IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No S100 of 2012

BETWEEN **X7**

Plaintiff

AUSTRALIAN CRIME COMMISSION

First Defendant

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THE COMMONWEALTH OF AUSTRALIA

Second Defendant

PLAINTIFF'S REPLY

PART I

The plaintiff confirms that these submissions in reply are suitable for publication on the internet.

PART II

The plaintiff replies to the written submissions of the second defendant as follows:

II .1 At para 15 of the second defendant's submissions the second defendant states:*"First, the ACC Act expressly contemplates that a person may be compelled to attend an examination after being charged"* i.e. an abrogation of the **Hammond** principle; and the second defendant further states: *"The person summonsed is the person whose fair trial is most at risk of being prejudiced by the failure to give a direction. .Accordingly, s25A(9)) cannot be read down to address only the fairness of the trial of a person other than the person charged with the offence"* The plaintiff

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submits this construction of s25A(9) of the ACC Act is misconceived because in practical reality other ways can be contemplated whereby a charged person pending trial may be prejudiced by publication of evidence obtained by coercive interrogation e.g.: the *"person"* whose fair trial may be prejudiced within the meaning of s25A(9) may not be the person actually examined by the Commission.

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II.2 At par 17 the second defendant states: *"The repeal of s30 (10) indicates an intention to remove the restriction preventing a witness from being compelled to give self-incriminating answers with respect to an offence charged"* The legal purpose of s30(10) of the NCA Act was to circumscribe or control the examination of a person charged with an offence. Section 30(10) recognised a person's due process rights before the court. The mere fact the s 30(10) is absent from the current ACC Act does not, ipso facto, indicate that the legislature abrogated the **Hammond** principle because a scrutiny of the legislative history of the ACC Act reveals that none of the reading speeches suggest the reason for reforming s30 was to permit interrogation of a person before the Commission on the very offence(s) charged. Further the Parliamentary Joint Committee inquiry into the National Crime Commission Amendment Bill 2000 noted: *"Currently if a person claims to have a reasonable excuse for failing to answer a question one possible reasonable excuse is that the answer to the question might tend to incriminate the person. Whether or not that claim is reasonable can result in court challenges and delay. Removing reasonable excuse would have the consequential effect of removing this avenue for collateral attack. However the removal would not impact on the ability of an alleged offender to raise any defence or justification for failing to answer the question when defending the substantive charge*"

II.3 At para 16 the second defendant submits: *"Accordingly if the ACC Act does not authorise questioning after charge that must be the result of an implied limitation. But such an implied limitation would be inconsistent with both the express terms of the Act and with the purpose of the Act."*The plaintiff submits that the terms of s25A (9) are not express given the fact parliamentary speeches and joint committee proceedings do not contain a single reference to post charge questioning. There is no evidence that Parliament ever contemplated authorising post charge questioning upon charge. It would appear that the issue of post charge questioning was first raised in the 2005 Joint Committee review of the Act .It is recorded that Kerr MP said: *"...in 18 years in this Parliament of which I have always either been on this committee on its predecessor committee or a minister, I have never heard the suggestion that the powers would be used in such a way*" (Parliamentary Joint Committee review of the ACC Act 2002- 7/10/2005)

II.3 At Para 18 the second defendant submits that: *"The immunity provided by ss 30(4) and 30(5) eliminates the major way in which an ACC examination might*

otherwise affect the trial of a person who is subject to pending criminal proceedings". The plaintiff submits that in **Hammond** there was also available use immunity and privacy during the examination under the Royal Commission Act however that did not prevent the High Court from detecting a *"real risk"* or *"likelihood"* that the curial process would be interfered with and in the opinion of Deane J - an interference with the investing of jurisdiction pursuant to s77iii of the Constitution.

II.4 In para 19.2 the second defendant makes two points namely: *"a failure of an examiner to give adequate direction remediable by, at least, mandamus"* and *"the obligation under s 25A (9) to give a direction does not rest on an evaluative judgment"* The mandate to make a direction in terms of s25A (9) if the examiner's prognosis is that not to do so will make a person's trial unfair still depends upon a value judgement by the examiner. The fairness of a person's trial will still be exposed to the evaluative judgments of the staff of the ACC as to what use can permissibly be made of coerced evidence without infringing the terms of the examiner's publication order. Presumably all this would occur in the absence of the witness and render any prerogative remedy such as mandamus "pie in the sky".

