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 SUBMISSIONS IN RESPONSE TO THE SUBMISSIONS OF THE AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION - REDACTED

Part I: Certification

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

Part II: Issues

2 This issues are set out in the Appellant's Submissions dated 22 December 2017.

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

3 No sec 78B of the *Judiciary Act 1903* (Cth) notice is necessary.

Part IV: Material facts

4 See Appellant's Submissions dated 22 December 2017 and Chronology.

Part V: Applicable statutory and constitutional provisions

5 See Appellant's Submissions dated 22 December 2017.

Part VI: Argument

6 The appeal to this Court is against the decision of the Court of Appeal (**CA**), on an interlocutory appeal by the CDPP under the *Criminal Procedure Act 2009* (Vic) (**CPA**), to overturn the trial judge's decision ordering that proceedings against the appellants be permanently stayed.

7 Before the CA, on the CDPP interlocutory appeal, the Australian Criminal Intelligence Commission (**ACIC**) was granted leave to intervene (over objection). Because of that it was

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required to be named as a respondent in the application for leave to appeal and the appeal in this Court.

8 The ACIC now seeks to raise a number of issues by way of Notice of Contention. Its standing to do that is challenged, as it was before the CA.[1] The Commonwealth Crown is represented by the appropriate entity, the CDPP. The ACIC has no sufficient legal interest in the proceeding to warrant its participation. A criminal proceeding involves issue being joined between on the one hand the individual charged, and on the other hand, the Crown. The Crown represents the interests of the community. A decision will not ordinarily directly affect any other person's legal interests.[2] It follows that, absent some special legislative power, leave could not ordinarily be granted to intervene in criminal proceedings.[3] Adverse findings as to the conduct of members of staff of the ACIC would not provide the requisite direct impact on a legal interest of the ACIC. Nor would resolution of a question of statutory interpretation in relation to the *Australian Crime Commission Act* 2002 **(the Act)** provide such a direct impact,[4] particularly given that that Act has been radically amended so that any such interpretations are of very limited ongoing impact. Consequently, it is submitted that the ACIC lacks standing in the appeal.

9 The ACIC seeks to challenge the following findings by the CA:

(a) That in the circumstances here applying the Examiner was bound to make quarantining directions under sec 25A of the Act, in relation to the examinations of the appellants (CA 12, 26, 27-67).

(b) The examinations were unlawful because they were not authorised by the Act; (CA 12, 26, 153-162, 163-189).

(c) The examinations were unlawful because they were carried out for an improper purpose (CA 12, 26, 153-162, 190-212).

10 The ACIC seeks to support the findings by the CA:

(a) That the subject Determinations were valid; (CA 26, 118-152) and

(b) That the application for a stay should be refused (paragraph [14] ACIC submissions which adopt the submissions of the CDPP).

11 Assuming that this Court entertains the substance of the ACIC submissions, for the reasons set out below, the ACIC contentions ought be rejected.

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[1] Respondents' joint submissions in response to ACIC (intervening) filed in the CA 14 November 2016, [1]-[4].
[2] *R v GJ* (2005) 196 FLR 233 at 244; [54] per Mildren J with whom RileyJ and SouthwoodJ agreed
[3] *R v GJ* (2005) 196 FLR 233 at 244; [54] per Mildren J with whom RileyJ and SouthwoodJ agreed
[4] *Re McBain; ex p Catholic Bishops* (2002) 209 CLR 372 at 395 [23] per Gleeson CJ

Section 25A of the Act

12 The submissions of the ACIC regarding section 25A of the Act are contrary to:

(a) the clear words and obvious intention of the provision[5]

(b) the understanding of the ACIC of the operation of the provision as evidenced by the position taken in court proceedings[6], advice received from senior counsel[7] and directions regularly given by examiners reflecting that understanding, including examiner Sage, that preceded the examinations of the appellants[8]

(c) the findings of all courts that have examined the operation of the provision, including this court and a number of intermediate appellate courts[9], to such a marked and obvious extent that the CA in this case was moved to observe (the argument having been rejected by the trial judge) - "In the circumstances, it is surprising that the argument was renewed on this application."[10]

