IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

No. B71 of 2010

BETWEEN:

AUSTRALIAN CRIME COMMISSION

Appellant

AND

LOUISE STODDART

First Respondent

10

WILLIAM MCLEAN BOULTON

(EXAMINER, AUSTRALIAN CRIME COMMISSION)

Second Respondent

APPELLANT'S SUBMISSIONS

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PART I: SUITABILITY FOR PUBLICATION

1. The appellant certifies that these submissions are in a form suitable for publication on the Internet.

PART II: ISSUES

2. The appeal presents two issues:

   2.1 whether the common law of Australia recognises a privilege against incriminating one's spouse (**spousal privilege**); and

   2.2 whether, if spousal privilege exists, the *Australian Crime Commission Act 2002* (Cth) (**Act**) abrogates the privilege.

PART III: SECTION 78B JUDICIARY ACT

3. The appellant certifies that it has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth). No notice should be given.

PART IV: CITATIONS

4. The reasons for judgment of the Full Court of the Federal Court of Australia are reported in *Stoddart v Boulton* (2010) 185 FCR 409. The reasons for judgment of the primary judge are reported in *Stoddart v Boulton* (2009) 260 ALR 268; (2009) 197 A Crim R 467; (2009) 111 ALD 294.

PART V: FACTS

5. The facts appear sufficiently in the reasons for judgment of Greenwood J at [31]-[39] (AB 74-77). In answer to a summons issued under s 28 of the Act, the first respondent appeared before the second respondent (**examiner**), who is an examiner of the Australian Crime Commission (**ACC**), in connection with a "special ACC investigation" as defined in s 4 of the Act (AB 6-7). Counsel assisting the examiner asked the first respondent questions about alleged activities of the first respondent's husband, entities related to him and other persons (AB 32-42). When asked if she was aware whether certain activities had taken place at her husband's business premises, the first respondent

by her counsel objected to the question, purported to claim "the privilege of spousal incrimination" and chose not to answer the question (AB 42). The examiner rejected the claim to spousal privilege and required the first respondent to answer the question, ruling that "if spousal privilege exists, ... the [Act] abrogates it" (AB 42, 46). The examiner then adjourned the examination (AB 48).

6. The first respondent commenced a proceeding in the Federal Court of Australia seeking a declaration that common law spousal privilege has not been abrogated by the Act and an injunction restraining the examiner from questioning her in relation to "matters concerning her husband" (AB 1-3). A judge of the Federal Court dismissed the application (AB 60). A Full Court of the Federal Court, by majority, allowed an appeal and declared that "the common law privilege against spousal incrimination has not been abrogated by the [Act]" (AB 124).

PART VI: ARGUMENT

7. The Full Court erred in recognising spousal privilege because spousal privilege is not a part of the common law of Australia. Alternatively, the Full Court erred in holding that the Act does not abrogate spousal privilege.

A. Spousal privilege not a part of the common law of Australia

Introduction

8. The spousal privilege asserted by the first respondent is to be distinguished from the rules of evidence governing the competence and compellability of a witness spouse, between which there is a fundamental difference: *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552-553 [10] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, at 563 [44] per McHugh J, at 575 [85] per Kirby J. A rule of evidence would not apply in a hearing before an examiner of the ACC, whereas a substantive privilege would apply if not abrogated by the Act. The asserted spousal privilege is also to be distinguished from the old privilege, founded only in statute, protecting confidential marital communications: see, e.g., s 11 *Evidence Act 1898* (NSW); as to the non-existence of this privilege at common law see *Rumping v DPP* [1964] AC 814 at 833-834. The first respondent was not sought to be examined in relation to

the contents of a communication. The asserted privilege against incriminating one's spouse is much wider.

9. The first Australian case to recognise the asserted spousal privilege was *Callanan v B* [2005] 1 Qd R 348 ('*Callanan*'). In that case, McPherson JA, with whom McMurdo P agreed, said at [6] that he "would have been disposed to agree with [the conclusion that there is no common law privilege against spouse incrimination] were it not for having seen" a journal article by Mr David Lusty entitled "Is there a Common Law Privilege against Spouse Incrimination?" (2004) 27 *University of New South Wales Law Journal* 1. Subsequently, a Full Court of the Federal Court recognised the privilege in *S v Boulton* (2006) 151 FCR 364. Black CJ expressly followed *Callanan* (at 370 [28]) while Jacobson J (with whom Greenwood J agreed at 389 [170]) gave independent reasons on the question (at 378-381 [75]-[99]). At first instance in *S v Boulton* (reported at (2005) 155 A Crim R 152), Kiefel J followed *Callanan* but doubted its correctness (at 158-159 [25]-[29]).

10. The appellant's basic contention is that the Full Court (and the other courts to recognise spousal privilege, in at least partial reliance upon Mr Lusty's article) erroneously conflated the rules of evidence governing the competence and compellability of witness spouses with a substantive privilege. Three propositions support this contention. First, the historical record has been misread by the intermediate courts and, in truth, strongly suggests that the common law rule is one only of competence and compellability. Second, courts should not create new categories of privilege and so a doubtful historical record should be resolved against the existence of spousal privilege. Third, legal developments in foreign jurisdictions support the appellant's submission.

Historical record

11. At common law, before nineteenth century statutory modifications, there was a rule of evidence that a party's spouse was incompetent as a witness either for or against the party: *Riddle v The King* (1911) 12 CLR 611 ('*Riddle*'); J D Heydon, *Cross on Evidence* (8th ed, 2010) at [13030] citing *Bentley v Cooke* (1784) 3 Doug KB 422; 99 ER 729 (KB). The rationale for the rule included the doctrine of the unity of husband and wife, later the unity of their interest, coupled with the privilege against self-incrimination and also involved the danger of perjury and the repugnance likely to be felt by the public seeing

one spouse testify against the other: *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 (*'Hoskyn'*) at 484-5 per Lord Wilberforce. The common law recognised limited exceptions to the incompetency, such as in the trial of a criminal charge involving personal violence by the accused against the spouse, but within those exceptions a spouse, though competent, was not compellable: *Riddle* at 629 per Griffith CJ, 633 per Barton J, 639 per O'Connor J. The common law position was altered by the *Evidence Amendment Act 1853* (UK), which made spouses competent and compellable in civil proceedings and the *Criminal Evidence Act 1898* (UK), which made spouses competent, though not compellable witnesses, in certain criminal proceedings.

