IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

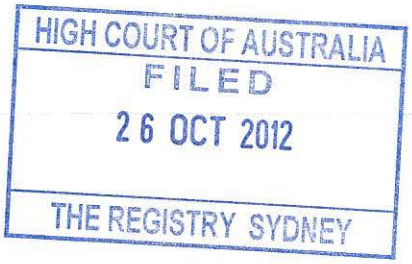
No S100 of 2012

BETWEEN

X7

Plaintiff

and



AUSTRALIAN CRIME COMMISSION

First Defendant

10 **THE COMMONWEALTH OF AUSTRALIA**

Second Defendant

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Part I Form of Submissions

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

Part II Basis of Intervention

2. The Attorney General for the State of New South Wales ("NSW Attorney") intervenes under s 78A of the Judiciary Act 1903 (Cth) in support of the defendants.

20 **Part III Legislative Provisions**

3. The NSW Attorney adopts the defendants' statement of legislative provisions.

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Part IV Issues presented by the matter and argument

Issues

4. The NSW Attorney adopts the submissions of the defendants regarding the proper construction of the Australian Crime Commission Act 2002 (Cth) ("ACC Act") and the powers of the first defendant. These submissions address the balance of the submissions made by the plaintiff asserting that Div 2 of Pt II of the ACC Act is invalid for infringing Chapter III and s 80 of the Constitution. In summary the NSW Attorney submits as follows:

   (a) the plaintiff's attempt to invoke one or more "criminal process rights" commences the analysis at the wrong point and is at odds with authority;

   (b) the plaintiff's submission that relevant constraints flow from the "exclusivity of judicial power" by reference to what was said by Barton J in Melbourne Steamship Co Limited v Moorehead (1912) 15 CLR 333 overlooks later authority;

   (c) when considered in light of the doctrines of contempt and abuse of process in the area of so called parallel administrative inquiries, the ACC Act does not impermissibly interfere with the manner or outcome of the exercise of judicial power;

   (d) nor does the ACC Act infringe the constitutional guarantee of trial by jury in s 80.

Chapter III - General principles

5. The authorities of this Court do not go so far as to support the implication of something akin to a "due process" requirement from the text and structure of Chapter III. Indeed, that term, imported from United States jurisprudence, is one that must be treated with caution in an Australian constitutional context: International Finance Trust Company Limited v New South Wales Crime Commission (2009) 240 CLR 319 at 353 [52] per French CJ and see also Hamilton v Oades (1989) 166 CLR 486 at 509 per Dawson J. One of the principal reasons that is so is that, unlike the United States Constitution, Chapter III is not concerned with conferring procedural or substantive "rights" upon individuals (see, by way of comparison, discussing the fifth and

fourteenth amendments, Nowak and Rotunda Constitutional Law (8th ed, 2010) at 425-428).

6. Chapter III is rather informed by the "central" consideration of the role that the judicature must play in a federal form of government, including in particular its ultimate responsibility for determining the limits of the respective powers of the integers of the federation: Forge v Australian Securities and Investments Commission (2006) 228 CLR 45 at 73 [56] per Gummow, Hayne and Crennan JJ. As with other constitutional constraints upon legislative power, the relevant inquiry is systemic or "functionalist" in character: see eg Wainohu v New South Wales (2011) 243 CLR 181 at 212 [52] per French CJ and Kiefel J (their Honours were there discussing the doctrine in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51, but the point is of more general application in the context of Chapter III).

7. True it is that the separation of the judicial power of the Commonwealth from other functions of government has been said to advance, amongst other things, the objective of the guarantee of liberty. However, the constitutional questions regarding the infringement of Chapter III fall to be determined by reference to matters related to the roles and responsibilities of the judicial branch in the federal system – such as the nature of judicial power or its usurpation or the effect of the impugned legislation upon the institutional integrity of the Court. Those criteria of validity "commonly subsume" consideration of the effects of the impugned legislation upon the rights and liberties of the individual: South Australia v Totani (2010) 242 CLR 1 at 156, [424] per Crennan and Bell JJ. Of course, Chapter III may invalidate a law which impinges upon individual rights, but it is only in that "limited" sense that those matters are related to the subject matter of Chapter III: see by way of analogy Betfair Pty Limited v Racing NSW (2012) 86 ALJR 418 at 428 [43]-[44].

