Commonwealth Director of Public Prosecutions at various times between December 2013 and May 2014. The appellants have all been charged with [redacted]. Some are also charged with false accounting, contrary to s 83(1)(a) of the *Crimes Act* 1958 (Vic).

29 In some cases, the appellants had been committed to stand trial for the relevant charges; in most cases, the CDPP exercised the power to directly indict, after the accused had been discharged at committal.

30 ***Widespread and continued dissemination of examination material:*** Further dissemination of examination material and content continued to occur for years after the examinations {SC [676]}. Disseminations continued to occur within the CDPP and counsel notwithstanding warnings following the decision of Garling J in *R v Seller; R v McCarthy* (2012) 232 A Crim R 146 (***Seller (1)***) on 17 August 2012 {SC [678]-[681], [685], [771], [823]-828]}.

31 ***Pre-trial application for permanent stay:*** The appellants made a pre-trial application for orders permanently staying the proceedings arising out of their compulsory examinations by the ACC. The trial judge granted leave to the ACC to intervene in the application.

32 The trial judge heard evidence and submissions in respect of that application, and other applications, over numerous sitting days between August 2014 and June 2015.

33 On 17 June 2016 her Honour published reasons in favour of the grant of a permanent stay of the proceedings, on the basis that the appellants would be unable to have a fair trial and also to protect the public interest in the administration of justice. Formal orders to that effect were made on 27 July 2016.

34 The CDPP appealed the orders by way of interlocutory appeal under sec 295 of the *Criminal Procedure Act* 2009 (Vic). The appeal was heard over five days in November and December 2016 and February 2017. The CA granted leave to the ACIC to intervene in the appeal, over the objection of the appellants.

35 ***Court of Appeal decision:*** The CA allowed the appeal and set aside her Honour's orders staying the proceeding. It upheld her Honour's findings regarding the illegality occasioned by non-compliance with sec 25A(3) and (9) of the ACC Act. It upheld Grounds 2 and 3 of the appellant's Notice of Contention, finding that the examinations were unlawful as they were not authorised by the ACC Act and unlawful because they were conducted for an improper purpose {CA [4], [209]-[211]}.

Part VI: Argument

36 **Principles regarding permanent stay of proceedings, self-incrimination and the accusatorial process:** Hollingworth J correctly identified that the Supreme Court of Victoria has the jurisdiction to order a permanent stay of criminal proceedings in circumstances where:

(a) There is a fundamental defect of such a nature that there is nothing the judge could do in the conduct of the trial to relieve against its unfair consequences; and/or

(b) irrespective of fairness, whether the proceedings are an abuse of process, in the sense that use of the court proceedings brings the administration of justice into disrepute {SC [869]}.

37 In this case, Hollingworth J heard evidence on the *voir dire* over some 30 sitting days. Thousands of documents were subpoenaed, called for and tendered. Claims of legal professional privilege and public interest immunity were made by the AFP and ACIC; some claims were upheld, some were withdrawn and some overturned. Documents produced by the agencies were often initially heavily redacted, with many such redactions later being removed progressively through the course of evidence as claims to privilege or immunity were withdrawn or overruled. In the end illegality and impropriety were uncovered. At [869]–[882] her Honour summed up why at [883] she ruled as a matter of discretion:

> In the exceptional circumstances of this case, I am satisfied that a permanent stay should be granted, not only as a result of the forensic disadvantage considerations, but also in order to protect confidence in the administration of justice.

38 It is a well-established principle that the system of criminal justice in Australia is, at every stage (investigation, prosecution and trial), accusatorial: *X7 v Australian Crime Commission* (2013) 248 CLR 92 (***X7***), [101] per Hayne and Bell JJ, [160] per Kiefel J. An accused person has a fundamental right to a trial that accords with the accusatorial system of justice: *Lee v The Queen* (2014) 253 CLR 455 (***Lee(2)***) at [46]. It is a presupposition of the accusatorial system of justice, and of fair trial within that system, that an accused person need never make any answer to any allegation of wrongdoing: *X7* [104] per Hayne and Bell JJ.

39 Privilege against self-incrimination has an important role in the accusatorial process. It has long been recognised that the doctrine of privilege against self-incrimination serves, among other things, to preserve the presumption of innocence, and to ensure that the burden of proof remains on the prosecution: *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 527; *X7* [55]. In *Cornwell v The Queen* (2007) 231 CLR 260, Kirby J said at [176]:

> Such self-incrimination has been treated in the jurisprudence as objectionable, not only because the methods used to extract it are commonly unacceptable but because the practice is ordinarily incompatible with the presumption of innocence. This presumption normally obliges proof of criminal wrong-doing from the evidence of others, not from the mouth of the person accused, given otherwise than by his or her own free will.

40 The privilege against self-incrimination reduces the power imbalance between the prosecution and a defendant, or as Gleeson CJ put it in *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118 at 127, to hold a proper balance between the powers of the State and the rights and interests of citizens: see also Australian Law Reform Commission, 'Evidence' (Interim Report 26) [857].

41 In *Environmental Protection Agency v Caltex Refining Company Pty Ltd* (1993) 178 CLR 477 McHugh J made the following remarks at 546:

> This justification [that is, the justification to protect human dignity and personal freedom] is closely associated with concern at the possibility of abuse of the power by the Crown (*White* (1944) 322 US, at p.698.) which, as I have pointed out, was the historical reason for the privilege. But the desire to protect the human dignity of the accused is a separate and important justification of the privilege. A rule which requires the prosecution to prove the guilt of an accused in the course of a judicial proceeding without reliance on his or her incriminating answers compulsorily obtained ensures that the prosecution must treat the accused as an innocent person whose rights as a human being must be respected. The "show trials" of the totalitarian state are hardly possible in a system where the accused cannot be compelled to incriminate him or herself and the plea of not guilty at the commencement of the trial puts the Crown to proof of every

issue and entitles the accused to a presumption of innocence until a guilty verdict displaces that presumption.

42 Important common law rights, including the privilege of self-incrimination can be modified or abrogated by the legislature: *X7* per French CJ and Crennan J at [24], Hayne and Bell JJ with whom Kiefel J agreed at [86]-[87]. In this case, the legislature did not authorise the compulsory interrogation of the appellant in the presence of those seeking to prosecute him and did not authorise the dissemination of the record of his compelled testimony to others seeking to prosecute him.

43 When an accused person is compelled to answer questions about their alleged wrong-doing, the accusatorial process is fundamentally altered: *Hammond v The Commonwealth* (1982) 152 CLR 188 at 196 (***Hammond***); *X7* [124] and [136]-[137] per Hayne and Bell JJ; *Lee(2)* (2014) 253 CLR 455 [31].

44 In *Hammond*, Gibbs CJ (with whom Mason and Murphy JJ agreed on this point) said:

> Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used in the criminal trial. Nevertheless, the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence.

45 In *Lee(2)* the High Court applied the principles confirmed in *Hammond* and *X7* to reach the conclusion that the appellants' trial was altered in a fundamental respect by the prosecution having the appellants' evidence from a coercive examination before the ACC in its possession. It stated at [46]:

> It is a breach of the principle of the common law, and a departure in a fundamental respect from a criminal trial which the system of criminal justice requires an accused person to have, for the prosecution to be armed with the evidence of an accused person obtained under compulsion concerning matters the subject of the charges. It cannot be said that the appellants had a trial for which our system of criminal justice provides and which s 13(9) of the NSWCC Act sought to protect. Rather, their trial was one where the balance of power shifted to the prosecution.

46 The proposition to be drawn from *Lee(2)* (2014) 253 CLR 455 at [43]-[51] is that where a fundamental departure from the accusatorial system of justice has occurred, it is unnecessary for it to be shown that some 'actual' or 'practical' unfairness to the accused has occurred before it can be concluded that the trial is not a fair trial according to law. The fundamental departure occasioned by the unlawful coercive examination means the trial is unfair, and results in the kind of prejudice to the accused contemplated by Gibbs CJ in *Hammond* and described by Hayne and Bell JJ in *X7* at [124] thus:

> Even if the answers given at a compulsory examination are kept secret, and therefore cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged, the requirement to give answers, after being charged, would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom. No longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according only to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused person is thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the charge.