12. The historical position demonstrates that the common law never had occasion to develop spousal privilege. As Kiefel J observed in *S v Boulton* (2005) 155 A Crim R 152 at 158 [26]:

> There is an immediate difficulty ... in accepting that the law developed by reference to competence and compellability and also recognised a privilege. An application of the former two rules would mean that the question of privilege would almost never arise for discussion given at the least that a spouse could not be compelled to be a witness.

13. The thesis that the common law also recognised a privilege is advanced in Mr Lusty's journal article on the basis that the rule of incompetence is attributable to "a major augmentation" of the law in 1628 by what Mr Lusty says is an erroneous assertion of Lord Coke that distorted the actual position, as explained a decade earlier by Michael Dalton in *The Countrey Justice*, that a wife was in fact competent but not compellable by virtue of her privilege: Lusty at 10.

14. That thesis rests on a misreading of Dalton and the *Act to take the examination of Prisoners suspected of Manslaughter or Felony 1555*, 2 & 3 Ph & M, c. 10 (Marian Committal Statute), which has affected the Australian authorities on the point. The error is revealed in a telling misquotation by McPherson JA in *Callanan*. His Honour said at [6]:

> It would be an act of temerity on my part to attempt to summarise what [Mr Lusty] has written ... but its substantial starting point is the statement by Michael Dalton in *The Countrey Justice* (1618), at 261, that a wife "is not bound to give evidence, nor be examined against her husband"
>
> (emphasis added)

In fact, Dalton wrote this (Michael Dalton, *Countrey Justice 1619*, London Professional Books Ltd: 1973 ed, at 270):

> The Justices of Peace have authority (by the words of the [Marian Committal] Statute) to bind by Recognizance all such as do declare any thing material to prove the felony, to give evidence against the offender; And yet the wife is not to be bound to give evidence, nor to be examined against her husband.
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> (emphasis added and English spelling modernised)

15. The difference is significant because the word "bound" was used by Dalton in the special sense of binding over by recognizance to attend trial and give evidence in accordance with the procedures prescribed by the Marian Committal Statute and not with the broader, contemporary meaning of "obliged" or "compelled". Remembering that "binding over" was, under the Marian Committal Statute, the very way in which witnesses for the Crown were brought before the Justices of Assize to testify at trial, the rule that a wife is "not to be bound" was a rule that a wife is not to testify, at least for the Crown (whether she could volunteer an unsworn statement for her husband is less clear, but also not presently material). It was a rule of incompetence or disqualification: see John H. Langbein, *Prosecuting Crime in the Renaissance* (1974) at 123; see also the reported argument of Mr Du Cann QC for the respondent in *Hoskyn* at 481. What McPherson JA identified as the "substantial starting point" of Mr Lusty's article is, therefore, squarely concerned with the incompetence of a spouse, not her compellability and much less any supposed privilege.

16. McPherson JA's misquotation in *Callanan* betrays his Honour's misunderstanding of the word "bound" to mean "obliged" or "compelled", which meaning is unduly wide. Similarly, Mr Lusty's assertion (at 9) that "it is clear that the rule stated by Dalton was based on the centuries-old principle that a wife is not bound to discover the crime of her husband" manifests the same error of attributing to that word a wider meaning than is warranted. The same error equally affects the Full Court's decision in *S v Boulton*, for Black CJ followed *Callanan* while Jacobson J (with whose reasons Greenwood J agreed) commenced his analysis upon the false premise that "Dalton stated the rule in the language of compellability, namely that a wife was 'not to be bound to give evidence, nor be examined against her husband'" (at 378-379 [79]).

17. Properly read, Dalton is entirely consistent with the later statement of Lord Coke that "a wife cannot be produced either against or for her husband". The contention that Lord Coke's statement of spousal incompetency was a material "distortion" of Dalton cannot be sustained.

18. Mr Lusty separately identifies certain English authorities in which, it is said, the evidentiary rule of incompetence did not apply and yet spousal privilege was recognised. The main of those authorities were also referred to in *Callanan*: at [20]-[21] per Jerrard JA. Chief among them is *R v Inhabitants of All Saints, Worcester* (1817) 6 M & S 194; 105 ER 1215 ('*All Saints*'), a case in which the witness spouse was not incompetent, her husband not being a party. The obiter dictum of Bayley J relied upon is to the effect that the wife, although competent in a collateral case would be "entitled to the protection of the court" and not "compelled to answer". It is, however, properly to be understood as a statement of the wife's non-compellability, not of her privilege and Jerrard JA and Mr Lusty each conflate the two. While Mr Lusty correctly observes that the dictum was cited approvingly in subsequent cases, notably *Riddle* and *Hoskyn*, his conclusion that this amounts to "implicitly endorsing" or "the next best thing to an express ruling that there is" spousal privilege is wrong (Lusty at 15, 24). The subsequent authorities were undeniably cases about non-compellability and not privilege. Their citation of *All Saints* suggests that case was also about non-compellability and not privilege. As Kiefel J explained in *S v Boulton* at [27]-[28], the subsequent reception of Bayley J's dictum "reinforces the view that what was being determined was compellability of a witness in its broad sense and not a narrower privilege with respect to aspects of the evidence ... all that can be said about the *All Saints* case is that it did not suggest competence meant compellability."

