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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S100 of 2012

BETWEEN:



X7
Plaintiff

AND:

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AUSTRALIAN CRIME COMMISSION
First Defendant

AND:

THE COMMONWEALTH OF AUSTRALIA
Second Defendant

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SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
(INTERVENING)

Part I: Form of Submissions

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

Part II: Basis of Intervention

2. The Attorney-General for the State of South Australia (**South Australia**) intervenes pursuant to s78A of the *Judiciary Act 1903* (Cth) in support of the Second Defendants.

Part III: Legislative Provisions

3. South Australia adopts the Second Defendant's statement of applicable legislative provisions.

Part IV: The Issues Presented and South Australia's submissions in summary

The Issues

- 10 4. X7 is charged with offences against the Commonwealth Criminal Code. He, assuming X7 is a he, has not as yet been committed for trial. Subsequent to his arrest for those offences he was served with a summons to appear before an Australian Crime Commission (**Crime Commission**) examiner to be examined under Division 2 Part II of the *Australian Crime Commission Act 2002* (Cth) (**the ACC Act**) on matters which included the subject matter of the offences upon which he had been arrested and with which he was charged.
- 20 5. The Crime Commission examination took place on two consecutive days. On the first day X7 did not have the assistance of a lawyer. The examination proceeded nonetheless, but only after X7 was informed that no member of any authority involved with the investigation and prosecution of the charges he then faced would be present during the proceeding or have access to the record of the proceeding. Further, he was informed that the privilege against self-incrimination was available to him in the event that he was charged with offences as a consequence of anything he said during the course of the examination. He answered the questions asked, including questions that touched on the subject matter of the offences upon which he had been arrested and with which he was charged.
- 30 6. On the second day X7 attended with legal representation. The examination resumed and X7 was directed that he was required to answer questions including questions that touched on the subject matter of the offences upon which he had been arrested and with which he was charged. He declined to do so. He was advised that he would be charged with failing to answer questions, contrary to s25A(9) ACC Act. Before concluding the examination the Examiner directed that the product of the examination could only be published to the Chief Executive Officer, examiners and

staff of the Crime Commission, and to the Director of Public Prosecutions but only for the purpose of pursuing any charges arising out of the evidence X7 had given, in which case the product of the examination could also be published to court staff and legal representatives involved in any proceedings. The examiner made clear that the officers of the Commonwealth Director of Public Prosecutions and the police officers involved in the investigation and prosecution of the offences with which X7 then stood charged were not entitled to receive a copy of the evidence X7 had given to the examiner.

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7. In the circumstances, does an examination conducted under Division 2 Part II of the ACC Act of a person charged with offences against the Commonwealth Criminal Code that includes consideration of the subject matter of those offences, impermissibly interfere with the exercise of judicial power such that Division 2 Part II is invalid as being contrary to Ch III of the Constitution?¹
 8. Antecedent to this question is a question of construction, namely, whether Division 2 Part II of the ACC Act empowers an examiner to conduct an examination of a person charged with offences against the Commonwealth Criminal Code where that examination concerns the subject matter of the offences?² It is only if this question is answered in the affirmative that the constitutional validity of Division 2 Part II of the ACC Act falls to be considered.

South Australia's submissions in summary

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9. In summary, South Australia:
 - 9.1. supports the Second Defendant's submission that the ACC Act empowers an examiner in an examination to require a witness, who is also a defendant in criminal proceedings, to answer a question related to the subject matter of the criminal proceedings.
 - 9.2. contends that in so empowering an examiner, Division 2 Part II of the ACC Act is not repugnant to Ch III of the *Constitution* as, on the proper construction of the Act, there is no impact or impairment of the exercise of judicial power by reason of the combined operation of requirements of confidentiality concerning summonses, the private character of the examination hearing, and the non-publication orders that must be made where criminal proceedings are pending.

¹ The second question stated; AB 26.

² The first question stated; AB 26.

9.3. contends that it is unnecessary to examine whether the types of limits on legislative power by reason of Ch III, of the kinds referred to in *obiter* in *Hammond*³, *Dietrich*⁴ and *Ebner*⁵, arise.