47 The trial that awaits the appellant in this case will be fundamentally flawed. The multiple layers of illegality and impropriety have ensured that the appellant's trial will not be one with the characteristics that the criminal justice system requires {SC [726]-[727], [870]}. He faces the kind of unfair trial described by Gibbs CJ in *Hammond* and described and explained in *X7* and *Lee(2)*.

48 ***Trial judge's findings*:** In addition to the fundamental departure from the accusatorial system occasioned by the acts of illegality and impropriety, the trial judge made a series of findings which, in combination, moved her to exercise the discretion to permanently stay the proceedings. Those findings, outlined below, were: (A) an identifiable forensic benefit accrued to the prosecution; (B) an identifiable forensic disadvantage was suffered the appellant, and (C) the nature of the conduct necessitated a permanent stay to protect the administration of justice.

49 (A) Forensic benefit to prosecution: The trial judge found that the appellant could not receive a fair trial because, *inter alia,* those investigating and prosecuting him had obtained a forensic advantage, as evident in her Honour's findings as follows:

(a) examination material was used by the AFP to guide their selection of documents to include in the brief, from among the millions available to them {SC [871]}.

(b) AFP officers who attended the examinations could not have put the information obtained completely out of their minds, and would have been significantly assisted (even if indirectly) by that knowledge, in conducting their investigations and compiling the brief for the CDPP {SC [872]}.

(c) Given that AFP officers thought that they were entitled to it, is highly probable that the examination material was used to generate further enquiries and target witnesses. It is

possible that such information was used (at least indirectly) in obtaining witness statements, dealing with the appellants and compiling the briefs {SC [873]}.

(d) Given the number of AFP members who attended the examinations or received examination product and the size of Operation Thuja, it is extremely difficult to prove how and to what extent use has been made of information that the AFP would not have received but for the examination of [the appellants] {SC [874]}.

(e) Given the AFP had done very little by way of searching or analysing the enormous number of seized documents before the ACC examinations, her Honour had no doubt that the capacity to go and perform targeted documentary searches to look for evidence against the appellants would have given the AFP a substantial investigative advantage – one which it would not have had without the compulsory examinations {SC [790]}.

(f) The numerous investigators who were privy to the examinations will continue to be involved by giving evidence, liaising with witnesses, and suggesting avenues of examination and tactical decisions to be made at trial {SC [876]}.

(g) Short of creating a new investigation team and conducting a new investigation, it appears all but impossible to ensure that sufficient quarantining could occur to mitigate the permeation of examination information from the prosecutors {SC [877]}.

50 Her Honour then went on to observe that in the various other cases in which courts have considered how an accused's right to a fair trial may have been compromised, the publication had been very limited in scope; quarantining has not been difficult to achieve. By comparison, she found this case is truly exceptional in terms of what happened {SC [878]}. She went on to find at [879]-[880]:

> In this case, it is practically impossible to "unscramble the egg", so as to remove the forensic advantage which has been improperly obtained by the prosecution, or to ameliorate the forensic disadvantage suffered by at least three of the [appellants].
>
> This case is different from other cases of illegality or impropriety in the conduct and use of the ACC examinations and examination material, where stays have previously been refused. This case involves the deliberate coercive questioning of suspects because they had exercised their rights to decline a cautioned police interview. The examination power was used for the very purpose of achieving forensic disadvantage to the ACC accused and advantage to the prosecution in foreseen future legal proceedings.

51 (B) Forensic disadvantage to appellants: After analysing the testimony compelled from each of the appellants and citing *Hammond, X7* and *Lee(2)*, Hollingworth J held that they suffered the forensic disadvantage of being denied the fundamental right to defend the charges only on the basis of putting the prosecution to its proof and testing the strength of the prosecution evidence {SC [748]}.

52 Her Honour found that the practical effect of the appellants' examinations has been to constrain their legitimate forensic choices in the conduct of the trials, by reason of the answers they were compelled to give on oath in their examinations. They have also been constrained in their ability to test before a jury the basis on which the documents in the prosecution brief have been selected {SC [870]}.

53 (C) The administration of justice: Hollingworth J found that the examiner was reckless as to his various obligations to an unacceptable degree {SC [881]}. Had he exercised his powers independently, and with appropriate diligence, those responsible for investigating the (appellants) and preparing the brief would never have received the information which they in fact obtained {SC [881]}. The examiner, her Honour found at [882], had succumbed to the insidious danger that Harper JA warned of in the context of compulsory examination powers in *The Chief Examiner v Brown (a pseudonym)* (2013) 44 VR 741 at [3]:

> Such officials may have an acute appreciation of the valid reasons why power has been conferred upon them. A similarly acute appreciation of the proper limits of that power is not so readily grasped, because the prospect and actuality of the exercise of the power itself tends to dull the imaginative appreciation of its true purpose, and of the effects of its misuse or misapplication... Officials such as the Chief Examiner...being trustees of powers conferred upon them by the public through Parliament have a duty to be diffident in their exercise.

54 In the exceptional circumstances described by her Honour in her detailed reasons, she was satisfied that a permanent stay should be granted, not only as a result of the forensic disadvantage considerations, but also in order to protect confidence in the administration of justice {SC [883]}.

55 ***Court of Appeal findings:*** The CA confirmed her Honour's findings of illegality and impropriety in relation to conducting the examinations in the presence of investigators and disseminating examination material to investigators and prosecutors {CA [12], [57]-[62], [187]-[189], [212]-[213], [276]-[277]}.

56 The CA allowed the CDPP Interlocutory Appeal against her Honour's order of a stay of the proceedings holding that it was not open to her Honour to make the findings of material forensic advantage to the prosecution and forensic disadvantage to the appellant {CA [15], [221], [222], [258]} and that it was not open to her Honour to find as she had {SC [881]} that in permitting and facilitating the unlawful dissemination of the compelled testimony, the examiner had been "reckless to his various obligations to an unacceptable degree". Rather, the CA found that the examiner had "not undertaken reasonable care to understand what his obligations were under the law as it stood" but this "was not recklessness in the legal sense" {CA [13], [116]}.

57 The CA failed to, but should have, found that the Determination was invalid because it failed to describe the general nature of the circumstances or allegations constituting the federally relevant criminal activity, as required by s 7C(4) of the ACC Act, and/or the ACC Board did not (and could not, having regard to the form and content of the Determination) consider whether ordinary police methods of investigation were likely to be effective before making the Determination as required by s 7C(3) of the ACC Act {CA [118]-[152]}.

58 The relevant authorities relied upon by the ACC, namely, *NCA v A1* (1997) 75 FCR 274 (***A1***), *AB v The National Crime Authority (1998)* 85 FCR 538 (***AB***) and *XCIV v Australian Crime Commission* (2015) 234 FCR 274 (***XCIV***) do not support the legality of the Determination, indeed they are all examples of determinations (or references) that contain distinct features of limitation and certainty not present in the determination the subject of this case.

59 The appellants made written submissions to the CA in respect of the invalidity of the Determinations under which they were purportedly examined {CA Respondents' Submissions on Notice of Contention, filed 7 October 2016}.

60 ***CA findings on forensic disadvantage – constraining forensic choices:*** The CA effectively rejected the *Hammond* principle in finding that any forensic disadvantage suffered by being compulsorily interrogated on oath about the circumstances of a proposed criminal trial could not be regarded as an unfair constraint given that the Court must proceed on the assumption that an examinee would give truthful instructions to his counsel who, in turn, would be ethically obliged to conduct the defence consistently with those instructions {CA [297]}.

