Supreme Court
New South Wales
Common Law Division

Case Title:	R v Seller R v McCarthy
Medium Neutral Citation:	[2012] NSWSC 934
Hearing Date(s):	29/03/2012-30/03/2012, 02/04/2012
Decision Date:	17/08/2012
Jurisdiction:	Criminal
Before:	Garling J
Decision:	(1) Order that any proceedings on the indictments presented on 14 March 2012 against Ross Edward Seller and Patrick David McCarthy, be, and hereby are, stayed. (2) Order that the Commonwealth Director of Public Prosecutions pay the applicants' costs of the applications, except the costs of preparing and copying Exhibits PH5, PH6 and PH7. (3) Order that the Australian Crime Commission pay its own costs of the proceedings.
Catchwords:	PRACTICE AND PROCEDURE – Application for permanent stay – Charge of conspiracy with intention of dishonestly influencing Commission of Taxation – Criminal Code Act s 135.4(7) - Examination pursuant to s 28 of Australian Crime Commission Act 2002 – Claim for self-incrimination under s 30 – Non-publication direction given – Transcripts of examinations provided to CDPP contrary to direction for one accused – Transcripts contained factual matters central to criminal charge – Evidence solicitor for CDPP did not

read transcripts - Other communication between CDPP and ACC – Updates, advice, briefing papers — Principal ATO investigator attended examinations and read transcripts – Significant and central witness at future trial – Whether real risk that relevant ACC information communicated to the prosecution – Whether fair trial possible – Whether permanent stay should be granted – Stay granted

Legislation Cited:

Australian Crime Commission Act 2002 (Cth)
International Covenant on Civil and Political Rights
Bill of Rights Act 1990 (NZ)
Crimes Act 1914 (Cth)
Criminal Code Act 1995 (Cth)
Mutual Assistance in Criminal Matters Act 1987 (Cth)

Cases Cited:

A v Boulton [2004] FCA 56; (2004) 204 ALR 598
A v Boulton [2004] FCAFC 101; (2004) 136 FCR 240
Australian Crime Commission v OK [2010] FCAFC 61; (2010) 185 FCR 258
Batistatos v Roads and Traffic Authority of NSW (NSW) [2006] HCA 27; (2006) 226 CLR 256
Blatch v Archer (1774) 1 Cowp 63; 98 ER 969
Collins v R [1975] HCA 60; (1975) 133 CLR 120
Dupas v R [2010] HCA 20; (2010) 241 CLR 237
Environment Protection Authority v Caltex Refining Company Pty Ltd [1993] HCA 74; (1993) 178 CLR 477
Hamilton v Oades [1989] HCA 21; (1989) 166 CLR 486
Hammond v The Commonwealth [1982] HCA 42; (1982) 152 CLR 188
Huddart Parker & Co Pty Ltd v Moorehead [1909] HCA 36; (1909) 8 CLR 330
Mansfield v Australian Crime Commission [2003] FCA 1059; (2003) 132 FCR 251
Moevao v Department of Labour [1980] 1 NZLR 464
Moti v R [2011] HCA 50; (2011) 86 ALJR

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MP v R; CB v R [2012] HCA Trans 162 (22 June 2012)
North Ganalanja Aboriginal Corporation & The Waanyi People v Queensland [1996] HCA 2; (1996) 185 CLR 595
NSW Food Authority v Nutricia Australia Pty Ltd [2008] NSWCCA 252; (2008) 72 NSWLR 456
People v Defore 242 NY 13; 150 NE 585
Quinn v United States (1955) 349 US 155 [99 L. Ed. 964]
R v CB, MP v R [2011] NSWCCA 264
R v Glennon [1992] HCA 16; (1992) 173 CLR 592
R v Sang [1980] AC 402; [1979] 3 WLR 263
Rees v Kratzmann [1965] HCA 49; (1965) 114 CLR 63
Rogers v R [1994] HCA 42; (1994) 181 CLR 251
RPS v R [2000] HCA 3; (2000) 199 CLR 620
Sorby v The Commonwealth [1983] HCA 10; (1983) 152 CLR 281
Stoddart v Boulton [2010] FCAFC 89; (2010) 185 FCR 409
Ullmann v United States [1956] 350 US 422 [100 L. Ed. 511]
Vetter v Lake Macquarie City Council [2001] HCA 12; (2001) 202 CLR 439
Warren v Attorney-General for Jersey [2011] UKPC10; [2012] 1 AC 22
Weissensteiner v R [1993] HCA 65; (1993) 178 CLR 217
Williams v Spautz [1992] HCA 34; (1992) 174 CLR 509

Category: Procedural and other rulings

Parties:
Crown (respondent)
Ross Edward Seller (applicant)
Patrick David McCarthy (applicant)
Australian Crime Commission (amicus curiae)

Representation

Counsel:
D J Fagan SC, P R McGuire (Crown)
H K Dhanji SC (Seller)
I H McClintock SC, P Bruckner (McCarthy)
S Maharaj QC (amicus curiae)

	Solicitors: Solicitor for Public Prosecutions (Cth) (Crown) Speed & Stracey Lawyers (Seller) Hardinlaw Lawyers (McCarthy) Australian Government Solicitor (amicus curiae)
File number(s):	2009/237556 2009/237509

JUDGMENT

INTRODUCTION

1 On 14 March 2012, the Commonwealth Director of Public Prosecutions ("CDPP") presented an indictment to this Court which charged that Ross Edward Seller and Patrick David McCarthy:

> "Between about 24 May 2001 and about 30 December 2002, at Sydney in the State of New South Wales and elsewhere, did conspire with each other and divers other persons with the intention of dishonestly influencing a Commonwealth public official, namely the Commissioner of Taxation, in the exercise of his duties as a public official."

2 The offence charged was one contrary to s 135.4(7) *Criminal Code Act* 1995 (Cth).

3 The Crown alleges that each of Mr Seller and Mr McCarthy, together with a Mr Phillip Egglishaw and a Mr Philip de Figueiredo, entered into an agreement to make false representations to officers of the Australian Taxation Office ("the ATO") with the intention of dishonestly influencing them to approve and accept deductions claimed in the 1999, 2000 and 2001 income tax returns of tax payers who had participated in particular schemes involving the distillation of whisky in those years ("the whisky schemes").

4 The Crown alleges that the representations which were made by Mr Seller and Mr McCarthy were to convey false and misleading information regarding:

(a) the association of each of Mr Seller and Mr McCarthy with, and the relationship between, the entities involved in the whisky schemes;

(b) Chambers Finance Ltd; and

(c) Grant McKenzie Hong Kong Ltd.

5 In 2005, the Australian Crime Commission ("Crime Commission") commenced an investigation into the activities of Mr Seller and Mr McCarthy which lasted for some years. During the course of this investigation, both Mr Seller and Mr McCarthy gave evidence under oath in response to a summons that had been served upon them. The examination was conducted pursuant to s 28 of the *Australian Crime Commission Act* 2002 (Cth) ("the ACC Act").

6 In October 2009, Court Attendance Notices were issued to Mr Seller and Mr McCarthy in which it was alleged that each had engaged in a conspiracy to defraud the Commonwealth of Australia contrary to s 29D and s 86 of the *Crimes Act* 1914 (Cth), and a further charge to similar effect contrary to s 135.4(7) of the *Criminal Code Act* (Cth). On 25 November 2010, Mr Seller and Mr McCarthy were committed to stand trial.

7 After being arraigned in this Court, each of Mr Seller and Mr McCarthy filed motions in this Court seeking orders that the trial of the indictment against each of them be permanently stayed.

8 At the hearing of these motions, the CDPP was represented by Mr D Fagan SC and Mr McGuire of counsel. Mr I McClintock SC appeared with Mr P Bruckner for Mr McCarthy. Mr H Dhanji SC appeared for Mr Seller.

9 At the commencement of the hearing, a number of issues arose with respect to production of documents pursuant to subpoenas that had been served by the applicants on the CDPP, and also the Crime Commission. In dealing with those issues, Ms Maharaj QC appeared for the Crime Commission. These issues were resolved between the parties, without the need for the delivery of any judgment.

10 During the course of the hearing of these motions, Ms Maharaj QC sought leave for the Crime Commission to either intervene in the applications, or, alternatively, leave to appear as amicus curiae in the applications. Ms Maharaj QC informed the Court that the extent of the Crime Commission's participation, on either basis, was that it would provide the Court with written submissions and provide any oral elucidation of those submissions if that was required by the Court.

11 None of the parties opposed leave being granted to the Crime Commission to either intervene or be heard amicus curiae. I granted leave to the Crime Commission to be heard, to the limited extent indicated, as amicus curiae. In accordance with its application, the Crime Commission filed written submissions in respect of the applications.

12 For the reasons which follow, I have decided that I should uphold the application for a permanent stay of the criminal proceedings, and grant the stay of the indictment which the applicants seek.

Chronology of the Conduct of the Crime Commission

13 Ms Sharp, a senior financial investigator at the Crime Commission, is presently the case officer for this investigation. This chronology is largely drawn from her evidence, which I accept.

14 In May 2004, the Crime Commission commenced a special investigation named "Operation Wickenby". It was a joint Crime Commission and ATO investigation into suspected tax fraud and money laundering by Australian

taxpayers who or which had used services provided by a company called Strachans SA ("Strachans") which was based in the Channel Islands.

15 As a part of Operation Wickenby, the Crime Commission commenced an investigation, in March 2005, into the activities of Mr Seller and Mr McCarthy. This particular investigation was named "Operation Polbream" by the Crime Commission.

16 In 2005, after Operation Polbream had been commenced, the Crime Commission set about the gathering of various documents that were thought to be relevant. It obtained files from Strachans, having made a request to the relevant Swiss authority pursuant to the *Mutual Assistance in Criminal Matters Act* 1987 (Cth). On 9 June 2005, search warrants were executed at the residential and business premises of Mr Seller and Mr McCarthy. Other search warrants were executed on other premises during 2005.

17 From 14 August 2006 through to 23 April 2007, the Crime Commission examined 22 witnesses. The examinations were recorded and transcripts prepared.

18 The Crime Commission examined Mr McCarthy for four days over the period 14 May 2007 to 17 May 2007 (inclusive), on 30 July 2007, and again for two days over 12 and 13 September 2007.

19 Mr Seller was examined on 31 July 2007 and again for two days over 13 and 14 September 2007.

20 During August 2007, the Crime Commission examined four further witnesses. The last examination of the final witness by the Crime Commission occurred on 1 November 2007.

21 Thus it can be seen that, with the exception of this final witness, all other examinations occurred prior to September 2007, when each of Mr McCarthy and Mr Seller were last examined over a two day period.

22 During Operation Polbream, four case officers at the Crime Commission have been involved. They were, and are:

(a) March 2005 – October 2006 - Stephen Economou;

(b) October 2006 – 22 December 2009 - Elizabeth Simpkin;

(c) December 2009 – 21 July 2011 - Georgina Wade; and

(d) 21 July 2011 to date - Paula Lee Sharp.

23 Mr Quincy Tang, an officer of the ATO, was seconded during 2005 to the Crime Commission. He attended and participated in a search of Mr McCarthy's premises in 2005, and was present in the hearing room during the examination of Mr McCarthy on a number of days. On other days, although he was not physically present in the hearing room whilst Mr McCarthy was being examined, he was able to observe the examination as it was happening from a separate room. Mr Tang described his attendance at the examination of Mr McCarthy as being appropriate, and in order that he, Mr Tang, could perform the task of financial analysis that was allotted to him, within the Crime Commission, in respect of the investigation into Mr McCarthy and Mr Seller.

24 In addition to clarifying for the investigators the nature of the transactions involved in the whisky schemes, Mr Tang also prepared financial reports prior to the examinations in May 2007 which, I am satisfied, were provided together with various financial records, transactional records and the like, to Mr Bonnici whose task it was to conduct the examination of Mr McCarthy and Mr Seller.

25 Mr Tang agreed that it was of interest to, and relevant for, him to cross-check the analysis which he had undertaken from documents with the

evidence given by Mr McCarthy, with respect to the whisky schemes. I am satisfied that this cross-checking also involved checking the evidence given by Mr Seller.

26 Mr Tang attended a significant number of the examinations of Mr McCarthy as part of his duties in the Crime Commission. He is now one of the witnesses upon whose evidence the Crown will rely at the trial.

27 Mr Tang has had access to the transcripts of examination of Mr McCarthy, although he may not have accessed all of them. He has been given access to transcripts of the examinations of all other witnesses examined by the Crime Commission. Although he could not recall with precision which transcripts of Mr McCarthy's examinations he had had access to, he was able to say that he had had access to such transcripts as he had requested. The same situation applies to the transcript of the examination of Mr Seller.

28 I am satisfied that the reality is, with respect to Mr McCarthy and to Mr Seller, that Mr Tang attended or else observed and listened to most of the examinations conducted by the Crime Commission of Mr McCarthy and Mr Seller. He had access to all of the transcripts of those examinations, and he had read some of those transcripts although the evidence does not permit a finding as to which ones. His access to the transcripts was for the purpose of undertaking his duties with the Crime Commission and ultimately to inform any of the evidence which he may give at the trials of Mr McCarthy and Mr Seller.

29 Mr Tang left the Crime Commission and returned to the ATO in 2009.

30 After he returned to the ATO, Mr Tang viewed transcripts of a number of the examinations of witnesses. His purpose in so doing was to establish financial transactional material. He could not recall in his evidence whether this included the transcript of Mr McCarthy's and Mr Seller's evidence. On the probabilities, having regard to the nature of his ongoing

duties and the content of his statements of evidence, I am satisfied that they did.