13 The statutory scheme that delivered to the ACIC the power to compel testimony provided a number of safeguards and conditions to the exercise of the power. It dealt with the issue of the common law privilege against self-incrimination by dealing with the two aspects of unfairness generated by its abrogation to a person's potential trial in different ways. Firstly, it prohibited direct use of the compelled testimony (sec 30). Secondly, it dealt with the issue of derivative or indirect use of the compelled testimony, not by preventing its use in

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[5] *CDPP v Brady and Others* [2016] VSC 334 at [95], [126]-[128], [135]-[137], [141]-[144], [146]-[150], [164]-[165], [179]-[180], [199]-[207], [209]-[212], [214], [220]-[221], [222], [226]—[227], especially [251]-[252], per Hollingworth J (the decision at first instance in this appeal) (**SC**); *ABC v Sage* (2009) 175 FCR 319 at [25]-[30]; *OK v Australian Crime Commission* (2009) 259 ALR 507 per Mansfield J at [69]-[73] (***OK(1)***); *Australian Crime Commission v OK* (2010) 185 FCR 258 (***OK(2)***) at [140]-[141], [143]-[144]; *R v CB and anor* (2011) 291 FLR 113 (***CB***) at [109], [118]-[128]; *R v Seller and McCarthy* (2012) 232 ACrimR 146 (Garling J) (***Seller(1)***) at [142], [246]-[249]; *R v Seller and McCarthy* (2013) 273 FLR 155 at [102]-[106]; (***Seller(2)***) **(Please note that the ACIC Submissions refer to this decision as "Seller(1)");** *Australian Crime Commission v X7* (2013) CLR 92 (**X7(1)**) at [26], [37], [50]-[51], [55]-[57], [61], [83]; *R v Lee* (2014) 253 CLR 455 (**Lee(2)**) at [8], [28]-[29], [34], [39], [43]-[44]; *QAAB v Australian Crime Commission* (2014) 227 FCR 293 (**QAAB**) at [38]; *R v X* [2014] NSWCCA 168 (**X**) at [60]-[61]; *X7 v R* (2014) FLR 57 (**X7(2)**) at [3], [5], [111]; *R v Seller and McCarthy* (2015) 89 NSWLR 155 **(Seller (3))** at [111]-[120], [122]-[123] [203], [208]-[209]; CA [104]-[107].

[6] See above and SC at [243], [251]-[253]; CA at [97]-[99], [104] re Maharaj advice and generally at [104], [105]-[107].

[7] Exhibit 385 at paragraphs 4 (regarding dissemination powers being subservient to s 25A) and paragraph 25 which states "*Section 25A empowers the Examiner to give directions including the identification of persons to whom the examination product must not be published if the failure to do give the direction (relevantly) 'might... prejudice the fair trial of a person who has been, or may be, charged with an offence*'", and again at paragraph 33.

[8] See for example the quarantining directions made pre charge in 2007 made by Examiner Sage and described in *Seller(1)* and *(2)*; *ABC v Sage*.

[9] See each of the cases cited in Footnote 1 above. Unlike the position in respect of whether the Act actually authorised the examination of a person charged regarding the circumstances of the charge, cases discussing the meaning, practical operation and requirements of sec 25A have been entirely consistent and based on the evident and clear statutory purpose to strike a balance, in relation to the privilege against self-incrimination "between competing public and private interests" per French CJ and Crennan J in *Lee(2)* at [50].

[10] CA at [48].

proceedings (which had been fraught from a practical perspective - what evidence had been derivatively obtained and what had not?) but rather by preventing those seeking to use the compelled testimony to prosecute the witness (prosecutors and investigators) from having access to the information. (sec 25A(9) and (3) - provisions which overrode other provisions regarding use and dissemination of material under the Act). As explained by French CJ and Crennan J in *X7(1)*[11], the manner in which the Act dealt with indirect or derivative use of compelled testimonial examination material ensured that complex and difficult issues regarding whether particular pieces of evidence had been derivatively obtained were avoided, by simply denying access to examination material by investigators and prosecutors of examinees in the protected class.

14 By this method, the ACIC could lawfully examine suspects for the purpose of achieving its primary functions in relation to intelligence gathering, priority setting, coordination and understanding of organised crime methodologies and practices and the like whilst preserving at least to some extent principles and established common law rights regarding self- incrimination, and regulating to some extent the balance of power between individual and state in the operation of the criminal justice system.