8. So, for example, in Sorby v Commonwealth (1983) 152 CLR 281, Mason, Wilson and Dawson JJ analysed (and rejected) the proposition that Chapter III in some way entrenched the privilege against self incrimination by asking whether the existence of the privilege was an integral element in the exercise of the judicial power of the Commonwealth: at 308 (see also at 298 per Gibbs CJ and at 314 per Brennan J). It was immaterial to the constitutional question that the privilege conferred what their Honours described as a "very valuable protection" or, as it was later described by

Mason CJ and Toohey J in Environment Protection Authority v Caltex Refining Co Pty Limited (1993) 178 CLR 477 at 500, a "human right which protects personal freedom, privacy and human dignity".

9. As such, the plaintiff's submission that Chapter III operates to entrench a seemingly wide range of "criminal process rights", including some form of "immunity against parallel executive interrogation" which the ACC Act is said to violate (Plaintiff's Submissions ("PS") [VI.11], pp 14, lines 1-35 and 16, lines 44-52), is to erroneously invert the required analysis. The relevant principles to be applied rather flow from the constitutionally mandated role and independence of the judicature. Apart from s 80, the plaintiff's case seemingly requires consideration of two such principles: first, that the Parliament may not confer the judicial power of the Commonwealth upon a body that is not a "court" within the meaning of s 71 of the Constitution. Secondly, that the legislative powers of the Commonwealth do not extend to such interference with the judicial process as would authorise or require a Court exercising that power to do so in a manner which is inconsistent with its nature: see eg Nicholas v The Queen (1998) 193 CLR 173 per Gummow J at 233 [148]; International Finance Trust at 352-353 [50] per French CJ.

"Exclusivity" argument

10. Any assertion that the Act is invalid on the basis of the first principle (which the plaintiff seemingly invokes in referring to the "exclusivity of the exercise of Commonwealth judicial power" – PS [14], page 17) is foreclosed by the decision of this Court in Pioneer Concrete (Vic) Pty Limited v Trade Practices Commission (1982) 152 CLR 460, which the plaintiff does not seek to re-open. All members of the Court in that case held that the enactment of a comparable power did not amount to the impermissible conferral of judicial power upon the Commission: see Gibbs CJ at 467, Mason J at 471-2, Murphy J at 475 and Brennan J, agreeing with Gibbs CJ, at 475. To the extent they support the contrary proposition, the remarks of Barton J in Melbourne Steamship Co Limited v Moorehead at 346 (described by Gibbs CJ in Pioneer as having been made "per incuriam") have not been followed by this Court.

11. The further suggestion made by Barton J that once proceedings have been commenced the "subject matter [of those proceedings] has passed into the hands of the Courts

alone" seemingly flows from his Honour's overly expansive conception of judicial power and was expressly rejected by Mason J in Pioneer at 474 (see also Deane J sitting as a member of the Full Federal Court at first instance at (1981) 36 ALR 151 at 165). The plaintiff's reliance on that passage (PS [V1.12], pp 15, lines 30-40 and 17, line 20) does not assist him.

Interference with judicial power

12. Nor can it tenably be argued that the Act authorises an impermissible interference with the manner and outcome of the exercise of judicial power.

13. Consistent with the systemic or functionalist nature of the inquiry identified above, such questions require consideration of predominant characteristics together with the historic functions and processes of courts of law: see eg Totani at 63 [134] per Gummow J.