The Compulsory Examination of Mr McCarthy

31 The first examination took place on 14 to 17 May 2007. This examination was pursuant to a summons which required McCarthy to attend before an examiner:

> "to give evidence of federally relevant criminal activity involving:
>
> (i) defrauding the Commonwealth contrary to section 29D of the *Crimes Act* 1914 (Cth) through tax evasion; and/or
>
> (ii) obtaining property or financial advantage by deception contrary to sections 134.1 and 135.4 of the *Criminal Code Act* 1995 (Cth); and/or
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> (iii) money laundering within the meaning of the *Proceeds of Crime Act* 1987 and the *Criminal Code Act* 1995 (Cth); and/or
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> (iv) Dealing with Money or other property contrary to s 400.4 of the *Criminal Code Act* 1995 (Cth), namely dealing with money or other property valued at $100,000.00 or more, knowing it to be proceeds of crime."

It is to be observed that the summons permitted an examination in respect of the offence under s 135.4 of the *Criminal Code Act* (Cth), with which he is now charged.

32 At the commencement of the examination on 14 May 2007, and after McCarthy had taken an oath, the Examiner, Mr Sage, outlined the procedure to Mr McCarthy saying the following:

> "I'll also tell you your rights and obligations under the *Australian Crime Commission Act*. The Act provides that you must answer all questions that I require you to answer and you must produce all documents or things that I require you to produce. There is no relief from that obligation ... You must answer the questions and produce documents or things that are required of you even if they may tend to incriminate you or render you liable to a penalty. However, the *Australian Crime Commission Act* provides protection for you from self-incrimination in this way. If you believe that an answer to a question or a document or thing that is required of you might tend to incriminate you or render you liable to a penalty, you may tell me so before you answer the question

> and before you produce any document or thing. By so doing, you will be making a claim of self-incrimination, and as a consequence of making that claim, the answer that you must give and the document or thing that you must produce, will not be admissible against you in proceedings for a criminal offence or for the imposition of a penalty ... You should also understand and appreciate that there is no adverse inference to be drawn from the fact that you might claim self-incrimination in this examination. It is your right to do so if you have a concern or a fear about the question or questions that you are being asked."

33 The Examiner then turned to Mr Hartnell, a lawyer who was representing Mr McCarthy, and said this:

> "Mr Hartnell, it is my practice at this time to offer the witness an opportunity to make a claim for self-incrimination, thereafter I would make an order which protects him for the entirety of his evidence rather than he or you needing to be concerned about each question that is being asked. Is that something that you have considered with your client?"

Mr Hartnell responded on behalf of Mr McCarthy that he wished to make such a claim. The Examiner then continued:

> "In response to your claim of self-incrimination through Mr Hartnell, I make the following order. The order is pursuant to subsection 5 of section 30 of the *Australian Crime Commission Act* that the evidence of this witness is not admissible in evidence against him in any criminal proceedings or a proceeding for the imposition of a penalty other than in confiscation proceedings or a proceeding in respect of, in the case of an answer, the falsity of the answer, or in the case of the production of a document, the falsity of any statement contained in the document. Mr McCarthy, that order gives you the protection that I've spoken about, but I now need to remind you that you must give truthful evidence in this examination ..."

34 At the conclusion of the day's proceedings, the Examiner indicated that he would be giving a detailed non-publication direction in due course, but directed that for the duration of the examination there was to be no communication of the contents of the examination to anybody other than those who were present.

35 At the conclusion of the examination on 17 May 2007, the Examiner gave a direction pursuant to s 25A(9) of the ACC Act which entirely restricted

the publication of the evidence given by Mr McCarthy, the contents of the documents and the description of any things which he produced to the Crime Commission, except to:

(a) the Chief Executive Officer, the Examiner and members of staff of the Crime Commission;

(b) any prosecution authority and the staff of any such authority for any matter including a prosecution for which they are responsible arising from this investigation;

(c) the Australian Taxation Office and the Australian Securities and Investment Commission for any matters within their jurisdiction arising from this investigation.

36 The second examination of Mr McCarthy took placed on 30 July 2007.

37 Again, it was pursuant to a summons, which nominated the offences to which I have earlier made reference. At the commencement of the examination, Mr Hartnell indicated, consistently with what had occurred in May 2007, that his client made a claim for self-incrimination. The Examiner made a further order in the same terms as he had made in May 2007.

38 At the conclusion of the examination on 30 July 2007, the Examiner indicated that he proposed to formally adjourn the examination until September and directed that during the adjournment there was to be no communication about the examination or its contents to anyone other than those persons present in the room. He indicated that he would give a formal order dealing with disclosure at the conclusion of the September examination.

39 The third examination occurred on 12 and 13 September 2007.

40 Again, Mr McCarthy appeared pursuant to a summons in the same form as previously. The Examiner noted at the commencement of the examination that the orders and directions that he had given on previous occasions

> "particularly the order in relation to Mr McCarthy's claim for self-incrimination continues for this further examination."

41 Because he was requested so to do by counsel assisting, the Examiner made a further formal order reflecting that which he had earlier given which recorded that Mr McCarthy had made a claim against self-incrimination and he had been ordered pursuant to s 30(5) of the ACC Act to answer all questions posed to him during this examination.

42 This examination continued until 13 September 2007.

43 At the conclusion of the examination on that day, the Examiner said this:

> "I am going to give a non-publication direction in relation to the evidence that you have given on every occasion that you have been before the Commission including the last two days, the 12th and 13th of September. The direction I give is under subsection 9 of s 25A of the *Australian Crime Commission Act*. I direct that the evidence given by Patrick David McCarthy, the contents of the document, and the description of any things produced to the Commission during this examination, any information that might enable the witness to be identified and the fact that he has given evidence at this examination shall not be published except to the Chief Executive Officer, the Examiners and members of staff of this Commission. Members of staff of the Commission includes the head of the special investigation under which you have been examined. ... and also the Australian Taxation Office for any matter within its jurisdiction arising from this investigation."

44 This direction was clearly by its terms intended to replace all earlier directions given at the conclusion of Mr McCarthy's evidence from time to time.

45 The terms of this order did not permit disclosure of the fact of the examination nor the contents of it, including the transcript of the examination, to the CDPP. Accordingly, any such disclosure after that time was absolutely prohibited. Disclosure of the fact of the examination

had occurred by this time, but there had been no disclosure of the transcript at the earlier examination in May 2007.

46 Section 25A(10) of the ACC Act permits the Chief Executive Officer of the Crime Commission, or his delegate, to vary the non-publication direction given by an examiner.

47 With respect to Mr McCarthy's evidence there were a number of variations. Some of those variations occurred during 2007, and it is not necessary to record the detail, as it is not relevant to the events in these applications.

48 On 22 August 2008, Mr Peter Brady, Senior Legal Adviser to the Crime Commission, an authorised delegate of the Chief Executive Officer, varied the directions given by the Examiner, so far as Mr McCarthy was concerned, so as to permit the distribution of the evidence given during his first examination in May 2007, to the Australian Federal Police, the ATO, the Australian Securities and Investments Commission and "prosecution authorities". This variation did not deal with the evidence which Mr McCarthy had given in July or September 2007.

49 On 10 March 2009, a further variation was made by Mr Brady which had added to the authorised publication, the following:

> "Publication of the information is subject to the restrictions on use in ss30(5) of the ACC Act and the information may not be publicly released."

50 The purpose and intention of this variation, which seems merely to note the existence of statutory restrictions which the delegate did not have the power to waive, is somewhat elusive.

51 The final variation was made on 6 March 2012 by Ms Jacqueline Thompson, the Acting National Manager of Legal Services of the Crime Commission. She was also a delegate of the Chief Executive Officer of the Crime Commission. She varied all of the previous directions which

had been given by the Examiner including all previous variations, so as to authorise publication in the following way:

> "Subject to paragraph 5, the information ..., may only be published to:
>
> (a) the Chief Executive Officer, Examiners and members of the staff of the ACC (and lawyers engaged) and
>
> (b) the following agencies (and staff thereof and lawyers engaged) namely AFP, ATO, ASIC and AUSTRAC;
>
> (c) any prosecution authority (and staff thereof and lawyers engaged), any court (and staff thereof), and any legal representative of the witness **for use in connection with any criminal proceedings brought against the witness**.
>
> 4. ...
>
> 5. Publication of the information and edited information is subject to the following:
>
> (a) **the restrictions on use in sub-section 30(5) of the ACC Act**;
>
> (b) It **may not be publicly released**; and
>
> (c) it **may not be considered as part of any proposed adverse administrative action** without prior consultation with the ACC." (Emphasis added)

It is observed that the final variation was given after the arraignment of Mr McCarthy and shortly prior to the scheduled commencement of his trial. By this time, all of the distributions of information that were relied upon by the applicants in this application, had taken place.

52 The transcripts of each of the compulsory examinations of Mr McCarthy were tendered and became an exhibit in these proceedings.

53 Counsel for the CDPP made it clear that in the course of, and for the purpose of, these proceedings, he had not read the transcripts, and did not propose to. He did not make any reference to or submission about, the contents of these transcripts. Counsel for Mr McCarthy drew attention to the content of the transcripts generally and to a number of specific pages.

54 Accordingly, it was necessary for the Court to read the entirety of the transcripts, as the content of them was being relied upon to ground the relief in question. The same applied with respect to the transcripts of the examinations of Mr Seller.

55 However, the transcripts of all of the other compulsory examinations undertaken by the Crime Commission were also tendered. Neither of the applicants, nor the CDPP, referred to any of that evidence, nor sought to rely upon it in any way in submissions. Accordingly, I have not undertaken the task of reading that material, which runs to many hundreds of pages. No party has suggested that I ought to have done so, nor that it was necessary in order to determine the issues. The tender of the volumes of these documents was unnecessary.

56 Having read the transcripts of the compulsory examination of Mr McCarthy, it is appropriate that I note the specific contents of them insofar as the contents relate directly to the subject matter of the charges, or matters that may be relevant to the defence of Mr McCarthy.

57 However, in order to avoid disclosing the contents of the actual answers which Mr McCarthy gave, and the questions which he was asked, any further than is essential for the determination of the issues joined in these applications, I will refer to the compulsory examinations by reference to a table which briefly records the nature and subject matter of the questions which Mr McCarthy was asked.

58 The transcript of the examinations of Mr McCarthy contain the complete details.

Item	Date	Exh 3 pg	Content
1	14/5/07	55	Payments made by Grant McKenzie Hong Kong Pty Ltd ("GMHK") to Mr McCarthy and associated entities, including the nature and purpose of the payments.
2	14/5/07	117	Mr McCarthy's knowledge of, and relationship with, Mr Robert Speirs, and the ownership as at 2007 of Chambers Finance Pty Ltd and GMHK.
3	14/5/07	119-23	Background to and commencement of involvement of Mr

			McCarthy and Mr Seller in the whisky ventures.
4	14/5/07	124-32	GMHK, its inception, role, legal and beneficial ownership including the role of Strachans.
5	14/5/07	133	Honesty of Mr McCarthy and Mr Seller in relation to the ownership of GMHK.
6	14/5/07	140	Dealings of Mr McCarthy and Mr Seller with Strachans.
7	14/5/07	141	The ownership, control and use of Australian Spirit Management Pty Ltd.
8	14/5/07	146-50, 155-56, 161-163	The inception, ownership, control and use of Chambers Finance.
9	15/5/07	190	Beneficial ownership of Chambers Finance.
10	15/5/07	207ff	Outline and description of the whisky ventures including the preparation of and diagrammatic outline of each venture.
11	15/5/07	246-249	Fees and commissions charged by GMHK, and Mr Robert Speirs including the disclosure (or lack of it) to investors of these fees.
12	15/5/07	253-255, 260-265, 277-284	Reasonable commerciality of the terms upon which Chambers Finance participated in the whisky ventures, including advancing loans and the participation of other entities.
13	15/5/07	285-287	Elements of deception in the whisky ventures and the honesty of Mr McCarthy as a promoter of the scheme.
14	15/5/07	290-297	The commerciality and rationality of the whisky ventures.
15	16/5/07	322-333	Outline and description of the whisky venture and essential steps for their functioning.
16	16/5/07	384-386	Dishonesty associated with payments to Mr Conklin and associated entities.
17	16/5/07	364-415	Specific questions relating to the authorship, knowledge of, and contents of a large volume of documents and emails involving a variety of steps in each of the whisky ventures.
18	17/5/07	474	Role of Mr McCarthy in undertaking the work of GMHK.
19	17/5/07	602-607	Explanation by reference to documents of the source and destination of payments made under the whisky ventures.
20	12/9/07	712-714	Honesty of dealings with investors and retained counsel.
21	12/9/07	747	Ownership and control of GMHK.
22	12/9/07	753-754	Beneficial ownership of GMHK.
23	12/9/07	781-794	Role of Chambers Finance and Strachans including correspondence from Mr McCarthy and Mr Seller.

59 This necessarily brief summary is sufficient to conclude that the compulsory examination of Mr McCarthy touched upon factual matters, the proof of which are necessary to sustain the criminal charge.

60 The examination also covered his view, and understanding, of the nature and structure of the arrangements, including the roles and functions of each of the relevant entities, and whether the ventures were accompanied by features of dishonesty.

61 These were matters about which Mr McCarthy had a right to silence and which engaged his privilege against self-incrimination generally, and also in respect of the specific charge which he now faces. As well, these are matters which may be relevant to any defence which he advances at trial.