15 The ACIC's submissions do not descend to dealing with the relevant authorities. The submissions at paragraph [24]-[27] appear to rely upon the decision of the Court of Criminal Appeal in *Seller(2).* In that case the court upheld the decision of the trial judge in *Seller(1)* that the circumstances of the case demanded quarantining directions to be made under s.25A of the Act, in respect of pre charge examinations.[12] The same reasoning applies in relation to the operation of sec 25A in this case. *Seller(2)* was properly applied by the trial judge and confirmed by the CA.[13]

16 The ACIC submits at [45]-[46] that the appellants rely on post charge cases which are of limited relevance. That is not the case. As explained in the careful analysis of the authorities by the trial judge and confirmed by the CA, *Lee(2)*, *Seller(1)*, *Seller(2)* and *Seller(3)* and *QAAB* all involved pre charge examinations. Other relevant authority including *OK(1)* and *OK(2)*, *CB*, *X7(1)* and *X7(2)* made it plain that the court regarded sec 25A(9) of the Act as having the same application to pre charge examinations as the ACIC had submitted that it had in relation to post charge examinations, namely, to prevent derivative use of compelled testimony of persons charged or who may be charged by the making of

[11] At [50]-[57] (in dissent on the result but not on the operation of sec 25A).
[12] *Seller(1)* at [60] and [61], [79]-[81]; *Seller(2)* at [105], [108]; *Seller(3)* at [16].
[13] See analysis of all relevant authority at SC [108]-[242] and in particular in relation to *Seller(1)* at [151]- [159], *Seller(2)* at [160]-[165] and *Seller(3)* at [232]-[242] and at CA [41]-[53], [57]-[62].

quarantining orders preventing investigators and prosecutors obtaining access to the record of the compelled testimony.

Statutory context

17 The ACIC was established to subsume the functions of the Australian Bureau of Criminal Intelligence (**ABCI**), the Office of Strategic Crime Assessments (**OSCA**) and the National Crime Authority (**NCA**).

18 Contrary to the first "key" point submission of the ACIC at paragraph 23 of its submissions[14] and in accordance with the findings of the CA, secs 7A and 7C of the Act, the text of the statute, the Explanatory Memorandum (**EM**) and Second Reading Speech make it clear that the "focus" of the ACIC is on "criminal intelligence"[15] and that its "fundamental role" is "in determining national criminal intelligence priorities."[16] These functions are not limited or hindered by sec 25A operating according to law as found by the trial judge and the CA.[17]

19 The ACIC understood and implemented the requirements of the Act, including secs 25A(3) and (9) differently in cases other than those involving the appellants. Examiner Sage himself made such orders and explained on affidavit why, in *ABC v Sage*. Moreover, in 2007 Sage made appropriate quarantining directions in respect of the pre charge examinations of the examinee, Mr Seller[18].

20 The second "key point" at paragraph 23 of the ACIC submissions is that the "special powers conferred on the ACIC were designed to supplement the investigative powers of police forces in Australia, rather than to constitute the ACIC as a self-contained investigative body..." This does not equate to making those powers available for use by another agency, as found to have occurred here. [19]

Reliance on *IBAC*

21 The reliance upon the decision in this court in *R v Independent Broad-based Anti-Corruption Commissioner* (2016) 256 CLR 459 (***IBAC***) is misplaced. *IBAC* did not consider any of the cases dealing with the operation of sec 25A of the Act or similar provisions. That is because the issue did not arise. The case was about something different - whether the

[14] The ACIC submits (unsupported by any footnoted evidence) that its "primary purpose...is to obtain evidence that can be used to prosecute persons who have committed serious offences..." This, like many of the other submissions of the ACIC is a substantial overreach of the situation, at best. This is made clear by the express terms of s7A of the Act in relate to the functions of the ACC and section 7C in relation to the functions of the Board as informed by the explanatory material referred to herein.
[15] Second Reading Speech p.7330
[16] Revised Explanatory Memorandum p.9
[17] Cf ACIC Submissions at [21] which are unsupported by the evidence and the law and the circumstances
[18] *Seller(1)* [43]-[45], *Seller(2)* [27], CA [43], [67]
[19] SC [618], [619], [620] [640], [622],[647], [709], [710], [862], [864], -[866], [868], [880]

IBAC Act authorized the examination of "suspects"- not what protections (if any) the Act contained regarding direct or derivative use of that compelled testimony.[20]

22 Sec 42 of the *IBAC Act* (which is not the same as but has some similarity to sec 25A) was briefly mentioned but not considered. That point in the process had not yet been reached.