14. That, in turn, directs attention to the functions and processes by which the Courts have traditionally sought to deal with parallel criminal and administrative proceedings, particularly through the doctrines of contempt and abuse of process. Indeed, those principles are of particular assistance in the current matter for at least three reasons: first, there is some similarity in the terminology employed in the formulations of the constitutional criteria for validity and the tests applied in the context of the doctrine of contempt, as Spigelman CJ observed in NSW Food Authority v Nutricia Australia Pty Limited (2008) 72 NSWLR 456 at 495 [186]. Secondly, there is support in the authorities for the proposition that the power to control abuse of process, together with the contempt power, are properly regarded as attributes of the judicial power provided for in Chapter III: Hogan v Hinch (2011) 243 CLR 506 at 552 [86], referring to Dupas v The Queen (2010) 241 CLR 237 at 243 [15]. Thirdly, seemingly related to the last point, the obiter suggestions in the authorities to the effect that Chapter III may impose relevant limitations in such cases appear to proceed from the notion that legislation authorising interference in the administration of a Court amounting to a contempt may exceed the powers of the Commonwealth Parliament: see Hammond v Commonwealth (1982) 152 CLR 188 at 206 per Deane J; Sorby at 306 per Mason, Wilson and Dawson JJ; Pioneer at 474 per Mason J.

15. The fact that an administrative body with powers of compulsion conducts an inquiry into facts that are the subject of pending proceedings in a court does not, of itself, constitute a contempt or abuse of process: Hamilton v Oades at 494 per Mason CJ, at 509 per Dawson J and at 515-516 per Toohey J; Pioneer at 468 per Gibbs CJ (with whom Brennan J agreed) and Mason J at 474 and Caltex at 558-9 per McHugh J. What must rather be shown is that the conduct of the inquiry creates a "substantial risk of serious injustice" or a "real risk" that justice will be interfered with: Hammond v Commonwealth (1982) 152 CLR 188 at 196 per Gibbs CJ (with whom Mason J agreed at 199) and Victoria v Australian Building and Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25 at 56 per Gibbs CJ, 98, 99 per Mason J and 137 per Wilson J.

16. That is to be determined by reference to matters of practical reality, not mere theoretical tendency. Of course, that approach bears some resemblance to the constitutional inquiry as regards impermissible interference with judicial power, which similarly requires attention to the "practical operation" of the law (Totani at 63 [134] per Gummow J) or, as was said in Liyanage v The Queen [1967] 1 AC 259 at 290, its "pith and substance". The Court is not engaged in a "purely abstract conceptual analysis": see Nicholas at 233 [148] per Gummow J.

17. Although it has been suggested that it is difficult to envisage circumstances in which the conduct of an inquiry expressly authorised by statute could constitute a contempt (Lockwood v Commonwealth (1954) 90 CLR 177 at 185 per Fullagar J), it is tolerably clear that one such case may arise where the exercise of the relevant power confers upon a party to litigation "advantages which the rules of procedure would otherwise deny him" if the power is exercised in such a way as to interfere with the course of justice: Pioneer at 468 per Gibbs CJ and Caltex at 559 per McHugh J.

18. Although not clearly emerging from the reasons in Hammond (which is perhaps unsurprising given the constraints of time referred to by Gibbs CJ at 198), it is properly seen as an example of such a case, albeit that it remains a difficult case from which to extract a principle: New South Wales Crime Commission v Jason Lee [2012] NSWCA 276 at [26] per Basten JA (McColl, Beazley and McFarlan JJA agreeing). The emphasis placed by Gibbs CJ upon the "circumstances" giving rise to a real risk that the administration of justice would be interfered with (at 198) should be

understood to refer, in particular, to the matter to which his Honour earlier referred at 194 - that is, that the police officers who had investigated the matters upon which the plaintiff was to be examined were permitted to be present during that part of the examination which was held in private and were presumably free to attend such parts of the examination as were earlier held in public. It may also be seen to be a reference to the fact (identified in argument at 192) that the Commission had decided to permit the transcript of the examination to be made available to the prosecution, in circumstances where the plaintiff would be "bound to answer questions designed to establish that he was guilty of the offence with which he was charged". Those were matters which stood to confer upon the prosecution advantages of the nature referred to by Gibbs CJ in Pioneer. Although Deane J expressed a broader view at 206 (which is inconsistent with the authorities identified above), he too appears to have placed some weight upon the close relationship between the participants in the inquiry and the prosecuting authorities: at 207.5. That matter was seemingly central to his Honour's rejection of the Commonwealth's submission that there had not been shown to be any substantial risk of serious injustice.