The Compulsory Examination of Mr Seller

62 Mr Seller was examined on the first occasion on 31 July 2007. This examination was pursuant to a summons which required Mr Seller to attend before an examiner:

> "to give evidence of federally relevant criminal activity involving:
>
> (i) defrauding the Commonwealth contrary to section 29D of the *Crimes Act* 1914 (Cth) through tax evasion; and/or
>
> (ii) obtaining property or financial advantage by deception contrary to sections 134.1 and 135.4 of the *Criminal Code Act* 1995 (Cth); and/or
>
> (iii) money laundering within the meaning of the *Proceeds of Crime Act* 1987 and the *Criminal Code Act* 1995 (Cth);
>
> (iv) dealing with money or other property contrary to section 400.4 of the *Criminal Code Act* 1995 (Cth), namely dealing with money or other property valued at $100,000 or more, knowing it to be proceeds of crime."

It is to be observed that the terms of the summons were identical with that delivered to Mr McCarthy.

63 Mr Seller was represented by Mr Hartnell at this examination. Mr Hartnell had, as I have noted, previously represented Mr McCarthy at earlier examinations.

64 Mr Bonnici who appeared to assist the Examiner, took objection to Mr Hartnell appearing and submitted that leave ought not be granted to enable him to represent his client Mr Seller. The Examiner considered a set of confidential submissions that were provided to him by Mr Bonnici, but which were not provided to Mr Hartnell.

65 Having considered the question, the Examiner concluded the following:

> "I am of the view that there is a real risk of inadvertent disclosure of information so as to compromise this special investigation and therefore I have concluded on reasonable grounds, and in good faith, that to allow Mr Hartnell to represent Mr Seller at this examination will, or is likely to, prejudice the special investigation being conducted by this Commission and I reserve the right to prepare detailed reasons if necessary."

As a consequence, the examination of Mr Seller was adjourned to 13 September 2007, without any evidence being taken.

66 On that occasion, Mr Seller again appeared pursuant to a summons in terms similar to that which I have set out above. He was represented by another solicitor from the firm Atanaskovic Hartnell, Ms Hillman. A condition of Ms Hillman's leave to represent Mr Seller was, identically with that of Mr Hartnell for Mr McCarthy, that they were not entitled to keep any notes of the examination and that all notes which they made in the course of the examination either had to be destroyed or else kept in a sealed envelope by the Crime Commission. The statutory basis for this condition was not identified in the submissions to this Court. But as there was no issue before me that required the determination of the validity of this somewhat curious direction, and no submissions were received about it, it is unnecessary to comment further.

67 After Mr Seller was sworn, and having identified himself and his place of work, the Examiner then addressed him in these terms:

> "I'll also tell you your rights and your obligations under the *Australian Crime Commission Act*. The Act provides that you must answer all questions that I require you to answer and you must produce all documents or things that I require you to produce. There is no relief from that obligation. ... You must answer the questions and produce documents or things required from you even if they may tend to incriminate you or render you liable to a penalty. However, the *Australian Crime Commission Act* provides you protection from self-incrimination in this way. If you believe that an answer to a question or a document or thing that is required from you might tend to incriminate you or render you liable to a penalty, you may tell me before you answer the question and before you produce any document or thing. In so doing, you'll

be making a claim of self-incrimination and as a consequence of making that claim, the answer that you must give and the document or thing that you must produce, will not be admissible against you in proceedings for a criminal offence or for the imposition of a penalty. ..."

68 The Examiner then addressed Ms Hillman, Mr Seller's lawyer, and said this:

> "However, Ms Hillman, at this point I am prepared to offer Mr Seller an opportunity to claim self-incrimination through you, thereafter I would make an order which protects him for the entirety of the evidence rather than having to object to each question."

69 Ms Hillman responded that Mr Seller wished to make such a claim. Thereupon the Examiner said:

> "I'll make an order pursuant to subsection 5 of section 30 of the *Australian Crime Commission Act* that the evidence of this witness is not admissible in evidence against him in any criminal proceedings or a proceeding for the imposition of a penalty other than in confiscation proceedings or a proceeding in respect of, in the case of an answer, the falsity of the answer, or in the case of the production of a document, the falsity of any statement contained in the document."

He went on to remind Mr Seller that his evidence had to be truthful.

70 At the conclusion of the day's proceedings, the Examiner gave an interim non-disclosure order which required that there be

> "no communication other than between the persons that I've approved of, [of] any matters arising from this examination."

71 The examination was adjourned to the following day, 14 September 2007. At the conclusion of the examination on 14 September 2007, the Examiner gave the following direction:

> "I am going to give a non-publication direction ... and I propose to give the direction under subsection 9 of section 25A of the *Australian Crime Commission Act*. I direct that the evidence given by Ross Edward Seller, the content of the documents and the description of any things produced to the Commission during this examination, any information that might enable the witness to be

> identified and the fact that he has given evidence at this examination, shall not be published except to the Chief Executive Officer, the Examiners and members of staff of this [Commission]. Members of staff of the Commission includes the head of the special investigation under which this examination is being conducted. The Commission's Chief Executive Officer or his delegate may vary or revoke this direction in writing but must not do so if it might prejudice the safety or the reputation of a person or prejudice the fair trial of a person who has been or may be charged with an offence."

72 As with the evidence of Mr McCarthy, this direction was later varied, but only on one occasion. The variation was made pursuant to s 25A(9) of the ACC Act.

73 That variation was on 7 December 2007. At that time, Mr Peter Brady, the senior legal adviser of the Crime Commission, an authorised delegate of the Chief Executive Officer of the Crime Commission, signed a form of variation. This variation permitted publication of the fact that Mr Seller had given evidence, the evidence given and the content of documents produced to the Examiner, to the Crime Commission Chief Executive Officer, examiners and members of staff, and

> "...any prosecution authority, the staff of such an authority and counsel appointed by such an authority, to provide advice and in relation to the prosecution of offences for which they are responsible against Ross Seller, Patrick McCarthy or Phillip Egglishaw."

74 Publication was also permitted to the ATO for the purpose of audits and assessments.

75 It was as a consequence of this variation, that on 11 December 2007, a decision was made by the Crime Commission, purportedly under s 59(7) of the ACC Act to furnish to the CDPP the transcript of Mr Seller's compulsory examination. Consequent upon that determination on 18 December 2007, the transcript was delivered to the CDPP.

76 The transcripts of each of the compulsory examinations of Mr Seller were also tendered and became an exhibit in the proceedings. The position of

counsel for the CDPP was the same as that which he took with respect to the examination of Mr McCarthy, and which I have recorded in [53] above.

77 In dealing with the contents of the compulsory examination of Mr Seller, I will adopt the same course as that taken with Mr McCarthy.

78 Here are the contents, in abbreviated form, of Mr Seller's evidence.

Item	Date	Exh 3 pg	Content
1	13/9/07	952-954	Ownership of and beneficial interest in Grant McKenzie Hong Kong Pty Ltd.
2	13/9/07	969 ff	Description, step by step, of the 1999 whisky venture.
3	13/9/07	974-975	Mr Seller's knowledge of, and understanding of, the structure, ownership and control of GMHK.
4	13/9/07	973-974	Mr Seller's knowledge of the ownership, control and involvement of Chambers Finance.
5	13/9/07	990	Mr Seller's knowledge and understanding of Chambers Finance and its genuineness and financial capacity to operate as a finance company.
6	13/9/07	991 ff	The steps involved in and the structure of the whisky ventures in 2000 and 2001.
7	13/9/07	1001-1005	Extent of disclosure to Mr Conklin of issues arising from the whisky venture and any dishonesty associated therewith.
8	13/9/07	1022-1024	Representations made to investors and any dishonesty associated therewith.
9	13/9/07	1027 ff	Knowledge of and arrangements with, GMHK.
10	14/9/07	1085	Role of, and interactions between Chambers Finance and investors.
11	14/9/07	1091,1098–1100, 1102	Control, ownership and role of GMHK.
12	14/9/07	1093 ff	Contents of various documents relevant to and arising out of the whisky ventures.
13	14/9/07	1117 ff	Details of and content meetings between Mr Seller, Mr McCarthy, Mr Egglishaw and Mr de Figueiredo.
14	14/9/07	1190-1207	Contents of spreadsheets dealing with financial details of whisky ventures.

79 I am satisfied that the contents of the compulsory examination of Mr Seller dealt with factual matters which were central to the charge that he has now been confronted with, and to his defence of that charge.

80 In particular, as with Mr McCarthy, the compulsory examination covered his view of the nature and structure of the arrangements and, to a limited extent, whether there were any features of dishonesty involved with various parts of the ventures.

81 I am also satisfied with respect to the compulsory examination of Mr Seller, similarly to that of Mr McCarthy, that the contents of his examination clearly engaged his privilege against self-incrimination, both generally and in respect of the specific charge with which he is now confronted and required him to answer questions which he, ordinarily, was entitled to decline to give answers to.

Communications between the Crime Commission and the Commonwealth Director of Public Prosecutions

82 Prior to the commencement of any of the compulsory examinations, the CDPP, through his officers, was in communication with the case officer at the Crime Commission and Mr Tang. This communication was not regarded as out of the ordinary because the CDPP and the Crime Commission were partner agencies in these operations. There were regular updates between the partner agencies with respect to Operation Wickenby and Operation Polbream, including the fact that compulsory examinations were taking place, the identity of the witnesses, and the topics that were to be investigated at those examinations.

83 As well, from time to time, it appears that the CDPP's office would provide advice to the Crime Commission. As an example, in the evidence before this Court, is a memorandum from Ms Shouldice, the case officer in charge of the CDPP's proceedings against Mr Seller and Mr McCarthy, who wrote to Mr Economou of the Crime Commission and Mr Tang, on 23 February 2006 in these terms:

> "Thanks for the update yesterday. Just a thought I had during the meeting and may not have stated it – what we would want to avoid before any jury is to argue the legalities or otherwise of the actual schemes. ... Need to focus on dishonesty and lies and who got the money – this is the guts of the criminality and what the jury will understand ..."

84 On 25 May 2007, the Crime Commission provided to the CDPP a Briefing Paper, which is of some significance. The paper included a reference to Mr McCarthy's compulsory examination in a list of 20 examined

individuals. The examinees, including Mr McCarthy, whose names were on the list, were described as a "source of information" for the ACC. The Briefing Paper contains, relevantly, the following:

(a) A reference to the evidence of Mr McCarthy at his compulsory examination in May 2007 which is used as the source to outline what is described as his financial profile and his current asset position. No doubt the purpose of this being included in the briefing document, is to inform the CDPP of the likely nature and extent of Mr McCarthy's financial capacity to mount a defence to the proposed criminal charges, and any other monetary claim which may be made against him;

(b) A reference to the evidence of Mr McCarthy at his compulsory examination, which referred to the role of one of the other participants in the whisky schemes. The briefing paper says:

> "When McCARTHY attended his S28 examination he gave a version of events as to the operation of the scheme, however this contradicted previous versions presented by him in documentation of the operation of the scheme."

(c) A summary of the key evidence to be identified in any prosecution of the applicants. It acknowledges that the extent of the evidence will depend upon the precise charges which are preferred. However, the briefing paper asserts that one of the key propositions to be established in any prosecution is that the

> "...Promissory Notes which represent the sham financing will in fact become part of a round robin arrangement upon the crystallization of the transactions"

It goes on to assert that, based upon the proposition that the promissory notes which secure the loans represent a sham financing, there will be no cash available to fund the second part of the transaction, which is the bottling and distribution of the whisky. It records that:

> "... McCARTHY has stated that the loan funds will pay for this".

This is a direct reference to his evidence at the compulsory examination;

(d) It also notes that the following facts need to be established, which are all facts and matters, the subject of the compulsory examination of Mr McCarthy, namely that: -

(i) the Chambers Finance was controlled by Seller and McCarthy;

(ii) Grant McKenzie (Hong Kong) Ltd was controlled by Seller and McCarthy;

(iii) Chambers Finance is a sham finance company;

(iv) the investors were duped into thinking that the loans were legitimate; and finally

(v) the promoters knew that the tax deductibility of the scheme was fragile.

(e) In discussing possible evidence by an expert, the briefing note includes the following:

> "The promoters of the scheme have now apparently realised that there is no market in Australia for 2.6 million litres of Single Malt Whisky. There is no place to sell the whisky in Australia, and furthermore the import duties on the product would inflate the cost of the product to such an extent that it would not sell in the domestic market, and make a profit after the payment of the sham debt and accrued interest."

and further the following:

> "Further, the current story being espoused by McCARTHY is that the loan funds be used to bottle and distribute the whisky. However there is one major flaw in this story, there are no loan funds to pay for the bottling and distribution as the loans are a sham."

The information about the realisations of the promoters and Mr McCarthy's current store are directly derived from his evidence on 15 May 2007.

85 The paper concludes with a list and description of recommended charges. Attached to the paper is a 33 page document which was described as "*Witness Statements/Interviews Listing*". It recorded with respect to possible witnesses whether they had been compulsory examined, whether

they had provided statements, whether statements were necessary and the like. Importantly, on the final page, it listed eight witnesses, each of whom were officers of the ATO. That list did not include Mr Tang.

I infer from the contents of the briefing paper, and the attached witness list, that it was not at that point of time intended to call Mr Tang as a witness.