19. Next, *Cartwright v Green* (1803) 8 Ves Jun 405; 32 ER 412 is said to have recognised spousal privilege in the context of pre-trial discovery. Since, in that case, both husband and wife were parties to the bill of discovery, the upholding of their demurrer stands for the uncontroversial proposition that discovery should not be given in aid of an action founded in felony (see *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 520 per Brennan J). It does not stand for the proposition embraced by Jerrard JA in *Callanan* at [20] that a wife is "not compellable to make discovery as to acts constituting larceny on the part of her husband". Lord Eldon LC did state, strictly obiter

dicta, that "the wife, if the act was a felony in the husband, would be protected: at all events she could not be called upon to make a discovery against her husband." Mr Lusty, seizing on the absence of cited authority for this proposition, is quick to assimilate the dictum to his supposed "general principle that a wife is not bound to discover the crime of her husband" (Lusty at 13). However, although the Lord Chancellor did not cite the authority, it is patent from the reported decision that counsel referred on that very point to *Le Texier v The Margrave of Anspach* (1800) 5 Ves Jun 322; 31 ER 610 (a case which the Lord Chancellor had argued as Attorney-General). *Le Texier*, being a proceeding against the Margrave whose wife managed his domestic concerns as agent, held only that the case of a wife is no exception to the general rule that an agent with no interest cannot be made a party to a bill of discovery: see also Edward Bray, *The Principles and Practice of Discovery* (1885) at 40-51. The dictum of the Lord Chancellor should be read accordingly – as a statement of the proper parties to a bill of discovery – and not, as Jerrard JA and Mr Lusty contend, as a statement of spousal privilege.

20. Early modern bankruptcy practice is also cited in support of spousal privilege. The *Act for the further description of a bankrupt, and relief of creditors against such as shall become bankrupts, and for inflicting corporal punishment upon the bankrupts in some special cases 1623*, 21 Jac 1, c. 19 authorised the bankruptcy commissioners to examine the wife "for the finding out and discovery of the estate" but, crucially, only "after such time as any person shall ... be lawfully adjudged or declared to be a bankrupt": s 6. Mr Lusty identifies spousal privilege in the subsequent decision of *Ex parte James* (1719) 1 P Wms 610; 24 ER 538 to the effect that the wife could not be examined as to the husband's acts of bankruptcy. However, the decision clearly turned on the construction of the statutory power of the bankruptcy commissioners. The case cannot be understood as evidencing a privilege that "withstood a wide statutory power" (Lusty at 8); on the contrary, the case is one of a narrow statutory power that did not authorise the examination that occurred. Further indicating the error in seeing spousal privilege in the case, the Lord Chancellor expressly referred to the common law rule of incompetence: "She by the common law cannot be a witness for or against her husband" (at 611; 539). The earlier and very briefly reported case of *Anonymous* (1613) 123 ER 656 preceded the express grant in 1623 of statutory power to examine the wife. The nascent bankruptcy laws at the time of that case were spare in their provisions. In particular, the provisions for examination focussed on examination of the bankrupt himself and only those others "known, supposed or

suspected, to have any such goods, chattels, wares, merchandises, or debts, in his or their custody, use, occupation, keeping or possession, or supposed or suspected, to be indebted to" the bankrupt: see 34 & 35 Hen 8, c. 4, s 2; 13 Eliz, c. 7, s 4; and, in different terms, 1 Jac 1, c. 15, s 10.

21. The foregoing analysis reveals the multiple errors in the reading of the historical record that have affected the decisions of the intermediate appellate courts. Properly understood, the historical sources are consistent with the well-recognised rule of evidence about the competence and compellability of a spouse, but not with the asserted spousal privilege.

10 22. That said, there are intermittent examples which might be seen to be suggestive of a privilege. For example, in the *Southampton Case* (1842) Barr & Aust 376, a parliamentary committee hearing an election petition exempted a wife from answering particular questions. But the reporter's notes show that the committee of seven members divided on the question whether to follow that course or, instead, to exclude the witness altogether (in the nature of a testimonial incompetency): at 399-400, Notes (M)-(N). Notably, this uncertainty prevailed in the committee in 1842, well after the decisions in *Anonymous, Ex parte James, All Saints* and *Cartwright v Green* and notwithstanding the benefit of counsel's submissions. There may be other isolated examples, but they should not be taken themselves to establish the existence of spousal privilege in the absence of a
20 more confident, or at least consistent, historical foundation.

Creation of new privileges

23. The position in the intermediate appellate courts is that spousal privilege has existed "for at least a thousand years": *Callanan* at [22] per Jerrard JA. The intermediate courts have not styled their decisions as the "creation" of a new privilege. Nevertheless, if it be accepted that the historical basis for the recognition of the privilege is at least highly doubtful, it is further submitted that in such circumstances, spousal privilege should not be judicially created. Any doubt in the historical record should be resolved against the existence of spousal privilege.

24. Dixon J observed that no duty of confidence would impede the "imperative necessity of
30 revealing the truth in the witness box" except "in a few relations where paramount

considerations of general policy appeared to require that there should be a special privilege": *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 102-103. Although Dixon J recorded "husband and wife" as one such relation, his Honour was most likely referring to the statutory privilege protecting confidential marital communications or, perhaps, the evidentiary rule of incompetence: see *R v Young* (1999) 46 NSWLR 681 at 699 [87] per Spigelman CJ.

25. To create a new head of privilege is to lend judicial authority to the particular form of public policy advanced by that privilege. Such an exercise is necessarily confined by the nature of the judicial function. As Brennan J explained in *Dietrich v The Queen* (1992) 177 CLR 292 at 319, "the contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community." In the absence of a clear historical record, there is no warrant for the courts to give precedence to a perceived public policy in marital harmony over that in ensuring the availability of all witnesses and their testimony.