19. As the Full Federal Court correctly held in Australian Crime Commission v OK (2010) 185 FCR 258 at 277 [107], the risks to the integrity of the criminal trial which grounded the injunction in Hammond are directly and sufficiently addressed by the protective regime erected by ss 25A(3), (9) and (11) of the ACC Act. Moreover, for the reasons there given at 275-276 [102], 277 [108] and 278 [111]-[112], the Act as a whole is to be construed in a harmonious fashion, such that those protections are not circumvented by operation of the duties and powers imposed or conferred by ss 12 and 51 or the former terms of s 59(7) (see now s 59AA).

20. Having regard to those matters, the fact that the ACC Act on its proper construction permits the compulsory examination of a person who has been charged with an offence on the subject matter of the offence charged does not, of itself, authorise conduct that would constitute contempt of Court (cf Deane J in Hammond at 206). It is notable in that regard that, in Hamilton v Oades, both Dawson J (at 508-9) and Toohey J (at 515-6) did not accept that Hammond was authority to the contrary.

21. Nor, for similar reasons, could it be said that the ACC Act in authorising such inquiries interferes with the governance of the trial or distorts its predominant characteristics so

as to authorise or require the Court to exercise judicial power in a manner which is inconsistent with its nature and thus infringe Chapter III. Justice Deane's obiter suggestion to the contrary in Hammond at 206-207 appears to rest principally upon his view that the conduct of such an inquiry where criminal proceedings were pending constituted contempt and a passage from O'Connor J's reasons in Melbourne Steamship Co Limited v Moorehead at 379-380. However, as Gibbs CJ observed in Pioneer at 466, the first two sentences of that passage relate to the proper construction of the relevant section and the third supports that construction by reference to the possible consequences of adopting a broader view of the Comptroller's powers. As to the last mentioned point, Gibbs CJ expressed the view that O'Connor J meant no more than such an exercise of power "might" amount to a contempt of Court – accepting that that may be so "if the powers were used to extract information for the purpose of aiding a prosecution already commenced" (emphasis added). So understood, O'Connor J's reasons provide no support for some broader ranging notion that any form of parallel inquisitorial inquiry concerning the subject of pending criminal proceedings will necessarily infringe Chapter III.

22. It is not to the point that the application of the protections conferred by the Act depend upon what the plaintiff describes as a "discretion" (PS [VI.9], p 12 line 31). It is perhaps more material that s25A(9) creates two related duties: first, to consider whether the failure to give such a direction might prejudice a fair trial and secondly to make an appropriate direction where the examiner forms the requisite state of satisfaction. The plaintiff here makes no complaint about the discharge of those duties or the particular direction made. Any such issue that did arise would involve a question as to whether the examiner has complied with the applicable statutory limits. As was accepted in Wotton v Queensland (2012) 86 ALJR 246 at 252-253, [22], where, as here, the statute complies with the relevant constitutional limitation (without any need to read it down to save its validity) such a complaint does not raise a constitutional question, as distinct from a question of the exercise of statutory power to be determined under ordinary principles of administrative law. Indeed, applying analogous reasoning and accepting that questions of statutory power and contempt are discrete (Pioneer per Mason J at 473), it may be that most issues involving the alleged interference of extra-curial inquiries in the administration of justice do not raise any question of constitutional constraints on the exercise of legislative power (absent some

purported legislative abrogation of the powers to deal with contempt or abuse of process).

