

# Chapter 1

## Introduction

1.1 On 26 March 2015, the Hon Mr Michael Keenan MP, Minister for Justice, introduced the Law Enforcement Legislation Amendment (Powers) Bill 2015 (the Bill) into the House of Representatives.<sup>1</sup>

1.2 On 14 May 2015, pursuant to a report of the Senate Standing Committee for Selection of Bills, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 18 June 2015.<sup>2</sup>

### Conduct of the inquiry

1.3 In accordance with usual practice the committee wrote to a number of persons and organisations, inviting submissions to the inquiry by 1 June 2015. Details of the inquiry were also made available through the committee's website at [http://www.aph.gov.au/senate\\_legalcon](http://www.aph.gov.au/senate_legalcon).

1.4 The committee received 5 submissions in response to this inquiry. The submissions are listed at Appendix 1 to this report and are available on the committee's webpage. The committee would like to thank all those who submitted to the inquiry.

### Background to the Bill

#### *Case law*

1.5 The Explanatory Memorandum to the Bill (EM) notes that the powers of the Australian Crime Commission (ACC) and the Australian Commission for Law Enforcement Integrity (ACLEI) to conduct examinations and hearings have been affected by a number of recent cases including *X7 v Australian Crime Commission*<sup>3</sup> (X7 case), *R v Seller and McCarthy*<sup>4</sup> (Seller case), *Lee v NSW Crime Commission*<sup>5</sup> (Lee No 1 case) and *Lee v R*<sup>6</sup> (Lee No 2 case).<sup>7</sup>

#### *The X7 case*

1.6 On 26 June 2013, a majority of the High Court of Australia (HCA) in the X7 case held that the *Australian Crime Commission Act 2002* (Cth) (ACC Act) did not

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1 *Votes and Proceedings*, No. 111, 26 March 2015, p. 1244.

2 *Journals of the Senate*, No. 94, 14 May 2015, pp 2598–2599.

3 *X7 v Australian Crime Commission* [2013] HCA 29; (2013) 248 CLR 92.

4 *R v Seller and McCarthy* [2013] NSWCCA 42; (2013) 273 FLR 155.

5 *Lee v NSW Crime Commission* [2013] HCA 39; (2013) 251 CLR 196.

6 *Lee v R* [2014] HCA 20; (2014) 88 ALJR 656.

7 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, p. 2.

authorise an examiner appointed under the ACC Act to require a person charged with, but not yet tried for, an indictable Commonwealth offence to answer questions about the subject matter of the offence. The majority of the HCA reasoned that if the provisions of the ACC Act were to permit the compulsory examination of a person charged with an offence about the subject matter of the pending charge they would effect a fundamental alteration to the process of criminal justice, given the accusatorial nature of criminal justice.<sup>8</sup> The majority of the HCA stated that:

This is not to decide that statute can never effect fundamental alterations to the process of criminal justice...But such an alteration can only be made if it is made clearly by express words or necessary intendment.<sup>9</sup>

1.7 A majority of the court held that the ACC Act does not expressly or impliedly effect such an alteration.<sup>10</sup> In his second reading speech, Mr Keenan explained that:

...following the decision in X7, the Crime Commission has stopped examining anyone who had been charged with an offence where the questioning might touch on the subject matter of the charges. This has already prevented the Crime Commission from obtaining valuable intelligence about the methodologies and activities of those involved in serious criminal activity, including recruiters and facilitators of foreign fighters and their links with other individuals.<sup>11</sup>

### *Practical unfairness*

1.8 In the Seller case, which preceded the X7 case, the New South Wales Court of Criminal Appeal (NSWCCA) held that the use of material by the Commonwealth Director of Public Prosecutions (CDPP) derived from a compulsory examination conducted by the ACC did not, of itself, justify a permanent stay of proceedings, without proof that the dissemination would result in a fundamental defect in the trial process, by prejudicing the accused's right to a fair trial.<sup>12</sup>

1.9 In contrast, in relation to the use of post-charge material by a prosecutor, the HCA stated in the Lee No 2 case:

These appeals do not fall to be decided by reference to whether there can be shown to be some "practical unfairness" in the conduct of the appellants' defence affecting the result of the trial. This is a case concerning the very nature of a criminal trial and its requirements in our system of criminal justice. The appellants' trial was altered in a fundamental respect by the

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8 *X7 v Australian Crime Commission* [2013] HCA 29 at [118]; (2013) 248 CLR 92.