26. Moreover, the asserted policy interest in marital relations is not of a kind peculiarly apt to be developed by the courts, as is, say, the public policy concerning the administration of justice: see, e.g., *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1. This is not a case like *Baker v Campbell* (1983) 153 CLR 1 – which concerned a privilege (legal professional privilege) based on the public interest in the administration of justice – in which the rule of evidence concerning competence and compellability should be adapted into a substantive privilege. The creation of a spousal privilege is a matter, if at all, for the legislatures.

27. Indeed, the common law rules governing the competence and compellability of spouses substantially gave way in the nineteenth century to carefully designed statutory reforms and modern legislation in Australia continues to govern the subject: ss 18-19 *Evidence Act 1995* (Cth); ss 18-19 *Evidence Act 1995* (NSW); ss 18-19 *Evidence Act 2008* (Vic); s 21 *Evidence Act 1929* (SA); s 18 *Evidence Act 2001* (Tas); ss 7-8 *Evidence Act 1977* (Qld); ss 7, 9 *Evidence Act 1906* (WA); ss 7, 9 *Evidence Act* (NT). Creation now of a spousal privilege would defeat the purpose of these legislative regimes and contradict the clear view of

every parliament in Australia as to where the public interest lies. It cannot be said, especially in light of this legislation, that a new spousal privilege would reflect any "relatively permanent values of the Australian community."

Foreign law

28. The development of relevant law in foreign jurisdictions is consistent with the appellant's submissions.

29. In the United Kingdom, s 14 of the *Civil Evidence Act 1968* provides that the right not to incriminate oneself "shall include a like right" not to incriminate one's spouse. That provision enacts a recommendation of the Law Reform Committee: *Privilege in Civil Proceedings*, 16th Report of the Law Reform Committee (1967) at [9]. But it is notable that a similar recommendation by the Criminal Law Revision Committee in respect of criminal proceedings has not been followed: *Evidence (General)*, 11th Report of the Criminal Law Revision Committee (1972). Thus, the law of the United Kingdom quite clearly illustrates that spousal privilege is based on statutory enactment and not in the common law. That view is confirmed by Colin Tapper, *Cross and Tapper on Evidence* (12th ed, 2010) at 425-426 and by *Halsbury's Laws of England*, Vol 27 (2010) Criminal Procedure at [503].

30. The Supreme Court of the United States has recognised (as a matter of federal common law) what it calls the "privilege against adverse spousal testimony": *Trammel v United States*, 445 US 40 (1980). Australian lawyers would, however, identify that so-called "privilege" as a rule of non-compellability. The principle developed from the abolition, in *Funk v United States*, 290 US 371 (1933), of the "rule of spousal disqualification" (incompetence) and, in *Trammel* itself, the holding that the capacity to withhold testimony vests in the witness spouse and not in the accused. The application of the rule of non-compellability in proceedings other than the criminal trial itself – notably, in Grand Jury proceedings – has occurred pursuant to express enactment: Federal Rules of Evidence 1101(c), 1101(d)(2); see also *Re Grand Jury (Malfitano)*, 633 F 2d 276 at 277 (3rd Cir. 1980). Indeed, in consciously moulding the "privilege" by reference to competing policy interests in marital harmony and legitimate law enforcement needs (see *Trammel* at 50-51), the United States courts have acted under explicit statutory authority: *Trammel* at 40

citing Federal Rule of Evidence 501. In the Australian context, in the absence of such legislative warrant, any such balancing of policy interests to mould a new privilege must be done, if at all, by the legislatures.

31. Finally, it may be added that Mr Lusty's analysis of Canadian law is wrong. Although in *R v Kabbabe* (1997) 6 CR (5th) 82 the Quebec Court of Appeal found error in the compulsory examination of the wife before the non-judicial fire commissioner's inquiry, the applicable statute provided that the "ordinary rules of evidence in criminal matters shall apply to the inquiries": see at 118 [181] per Nuss JA citing s 25 *Fire Investigations Act* R.S.Q., c. E-8. Thus, the decision rested simply upon the application of the common law rule of incompetence and non-compellability as recognised by the Supreme Court in *R v Hawkins* [1996] 3 SCR 1043: at 116-117 [171]-[175], 120 [191].

Conclusion

32. The asserted spousal privilege is not a part of the common law of Australia. The historical record, on the basis of which the intermediate courts have recognised the privilege, has been misread in multiple respects and, in truth, suggests that there is no such privilege. In any event, doubts in the historical record should be resolved against the existence of a privilege. Consistently with authority, and with comparable foreign legal developments, the capacity to recognise any spousal privilege should now be reserved to the legislatures.

B. Alternatively, the Act abrogates spousal privilege

No presumption against abrogation

33. The appellant accepts, of course, the principle of statutory construction – sometimes called the "principle of legality" – that the courts will not impute to the legislature an intention to interfere with fundamental rights, freedoms or immunities, or to displace fundamental principles of the common law, absent clear manifestation of such intention either expressly or by necessary implication: *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 259 [15], 271 [58] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; *Coco v The Queen* (1994) 179 CLR 427 at 438 per Mason CJ, Brennan, Gaudron and McHugh JJ. However, there is no wider presumption against legislative alteration of

the common law generally. The presumption is attracted only by "fundamental" principles or rights. "if what was previously accepted as a fundamental principle or fundamental right ceases to be so regarded, the presumption that the legislature would not have intended to depart from that principle or to abolish or modify that right will necessarily be undermined and may well disappear": *Bropho v Western Australia* (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

34. Because the presumption against the abrogation of common law rights derives force from its character as a "working hypothesis, the existence of which is known to Parliament and the courts" (*Saeed* at 259 [15]; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ), its proper operation is in relation only those rights similarly "known to Parliament". Thus, whether a right is "fundamental" in the sense contemplated by the principle of legality depends not upon whether the right is perceived to be "important" or "significant" in an abstract sense or according to idiosyncratic notions of justice or public policy, but upon its entrenched and consistent recognition in the decided cases as a fundamental right.