23 Paragraph [31] of the ACIC submissions countenance that sec 25A(9) may require non publication directions in relation to suspects who have not been charged. "Plainly it may". The submission is footnoted to paragraph [105] of *Seller(2)* which states that "the requirement of a direction does not differentiate between pre and post-charge dissemination".

ACIC Submission regarding statutory modification to the privilege against self-incrimination and accusatorial system of justice (ACIC Submissions Paragraph [31])

24 That the legislature can modify or impinge upon the common law right to silence and the accusatorial nature of a criminal trial has not been and is not in dispute. The CPA examples given however add no weight to the proposition to which they are directed (at [37]-[38]), namely that the requirements of sec 25A(9) ought be read as permitting what occurred in the case of the appellants.

25 Insofar as the ACIC seeks to obtain some support from the South African, Canadian and United Kingdom authorities mentioned at footnote 57 (Submissions [35] and [44.1]), as might be expected, they all concerned situations within the legislative and constitutional context there applying. The cases recognize that the fair trial of a person is impacted upon by the direct, indirect or derivative use of compelled testimony. Whether such an impact is authorized is another matter and dependent upon the legislative and constitutional context. True it is that some of the cases draw a distinction between the impact on a fair trial of types of derivative evidence. In this regard, Gibbs CJ relevantly observed in *Sorby* at [8]:

> The privilege prohibits the compulsion of the witness to give testimony, but it does not prohibit the giving of evidence, against the will of a witness, as to the condition of his body. For example, the witness may be required to provide a fingerprint, or to show his face or some other part of his body so that he may be identified, or to speak or to write so that the jury or another witness may hear his voice or compare his handwriting. That this was the significance of the distinction between "testimonial" and other disclosures was recognized in King v. McLellan, where it was held that the protection afforded by the rule against self-incrimination did not extend to entitle a person who had been arrested to refuse to furnish a sample of his breath for analysis when required to do so under s. 80F(6) of the Motor Car Act 1958 (Vict.). There are decisions to the same effect in Canada (Curr v. The Queen (1972) SCR 889) and the United States (Schmerber v. California [1966] USSC 135; (1966) 384 US 757 (16 Law Ed 908) - the case of a blood test). It is a misunderstanding to think that a statement is not a "testimonial disclosure" within the meaning of the principle as

[20] IBAC at [1].

expounded in Wigmore on Evidence if it cannot be admitted in evidence. An admission is a "testimonial disclosure", whether it can be given in evidence or not.

26 The footnote 57 decisions must also be read in light of, firstly, the *Evidence Act 1995* (Cth) and the *Evidence Act 2008* (Vic) which both provide direct and the broadest of indirect or derivate use immunity in relation to any witness (charged or not charged) compelled to give testimony in an Australian legal proceeding. (Secs 128(a) and (b)) And secondly, that there is no need in this case for fine or technical distinctions as to the objective assessment of the prejudice Hodges might suffer to his fair trial by being compulsorily examined about the circumstances of offences in respect of which he was a suspect. As her Honour found and the CA confirmed, the requirement to make the quarantining orders was, in this case, obvious. Hodges testimony could be relevantly summarized as a combination of disclosing his defences, explaining key relationships and transactions and making admissions against interest.[21]

27 The conclusion that there is nothing anodyne about the impact of the examination of Hodges on his trial is with respect inevitable.

28 At [39] the ACIC submit that "a direction under sec 25A(9) is required only where it is possible to identify a logical connection between a failure to prohibit the dissemination of the examination material and interference with the administration of justice." If that is the test,[22] what occurred in this case required the making of "quarantining" directions.[23] The content of the examination of Hodges was precisely that described by Bathurst CJ in *Seller(2)* at [104] (see also [98]).

29 The submission that any prejudice to the trial of the appellant and any advantage secured by investigators was not an "unfair forensic advantage"[24] because it was what the statute dictated and that being "locked in" is a "necessary incident of any coercive examination"[25], falls away when it is recognised that the examinations were unlawful. The appellants have been subjected to unfair forensic disadvantage not because of the operation of the statute but because of the established acts of illegality and impropriety in breach of the statute.

