# THE RIGHT TO SILENCE: IMPLICATIONS FROM THE X7 CASE

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1. *X7 v Australian Crime Commission*[1] ("X7") was decided by the High Court of Australia on 26 June 2013. Since then, the High Court has considered the case on two occasions; *Lee v New South Wales Crime Commission*[2] ("Lee No 1") and *Lee v R*[3] ("Lee No 2"). Lee No 1 and Lee No 2 are related cases. Both concern Jason Lee and Seong Wong Lee ("the Lees"). As will be seen, Lee No 1 is an appeal from the New South Wales Court of Appeal which itself allowed an appeal from a single judge who refused to make orders for the Lees' compulsory examination under a New South Wales statute. However, there had been earlier examinations of the Lees under a different New South Wales statute and those earlier examinations and the subsequent disclose of the information gained from those examinations was the subject of Lee No 2.

2. Between the handing down of X7 and the handing down of Lee No 2, X7 was considered by other courts in Australia. It is not necessary to deal with any of those cases given the recent examination of X7 by the High Court in the two cases it has decided since.

3. X7 followed upon a decision of the Full Court of the Federal Court of Australia namely *Australian Crime Commission v OK*[4] which concerned similar issues. Although this predated X7, it is worth some attention, as are two of the cases central to the High Court's considerations namely *Hamilton v Oades*[5] and *Hammond v The Commonwealth*[6]. It is convenient to deal with these cases after explaining the context of X7 but before analysing the reasons of the Court in that case.

**X7**

*The facts in X7*

4. The *Australian Crime Commission Act* 2002 ("the ACC Act") vests power in examiners appointed under the Act to conduct examinations of individuals. The relevant provisions are contained in Division 2 of Part II. It is necessary to set these provisions out.

> *"**24A Examinations***
>
> *An examiner may conduct an examination for the purposes of a special ACC operation/investigation.*
>
> ***25A Conduct of examination***
>
> *Conduct of proceedings*
>
> *(1) An examiner may regulate the conduct of proceedings at an examination as he or she thinks fit.*
>
> *Representation at examination*
>
> *(2) At an examination before an examiner:*
> *(a) a person giving evidence may be represented by a legal practitioner; and*
> *(b) if, by reason of the existence of special circumstances, the examiner consents to a person who is not giving evidence being represented by a legal practitioner—the person may be so represented.*
>
> *Persons present at examination*
>
> *(3) An examination before an examiner must be held in private and the examiner may give directions as to the persons who may be present during the examination or a part of the examination.*

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1 (2013) 248 CLR 92
2 (2013) 87 ALJR 1082
3 [2014] 308 ALR 252
4 (2010) 185 FCR 258
5 (1989) 166 CLR 486
6 (1982) 152 CLR 188

*(4) Nothing in a direction given by the examiner under subsection (3) prevents the presence, when evidence is being taken at an examination before the examiner, of:*

*(a) a person representing the person giving evidence; or*

*(b) a person representing, in accordance with subsection (2), a person who, by reason of a direction given by the examiner under subsection (3), is entitled to be present.*

*(5) If an examination before an examiner is being held, a person (other than a member of the staff of the ACC approved by the examiner) must not be present at the examination unless the person is entitled to be present by reason of a direction given by the examiner under subsection (3) or by reason of subsection (4).*

*Witnesses*

*(6) At an examination before an examiner:*

*(a) counsel assisting the examiner generally or in relation to the matter to which the ACC operation/investigation relates; or*

*(b) any person authorised by the examiner to appear before the examiner at the examination; or*

*(c) any legal practitioner representing a person at the examination in accordance with subsection (2);*

*may, so far as the examiner thinks appropriate, examine or cross-examine any witness on any matter that the examiner considers relevant to the ACC operation/investigation.*

*(7) If a person (other than a member of the staff of the ACC) is present at an examination before an examiner while another person (the **witness**) is giving evidence at the examination, the examiner must:*

*(a) inform the witness that the person is present; and*

*(b) give the witness an opportunity to comment on the presence of the person.*

*(8) To avoid doubt, a person does not cease to be entitled to be present at an examination before an examiner or part of such an examination if:*

*(a) the examiner fails to comply with subsection (7); or*

*(b) a witness comments adversely on the presence of the person under paragraph (7)(b).*

*Confidentiality*

*(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.*

*(10)Subject to subsection (11), the CEO may, in writing, vary or revoke a direction under subsection (9).*

*(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.*

*Courts*

*(12)If:*

*(a) a person has been charged with an offence before a federal court or before a court of a State or Territory; and*

*(b) the court considers that it may be desirable in the interests of justice that particular evidence given before an examiner, being evidence in relation to which the examiner has given a direction under subsection (9), be made available to the person or to a legal practitioner representing the person;*

*the court may give to the examiner or to the CEO a certificate to that effect and, if the court does so, the examiner or the CEO, as the case may be, must make the evidence available to the court.*

*(13)If:*

*(a) the examiner or the CEO makes evidence available to a court in accordance with subsection (12); and*

*(b) the court, after examining the evidence, is satisfied that the interests of justice so require;*

*the court may make the evidence available to the person charged with the offence concerned or to a legal practitioner representing the person.*

*Offence*

*(14)A person who:*

*(a) is present at an examination in contravention of subsection (5); or*

*(b) makes a publication in contravention of a direction given under subsection (9);*

*is guilty of an offence punishable, upon summary conviction, by a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 12 months.*

*End of examination*

*(15)At the conclusion of an examination held by an examiner, the examiner must give the head of the special ACC operation/investigation:*

*(a) a record of the proceedings of the examination; and*

*(b) any documents or other things given to the examiner at, or in connection with, the examination.*

***28 Power to summon witnesses and take evidence***

*(1) An examiner may summon a person to appear before an examiner at an examination to give evidence and to produce such documents or other things (if any) as are referred to in the summons.*

*(1A) Before issuing a summons under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the summons. The record is to be made:*

*(a) before the issue of the summons; or*

*(b) at the same time as the issue of the summons.*

*(2) A summons under subsection (1) requiring a person to appear before an examiner at an examination must be accompanied by a copy of the determination of the Board that the intelligence operation is a special operation or that the investigation into matters relating to federally relevant criminal activity is a special investigation.*

*(3) A summons under subsection (1) requiring a person to appear before an examiner at an examination shall, unless the examiner issuing the summons is satisfied that, in the particular circumstances of the special ACC operation/investigation to which the examination relates, it would prejudice the effectiveness of the special ACC operation/investigation for the summons to do so, set out, so far as is reasonably practicable, the general nature of the matters in relation to which the person is to be questioned, but nothing in this subsection prevents an examiner from questioning the person in relation to any matter that relates to a special ACC operation/investigation.*

*(4) The examiner who is holding an examination may require a person appearing at the examination to produce a document or other thing.*

*(5) An examiner may, at an examination, take evidence on oath or affirmation and for that purpose:*

*(a) the examiner may require a person appearing at the examination to give evidence either to take an oath or to make an affirmation in a form approved by the examiner; and*

*(b) the examiner, or a person who is an authorised person in relation to the ACC, may administer an oath or affirmation to a person so appearing at the examination.*

*(6) In this section, a reference to a person who is an authorised person in relation to the ACC is a reference to a person authorised in writing, or a person included in a class of persons authorised in writing, for the purposes of this section by the CEO.*