23. Putting to one side the fact of the conduct of the examination, the only manner in which the ACC Act in its practical operation could otherwise be said to bear upon any criminal proceedings or their governance relates to the possibility that the examination might lead officers of the first defendant to obtain other evidence which might be provided to prosecuting authorities and tendered in the criminal proceedings (that is, so called "derivative" evidence). By contrast, any "direct" evidence obtained in the course of the examination itself is protected by the direction under s 25A(9) and, further, is not admissible in evidence against the examinee in a criminal or penalty proceeding if that person avails themselves of the privilege conferred by ss 30(4) and (5) of the ACC Act. There is no suggestion that derivative evidence has been or will be obtained in this case. Nevertheless, to the extent those matters arise in these proceedings, they are immaterial to any question of validity (for reasons developed below).

24. It is well established that Parliament may "interfere with" common law protections against self incrimination without giving rise to issues of contempt or abuse of process. The concepts of the proper administration of justice or due process of law which those doctrines protect derive their meaning from the substantive and procedural law as it exists from time to time, be it statutory or common law: Hamilton v Oades at at 494 per Mason CJ and at 509 per Dawson J. Notably in that regard there is a lengthy history of statutory and non-statutory exceptions to the traditional objections to compulsory interrogations at common law in circumstances where the answers given may incriminate the examinee: see the examples given by Windeyer J in Rees v Kratzmann (1965) 114 CLR 63 at 80.

25. While, as submitted above, the power to control an abuse of process or punish for contempt may be regarded as attributes of federal judicial power, there is no constraint to be derived from Chapter III which restricts in "absolute terms" the legislative power of the Parliament to deal with such matters: Hogan at 554 [91]. Provided Parliament does not, for example, trespass upon the essential character of a Court or the nature of judicial power, it may make laws dealing with substantive and procedural matters which alter the range of circumstances in which those powers may be exercised: cf the

impugned law in Russell v Russell (1976) 134 CLR 495 which was characterised as an attempt "to obliterate" such an attribute: at 520 per Gibbs J. It cannot be said that the Parliament has here exceeded those limitations, particularly given that Sorby stands directly in the path of any suggestion that the privilege against self incrimination is, of itself, an integral element in the exercise of the judicial power. It is true that the law in issue there preserved the privilege in respect of person who had been charged. But, having regard to the "functionalist" character of the inquiry required by Chapter III (see above), it is difficult to discern any reason in principle why a different result should follow depending upon whether charges have or have not been laid: note the observations of Dawson J in Hamilton v Oades at 508, querying the utility of adopting a differentiated approach.

26. The effect of those matters may be that, in a particular case, the prosecution has available to it evidence that it would not otherwise have had. However, the potential for such material to be so used does not, without more, confer some form of unfair advantage upon a party to the proceeding so as to render the exercise of the statutory power a contempt: Pioneer at 474 per Mason J. Nor does it raise any issue in terms of Chapter III. The limitation imposed on the Court's discretion by the law in Nicholas similarly facilitated proof of the prosecution's case by the admission of evidence otherwise liable to exclusion under a discretion concerned with the protection of the integrity of the Court's processes: see eg Hayne J at 272-3 [234]. That was not sufficient to distort the predominant characteristics of the trial so as to contravene Chapter III. The fact that such laws may involve Parliament striking a different balance between competing public policy interests to that drawn by the common law does not require a conclusion that there has been an impermissible intrusion on the judicial power: see eg Nicholas at 197 [37]-[38] per Brennan CJ, 239 [164] per Gummow J and 272 [234], 274 [238], 276 [244] per Hayne J.

Section 80

27. None of the foregoing is affected by s 80 of the Constitution (cf PS p 16, lines 32 et seq). To the extent Murphy J suggested otherwise in Hammond at 201 and in Sorby at 313, his Honour's observations are at odds with the jurisprudence of this Court and should not be followed: see Sorby at 298-299 per Gibbs CJ and at 308-309 per Mason, Wilson and Dawson JJ and the authorities there referred to.

Part V Estimate of time for oral argument

28. The Attorney estimates that he will require 15 minutes for oral argument.

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