61 The observations of Gageler and Keane JJ in *Lee(1)* were called in aid by the CA at [298]. First, it is submitted that those *obiter dicta* do not support the finding of the CA. Secondly, if they are so interpreted, they are an *obiter* minority observation and do not reflect the law as explained in *Hammond*, *X7* and *Lee(2).*

62 The CA spent little time on this significant issue, recording that a concession had been made by the appellants that this would be so. No such concession was, in fact, ever made: see CA transcript p 50 and following, p 160 and following and p 167 where senior counsel for the appellant submitted that Gageler and Keane JJ's obiter remarks were not the law. A central part of the appellant's case was that he would not receive a fair trial because of the constraints and unfairness placed upon him.

63 At [301] the CA found that if, contrary to its view, certain forensic choices might be impeded it could be managed by the trial judge with appropriate directions. The example given by the CA of the trial judge effectively telling AFP investigators not to answer questions truthfully is, it is submitted, not an appropriate remedy for the forensic disadvantages imposed

upon the appellants. Rather, the expedient exacerbates the dysfunctional character of the prospective trial.

64 The CA, in error, overruled the trial judge's finding. It overruled the finding that there had been a fundamental alteration to the accusatorial trial. At [296] it stated that the appellants simply failed to demonstrate that what had occurred at or subsequent to the examinations would inhibit them in any way from putting the prosecution to its proof or testing the strength of the evidence.

65 It reached those conclusions notwithstanding the CDPP's concession that the coerced evidence and admissions would prevent the appellant from adopting a contrary position at trial, either through his counsel or giving evidence. It reached that conclusion notwithstanding the evidence before it of the nature of the questioning, which indisputably bore directly upon the matters with which the appellant was charged, and the answers and admissions coerced from him.

66 In doing so, the CA departed from the principles expressed in *Hammond* and confirmed in *X7* and *Lee(2)*.

67 ***'Actual' or 'demonstrable' unfairness:*** The CA at [251] and [288]-[289] relied upon the reasons of Bathurst CJ of the NSWCCA in *X7 v R* (2014) (***X7(2)***) 292 FLR 57 at [91]-[93] and [106], and his Honour's reasons in *R v Seller; R v McCarthy* (2015) 89 NSWLR 155, 191 at [203]-[204] to impose a requirement upon the appellant to demonstrate some 'actual' unfairness resulting from the prosecution and investigators having access to his unlawfully coerced and disseminated testimony. This is not consistent with the governing principles that were confirmed, explained and applied in *Lee(2)* (2014) 253 CLR 455 at [43]-[51].

68 This Court should confirm that the *Lee(2)* principles apply with equal force to considerations of a permanent stay of a trial yet to commence, as to a consideration of whether a trial that has already occurred has miscarried.

69 The CA's observation at [305] that the instant case is of a quite different character from *Lee(2)* is not explained and not correct. If anything, this case has aggravating features of illegality not present in *Lee(2)*.

70 The imposition of the requirement imposed upon the appellant by the CA in this case, to identify specific documents or pieces of evidence that were obtained by reason of the illegal conduct suffers from the vice of imposing upon the accused, who knows nothing of the detail of how the case against him has been assembled (much of which is privileged or subject to public interest immunity claims), the burden of proving that the demonstrated departure from the accusatorial character of the pre-trial process is unable to be cured.

71 If the prosecution wishes to argue that its acts of illegality will have only an anodyne impact upon the proposed trial then it should establish that case. Such an approach would be consistent with the principles in *Blatch v Archer* [1774] 1 Cowp 63, and with the principle that it is the prosecution that has the responsibility of ensuring its case is presented properly and with fairness to the accused: *Lee(2)* at [44], *Richardson v The Queen* (1974) 131 CLR 116 at 119; *Whitehorn v The Queen* (1983) 152 CLR 657 at 675; *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393 at 432-433 [63].

72 If, contrary to our submission, it falls to the appellant to demonstrate 'actual' prejudice before a permanent stay can be granted, the CA in this case erred in finding that the appellants had not demonstrated "actual" unfairness as described by Bathurst CJ in *X7(2)* (2014) 292 FLR 57 at [110]. In that case, the NSWCA knew that a coercive examination had taken place but had no evidence of the questions asked in the examination. As Beazley P noted at [115]:

> [W]ithout evidence as to the extent or nature of the questions asked, it was impossible to determine what the impact of the questioning on his criminal trial would be. Had the questioning extended to no more that X7's identity and background, which may have nothing to do with the crime in respect of which is to be tried, the information may have been 'anodyne' in its effect on the trial process.

73 In contrast to *X7(2)*, in this case the transcript of the appellant's examination was tendered in evidence and the content was far from anodyne. The nature and content of the examination was sufficient to satisfy the trial judge, and the CDPP by its concession, that there was no real prospect of the appellant being able to give evidence at his trial.

74 The accusatorial trial to which the appellant is entitled has been fundamentally altered. The appellant will suffer actual prejudice in his trial, being the very prejudice that the unlawful, improper conduct was directed towards achieving. As found by the trial judge, the circumstances of this case require the proceeding to be stayed.

75 ***CA findings on forensic advantage:*** The CA held that her Honour was not in a position to doubt the veracity of the AFP officers evidence or to draw the inference which she did, because the issue of forensic advantage had not been explored, and the AFP officers' denials had not been challenged {CA [276]-[277]}.

76 The CA's conclusions were based on a misunderstanding of the evidence before her Honour and legal error in equating "actual" or "practical" forensic advantage to a requirement to identify particular pieces of evidences that were and could only have been obtained by reason of the compelled testimony. The CA erred in this regard in a number of ways.

77 *First*, the appellant's case – that he was a suspect and a person clearly falling within the protective provisions of sec 25A – is not inconsistent with the capacity of the AFP to benefit in a material way from the compelled testimony, as identified by her Honour.

78 It was not open to the CA to find, as it did, that it was not open to her Honour to find that a material forensic advantage had impermissibly accrued in relation to brief preparation and document identification because, at the time of the appellant's examination the investigation and brief preparation was at such an advanced stage that no relevant 'material' assistance could have been gained {CA [266]}.

79 *Secondly*, it was not necessary for her Honour to draw an inference in that regard. Her Honour was acting on the direct evidence of the SIO, Schwartz {SC [783]-[785], [788]-[790], [814], [816]-[818], [846]}.

80 *Thirdly*, no *Browne v Dunn* issue arose. The CA wrongly attribute to "AFP officers" evidence said to be in conflict with her Honour's findings. That is not the case. The AFP witness statements included a standard clause to the effect that each officer did not take examination material into account when any decision to charge was made and did not include examination material on the brief. Evidence was not led from them by the prosecution or the defence regarding what use they made of the examination material. The SIO, Schwartz, dealt with in his statement the AFP's reasons for the examinations and he was cross examined about those matters and about use of the examination material. No *Browne v Dunn* issue could arise and no submission was made by the CDPP that it should.

81 *Fourthly*, it had never been part of the appellant's case that it could be established that specifically identifiable pieces of evidence were obtained as a direct result of use of examination material and that such evidence could not have been obtained by other means. It is true, as the CA repeatedly stated, that the defence did not attempt that task. One reason is likely to be that in its submissions at the outset of the application before the trial judge, the CDPP submitted at 12(e) {CA exhibit R1, document 5 – "Prosecution Proposed Order of Defence ACC Application} that it ought be assumed 'that the AFP made derivative use of the material obtained by compulsory examination of each accused' {see also CA transcript p 130, lines 15-25}. The two examples given by the CA of how simple it would have been to attempt the task, however, evidence a misunderstanding of the state of the evidence. The CA's first suggestion was to compare all post-examination documents on the brief to the documents shown to the various appellants in their examinations. The CA did not seem to appreciate that there was, in fact, no brief at the time of the appellant's examination and that he was shown only one document in his examination. The second suggestion relates to a spreadsheet prepared by the prosecution

showing search terms and dates. This document shows that in excess of 98% of the recorded searches occurred after the appellant's examination {AB 777, CA [259], [261]}. It does not assist in establishing how the search terms were thought of. Neither the prosecution nor the defence sought to establish how specific pieces of evidence were obtained.

