

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

NO S217 OF 2019



COMMONWEALTH OF AUSTRALIA

Appellant

and

HELICOPTER RESOURCES PTY LTD ACN

006 485 105

First Respondent

CORONER'S COURT OF THE

AUSTRALIAN CAPITAL TERRITORY

Second Respondent

**OUTLINE OF ORAL SUBMISSIONS OF THE
COMMONWEALTH OF AUSTRALIA ADDRESSING NOTICE OF CONTENTION**

Filed on behalf of the Appellant

Date of this document: 5 February 2020

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PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

I. Notice of Contention

2. The NOC argument seeks to detach existing legal doctrines from their foundations and combine them in a way that produces a result at odds with settled principle and authority (PJ [115]; CAB 60-61).

3. In identifying what was actually decided in the relevant authorities, it is analytically helpful to distinguish between three possible applications of the principle of legality/clear statement rule.

3.1. *First*, there must be a clear statement before a statutory power that is conferred for the purpose of determining whether criminal proceedings should be instituted will be held to authorise a coercive examination after the laying of criminal charges.

3.2. *Second*, there must be a clear statement before a statutory power to conduct a coercive examination will be held to authorise an interference with the accusatorial system of justice. Such an interference will occur only if the examination concerns an accused (or, in some circumstances, a person who is about to be charged). The examination of persons other than the accused does not interfere with the accusatorial system of justice. To the contrary, the prosecution is ordinarily required to prove its case based on the evidence of such witnesses.

3.3. *Third*, even where a statutory power contains a sufficiently clear statement to authorise investigations after the laying of charges, that power nevertheless will not be held to authorise conduct that interferes with the administration of justice in the absence of a clear statement to that effect. There is no such clear statement in the *Coroner's Act 1997* (ACT) (FFC [71] (CAB 106); [90] (CAB 115)).

4. It is not an interference with the administration of justice to use statutory powers to obtain information from a person other than the accused.

4.1. *Lee (No 1)* (2013) 251 CLR 196 at [304], [307]-[318], [320], [322], [324] (Vol 2, Tab 17); *Hak Song Ra v ACC* (2004) 138 FCR 51 at [22], [24], [26]; *ASIC v Elm Financial* (2004) 186 FLR 295 at [34], [40]-[43], [79], [81], [83].

5. To accept HeliRes' argument would mean that committals are inconsistent with the accusatorial system, because during a committal the prosecution is entitled to compel an uncooperative witness to reveal their evidence prior to trial (cf **RS [25]-[26]; T 90, ln 4001-4003**).

5.1. *Magistrates Court Act 1930* (ACT), ss 64, 90, 90AA-90B, 318; *Court Procedures Rules 2006* (ACT), r 6601(1); *Criminal Procedure Act 2009* (Vic) Pt 4.3.

6. HeliRes' submission at the first hearing was that it was a contempt of court, not only to compel evidence from the accused post-charge, but also to compel evidence from witnesses "central to the defence" of the accused (**T 88, ln 3894**). The argument was very fluid and embraced broad categories of persons with vague boundaries (**T69, ln 3040-3044; T 65, ln 2867; T67, ln 2942; T86, ln 3824; T 64, ln 2822-2844**). None of these categories are supportable as a matter of either principle or authority (**CNOC [29]**). In particular, the "guiding mind" fiction that allows corporations to be held liable for criminal acts should not be extended. The settled rule that a corporation cannot give oral evidence entails that, even when evidence is given by a person who is the guiding mind of a corporation, that evidence is not attributed to the corporation.

6.1. *Smorgon v ANZ Banking Group Ltd* (1976) 134 CLR 475 at 482-484 (**Vol 3, Tab 24**).

Date: 5 February 2020

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Tim Begbie

Julia Watson