*(7) The powers conferred by this section are not exercisable except for the purposes of a special ACC operation/investigation.*

*(8) A failure to comply with section 29A, so far as section 29A relates to a summons under subsection (1) of this section, does not affect the validity of the summons.*

***29 Power to obtain documents***

*(1) An examiner may, by notice in writing served on a person, require the person:*

*(a) to attend, at a time and place specified in the notice, before a person specified in the notice, being an examiner or a member of the staff of the ACC; and*

*(b) to produce at that time and place to the person so specified a document or thing specified in the notice, being a document or thing that is relevant to a special ACC operation/investigation.*

*(1A) Before issuing a notice under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the notice. The record is to be made:*

*(a) before the issue of the notice; or*

*(b) at the same time as the issue of the notice.*

*(2) A notice may be issued under this section in relation to a special ACC operation/investigation, whether or not an examination before an examiner is being held for the purposes of the operation or investigation.*

*(3) A person shall not refuse or fail to comply with a notice served on him or her under this section.*

*(3A) A person who contravenes subsection (3) is guilty of an indictable offence that, subject to this section, is punishable, upon conviction, by a fine not exceeding 200 penalty units or imprisonment for a period not exceeding 5 years.*

*(3B) Notwithstanding that an offence against subsection (3) is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.*

*(3C) Where, in accordance with subsection (3B), a court of summary jurisdiction convicts a person of an offence against subsection (3), the penalty that the court may impose is a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 1 year.*

*(4) Subsections 30(3) to (5) and (9) apply in relation to a person who is required to produce a document or thing by a notice served on him or her under this section in the same manner as they apply in relation to a person who is required to produce a document or thing at an examination before an examiner.*

*(5) A failure to comply with section 29A, so far as section 29A relates to a notice under subsection (1) of this section, does not affect the validity of the notice.*

***29A Disclosure of summons or notice etc. may be prohibited***

*(1) The examiner issuing a summons under section 28 or a notice under section 29 must, or may, as provided in subsection (2), include in it a notation to the effect that disclosure of information about the summons or notice, or any official matter connected with it, is prohibited except in the circumstances, if any, specified in the notation.*

*(2) A notation must not be included in the summons or notice except as follows:*

*(a) the examiner must include the notation if satisfied that failure to do so would reasonably be expected to prejudice:*

*(i) the safety or reputation of a person; or*

*(ii) the fair trial of a person who has been or may be charged with an offence; or*

*(iii) the effectiveness of an operation or investigation;*

*(b) the examiner may include the notation if satisfied that failure to do so might prejudice:*

*(i) the safety or reputation of a person; or*

*(ii) the fair trial of a person who has been or may be charged with an offence; or*

*(iii) the effectiveness of an operation or investigation;*

*(c) the examiner may include the notation if satisfied that failure to do so might otherwise be contrary to the public interest.*

*(3) If a notation is included in the summons or notice, it must be accompanied by a written statement setting out the rights and obligations conferred or imposed by section 29B on the person who was served with, or otherwise given, the summons or notice.*

*(4) If, after the ACC has concluded the operation or investigation concerned:*

*(a) no evidence of an offence has been obtained as described in subsection 12(1); or*

*(b) evidence of an offence or offences has been assembled and given as required by subsection 12(1) and the CEO has been advised that no person will be prosecuted; or*

*(c) evidence of an offence or offences committed by only one person has been assembled and given as required by subsection 12(1) and criminal proceedings have begun against that person; or*

*(d) evidence of an offence or offences committed by 2 or more persons has been assembled and given as required by subsection 12(1) and:*

*(i) criminal proceedings have begun against all those persons; or*

*(ii) criminal proceedings have begun against one or more of those persons and the CEO has been advised that no other of those persons will be prosecuted;*

*all the notations that were included under this section in any summonses or notices relating to the operation or investigation are cancelled by this subsection.*

*(5) If a notation is cancelled by subsection (4), the CEO must serve a written notice of that fact on each person who was served with, or otherwise given, the summons or notice containing the notation.*

*(7) If:*

*(a) under this section, a notation in relation to the disclosure of information about:*

*(i) a summons issued under section 28; or*

*(ii) a notice issued under section 29; or*

*(iii) any official matter connected with the summons or notice;*

*has been made and not cancelled; and*

*(b) apart from this subsection, a credit reporting body (within the meaning of the Privacy Act 1988) would be required, under subsection 20E(5) of the Privacy Act 1988, to make a note about the disclosure of the information;*

*such a note must not be made until the notation is cancelled.*

*(8) In this section:*

***official matter** has the same meaning as in section 29B.*

***30 Failure of witnesses to attend and answer questions***

*Failure to attend*

*(1) A person served, as prescribed, with a summons to appear as a witness at an examination before an examiner shall not:*

*(a) fail to attend as required by the summons; or*

*(b) fail to attend from day to day unless excused, or released from further attendance, by the examiner.*

*Failure to answer questions etc.*

*(2) A person appearing as a witness at an examination before an examiner shall not:*

*(a) when required pursuant to section 28 either to take an oath or make an affirmation—refuse or fail to comply with the requirement;*

*(b) refuse or fail to answer a question that he or she is required to answer by the examiner; or*

*(c) refuse or fail to produce 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.*

*(3) Where:*

*(a) a legal practitioner is required to answer a question or produce a document at an examination before an examiner; and*

*(b) the answer to the question would disclose, or the document contains, a privileged communication made by or to the legal practitioner in his or her capacity as a legal practitioner;*

*the legal practitioner is entitled to refuse to comply with the requirement unless the person to whom or by whom the communication was made agrees to the legal practitioner complying with the requirement but, where the legal practitioner refuses to comply with the requirement, he or she shall, if so required by the examiner, give the examiner the name and address of the person to whom or by whom the communication was made.*

*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 part 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.*

*Offence for contravention of subsection (1), (2) or (3)*

*(6) A person who contravenes subsection (1), (2) or (3) is guilty of an indictable offence that, subject to this section, is punishable, upon conviction, by a fine not exceeding 200 penalty units or imprisonment for a period not exceeding 5 years.*

*(7) Notwithstanding that an offence against subsection (1), (2) or (3) is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.*

*(8) Where, in accordance with subsection (7), a court of summary jurisdiction convicts a person of an offence against subsection (1), (2) or (3), the penalty that the court may impose is a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 1 year.*

*Legal professional privilege*

*(9) Subsection (3) does not affect the law relating to legal professional privilege."*

(My underlining)

5. There are other sections in the Division which provide for:

a. Reimbursement of expenses for witnesses who are summoned[7];

b. Legal assistance to witnesses[8];

c. Offences for unauthorised disclosure of material[9], giving false evidence[10] and hindering an examiner[11];

d. Warrants for the arrest of persons who fail to attend examinations[12];

e. Contempt[13];

f. The protection of witnesses and examiners[14].

6. Division 2 provides what is now a fairly typical scheme for compulsory examinations, the removal of the privilege against self-incrimination and the grant of a statutory qualified privilege.