Part V: South Australia's Argument

Can the ACC examiner examine a person summonsed on matters subject of a pending criminal trial? (the first question stated)

10. The functions of the Crime Commission include the investigation, when authorized by the Board, of matters relating to federally relevant criminal activity.⁶ In this case the Board of the Crime Commission exercised the power conferred on it by s7C(1)(c) of the ACC Act, authorizing the Crime Commission to investigate federally relevant criminal activity. More particularly, the Board's determination identified the federally relevant criminal activity to be investigated.⁷ Further, the Board determined under s7C(3) ACC Act that the investigation was a special operation.⁸ That determination enlivened the power to conduct an examination as vested in an examiner by s24A ACC Act.

11. The power to conduct an examination is discretionary. That discretion is constrained in its exercise to the purposes of a special ACC operation/investigation. A special ACC operation/investigation is defined in s4 ACC Act as, relevantly: -

20 ***Special ACC operation/investigation*** means
 (a) ...
 (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.⁹

Federally relevant criminal activity is defined as meaning -

30 ***Federally relevant criminal activity*** means
 (a) a relevant criminal activity, where the relevant crime is an offence against the law of the Commonwealth or a Territory; or
 (b) a relevant criminal activity, where the relevant crime:
 (i) is an offence against the law of a State; and
 (ii) has a federal aspect.¹⁰

³ *Hammond v The Commonwealth* (1982) 152 CLR 188, 206, (Deane J).

⁴ *Dietrich v The Queen* (1992) 177 CLR 292, 337-338 (Deane J) and 362-363 (Gaudron J).

⁵ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [82] (Gaudron J), [115] (Kirby J).

⁶ ACC Act, s7A(c).

⁷ CSB 28-35.

⁸ CSB 29.

⁹ ACC Act, s4.

¹⁰ ACC Act, s4.

The meaning of relevant crime is defined in s4 ACC Act as including serious and organized crime which is, in turn, defined in s4 ACC Act and includes specific offences contained in the Criminal Code, offences of a similar nature, the commission of offences by two or more persons that involve substantial planning and organization, and offences of a kind that ordinarily involve sophisticated methods and techniques.

12. Pausing there; a special ACC operation/investigation is not confined to the investigation of federally relevant criminal activity but extends to matters “relating to” such activity.¹¹ Further, it is not confined to the investigation of particular individuals who engage in the identified conduct, but the conduct itself.
- 10 13. The point is that, a special ACC operation/investigation may, in terms of its temporal aspect, be broad enough in its ambit to include offending yet detected, offending detected but not investigated or prosecuted, offending in the course of being prosecuted, and offending that has been prosecuted to a conclusion.
14. Turning to the purpose of the Crime Commission its functions include those of maintaining a “national database” of criminal information and intelligence, the undertaking of “intelligence operations”, the provision of “strategic criminal intelligence assessments” and the provision of advice on “national criminal intelligence *priorities*”.¹² Those functions, and the nature of the offending that may be the subject of an operation, suggest that the task of the Crime Commission must necessarily address past, ongoing and anticipated future criminal activity, particularly, at
20 the higher levels of its organisation and planning.
15. Taking as an example drug trafficking into Australia, that would include networks of supply of narcotics both inside and outside Australia, the methods for importation and subsequent distribution, the means and methods of payment of suppliers, and the identities of those currently engaging in that activity. It would follow that such intelligence may relate to criminal conduct the subject of a charge.
16. Any limitation that the existence of unresolved charges delays intelligence gathering h would significantly undermine the purpose of developing “priorities” as a means of crime control and prevention.
17. The end point of that analysis of the language used in the ACC Act is that it necessarily
30 encompasses the gathering of intelligence about conduct that is then, or may in the future be, the subject of a criminal charge.

¹¹ ACC Act, s7A(c), 7C(1)(c).

¹² ACC Act, s7A, see also s7C.