86 On 4 June 2007, Ms Simpkin and Ms Shouldice spoke. Ms Shouldice's note of that conversation forms part of the evidence. It appears that Ms Simpkin told Ms Shouldice that there were further examinations to take place, including those of Mr McCarthy and Mr Seller. The note then includes the following:

> "Eon/Sanabu-Mc-S says: 2 mil each – are there secret comm'n – was $ returned etc. Some investors knew some commission??"

87 The reference in this note to Eon and Sanabu is a reference to companies associated with each of Mr McCarthy and Mr Seller, which received monies as part of each of the whisky schemes. I am satisfied that the source of the information in this note is the compulsory examination of Mr McCarthy, because of the use of the word "*says*" and because the information in the note accords with the evidence given by Mr McCarthy during the May 2007 examination.

88 In November 2007, a paper was provided by the Crime Commission to the CDPP. It was described as Brief of Evidence and Preparation Paper. It was prepared by Ms Simpkin. It included at least the following:

(a) A reference to advice provided by the CDPP to the ACC about the preferred charges in these terms:

> "The preferred charges were to be Commonwealth based, with a preference towards conspiracy charges. The brief is to be prepared with the view of pursuing Commonwealth fraud charges";

(b) It repeats and extracts material from the first briefing paper including that set out in [84] above.

89 A substantially similar Briefing Paper was sent on 6 December 2007, after the examination of the final witness had commenced, but not before it had concluded.

90 By a letter dated 18 December 2007, the Crime Commission forwarded to the CDPP (Julie Shouldice) information which it asserted in the letter was:

> "... provided pursuant to the *Australian Crime Commission Act* 2002."

91 The letter described the information which was being provided with it in the following terms:

> "Copies of the following material containing information and documents lawfully obtained by the Australian Crime Commission in the above investigation:
>
> (i) Operation Polbream Briefing Paper updated as at December 2007;
>
> (ii) Operation Polbream – Schedule of Meetings with Strachans;
>
> (iii) Operation Polbream Brief Plan and Preparation Paper, November 2007 (and attachments, Annexures A, B, C & D);
>
> (iv) 1 x CD titled 'Operation Polbream Examinations until Nov 07';
>
> (v) Letter dated 6 December 2007."

92 The CD contained, amongst other things, the transcripts of each of the compulsory examinations of Mr McCarthy and Mr Seller.

93 It is convenient to note here that s 12 of the ACC Act could not have been the basis for the disclosure of the material because none of it was in the form of admissible evidence. No submission was put to the Court that s 12 could be relied upon as a source of power to authorise the distribution of the material.

94 According to the evidence, this information was released by the Crime Commission pursuant to s 59(7) of the ACC Act because:

> "... the information is relevant to the activities of the Commonwealth Director of Prosecutions."

The letter also noted that:

> "... to do so would not be contrary to a law of the Commonwealth".

However, the disclosure of the evidence of Mr McCarthy was contrary to the non-publication directions which had been given on 13 September 2007 by the Examiner, because it was not until March 2012 that the variation of the directions was made to include the CDPP, as being a recipient of all of the examinations, although the variation made on 22 August 2008 to which I have referred at [48] above, did permit a limited release of transcript.

95 The disclosure of Mr Seller's examination was consistent with the variation dated 7 December 2007 of the original non-disclosure order of the Examiner in September 2007.

96 By 26 February 2009, the Crime Commission had provided the entirety of the brief of Evidence to the CDPP. This included witness statements and exhibits produced by those witnesses. It was a very large brief.

97 From that time, Mr Corkery, who was by that stage the CDPP case officer, commenced an examination of the brief to determine what, if any offences, had been committed by Mr Seller and Mr McCarthy.

98 On 5 August 2009, Ms Simpkin, the case officer at the Crime Commission, sent an email to Mr Corkery at the CDPP's office which included the following:

> "I am still drafting Fraser's statement, it will be quite lengthy.

However, Fraser stated in his examination that the Commissioner of Taxation in his position paper of April 2002 DID NOT raise the issue of the fact that no funds had been provided by the financier. It wasn't raised in the paper as the ATO didn't know that, at that time, or even later. It goes to our view that the ATO were never told the actual facts, they were only given snippets."

99 On 28 July 2009, there was an email exchange between Mr Corkery and Ms Simpkin which dealt with, in part, the role of Mr Fraser, who as junior counsel had joined in with senior counsel, in the provision of a Memorandum of Advice, upon which both Mr Seller and Mr McCarthy relied. It was to this effect:

"Martin Corkery: 'I am putting together my minute to the director regarding the conspiracy charge and the involvement of Fraser was substantial over the 12 months from May 2000 to 2001. In particular his involvement regarding the product ruling problems they were having. **Seller keeps saying that he had referred the matter to counsel.** Does Fraser say he did speak to him?'

Elizabeth Simpkin: 'Fraser states ...' " (Emphasis added)

Ms Simpkin then sets out in some detail passages from Mr Fraser's evidence, together with page references, given at the compulsory examination.

100 Mr Corkery gave evidence, which I accept, that he had not read any of the transcripts of the compulsory examinations, including those of Mr McCarthy and Mr Seller. It was not submitted that I should not accept his evidence. The email exchange, subject to what is said below, corroborates this evidence, at least so far as the Fraser's examination is concerned. However, the response by Ms Simpkin to Mr Corkery does provide him with a summary of, or the effect of, some of the evidence given in a compulsory examination by Mr Fraser.

101 It is curious then to see the use of the present tense "... *keeps saying ...*", by Mr Corkery, in the email just referred to. However, it seems that the expression is consistent with a description of what Mr Seller was saying in

the nominated twelve month period, that is, 2000 to 2001. Seen in this light, the reference to the present tense does not cause me to make a finding that Mr Corkery had read, or else been told of, the content of Mr Seller's compulsory examination.

102 On 29 October 2009, Court Attendance Notices were filed. Ms Simpkin, the Crime Commission case officer, was nominated as the Prosecutor.

103 Thereafter there was communication between the CDPP and the ACC frequently. One subject matter of their communication was the question of bail and proposed variations. Another topic of communication was the fact of, and contents of, the brief of evidence prepared by the Crime Commission for the CDPP with respect to both applications.

104 The third topic of communication between the Crime Commission and the CDPP dealt with the question of appropriate disclosure to the applicants and their lawyers of material in the prosecution's possession. This included material in the Crime Commission's possession.

105 Apparently, as a part of the disclosure process, on 4 December 2009, the CDPP requested from the ACC versions of the transcript of the compulsory examinations of Mr McCarthy and Mr Seller, in MS Word. They were sent on 7 December 2009. The purpose of this particular request is not apparent from the evidence, but the timing of the request leads me to conclude that it was part of the disclosure process.

106 A further subject of communication were the draft statements of potential witnesses including Mr Quincy Tang. By way of example, on 16 March 2010, Ms Wade, then the case officer at the Crime Commission, wrote to Mr Corkery at the CDPP's office by email attaching a draft statement of Mr Tang and saying:

> "Quincy has prepared the attached statement and attached tables in respect of the request for a statement in respect of the whisky disparity schedules that Elizabeth Simpkin had previously

> prepared. Quincy has made reference to exhibits in the statement and the tables. If needed for your review, I can probably scan the documents and burn to disc."

107 There were other communications dealing with the preparation of the matter for a hearing. These communications demonstrated a close working relationship between the Crime Commission and the CDPP. They show cooperation in the conduct of the investigation and the prosecution of Mr Seller and Mr McCarthy. Such a relationship, at the least, raises a question and a real concern, as to what extent information has been shared and, in particular, whether the information from the compulsory examination of Mr Seller and Mr McCarthy has been relied upon by the CDPP for the purpose of the prosecution.

108 On 13 January 2010, an email fixed a meeting to take place on 19 January 2010 at which there was to be a discussion between Ms Wade and Mr Corkery, and perhaps others, of the documents that were shown to Mr Seller and Mr McCarthy during their examinations.

109 On 19 January 2010, Ms Wade sent an email to Mr Corkery to which was attached a list of exhibits shown to Mr McCarthy and Mr Seller during the course of their compulsory examinations. The body of the email contains this statement:

> "Attached are lists of the exhibits shown to Messrs Seller and McCarthy. I'll drop a disc of the exhibits up to the CDPP this afternoon to your attention."

The evidence of Mr Corkery was silent on whether he had perused these exhibits.

Dissemination of compulsory examination, transcripts and Exhibits

110 As the previous history shows, the transcripts of the compulsory examinations of Mr McCarthy and Mr Seller, as well as copies of the documents shown to them in the course of their examinations, were

provided by the Crime Commission to the CDPP, both in electronic and paper form.

111 I have accepted the evidence of Mr Corkery, the current case officer of the CDPP, that he has not read these documents. Senior and junior counsel both indicated that they had not read these documents. I accept their assurances to that effect.

112 But this does not exclude the potential group of individuals in the office of the CDPP, who were and are authorised to have access to these documents, and who may have read them.

113 Mr Corkery received the paper version of the transcripts and they were stored in his office. He is not aware that anyone in the office of the CDPP has entered into his particular office and read the transcripts, or else removed the folders for reading. I accept this evidence.

114 The transcripts were not stored in a locked cabinet in his room, but rather were placed on an open shelf. It is therefore not possible for Mr Corkery to be absolutely certain that the transcripts have not been accessed during his absence. However, I do not regard it as likely that any significant, or meaningful, access could have occurred to these folders without Mr Corkery's knowledge.

115 However, the position is not the same with respect to the electronically stored copies of the transcripts of the compulsory examinations of Mr McCarthy and Mr Seller.

116 The evidence is that a complete copy of the transcripts was stored electronically on a computer driver within the CDPP's system. Access to the computer files containing the transcripts was only permitted to authorised users, who needed to log on to the system under that user name, and insert the correct password.

117 Over the course of time, in addition to Mr Corkery, the following were the persons, together with the positions which held by them, authorised to electronically access the transcripts:

Jim Joliffe	Director, Sydney Office
Chris Murphy	Senior Assistant Director, Tax and Economic Crime
Angela Alexandrou	Assistant Director, Proceeds of Crime
Elizabeth Ryan	Senior Assistant Director, Tax and Economic Crime
Paul Shaw	Assistant Deputy Director
Julie Shouldice	Operation Polbream Case Officer
Evelyn Barnes	Legal Officer
Esther Phang	Legal Officer/Legal Assistant
Katrina Curry	Legal Officer
Dimitri Kapelaris	Legal Officer
Julnar Katrib	Legal Assistant
David Travis	Legal Assistant

118 The Legal Officers and Legal Assistants were each part of Mr Corkery's team which was working on this prosecution. A number of the others were senior members of the CDPP's Sydney office, or functional structure to whom Mr Corkery reported.

119 No evidence was led by the CDPP which dealt with electronic access by any of these officers to the stored transcripts. No explanation was proffered as to the absence of any of these individuals from the proceedings. No evidence, such as an audit trail of access to the stored transcripts, was produced. A computer system for an office of the CDPP, which no doubt had stored on it documents with a variety of security designations, and with a variety of confidentiality restrictions, would ordinarily have the capacity to produce an audit trail of the users who had accessed particular documents and when. No such audit trail was produced in evidence, nor was any explanation given which suggested that such an audit trail was not possible on the system used by the CDPP.

120 In light of the CDPP's failure to adduce any direct evidence from the officers concerned, or any indirect evidence, such as an audit trail of access to the documents, or even the results of enquiries made with each

of these officers, I am not prepared to conclude that there has not been any access to the transcripts in their electronic form.

121 I accept that, in this application, the CDPP does not carry any onus of proof. Nevertheless, he submitted that I should find that the transcripts had not been accessed by the current prosecutorial team, nor anyone else in the office of the CDPP. The evidence about access to these computer records is wholly within the power or control of the CDPP to produce, or lead. It was not in the power or control of the applicants.

122 In these circumstances, the remarks of Gleeson CJ, Gummow and Callinan JJ in *Vetter v Lake Macquarie City Council* [2001] HCA 12; (2001) 202 CLR 439 at [36], are apt to apply:

> "As long ago as 1774, Lord Mansfield said ... that all evidence is to be weighed according to the proof which it is in the power of one side to have produced and the power of the other to have contradicted."

123 Their Honours made reference in a footnote to the decision of *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970], and also *Weissensteiner v R* [1993] HCA 65; (1993) 178 CLR 217 at [23]-[28], per Mason CJ, Deane and Dawson JJ.

124 The remarks of the plurality in *Weissensteiner* are also apt. At [28] their Honours said:

> " 28. We have quoted rather more extensively from the cases than would otherwise be necessary in order to show that it has never really been doubted that when a party to litigation fails to accept an opportunity to place before the court evidence of facts within his or her knowledge which, if they exist at all, would explain or contradict the evidence against that party, the court may more readily accept that evidence. It is not just because uncontradicted evidence is easier or safer to accept than contradicted evidence. That is almost a truism. It is because doubts about the reliability of witnesses or about the inferences to be drawn from the evidence may be more readily discounted in the absence of contradictory evidence from a party who might be expected to give or call it. In particular, in a criminal trial,

> hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused."