82 The law did not require the test posed by the CA to be satisfied before it could be found that a relevant forensic advantage had accrued.

83 The unfairness is irremediable. As the trial judge found at [876]-[877], replacing the prosecution team will not be sufficient to ensure a fair trial, because information obtained from the examinations has been used to compile the prosecution brief and obtain evidence against the appellants {SC [834]}. The CA did not answer the problem of the enduring presence in the prosecution process of at least 17 investigators informed by the product of the unlawful examinations. It was later revealed that 41 AFP agents and 3 officers of AFP legal had access to examination material {AB 818}.

84 ***Court of Appeal findings - Administration of justice in disrepute:*** The CA held that it was not open to her Honour to find that the examiner was "reckless to his various obligations to an unacceptable degree" **(the Recklessness Finding)** {SC [881]}.

85 The CA found that once it was found not open to conclude "*recklessness in the legal sense*", that ground for the stay "*falls away*" {CA [15], [314]}.

86 When considering the exercise of the discretion to stay a criminal prosecution to prevent the administration of justice being brought into disrepute because of illegal or improper conduct of the executive in connection with the prosecution, an important consideration will be the extent of the departure from the required legal procedures and the state of mind of those involved. Was the departure serious and intentional or minimal and inadvertent: *R v Raby* [2003] VSC 213 at [37]. Was there a mere "venial irregularity": *R v Horseferry Road Magistrates' Court; Ex parte Bennett*; [1994] 1 AC 42 at 77 per Lord Lowry; or a "technical breach": *Hong Phuc Truong v The Queen* ("***Truong***") (2004) 223 CLR 122 at [136].

87 In *Truong*, Kirby J at [135] explained that the jurisdiction to order a stay is not confined to cases of intentional illegality by the executive:

> the relief is not confined to cases of deliberate and knowing misconduct, although that may be sufficient to enliven the jurisdiction. It extends to serious cases where, whatever the initial motivation or purpose of the offending party, and whether deliberate, reckless or seriously negligent, the result is one which the courts, exercising the judicial power, cannot tolerate or be part of.

88 In *X7(2)* (2014) 292 FLR 57 Bathurst CJ regarded it as important that the relevant examination had occurred in circumstances where the examiner held the reasonable belief that

the examination was lawful and had made the necessary protective directions to ensure that investigators and prosecutors were not present at the examination and did not have access to the examination material. This, his Honour found at [111], evidenced a *bona fide* use of the power, mitigating against the ordering of a stay.

89 In this case, the various acts of illegal conduct were carried out by the executive for the very purpose of achieving forensic advantage for the prosecution and imposing forensic disadvantage upon the appellant in the foreseen trial {SC [880]-[881]}.

90 The authorities demonstrate that the word reckless is 'imprecise' and 'ambiguous'. Its context will dictate its meaning. Its ordinary meaning in the English language is 'careless', 'heedless', 'inattentive to duty'. Literally, it means 'without reck'. 'Reck' is an old English word meaning 'heed', 'concern', or 'care': *Aubrey v The Queen* (2017) HCA 18 at [43]. When used in the context of the criminal law the term has been given differing meanings according to the statutory or common law context.

91 In this case, the CA purported to apply the test of recklessness applied in *Director of Public Prosecutions v Marijancevic; Director of Public Prosecutions v Preece* (2011) 33 VR 440 (***Marijancevic***) where the DPP had appealed a decision of a trial judge to exclude evidence under sec 138 of the *Evidence Act* 2008 *(Vic).* At [84] in *Marijancevic* the court cited *R v Helmhout* (2001) 125 A Crim R 257 at 262-3, [33] and the test of recklessness as:

> Recklessness must involve as a minimum, some advertence to the possibility of or breach of some obligation, duty or standard of propriety or some relevant Australian law or a 'don't care' attitude, generally.

92 In concluding that the Recklessness Finding was not open to her Honour, the CA made serious adverse findings as to the conduct of Sage (and the ACC), sufficient to engage the jurisdiction of the court to order a stay, whether or not the label of reckless was used as a descriptor: see *Moti v The Queen* (2011) 245 CLR 456 at [60]. Those findings can be summarised as follows:

(a) The examinations were unlawful as they were not authorised by the ACC Act.

(b) The examinations were conducted for the unlawful and improper purpose of assisting the AFP in investigating and prosecuting the appellant.

(c) The ACC was not conducting an investigation. It unlawfully made its examination powers available to the AFP to further its investigation.

(d) Sage permitted numerous AFP investigators to be secretly present at the unlawful examination.

(e) The AFP dictated the questioning at the examination.

(f) The appellant was interrogated and cross examined about matters central to the proposed trial. He was 'locked in' to positions on important issues in the trial and made significant admissions against interest.

(g) Sage unlawfully disseminated the examination material widely to investigators and prosecutors when he was bound to give directions under sec 25A of the ACC Act to quarantine the examination material so as to protect the fair trial of the appellant.

(h) The case law extent at the time highlighted the importance of the protective provisions. Sage's conduct in this case was not supported by those cases, the ACC's position taken in those cases and the advice prepared by Ms Maharaj regarding the decision in *OK v Australian Crime Commission* (2009) 259 ALR 507 ("*OK(1)*") {CA [103]-[107]}.

(i) Sage had a duty under the ACC Act to pay the closest attention to the provisions which governed the conduct of examinations: {CA [104]-[105]}.

(j) Sage did not make the enquiries that provisions of the ACC Act required to protect the rights of examinees: {CA [116], [106]}.

(k) Sage did not make an independent judgement about whether the protective provisions ought to be applied to the appellant. He acted at the behest of the AFP.

(l) Sage failed to take reasonable care to understand what his obligations were under the law as it stood.

(m) Sage and the ACC should have recognised that directions 'quarantining' the appellant's examination material from investigators and prosecutors were required under sec 25A of the ACC Act: {CA [107]}.

(n) Sage's evidence explaining his errors by reference to cases being decided after the relevant examinations was plainly wrong; *OK(1)* was extant at the time of the examinations of Hodges and Galloway and *Australian Crime Commission v OK* (2010) 185 FCR 258 (***OK(2)***) extant at the time of the examinations of the fourth and fifth appellants, with both clearly explaining the meaning and purpose of sec 25A (and indeed the recognised importance of the provision inherent in the ACC's submissions in those cases): [74], [85], [94]-[96].

93 It appears the CA regarded the failure of the trial judge to make a finding of dishonesty, when Sage claimed to have had a belief that he was acting lawfully, as conclusive that the Recklessness Finding was not open to her Honour {CA [13], [15], [26.2], [84], [107]-[109], [116]}.

94 In that regard, it is important to refer to the trial judge's observations and findings regarding the vagueness, lack of detail, and reconstruction by Sage on the basis of what he thought should have happened, and unreliability of Sage's evidence {SC [35]-[36]}.

95 Other relevant findings and examples of Sage's unreliability and inability to give a coherent and consistent explanation for his conduct are mentioned throughout the trial judge's reasons {SC [395], [509], [538]-[540], [583], [592]-[595], [597]-[598], [616]-[620], [656], [657], [694], [708]-[710], [849]-[854], [856]-[862], [868]}.

96 The CA found that it was not open to her Honour to make the Recklessness Finding because on the evidence Sage honestly believed that the dissemination of the material was lawful {CA [13]}. Other relevant findings in the same vein appear at [26.2], [108] and [109], noting that the CA also misstated the evidence actually given by Sage and Bonnici.

97 In coming to the above conclusions the CA erred, in principle, in a number of ways that require correction by this Court:

(a) It wrongly imposed upon the appellant the burden of establishing, effectively, that there had been conscious wrongdoing by Sage, in the sense of a dishonest exercise of power, before his conduct could be described as reckless and before the discretion to order a stay could be engaged.

(b) It failed to recognise that for a person in Sage's position, the established facts evidenced conduct that was just as serious a departure from the required standard when exercising his powers as a finding that complied with the court's interpretation of recklessness, per *Marijancevic*, in a legal sense.