18. The same result arises from an analysis of the provisions governing examinations. An examiner has power to require by summons a person to appear before an examiner at an examination to give evidence and to produce documents or things subject only to the satisfaction of the examiner that "it is reasonable in all the circumstances to do so".¹³ At such an examination the giving of evidence or the production of a document or thing may be required.¹⁴ A similar power exists in relation to obtaining documents only.¹⁵
19. The scope of an examination is limited to matters relevant to the ACC operation/investigation.¹⁶ A summons may only be issued in relation to a special operation or special investigation.¹⁷ For an operation or investigation to be a special operation or investigation it must be determined so by the Board.¹⁸
20. Coercive powers extend to requiring a person to provide answers to questions where those answers are self-incriminating. Subsections 30(2), (4) and (5) together operate to abrogate the privilege against self-incrimination, by creating an absolute obligation to answer questions;¹⁹ providing for a claim of self-incrimination to be made;²⁰ and providing that a subsequent answer will not be "admissible in evidence" against the person in criminal proceedings and other proceedings in which a penalty might be imposed.²¹
21. That coercive power extends to questioning about matters which are the subject of a criminal charge that a person examined is currently facing. The ACC Act specifically contemplates that a witness being examined may be a person who has been, or may be charged.²² That is sufficient to establish that the witness may be more than a potential defendant, and may in fact be a defendant at the time of the giving of evidence. It reinforces the analysis above.
22. The plaintiff submits that the construction of the Division ought be approached by regarding the questioning after charge as contrary to a fundamental common law norm. That is suggested to arise from the separation of the investigative phase and prosecution phase, the norm being that it is appropriate to question in the former but not the latter. Such construction has no textual or contextual support and is inconsistent with the purposes of the ACC Act.

¹³ ACC Act, s28.

¹⁴ ACC Act, s28(4).

¹⁵ ACC Act, s29.

¹⁶ ACC Act, s25A(6).

¹⁷ ACC Act, s28(2).

¹⁸ ACC Act, s4(1).

¹⁹ ACC Act, s30(2).

²⁰ ACC Act, s30(4).

²¹ ACC Act, s30(5).

²² ACC Act, s25A(9).

23. The privilege against self-incrimination may be abrogated by statute.²³ To do so requires clear words or necessary implication to that effect.²⁴ There is no separate principle, once the privilege is abrogated, that questions are impermissible because they are asked after the charge has been laid. It is well accepted that statutes may abrogate the privilege at various times during the judicial process, and it may be abrogated only in part and then on condition.²⁵
24. Subject to the terms of a statute properly construed, a defendant may be required to: answer questions after charge; disclose a defence; disclose what evidence they are to call and provide it; to admit facts.²⁶ Further, if they choose to give evidence at trial they stand to be required to answer questions in the course of examination and cross-examination incriminatory or otherwise.²⁷
25. The principles applied by Barton J in *Melbourne Steamship v Moorehead*²⁸ do not support some wider entrenched fundamental rights for the defendant. In essence, Barton J considered that the executive, by questioning a defendant was exercising judicial power.²⁹ That view was not the *ratio* of the court. The better view is that of Isaacs J and Griffiths CJ that the power there in question had been exhausted at the time of charge.³⁰

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²³ *Sorby v The Commonwealth* (1983) 152 CLR 281 at 298 (Gibbs CJ); 308 (Mason, Wilson and Dawson JJ).

²⁴ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 565 (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Sorby v The Commonwealth* (1983) 152 CLR 281 at 289-290 (Gibbs CJ), 309 (Mason, Wilson and Dawson JJ), 311 (Murphy J); *Hamilton v Oades* (1989) 166 CLR 486 at 495 (Mason CJ), 500 (Deane and Gaudron JJ), 509 (Dawson J).

²⁵ See for example Mason CJ in *Hamilton v Oades* (1989) 166 CLR 486 at 499:

Except in the sense that a witness enjoys what is known as the right to silence, the respondent has no relevant right, either at common law or by virtue of statute. The privilege against self-incrimination would not ordinarily protect a person against disclosure of his defence to a criminal charge. The so-called right not to disclose a defence is the result merely of the absence in ordinary circumstances of any statutory requirement that defences be revealed. In some instances there is such a specific requirement, for example, in relation to alibi defences. ... The possibility of disclosure of a defence is, accordingly, not a matter in respect of which a witness needs to be protected, except perhaps in the most exceptional circumstances.

By way of example, in South Australia an accused is required to notify in writing the prosecution of any alibi evidence, within 7 days of their committal (*Criminal Law Consolidation Act 1935* (SA) s285C); may be required to provide notice of evidence intended to be called in relation to proof of mental incompetence, provocation, automatism, necessity or duress and intoxication (*Criminal Law Consolidation Act 1935* (SA) s 285BB); and must provide written notice of any expert evidence to be relied on in defence on or before the first directions hearing or as soon as it is practically available (*Criminal Law Consolidation Act 1935* (SA) s 285BC). Pursuant to the *Judiciary Act 1903* (Cth) s68, a Commonwealth offence that is tried in a State court is subject to the State procedural laws.