7. X7 was arrested and charged with various offences relating to a *"controlled drug"* against provisions of the *Criminal Code (C'th).* After his arrest, he was served with a summons issued under s 28 of the

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7 Section 26

8 Section 27

9 Section 29B

10 Section 33

11 Section 35; and see also s 35A which deals with double jeopardy considerations as between State and Commonwealth offences

12 Section 31

13 Sections 34A-34F

14 Sections 34 and 36

ACC Act. He was initially unrepresented before the examiner. He answered some questions put to him. The examination was adjourned and the next day X7, now being legally represented, refused to answer any further questions. A direction was made by the examiner under s 25A(9) of the ACC Act that the evidence given by X7 not be published to any person connected with the investigation or prosecution of the offences with which X7 had been charged. X7 persisted with his refusal to answer further questions and ultimately a case was stated to the High Court. In the case stated, two questions were posed:

1. Does Division II of Part 2 of the ACC Act empower an examiner appointed under s 46B (1)[15] to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerns the subject matter of the offence so charged;

2. If the answer to question 1 is *"yes"*, is Division II of Part 2 of the ACC Act invalid to that extent as contrary to Ch III of the Constitution.

8. For reasons which will become obvious later, it is important to note that the case was considered by a court consisting of French CJ, Hayne, Crennan, Kiefel and Bell JJ.

*The issues in X7*

9. Primarily of course the issues in X7 were the two questions in the case stated. It is necessary though to identify where the real battle lines were drawn.

10. As to Question 1, it can be seen immediately that there is nothing in the ACC Act which expressly limits the examiner's powers as postulated by the question. The argument then was whether the provisions should be construed so that the *"right to silence"* enjoyed by an accused in a criminal proceeding impliedly restricted the powers of the examiner in the absence of an express provision to the contrary.

11. As to Question 2, three arguments were advanced:

    a. That the examination provisions, authorising the examination of persons charged with a criminal offence impermissibly permit executive interference with the judicial process of a criminal trial;

    b. That the *"right to silence"* is a necessary feature of *"trial by jury"* so removal of that right negates *"trial by jury"* which is guaranteed by s 80 of the Constitution for trial of a Commonwealth indictable offence;

    c. That s 25A(9) empowers an examiner to exercise judicial power. Of course only a court can exercise Commonwealth judicial power.

*The outcome of X7*

12. *Question 1*: A majority (Hayne Kiefel and Bell JJ)[16] answered Question 1 *"no"*. French CJ and Crennan J[17] answered Question 1 *"yes"*.

13. *Question 2:* The majority did not answer Question 2 as they had given a negative answer to Question 1. French CJ and Crennan J answered Question 2 *"no"*.

*Hammond v The Commonwealth*[18], *Hamilton v Oades*[19] and *Australian Crime Commission v OK*[20]

14. *Hammond v The Commonwealth* was decided in 1982. There, Royal Commissions had been

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15 Section 46B provides that an examiner is appointed by the Governor General, can only be appointed after consultation with the *"inter-governmental committee"*, must be a legal practitioner, can be appointed on a full time basis or on a part time basis but cannot hold office for more than five years

16 Hayne and Bell JJ delivered a joint judgment and Kiefel J delivered a separate judgment

17 In a joint judgment

18 (1982) 152 CLR 188

19 (1989) 166 CLR 486

20 (2010) 185 FCR 258

established to investigate suspected malpractices in the handling of meat. The legislation governing the Royal Commissions[21] provided that witnesses were compelled to answer questions put to them by the Commissioner. Hammond was charged with conspiracy to export a prohibited export. The allegations in the criminal prosecution related directly to evidence which the Commissioner sought to elicit from him. He objected to answer. He sought to restrain the Commissioner from examining him. It was common ground that a witness was not entitled to refuse to answer a question asked in the Royal Commission which may incriminate him. Of the parties' position on that point, Gibbs CJ said:

> *"I am by no means satisfied that these submissions are correct. It would be necessary to find a clear expression of intention before one could conclude that the legislature intended to override so important a privilege as that against self-incrimination . . ."*[22]

15. However, the Chief Justice then went on to decide the case on the consideration of whether further questioning Mr Hammond would raise *"a real risk that the administration of justice would be interfered with"*[23]. In other words, would the questioning of Mr Hammond be contempt of the court in which the criminal charges were pending. While the Chief Justice decided that an injunction would issue against the Commissioner restraining further examination of Mr Hammond, no injunction was issued to restrain the Commissioner from otherwise enquiring into, or reporting on, matters touching and concerning the charges against Mr Hammond. Mason J (as his Honour then was) agreed with the Chief Justice's judgment.

16. Murphy J agreed with the orders, but for different reasons. His Honour considered that the laws concerning criminal procedure *". . . are founded on the traditional accusatorial procedure and represent consistent adherence to the form of criminal justice considered to best preserve a balance between individual and societal interests in civil liberty and social interest in the enforcement of the criminal law."*[24] His Honour then referred to the right of trial by jury[25] and said:

> *"It is inconsistent with that right that he now be subject to interrogation by the Executive Government or that his trial be prejudiced in any other manner. I would take this view whether or not he has privilege against self-incrimination."*

17. Brennan J (as his Honour then was) agreed with the orders and left open the question whether it was within the legislative power of the Commonwealth to compel a citizen to answer questions in a Royal Commission once the citizen had been charged with a related offence[26]. Deane J held also that the examination of Mr Hammond would constitute an improper interference with the due administration of justice in the criminal proceedings against him and would constitute a contempt of court. His Honour joined in the orders[27].

18. *Hamilton v Oades*[28] concerned an examination of a company director under the provisions of the *Companies (New South Wales) Code*. Mr Oades was a director of the company then being investigated and had been charged with a number of criminal offences in relation to the affairs of the company and an associated company. Those criminal proceedings had not been concluded by the time the liquidator of the company summonsed Mr Oades to be examined pursuant to the *Code*.

19. Section 541 of the *Code* provided for the examination and provided that any claim of self-incrimination privilege was not an excuse for refusing to answer any question. However, s 541(12) provided that if objection was taken to answering a question on the basis of self-incrimination, then the answer ultimately given could not be used in criminal proceedings against the witness. Section 541(5) provided as follows:

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21 *Royal Commissions Act* 1902 (C'th) and, relevantly the *Evidence Act* 1958 (Vic)

22 *Hammond v The Commonwealth* (1982) 152 CLR 188 at pages 197-198

23 Page 198

24 Pages 200-201

25 *Commonwealth Constitution* s 80; trial on indictment of Commonwealth offences

26 Page 203

27 Pages 206 and 209

28 (1989) 166 CLR 486

> *"(5) The court, on making an order for examination, or at any later time, on the application of any person concerned, may give such directions as to the matters to be enquired into, and, subject to subsection (4), as to the procedure to be followed (including, in the case of an examination in private, directions as to the persons who may be present) as it thinks fit."*

20. Counsel for Mr Oades sought an order under s 541(5) that he not be required to answer any questions concerning matters which were the subject of the criminal proceedings. That application was refused. The New South Wales Court of Appeal[29] allowed Mr Oades' appeal, but the High Court, by a majority, reversed the decision.