(c) It ignored the capacity of the *objective* evidence to found an inference that Sage must have turned his mind to the possibility that a direction was required in the case of the appellant and without any or any proper consideration simply proceeded as he had been requested to do by the AFP.

(d) It wrongly assumed that even if her Honour was bound to find that Sage thought he was acting lawfully that this excluded the Recklessness Finding under the *Marijancevic* test.

(e) It ignored the second limb of the *Marijancevic* test completely, namely, exercising such significant statutory powers with a 'don't care attitude, generally', when such test appears plainly satisfied on the court's own findings.

(f) It wrongly held that a finding that recklessness "*in the legal sense*" was not open to the trial judge meant that the order staying the prosecution must "fall away".

98 Whilst the appellants argued that the objective evidence provided an ample basis for her Honour to make a finding on the criminal law definition, such a finding was not essential and its overturning does not amount to a finding that her Honour's discretion to order a stay on this ground miscarried.

99 The CA did not address whether her Honour's finding at [880], which itself was based upon a detailed analysis of the relevant cases including *Seller(1)*, *CB* and *X7(2)*, was sufficient to ground a stay, and wrongly recorded {CA [313]} that such submission had been made and upheld by her Honour "*but not maintained on this application*". Her Honour's finding at [880] was:

> This case is different from other cases of illegality or impropriety in the conduct and use of ACC examinations and examination material, where stays have previously been refused. This case involves the deliberate coercive questioning of suspects, because they had exercised their rights to decline a cautioned police interview. The examination power was used for the very purpose of achieving a forensic disadvantage to the ACC accused, and advantage to the prosecution in foreseen future legal proceedings.

100 At all times that finding was a central – if not *the* central – argument advanced by the appellant as to why the granting of a stay in his circumstances was consistent with authority and particularly consistent with intermediate appellate authority declining to order a stay in cases including *Seller(1), Seller(2), CB and X7(2)* {see CA Respondents' Joint Submissions: sec 25A construction issue, filed 14 October 2016, [104]-[118] where the Respondents joined issue with Ground 10 of the CDPP Notice of Appeal; see also Respondents' joint submissions in reply to the ACIC, filed 14 November 2016, [17(bb)] and following}.

Part VII: Legislation

101 The applicable legislation is set out in the joint list of authorities, and annexed.

Part VIII: Orders sought

102 The appellant seeks orders that:

(1) The orders made by the Court of Appeal on 25 May 2017 are set aside;

(2) In lieu thereof, the appeal to the Court of Appeal be dismissed with costs.

Part IX: Time estimate

103 The appellant would seek no more than 2.5 hours for the presentation of the appellant's oral argument.

22 December 2017

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ANNEXURE

Australian Crime Commission Act 2002 (Cth)

4 Interpretation

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

ACC means the Australian Crime Commission established by section 7.

ACC operation/investigation means:

(a) an intelligence operation that the ACC is undertaking; or

(b) an investigation into matters relating to federally relevant criminal activity that the ACC is conducting.

acting SES employee has the same meaning as in the *Public Service Act 1999*.

appoint includes re-appoint.

Board means the Board of the ACC.

business includes:

(a) any profession, trade, employment or vocational calling;

(b) any transaction or transactions, whether lawful or unlawful, in the nature of trade or commerce (including the making of a loan); and

(c) any activity, whether lawful or unlawful, carried on for the purposes of gain, whether or not the gain is of a pecuniary nature and whether the gain is direct or indirect.

CEO means the Chief Executive Officer of the ACC.

child means any person who is under 18 years of age.

child abuse means an offence relating to the abuse or neglect of a child (including a sexual offence) that is punishable by imprisonment for a period of 3 years or more.

confiscation proceeding means a proceeding under the *Proceeds of Crime Act 1987* or the *Proceeds of Crime Act 2002*, or under a corresponding law within the meaning of either of those Acts, but does not include a criminal prosecution for an offence under either of those Acts or a corresponding law.

constable means a member or special member of the Australian Federal Police or a member of the police force or police service of a State.

document has the same meaning as in the *Evidence Act 1995*.

eligible Commonwealth Board member means the following members of the Board:

(a) the Commissioner of the Australian Federal Police;

(b) the Secretary of the Department;

(c) the Chief Executive Officer of Customs;

(d) the Chairperson of the Australian Securities and Investments Commission;

(e) the Director-General of Security holding office under the *Australian Security Intelligence Organisation Act 1979*;

(f) the Commissioner of Taxation.

eligible person means:

(a) an examiner; or

(b) a member of the staff of the ACC who is also a member of:

(i) the Australian Federal Police; or

(ii) the Police Force of a State.

examiner means a person appointed under subsection 46B(1).

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

Federal Court means the Federal Court of Australia.

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.

foreign law enforcement agency means:

(a) a police force (however described) of a foreign country; or

(b) any other authority or person responsible for the enforcement of the laws of the foreign country.

in contempt of the ACC has the meaning given by section 34A.

Indigenous person means a person (including a child) who is:

(a) a person of the Aboriginal race of Australia; or

(b) a descendant of an Indigenous inhabitant of the Torres Strait Islands.

Indigenous violence or child abuse means serious violence or child abuse committed by or against, or involving, an Indigenous person.

intelligence operation means an operation that is primarily directed towards the collection, correlation, analysis or dissemination of criminal information and intelligence relating to federally relevant criminal activity, but that may involve the investigation of matters relating to federally relevant criminal activity.

Inter-Governmental Committee or ***Committee*** means the Inter-Governmental Committee referred to in section 8.

issuing officer means:

(a) a Judge of the Federal Court; or

(b) a Judge of a court of a State or Territory; or

(c) a Federal Magistrate.

law enforcement agency means:

(a) the Australian Federal Police;

(b) a Police Force of a State; or

(c) any other authority or person responsible for the enforcement of the laws of the Commonwealth or of the States.

legal practitioner means a barrister, a solicitor, a barrister and solicitor, or a legal practitioner, of the High Court or of the Supreme Court of a State or Territory.

member of the staff of the ACC means:

(a) a member of the staff referred to in subsection 47(1); or

(b) a person participating in an ACC operation/investigation; or

(c) a member of a task force established by the Board under paragraph 7C(1)(f); or

(d) a person engaged under subsection 48(1); or

(e) a person referred to in section 49 whose services are made available to the ACC; or

(f) a legal practitioner appointed under section 50 to assist the ACC as counsel.

officer of a State includes:

(a) a Minister of the Crown of a State;

(b) a member of either House of the Parliament of a State or, if there is only one House of the Parliament of a State, a member of that House;

(c) a person holding or acting in an office (including a judicial office) or appointment, or employed, under a law of a State; and

(d) a person who is, or is a member of, an authority or body established for a public purpose by or under a law of a State or is an officer or employee of such an authority or body.

officer of a Territory includes:

(a) a person holding or acting in an office (including a judicial office) or appointment, or employed, under a law of a Territory; and

(b) a person who is, or is a member of, an authority or body established for a public purpose by or under a law of a Territory or is an officer or employee of such an authority or body.

officer of the Commonwealth includes:

(a) a Minister of State of the Commonwealth;

(b) a member of either House of the Parliament of the Commonwealth;

(c) a person holding or acting in an office (including a judicial office) or appointment, or employed, under a law of the Commonwealth; and

(d) a person who is, or is a member of, an authority or body established for a public purpose by or under a law of the Commonwealth or is an officer or employee of such an authority or body;

but does not include an officer of a Territory.

Ombudsman means the Commonwealth Ombudsman.

participating State means a State the Premier of which:

(a) has notified the Prime Minister that the State will participate in the activities of the Inter-Governmental Committee; and

(b) has not subsequently notified the Prime Minister that the State will not participate in the activities of the Committee.

passport means an Australian passport or a passport issued by the Government of a country other than Australia.

relevant crime means:

(a) serious and organised crime; or

(b) Indigenous violence or child abuse.