²⁶ *Hamilton v Oades* (1989) 166 CLR 486 at 499-500 (Mason CJ). See also footnote 25 above.

²⁷ For example see *Evidence Act 1929* (SA) s 18(1)(c), applicable to Commonwealth criminal offences pursuant to s68 of the *Judiciary Act 1903* (Cth).

²⁸ *Melbourne Steamship v Moorehead* (1912) 15 CLR 333

²⁹ *Melbourne Steamship v Moorehead* (1912) 15 CLR 333 at 346 (Barton J).

³⁰ *Melbourne Steamship v Moorehead* (1912) 15 CLR 333 at 350 (Isaacs J) and see also 341 (Griffith CJ).

26. For the reasons given above, South Australia contends that the first of the stated questions should be answered, "Yes".

Does an ACC examination that includes questioning on a matter that is before the criminal courts impermissibly interfere with the exercise of judicial power? (the second question stated)

27. The plaintiff argues that the *Constitution* (either by reason of an implication arising from the vesting of judicial power in federal courts under s71 or the right to trial by jury in s80) operates to prohibit the parallel coercive executive inquiry into a subject matter before a criminal court.³¹

10 28. In *Chu Kheng Lim v Minister for Immigration* Brennan, Deane and Dawson JJ noted:

There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgement and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to and "could not be excluded from" the judicial power of the Commonwealth.³² (Footnotes omitted)

29. In *Polyukhovich v The Commonwealth* Deane J observed:

20 The provisions of Ch III are based on an assumption of traditional judicial procedures, remedies and methodology. They confer "jurisdiction", that is, the curial power of declaration (dictio) of the law (jus): "the power and authority of a court to hear and determine a judicial proceeding" (*In re Estate of De Camillis*). ...³³ (footnote omitted)

30. In this case it is the method or process to be invoked in the adjudgement and punishment of criminal guilt in the exercise of judicial power that is said to be impermissibly interfered with by the conduct of a coercive examination that includes a matter before the courts.

31. Where jurisdiction is conferred, a law that has the effect of preventing the exercise of that jurisdiction to quell a controversy, or frustrates the exercise of that jurisdiction to quell a controversy, invites close scrutiny as to whether it contravenes Ch III and/or the *Kable* doctrine. As a general proposition, a law that denies the judicial arm of government the ability to exercise "the power and authority ... to hear and determine a matter" will offend Ch III and/or the *Kable* doctrine.

32. In a different context in *Forge v Australian Securities and Investments Commission*, Gummow, Hayne and Crennan JJ said:

³¹ Plaintiff's Submissions at p12 and p17.

³² *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27; see also *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 608-9 (Deane J); *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 444 (Griffith CJ); *Victoria v Australian Building Construction Employee's and Builders Labourer's Federation* (1982) 152 CLR 25 at 107 (Murphy J).

³³ *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 614.

[64] It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so. An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal.³⁴

A law that denies capacity to administer the common law system of adversarial trial indirectly is as offensive to Ch III and the *Kable* doctrine as one that does so directly.

33. Likewise a law that prevented the court from affording procedural fairness to the parties, even if it did so indirectly, would offend Ch III and the *Kable* doctrine.³⁵

10 34. Courts are, depending upon their provenance, armed with either inherent or implied powers to protect themselves in the exercise of jurisdiction so as to ensure that jurisdiction conferred may truly be exercised and that processes are not abused or frustrated. The power to punish for contempt and the power to stay for abuse of process are examples of such powers. Unless Parliament has expressly provided otherwise, the ordinary incidents of judicial process, including those powers, apply.³⁶

20 35. Courts may draw upon a well of inherent or implied powers to protect their processes. In particular, courts are empowered to take action to protect their own judicial processes, which includes power to avoid unlawful interference with the due administration of justice.³⁷ The scope of the power is “responsive to the exigency of particular circumstances, though it must be exercised in protection of the limited jurisdiction vested in the court.”³⁸ A court has a “duty ...to exercise that power in order to secure its independence in the exercise of its jurisdiction.”³⁹ Where there is a “real risk...that justice will be interfered with”⁴⁰ resort may be had to the contempt power to injunct parallel executive actions.

³⁴ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 76 [45]. In the federal courts context see *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ).

