IN THE HIGH COURT OF AUSTRALIA No. S217 of 2019

SYDNEY REGISTRY

BETWEEN: **COMMONWEALTH OF AUSTRALIA**

Appellant

and

HELICOPTER RESOURCES PTY LTD ACN 006 485 105

First Respondent

MARY MACDONALD

Second Respondent

10 **CORONER'S COURT OF THE AUSTRALIAN CAPITAL TERRITORY**

Third Respondent

APPELLANT'S REPLY

Filed on behalf of the Appellant by:

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PART I: CERTIFICATION

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

PART II: REPLY

2. ***Utility of proceedings***: Contrary to Helicopter's Submissions (**HS**) [1], the Commonwealth does not seek an advisory opinion. Helicopter correctly conceded this point at the special leave hearing, accepting that an appeal to this Court under s 73 of the Constitution is an appeal in a strict sense.[1] An appeal of that kind, which concerns the correctness of the Full Court's decision at the time it was made, cannot become hypothetical by reason of events that occur after the decision under appeal. Nor is there any basis for Helicopter's submission that special leave should be revoked (cf HS [3]). The Court was persuaded to grant special leave despite Helicopter's reliance on uncontested evidence that the criminal proceeding would be complete before any appeal could be heard.[2] As such, the evidence now filed by Helicopter does not in any way undermine the grant of special leave.[3]

3. ***Helicopter's approach***: Strangely for a party that asserts it has no "continuing legal interest" in the matter, and is simply "a contradictor to the Appellant's arguments" (HS [3]), Helicopter's submissions barely engage with the grounds of appeal, and make no real attempt to defend the Full Court's reasoning. Instead, its focus is on arguments that, if they arise at all, could do so only as a result of its proposed Notice of Contention (**NOC**). That is not the proper role of a "contradictor". As developed in Part III, leave to file the NOC should be refused, and this appeal should be confined to determining the correctness of the Full Court's judgment. The appeal should not be permitted to be transformed, late in the day and by a party that asserts no continuing interest, into a case about different issues. This Reply therefore focuses on Helicopter's submissions to the limited extent that they address the grounds of appeal.

4. ***Section 87(1)(b)***: None of Helicopter's three "answers" to ground 1 are made good. *As to the first*, contrary to HS [69]-[71], the fundamental alteration of Helicopter's position identified by the Full Court was *not* held to arise apart from s 87(1)(b). To the contrary, the Full Court made clear that its decision turned on that provision: CAB 133 [143], 142 [183]-[184], 144 [189]. Helicopter does not explain these passages, beyond

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1 *Commonwealth v Helicopter Resources Pty Ltd & Ors* [2019] HCATrans 131 at ll 404-406; *Eastman v The Queen* (2000) 203 CLR 1 at 13 [17]-[18] (Gleeson CJ), 26 [78] (Gaudron J), 33-34 [104]-[105] (McHugh J), 63 [190] (Gummow J), 97-98 [290]; *Mickelberg v The Queen* (1989) 167 CLR 259 at 269 (Mason CJ), 274 (Brennan J), 297-299 (Toohey and Gaudron JJ).

2 Ibid at ll 5-25, 375-492. See also Helicopter's Response in S71/2019 dated 5 April 2019 at [1], [14].

3 Ibid at ll 217-281. See also the Commonwealth's Special Leave Application in S71/2019 dated 15 March 2019 at [35]-[39] and its Reply dated 12 April 2019 at [8]-[10].

the implausible assertion in HS [71], fn 67 that the words "*That is because s 87(b) ...*" in CAB 144 [189], should be read as identifying a consideration that was not actually necessary to the Full Court's ultimate conclusion, which immediately precedes those words.

5. *As to the second*, at HS [72]-[74] Helicopter says that the Commonwealth mischaracterizes the Full Court's reasoning as to the second effect of s 87(1)(b) (ie that Captain Lomas' statements would be admissible as statements *of* Helicopter). Helicopter offers no explanation of the Full Court's explicit finding that s 87(1)(b) changed the common law in precisely that respect: CAB 142-3 [184]-[185].