Note: See also subsection (2) (which expands the meaning of ***relevant crime*** in certain circumstances).

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.

secrecy provision means:

(a) a provision of a law of the Commonwealth, of a State or of a Territory, being a provision that purports to prohibit; or

(b) anything done, under a provision of a law of the Commonwealth, of a State or of a Territory, to prohibit;

the communication, divulging or publication of information, the production of, or the publication of the contents of, a document, or the production of a thing.

serious and organised crime means an offence:

(a) that involves 2 or more offenders and substantial planning and organisation; and

(b) that involves, or is of a kind that ordinarily involves, the use of sophisticated methods and techniques; and

(c) that is committed, or is of a kind that is ordinarily committed, in conjunction with other offences of a like kind; and

(d) that is a serious offence within the meaning of the Proceeds of Crime Act 2002, an offence of a kind prescribed by the regulations or an offence that involves any of the following:

(i) theft;

(ii) fraud;

(iii) tax evasion;

(iv) money laundering;

(v) currency violations;

(vi) illegal drug dealings;

(vii) illegal gambling;

(viii) obtaining financial benefit by vice engaged in by others;

(ix) extortion;

(x) violence;

(xi) bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory;

(xii) perverting the course of justice;
(xiii) bankruptcy and company violations;
(xiv) harbouring of criminals;
(xv) forging of passports;
(xvi) firearms;
(xvii) armament dealings;
(xviii) illegal importation or exportation of fauna into or out of Australia;
(xix) cybercrime;
(xx) matters of the same general nature as one or more of the matters listed above; and

(da) that is:
(i) punishable by imprisonment for a period of 3 years or more; or
(ii) a serious offence within the meaning of the *Proceeds of Crimes Act 2002*;

but:

(e) does not include an offence committed in the course of a genuine dispute as to matters pertaining to the relations of employees and employers by a party to the dispute, unless the offence is committed in connection with, or as part of, a course of activity involving the commission of a serious and organised crime other than an offence so committed; and

(f) does not include an offence the time for the commencement of a prosecution for which has expired.

serious violence means an offence involving violence against a person (including a child) that is punishable by imprisonment for a period of 3 years or more.

SES employee has the same meaning as in the *Public Service Act 1999*.

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.

State includes the Australian Capital Territory and the Northern Territory.

taxation secrecy provision means a secrecy provision that is a provision of a law that is a taxation law for the purposes of the *Taxation Administration Act 1953*.

Territory does not include the Australian Capital Territory or the Northern Territory.

the Commonwealth Minister or ***the Minister*** means the Minister of State administering this Act.

(2) If the head of an ACC operation/investigation suspects that an offence (the ***incidental offence***) that is not a relevant crime may be directly or indirectly connected with, or may be a part of, a course of activity involving the commission of a relevant crime (whether or not the head has identified the nature of that relevant crime), then the incidental offence is, for so long only as the head so suspects, taken, for the purposes of this Act, to be a relevant crime.

(3) In this Act:

(a) a reference to the Parliament of a State is to be read as:

(i) in relation to the Australian Capital Territory—a reference to the Legislative Assembly of that Territory; and

(ii) in relation to the Northern Territory—a reference to the Legislative Assembly of that Territory; and

(b) a reference to the Governor of a State is to be read as:

(i) in relation to the Australian Capital Territory—a reference to the Governor-General; and

(ii) in relation to the Northern Territory—a reference to the Administrator of that Territory; and

(c) a reference to the Premier of a State is to be read as:

(i) in relation to the Australian Capital Territory—a reference to the Chief Minister of that Territory; and

(ii) in relation to the Northern Territory—a reference to the Chief Minister of that Territory; and

(d) a reference to a Minister of the Crown of a State is to be read as:

(i) in relation to the Australian Capital Territory—a reference to a person appointed as a Minister under section 41 of the *Australian Capital Territory (Self-Government) Act 1988*; and

(ii) in relation to the Northern Territory—a reference to a person holding Ministerial office within the meaning of the *Northern Territory (Self-Government) Act 1978*.

4A When a State offence has a federal aspect

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).

Specificity of acts or omissions

(3) For the purposes of paragraph (2)(c), the specificity of the acts or omissions involved in committing a State offence is to be determined having regard to the circumstances in which the offence was committed (whether or not those circumstances are expressed to be elements of the offence).

State offences covered by paragraph (2)(c)

(4) A State offence is taken to be covered by paragraph (2)(c) if:

(a) the State offence affects the interests of:

(i) the Commonwealth; or

(ii) an authority of the Commonwealth; or

(iii) a constitutional corporation; or

(b) the State offence was committed by a constitutional corporation; or

(c) the State offence was committed in a Commonwealth place; or

(d) the State offence involved the use of a postal service or other like service; or

(e) the State offence involved an electronic communication; or

(f) the State offence involved trade or commerce:

(i) between Australia and places outside Australia; or

(ii) among the States; or

(iii) within a Territory, between a State and a Territory or between 2 Territories; or

(g) the State offence involved:

(i) banking (other than State banking not extending beyond the limits of the State concerned); or

(ii) insurance (other than State insurance not extending beyond the limits of the State concerned); or

(h) the State offence relates to a matter outside Australia.

(5) Subsection (4) does not limit paragraph (2)(c).

Definitions

(6) In this section:

ancillary offence, in relation to an offence (the ***primary offence***), means:

(a) an offence of conspiring to commit the primary offence; or

(b) an offence of aiding, abetting, counselling or procuring, or being in any way knowingly concerned in, the commission of the primary offence; or

(c) an offence of attempting to commit the primary offence.

Commonwealth place has the same meaning as in the *Commonwealth Places (Application of Laws) Act 1970*.

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

electronic communication means a communication of information:

(a) whether in the form of text; or

(b) whether in the form of data; or

(c) whether in the form of speech, music or other sounds; or

(d) whether in the form of visual images (animated or otherwise); or

(e) whether in any other form; or

(f) whether in any combination of forms;

by means of guided and/or unguided electromagnetic energy.

intelligence operation means an operation that is primarily directed towards the collection, correlation, analysis or dissemination of criminal information and intelligence relating to relevant criminal activity, but that may involve the investigation of matters relating to relevant criminal activity.

State offence means an offence against a law of a State.

7A Functions of the ACC

The ACC has the following functions:

(a) to collect, correlate, analyse and disseminate criminal information and intelligence and to maintain a national database of that information and intelligence;

(b) to undertake, when authorised by the Board, intelligence operations;

(c) to investigate, when authorised by the Board, matters relating to federally relevant criminal activity;

(d) to provide reports to the Board on the outcomes of those operations or investigations;

(e) to provide strategic criminal intelligence assessments, and any other criminal information and intelligence, to the Board;

(f) to provide advice to the Board on national criminal intelligence priorities;

(g) such other functions as are conferred on the ACC by other provisions of this Act or by any other Act.

7C Functions of the Board

(1) The Board has the following functions:

(a) to determine national criminal intelligence priorities;

(b) to provide strategic direction to the ACC and to determine the priorities of the ACC;

(c) to authorise, in writing, the ACC to undertake intelligence operations or to investigate matters relating to federally relevant criminal activity;

(d) to determine, in writing, whether such an operation is a special operation or whether such an investigation is a special investigation;

(e) to determine, in writing, the class or classes of persons to participate in such an operation or investigation;

(f) to establish task forces;

(g) to disseminate to law enforcement agencies or foreign law enforcement agencies, or to any other agency or body of the Commonwealth, a State or a Territory prescribed by the regulations, strategic criminal intelligence assessments provided to the Board by the ACC;

(h) to report to the Inter-Governmental Committee on the ACC's performance;

(i) such other functions as are conferred on the Board by other provisions of this Act.

Note: The CEO must determine, in writing, the head of an intelligence operation or an investigation into matters relating to federally relevant criminal activity: see subsection 46A(2A).

Special operations

(2) The Board may determine, in writing, that an intelligence operation is a special operation. Before doing so, it must consider whether methods of collecting the criminal information and intelligence that do not involve the use of powers in this Act have been effective.