35. Spousal privilege (assuming it to exist) is not, and never has been, a "fundamental" right. The considerable uncertainty about its very existence denies spousal privilege such status. In this sense, spousal privilege is unlike the privilege against self-incrimination, legal professional privilege or natural justice: AB 102 at [104] per Greenwood J. Indeed, it is also unlike the consistently recognised rules of evidence governing spousal testimony, which have been identified as liable to abrogation only by "clear, definite and positive enactment": *Leach v The King* [1912] AC 305 at 311 per Lord Atkinson. Seminal recognition in Australia by an intermediate appellate court as recently as 2004 speaks against the privilege being regarded as "fundamental" in the relevant sense. Therefore, there is no presumption against abrogation of the privilege and the provisions of the Act should not be read down.

Presumption against abrogation displaced in any event

36. In any event, and substantially for the reasons given in the dissenting opinion of Greenwood J in the Full Court and by the majority in *S v Boulton* (2006) 151 FCR 364, the

Act manifests an unmistakable intention to abrogate spousal privilege sufficient to overcome any contrary presumption.

37. The Act establishes the ACC (s 7) and defines its functions, which include: the collection, correlation, analysis and dissemination of criminal information and intelligence (s 7A(a)); the undertaking of intelligence operations and the investigation of federally relevant criminal activity (s 7A(b) and (c)). The Act also authorises the conduct of examinations by examiners for the purposes of an operation or investigation (s 24A).

38. An examiner has a wide discretion to regulate the conduct of proceedings at an examination (s 25A(1)), including the persons who may be present at an examination (s 25A(3)-(5)) and the scope of the examination or cross-examination of witnesses (s 25A(6)). An examiner may summon a person to appear as a witness before an examination to give evidence or produce documents (s 28).

39. A person summoned to appear must not fail to attend (s 30(1)) and must not refuse or fail to answer a question that the examiner requires him or her to answer (s 30(2)). The obligations to attend an examination and answer questions are imposed in imperative and unqualified terms. Their contravention is an indictable offence punishable by a fine or 5 years' imprisonment (s 30(6)). In some cases, where a witness claims that an answer or the production of a document or thing would tend to incriminate the person or make him or her liable to a penalty, the answer or document or thing produced may not be admissible in other proceedings (s 30(4)-(5)). Legal professional privilege is expressly preserved (s 30(9)).

40. The Act has an evident central purpose of discovering the truth. That purpose is fundamentally inconsistent with any common law privilege, since each such privilege manifests a specific public policy that competes with the interest in the discovery of truth: *R v Young* (1999) 46 NSWLR 681 at 696-704 per Spigelman CJ. In this respect, the Act is sharply distinguishable from the *Trade Practices Act 1974* (Cth) at issue in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; it is also distinguishable from s 10 of the *Crimes Act 1914* (Cth), at issue in *Baker v Campbell* (1983) 153 CLR 52, which authorised search warrants not for the discovery of truth in itself, or for the purpose of investigation, but for the collection of evidence for possible use in legal proceedings: at 118 per Deane J; 107-109 per

Brennan J; *contra* at 92 per Wilson J. The majority in the Full Court erred in considering those precedents to control this case (AB 73 at [27] per Spender J; AB 112 at [135] per Logan J).

41. The purpose of discovering the truth is implemented specifically and in express words of unmistakable intention: the Act authorises examiners to summon witnesses (s 28) and to regulate the examination of those witnesses (s 25A(6)); the Act imposes upon persons summoned the unqualified obligation to attend and answer questions (s 30). Section 30 strikes a careful balance between truth-ascertainment and other competing interests and the specific provisions for limited use immunity and legal professional privilege "cover the field of considerations that reflect the balance": AB 82 at [50] per Greenwood J.

42. The intention exhaustively to define the balance is confirmed by legislative history. The predecessor of s 30 in the *National Crime Authority Act 1984* (Cth) contained a "reasonable excuse" exception. This was repealed and specifically substituted by the regime for limited use immunity and legal professional privilege, which continues in the current Act: s 3 and Sch 1 *National Crime Authority Legislation Amendment Act 2001* (Cth). In light of that legislative context, and notwithstanding the generality of the words used in s 30, the failure to advert specifically to spousal privilege does not have the effect that the privilege survives the wide obligation cast upon a witness not to refuse or fail to answer a question. On the contrary, s 30 gives imperative effect to the Act's overriding purpose in the discovery of truth subject only to the limited and carefully designed qualifications specifically enacted.

43. Moreover, s 30 undoubtedly abrogates the privilege against self-incrimination: *A v Boulton* (2004) 136 FCR 420. In circumstances where the person incriminated does not enjoy the privilege, it would be incongruous to recognise spousal privilege because it is, if it exists, "necessarily related" to the privilege against self-incrimination: at [125] per Greenwood J; see also J D Heydon, *Cross on Evidence* (8th ed, 2010) at [25150]. Although it might be said that the privileges against self- and spouse-incrimination respectively reflect different policy concerns, those policy concerns are not independent of each other: in circumstances where a person can be compelled to incriminate him or herself, incrimination by the person's spouse is unlikely to occasion the marital dissension that spousal privilege is said to be necessary to prevent.

PART VII: APPLICABLE PROVISIONS

44. The applicable legislative provisions, as at 15 July 2010 (the date of the judgment appealed from), attached as "**Annexure A**" to this submission, are: *Australian Crime Commission Act 2002* (Cth) ss 1-7A, 24A–36.