125 I draw these conclusions with respect to the officers of the CDPP, other than Mr Corkery:

(a) each of the named officers were authorised to access the electronic file of the transcripts of Mr McCarthy and Mr Seller;

(b) each of the officers at Director, Senior Assistant Director, Assistant Director or Assistant Deputy Director level, except for Ms Alexandrou, had supervisory and oversight roles with respect to Ms Shouldice and Mr Corkery, whilst they were worked on Operation Polbream, including recommending or approving the charges to be preferred and prosecuted against Mr McCarthy and Mr Seller;

(c) Ms Shouldice was, at one time, the CDPP case officer who was responsible for providing advice to the CDPP with respect to Operation Polbream and also for providing advice to and liaising with the Crime Commission with respect to Operation Polbream;

(d) the officers in (b) and (c), each had an interest and duties to perform, with respect to Operation Polbream, which meant that the nature of the defence likely to be raised by Mr McCarthy and Mr Seller, and the strength of the Crown case, having regard to what Mr McCarthy and Mr Seller said, was relevant to their functions and the decisions which were made, for which they were responsible or in which decisions they had a role to play;

(e) there was no other source of information about the likely defences of Mr McCarthy and Mr Seller except the transcripts of evidence and any documents which relied upon them;

(f) I would infer, from the foregoing, that it is likely that one or more of these officers read all or part of the transcripts of Mr McCarthy and Mr Seller;

(g) the absence of evidence, which only the CDPP or the officers could provide, serves to strengthen the inference which I am prepared to draw;

(h) the legal officers and legal assistants, except for Ms Phang, who were authorised to have electronic access to those transcripts, were unlikely to have had access in the absence of a specific task being delegated to them by Mr Corkery which required them to access those transcripts;

(i) Mr Corkery denies giving any such specific tasks to any subordinate, except Ms Phang. I accept that evidence;

(j) it seems clear that Ms Phang was involved in the process of obtaining and copying transcripts for the purpose of them being provided to the solicitors for Mr McCarthy and Mr Seller, as part of the pre-trial disclosure process. Clearly, in the course of so doing, it is likely that she glanced at, and perhaps read, parts of the transcript for the purposes of ensuring that they were being correctly provided. I do not regard any such access as anything more than the minimum necessary to achieve the above task. Such access was neither meaningful nor significant. It is irrelevant for the purposes of this case.

The Role of, and the Evidence of Mr Tang

126 I have earlier described in some detail, the activities and role of Mr Tang whilst he was seconded to the Crime Commission from the ATO.

127 The CDPP intends to rely upon four statements of Mr Tang as constituting part of the evidence to be adduced against Mr Seller and Mr McCarthy.

128 The first three statements are each dated 3 November 2009 and refer respectively to the whisky schemes in each of the three tax years involved, namely, 1999, 2000 and 2001. The statements follow a common format. Each statement describes the position and role of Mr Tang and describes what his duties involved. It notes his formal qualifications, and in particular the fact that he is an expert accountant. Each statement describes the purpose of the statement as being to examine accounting and banking records to:

(a) conduct reconciliations of bank account transactions undertaken in regard to the whisky scheme; and

(b) to trace the flow of funds invested in the 1999 Whisky scheme.

129 Each statement describes the source of documents upon which the contents of the statement is based. None of the source documents, as described by Mr Tang, include the transcripts of the compulsory examinations nor are the source documents described as including any documentary exhibit shown to any of Mr Seller or Mr McCarthy, during the compulsory examinations.

130 Each statement describes the accounting principles which have been applied, the reconciliation methodology of cash funds, the various terminology used and then each reconciliation in detail.

131 To use the statement referring to the 1999 year as an example, Mr Tang concludes the following:

> "13. For the 1999 whisky scheme, 17% of the total cash and loan funds invested by participants equalling **$3,034,184** was sent to Brechin Tindal Oatts solicitors trust accounts in Scotland, of which **£1,178,743** was paid to Scottish distilleries for the purchase or manufacture of whisky.
>
> 14. The funds drawn down pursuant to the Promissory notes issued by Chambers Finance Ltd were not paid to Scottish distilleries for the manufacture of whisky."

132 Mr Tang had earlier noted with respect to this financial year that the total of funds raised comprised:

(a) $4,469,127 in investors cash deposits and interest;

(b) $21,206 in other interest deposits; and

(c) $13,550,000 in promissory notes.

133 A fourth statement by Mr Tang is that dated 30 June 2010.

134 Again, Mr Tang describes his role and qualifications. He notes that he has previously provided three statements. He then describes the purpose of this fourth statement as being to:

(a) examine documentation for each whisky scheme, and calculate the cost and amount of whisky which was stated to be produced for each whisky scheme;

(b) examine the whisky scheme production records and calculate the actual cost and amount of whisky produced for each whisky scheme; and

(c) detail the above calculations in a table form for each of the three years involved in the whisky schemes.

135 The documentation listed does not include any transcript of any compulsory examination, nor does it explicitly include any of the exhibits identified by Mr Seller or Mr McCarthy in the course of their compulsory examination. Some of the source documents include documents prepared by Mr Seller and Mr McCarthy. However, it is not readily apparent, with respect to these documents, that any of them were shown to Mr Seller or Mr McCarthy during the course of their compulsory examination.

136 These statements, together with the extent of the participation of Mr Tang in assisting Crime Commission officers to prepare for the compulsory examinations of Mr Seller and Mr McCarthy, leads me to conclude that Mr Tang has been one of the principal investigators of the whisky schemes, including investigating the conduct of Mr Seller and Mr McCarthy. He has been largely responsible for the compilation of the financial material which underlays an understanding of the whisky schemes and which, in large part, underlays the proof of the Crown case about the falsity of the statements made by Mr Seller and Mr McCarthy to officers of the ATO. The statements are those of an expert, the purpose of which is to objectively prove facts, against which the truth and accuracy of the statements made by the applicants will be tested.

137 There were tendered to the Court a number of flow charts with respect to the whisky schemes. There was one flow chart for each of the three tax years involved in the schemes. The flow charts were referred to and form part of, the outline of the Crown case which was provided as part of the evidence before me. I have little doubt that Mr Tang played a significant role in the preparation of these flow charts, having regard to his role as the principal financial investigator, and the inclusion in those flow charts of significant financial information indicating a flow of funds between all of the entities.

138 His evidence, as I have previously indicated, forms a central and significant part of the evidence to be presented by the Crown at any trial of Mr Seller and Mr McCarthy.

139 The significance and centrality of Mr Tang's evidence can be confidently deduced from the outline of the case that the Crown will present at the trial. The outline was tendered before me. In it are contained the following:

> "3. To establish the significance and context of the alleged misrepresentations the Crown will prove the nature and details of the tax minimisation schemes which came under investigation by the ATO in the period 2000-2003 inclusive.
>
> 4. Annexed to this outline are three diagrams of what the Crown intends to prove in this regard. ...
>
> 5. To prove these transactions the Crown intends to tender a folder containing transaction documents for each of the three years in which the schemes were implemented, which support the description of the schemes shown in the diagrams.
>
> 6. These transaction documents have been examined by Quincy Tang, of the ATO, who will be a witness at the trial. Mr Tang has also analysed transaction documents which record the funds flows and the quantity of whisky actually produced in each year. The Crown does not intend to tender all of the documents examined by Mr Tang, just sufficient to support his conclusions and to verify the correctness of the diagrams."

140 There is nothing apparent from the contents of his statements, which suggests that he has directly drawn specific information from the compulsory examinations of Mr Seller and Mr McCarthy as a basis, or source, of the conclusions which he has expressed in those statements.

141 However, I would readily conclude, that having heard or having read the evidence given at the compulsory examinations, particularly the evidence about the flow charts or diagrams shown to each of Mr McCarthy and Mr Seller, which presented a complete picture of all of the steps involved in the transactions, in the interpretation of the documents with which he was provided, Mr Tang was materially assisted in the preparation of his statements of evidence.

142 By way of an analogy, a person who is required to piece together a jigsaw puzzle, does so entirely by the process of sorting the pieces, and then fitting them together. However, if that person has, albeit for a brief period, had the benefit of seeing the entire finished picture of the jigsaw puzzle, the task of identifying the various pieces of the jigsaw and then fitting them together, is much easier, and is much more readily achieved even if the complete picture is no longer in front of them.

143 It is not possible for me to conclude, notwithstanding the terms in which the statements of Mr Tang are expressed, that his attendance at, listening to, and reading the transcripts of evidence of the compulsory examinations of Mr Seller and Mr McCarthy, together with looking at the documents which were tendered as a part of that examination, could have been completely put out of his mind when preparing the statements. I am satisfied that his knowledge of this material has contributed in a significant although indirect way to his evidence, and the conclusions which he expresses.

144 An alternative way to describe the use of the compulsory examination transcript and exhibits is that the use is a derivative use or an indirect use

of that compulsorily obtained material for the purpose of Mr Tang preparing for and providing his statements.

Right to Silence

145 At the heart of the submissions of the applicants, is their right to silence, or differently put, their privilege against self-incrimination. In the context of these applications, there is no significant difference between these two expressions. It is convenient to identify the nature of the right or privilege, its meaning and its importance in the administration of justice.

146 It is a firmly established principle of the common law, for over 300 years, that no person can be compelled to incriminate himself: *Sorby v The Commonwealth* [1983] HCA 10; (1983) 152 CLR 281 at [5] per Gibbs CJ.

147 The right to silence was described as:

> "... a freedom so treasured by tradition and so central to the judicial administration of criminal justice."

Hammond v The Commonwealth [1982] HCA 42; (1982) 152 CLR 188 at [3] per Brennan J.

148 It is a right which:

> "... derives from the privilege against self-incrimination. That privilege is one of the bulwarks of liberty. History, and not only the history of totalitarian societies, shows that all too frequently those who have a right to obtain an answer soon believe that they have a right to the answer that they believe should be forthcoming. Because they hold that belief, often they do not hesitate to use physical and psychological means to obtain the answer they want. The privilege against self-incrimination helps to avoid this socially undesirable consequence. ...
>
> The privilege exists to protect the citizen against official oppression."

RPS v R [2000] HCA 3; (2000) 199 CLR 620 at [61]-[62] per McHugh J.

149 Windeyer J in *Rees v Kratzmann* [1965] HCA 49; (1965) 114 CLR 63 at [3], considered the question of a compulsory examination, which may breach the privilege against self-incrimination, saying:

> "There is in the common law a traditional objection to compulsory interrogations. Blackstone explained it: 'For at the common law *nemo tenebatur prodere seipsum*: and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men': *Comm.* iv 296.' The continuing regard for this element in the lawyers notion of justice may be, as has been suggested, partly a consequence of a persistent memory in the common law of hatred of the Star Chamber and its works. It is linked with the cherished view of English lawyers that their methods are more just than are the inquisitional procedures of other countries. But strong as has been the influence of this attitude upon the administration of the common law, of the criminal law especially... "

150 Whilst the right confers a very valuable protection, it is not an immutable characteristic of the exercise of federal judicial power: *Sorby* at 308 per Mason, Wilson and Dawson JJ. Nor is an abrogation of the principle inconsistent with the right to a jury trial conferred by s 80 of the Constitution: *Huddart Parker & Co Pty Ltd v Moorehead* [1909] HCA 36; (1909) 8 CLR 330 at 358 per Griffiths CJ, at 375 per O'Connor J and at 385 per Isaacs J.

151 The privilege, unless abrogated or modified by statute, protects a witness not only from incriminating himself directly under a compulsory process, but also from making a disclosure which may lead to incrimination or to the discovery of evidence of an incriminating character: *Sorby* at 310 per Mason, Wilson and Dawson JJ.

152 The right to silence, or privilege against self-incrimination, is a somewhat loose description which contains within it, at least, these concepts as opposed to a single right:

(a) the privilege (which is an absolute immunity) of a person against being required to answer questions, or provide information which is incriminating;

(b) the right not to be compelled to give evidence at one's own trial;

(c) the right not to have any adverse comment made about not giving evidence: see *R v CB, MP v R* [2011] NSWCCA 264 at [96];

(d) the right to a fair trial, which trial is conducted within the accusatory system and which has as a fundamental element, the traditional method of determining guilt It includes the onus of proof resting upon the Crown, beyond reasonable doubt and circumstances where an accused cannot be required to testify to the commission of an offence charged; see *NSW Food Authority v Nutricia Australia Pty Ltd* [2008] NSWCCA 252; 72 NSWLR 456 at [155] per Spigelman CJ; *Environment Protection Authority v Caltex Refining Company Pty Ltd* [1993] HCA 74; (1993) 178 CLR 477 at [45].

153 It is appropriate to note, by way of analogy, the regard which is paid to the privilege against self-incrimination in the United States of America. In so doing, it needs to be kept in mind that, in the US, the privilege is enshrined in the Constitution by the Fifth Amendment. However, the source of the privilege, and the reasons for its continued existence are similar in both Australia, as a part of the common law, and in the US as part of the Constitution.

154 The privilege was described this way in the majority decision of the US Supreme Court in *Quinn v United States* (1955) 349 US 155 [99 L. Ed. 964] at 161-162:

> "The privilege against self-incrimination is a right that was hard-earned by our forefathers. The reasons for its inclusions in the Constitution – and the necessities for its preservation – are to be found in the lessons of history. As early as 1650, remembrance of the horror of Star Chamber proceedings a decade before had firmly established the privilege in the common law of England. ... The privilege, this Court has stated,
>
> > 'was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions.'

> Co-equally with our other constitutional guarantees, the Self-Incrimination Clause
>
> > 'must be accorded liberal construction in favor of the right it was intended to secure'.
>
> Such liberal construction is particularly warranted in a prosecution of a witness for a refusal to answer, since the respect normally accorded the privilege is then buttressed by the presumption of innocence accorded a defendant in a criminal trial. To apply the privilege narrowly or begrudgingly – to treat it as an historical relic, at most merely to be tolerated – is to ignore its development and purpose."