Note 1: See also subsection 7G(4) for the voting rule that applies in relation to such a determination.

Note 2: See also Division 2 for the examination powers available if there is a special operation.

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.

Note 1: See also subsection 7G(4) for the voting rule that applies in relation to such a determination.

Note 2: See also Division 2 for the examination powers available if there is a special investigation.

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.

Informing the Inter-Governmental Committee

(5) The Chair of the Board must, within the period of 7 days beginning on the day a determination under subsection (2) or (3) is made, give a copy of the determination to the Inter-Governmental Committee.

When determination takes effect

(6) A determination under subsection (2) or (3) has effect immediately after it is made.

24A Examinations

An examiner may conduct an examination for the purposes of a special ACC operation/investigation.

25A Conduct of examination

Conduct of proceedings

(1) An examiner may regulate the conduct of proceedings at an examination as he or she thinks fit.

Representation at examination

(2) At an examination before an examiner:

(a) a person giving evidence may be represented by a legal practitioner; and

(b) if, by reason of the existence of special circumstances, the examiner consents to a person who is not giving evidence being represented by a legal practitioner – the person may be so represented.

Persons present at examination

(3) An examination before an examiner must be held in private and the examiner may give directions as to the persons who may be present during the examination or a part of the examination.

(4) Nothing in a direction given by the examiner under subsection (3) prevents the presence, when evidence is being taken at an examination before the examiner, of:

(a) a person representing the person giving evidence; or

(b) a person representing, in accordance with subsection (2), a person who, by reason of a direction given by the examiner under subsection (3), is entitled to be present.

(5) If an examination before an examiner is being held, a person (other than a member of staff of the ACC approved by the examiner) must not be present at the examination unless the person is entitled to be present by reason of a direction given by the examiner under subsection (3) or by reason of subsection (4).

Witnesses

(6) At an examination before an examiner:

(a) counsel assisting the examiner generally or in relation to the matter to which the ACC operation/investigation relates; or

(b) any person authorised by the examiner to appear before the examiner at the examination; or

(c) any legal practitioner representing a person at the examination in accordance with subsection (2);

may, so far as the examiner thinks appropriate, examine or cross-examine any witness on any matter that the examiner considers relevant to the ACC operation/investigation.

(7) If a person (other than a member of the staff of the ACC) is present at an examination before an examiner while another person (the ***witness***) is giving evidence at the examination, the examiner must:

(a) inform the witness that the person is present; and

(b) give the witness an opportunity to comment on the presence of the person.

(8) To avoid doubt, a person does not cease to be entitled to be present at an examination before an examiner or part of such an examination if:

(a) the examiner fails to comply with subsection (7); or

(b) a witness comments adversely on the presence of the person under paragraph (7)(b).

Confidentiality

(9) An examiner may direct that:

(a) any evidence given before the examiner; or

(b) the contents of any document, or a description of any thing, produced to the examiner; or

(c) any information that might enable a person who has given evidence before the examiner to be identified; or

(d) the fact that any person has given or may be about to give evidence at an examination,

must not be published, or must not be published except in such matter, and to such persons, as the examiner specifies. The examiner must give such a direction if the failure to do so might prejudice the safety or reputation of a

person or prejudice the fair trial of a person who has been, or may be, charged with an offence.

(10) Subject to subsection (11), the CEO may, in writing, vary or revoke a direction under subsection (9).

(11) The CEO must not vary or revoke a direction if to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been nor may be charged with an offence.

Courts

(12) If:

(a) a person has been charged with an offence before a federal court or before a court of a State or Territory; and

(b) the court considers that it may be desirable in the interests of justice that particular evidence given before an examiner, being evidence in relation to which the examiner has given a direction under subsection (9), be made available to the person or to a legal practitioner representing the person;

the court may give to the examiner or to the CEO a certificate to that effect and, if the court does so, the examiner or the CEO, as the case may be, must make the evidence available to the court.

(13) If:

(a) the examiner or the CEO makes evidence available to a court in accordance with subsection (12); and

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

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

Offence

(14) A person who:

(a) is present at an examination in contravention of subsection (5); or

(b) makes a publication in contravention of a direction given under subsection (9);

is guilty of an offence punishable, upon summary conviction, by a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 12 months.

End of examination

(15) At the conclusion of an examination held by an examiner, the examiner must give the head of the special ACC operation/investigation:

(a) a record of the proceedings of the examination; and

(b) any documents or other things given to the examiner at, or in connection with, the examination.

28 Power to summon witnesses and take evidence

(1) An examiner may summon a person to appear before an examiner at an examination to give evidence and to produce such documents or other things (if any) as are referred to in the summons.

(1A) Before issuing a summons under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the summons. The record is to be made:

(a) before the issue of the summons; or

(b) at the same time as the issue of the summons.

(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.

(3) A summons under subsection (1) requiring a person to appear before an examiner at an examination shall, unless the examiner issuing the summons is satisfied that, in the particular circumstances of the special ACC operation/investigation to which the examination relates, it would prejudice the effectiveness of the special ACC operation/investigation for the summons to do so, set out, so far as is reasonably practicable, the general nature of the matters in relation to which the person is to be questioned, but nothing in this subsection prevents an examiner from questioning the person in relation to any matter that relates to a special ACC operation/investigation.

(4) The examiner who is holding an examination may require a person appearing at the examination to produce a document or other thing.

(5) An examiner may, at an examination, take evidence on oath or affirmation and for that purpose:

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

(b) the examiner, or a person who is an authorised person in relation to the ACC, may administer an oath or affirmation to a person so appearing at the examination.

(6) In this section, a reference to a person who is an authorised person in relation to the ACC is a reference to a person authorised in writing, or a person included in a class of persons authorised in writing, for the purposes of this section by the CEO.

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

(8) A failure to comply with section 29A, so far as section 29A relates to a summons under subsection (1) of this section, does not affect the validity of the summons.

29A Disclosure of summons or notice etc. may be prohibited

(1) The examiner issuing a summons under section 28 or a notice under section 29 must, or may, as provided in subsection (2), include in it a notation to the effect that disclosure of information about the summons or notice, or any official matter connected with it, is prohibited except in the circumstances, if any, specified in the notation.

(2) A notation must not be included in the summons or notice except as follows:

(a) the examiner must include the notation if satisfied that failure to do so would reasonably be expected to prejudice:

(i) the safety or reputation of a person; or

(ii) the fair trial of a person who has been or may be charged with an offence; or

(iii) the effectiveness of an operation or investigation;

(b) the examiner may include the notation if satisfied that failure to do so might prejudice:

(i) the safety or reputation of a person; or

(ii) the fair trial of a person who has been or may be charged with an offence; or

(iii) the effectiveness of an operation or investigation;

(c) the examiner may include the notation if satisfied that failure to do so might otherwise be contrary to the public interest.

(3) If a notation is included in the summons or notice, it must be accompanied by a written statement setting out the rights and obligations conferred or imposed by section 29B on the person who was served with, or otherwise given, the summons or notice.

(4) If, after the ACC has concluded the operation or investigation concerned:

(a) no evidence of an offence has been obtained as described in subsection 12(1); or

(b) evidence of an offence or offences has been assembled and given as required by subsection 12(1) and the CEO has been advised that no person will be prosecuted; or

(c) evidence of an offence or offences committed by only one person has been assembled and given as required by subsection 12(1) and criminal proceedings have begun against that person; or

(d) evidence of an offence or offences committed by 2 or more persons has been assembled and given as required by subsection 12(1) and:

(i) criminal proceedings have begun against all those persons; or

(ii) criminal proceedings have begun against one or more of those persons and the CEO has been advised that no other of those persons will be prosecuted;

all the notations that were included under this section in any summonses or notices relating to the operation or investigation are cancelled by this subsection.

(5) If a notation is cancelled by subsection (4), the CEO must serve a written notice of that fact on each person who was served with, or otherwise given, the summons or notice containing the notation.