II.5 in para 22 the second defendant submits Section 25A(9) is to be regarded as the leading provision to which s12(1) is subservient and gives 3 examples: The plaintiff submits that if the purpose of 25A(9) was to quarantine the evidence of the charged person then what is the point of examining that person at all given that the purpose of the s12(1) of the Act and generally is to accumulate criminal intelligence and use that intelligence for the purpose of investigating and defeating federally related criminal activity?.Is the short answer that s 25A (9) has nothing to do with post charge interrogation upon charge?

II.6 in para 38 the second defendant submits in essence that the ACC Act empowers an examiner to interrogate a person about the very charges because there is no *"real risk"* to parallel curial proceedings. The AG for South Australia submits that the plaintiff's allegations of risk are theoretical. The plaintiff submits that the practical reality of prejudice arises from derivative use of evidence capable of providing evidential or forensic advantages. There does not appear to be any treatment by the majority judges in **ACC v OK (2010)268ALR281** and the NSW Court of Criminal Appeal in **CB&MP v R NSWCCA 264 (9/12/2011)** to suggest how the Act prevents derivative use of evidence obtained post charge. Neither the second defendant nor the interveners appear to deny that derivative use is available by operation of the ACC

Act. In practical terms a person is likely never to be in a position to know or appreciate what happens to the evidence once the Commission concludes its interrogation. Further there is interference through conferring upon the examiner, a non judicial officer, a determination whether a person's CHII trial will or will not be fair. This responsibility can only ever reside with the closed category of courts vested with the exercise of Commonwealth judicial power in s71 of the Constitution.

II.7 The second defendant's reliance on **Hamilton v Oades (1989) 166 CLR 486** is misconceived: In **Hammond** the Court was alive and sensitive to curial interference by the executive and contempt by the executive of the curial process. **Hamilton v Oades** was not a CHIII case. In **Hamilton v Oades** the examination was not conducted by the executive but by a superior court and was for the limited purpose of assisting a liquidator to examine the affairs of a company in liquidation. The examination was not interested in any detailed inquiry into any offences charged against the respondent with the court retaining control over prejudicial questioning, as the Chief Justice, Mason J, noted at p 498 supra: *"The court retains its power to give directions and to restrain questions in cases where the examination is being conducted for an improper purpose or constitutes an abuse of process"*. No issue of contempt of court arose in **Hamilton** because a court cannot be in contempt of itself whereas in **Hammond** the interference was a contempt of court thus the respective examinations in **Hammond** and later in **Hamilton** raised different issues for consideration. In passing it should be noted that **Hamilton** was of course pre the **Kable doctrine** and thus no question arose concerning whether a State court empowered by State legislation to engage in coercive interrogation upon the very offences charged was incompatible with its CHIII institutional status as a repository of federal judicial power.

II.8 The second defendant at para51 footnotes **Chu-Kheng Lim v Min. for Immigration (1992)176CLR1 at p27**, as an authority dealing with the question of the Commonwealth's legislative incompetence to require or authorize courts to exercise judicial power in a manner which is inconsistent with the essential character of a court. Historically there is powerful support in the cases for the proposition that the Parliament of the Commonwealth is legislatively incompetent to enact laws that derogate from the jurisdiction which the Constitution invests in the courts identified in CHIII and channelled through s77iii in respect of State courts. These propositions emerge primarily from the separation of powers doctrine arising from the structure of

the Constitution and maintenance of the institutional integrity of the courts constitutionally responsible for the exercise of the judicial power of the Commonwealth in s71 of the Constitution; **Huddart Parker v Moorehead (1909) 8 CLR 330 379-80 per O'Conner J; Melbourne Steamship Co Ltd v Moorehead (1912)15 CLR 333 per Griffith CJ at 341 Barton J at 346; Victoria v ABEC&BLF(1982) 152 CLR 25 per Murphy J at 105; per Brennan J at 161-3; Hammond per Deane at 206-207; Re Tracy Ex parte Ryan (1989)166 CLR 518 per Deane J at 580; Street v Qld Bar Association (1989)168CLR461 per Deane J at 521, Re Nolan Ex parte Young (1991) 172 CLR 460 per Gaudron J at 497, Leeth v R (1992)174 CLR 455 Deane &Toohey JJ at 486-7; Dietrich vR (1992) 177 CLR 292 per Deane at 326;EPA v Caltex Refining Ltd Pty (1993)477per Deane, Dawson, Gaudron, JJ at 528**

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