Quinn was a case involving the refusal of a witness to answer questions put by the sub-committee of the Un-American Activities of the House of Representatives chaired by Senator McCarthy.

155 Frankfurter J expressed his views of the privilege in somewhat more colourful language in *Ullmann v United States* [1956] 350 US 422 [100 L. Ed. 511], which was also a case about the McCarthy committee, when he said at 426-428:

> "It is relevant to define explicitly the spirit in which the Fifth Amendment's privilege against self-incrimination should be approached. This command ... registers an important advance in the development of our liberty -
>
> > 'one of the great landmarks in man's struggle to make himself civilized'.
>
> Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honour to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States.
>
> ...
>
> No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts, it was aimed at a more far-reaching evil – a recurrence of the inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in

> human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies."

156 That the privilege is regarded as being of importance can be seen in other countries whose laws derive from their shared inheritance of the common law. In Canada, the privilege is entrenched as a part of the law by s 13 of the Canadian Charter of Rights and Freedoms. The privilege is also enshrined in New Zealand by the provisions of s 25 of the *Bill of Rights Act* 1990 (NZ).

Australian Crime Commission Act 2002

157 Against that background, it is necessary to consider the provisions of the ACC Act to which I now turn. Speaking generally, it cannot be doubted that in Australia, a parliament has the power to abolish absolutely, or else in limited circumstances, any common law right or privilege.

158 This is subject to an often difficult question of statutory interpretation requiring analysis of the purpose of the statute and the words used, to be certain that the right has been abolished or modified.

159 In so describing the power of the parliament, I do not pause here to analyse what impact, if any, the provisions of Article 14 and in particular, Article 14(3)(g) of the International Covenant on Civil and Political Rights may have on such power. It is not necessary to consider these questions.

160 The Crime Commission is established by s 7(1) of the ACC Act.

161 The Crime Commission has, at least, these functions, by virtue of s 7A of the ACC Act:

(a) to collect, collate, analyse and disseminate criminal information and intelligence;

(b) to undertake intelligence operations;

(c) to investigate matters relating to federally relevant criminal activity, that is, activity where the crime is an offence against a law of the Commonwealth.

162 In order to carry out its functions, the Crime Commission may undertake compulsory examinations, that is, examinations at which attendance and participation of the examinee is compelled by law, including answering questions which may incriminate the examined, which have these features:

(a) the conduct of an examination is to be regulated by the examiner: s 25A(1) of the ACC Act;

(b) the examination must be held in private with only persons specifically authorised by the examiner be present: s 25A(3) of the ACC Act;

(c) any evidence before an examiner whether oral (or a transcript of it) or documentary can, or must be, the subject of a confidentiality order: s 25A(9) of the ACC Act.

163 The terms of s 25A(9) of the ACC Act dealing with a confidentiality order ought be set out in full. They are:

"(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."

164 Section 25A(10) permits such an order to be varied by the Chief Executive Officer of the Crime Commission, or their delegate, but:

"(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."

165 An examination is compulsorily imposed upon an individual, because the individual can be summoned, and if so, must attend and answer questions: ss 30(1) and 30(2) of the Act.

166 If a person being examined claims privilege against self-incrimination, then the specific provisions of ss 30(4) and 30(5) apply. They are:

"**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 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."

167 Legal professional privilege is preserved with respect to an examination: s 30(9) of the ACC Act.

168 What the Crime Commission can do with information and material obtained during compulsory examinations, or else as a result of compulsorily requiring the production of documents, is this:

(a) if it constitutes evidence, which is admissible in proceedings for the prosecution of a Federal, State or Territory offence, it must be assembled and given to the Commonwealth or State Attorney-General or a relevant law enforcement or prosecution authority. This includes the CDPP: s 12 of the ACC Act;

(b) may give any information in the possession of the Crime Commission to any law enforcement agency or other agency or body prescribed by the Regulations: s 59(7) of the ACC Act; or

(c) the CEO may furnished to authorities or persons taking civil action by or on behalf of the Crown, in the right of the Commonwealth, a State or a Territory, that may be relevant to the bringing of such an action: s 59(8) of the ACC Act;

(d) the CEO may furnish any instrumentality of the Commonwealth or a State or Territory, with any information which the CEO considers desirable, where the information relates to the performance of a function such an agency: s 59(9) of the ACC Act.

Authorities on the ACC Act

169 In the ten years since its introduction, the provisions of the ACC Act have been considered by the Courts on a number of occasions. Two particular decisions are of relevance, and are binding on this Court. They are:

(a) *Australian Crime Commission v OK* [2010] FCAFC 61; (2010) 185 FCR 258

and

(b) *R v CB; MP v R* [2011] NSWCCA 264.

It will be necessary to consider these judgments, and the principles established by them.

170 However, before considering these two cases it is necessary to commence with an understanding of *Hammond.*

171 In this case, Mr Hammond sought orders from the High Court of Australia, the effect of which was to restrain a Royal Commissioner from examining him, in circumstances where he had been charged with an offence of conspiracy to breach a Commonwealth law, until the end of his trial. It was submitted that the further investigation by the Royal Commissioner would constitute a contempt of Court.

172 The legislation under which the Royal Commissioner operated (a Commonwealth and a Victorian statute) contained use immunity provisions: that is, provisions which precluded the admissibility into evidence at a later criminal trial of the answers given to the Royal Commissioner.

173 Gibbs CJ (with whom Mason J agreed) said at [17]:

> "Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow ... that there is a real risk that the administration of justice will be interfered with ... the fact that the

> plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence."

174 All members of the High Court of Australia agreed that an order should be made restraining the examination of Mr Hammond, although Murphy J, Brennan J and Deane J each gave separate reasons for their judgment.

175 Murphy J expressed the view that an interrogation by the Executive Government, in circumstances where no privilege against self-incrimination was available, was inconsistent with the right to trial by jury contained in s 80 of the Constitution. He concluded that a restraining order was necessary to maintain the integrity of the administration of the judicial power of the Commonwealth.

176 Brennan J rested his judgment on the principle which he described as "... *deep-rooted in our law and history* ...", that the Crown could not compulsorily interrogate a person who had been charged, about his guilt of the charged offences.

177 Deane J held that an extracurial inquisitorial investigation about the factual basis of criminal charges upon which the individual had been committed for trial would amount to an improper interference with the administration of justice. He noted at [8]:

> "Where a court is exercising the judicial power of the Commonwealth pursuant to s 71 of the Constitution, such interference involves a derogation of the constitutional guarantees that flow from the vesting of the judicial power of the Commonwealth in courts of law."

178 He also held that the conduct of a parallel inquisitorial inquiry while charges were pending would of itself constitute an injustice and would be prejudicial to the examinee.

179 It seems to have been of importance to each of the judgments in *Hammond*, that the Royal Commission's examination of Mr Hammond was

to take place after he had been charged and he had been committed for trial. Deane J described it in these terms at [8]:

> "... it is fundamental to the administration of criminal justice that a person who is the subject of pending criminal proceedings is a court of law should not be subjected to having his part in the matter involved in those criminal proceedings made the subject of a parallel inquisitorial inquiry by an administrative tribunal with powers to compel the giving of evidence and the production of documents which largely correspond (and to some extent, exceed) the powers of the criminal court."

180 The decision in *Hammond* was delivered in circumstances of some urgency, with the consequence that the questions posed were not subjected to an in depth analysis which in other circumstances may have been possible.

181 Shortly after *Hammond*, the High Court of Australia delivered judgment in *Sorby*. At [11], Gibbs CJ said:

> "The traditional objection exists to allowing the executive to compel a man to convict himself out of his own mouth applies even when the words of the witness may not be used as an admission. It is a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person and the protection which that principle affords to the liberty of the individual will be weakened if power exists to compel a suspected person to confess his guilt."

182 The High Court held in *Sorby* that the words used in the Commonwealth legislation touching upon the holding of the particular Royal Commission, had abrogated the privilege against self-incrimination. This decision did not turn on whether only direct use of the incriminating answers was prohibited, and that derivative (or indirect) use would be permitted; rather it turned on the sufficiency of the words used in the two Acts under consideration.

183 However, later decisions have dealt with the ACC Act.

184 The provisions of s 30 of the ACC Act have been held to have impliedly abrogated the common law privilege against self-incrimination, and to

provide use immunity with the consequence that an examinee must answer incriminating questions asked during a compulsory Crime Commission examination whether or not the individual faces criminal charges: *R v CB; MP v R* at [73] per McClellan CJ at CL (Buddin and Johnson JJ agreeing); *A v Boulton* [2004] FCA 56; (2004) 204 ALR 598 per Weinberg J; *Stoddart v Boulton* [2010] FCAFC 89; (2010) 185 FCR 409 at [140] per Logan J; *Mansfield v Australian Crime Commission* [2003] FCA 1059; (2003) 132 FCR 251 at [48] per Carr J.

185 The decision of Weinberg J in *A v Boulton*, in which the history of the ACC Act and its context is examined, contains this important conclusion:

> "[100] It follows from all that I have said that, in my view, the Act abrogates the privilege against self-incrimination. It does so by necessary implication. It provides some compensation to witnesses who are compelled to incriminate themselves. However, that compensation was deliberately limited to use immunity and did not extend to derivative use immunity ... the privilege has been entirely abrogated, though there has been 'partial' compensation by way of use immunity."

186 On appeal, the Full Court of the Federal Court of Australia, *A v Boulton* [2004] FCAFC 101; (2004) 136 FCR 240 per Kenny J, with whom Beaumont and Dowsett JJ agreed, said at [66]:

> "It is manifestly clear that the Act deprives a witness of the benefit of the privilege against self-incrimination, although it provides limited compensation in the form of use immunity ..."

187 The Full Court of the Federal Court of Australia affirmed this conclusion in *Stoddart v Boulten*. Greenwood J said at [43], having referred to the earlier decision of the Full Court in *A v Boulton*:

> "That conclusion by the Full Court in *A v Boulton* was said to be consistent with the purpose, character and objects of the Act; the unqualified obligation to answer a question when required ... the history of the legislation; and the evident parliamentary recognition of the public interest in a long-standing and fundamental privilege against self-incrimination, by providing for a limited use immunity ...

> The limited use immunity ... represents a measure of protection for the citizen arising out of the abrogation of the privilege from self-incrimination which is 'a basic and substantive common law right' said to be 'deeply ingrained' in the common law ..."

188 It is to be observed that it is clear from the legislation and from these decisions that there is no statutory prohibition on derivative use of any of the material obtained from a compulsory examination.

Australian Crime Commission v OK

189 In *OK*, the majority of the Full Court of the Federal Court of Australia (Emmett and Jacobson JJ) held, with respect to a compulsory examination taking place of an individual at a time when that individual had been charged with a Federal offence, that:

(a) a tendency for the proposed examination to interfere with the course of justice must be a practical reality, and not a theoretical tendency: at [105];

(b) in order for a compulsory examination by the Crime Commission to avoid the real risk that the administration of justice would be interfered with if an examinee was bound to answer questions which related to the offence with which he was charged, it was necessary for the Commission's statutory safeguards, contained in s 25A of the Act, to be engaged: at [106]-[107];

(c) the power, duty and obligation to disseminate admissible evidence and other information contained in ss 12 and 59 of the Act, must be read as being subject to the protective prohibition in s 25A(9) of the ACC Act. All of the provisions of the ACC Act could not be read harmoniously unless they are read in a way which was designed to ensure that investigation into serious organised crime, and the dissemination of intelligence gathered by the Commission, could proceed in a timely manner without prejudicing the fair trial of an accused person: at [108];

(d) the right to a fair trial would not be compromised merely by the asking of questions of an accused person in circumstances where appropriate confidentiality is ensured. Equally the public interest in the administration of justice, in particular the right to

a fair trial, was preserved by the statutory safeguards set out in s 25A: at [109];

(e) the coercive powers conferred on examiners, and the provisions of s 25A, contemplate examinations continuing in the face of pending charges. The provisions confer on an examiner, and on the CEO, powers to ensure that there is no real risk to a fair trial because of the requirement of the confidentiality directions which must be imposed by an examiner, and which may not be varied by the CEO, where there is a risk to the fair trial of a person who has been or may be charged with an offence: at [110].

190 Their Honours noted at [106]-[107], that the High Court of Australia in *Hammond*'s case had concluded that an exposure to compulsory questioning would be likely to prejudice the fair trial of the examinee and for that reason the examination ought not continue until the criminal proceedings had concluded. The effect of *Hammond* put in terms of more modern terminology is that derivative use of material obtained in compulsory examination would be likely to prejudice a fair trial. But their Honours reasoned that the regime provided for by s 25A of the ACC Act would address this risk by confining, not the questions to be asked of a witness, nor the answer to be given, but rather the person or persons to whom answers might be disclosed, and hence what derivative use might be made of those answers.

191 This decision turned not on the same questions as some of the earlier decisions did, that is, whether an examination would be a contempt of court, or would be an undue interference with the administration of justice, but rather whether, although there is no derivative use immunity conferred by the ACC Act, nevertheless, the risk which derivative use of information obtained in the course of a compulsory examination might cause to a person standing trial, must be adequately addressed so that any prejudice to a fair trial can be avoided.

192 In dealing with this question, their Honours gave primacy to the s 25A regime, and a strict application of it, and compliance with it.