(7) If:

(a) under this section, a notation in relation to the disclosure of information about:

(i) a summons issued under section 28; or

(ii) a notice issued under section 29; or

(iii) any official matter connected with the summons or notice;

has been made and not cancelled; and

(b) apart from this subsection, a credit reporting agency (within the meaning of section 11A of the *Privacy Act 1988*) would be required, under subsection 18K(5) of the *Privacy Act 1988*, to make a note about the disclosure of the information;

such a note must not be made until the notation is cancelled.

(8) In this section:

official matter has the same meaning as in section 29B.

30 Failure of witnesses to attend and answer questions

Failure to attend

(1) A person served, as prescribed, with a summons to appear as a witness at an examination before an examiner shall not:

(a) fail to attend as required by the summons; or

(b) fail to attend from day to day unless excused, or released from further attendance, by the examiner.

Failure to answer questions etc.

(2) A person appearing as a witness at an examination before an examiner shall not:

(a) when required pursuant to section 28 either to take an oath or make an affirmation—refuse or fail to comply with the requirement;

(b) refuse or fail to answer a question that he or she is required to answer by the examiner; or

(c) refuse or fail to produce a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed.

(3) Where:

(a) a legal practitioner is required to answer a question or produce a document at an examination before an examiner; and

(b) the answer to the question would disclose, or the document contains, a privileged communication made by or to the legal practitioner in his or her capacity as a legal practitioner;

the legal practitioner is entitled to refuse to comply with the requirement unless the person to whom or by whom the communication was made agrees to the legal practitioner complying with the requirement but, where the legal practitioner refuses to comply with the requirement, he or she shall, if so required by the examiner, give the examiner the name and address of the person to whom or by whom the communication was made.

Use immunity available in some cases if self-incrimination claimed

(4) Subsection (5) limits the use that can be made of any answers given at an examination before an examiner, or documents or things produced at an examination before an examiner. That subsection only applies if:

(a) a person appearing as a witness at an examination before an examiner:

(i) answers a question that he or she is required to answer by the examiner; or

(ii) produces a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed; and

(b) in the case of the production of a document that is, or forms part of, a record of an existing or past business—the document sets out details of earnings received by the person in respect of his or her employment and does not set out any other information; and

(c) before answering the question or producing the document or thing, the person claims that the answer, or the production of the document or thing, might tend to incriminate the person or make the person liable to a penalty.

(5) The answer, or the document or thing, is not admissible in evidence against the person in:

(a) a criminal proceeding; or

(b) a proceeding for the imposition of a penalty;

other than:

(c) confiscation proceedings; or

(d) a proceeding in respect of:

(i) in the case of an answer—the falsity of the answer; or

(ii) in the case of the production of a document—the falsity of any statement contained in the document.

Offence for contravention of subsection (1), (2) or (3)

(6) A person who contravenes subsection (1), (2) or (3) is guilty of an indictable offence that, subject to this section, is punishable, upon conviction, by a fine not exceeding 200 penalty units or imprisonment for a period not exceeding 5 years.

(7) Notwithstanding that an offence against subsection (1), (2) or (3) is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.

(8) Where, in accordance with subsection (7), a court of summary jurisdiction convicts a person of an offence against subsection (1), (2) or (3), the penalty that the court may impose is a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 1 year.

Legal professional privilege

(9) Subsection (3) does not affect the law relating to legal professional privilege.

59 Furnishing of reports and information

(1) The Chair of the Board must keep the Minister informed of the general conduct of the ACC in the performance of the ACC's functions. If the Minister requests the Chair to provide to him or her information concerning a specific matter relating to the ACC's conduct in the performance of its functions, the Chair must comply with the request.

(1A) Subject to subsection (2), if a Minister of the Crown of a State who is a member of the Inter-Governmental Committee requests the Chair of the Board to provide him or her with information concerning a specific matter relating to the ACC's conduct in the performance of its functions, being conduct that occurred within the jurisdiction of that State, the Chair of the Board must comply with the request.

(2) If the Chair of the Board considers that disclosure of information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the Chair must not provide the information under subsection (1A).

(3) Subject to subsection (5), the Chair of the Board:

(a) shall, when requested by the Inter-Governmental Committee to furnish information to the Committee concerning a specific matter relating to an ACC operation/investigation that the ACC has conducted or is conducting, comply with the request; and

(b) shall when requested by the Inter-Governmental Committee to do so, and may at such other times as the Chair of the Board thinks appropriate, inform the Committee concerning the general conduct of the operations of the ACC.

(4) Subject to subsection (5), the Chair of the Board shall furnish to the Inter-Governmental Committee, for transmission to the Governments represented on the Committee, a report of the findings of any special ACC operation/investigation conducted by the ACC.

(5) The Chair of the Board shall not furnish to the Inter-Governmental Committee any matter the disclosure of which to members of the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies and, if the findings of the ACC in an investigation include any such matter, the Chair of the Board shall prepare a separate report in relation to the matter and furnish that report to the Minister.

(6) The Chair of the Board may include in a report furnished under subsection (4) a recommendation that the report be laid before each House of the Parliament.

(6A) Subject to subsection (6B), the Chair of the Board:

(a) must comply with a request by the Parliamentary Joint Committee on the Australian Crime Commission for the time being constituted under Part III (the ***PJC***) to give the PJC information relating to an ACC operation/investigation that the ACC has conducted or is conducting; and

(b) must when requested by the PJC, and may at such other times as the Chair of the Board thinks appropriate, inform the PJC concerning the general conduct of the operations of the ACC.

(6B) If the Chair of the Board considers that disclosure of information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the Chair must not give the PJC the information.

(6C) If the Chair of the Board does not give the PJC information on the ground that the Chair considers that disclosure of the information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the PJC may refer the request to the Minister.

(6D) If the PJC refers the request to the Minister, the Minister:

(a) must determine in writing whether disclosure of the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies; and

(b) must provide copies of that determination to the Chair of the Board and the PJC; and

(c) must not disclose his or her reasons for determining the question of whether the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies in the way stated in the determination.

(7) The CEO may give to:

(a) any law enforcement agency; or

(b) any foreign law enforcement agency; or

(c) any other agency or body of the Commonwealth, a State or a Territory prescribed by the regulations;

any information that is in the ACC's possession and that is relevant to the activities of that agency or body if:

(d) it appears to the CEO to be appropriate to do so; and

(e) to do so would not be contrary to a law of the Commonwealth, a State or a Territory that would otherwise apply.

(8) The CEO may, whenever it appears to the CEO to be appropriate to do so, furnish to authorities and persons responsible for taking civil remedies by or on behalf of the Crown in right of the Commonwealth, of a State or of a Territory any information that has come into the possession of the ACC and that may be relevant for the purposes of so taking such remedies in respect of matters connected with, or arising out of, offences against the laws of the Commonwealth, of a State or of a Territory, as the case may be.

(9) Where any information relating to the performances of the functions of:

(a) a Department of State of the Commonwealth or of a State;

(b) the Administration of a Territory; or

(c) an instrumentality of the Commonwealth, of a State or of a Territory;

comes into the possession of the ACC in the course of any operations or investigations conducted by it, the CEO may, if he or she considers it desirable to do so:

(d) furnish that information to the Department, the Administration or the instrumentality; and

(e) make to the Department, the Administration or the instrumentality such recommendations (if any) relating to the performance of the functions of the

Department, of the Administration or of the instrumentality as the CEO considers appropriate.

(10) A report under this Act that sets out any finding that an offence has been committed, or makes any recommendation for the institution of a prosecution in respect of an offence, shall not be made available to the public unless the finding or recommendation is expressed to be based on evidence that would be admissible in the prosecution of a person for that offence.

(11) The CEO may, whenever it appears to the CEO to be appropriate to do so, furnish to the Australian Security Intelligence Organisation any information that has come into the ACC's possession and that is relevant to security as defined in section 4 of the *Australian Security Intelligence Organisation Act 1979*.