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[21] See *Seller(2)* at [104].
[22] In our submission there is no need to pose the test in a different was to that set out in the statute and apply it in light of the common law in relation to the privilege against self incrimination and the accusatorial system of criminal justice as explained and applied in the authorities referred to herein.
[23] See analysis of all relevant authority at SC [108]-[242] and in particular in relation to *Seller(1)* at [151]-[159], *Seller(2)* at [160]-[165] and *Seller (3)* at [232]-[242] and at CA [41]-[53], [57]-[62]; *Seller(1)* at [60] and [61], [79]-[81]; *Seller(2)* at [108]; *Seller(3)* at [16].
[24] ACIC submissions at [44] – ACIC underlining.
[25] ACIC submissions [44.2].

30 The submission at paragraph 44.2 of the ACIC submissions that Hodges will be able to "put the prosecution to its proof in the usual way" cannot stand with the content of his compelled testimony and the analysis carried out by the trial judge, giving rise to conclusion that:

31 The CDPP submitted and the CA wrongly accepted, that whatever the content of unlawfully compelled testimony it will never result in an unfair constraint or deprive the accused of a "legitimate" forensic choice because *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*[28]. The CA was wrong for the following reasons:

(a) it is unsupported by any authority (insofar as it is submitted that it is supported by the minority observations of Gageler and Keane JJ in *Lee(1)* at [323] those observations do not support the proposition and/or do not represent the law[29]; A majority of the court in *Lee(1)* approved the observations of Hayne and Bell JJ with whom Kiefel J agreed at paragraph [124} of *X7(1)*: French CJ at [54] (footnote 173); Kiefel J (Bell J agreeing) at [163] (footnote 341). Although Hayne J did not refer to the passage specifically in *Lee(1)*, his Honour restated the principle in similar terms in *Lee(1)* at [79]

(b) it conflicts directly with the principles, reasoning and findings of this court in *Hammond*, *Lee(2)* and *X7(1)* ([124] and [136] per Hayne and Bell JJ, [161] per Kiefel J; Noting that the observations of Hayne and BellJJ with whom Kiefel J agreed, at paragraph

[26] SC [722].
[27] SC [534], [537]-[540], [621]-[624], [721]-[727] especially at [726]-[727].
[28] CA [297].
[29] See the detailed analysis of authority by the trial judge at SC [181]-[191] cf: the lack of such analysis by the CA; the Victorian Court of Appeal decision in Zhao at [para [48] referred to at para 44.2 of the ACIC submissions does not represent an endorsement by the court but rather a summary of the arguments flowing from *Lee(1)*. Of note is that the court applied *Lee(2)* (at [53]-[58]) finding that "the court is bound to do what it can to protect the accused's right to require the Crown to prove its case without the accused's assistance" [58] and therefore stayed the forfeiture proceedings. [66]; The High Court (including Keane J) upheld the decision of the Court of Appeal see [42], [45]-[46], [49]-[51] without need to refer to the observations of Gageler and Keane JJ relied upon by the ACIC in its submissions.

[124] of X7 were approved by a majority of this Court in *Lee(1)*; French CJ at [54] (footnote 173); Kiefel J (Bell J agreeing) at [163] (footnote 341). Although Hayne J did not refer to the passage specifically in *Lee No. 1*, his Honour restated the principle in similar terms in *Lee(1)* at [79]

(c) does not stand scrutiny for the reasons set out in the above cases and explained by Hayne J in *Lee(1)* at [67]-[84] especially at [79], [82]-[84]; Kiefel J generally and especially at [202]-[203] (citing Gibbs CJ in *Hammond* - with whom Mason and Murphy JJ agreed, at p.198-199), [210]-[213], [239] with whom Bell J agreed [255], [258], [264]; French CJ at [54]; and

(d) there was no relevant concession by the appellants.

32 The ACIC at 44.3 make some submissions regarding the content of the Galloway examination. No such submissions are made in respect of Hodges and none could be. The findings of the trial judge at [534], [537]-[540], [621]-[624], [721]-[727] and especially at [726]-[727] referred to above remain undisturbed by the CA.

Other ACIC Submissions

33 Contrary to the submission of ACIC at paragraph 5.4, the trial judge and the CA did not uphold "the validity of those special investigations." The trial judge and CA held that the Determinations under which the examinations were conducted were valid, in that they complied with the statutory criteria set out in sec 7C of the Act.