9 *X7 v Australian Crime Commission* [2013] HCA 29 at [119]; (2013) 248 CLR 92.

10 *X7 v Australian Crime Commission* [2013] HCA 29 at [142] and [147]; (2013) 248 CLR 92 per Hayne and Bell JJ (Kiefel J agreeing).

11 The Hon Mr Michael Keenan MP, *House of Representatives Hansard*, 26 March 2015, p. 3555.

12 *R v Seller and McCarthy* [2013] NSWCCA 42 at [112] and [114]; (2013) 273 FLR 155 per Bathurst CJ (Bellew J agreeing).

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prosecution having the appellants' evidence before the Commission in its possession.<sup>13</sup>

1.10 However, in *Bartlett v R* (Bartlett case),<sup>14</sup> in the Supreme Court of Western Australia, Justice Heenan distinguished the judgment of the HCA in the Lee No 2 case. Justice Heenan held that even where the Crown Prosecutor was in possession of the transcript of a compulsory examination, a criminal trial of the examinee could go ahead if he or she would not suffer any actual or potential prejudice. In the Bartlett case, on the facts, Justice Heenan concluded that the accused did not suffer any prejudice, because the compulsory examination was conducted without objection and without the invocation of a claim for limited privilege.<sup>15</sup>

1.11 Justice Kaye of the Supreme Court of Victoria in *R v Jacobson (Ruling No 4)*<sup>16</sup> cited the reasoning of Justice Heenan in the Bartlett case and held, on the facts, that the Lee No 2 case did not prevent the Victorian Director of Public Prosecutions from having access to the transcript of an examination of the accused conducted under section 19 of the *Australian Securities Investments Commission Act 2001* (Cth), as no practical prejudice or unfairness could be shown.<sup>17</sup>

#### *Confiscation proceedings*

1.12 When examining the scope of power of the Supreme Court of New South Wales to order the examination of a person under paragraph 31D(1)(a) of the *Criminal Assets Recovery Act 1990* (NSW), the majority of the HCA in the Lee No 1 case found that the provisions of that Act clearly abrogated any privilege against self-incrimination, irrespective of whether or not an examinee had been charged with a criminal offence. The majority of the HCA held that where Parliament uses sufficiently clear words, a statute can abrogate the right to silence for civil matters, such as confiscations.<sup>18</sup>

1.13 In the case of *Commissioner of the Australian Federal Police v Zhao*,<sup>19</sup> the HCA unanimously accepted that the provisions of the *Proceeds of Crime Act 2002* (Cth) (PoC Act) relating to restraining orders and forfeiture orders contemplated that such civil orders may be made regardless of whether a person is charged with a similar criminal offence.<sup>20</sup> However the HCA concluded that this would not impact on a court's discretion to order a stay of forfeiture proceedings where the court has

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13 *Lee v R* [2014] HCA 20 at [43]; (2014) 88 ALJR 656 per *curiam*.

14 *Bartlett v R* [2014] WASC 277; (2014) 287 FLR 402.

15 *Bartlett v R* [2014] WASC 277 at [46] and [48]; (2014) 287 FLR 402 per Heenan J.

16 *R v Jacobson (Ruling No 4)* [2014] VSC 508; (2014) 290 FLR 143.

17 *R v Jacobson (Ruling No 4)* [2014] VSC 508 at [39]–[40]; (2014) 290 FLR 143 per Kaye J.

18 *Lee v NSW Crime Commission* [2013] HCA 39 at [55] per French CJ, at [144] per Crennan J and at [331]–[335] per Gageler and Keane JJ; (2013) 251 CLR 196.

19 *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5; (2015) 89 ALJR 331.