45. Those provisions remain in force, in that form, at the date of this submission.

PART VIII: ORDERS SOUGHT

46. The orders sought are:

1. Appeal allowed;

2. Set aside orders 1, 2 (save insofar as it set aside order 2 of the orders made by Reeves J on 1 October 2009) and 3 of the orders of the Full Court and in lieu thereof order that the appeal to that Court be dismissed;

3. Note the undertaking of the appellant to pay the costs of and incidental to the appeal to this Court in any event.

Dated: 31 January, 2011

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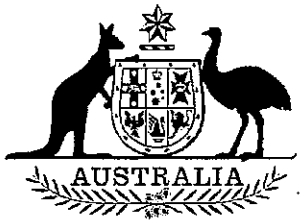
ANNEXURE A



Australian Crime Commission Act 2002

Act No. 41 of 1984 as amended

This compilation was prepared on 13 July 2010
taking into account amendments up to Act No. 93 of 2010

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

Contents

An Act to establish the Australian Crime Commission, and for related purposes

Part I—Preliminary

1 Short title [*see* Note 1]

This Act may be cited as the *Australian Crime Commission Act 2002*.

2 Commencement [*see* Note 1]

This Act shall come into operation on a day to be fixed by Proclamation.

3 Repeal

The *National Crimes Commission Act 1982* is repealed.

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 against 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 against Subdivision B or C of Division 471, or D or F of Division 474, of the *Criminal Code*, 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.

5 Act to bind Crown

This Act binds the Crown in right of the Commonwealth, of each of the States, of the Northern Territory, of the Australian Capital Territory, and of Norfolk Island.

6 Extension to external Territories

This Act extends to all the external Territories.

6A Application of the *Criminal Code*

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Part II—The Australian Crime Commission (the ACC)

Division 1—Establishment and functions of the Australian Crime Commission, the Board and the Inter-Governmental Committee

Subdivision A—The Australian Crime Commission

7 Establishment of the Australian Crime Commission

(1) The Australian Crime Commission is established by this section.

(2) The ACC consists of:
  (a) the CEO; and
  (b) the examiners; and
  (c) the members of the staff of the ACC.

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.

Division 2—Examinations

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 the 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 manner, 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 or 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.

26 Reimbursement of expenses

(1) A witness appearing before an examiner shall be paid by the Commonwealth in respect of the expenses of his or her attendance an amount ascertained in accordance with the prescribed scale or, if there is no prescribed scale, such amount as the CEO determines.

(2) The CEO may direct that a person producing a document or thing pursuant to a notice issued under section 29 shall be paid by the Commonwealth in respect of the expenses of his or her attendance an amount ascertained in accordance with the prescribed scale or, if there is no prescribed scale, such amount as the CEO determines.

27 Legal and financial assistance

(1) A witness who is appearing or is about to appear before an examiner may make an application to the Attorney-General for the provision of assistance under this section in respect of his or her appearance.

(2) A person who proposes to make, or has made, an application to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* for an order of review in respect of a matter arising under this Act may make an application to the Attorney-General for the provision of assistance under this section in respect of the application to the Federal Court.

(2A) A person who proposes to make, or has made, an application to the Federal Magistrates Court under the *Administrative Decisions (Judicial Review) Act 1977* for an order of review in respect of a matter arising under this Act may make an application to the Attorney-General for the provision of assistance under this section in respect of the application to the Federal Magistrates Court.

(3) Where an application is made by a person under subsection (1), (2) or (2A), the Attorney-General may, if he or she is satisfied that:

(a) it would involve substantial hardship to the person to refuse the application; or

(b) the circumstances of the case are of such a special nature that the application should be granted;

authorize the provision by the Commonwealth to that person, either unconditionally or subject to such conditions as the Attorney-General determines, of such legal or financial assistance in respect of the appearance of that person before the examiner, or the application by that person to the Federal Court, as the case may be, as the Attorney-General determines.

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.

29 Power to obtain documents

(1) An examiner may, by notice in writing served on a person, require the person:

(a) to attend, at a time and place specified in the notice, before a person specified in the notice, being an examiner or a member of the staff of the ACC; and

(b) to produce at that time and place to the person so specified a document or thing specified in the notice, being a document

or thing that is relevant to a special ACC operation/investigation.

(1A) Before issuing a notice 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 notice. The record is to be made:

(a) before the issue of the notice; or

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

(2) A notice may be issued under this section in relation to a special ACC operation/investigation, whether or not an examination before an examiner is being held for the purposes of the operation or investigation.

(3) A person shall not refuse or fail to comply with a notice served on him or her under this section.

(3A) A person who contravenes subsection (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.

(3B) Notwithstanding that an offence against subsection (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.

(3C) Where, in accordance with subsection (3B), a court of summary jurisdiction convicts a person of an offence against subsection (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.

(4) Subsections 30(3) to (5) and (9) apply in relation to a person who is required to produce a document or thing by a notice served on him or her under this section in the same manner as they apply in relation to a person who is required to produce a document or thing at an examination before an examiner.

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

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.

29B Offences of disclosure

(1) A person who is served with, or otherwise given, a summons or notice containing a notation made under section 29A must not disclose:

(a) the existence of the summons or notice or any information about it; or

(b) the existence of, or any information about, any official matter connected with the summons or notice.

Penalty: 20 penalty units or imprisonment for one year.

(2) Subsection (1) does not prevent the person from making a disclosure:

(a) in accordance with the circumstances, if any, specified in the notation; or

(b) to a legal practitioner for the purpose of obtaining legal advice or representation relating to the summons, notice or matter; or

(c) to a legal aid officer for the purpose of obtaining assistance under section 27 relating to the summons, notice or matter; or

(d) if the person is a body corporate—to an officer or agent of the body corporate for the purpose of ensuring compliance with the summons or notice; or

(e) if the person is a legal practitioner—for the purpose of obtaining the agreement of another person under subsection 30(3) to the legal practitioner answering a question or producing a document at an examination before an examiner; or

(f) to the Ombudsman for the purpose of making a complaint under the *Ombudsman Act 1976*; or

(g) to the Australian Law Enforcement Integrity Commission for the purpose of referring to the Integrity Commissioner, under the *Law Enforcement Integrity Commissioner Act 2006*, an allegation or information that raises a corruption issue.