Examinations not authorised by the Act and improper purpose

34 The CA dealt with the issue of lack of statutory authority to conduct the subject examinations at [153]-[189] carefully reciting her Honour's unchallenged findings of fact and the relevant statutory provisions. The CA dealt with the issue of the use of the examination powers for an improper purpose at [190]-[211]. There is some overlap in the relevant evidentiary findings and interpretation of provisions of the Act.

35 At [167] the CA relevantly held that:

> 167 In our view, the definition in s 4(1) establishes two distinct criteria, each of which must be satisfied as at the date of the proposed examination under s 24A. (For reasons of simplicity, what follows relates only to a special investigation). For a special investigation, there must be in existence both:
>
> **(a) an investigation which the ACC is conducting; and**
>
> **(b) a determination by the ACC Board that that investigation is a 'special investigation'.**

36 The CA concluded at [188]:

> ...These examinations were not the first step in an ACC investigation. There was no ACC investigation at any stage. The examination 'product' was never intended to be used by the ACC for any investigative purpose. The conduct of each examination was, instead, a step in the AFP investigation of the relevant respondent. And, as a result, the product was only ever to be used by the AFP.

37 When considering the improper purpose issue the CA relevantly explained at [207]-[211] why the purpose of examining suspects for the AFP, when no ACIC function was being performed was not a purpose authorised by the Act.

38 The ACIC challenge the finding of the CA by arguing that "There was an investigation"[30] by reason of the fact that "on the shelf" within the ACC there was in existence a Determination that authorised a special investigation, which Determination arguably, from a textual perspective "covered" the matter the subject of the examinations.

39 At [54] the ACIC refer to the definition of a "special ACC investigation" and the definition in s.4 which makes it clear as explained by the CA at [167] and [179] that there are two matters that need to be satisfied to permit the use of the compulsive powers. 1- the ACIC is conducting an investigation; and 2- the investigation is a special investigation. The ACIC was not conducting an investigation. The examinations were not authorised by the Act.

40 Contrary to the submission of the ACIC at [56], no uncertainty is created by the CA decision. All it does is require the statute to be observed and that the ACIC utilise its compulsive powers when, as required by the Act it is actually conducting an investigation. The ACIC Act does not authorise it to provide a "hearing room (and powers) for hire" to other law enforcement agencies.

41 As found by the CA, the only available interpretation of the relevant provisions is to give them the meaning they demand, which starts with the requirement that the ACC is actually **conducting** an investigation into the **matter** the subject of the proposed examination.

Improper purpose

42 The ACIC contend at [60] that the CA at [207]-[211] misunderstood "the history and purpose" of the ACC. The extraneous material relied upon by the ACIC does not support the contention.

43 The EM describes the availability of the special powers for ACIC investigations that are approved by the Board.[31] None of the provisions countenance the ACIC providing a hearing room (and powers) to other law enforcement agencies for their purposes, let alone the purposes found to exist in this case. Indeed, the concept runs counter to the statutory scheme

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[30] ACIC submissions [50]-[56].
[31] EM p.1-2, 6, 9, 10-11, 18; Second Reading Speech 26 September 2002- p.7328-7329

which carefully specifies the use of the special powers and the safeguards in relation to such use. Whilst joint investigations and task forces are clearly contemplated and may or may not attract the use of the special powers- such use would be for the purpose of an ACC investigation. At p.7330 of the Second Reading Speech for example: "The ACC will have in-house and task force access to all coercive and investigatory powers currently available to the NCA. The Board will need to specifically authorise those investigations or operations which are to have access to coercive powers."

44 Reliance upon the circumstances and decision in *LHRC* is misplaced as explained by the CA especially at [207]. *LHRC* is an example of the ACIC actually conducting an investigation as part of the formal multi agency Project Wickenby Task Force and Determination that included the ACC, ATO, AFP, ASIC and CDPP[32]. It can readily be contrasted to this case. Mr Ayres' evidence makes the point:

> Ayres was the ACC legal officer who prepared many of the legal submissions in support of the summons applications. He said that he, Cohen, Bonnici, and any administrative staff at the ACC, were simply facilitating the questioning requested by the AFP. Ayres said the ACC was conducting the examinations for the AFP, and the ACC was not conducting any separate investigation in relation to the matter. This was the only time Ayres had conducted examinations for another agency. Ayres said that in all other examinations with which he had been involved, the ACC itself was conducting an investigation.[33]