21. Mason CJ, Dawson and Toohey JJ formed the majority. It was accepted by the majority that clear words were needed before a provision would be held to abrogate or limit the privilege against self-incrimination[30]. It was also accepted that in some cases, an examination may amount to an interference with the administration of criminal justice and therefore be a contempt[31]. It was held that the privilege against self-incrimination was abrogated, but there was no interference with the administration of justice because the legislature provided immunity against use of the answers given and also by s 541(5) the Court could give directions concerning the examination. In particular, Mason CJ said:

> *"The Court retains its power to give directions and to restrain questions in cases where the examination has been conducted for an improper purpose or constitutes an abuse of process; s 541(5). Thus if a liquidator was lured to conduct an examination directed to compel the examinee to disclose defences, or to give pre-trial discovery, or to establish guilt, this examination may be restrained as an abuse of process."*[32]

22. Deane and Gaudron JJ, in dissent, did agree with the majority that the section abrogated the common law privilege against self-incrimination. Their Honours though concluded that as a matter of discretion under s 541(5), Mr Oades ought to have been relieved of the obligation to answer the questions while the charges remained unresolved.

23. In Australian Crime Commission v OK[33] the Full Court of the Federal Court was faced with similar facts to those considered by the High Court in X7. OK had been charged with criminal offences against State laws. He had then been summonsed to appear before the ACC. Mansfield J heard an application by OK and upon that application restrained the ACC in these terms:

> *"The Australian Crime Commission by its examiner be restrained in relation to the examination from time to time of the applicant pursuant to an examination summons issued under s 28 of the Australian Crime Commission Act 2002 (C'th) on 5 May 2009 from asking questions which by such questions would directly relate only to matters the subject of the charge laid against the applicant on 13 May 2009 in respect of certain conduct alleged to have occurred on 27 April 2009, contrary to s 33(3) of the Controlled Substances Act 1984 (SA) or from requiring the applicant to answer questions to the extent that such answers disclose information directly related to that charge, such injunction to remain in force until the said charge against the applicant has been finally determined by plea or verdict or by it being withdrawn or dismissed."*

24. The Full Court comprised of Spender, Emmett and Jacobson JJ. Emmett and Jacobson JJ constituted the majority who allowed the appeal. Spender J delivered what can, with respect, be described as a strong dissent.

25. The majority, distinguished *Hammond v Commonwealth of Australia*[34] on this basis:

> *"107 A significant difference between the circumstances of Hammond's Case and the circumstances of the present case is the regime that is now provided for in s 25A of the Commission Act. Under the Commission Act generally, and s 25A in particular, the risk of prejudice to a fair trial is to be managed by confining the persons to whom answers given by a witness can be disclosed, not by*

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29 *Oades v Hamilton* (1987) 11 NSWLR 138

30 Page 500

31 Page 494

32 Page 498

33 (2010) 185 FCR 258

34 (1982) 152 CLR 188

> *confining the questions that might be put to the witness. The Commission Act provides its own statutory safeguards to avoid risk to the fair trial of such a charge. On its true construction, the Commission Act permits an examination to continue on a subject matter directly related to a pending charge so long as the protective prohibitions contemplated by s 25A(3) and (9) have been put in place. Such principle as might relevantly be drawn from Hammond's Case is displaced by the express provisions of the Commission Act.*[35]

Then, later:

> *"109. The objects of the Commission Act could be seriously impaired if its investigations had to stop for an indeterminate period because charges had been laid. The public interest requires the investigation of a federally relevant criminal activity to continue. The right to a fair trial will not be compromised merely by the asking of questions of an accused person in circumstances where appropriate confidentiality is ensured. The public interest in the administration of justice, in particular to the right to a fair trial, is preserved by the statutory safeguards referred to in [43] above. In this way the legislation achieves a balance between the public interest in the investigation of federally related criminal activity and the public interest in the right of an accused person to a fair trial. Compromise, if any, would occur by reason of the deployment or dissemination of information obtained in a way that poses a real risk to a fair trial. A non-publication direction made under s 25A of the Commission Act remains operative unless and until it is varied or revoked. Such a direction binds the Board, the Commission and the CEO when disseminating, under s 12 or s 59, any information gathered at an examination conducted subject to such a direction."*[36]

26. Spender J thought that the real consideration was not whether or not the information might or might not be able to be quarantined. The real issue as his Honour saw it was expressed as follows:

> *"13 In my judgment, whether the quarantining of information from those authorities is successfully able to be done is not the determining question. It is the compulsory interrogation of a person facing a criminal charge about that criminal charge, whether quarantined or not, that constitutes the interference with the administration of justice."*[37]

27. After a careful examination of the authorities, his Honour concluded that consistently with the fundamental principle of criminal law and procedure that the onus remained on the Crown, a inquisitorial investigation of the subject matter of the criminal proceeding "*constitutes an improper interference with the due administration of justice in the proceedings against him in the criminal courts and contempt of court."*[38]

28. OK did not decide that the ACC Act did not vest power on the examiner to conduct the examination of a person who had been charged. The Court considered only whether the exercise of the power would interfere with the criminal process.

*The reasoning in X7*

29. As already observed, the majority consisted of Hayne, Bell and Kiefel JJ. Also as already observed, the majority did not consider the constitutional questions. X7 is therefore primarily a case concerning the approach to the construction of statutes. In that respect, the case concerns the "*principle of legality"*.

30. The principle of legality has been acknowledged in many decisions, in particular, *Potter v Minahan*[39] and *AL-Kateb v Godwin*[40]. In Lee No 2, Kiefel J described the principle of legality in these terms:

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35 At [107]

36 At [109]

37 At [13]

38 See paragraph [45]

39 (1908) 7 CLR 277 at 304

40 (2004) 219 CLR 562 at [19]

> *"As Gleeson CJ observed in Al-Kateb v Godwin (2004) 219 CLR 562 at 577 [19]; [2004] HCA 37, the principle of legality is not new. In 1908, O'Connor J, in Potter v Minahan (1908) 7 CLR 277 at 304; [1908] HCA 63, referred to a passage from the fourth edition of Maxwell on Statutes Maxwell, On the Interpretation of Statutes, 4th ed (1905) at 122 which stated that "[i]t is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness" Referred to in Al-Kateb v Godwin (2004) 219 CLR 562 at 577 [19] per Gleeson CJ. Absent that clarity of expression, the courts will not construe a statute as having such an operation Re Bolton; Ex parte Beane (1987) 162 CLR 514 at 523 per Brennan J; [1987] HCA 12. In Electrolux Home Products Pty Ltd v Australian Workers' Union (2004) 221 CLR 309 at 329 [21]; [2004] HCA 40, Gleeson CJ said "[t]he presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law." The principle has been cited and applied on many occasions Bropho v Western Australia (1990) 171 CLR 1 at 18; [1990] HCA 24; Coco v The Queen (1994) 179 CLR 427 at 437; [1994] HCA 15; Al-Kateb v Godwin (2004) 219 CLR 562 at 577 [19]; Electrolux Home Products Pty Ltd v Australian Workers' Union (2004) 221 CLR 309 at 329 [21]; K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501 at 520 [47]; [2009] HCA 4; Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252 at 259 [15]; [2010] HCA 23; Momcilovic v The Queen (2011) 245 CLR 1 at 46-47 [42]-[43], 200 [512]; [2011] HCA 34; Australian Education Union v General Manager of Fair Work Australia (2012) 246 CLR 117 at 134-135 [30]; [2012] HCA 19; Attorney-General (SA) v Corporation of the City of Adelaide (2013) 87 ALJR 289 at 304 [42]; 295 ALR 197 at 211; [2013] HCA 3; Monis v The Queen (2013) 87 ALJR 340 at 405 [331]; 295 ALR 259 at 342; [2013] HCA 4 as a rule of statutory construction. The principle was applied in X7 (2013) 87 ALJR 858 at 881 [87], 892 [158], 893 [162]; 298 ALR 570 at 596, 612, 613."*[41]

31. The majority in X7 started from the following propositions:

    a. That, subject to statutory exceptions, there existed a privilege against self-incrimination;

    b. Again, subject to statutory exceptions, there was a *"right to silence"* which was related to, but independent of the privilege against self-incrimination;

    c. The processes of the criminal law were adversarial and accusatorial;

    d. The principle of legality applied to the construction of the ACC Act.

