

IN THE HIGH COURT OF AUSTRALIA  
SYDNEY REGISTRY

No. S217 of 2019

BETWEEN:



**COMMONWEALTH OF AUSTRALIA**

Appellant

and

**HELICOPTER RESOURCES PTY LTD**

**(ACN 006 485 105)**

First Respondent

**MARY MACDONALD**

Second Respondent

**CORONERS COURT OF THE AUSTRALIAN CAPITAL TERRITORY**

Third Respondent

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**OUTLINE OF ORAL SUBMISSIONS OF FIRST RESPONDENT**

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1. **Preliminary issues:** The affidavits of Mackrell (4 Sept 2019 and 27 Sept 2019) and Cooper (5 Sept 2019) are read adjectivally to the appeal. Special leave should be revoked on ground of lack of utility/hypotheticality: **RS [1]-[3]**. Alternatively, the Court should reject the Appellant's attempt to limit the legal arguments put by HeliRes. For precaution, the Notice of Contention should be permitted: cf **AR [3], [7], [8], [12]-[14]**.
2. **Core facts:** (a) Each of the Appellant and HeliRes were under overlapping charges in a joint Criminal Trial; (b) HeliRes exercised its right to silence; (c) Captain Lomas, the Chief Pilot/guiding mind of HeliRes, was central to HeliRes' defence of the charges and under lawful directions by HeliRes in respect to that defence; (d) the prosecution's brief of evidence asserted that it could prove the guilt of HeliRes without calling Lomas; (e) the Coroner issued a subpoena to Lomas, at the insistence of the Appellant, so that the Appellant could cross-examine him on matters centrally relevant to the charges, thereby giving the Appellant direct access to the compelled testimony of Lomas; (f) the Appellant put no procedures in place to quarantine the answers of Lomas from Comcare/CDPP: **RS [12]-[13]**.
3. **Legal framework:** (a) It is common ground that the *Coroners Act* did not authorise the compelled examination of Lomas if it would work a contempt of the Criminal Trial; (b) the test for contempt is whether the compelled examination created a real risk, as opposed to a remote possibility, of interference with the due administration of justice in the Criminal Trial; (c) compulsion over A may, depending on the circumstances, interfere with the fair accusatory trial of B; (d) forms of interference may include the prosecution (or co-accused) obtaining advantages not available within the Criminal Trial or the accused being prejudiced in its defence: **RS [17]-[22], [56]-[57]**.
4. **Primary Judge:** Bromwich J correctly accepted that the compulsory examination was likely to provide the Appellant and the CDPP with advantages not available within the criminal process and cause corresponding prejudice to HeliRes. He erred by: (a) failing to evaluate those advantages and prejudices against the fundamental elements of the accusatorial system; (b) finding that compulsion over A could never interfere with the fair accusatory trial of B; and (c) by giving no weight to s 87(1)(b) *Evidence Act*.
5. **FFC:** The FFC noted the core question (**FFC [90]**); the various species of detriment and sequential ways in which HeliRes asserted interference (**[92]-[97], [101]-[119]**); and the Appellant's responses (**[120]-[136]**). It observed the limits of *Caltex* (**[143]**); accepted *Nutricia* (**[150]**); and held that HeliRes' status as a corporation did not deny it the

protections within the Criminal Trial of *X7* ([157]) or *Strickland* ([170]). It then provided a set of four interlocking reasons for why the compulsory examination would, as a matter of practical reality, work a likely interference with the Criminal Trial [171]-[189]: (a) Lomas, and therefore HeliRes, would lock themselves into a version from which they could not credibly depart at trial; (b) under s 87(1)(b), Lomas' statements (if adverse to HeliRes' interests) could be tendered against HeliRes as informal admissions by it; (c) the examination would reveal information to the CDPP and the Appellant which they did not currently have and could not otherwise lawfully compel HeliRes to reveal about how it would defend the charges; (d) the examination would assist the Appellant in its defence.