193 Ultimately, their Honours concluded in the particular circumstances of the case:

> "113 The application of the safeguards of s 25A(9) in the circumstances of the present case means that there is no real risk to the fair trial of the Witness. There is no reason to suspect that the CEO or any member of the Commission or the Board would act contrary to such a direction. There is no practical reality that the course of justice and a fair trial for the Witness would be interfered with by reason only of the witness being required to answer questions, so long as an appropriate direction is in force under s 25A(9). Whether a contempt of a criminal court might occur is a matter for that court. In the light of the analysis set out above, there is no real risk that the continuing questioning of the Witness would constitute a contempt. In those circumstances, the primary judge erred in concluding that there was a real risk that compelling the Witness to answer questions directly relating to the subject matter of the Charge against him under the State Act would result in a prejudice to his fair trial or interfere with the course of justice or constitute a contempt."

R v CB, MP v R

194 This decision of the New South Wales Court of Criminal Appeal, dealt with a circumstance in which three months after CB and MP were charged with an offence of conspiracy to manufacture an illegal drug, CB was examined before the Crime Commission. A transcript was taken of that examination, MP was not examined, but as a co-accused he sought to place himself in the same position as CB. A copy of the transcript of the compulsory examination was not given to the CDPP. The transcript was not tendered in the proceedings before the District Court or the Court of Criminal Appeal.

195 CB and MP sought a permanent stay of the charges brought against them in the District Court of NSW. The District Court granted a stay in respect of CB but refused a stay to MP. The District Court found that in respect of CB, the proceedings in the Crime Commission constituted "a serious interference with the administration of justice".

196 On appeal by the CDPP to the Court of Criminal Appeal, the Court unanimously overturned the stay granted in the District Court.

197 The judgment of the Court was delivered by McClellan CJ at CL with whom Buddin and Johnson JJ agreed. His Honour's judgment included the following:

> "97. ... the ACC Act abrogates ... the privilege against self-incrimination (section 30(4)). However, by reason of the retention of 'use immunity' in section 30(5) of the ACC Act in relation to answers given at an inquiry over an objection based on self-incrimination, and the confidentiality provisions in sections 25A(9) and 29A of the ACC Act designed to protect the fairness of trials of persons who have been or may be charged with an offence, it is clear that the ACC Act operates to protect the fairness and integrity of extant trials by preserving them from the effect of its qualification of the 'right to silence'.
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> ...
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> 100. With respect to the ACC Act where an accused the subject of an extant charge is summonsed to appear at an examination under s 28 of the ACC Act but is protected against direct use of any answers given over an objection based on the privilege against self-incrimination by reason of section 30(4) and protected from derivative use by reason of confidentiality directions given pursuant to section 25A(9) and section 29 of the ACC Act, there is no possible compromise of the accusatory system of criminal justice. The onus of proof still lies on the prosecution. The accused cannot be made to testify in or in connection with the trial to the commission of the offence charged. The accused's rights and privileges at the trial are preserved.
>
> ...
>
> 103. ... The purpose of the confidentiality obligations in s 25A(9) and s 25A of the ACC Act is to prevent the information obtained during the examination from being used by prosecuting or investigating authorities in the trial of a person who has or may be charged with an offence. Furthermore, where a failure to make such an order might prejudice the fair trial of such a person, there is no discretion as to whether such confidentiality obligations are to be imposed. Section 25A(9)(c) imposes that obligation.
>
> ...
>
> 110. Accordingly, in my opinion, the conclusion of Emmett and Jacobson JJ in *Australian Crime Commission v OK* to the

effect that a confidentiality direction made [under] sections 25A(9) and 29A of the ACC Act overrode the obligations and powers of disclosure of the CEO and the Board of the ACC in section 12(1) and 59(7) of the ACC Act is correct. In the result, those directions having been made in relation to the examination of CB, he was effectively immunised from any direct or derivative use of the contents of his examination in his pending criminal trial.

111. Provided the knowledge of the proceedings in the Commission are adequately protected an accused person's entitlement to a fair trial in accordance with the adversarial process will be ensured. The situation is no different whether at the time of the Commission hearing a charge has not been laid or the criminal process has commenced. The right to a fair trial will only be compromised if information relevant to a person's defence in any form, including any derivative information, is available to the prosecution."

198 His Honour went on to consider the appropriate relief. In so doing, he said:

"128. Although I accept that questions were asked of the appellant during his examination relating to matters relevant to the charges, accepting as I do that the majority decision in *OK* should be followed, provided the information obtained was effectively protected as the Commission acknowledged it should be, the mere fact that an examination has occurred could not justify a permanent stay. Even if, and the evidence does not establish this fact, it was the case that questions were asked which required the appellant to disclose his defence, this would not of itself have the consequence that the appellant would be denied 'a fair trial'. **Only if it can be shown that either the relevant information has been, or there was a real risk that it would be communicated to the prosecution, could it be concluded that the exceptional step of granting a permanent stay should be taken**." (Emphasis added)

199 It will be necessary in due course to consider the other authorities with respect to the appropriateness of a discretionary grant of relief in the nature of a permanent stay of proceedings, however, I note that the factual circumstances in this case differ from those in *R v CB; MP v R*, in two respects:

(a) charges had not been preferred against Mr McCarthy and Mr Seller at the time of their examination,

although it is clear that the examinations were being conducted in the context that specific charges were in contemplation, and evidence was being sought which related to those charges; and

(b) the conduct of the Crime Commission in the case of Mr McCarthy in contravention of a s 25A(9) Order, and in the case of Mr Seller, in accordance with a s 25A(9) Order, had the consequence that derivative use of the evidence of the compulsory examinations by the CDPP, and retained prosecutors, was made possible, and engaged in, with respect to one Crown witness, Mr Tang.

200 The High Court of Australia refused to grant CB and MP special leave to appeal from this decision: *MP v R; CB v R* [2012] HCA Trans 162 (22 June 2012). In delivering short reasons for the Court (Gummow and Crennan JJ), Gummow J said:

> "Having regard, in particular, to the terms of section 25A of the [ACC Act] and to what was said in paragraph 110 and 111 of the reasons of the Chief Judge at Common Law in the Court of Criminal Appeal, this is not an appropriate occasion to reconsider what was said in *Hammond v The Commonwealth* ... and *Sorby v The Commonwealth* ..."

201 The applicants submitted that the Court ought discern from the transcript of this special leave application, corroboration for their submissions. But, decisions on special leave applications, much less transcripts of argument, do not create any binding precedent: *North Ganalanja Aboriginal Corporation & The Waanyi People v Queensland* [1996] HCA 2; (1996) 185 CLR 595 at [43] per McHugh J and *Collins v R* [1975] HCA 60; (1975) 133 CLR 120.

202 It follows that I reject the applicants submissions and place no weight at all on the transcripts of the special leave application to the High Court of Australia, save to note that as a consequence of it, I remain bound to apply the principles identified by the Court of Criminal Appeal in *CB*.

203 From all of the authorities to which I have made reference, but in particular the cases of *OK* and *CB*, I draw the following conclusions:

(a) the privilege against self-incrimination is an entrenched common law right which is deeply ingrained in the law;

(b) section 30 of the ACC Act abrogates that common law privilege;

(c) sections 30(4) and 30(5) of the ACC Act provide a limited compensation by retaining a protection against direct use of the evidence (or documents) obtained by compulsory process;

(d) section 25A of the ACC Act in general, and section 25A(9) in particular, protects against derivative use of the evidence (or documents) obtained by compulsory process where that derivative use might prejudice the fair trial of a person who may be charged with an offence;

(e) interference with justice by way of the prejudicing of a fair trial must be a practical, rather than a theoretical, reality;

(f) there is no practical reality that the course of justice and a fair trial would be interfered with, by reason only of the witness being required to answer questions, including disclosure of their defence, but only so long as an appropriate direction is in force under s25A(9) which preserves the confidentiality of the examination; and

(g) the right to a fair trial will be compromised if information relevant to a person's defence in any form, including derivative information, has been, or there was a real risk that it would be, communicated to prosecution authorities.

Relief – Legal Principles

204 The applicants seek an order that their trial be permanently stayed. It is necessary to examine, and identify, the relevant legal principles which are applicable.

205 Firstly, it is necessary to acknowledge that an order for the permanent stay of a criminal trial is not lightly to be made by a court.

206 The High Court of Australia in *Dupas v R* [2010] HCA 20; (2010) 241 CLR 237 at [18] described an earlier statement by Mason CJ and Toohey J in *R v Glennon* [1992] HCA 16; (1992) 173 CLR 592 at [18] as an authoritative statement of principle. What was said in *Glennon* at [28] is this:

> "a permanent stay will only be ordered in an extreme case [*Jago v District Court of New South Wales* (1989) 168 CLR 23 at 34 per Mason CJ] and there must be a fundamental defect 'of such a nature that nothing a trial judge can do in the conduct of the trial can relieve against its unfair consequences' [*Barton v The Queen* (1980) 147 CLR 75 at 111 per Wilson J]".

207 In large part, the reason for such caution is because there is a substantial public interest of the community in having those who are charged with criminal offences brought to trial: *Dupas* at [37]; *Glennon* at [10] per Mason CJ and Toohey J; *Moti v The Queen* [2011] HCA 50; (2011) 86 ALJR 117 at [11].

208 In considering the question of the grant of relief, it is appropriate to identify the question with which the Court is concerned. The Court is concerned that the question of whether, in light of the facts and circumstances, the prosecution of the charges laid in the indictment preferred against the applicants would be an abuse of process of this Court because the trial would not be fair, or would otherwise be inimical to the administration of justice generally.

209 What constitutes an abuse of process is insusceptible of a formulation comprising closed categories: *Batistatos v Roads and Traffic Authority of NSW (NSW)* [2006] HCA 27; (2006) 226 CLR 256 at [9].

210 McHugh J in *Rogers v R* [1994] HCA 42; (1994) 181 CLR 251 at [16], identified some heads of abuse of process, which he described as being usual areas. He said:

> "Although the categories of abuse of procedure remain open, abuses of procedure normally fall into one of three categories:

(1) the court's procedures are invoked for an illegitimate purpose;

(2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or

(3) the use of the court's procedures would bring the administration of justice into disrepute."

211 In *Moti* at [57], French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, noted that the concept of abuse of process extends to a use of the Court's processes in a way which is inconsistent with two fundamental policy requirements which arise in criminal proceedings. Those two fundamental requirements were described by the High Court of Australia in *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509 at [20] per Mason CJ, Dawson, Toohey and McHugh JJ, in these terms:

> "The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice."

See also *Regina v Sang* [1980] AC 402; [1979] 3 WLR 263 at 455 per Lord Scarman; *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481 per Richardson J; *Jago v District Court of NSW* [1989] HCA 46; (1989) 168 CLR 23 at 30 per Mason CJ.

212 As the decision in *Moti* shows, a stay can be granted in a case even though a trial may be fair. In other words, it is a sufficient, but not a necessary, basis for the grant of a permanent stay that any trial which is to be conducted, will be unfair.

213 The residual issue is whether the grant of such relief is necessary to protect an erosion of public confidence in the administration of justice in the court.

214 In short, on this issue the question is whether "the criminal is to go free because the official has blundered": *Moti* at [91] per Heydon J. Alternatively put, by Cardozo J in *People v Defore* 150 NE 585 at 589 (NYCA 1926):

> "The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side, is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office."

215 As Brennan J said in *Jago* at [28]:

> "interests other than those of the litigants are involved in litigation, especially criminal litigation. The community has an immediate interest in the administration of criminal justice to guarantee peace and order in society. The victims of crime, who are not ordinarily parties to prosecutions on indictment and whose interests have generally gone unacknowledged until recent times, must be able to see that justice is done if they are not to be driven to self-help to rectify their grievances. ... Refusal by a court to try a criminal case does not undo the anxiety and disability which the pendency of a criminal charge produces, but it leaves the accused with an irremovable cloud of suspicion over his head. And it is likely to engender a festering sense of injustice on the part of the community and the victim."

216 In the United Kingdom, the principal authorities it seems, make clear that a Court has the power to stay proceedings in two categories of cases:

(a) where it will be impossible to give the accused a fair trial; and

(b) where it offends the Court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case.

Warren v Attorney-General for Jersey [2011] UKPC10; [2012] 1 AC 22 at [22] per Lord Dyson JSC.

217 Lord Kerr of Tonaghmore JSC said in *Warren* at [83]:

> "Be that as it may, it appears to me that a number of principles have emerged from recent jurisprudence. These may be stated as follows: ...[(i) The principle purpose of the examination, in the second category of cases, of the question whether proceedings

> should be stayed, is to determine whether this is necessary in order to protect the integrity of the criminal justice system ... This principle has been expressed in various, slightly differing ways, in a number of judgments on the subject. Thus, in *R v Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42, 74G Lord Lowry said that a stay will be granted where a trial would 'offend the Court's sense of justice and propriety'. In *R v Latif,* Lord Steyn stated at p112F, that a stay should be granted where to allow the trial to proceed would 'undermine public confidence in the criminal justice system and bring it into disrepute'. In *R v Mullens* [2000] QB 520, 534C-D, Rose LJ said that a stay should be granted notwithstanding the certainty of an accused's guilt where to refuse it would lead to 'the degradation of the lawful administration of justice'. I consider that it should now be recognised that the best way to describe this basis for a stay is that chosen by Lord Dyson J at *CNR v Maxwell* – that it should be granted where necessary to protect the integrity of the criminal justice system."