32. It therefore followed, in the view of the majority, that the statute ought to be read so as not to remove the right to silence. Therefore, the examiner's powers were limited to examining persons who had not been charged.

33. The majority relied on *Hammond v The Commonwealth*[42], and distinguished *Hamilton v Oades*[43] on the basis that liquidators' investigations into companies were a recognised exception to the maintenance of the right to silence. It therefore followed said the majority that there was nothing in the ACC Act which overcame the principle of legality. Therefore, a person charged with an offence might not be compelled by the statute to answer questions relating to the circumstance of the offence charged.

34. The minority, French CJ and Crennan J acknowledged the existence of the principle of legality. However, their Honours observed that the fundamental right in question was the right to a fair trial so it must follow that by including provisions which *"[protect] from prejudice a fair trial of an examined person who has been charged with an offence"* the rule has been satisfied[44].

35. Their Honours then examined the various provisions of the ACC Act which protected X7's right to fair trial[45], ultimately concluding that the legislature had struck a *"balance between competing public and private interests . . . in the examination provisions by an abrogation, to an extent, of the [privilege against self-incrimination] while simultaneously preserving [the right of an accused person from being*

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41 *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at [171]

42 (1982) 152 CLR 258

43 (1989) 166 CLR 486

44 Paragraphs [1]-[24]

45 Paragraphs [25]-[30]

*compelled to give evidence or to answer questions] to the extent of ensuring a fair trial of the person examined."*[46].

36. Because the minority answered the first question affirmatively, it was necessary to deal with the constitutional issues. Central to that part of the case was a submission that maintenance of the privilege against self-incrimination was a necessary part of trial by jury guaranteed by s 80 of the Constitution. With respect, that was always going to be difficult given decisions of the Court that legislative alterations to the standard and burden of proof and the rules of evidence have been held constitutional[47]. The second argument was that the examination provisions authorised executive interference with the judicial process of criminal trials. If it is accepted (as the minority found) that there were safeguards in ensuring a fair trial, that argument would fail. And it did[48].

37. The third argument was that s 25A(9) empowered an examiner to exercise judicial power. The majority held that s 25A(9) did not interfere with the powers of the court hearing the criminal case to ensure a fair trial or punish for contempt or deal with an abuse of process[49]. The judicial power remained therefore with the trial court.

**Lee v New South Wales Crime Commission (Lee No 1)**

*The facts of Lee No 1*

38. Lee No 1 concerned the *Criminal Assets Recovery Act* 1990 (NSW) ("the Criminal Assets Act"). The Criminal Assets Act is New South Wales' criminal confiscation legislation. Commonly with such legislation, it provides for the confiscation of proceeds of crime through a civil proceeding. Prior to 2002 there was no legislation in Australia which permitted confiscation in the absence of a conviction. As a result of an Australian Law Reform Commission report "*Confiscation that counts. A revision of the Proceeds of Crime Act 1987"*[50] the Commonwealth and the States enacted legislation providing for orders for confiscation of property and recovery of profits from illegal activity upon proof in civil proceedings that the respondent had made financial gains from criminal behaviour[51].

39. Similarly with the Commonwealth *Proceeds of Crime Act* 2002 and legislation in other States, the Criminal Assets Act provides for the making of restraining orders pending finalisation of confiscation proceedings and further provides for the compulsory examination of respondents. Sections 12, 13, 13A, 31D and 63 of the Criminal Assets Act relevantly provide as follows:

> *"**12 Supreme Court may make further orders***
>
> *(1) The Supreme Court may, when it makes a restraining order or at any later time, make any ancillary orders (whether or not affecting a person whose interests in property are subject to the restraining order) that the Court considers appropriate and, without limiting the generality of this, the Court may make any one or more of the following orders:*
> *(a) an order varying the interests in property to which the restraining order relates,*
> *(b) an order for the examination on oath of:*
> *(i) the owner of an interest in property that is subject to the restraining order, or*
> *(ii) another person,*
> *before the Court, or before an officer of the Court prescribed by rules of court, concerning the affairs of the owner, including the nature and location of any property in which the owner has an interest,*
>
> ***13 Privilege***
>
> *(1) A person being examined under section 12 is not excused from answering any question, or from producing any document or other thing, on the ground that:*
> *(a) (Repealed)*
> *(b) production of the document would be in breach of an obligation (whether imposed by an enactment or otherwise) of the person not to disclose the existence or contents of the document, or*

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46 Paragraph [43]

47 *Thomas v Mowbray* (2007) 233 CLR 307 at 356, *Nicholas v The Queen* (1998) 193 CLR 173 at 90, *Milicevic v Campbell* (1975) 132 CLR 307 at 316-317

48 See paragraph [63]

49 Paragraph [65]

50 ALRC 87

51 *Proceeds of Crime Act* 2002 (C'th), *Criminal Proceeds Confiscation Act* 2002 (Qld)

*(c) the answer or production would disclose information that is the subject of legal professional privilege.*
*(2) A statement or disclosure made by a person in answer to a question put in the course of an examination under section 12, or any document or other thing obtained as a consequence of the statement or disclosure, is not admissible against the person in any civil or criminal proceedings except proceedings that comprise:*
*(a) proceedings in respect of the false or misleading nature of a statement or disclosure made under this Act, or*
*(b) proceedings on an application under this Act, or*
*(c) proceedings ancillary to an application under this Act, or*
*(d) proceedings for enforcement of a confiscation order, or*
*(e) in the case of a document or other thing--civil proceedings for or in respect of a right or liability it confers or imposes.*
*(3), (4) (Repealed)*

***13A Privilege against self-incrimination***
*(1) A person being examined under section 12 is not excused from answering any question, or from producing any document or other thing, on the ground that the answer or production might incriminate, or tend to incriminate, the person or make the person liable to forfeiture or penalty.*
*(2) However, any answer given or document produced by a natural person being examined under section 12 is not admissible in criminal proceedings (except proceedings for an offence under this Act or the regulations) if:*
*(a) the person objected at the time of answering the question or producing the document on the ground that the answer or document might incriminate the person, or*
*(b) the person was not advised that the person might object on the ground that the answer or document might incriminate the person.*
*(3) Further information obtained as a result of an answer being given or the production of a document in an examination under section 12 is not inadmissible in criminal proceedings on the ground:*
*(a) that the answer had to be given or the document had to be produced, or*
*(b) that the answer given or document produced might incriminate the person. . . .*