- 10 6. The FFC reasons rely on the accusatory system as whole, as explained in *X7*, *Lee No 2* and *Strickland*. They are not limited to the fundamental principle or companion rule. They include, but extend beyond, s 87(1)(b). They are summarised in FFC [189] without limiting what went before.
7. **Ground Two of the Appeal**: The Appellant's arguments (AS [53], [55]) rest on the false premise that *Caltex* and *Nutricia* stand for the proposition that a corporation under charge can be compelled to incriminate itself by *making answers*: RS [29]-[32], [45]-[55].
8. The correct starting point is that, by reason of the general system of law governing criminal trials in Australia, as expressly recognised in the *Magistrates Court Act 1930* (ACT), *Evidence Act 2011* (ACT) and *Court Procedure Rules*, each of the Appellant and  
20 HeliRes were entitled to a fair accusatory trial, key features of which included: (a) the fundamental principle; (b) the companion rule, meaning HeliRes could not be compelled to testify for the CDPP (to the extent such was otherwise possible) or assist it in the discharge of its onus of proof; (c) no power to administer interrogatories (*Nutricia*); (d) the general protections identified in *X7*, *Lee No 2* and *Strickland*; (e) the orderly progression of evidence at the trial as regulated by the *Evidence Act*; and (f) the absence of pre-trial depositions of its likely witnesses: RS [17]-[45].
9. Within the Criminal Trial, before the subpoena: (a) the CDPP asserted that it could prove the guilt of HeliRes without calling Lomas; (b) the CDPP had no means to compel HeliRes or Lomas to reveal the substance of Lomas' evidence or create a record of it for  
30 tender in the trial (whether by interrogatories, pre-trial depositions or otherwise); (c) the CDPP could choose to call Lomas as a witness in its case, but it would have to do so without his prior compelled testimony, limit itself to non-leading questions, and expose itself to cross-examination of Lomas by each accused; (d) the Appellant, as co-accused,

had no means of compulsion over HeliRes or Lomas to assist in its defence; and (e) HeliRes was entitled to conduct its defence on the basis that it knew the substance of Lomas' evidence; had a wide range of options whether, how or when to deploy it; and could not be called upon to show its hand prematurely: **RS [59]-[61]**.

10. After the subpoena, the compulsory examination threatened to confer advantages on the CDPP and the Appellant which were unavailable under the procedures of the Criminal Trial as well as radically restricting the options of HeliRes legitimately available within the Criminal Trial. It thereby created a real risk of interference with the administration of justice in the Criminal Trial, and a contempt of court, **RS [62]-[67]**.
- 10 11. **Ground One of the Appeal:** The compelled examination would lead to the production of a transcript containing the statements of Lomas which would be available for tender in the Criminal Trial, subject to admissibility rules. Section 87(1)(b) renders the out of court statements made by an employee of a party (whether natural person or corporate) on matters concerning the employment, if adverse to the interests of the party, admissions *by* the party so as to be admissible *against* the party under s 81 as proof of the truth of the matters asserted, by way of exception to the rule against hearsay in s 59: **RS [80]**.
12. Section 87(1)(b) changes the common law in one way only, by broadening the category of cases in which such result may be achieved, thereby limiting the ability of an accused to ensure that out of court statements by an employee do not bind it: **RS [79]**.
- 20 13. Without s 87(1)(b), the CDPP (or the Commonwealth) could call Lomas as a witness. With s 87(1)(b), the CDPP could tender any part of the Inquest transcript containing answers adverse to HeliRes without needing to call Lomas as a witness. This would confer advantages not available within the general system of justice (specifically, such answers would via s 81 go in as admissions by HeliRes with the same status in the trial as interrogatories which are not permitted: *Nutricia*) and prejudice HeliRes in its defence (as it would now have to chart its defence by reference to such answers in addition to the prosecution brief and might be forced to call Lomas or another witness in its case to explain or qualify such answers): **RS [76]-[79]**. Section 87(1)(b) puts the case for the subpoena working an interference beyond doubt but it is not essential to it: **RS [69]-[75]**.
- 30 14. **Ground Three of the Appeal:** The Full Court made no error in rejecting the separate prematurity defence: **RS [82]**.

**10 October 2019**

Justin Gleeson SC

Tom Brennan

Kate Lindeman