(3) If a disclosure is made to a person as permitted by subsection (2) or (4), the following provisions apply:

(a) while he or she is a person of a kind to whom a disclosure is so permitted to be made, he or she must not disclose the existence of, or any information about, the summons or notice, or any official matter connected with it, except as permitted by subsection (4);

(b) while he or she is no longer such a person, he or she must not, in any circumstances, make a record of, or disclose the

existence of, the summons, notice or matter, or disclose any information about any of them.

Penalty: 20 penalty units or imprisonment for one year.

(4) A person to whom information has been disclosed, as permitted by subsection (2) or this subsection, may disclose that information:

(a) if the person is an officer or agent of a body corporate referred to in paragraph (2)(d):

(i) to another officer or agent of the body corporate for the purpose of ensuring compliance with the summons or notice; or

(ii) to a legal practitioner for the purpose of obtaining legal advice or representation relating to the summons, notice or matter; or

(iii) to a legal aid officer for the purpose of obtaining assistance under section 27 relating to the summons, notice or matter; or

(b) if the person is a legal practitioner—for the purpose of giving or obtaining legal advice or legal representation, making representations, or obtaining assistance under section 27, relating to the summons, notice or matter; or

(c) if the person is a legal aid officer—for the purpose of obtaining legal advice or representation relating to the summons, notice or matter; or

(d) to the Ombudsman for the purpose of making a complaint under the *Ombudsman Act 1976*; or

(e) to the Australian Law Enforcement Integrity Commission for the purpose of referring to the Integrity Commissioner, under the *Law Enforcement Integrity Commissioner Act 2006*, an allegation or information that raises a corruption issue.

(5) This section ceases to apply to a summons or notice after:

(a) the notation contained in the summons or notice is cancelled by subsection 29A(4); or

(b) 5 years elapse after the issue of the summons or notice;

whichever is sooner.

(6) A reference in this section to disclosing something's existence includes disclosing information from which a person could reasonably be expected to infer its existence.

(7) In this section:

legal aid officer means:

(a) a member, or member of staff, of an authority established by or under a law of a State or Territory for purposes including the provision of legal assistance; or

(b) a person to whom the Attorney-General has delegated his or her powers and functions under section 27.

official matter means any of the following (whether past, present or contingent):

(a) the determination referred to in subsection 28(2);

(b) an ACC operation/investigation;

(c) an examination held by an examiner;

(d) court proceedings.

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.

31 Warrant for arrest of witness

(1) Where, upon application by an examiner, a Judge of the Federal Court or of the Supreme Court of a State or Territory sitting in chambers is satisfied by evidence on oath that there are reasonable grounds to believe:

(a) that a person who has been ordered, under section 24, to deliver his or her passport to the examiner, whether or not the person has complied with the order, is nevertheless likely to

leave Australia for the purpose of avoiding giving evidence before the examiner; or

(b) that a person in relation to whom a summons has been issued under subsection 28(1):

(i) has absconded or is likely to abscond; or

(ii) is otherwise attempting, or is otherwise likely to attempt, to evade service of the summons; or

(c) that a person has committed an offence under subsection 30(1) or is likely to do so;

the Judge may issue a warrant for the apprehension of the person.

(2) The warrant may be executed by any member of the Australian Federal Police or of the Police Force of a State or Territory, or by any person to whom it is addressed, and the person executing it has power to break into and enter any premises, vessel, aircraft or vehicle for the purpose of executing it.

(2A) The warrant may be executed notwithstanding that the warrant is not at the time in the possession of the person executing it.

(2B) A person executing a warrant under this section may only use such reasonable force as is necessary for the execution.

(3) Where a person is apprehended in pursuance of a warrant under this section, he or she shall be brought, as soon as practicable, before a Judge of the Federal Court or of the Supreme Court of a State or Territory and the Judge may:

(a) admit the person to bail, with such security as the Judge thinks fit, on such conditions as he or she thinks necessary to ensure the appearance of the person as a witness before the examiner;

(b) order the continued detention of the person for the purposes of ensuring his or her appearance as such a witness; or

(c) order the release of the person.

(4) Where a person is under detention in pursuance of this section, he or she shall, within 14 days after he or she was brought, or last brought, before a Judge of the Federal Court or of the Supreme Court of a State or Territory in accordance with this section, or within such shorter or longer time as a Judge has fixed upon the last previous appearance of the person before a Judge under this section, be again brought before a Judge and the Judge may

thereupon exercise any of the powers of a Judge under subsection (3).

(5) In this section, ***Australia*** includes the external Territories.

33 False or misleading evidence

(1) A person shall not, at an examination before an examiner, give evidence that is to his or her knowledge false or misleading in a material particular.

(2) A contravention of subsection (1) is an indictable offence and, subject to this section, is punishable, upon conviction, by imprisonment for a period not exceeding 5 years or by a fine not exceeding 200 penalty units.

(3) Notwithstanding that an offence against subsection (1) 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.

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

34 Protection of witnesses etc.

Where it appears to an examiner that, by reason of the fact that a person:

(a) is to appear, is appearing or has appeared at an examination before the examiner to give evidence or to produce a document or thing; or

(b) proposes to furnish or has furnished information, or proposes to produce or has produced a document or thing, to the ACC otherwise than at an examination before the examiner;

the safety of the person may be prejudiced or the person may be subjected to intimidation or harassment, the examiner may make such arrangements (including arrangements with the Minister or with members of the Australian Federal Police or of the Police Force of a State) as are necessary to avoid prejudice to the safety of

the person, or to protect the person from intimidation or harassment.