³⁵ *Leeth v Commonwealth* (1992) 174 CLR 455 at 470 (Mason CJ, Dawson and McHugh JJ); *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [54]-[56] (French CJ).

³⁶ *Mansfield v Director of Public Prosecutions (WA)* (2006) 226 CLR 486 at [7] (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ); *Thomas v Mowbray* (2007) 233 CLR 307 at [55] (Gummow and Crennan JJ); *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at [79] (Gummow and Bell JJ), [127] (Hayne, Crennan and Kiefel JJ).

³⁷ *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 CLR 25 at 161 and 165 (Brennan J); *Attorney-General v Times Newspapers Ltd* [1974] AC 173 at 294 Lord Reid.

³⁸ *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 CLR 25 at 164 (Brennan J).

³⁹ *Victoria v Australian Building Construction Employees’ and Builders Labourers’ Federation* (1982) 152 CLR 25 at p 164 (Brennan J).

⁴⁰ *Hammond v The Commonwealth* (1982) 152 CLR 188 at 196 (Gibbs CJ), see agreement at 199 (Mason J), 199 (Murphy J).

36. Further, courts have the ability to exclude evidence from admission. If a defendant were compelled to provide incriminating answers to questions and those answers were not kept confidential (whether in contravention of the Act or otherwise) the court could exercise its discretion for that evidence to be excluded pursuant to the public policy discretion,⁴¹ the combined discretion in respect of confessional evidence,⁴² where the evidence is more prejudicial than probative,⁴³ or on the basis of general unfairness.⁴⁴

37. Where the powers of the court are adequate to remedy or prevent any interference in the exercise of judicial power, there is no breach of the Constitutional limitation.

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38. Where the provisions of an Act do not regulate the conduct of judicial proceedings, but rather are said to empower the executive to act in a way which would impair, derogate, or affect their conduct, it is necessary to characterise precisely the executive act, the relevant judicial proceedings, and the effect of the executive act on those proceedings, taking into account the power of the court to control and protect its processes. In essence, it is necessary to specifically identify the interference with the judicial process before considering whether the constitutional limitation is offended.

39. The privilege against self-incrimination is not a necessary concomitant of the exercise of judicial power. In *Sorby v The Commonwealth* Mason, Wilson and Dawson JJ stated:

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In any event the privilege against self-incrimination is not an integral element in the exercise of the judicial power reposed in the courts by Ch III of the Constitution. It is a privilege that has been abrogated by legislative action in Australia, the United Kingdom and Canada without anyone having previously suggested that it involved the elimination of an integral element in the exercise of judicial power in a democratic society.⁴⁵

This Court has also previously rejected the submission that the right to trial by jury in section 80 of the *Constitution* in some way entrenches the privilege against self-incrimination as part of the judicial process.⁴⁶

40. However, the question arises: where the jurisdiction of a criminal court is engaged, and, in the course of the exercise of that jurisdiction the general law requires that an accused be afforded the privilege against self-incrimination, is the exercise of judicial power impermissibly interfered with by the conduct of an examination under the ACC Act in which answers to questions on the

⁴¹ *Bunning v Cross* (1978) 141 CLR 54.

⁴² *R v Swaffield* (1998) 192 CLR 159.

⁴³ See *R v Swaffield* (1998) 192 CLR 159 at 191-192 (Toohey, Gummow and Gaudron JJ).

⁴⁴ *Driscoll v The Queen* (1977) 137 CLR 517; *Stephens v The Queen* (1985) 156 CLR 664; *Harriman v The Queen* (1989) 167 CLR 590.

⁴⁵ *Sorby v The Commonwealth* (1983) 152 CLR 281 at 308 (Mason, Wilson and Dawson JJ)

⁴⁶ *Huddart Parker and Co Pty Ltd v Moorehead* (1908) 8 CLR 330 at 358 (Griffith CJ), 366 (Barton J who agreed with Griffith CJ), 375 (O'Connor J), 385-6 (Isaacs J) and 418 (Higgins J who concurred with other opinions).

subject matter of the criminal case are compelled? It is not necessary in this case to consider what particular aspects of the administration of the common law system of adversarial trial are or are not a necessary incident of the engagement of the judicial power. Each of the aspects of the criminal trial identified by the plaintiff in his submissions at [11] will be afforded to him. The focus of the analysis is on whether what is authorised by the ACC Act interferes with that course. That will, in appropriate cases, include an analysis of the power of the court to ensure the integrity of its own process.