6. *As to the third*, at HS [76]-[80] Helicopter's assertion that the Commonwealth has misunderstood the common law is itself erroneous. HS [77c.] and [80] wrongly assert that the common law made an employee's statement an admission *by* the employer. The sole authority cited to support that claim, *Fraser Henleins Pty Ltd v Cody*, in fact contradicts it. As Latham CJ put it: "statements made by the managing director of the appellant company ... were admissible in evidence *against* the company" (emphasis added).[4] While the Full Court did not take the mistaken view of the common law advanced by Helicopter, it did err in finding that s 87(1)(b) had changed the common law in this respect.

7. Helicopter having failed to answer ground 1, the appeal should be allowed. Even if Captain Lomas' evidence at the inquest was admissible *against* Helicopter by reason of s 87(1)(b), Helicopter would not *itself* have be compelled to give evidence contrary to the accusatorial principle: CAB 142 [183]-[184], 144 [189].

8. ***The accusatorial principle***: Despite Helicopter's claim that the "large issue" it identifies at HS [25] is responsive to ground 2, it is not. That is apparent from HS [24] and [42]-[44], which reveal that Helicopter's argument turns not upon the fundamental principle or the companion rule, but upon a broader conception of "a fair trial according to law under the accusatory method". That broader conception finds no reflection in the Full Court's reasoning, which focused solely on whether the examination of Captain Lomas would be contrary to the fundamental principle or the companion rule: CAB 133 [143], 136 [157], 142-144 [183]-[189]. Accordingly, if ground 2 is reached, it raises *only* the question whether the Full Court erred in its understanding of the companion rule and the fundamental principle as they apply to a corporate accused. It does not bring in the "broader conception" that permeates Helicopter's submissions. Helicopter should be permitted to advance submissions in

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4 (1945) 70 CLR 100 at 123 (Latham CJ). See also at 129 (Dixon J), 132 (McTiernan J).

support of that broader conception *only* if it is given leave to file the NOC. Otherwise, the Commonwealth responds as follow.

9. *First*, Helicopter asserts that the Commonwealth has misunderstood the majority reasoning in *Caltex*:[5] HS [29]-[30]. *Caltex* concerned both a notice to produce under court rules, and a statutory power to compel production of documents under the *Clean Waters Act 1970*. Both powers were exercised for the purpose of obtaining evidence relevant to the pending trial. Mason CJ and Toohey J, after concluding that a corporation could not claim the privilege against self-incrimination in answering the notice to produce, held that there was no reason to construe the statutory notice as an abuse of process, or as subject to a limitation that was not applicable to the notice to produce (at 507). As such, it was permissible to use the statutory power to obtain evidence. McHugh J reasoned similarly (at 557-559), holding that "the evidence gathering procedures of a party are not limited to the use of court procedures" (at 558). On this point, Brennan J's reasoning was to like effect (at 517-518). That is the majority. The dissenting reasons of Deane, Dawson and Gaudron JJ cannot assist Helicopter.[6] Given the above, it is wrong to assert that the Court upheld the statutory notice "on the basis that production was required in any event by the Notice to Produce": cf HS [29]. So much is confirmed when the answer to Question 7 (concerning the notice to produce) is contrasted with the answers to Questions 2, 3 and 6 (concerning the statutory power): see *Caltex* at 559-560.

10. *Second*, Helicopter asserts that corporations should not attract different protections from natural persons because they are "associations of persons": HS [41], [47]. That proposition is contrary to *Caltex*, which recognised that differences between natural persons and corporations *did* warrant different protections.[7]

11. *Third*, Helicopter asserts that there is a significant distinction between compelling the production of documents and compelling answers to questions: HS [31], [45]. That is no doubt true for natural persons (because answering a question produces new evidence). However, the distinction does not assist Helicopter, because unlike natural persons corporations cannot generally answer questions (CS [29]-[34]). Where an employee gives oral evidence, any new evidence is created by the employee, not by the corporation.[8]

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5 *Environment Protection Authority v Caltex* (1993) 178 CLR 477 (***Caltex***).
6 See, eg, *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96 at 111-114.
7 *Caltex* (1993) 178 CLR 477 at 500-501 (Mason CJ and Toohey J), 514-516 (Brennan J), 535 (Deane, Dawson and Gaudron JJ), 552 (McHugh J); see also *NSW v Commonwealth (Workchoices)* (2006) 229 CLR 1 at [113] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).
8 *Caltex* (1993) 178 CLR 477 at 504 (Mason CJ and Toohey J).