The Validity of the Determinations

45 The two determinations that putatively justified the examination of each appellant were invalid, because they did not comply with the mandatory requirements of sec 7C(3) & (4) of the Act. The ACIC Board and it alone was given authority to determine an investigation "special" and suitable for the use of the coercive powers, having considered whether "ordinary police methods" were or were likely to be effective in respect of the subject investigation. The power was seen as so significant that it could not be delegated to a committee of the Board. The decision required a special majority. The Act gave the Board the power "to determine in writing that an investigation into matters relating to federally relevant criminal activity is a special investigation[34] and to describe "the general nature of the circumstances or allegations constituting the federally relevant criminal activity" the subject of the determination, along with the purpose of the investigation.[35]

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[32] *LHRC (No 3)* at [47]-[48]
[33] SC [384], CA [162], [183]
[34] By virtue of s 7C(3) requiring the determination to be in writing.
[35] s 7C(4).

46 Only if the determination contains some reasonable definition and limitation of the matter being approved for investigation can control over the use of the coercive powers as intended by the legislature be achieved. Likewise, the oversight of determinations and use of the coercive powers by the Inter-Governmental Committee (**IGC**) requires some definition and limitation. The IGC must be informed of a determination,[36] may require further information[37] and may revoke the determination.[38]

47 The reason for the subject determinations taking the form they did became apparent during the evidence of ACIC witnesses before her Honour. The idea was that the Board would sign a "generic" determination drafted so as to encompass broad categories of federal crime without limitation by reference to time, identity or any other limiting circumstances[39]. The determination would then "sit on the shelf" until someone within the ACIC decided that a particular investigation (termed "project") was to avail itself of the use of the coercive powers, as long as it fell within the textual description of the determination.

48 The conception of sec 7C set out in the EM is one that requires the Board to give genuine consideration to a "matter" and "investigation" and to the real necessity for coercive powers in each investigation, having regard to the effectiveness of ordinary police methods of investigation. Such consideration cannot be given without some identification of the particular factual substratum for that consideration.

The instant determinations

49 The determination putatively relied upon to examine Hodges and Galloway was the Special Investigation Authorisation and Determination (Financial Crimes) 2008. That putatively relied upon to examine Strickland and Tucker was the Special Investigation Authorisation and Determination (Money Laundering) 2010.

50 In contradistinction to identifying the "general nature" of the matters the subject of the investigation determined to be "special", the determinations are generic. They are not treated by the ACIC as authorising an investigation but rather as authorising any number of investigations, as long as the matter is "covered" by the text of the determination.[40] Thus, the

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[36] s 7C(5).
[37] s 9(2).
[38] s 9(7).
[39] See application for use of such powers, Exhibit 127 (confirmed to be such an application at t.2299); see also the evidence of Deakin at t.2260-2267, t.2285-6.
[40] t.2284 line 24, where Deakin said: *Is this a fair statement: The determination allows for a series of quite discrete investigations into particular issues?---There can be overlaps but that's largely true, yes.*

ACIC Board was not presented with any of the details of AFP Operation Thuja, and did not authorise an investigation into the subject matter of Operation Thuja.[41]

51 Nor, indeed, could the ACIC Board have possibly considered whether examination powers were necessary in relation to the subject matter of Operation Thuja, both because "ordinary police methods of investigation" were still being used, and indeed had, by June 2010, led prosecutors to the view that there was a prosecutable case, and because no information at all relating to Operation Thuja was provided to the Board.[42]

52 The two determinations in issue purport to authorise a special investigation into:

Circumstances, being those implied from a series of facts that are connected only in that money or transactions for value are involved;

A broad variety of "allegations" that merely comprises a concern that people may have committed, or may be committing, or may in future commit a multitude of dishonesty offences or other financial crimes, or crimes related to financial crimes;

Without any temporal constraint.

53 The manner in which the subject purported determinations were created resulted in the ACIC Board effectively delegating its statutory duty and power to unidentified, unaccountable people devoid of statutory recognition or power. In fact, the coercive powers were employed against the appellants, not because the Board had approved such use but rather because of the coincidence that (arguably) the matter the subject of the questioning was encompassed by the broad descriptors of alleged criminality contained in the written determinations and the ACIC was prepared to do what the AFP wanted. The checks and balances required by the Act, including Board approval and IGC oversight were left by the wayside in relation to the appellants and Operation Thuja.