20 *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 at [34] per *curiam*; (2015) 89 ALJR 331.

determined that those proceedings would create a real risk of prejudice to the criminal trial.<sup>21</sup>

### ***Parliamentary Joint Committee Inquiry***

1.14 In March 2012, the Parliamentary Joint Committee on Law Enforcement (PJCLE) tabled its report on Commonwealth unexplained wealth legislation and arrangements (PJCLE Report) in the House of Representatives.<sup>22</sup> The PJCLE Report made 18 recommendations in total. Recommendations 3 and 4 concerned the use of ACC compulsory examinations to support unexplained wealth proceedings under the PoC Act and recommended that:

...the *Australian Crime Commission Act 2002* and the *Proceeds of Crime Act 2002* be amended as necessary to make clear that the Australian Crime Commission's examination material can be used as evidence in proceedings under the *Proceeds of Crime Act 2002*...[and] that the *Proceeds of Crime Act 2002* be amended so as to enable an ACC examiner to conduct examinations in support of unexplained wealth proceedings after a restraining order has been made by a court.<sup>23</sup>

### **Purpose of the Bill**

1.15 The EM notes that the Bill seeks to amend the ACC Act and the *Law Enforcement Integrity Commissioner Act 2006* (Cth) (LEIC Act) to more precisely clarify:

...the circumstances in which the ACC and Integrity Commissioner are able to use their powers to conduct examinations and hearings, to disclose information obtained directly and indirectly from examinations and hearings and the uses to which such information may be put.<sup>24</sup>

1.16 In his second reading speech, Mr Keenan stated that the Bill is also designed to:

...more clearly authorise the Crime Commission to conduct examinations in the context of ongoing confiscation proceedings under the *Proceeds of Crime Act 2002*, and set out when that material may be used in those proceedings. These changes respond to recommendations 3 and 4 of the Parliamentary Joint Committee on Law Enforcement's 2012 inquiry into unexplained wealth. This delivers on the government's election

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21 *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 at [47] per curiam; (2015) 89 ALJR 331.

22 *Votes and Proceedings*, No. 98, 19 March 2012, p. 1328.

23 Parliamentary Joint Committee on Law Enforcement, *Report on inquiry into Commonwealth unexplained wealth legislation and arrangements*, March 2012, pp 39, 43 at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Law\\_Enforcement/Completed\\_inquiries/2010-13/unexplained\\_wealth/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Completed_inquiries/2010-13/unexplained_wealth/report/index) (accessed 20 May 2015).

24 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, p. 2.

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commitment to implement the outstanding recommendations of the committee's report.<sup>25</sup>

### **Key provisions of the Bill**

1.17 The Bill comprises two schedules which propose amendments to the ACC Act and the LEIC Act and make a consequential amendment to the *Public Interest Disclosure Act 2013* (Cth). Schedule 1 of the Bill proposes amendments that would affect ACC examination powers, while Schedule 2 of the Bill proposes amendments that would affect the investigation powers of the Integrity Commissioner.

1.18 The EM notes:

As the powers of ACC examiners and the Integrity Commissioner are expressed in a very similar manner in the ACC Act and LEIC Act, the Bill will make similar amendments to both Acts.<sup>26</sup>

### ***Extension of examination and hearing powers***

1.19 Proposed subsections 24A(2) of the ACC Act and 82(1A) of the LEIC Act would specify that examinations and hearings could be conducted either pre-charge and pre-confiscation application or post-charge and post-confiscation application.<sup>27</sup>

1.20 Proposed subsections 25A(6A) of the ACC Act and 83(2A) of the LEIC Act would empower an ACC examiner or the Integrity Commissioner to ask questions of an examinee or witness, or request the production of documents, relating to the subject matter of any charge or imminent charge.<sup>28</sup>

1.21 Proposed sections 25B of the ACC Act and 96AA of the LEIC Act would allow specified entities to use or disclose material from examinations and hearings to obtain derivative material, irrespective of the nature of the material or when the material was used or disclosed.<sup>29</sup>

1.22 Under proposed sections 25C and 25D of the ACC Act and 96AB and 96AC of the LEIC Act, once an examinee or a witness has been charged with an offence, or if a charge is imminent, examination or hearing material, or material derived from the examination or hearing, may be disclosed to the relevant prosecutor with a court order from the court hearing the charges, made under proposed subsection 25E(1) of the ACC Act or 96AD(1) of the LEIC Act.<sup>30</sup>

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25 The Hon Mr Michael Keenan MP, *House of Representatives Hansard*, 26 March 2015, p. 3556.

26 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, p. 8.

27 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 12 and Sch 2 item 8.

28 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 12 and Sch 2 item 8.

29 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 16 and Sch 2 item 29.

30 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 16 and Sch 2 item 18.