34A Contempt of the ACC

A person is ***in contempt of the ACC*** if he or she:

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

(i) refuses or fails to take an oath or affirmation when required to do so under section 28; or

(ii) refuses or fails to answer a question that he or she is required to answer by the examiner; or

(iii) refuses or fails to produce a document or thing that he or she was required to produce by a summons or notice under this Act that was served to him or her as prescribed; or

(b) is a legal practitioner who is required to answer a question or produce a document at an examination before an examiner, and both of the following apply:

(i) 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;

(ii) he or she refuses to comply with the requirement and does not, when required by the examiner, give the examiner the name and address of the person to whom or by whom the communication was made; or

(c) gives evidence at an examination before an examiner that he or she knows is false or misleading in a material particular; or

(d) obstructs or hinders an examiner in the performance of his or her functions as an examiner; or

(e) disrupts an examination before an examiner; or

(f) threatens a person present at an examination before an examiner.

34B Federal Court or Supreme Court to deal with contempt

(1) If an examiner is of the opinion that, during an examination before the examiner, a person is in contempt of the ACC, the examiner

may apply to either of the following courts for the person to be dealt with in relation to the contempt:

(a) the Federal Court;

(b) the Supreme Court of the State or Territory in which the examination to which the contempt relates is being conducted.

(2) Before making the application, the examiner must inform the person that the examiner proposes to make the application.

(3) The application must be accompanied by a certificate that states:

(a) the grounds for making the application; and

(b) evidence in support of the application.

(4) A copy of the certificate must be given to the person before, or at the same time as, the application is made.

(5) If, after:

(a) considering the matters specified in the certificate; and

(b) hearing or receiving any evidence or statements by or in support of the ACC; and

(c) hearing or receiving any evidence or statements by or in support of the person;

the Court to which the application was made finds that the person was in contempt of the ACC, the Court may deal with the person as if the acts or omissions involved constituted a contempt of that Court.

(6) For the purposes of determining whether a person is in contempt of the ACC under subsection (1), Chapter 2 of the *Criminal Code* applies as if:

(a) contempt of the ACC were an offence; and

(b) references to a person being criminally responsible for an offence were references to a person being responsible for contempt of the ACC.

34C Conduct of contempt proceedings

(1) This section applies if an application for a person to be dealt with in relation to a contempt of the ACC is made to the Federal Court or to the Supreme Court of a State or Territory under section 34B.

(2) Proceedings in relation to the application are, subject to this Act, to be instituted, carried on, heard and determined in accordance with the laws (including any Rules of Court) that apply in relation to the punishment of a contempt of the Court to which the application was made.

(3) In proceedings in relation to the application, a certificate under subsection 34B(3) is prima facie evidence of the matters specified in the certificate.

34D Person in contempt may be detained

(1) If an examiner proposes to make an application under subsection 34B(1) in respect of a person, he or she may, during the hearing concerned, direct a constable to detain the person for the purpose of bringing the person before the Court to which the application was made for the hearing of the application.

(2) If the person is detained under subsection (1):
   (a) the examiner must apply to the Court as soon as practicable under subsection 34B(1) in respect of the person; and
   (b) the person must, subject to subsection (3) of this section, be brought before the Court as soon as practicable.

(3) The Court may:
   (a) direct that the person be released from detention on condition that he or she will appear before the Court in relation to the application; or
   (b) order that the person continue to be detained until the application is determined.

(4) The Court may also impose any other condition on the release, for example:
   (a) that the person surrenders his or her passport; or
   (b) that the person gives an undertaking as to his or her living arrangements; or
   (c) that the person reports as required to a law enforcement agency.

(5) The Court may at any time vary or revoke a condition imposed under subsection (4).

34E Examiner may withdraw contempt application

(1) An examiner may at any time withdraw an application in relation to a person under subsection 34B(1).

(2) If:

(a) the examiner does so; and

(b) the person is in detention under section 34D;

the person must be released from detention immediately.

34F Relationship with section 12

To avoid doubt, evidence relating to an application under subsection 34B(1) is not required to be given to a person or authority under subsection 12(1).

35 Obstructing or hindering the ACC or an examiner etc.

(1) A person must not:

(a) obstruct or hinder:

(i) the ACC in the performance of its functions; or

(ii) an examiner in the performance of his or her functions as an examiner; or

(b) disrupt an examination before an examiner; or

(c) threaten any person present at an examination before an examiner.

(2) A person who contravenes subsection (1) 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.

(3) Notwithstanding that an offence against subsection (1) 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.

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

35A Double jeopardy

(1) Where an act or omission by a person is an offence against this Act and is also an offence against a law of a State, the person may be prosecuted and convicted under this Act or under that law of that State in respect of that act or omission, but nothing in this Act renders a person liable to be punished twice in respect of the same act or omission.

(2) If:

(a) an application is made to the Federal Court or a Supreme Court under subsection 34B(1) in respect of an act or omission by a person; and

(b) the person is dealt with by the Court under that section in respect of the act or omission;

the person is not liable to be prosecuted for an offence in respect of that act or omission.

(3) If a person is prosecuted for an offence in respect of an act or omission referred to in subsection 34B(1), an application must not be made under subsection 34B(1) in respect of that act or omission.

36 Protection of examiners etc.

(1) An examiner has, in the performance of his or her functions or the exercise of his or her powers as an examiner in relation to an examination before the examiner, the same protection and immunity as a Justice of the High Court.

(2) A legal practitioner assisting the ACC or an examiner or representing a person at an examination before an examiner has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.

(3) Subject to this Act, a person summoned to attend or appearing before an examiner as a witness has the same protection as a witness in proceedings in the High Court.

(4) To avoid doubt, this section does not limit the powers of the Ombudsman under the *Ombudsman Act 1976*.