- 10 41. In this case, for the reasons given below there is no impermissible interference with the judicial proceedings, and, consequently, no need to determine the scope of any implied constitutional limitation on legislative power.

Impact or impairment on the criminal judicial process

42. In this case, on the proper construction of the Act, there is no impact or impairment of the exercise of judicial power by reason of the combined operation of confidentiality provisions protecting summonses, the private character of the examination hearing, the non-publication orders that must be made where prejudice might arise, and the secrecy provisions. These features are discussed in turn below.
43. The examiner has a structured discretion to include a notation on the summons prohibiting disclosure of information about the summons.⁴⁷
- 20 44. Section 25A provides that the examination hearing will be in "private". In effect, those present will be the examiner, the witness, any legal practitioner, counsel assisting the examiner and any other person authorised by the examiner to be present.⁴⁸
45. If a person has been charged, or might be charged, the examiner must give a direction not to publish if, as *objectively* assessed, not doing so might prejudice the fair trial of that person.⁴⁹ That objective assessment must be made having regard to the power to compel answers to incriminatory questions and any consequent potential prejudice to the trial, including the forensic position of the defendant.⁵⁰ The Crime Commission's power to share the information

⁴⁷ ACC Act, s29A(1). Where the examiner is satisfied that a failure to make a non-disclosure notation would be reasonably expected to prejudice (1) the safety or reputation of a person, (2) the fair trial of a person who has or may be charged with an offence, or (3) the effectiveness of the operation of investigation, the examiner must include a notation prohibiting disclosure: s29A(2)(a). The examiner may otherwise include a notation if satisfied that a failure to do so might prejudice those three elements, or might otherwise be contrary to the public interest: s29A(2)(b) and s29A(2)(c).

⁴⁸ ACC Act, s25A(3), (4) and (5).

⁴⁹ ACC Act, s25A(9).

⁵⁰ ACC Act, s30(2).

with prosecution or investigative agencies and other bodies is limited by the direction.⁵¹ The Chief Executive, Board members, members of staff and examiners are separately subject to the requirement not to divulge information except for the purposes of the Act.⁵² Although not expressly limited by the direction, it is implicit that they may not divulge information when a direction is in force.⁵³

- 10 46. A court exercising jurisdiction in criminal proceedings may require the examiner to provide evidence from an examination to the court if it is "desirable in the interests of justice" to provide it to a person charged with an offence notwithstanding a direction of non-publication.⁵⁴ The court may then, if satisfied the interests of justice require, provide it to the person charged with the offence.⁵⁵
47. The combination of those provisions is to wholly prohibit direct use and by the non-publication orders curtail any indirect use by the Crime Commission. The court is vested with a power to require disclosure only where it is in the interests of justice to do so. That power must be exercised judicially. It must be assumed that the court would appropriately balance the interests of an accused person who had claimed the privilege with the interests of justice in disclosure.
48. A defendant is not disadvantaged in the conduct of his criminal proceedings by the fact of the examination or answers given in it. A lawful summons can only be issued where it is reasonable to do so and could not permit an examination during his trial.⁵⁶
- 20 49. The prosecution can not be forensically advantaged because the operation of a confidentiality direction prevents it from obtaining the information.⁵⁷ Further, if its officers were present at the examination they are prohibited from using the information.⁵⁸ Section 30(5) prevents the admission of evidence from the examination at trial where the witness had claimed the privilege against self incrimination.
50. The judicial process of the court is not impeded because its processes are unaffected by the examination. As discussed above, the court is empowered to deal with any breach of confidentiality obligations. Stated at its broadest the executive actions authorised by the Act can be undertaken consistently with the exercise of judicial power.

⁵¹ ACC Act, ss 12(2), 59AC.

⁵² ACC Act, s51(2)

⁵³ *Australian Crime Commission v OK* (2010) 185 FCR 258, [2010] FCAFC 61 at [109] (Emmett and Jacobson JJ).

⁵⁴ ACC Act, s25A(12).

⁵⁵ ACC Act, s25A(13).

⁵⁶ ACC Act, s28(1A).

⁵⁷ ACC Act, s25A(9).

⁵⁸ ACC Act, s51(2).