***31D Additional orders where application made for confiscation order or order relating to evidence, warranty or representation made in proceedings for confiscation order***
*(1) If an application is made for a confiscation order or an order under section 31A (2) or 31B (2) (a "**non-disclosure order**"), the Supreme Court may, on application by the Commission, when the application for the confiscation order or non-disclosure order is made or at a later time, make any one or more of the following orders:*
*(a) an order for the examination on oath of:*
*(i) the affected person, or*
*(ii) another person,*
*before the Court, or before an officer of the Court prescribed by rules of court, concerning the affairs of the affected person, including the nature and location of any property in which the affected person has an interest,*
*(b) an order for the examination on oath of a person who is the spouse or a de facto partner of the affected person, before the Court or before an officer of the Court prescribed by rules of court, concerning the affairs of the person, including the nature and location of any property in which the person or that affected person has an interest,*
*(c) an order directing a person who is or was an affected person or, if the affected person is or was a body corporate, a director of the body corporate specified by the Court, to furnish to the Commission, within a period specified in the order, a statement, verified by the oath of the person making the statement, setting out such particulars of the property, or dealings with the property, in which the affected person has or had an interest as the Court thinks proper.*
*(2) The Commission must give notice of an application for an order under this section to the affected person.*
*(3) Sections 13 and 13A apply in respect of a person being examined under an order under this section in the same way as they apply in respect of a person being examined under an order under section 12 (1).*
*(4) In this section:"**affected person**" means:*
*(a) in the case of an application for an assets forfeiture order, the owner of an interest in property that is proposed to be subject to the order, or*
*(b) in the case of an application for a proceeds assessment order or unexplained wealth order, the person who is proposed to be subject to the order, or*
*(c) in the case of a non-disclosure order--the defendant whose interest in property is proposed to be subject to the order.*

> ***63 Stay of proceedings***
>
> *The fact that criminal proceedings have been instituted or have commenced (whether or not under this Act) is not a ground on which the Supreme Court may stay proceedings under this Act that are not criminal proceedings."* (my underlining)

40. The applicant in proceedings under the Criminal Assets Act is the New South Wales Crime Commission ("the Commission"). The Commission made an application under s 31D seeking orders for the compulsory examination of the Lees. At the time the application was made, the Lees had been charged with criminal offences. It was obvious that their examination would cover issues relating to the criminal proceedings. The primary judge refused the application and the Commission appealed. The New South Wales Court of Appeal heard the appeal on 9 August 2012 and allowed it on 6 September 2012. Five judges sat on the appeal[52].

41. In the New South Wales Court of Appeal, the central question was whether the discretion not to order an examination was appropriate given that the Lees had been charged[53]. It was accepted, it seems, that the Criminal Assets Act did validly authorise the examination order. It was held that there were sufficient safeguards in the legislation to ensure a fair trial notwithstanding the conduct of any examination and the appeal was allowed[54].

42. A Full Bench of the High Court heard the appeal in Lee No 1. That meant the addition of Gaegler and Keane JJ to the Court which heard X7.

43. As already observed, X7 came to the High Court by way of case stated. It therefore came before the Court quickly. Lee No 1 found its way to the High Court by a different route through an application being determined in the Supreme Court of New South Wales, then by an appeal to the Court of Appeal. The New South Wales Court of Appeal heard and determined the appeal before X7 was argued or, naturally, decided.

*The issue in Lee No 1*

44. The issue in Lee No 1 was whether the Criminal Assets Act authorised the Court to order an examination of a person who had already been charged with an offence arising from circumstances likely to be the subject of examination. Obviously, though, there were constitutional undertones.

*The outcome in Lee No 1*

45. The Court, by a majority, dismissed the appeal holding that the Criminal Assets Act did authorise the examination of a person who had already been charged. The majority consisted of the minority in X7 namely French CJ and Crennan CJ and the two judges who had not sat on X7, namely Gaegler and Keane JJ. The minority were the majority in X7 namely Hayne, Kiefel and Bell JJ.

46. Hayne J in Lee No 1 wrote that the decision in X7 laid down principles which, if applied to the facts of Lee No 1 could only lead to the conclusion reached by those who became the minority in Lee No 1. In his Honour's view, it was therefore inappropriate for the Court not to apply the principles enunciated in X7 simply because the constitution of the Bench had changed[55]. The majority in Lee No 1 did not feel so constrained. Ironically, the New South Wales Court of Appeal, in its consideration of Lee No 1[56] found itself obliged to follow *Australian Crime Commission v OK*[57] because the provisions of the Criminal Assets Act concerning compulsory examinations were fundamentally the same (the Court

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52 Originally the appeal came before a bench of three judges but given the importance of the issues raised, and the judgments in *Australian Crime Commission v OK* (2010) 185 FCR 258, the Court adjourned the appeal to a bench of five justices; *New South Wales Crime Commission v Lee* [2011] NSWCA 398. The appeal is *New South Wales Crime Commission v Lee* (2012) 301 ALR 629

53 See [10], [24] and [86]

54 See [67]-[81]

55 *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at paragraphs [61]-[72] citing in particular *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599

56 *New South Wales Crime Commission v Lee* (2012) 84 NSWLR 1

57 (2010) 185 FCR 258

thought) as the provisions of the ACC Act. The full Federal Court in *Australian Crime Commission v OK* had construed the provisions in the ACC Act as authorising an examination of a person who had already been charged. They were the same provisions analysed in X7.

*The reasoning in Lee No 1*

47. All the judges recognised the legality principle. All judges dealt with both *Hamilton v Oades*[58] and *Hammond v The Commonwealth* [59]. One cannot but help to conclude that ultimately X7 and Lee No 2 are ultimately just examples of differences in the application of principles over which there might not be significant disagreement.

48. While different words were used to express the principle of legality the differences might be more apparent than real. The Chief Justice expressed the test in this way:

> *"The courts do not interpret a statute to permit such questioning [of a person accused in criminal proceedings] unless it is expressly authorised or permitted as a matter of necessary implication."*[60] (my underlining)

49. Hayne JA said:

> *"The accusatorial process of criminal justice reflects the balance that is struck between the power of the State and the place of the individual. Legislative alteration to that balance may not be made without clear words or necessary intendment."* (my underlining)

50. Crennan J expressed the test similarly to the Chief Justice, namely:

> *"Two important rules of constructions do, however, apply. The first is the settled principle that statutory provisions are not to be construed as abrogating fundamental rights or important common law rights, privileges and immunities in the absence of clear words or necessary implication to that effect."* [61] (my underlining)

51. Kiefel J expressed the test by reference to *Al-Kateb v Godwin*[62] in the passage from her Honour's judgment that has already been set out.

52. Bell J articulated the principle *". . . the legislature does not intend to abrogate or restrict a fundamental right or freedom except by words of clear intendment."* [63] (my underlining)

53. Gaegler and Keane JJ stated the principle slightly differently. Their Honours said:

> *"The principle of construction is fulfilled in accordance with the rationale where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed. The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be evoked."* [64]

54. Where the minority and the majority parted company was as to the application of the principles.

55. As already observed, the result in Lee No 1 was the opposite to the result in X7 to the extent that both cases dealt with legislation said to authorise examination of persons who had been charged. In X7, the legislation was held not to authorise such an examination. In Lee No 1, it was held to do so. Of

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58 (1989) 166 CLR 486

59 (1982) 152 CLR 188

60 Paragraph [30]; and the same term *"necessary implication"* is repeated at paragraph [30]

61 Paragraph [126]

62 (2004) 219 CLR 562

63 At [220]

64 At [314]

course, the two cases dealt with different legislation so to that extent they are immediately and naturally distinguishable from each other.