### ***Other key provisions***

1.23 Proposed subsections 25A(9A) of the ACC Act and 90(2) of the LEIC Act would remove the need for an examiner or the Integrity Commissioner to issue a direction prohibiting the disclosure or use of examination or hearing material on grounds that a failure to do so might prejudice a person's reputation.<sup>31</sup>

1.24 The Bill also proposes to increase the penalties for breaching secrecy and non-disclosure obligations to imprisonment for two years or 120 penalty units or both.<sup>32</sup> The Statement of Compatibility in the EM (statement of compatibility) states that this would make the penalties in the ACC Act and the LEIC Act for unauthorised disclosure consistent with penalties for similar offences in other Commonwealth legislation.<sup>33</sup>

1.25 Finally, the Senate Standing Committee on the Scrutiny of Bills (Scrutiny of Bills Committee) briefly commented on the Bill in its *Alert Digest No. 5 of 2015*. The Scrutiny of Bills Committee noted that pursuant to sub-item 37(1) of Schedule 1 and sub-item 38(1) of Schedule 2, the proposed provisions of Part 1 of Schedule 1 and Schedule 2 would generally apply to all uses and disclosures of examination material and derivative material that are made, and summonses that are issued, at or after the amendments commence. The Scrutiny of Bills Committee noted that the EM states that 'the amendments are intended to apply irrespective of whether the relevant examination occurred before or after the commencement' of the relevant Schedules.<sup>34</sup> The Scrutiny of Bills Committee sought:

...the Minister's advice as to the rationale for applying these amendments to material that was generated from examinations (or hearings) conducted prior to the commencement of the provisions.<sup>35</sup>

1.26 As at the time of drafting, the minister's response was not available.

### ***Human rights implications of the key provisions***

1.27 The key provisions of the Bill would engage the human rights contained in articles 14 (the right to a fair trial and protection against self-incrimination), 17 (the right to privacy) and 19 (the right to freedom of expression) of the International

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31 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 14 and Sch 2 item 17. See also Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, p. 22.

32 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 items 15, 22, 23, 28, 30, 32, 41 and Sch 2 items 5, 16, 18, 22, 23, 34.

33 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, pp 8, 26.

34 See Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, pp 62, 101.

35 Senate Standing Committee on the Scrutiny of Bills, *Alert Digest No. 5 of 2015*, 13 May 2015, pp 15–16.

Covenant on Civil and Political Rights (ICCPR).<sup>36</sup> However, as noted by the Parliamentary Joint Committee on Human Rights (PJCHR) in its *Twenty-second report of the 44th Parliament*, a limitation of a human right may be permitted if it is necessary, reasonable and proportionate to a legitimate objective that is sought and the limitation incorporates effective safeguards to prevent misuse of the limitation.<sup>37</sup>

1.28 The statement of compatibility acknowledges that the Bill would engage the rights in article 14 of the ICCPR by:

- authorising post-charge examinations and hearings;
- authorising post-confiscation application examinations and hearings;
- authorising the derivative use of examination and hearing material; and
- modifying the categories of criminal proceedings in which hearing material may be used by the Integrity Commissioner against a witness.<sup>38</sup>

1.29 The statement of compatibility explains that the Bill would engage the right to privacy by:

- changing the circumstances in which a direction must be made about the disclosure or use of examination or hearing material; and
- authorising post-charge examinations and hearings.<sup>39</sup>

1.30 Finally, the statement of compatibility notes that the right to freedom of expression would be engaged through the proposed increases in penalties for breaching secrecy and other non-disclosure provisions in the ACC Act and the LEIC Act.<sup>40</sup>

### ***Proposed safeguards***

1.31 The current ACC Act and LEIC Act already limit the purposes for which an examination or a hearing may be conducted and the Bill proposes to extend these limitations to post-charge examinations and hearings and to post-confiscation application examinations and hearings. Under the ACC Act, an examiner may only conduct an examination in support of a special operation or special investigation<sup>41</sup> and

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36 *International Covenant on Civil and Political Rights*, articles 14(1), 14(3)(g), 17 and 19(2) at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 22 May 2015).

37 Parliamentary Joint Committee on Human Rights, *Twenty-second report of the 44th Parliament*, 13 May 2015, p. 54 at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Completed\\_inquiries/2015/Twenty-second\\_Report\\_of\\_the\\_44th\\_Parliament](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2015/Twenty-second_Report_of_the_44th_Parliament) (accessed 22 May 2015).