Entrenchment of criminal procedure

51. Separately, the plaintiff contends that a wide range of substantial and procedural arrangements concerning the criminal law, are entrenched in Ch III.⁵⁹ It is unnecessary to decide these matters absent there being any controversy requiring their resolution.
52. In any event, the plaintiff's case at its highest does not suggest that this legislation touches upon the presumption of innocence, the right to confront an accuser by cross examination, the standard or burden of proof, the right to hear the prosecution case before determining whether to give or adduce evidence, or the right to trial by jury and a unanimous verdict. It is accordingly unnecessary to examine the types of limits on legislative power by reason of Ch III, of the kinds referred to in obiter in *Hammond*,⁶⁰ *Dietrich*⁶¹ and *Ebner*.⁶²
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53. That *obiter* does not provide for a general identifiable test of the type contended for by the plaintiff. The extent of any such implication arising from Ch III concerning the effect of external factors on the exercise of judicial power should take account of the capacity of the courts to manage their impact. Accordingly, general statements about prohibitions on executive or administrative inquiries - of any kind - while criminal proceedings are ongoing over reach the true limit fixed by Ch III.
54. It is sufficient to observe that many of the suggested guarantees and recognised fundamental rights are not either statutory or common law requirements of the criminal law. Nor are they, save for the part of the passage replicating s80 requirements, mandated by the *Constitution*.
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55. As to the requirement established by s 80 of the Constitution, it does not give rise to the implications advanced by the plaintiff. The provision preserves only the essential features of trial by jury "with all that was connoted by that phrase in constitutional law and in the common law of England."⁶³ This Court has taken a functional rather than historical approach to interpreting s80.⁶⁴ Section 80 does not guarantee or require all of the elements of a trial by jury as that was understood at 1900.⁶⁵ As Gleeson CJ and McHugh J stated in *Brownlee v The Queen*:

⁵⁹ Plaintiff's Submissions at p 14.

⁶⁰ *Hammond v The Commonwealth* (1982) 152 CLR 188, 206, (Deane J).

⁶¹ *Dietrich v The Queen* (1992) 177 CLR 292, 337-338 (Deane J) and 362-363 (Gaudron J).

⁶² *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, [82], Gaudron J, [115] Kirby J.

⁶³ *R v LK* (2010) 241 CLR 177 at [36] (French CJ, with whom Gummow, Hayne, Crennan, Kiefel and Bell JJ agreed at [86] to [88]); *Cheatle v The Queen* (1993) 177 CLR 541 at 557-8 (The Court).

⁶⁴ *Ng v The Queen* (2003) 217 CLR 521 at [33] (Kirby J).

⁶⁵ *Cheatle v The Queen* (1993) 177 CLR 541 at 560 (The Court).

In the case of a procedure which has undergone so many changes, it is impossible to contend that all of its characteristics at any given time ought to be regarded as essential. Its history demonstrates that they are not.⁶⁶

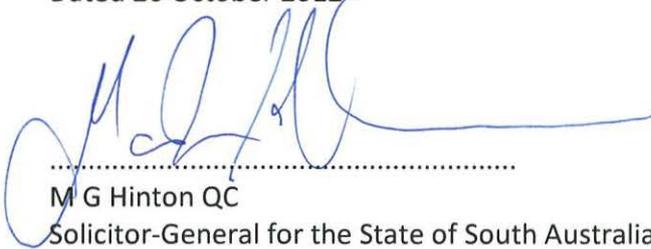
It is now accepted, for example, section 80 does not prevent an appeal on a question of law from a directed verdict to acquit⁶⁷ and a jury need not comprise 12 persons.⁶⁸ In preserving only those essential features, s80 has nothing to say about the privilege against self-incrimination in an inquiry by the Executive.

Part V: Estimated Hours

56. South Australia estimates it will require 20 minutes for presentation of its oral argument.

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Dated 26 October 2012



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⁶⁶ *Brownlee v The Queen* (2001) 207 CLR 278 at [17].

⁶⁷ *R v LK* (2010) 241 CLR 177 at [40] (French CJ); [88] (Gummow, Hayne, Crennan, Kiefel and Bell JJ)

⁶⁸ *Fittock v The Queen* (2003) 217 CLR 508 at [8] and [9] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon JJ), [19] (McHugh J), [39] (Kirby J) and *Ng v The Queen* (2003) 217 CLR 521 see particularly [29] to [50] (Kirby J).