**Lee v The Queen (Lee No 2)**

*The facts of Lee No 2*

56. Lee No 1 concerned the examination of the Lees after they had been charged. That examination occurred under the Criminal Assets Act. However, before the Lees were charged, they were examined under the provisions of the New South Wales *Crime Commission Act* 1985 ("the NSWCC Act"). The NSWCC Act has now been repealed and replaced by the *Crime Commission Act* 2012 (NSW). The NSWCC Act provided for compulsory examinations of witnesses by s 13 which provided as follows:

> *"**13 Hearings***
> *(1) For the purposes of an investigation the Commission may hold hearings.*
>
> *(2) A hearing shall be conducted by one or more members of the Commission, as determined by the Commission.*
>
> *(3) At a hearing conducted by 2 or more members of the Commission:*
> *(a) the member presiding is to be the Commissioner or (if the Commissioner is not conducting the hearing) an Assistant Commissioner determined by the Commissioner, and*
> *(b) Schedule 2 is to apply, so far as it is capable of application, as if the hearing were a meeting of the Commission.*
>
> *(4) At a hearing before the Commission:*
> *(a) a person giving evidence may be represented by a legal practitioner, and*
> *(b) if, by reason of the existence of special circumstances, the Commission consents to a person who is not giving evidence being represented by a legal practitioner-the person may be so represented.*
>
> *(5) A hearing before the Commission shall be held in private and the Commission may give directions as to the persons who may be present during the hearing or a part of the hearing.*
>
> *(6) Nothing in a direction given by the Commission under subsection (5) prevents the presence, when evidence is being taken at a hearing before the Commission, of:*
> *(a) a person representing the person giving evidence, or*
> *(b) a person representing, pursuant to subsection (4), a person who, by reason of a direction given by the Commission under subsection (5), is entitled to be present.*
>
> *(7) Where a hearing before the Commission is being held, a person (other than a member, counsel assisting the Commission in relation to the matter that is the subject of the hearing or a member of the staff of the Commission approved by the Commission) shall not be present at the hearing unless the person is entitled to be present by reason of a direction given by the Commission under subsection (5) or by reason of subsection (6).*
>
> *(8) At a hearing before the Commission for the purposes of an investigation:*
> *(a) counsel assisting the Commission generally or in relation to the matter to which the investigation relates,*
> *(b) any person authorised by the Commission to appear before it at the hearing, or*
>
> *(c) any legal practitioner representing a person at the hearing pursuant to subsection (4),*
>
> *may, so far as the Commission thinks appropriate, examine or cross-examine any witness on any matter that the Commission considers relevant to the investigation.*
>
> *(9) <u>The Commission may direct that:</u>*
> *<u>(a) any evidence given before it,</u>*
> *<u>(b) the contents of any document, or a description of any thing, produced to the Commission or seized pursuant to a search warrant issued under section 11,</u>*
>
> *<u>(c) any information that might enable a person who has given or may be about to give evidence before the Commission to be identified or located, or</u>*
>
> *<u>(d) the fact that any person has given or may be about to give evidence at a hearing,</u>*
>
> *<u>shall not be published, or shall not be published except in such manner, and to such persons, as the Commission specifies, and the Commission shall 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</u>.*
>
> *(10) Where:*
> *(a) a person has been charged with an offence before a court of the State, and*

> *(b) the court considers that it may be desirable in the interests of justice that particular evidence given before the Commission, being evidence in relation to which the Commission has given a direction under subsection (9), be made available to the person or to a legal practitioner representing the person,*
>
> *the court may give to the Commission a certificate to that effect and, if the court does so, the Commission shall make the evidence available to the court.*
>
> *(11) Where:*
> *(a) the Commission makes evidence available to a court in accordance with subsection (10), and*
> *(b) the court, after examining the evidence, is satisfied that the interests of justice so require,*
>
> *the court may make the evidence available to the person charged with the offence concerned or to a legal practitioner representing the person.*
>
> *(12) A person who:*
> *(a) is present at a hearing in contravention of subsection (7), or*
> *(b) makes a publication in contravention of a direction given under subsection (9),*
>
> *is guilty of an offence punishable, upon conviction, by a fine not exceeding 100 penalty units or imprisonment for a period not exceeding 2 years, or both."*
>
> (my underlining)

57. The Commission made a direction in terms of s 13(9) in relation to the evidence given by the Lees. That direction was in the following terms:

> *"I direct that any evidence given by this witness or tendered or produced in the presence of this witness or any information that might enable this witness to be identified as a person who has given evidence before the Commission, shall not be published except in such manner and to such persons as the Commission specifies."*

58. After the examinations were completed, search warrants issued authorising the search of premises occupied by the Lees. Drugs, firearms and money were located. These were the subject of charges that were laid against the Lees. In due course, the Director of Public Prosecutions ("the DPP") assumed carriage of the prosecution.

59. Sometime after being charged, the Lees were the subject of examinations under the Criminal Assets Act and that ultimately led to the decision in Lee No 1. In the meantime though, the criminal process was taking its usual course.

60. At some stage after the examinations under the NSWCC Act, but before trial, the transcripts of the examinations were released to the DPP, and the police, and were shown to potential witnesses. It became obvious that the DPP, at least, had used the transcripts to the extent of attempting to ascertain what the likely defence would be at the trial. At a pre-trial hearing, the Crown Prosecutor said:

> *"The Crown has nothing much to go on as to how the defence will be run and obviously not required to indicate how they are going to run their defence, but both of the accused were examined at the Crime Commission and whilst that evidence isn't admissible in these proceedings, I supposed it gives us a bit of an idea where they might be heading . . .*
>
> *Well we are not in a position to lead that evidence. All I'm saying, your Honour, is that because they were given the usual rider at the commencement of their evidence when objection's taken but it can't be used against them. But there's things said there to the Commission, which, as I say, give the Crown at least a possible scenario for where the defence might suggest that there's some innocent explanation about, not only of the money in the unit, but I don't know anything about the drugs.*
>
> *That innocent explanation in terms of how it all connects up at the property is the father Jason Lee, for example, and his evidence at the Crime Commission indicated he had received large amounts of money from . . ."*[65]

61. The Lees were convicted at their trial and they appealed to the New South Wales Court of Criminal Appeal[66]. There were various grounds of appeal raised, but the one relevant to present discussions related to the dissemination to the DPP and police of the transcripts of the examinations of the Lees before the New South Wales Crime Commission. The relevant ground of appeal asserted that there had

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65 This passage is set out in the judgment *Lee v The Queen* [2014] HCA 20 at [10]

66 *Lee v R* [2013] NSWCCA 68

been a miscarriage of justice because a transcript of the evidence before the Commission had been released to the DPP before trial[67].