38 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, pp 9, 15.

39 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, pp 21–22.

40 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, p. 25.

41 *Australian Crime Commission Act 2002* (Cth), s. 24A.

may only ask questions relevant to that special operation or special investigation.<sup>42</sup> Under the LEIC Act, the Integrity Commissioner may only conduct a hearing in support of an investigation into a corruption issue<sup>43</sup> and may only ask questions relating to a corruption issue at the hearing.<sup>44</sup> The statement of compatibility notes that these provisions mean that examiners and the Integrity Commissioner may not exercise their powers 'for the purposes of bolstering' a prosecution or a confiscation proceeding against an examinee or witness.<sup>45</sup>

1.32 Furthermore, under proposed paragraph 28(1)(d) of the ACC Act, before issuing a summons (including a post-confiscation application summons) to a person who has already been charged with an offence, an examiner would have to be satisfied that the summons would be reasonably necessary for the purposes of the relevant special operation or special investigation, irrespective that the person has been charged or a charge is imminent.<sup>46</sup> Similarly, under proposed paragraph 83(1)(d) of the LEIC Act, the Integrity Commissioner would need to have reasonable grounds to suspect that evidence, documents or things produced under or resulting from a summons would be necessary for the purposes of the corruption investigation, even though the person has been charged or a charge is imminent.<sup>47</sup>

1.33 The proposed subsections 25A(9A) of the ACC Act and 90(2) of the LEIC Act would require an examiner or the Integrity Commissioner to issue a direction preventing the disclosure of examination material or hearing material taken in private if the examinee or witness has been charged with an offence or a charge is imminent, and the disclosure would reasonably be expected to prejudice the fair trial of the examinee or witness.<sup>48</sup> Under proposed subsections 25A(14A) of the ACC Act and 90(6) of the LEIC Act, a disclosure made in contravention of such a direction would be a criminal offence punishable by imprisonment for two years and/or a fine of 120 penalty points.<sup>49</sup>

1.34 As noted above, post-charge material and post-charge derivative material could only be disclosed under proposed sections 25C and 25D of the ACC Act and 96AB and 96AC of the LEIC Act with a court order from the court hearing the charges. Additionally, under proposed subsections 25E(1) and 25E(3) of the ACC Act and 96AD(1) and 96AD(3) of the LEIC Act, the court would only be able to make a

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42 *Australian Crime Commission Act 2002* (Cth), ss. 25A(6).

43 *Law Enforcement Integrity Commissioner Act 2006* (Cth), ss. 82(1).

44 *Law Enforcement Integrity Commissioner Act 2006* (Cth), ss. 83(3).

45 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, pp 10, 13–14.

46 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 17.

47 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 2 item 9.

48 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 14 and Sch 2 item 17.

49 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 15 and Sch 2 item 18.

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disclosure order if it were satisfied that the disclosure would be required in the interests of justice. Moreover, the proposed provisions would not affect a court's power to make any orders necessary to ensure that the examinee or witness receives a fair trial.<sup>50</sup> The statement of compatibility notes that these 'provisions ensure that the court hearing the charges against the examinee or witness retains control over its proceedings to ensure that they are fair'.<sup>51</sup>

1.35 Proposed subsections 30(4) to 30(5A) of the ACC Act and 96(3) to 96(4A) of the LEIC Act would provide a qualified direct use immunity for examination or hearing material obtained by compulsion at criminal, confiscation or sentencing proceedings. That is, the specific information elicited using compulsory powers would not be admissible in proceedings against the examinee or witness. However, under the ACC Act the examinee would be required to claim a privilege against self-incrimination before the evidence becomes inadmissible.<sup>52</sup>

1.36 Finally, under proposed subsections 25H(4) of the ACC Act and 96AG(4) of the LEIC Act, the proposed provisions would not affect a court's power to make any orders necessary to prevent prejudice to the proper administration of justice.<sup>53</sup>

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50 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 16 and Sch 2 item 18.

51 Explanatory Memorandum to the Law Enforcement Legislation Amendment (Powers) Bill 2015, p. 11.

52 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 26 and Sch 2 item 26.

53 Law Enforcement Legislation Amendment (Powers) Bill 2015, Sch 1 item 16 and Sch 2 item 18.