PART III: APPLICATION FOR LEAVE TO FILE NOTICE OF CONTENTION

12. The Court should not grant leave to file the NOC for the following reasons. *First*, the only explanation that has been offered for the failure to file the NOC within time is that, in preparing written submissions, Helicopter's counsel "came to the view that the Notice of Contention would be necessary".[9] However, the NOC repeats arguments advanced by the same counsel below. If Helicopter intended to re-run arguments not accepted by the Full Court, that should have been apparent at the special leave stage. After a Notice of Appeal is filed, r 42.08.5 of the *High Court Rules 2004* (Cth) permits just 7 days to file a NOC, presumably so that the parameters of an appeal are clear before submissions are prepared. Yet here, the possible NOC was first raised some six weeks after the Notice of Appeal was filed, and two weeks after the Commonwealth had filed its written submissions. The Commonwealth is thereby prejudiced, having lost the opportunity to address proper written submissions in advance of the hearing to what Helicopter itself describes as a "large issue". Well-represented and well-resourced parties should not be permitted to disrupt the orderly preparation for a hearing, absent good explanation for non-compliance with the Rules. No such explanation exists here.

13. *Secondly*, during the special leave hearing, Helicopter submitted that it had no interest in the outcome of any appeal and would participate solely as a contradictor.[10] Orders entitling Helicopter to solicitor-client costs irrespective of the outcome of the appeal were made on this basis. Yet now, rather than defend the Full Court's reasons, it seeks to preserve a result in which it asserts that it has no continuing interest, on the basis of arguments not determined by the Full Court. Unlike the position on the appeal (where the Full Court's reasons will remain a binding precedent unless set aside), there is no reason for this Court to decide the issues sought to be raised in the NOC absent a dispute between parties with a real interest in the outcome.

14. *Thirdly*, the NOC would greatly expand the matters in dispute.

    a. Helicopter asserts that any process outside the ordinary rules of criminal procedure cannot be used to gather evidence against an accused: see HS [38], [44], [57]-[67]. However, both the parameters of, and the legal foundation for, the principle for which it contends are not clearly defined. Sometimes the argument appears limited to preventing the pre-trial compulsion of employees (eg HS [25]), but no principled basis for that limit is apparent. Helicopter for the most part appears to recognise this, reverting to the larger claim that no process outside the ordinary rules of

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9 Affidavit of Henry Charles Cooper sworn 5 September 2019 at [4].

10 *Commonwealth v Helicopter Resources Pty Ltd & Ors* [2019] HCATrans 131 at ll 360-434.

criminal procedure can be used to gather evidence against an accused. Yet Helicopter points to no authority limiting the use of investigative powers to gather evidence from a *witness*, as opposed to from an *accused*. In those circumstances, the Court should be very cautious in deciding the point, particularly on the basis of abbreviated argument.

b. Helicopter's submissions refer repeatedly to "compulsory pre-trial depositions", being an expression that conveys a deposition taken in, and for the purposes of, a criminal trial: HS [4], [5], [22], [25], [38], [45], [79]. They also refer repeatedly to compulsion by "the Court" (eg HS [34], but also [25]-[26], [37]), apparently meaning the trial court. These submissions raise a false issue. Captain Lomas was to be compelled to give evidence in an executive inquiry (an inquest), for the purposes of that inquiry (CAB 4-7). Australian legislation has long provided for compulsory examinations in the public interest, including by corporate regulators, Royal Commissions or crime commissions, that may cause witnesses to reveal matters that overlap with criminal proceedings.[11] Similar inquiries have long been conducted before courts, including in connection with bankruptcy and liquidations. Evidence given during investigative processes of these kinds is not accurately characterized as a "pre-trial deposition". Further, that characterization of the subpoena to Captain Lomas was contested below (CAB 128 [125]-[126]), and was not the subject of a ruling. There is therefore no factual foundation for the claim that the subpoena was an attempt to obtain a pre-trial deposition.

c. The possible effects on the trial about which Helicopter complains (HS [56]-[66], [70]) would equally occur if an employee spoke to the prosecution *voluntarily*. That highlights the distinction between obtaining information from the accused (the focus of the fundamental principle and the companion rule) and from any other person. There is no principle that the prosecution cannot obtain information by compulsion from a person who could give that same information voluntarily without that causing unfairness.

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11 *R v OC* (2015) 90 NSWLR 134 at [119], [123] (Bathurst CJ), [126] (RA Hulme J), [127] (Bellew J).