218 Even if those bases are met, the grant of a stay, will nevertheless, require a balancing of interests. In the course of that balancing exercise, it is appropriate to keep in mind Lord Dyson's caution in *Warren* at [35]. He said:

> "The second category of case where the court has the power to stay proceedings as an abuse of process is, as already stated, one where the court's sense of justice and propriety is offended if it asked to try the accused in the particular circumstances of the case. It is unhelpful and confusing to say that this category is founded on the imperative of avoiding unfairness to the accused. It is unhelpful because it focuses attention on the accused rather than on whether the court's sense of justice and propriety is offended or public confidence in the criminal justice system would be undermined by the trial. It is confusing because fairness to the accused is the focus of the first category of case. The two categories are distinct and should be considered separately."

219 There does not seem to me to be any significant difference of approach, although the relevant test is expressed using different words between the United Kingdom and Australia. In the first category of cases if, notwithstanding proper and appropriate directions of a trial Judge, an accused cannot get a fair trial, then relief by way of a permanent stay may be appropriate. The reasons why a fair trial is not possible are not confined, nor capable of strict categorisation.

220 In the second category of cases, where the Court's sense of justice and propriety is offended, and if public confidence in the criminal justice system would be undermined, and the trial itself, by the use of the court and its procedures, would bring the administration of justice into dispute, or if oppression and injustice would be the consequence of the trial being conducted as proposed, a court may order a permanent stay of the trial.

221 Before ordering a permanent stay of any trial, a court needs to balance the competing public interests. There is a powerful and public interest in ensuring that those who commit crimes are put on trial because one purpose of the administration of the criminal justice system is to guarantee peace and order in society.

222 It is only by balancing these interests in any particular case can a court come to an informed decision.

Submissions

223 A summary, necessarily brief, of the submissions of the parties is appropriate here.

224 The applicants largely based their submissions upon the authorities of *OK* and *CB*.

225 They submitted that the provisions of s 25A(9) of the ACC Act were intended to be used by the Crime Commission as a safeguard to prevent any interference with the administration of justice. They submitted that the section provides the mechanism to control, in this case by prohibiting, the derivative use of compulsorily obtained material by the CDPP in the proceedings against the applicants.

226 They submitted that derivative use had occurred because there had been *"... a free flow of information beyond the provision of admissible evidence"*

between the Crime Commission, the CDPP and a prosecution witness, Mr Tang.

227 It was said that a permanent stay was necessary because what had occurred was conduct constituting an abuse that was sufficient to "... *bring the system of justice into disrepute*".

228 The CDPP submitted that there was no proper basis for the grant of a permanent stay which was an exceptional remedy.

229 He submitted that there had been no direct or indirect usage of the material obtained during the compulsory examination. He noted that the transcripts of the compulsory examinations had not been read by any member of the prosecution team: that is, counsel and instructing solicitors. He submitted that therefore any trial of the applicants would be a fair one.

230 The CDPP pointed to the seriousness of the offences with which the applicants were charged and submitted that there was a real and important public interest in having the applicants put on trial, and that this public interest outweighed any private interest of the applicants.

231 The Crime Commission accepted that dissemination of material had occurred contrary to some of the directions of the examiner pursuant to s 25A(9) of the ACC Act. However, it submitted that this was, on the probabilities, due to an administrative oversight.

232 Further, the Crime Commission submitted that the ACC Act had abrogated the privilege against self-incrimination, and had provided only a limited protection, namely against direct use. It submitted that derivative use was permissible under the ACC Act, and any dissemination to the CDPP, and the use (if any) by the CDPP of that material, was derivative only and therefore lawfully permitted. It submitted that the administrative oversight was not a sufficient reason to order a permanent stay of the proceedings.

233 Although the Crime Commission submitted that the distribution of Mr McCarthy's examination transcripts and exhibits occurred due to an administrative oversight, I am not prepared to make such a finding.

234 Firstly, there was no evidence from the relevant officer of the Crime Commission that this was so. Ms Sharp, the Crime Commission's officer, did not become the case officer for Operation Polbream until a number of years after the dissemination had occurred. Her evidence on this issue is simply post-event speculation. Secondly, the terms of the relevant letter suggest that the distribution is authorised by s 59(7) of the ACC Act. This suggests that the Crime Commission, at that time, took the view, contrary to the decision in *OK*, that s 59(7) of the ACC Act authorised distribution even if the direction given under s 25(9) of the ACC Act did not. In other words, it intended to distribute the material, and asserted that it did so in accordance with its legal obligations.

235 Thirdly, the close relationship between the Crime Commission and the CDPP with respect to Operation Wickenby and Operation Polbream, suggests that an early, and intentional, decision was made to share all available information between the two agencies and the ATO.

236 I am thus satisfied that the distribution of the compulsorily obtained material was intended, and not due to an administrative oversight. it was clearly made without sufficient regard to any of the s 25A(9) directions which prohibited it and seemingly in the wrong belief that s 59(7) of the ACC Act authorised the distribution.

Discernment

237 Section 25A(9) of the ACC Act requires that the Examiner must give such a direction if the failure to do so might prejudice "*... the fair trial of a person who has been or may be charged with an offence*". The CEO of the Crime Commission, or his delegate, has a similar obligation: s 25(11) of the ACC Act.

238 It may be accepted that the privilege against self-incrimination may not ordinarily protect a person against disclosure of his defence at a criminal trial: see Mason CJ in *Hamilton v Oades* [1989] HCA 21; (1989) 166 CLR 486 at [24]. However, absent specific statutory provisions eg in the case of an alibi defence, an accused is not obliged to disclose his or her defence. That is the position here.

239 Ordinarily, a person who has been, or else may be charged with a criminal offence, is not obliged to, and is protected against being required to, disclose their defence. The reason for such protection is that such disclosure is usually regarded as a constituting a real risk to the fairness and integrity of the trial of the criminal charge: *Sorby* at [9]-[11] per Gibbs CJ; *Hamilton* at [9] per Deane and Gaudron JJ.

240 The ACC Act clearly prohibits the direct usage of compulsorily obtained evidence: s 30(5). It does not explicitly prohibit derivative or indirect usage, other than by the making of an order under s 25A(9) of the ACC Act, which itself either entirely prohibits or else prohibits publication to the CDPP: *OK* at [106]-[107].

241 Derivative or indirect usage is a concept well identified in the authorities. In *Sorby* at [2], Murphy J described derivative evidence as:

> "...evidence obtained by using the testimony as a basis of investigation."

242 In *Hamilton*, Mason CJ at [16] described it thus:

> "...derivative evidence, that is evidence which is obtained from other sources in consequence of answers given by the witness in his examination."

243 In the context of this case, the term would extend to include the use of the compulsorily obtained evidence as a basis for the development of strategies for the presentation of a prosecution case, such as the order in

which witnesses will be called, and also the development of an appropriate plan for the cross-examination of an accused if they give evidence. It also includes the use of that evidence by Mr Tang in the course of, or else in the preparation of, his statements. It would also cover the use of the material to make an assessment of the likely strength of the defence case and to have advance notice of any defence issues likely to be raised. Whilst counsel for the prosecution (and their instructing solicitor) have not read the transcripts, others in the CDPP's office, who are responsible for giving instructions, have the requisite knowledge.

244 Of course, knowledge by an accused, and his or her legal representatives, of the fact that such indirect usage was permitted, and that the compulsory examination transcripts and other material based on, or including, indirect usage are in the hands of the CDPP's office, whether this included the actual prosecutor or not, may be an important factor for that accused to take into account in determining how to present their case, including whether or not to give evidence.

245 Transcripts of compulsory examinations which are not admissible evidence, can only be distributed by the Crime Commission acting on powers contained in s 59(7) of the ACC Act. But, as the decisions in *OK* and *CB* make plain, in order to ensure that the relevant provisions of the ACC Act do not create circumstances which may affect a fair trial, the prohibition on the distribution of the evidence, by means of a direction contained in s 25A of the ACC Act prevails over the power in s 59(7) of the ACC Act to disseminate information. Accordingly, s 59(7) of the ACC Act is not a permissible basis in this case to justify the dissemination of the material.

246 Here, so far as Mr McCarthy was concerned, the final s 25A(9) direction was made by the Examiner on 13 September 2007, no doubt, because he thought it was necessary so as to ensure a fair trial. The later variation made by the delegate for the CEO of the Crime Commission was only lawful if it might not prejudice the fair trial of Mr McCarthy: s 25A(11) of the

ACC Act. But disclosure of the transcript of the examinations to the CDPP must have prejudiced, or else have been highly likely to have prejudiced the fair trial of Mr McCarthy. The only reason for supplying the transcripts to the CDPP was to enable their derivative or indirect use at trial. Otherwise, it was entirely unnecessary for transcripts to be passed on.

247 Although at one point in time, it appears that the CDPP required the transcripts for the purpose of pre-trial disclosure, a moment's pause and reflection would indicate clearly that the CDPP did not require them for that purpose. Pre-trial disclosure could readily have occurred of the transcripts of Mr McCarthy by the CDPP arranging with the Crime Commission for that body to send them directly to the lawyers for the accused. The CDPP did not have any indispensable role to play in this purely administrative exercise.

248 In short, the only basis for the transmission of the transcripts and other material was to enable their derivative or indirect usage against Mr McCarthy. Any such indirect usage must have been likely to have prejudiced a fair trial.

249 In the case of Mr McCarthy, I have concluded that distribution was wrong for two reasons:

(a) up to March 2012, because it contravened specific directions made by the Examiner on 13 September 2007;

(b) after March 2012, because the variation was not authorised by the ACC Act and the principles established in *OK*;

250 In the case of Mr Seller, the initial 25A(9) direction made on 14 September 2007, by the Examiner, prohibited distribution to the CDPP of the transcripts of his examination, or the exhibits identified during it. The variation in December 2007 permitted dissemination to the CDPP and to counsel who were retained *"... in relation to the prosecution of offences ...*

against Ross Seller, Patrick McCarthy ...". It seems that the CEO's delegate acted on the view that since derivative use of the material was permissible, dissemination to the CDPP was lawful and hence could not prejudice the fair trial of Mr Seller.

251 But for the same reasons as I have earlier articulated with respect to Mr McCarthy, such dissemination was likely to impact adversely on a fair trial for Mr Seller, and was not authorised by the ACC Act.

252 Putting it differently, I am satisfied that dissemination of the transcript of the examination of Mr Seller, and any documents identified, was wrong because the CEO's delegate's direction of December 2007 was not authorised by the ACC Act or the authorities.

253 The question then becomes what order, if any, ought be made was a matter of the exercise of discretion. I have found that:

(a) there has been indirect and derivative use of compulsorily obtained material;

(b) that derivative use was wrong because either it was contrary to a direction of the Examiner, or else because the relevant variation of the Examiner's direction was not authorised by the ACC Act;

(c) the transcripts of the evidence obtained during the compulsory examination contain material which would otherwise be caught by each applicant's privilege against self-incrimination, and which, but for the provisions of s 30 of the ACC Act would not be available to anyone except each applicant and their lawyer, unless each applicant waived their privilege; and

(d) the derivative use has provided the CDPP with the transcript of the examination and material derived from them. It has also assisted one of the witnesses upon whom reliance will be placed as part of the prosecution case.

254 This conduct is contrary to the relevant authorities dealing with the proper exercise of the Crime Commission's power, in particular, the full Court of the Federal Court of Australia in *OK* at [107]-[109], because the relevant obligation on the Examiner to prevent distribution of the contents of an examination and thus maintain the relevant balance between public and private interests, has been lost.

255 Because information, compulsorily obtained, which is relevant to the defence of Mr McCarthy and Mr Seller has been made available to the CDPP, their right to a fair trial in accordance with the adversarial process has been compromised rather than ensured: *CB* at [111].

256 But, are these events, and the conclusions which I have drawn from them, sufficient to amount to an abuse of the court's process in the sense of a trial bringing the administration of justice into disrepute, or else would a failure of the Court to grant a stay lead to an erosion of public confidence because the court's processes may lend themselves to oppression and injustice?

257 I am satisfied that this is a matter where the Court ought to grant a stay of the proceedings. The Crime Commission issued summonses for the compulsory examination of the applicants, in the express contemplation of specific charges – they were nominated in the summonses. The applicants were entitled to have the contents of their examination, in which they were obliged to forego their privilege against self-incrimination, and which contained evidence relevant to their defence, kept confidential from the prosecution so that their right it a fair trial was ensured.

258 The conduct of the Crime Commission, in conjunction with the CDPP has deprived them of the protection which the law ensured. Any trial would not be fair or in accordance with the adversarial process.

259 It is not appropriate for this Court to permit a trial of their offences in all of the circumstances because it would be an offence to the administration of

justice for the applicants to be confronted by prosecution authorities who have had access to material ordinarily caught by the privilege against self-incrimination, but which has been compulsorily obtained.

260 The undoubted and strong public interest in the prosecution of these criminal allegations, and the proof and punishment of their crimes, does not outweigh the public interest in the due administration of justice.

261 When added to the consideration of the private interests of the applicants in having their own entitlement to a fair trial in accordance with the adversarial process being ensured, the balance in favour of an order staying the proceedings falls strongly on their side.

262 In the result, the applicants succeed on their application.

Orders

263 I make the following orders:

(1) Order that any proceedings on the indictments presented on 14 March 2012 against Ross Edward Seller and Patrick David McCarthy, be, and hereby are, stayed.

(2) Order that the Commonwealth Director of Public Prosecutions pay the applicants' costs of the applications, except the costs of preparing and copying Exhibits PH5, PH6 and PH7.

(3) Order that the Australian Crime Commission pay its own costs of the proceedings.

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I certify that this and the 71 preceding pages are a true copy of the reasons for judgment herein of Justice Peter Garling.

Dated 17 August 2012

Associate