54 The ACIC submission at [49] that the decision of Wigney J in *XCIV* is "supported by a long line of authority" is a substantial over reach[43]. The relevant authority referred to in the footnote in support of the submission are the two NCA cases, *AB*[44] and *A1*[45]. Even if it is assumed that those authorities are not too relaxed in their exposition of the requirements to

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[41] t.2260 line 13, Exhibits 55 & 62.
[42] See Board papers, Exhibit 74.
[43] In any event, that decision does not support the validity of the instant determinations, for the reasons set out above. It was common ground before the CA that there had been no previous decision considering the validity of the determinations relied upon in this case.
[44] Which described allegations of identified crimes concerning securities of specified corporations including Elders IXL by officers of those corporations.
[45] Which described a broad range of criminal activity allegedly committed by a number of outlaw motor cycle gangs (that were identified to the committee issuing the reference)

achieve compliance with the Act, neither support the validity of the current determinations. Likewise, *XCIV*[46] and XX[47].

CA decision

55 The CA rejected the Appellants' submission at [118] and following. The CA reasoned at [143]-[144] that because of the broad definition of "relevant criminal activity" and "federally relevant criminal activity" that a "very clear legislative intent" is exposed such that: "..the Commission can be authorised to investigate any matter relating to an "allegation" of criminal activity. No specific allegation is required. On the contrary, all that needs to be alleged is possible criminal activity, past present or future." At [146] the CA observed that had there been a more specific definition of "criminal activity", then it might have been expected that the Board would have had before it more specific material.

56 Whilst the briefing paper presented to the Board advanced an incorrect statutory test, the CA held that this did not prove that the Board failed to apply the correct test, which was recited in the formal determination document. (CA [149]-[152])

57 In relation to the CA's reasoning, it is submitted that the gist of the submissions by the appellants, summarised above, were left unattended to. Moreover, the breadth of the statutory definitions do not as a matter of logic permit the Board to purport to grant a determination in the form of the instant determinations. Indeed the fact that the statutory definitions are broad heightens the need for the determination to actually describe with at least some definition, limitation or identifying characteristic the matter that is considered appropriate for investigation using the special powers. The mere recitation of terms broadly defined in the statute along with the drafters attempt to list every federal crime known to the law does not satisfy the requirements of s.7C of the Act and plainly does not give effect to the intent of the statutory scheme to regulate the use of the special powers by requiring Board control by approval and IGC control by oversight.

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[46] The determination under consideration in that case contained the description and limiting circumstance that the "targets" of the investigation were a group of people who had a set of specified characteristics so as to satisfy the definition of an "HRCT" (High Risk Criminal Target) to whom the investigation the subject of the determination was limited. It was further held that the fact that the judgment as to whether a person possessed those characteristics was to be made by certain defined ACC officers did not involve an invalid delegation of the determination power.

[47] The decision in *XCIV* was considered by Perry J in *XX v Australian Crime Commission (no 3)* [2016] FCA 437. At [64] Perry J also upheld the validity of the "HRCT Determination" for the same reasons as Wigney J, emphasising the meaning and limitation imposed by the definition of HRCT.(the HRCT characteristics are set at out at [28].

58 The appellant's submission regarding the invalidity of the determinations is encompassed by the special leave question because it is one of the circumstances relevant to the exercise of the power to stay.

Part VII: Legislation

59 Relevant legislation was provided with the Appellant's Submissions dated 22 December 2017.

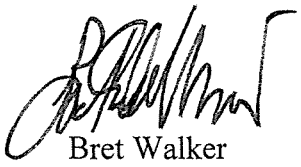
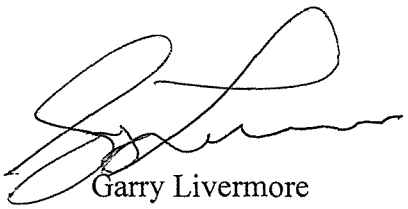
Part VIII: Orders sought

60 See the Appellant's Submissions dated 22 December 2017.

Part IX: Time estimate

114 The Appellant would seek no more than 2 hours for the presentation of the Appellant's oral argument in relation to the ACIC Notice of Contention.

9 February 2018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