62. In dismissing the ground of appeal concerning the dissemination of the transcripts of the examinations, the Court of Criminal Appeal looked at the impact which the dissemination may actually have had on the trial in the sense of assessing what advantage the Crown may have gained as a result of receiving the transcripts. Ultimately, the Court concluded that the information gained from the transcripts was available from other legitimate sources, so *"it is difficult to articulate any practical unfairness deriving from the disclosure of the transcripts to the prosecutor. Nothing in them was relevant to the trial as it in fact ran."*[68] And then later *"[the appellants have] not demonstrated that the release to the prosecutor of the transcripts of [the] interviews with the Commission, or the documents produced . . . to the Commission under compulsion, gave rise to any practical unfairness"*[69].

*The outcome of Lee No 2*

63. The High Court unanimously, in a joint judgment[70] allowed the appeal, quashed the convictions and ordered a new trial.

*Reasoning in Lee No 2*

64. Lee No 2 was fundamentally different litigation to both X7 and Lee No 1. Both X7 and Lee No 1 concerned direct challenges to the power of the examiners to conduct examinations. Lee No 2 was a criminal appeal. In various statutes in force across the Commonwealth regulating criminal appeals, the ultimate issue is whether there has been a *"miscarriage of justice"*. Therefore, in Lee No 2, the issue was not as to the power to conduct the examinations, but as to the effect of the release of the examinations upon a criminal conviction.

65. Various principles are now well established concerning the notion of *"miscarriage of justice"*. Firstly, the categories of *"miscarriage"* are not, and can never be, closed. The Court is constrained by the words of the statute namely *"miscarriage of justice"*, but not by any judicial categorisation of the circumstances which might constitute a miscarriage[71]. Secondly, a miscarriage of justice may be discerned from either the result of the trial or by its processes. In other words, if the appeal court, after reviewing the authorities, is left with a reasonable doubt as to guilt, then the conclusion can be made that the result of the trial has miscarried. Also, if there has been a defect in the trial *"which is such a departure from the essential requirements of the law that it goes to the root of the proceedings"*[72] then there has also been a miscarriage.

66. The High Court considered that it was not necessary for the Lees to identify any way in which the Crown used the information in the transcripts to the disadvantage of the Lees. This was not miscarriage in the sense that the result of the trial was affected. This was miscarriage because there had been a fundamental departure from the bases upon which a criminal trial is conducted.

67. In the penultimate paragraph of the judgment, this was said:

> *"51. The circumstances of this case involve the wrongful release and possession of evidence. However, its effects cannot be equated with the use of evidence illegally or improperly obtained. The question whether such evidence should, as a matter of discretion, be admitted does not arise. Clearly, s 18B(2) of the NSWCC Act provided that the appellants' evidence before the Commission was inadmissible at their trial. Rather, these appeals concern the effect of the prosecution being armed with the appellants' evidence. It is not necessary to resort to questions of policy to determine whether a miscarriage of justice has occurred. What occurred in this case affected this criminal trial in a fundamental respect, because it altered the position of the prosecution vis-à-vis the accused. There was*

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67 *Lee v R* [2013] NSWCCA 68 at [12]

68 At paragraph [47]

69 At paragraphs [49], [238] and [248]

70 French CJ, Crennan, Kiefel, Bell and Keane JJ

71 *Weiss v The Queen* (2005) 224 CLR 300

72 *Wilde v The Queen* (1988) 164 CLR 365 at 372-373

> *no legislative authority for that alteration. Indeed, it occurred contrary to the evident purpose of s 13(9) of the NSWCC Act, directed to protecting the fair trial of examined persons."*[73]

**THE LONG TERM IMPACT OF THE DECISIONS**

**Lee No 2**

68. It is convenient to deal firstly with Lee No 2.

69. Although Lee No 2 cited both X7 and Lee No 1, and arose from circumstances involving a compulsory examination of a person later charged with criminal offences, the case really has little to do with the issues raised in X7 and Lee No 1. Lee No 2 is, with respect, a fairly routine application of well-established principles concerning criminal appeals. The decision only relies upon X7 and Lee No 1 to the extent that those cases confirm the accusatorial nature of a criminal trial. Unauthorised breaches of that feature resulted, in Lee No 2, to a conclusion that the defect went to the root of the trial process.

70. Where the fact of the conduct of the examination, or the manner in which the examination is conducted, is such as to lead to a miscarriage of justice in a subsequent criminal trial, the criminal appeal statute will operate to set aside a conviction.

***X7 and Lee No 1***

71. The two cases raise a number of issues.

*The principle of legality*

72. Both X7 and Lee No 1 recognise the principle of legality as a principle of construction of statutes. Both cases also recognise that the right to silence, however that is formulated, and whatever the jurisprudential basis of it is, is a right which triggers the principle. Both cases also recognise that the accusatorial nature of a criminal trial, which might encompass notions beyond just the right to silence is also relevant to the consideration of the construction of statutes.

73. Where there may be ongoing debate is as to the application of the principle. X7 and Lee No 1 demonstrate that at the highest level there may be disagreement as to the significance of the right which triggers consideration of the principle and how the principle operates as a tool of construction.

74. It is also fair to say, with respect, that notwithstanding the existence of statutes which govern the construction of legislation, the common law rules of statutory interpretation continue to develop[74]? No doubt Lee No 2 and X7 are not the last cases which will be decided by the High Court which will consider the principle of legality.

*Examinations under the Australian Crime Commission Act and like legislation*

75. X7 was not overruled by Lee No 1 and has not been the subject of statutory modification. It therefore stands as authority for the principle that Division II of Part 2 of the ACC Act does not authorise the examination of a person on the subject matter of a charge which the person is facing.

76. Of course, legislation like the ACC Act which provides for compulsory examinations is now common. Lee No 1 and Lee No 2 prove that. What X7, Lee No 1 and Lee No 2 demonstrate is that there is no principle which prohibits compulsory examinations where a person has been charged with a criminal offence arising from the same or similar subject matter to that which is the subject of the examination. Whether any particular examination is authorised by any particular statute is a matter for a case by case determination depending upon the construction of the relevant statute.

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73 Paragraph [51]

74 DF Jackson QC and JC Conde *"Statutory Interpretation in the First Quarter of the 21st Century"* (2014) 38 Aust Bar Rev 168

*Contempt*

77. All of the cases recognise the jurisdiction of a criminal court to protect its own processes and to ensure a fair trial. Therefore, where the fact that the examination is being conducted, or the way in which it is being conducted, is such as to interfere with the due administration of criminal justice, the examination process will constitute a contempt.

78. There is little point in attempting to predict actual circumstances which could arise which might be said to constitute a contempt. Perhaps though the best guidance can be gained from the judgment of French CJ and Crennan J in dissent in X7. Their Honours, in some detail, analysed the provisions of the ACC Act which their Honours ultimately held provided adequate safeguards to protect the fairness of any criminal trial, thereby demonstrating the types of considerations which could lead to a conclusion that a fair trial was jeopardised.

79. In X7 and Lee No 1, and indeed *Australian Crime Commission v OK*[75], the issue was whether the examination should proceed. A witness facing examination in circumstances where he or she has already been charged with a criminal offence obviously has potential remedies in the nature of declarations and injunctions. Lee No 2 was very much a different case. There, there had been a conviction and the circumstances of the examination were raised as a ground of appeal.

80. However, there is another remedy which might arise depending upon the circumstances. In Australia, there is now no doubt that the criminal courts have a broad and powerful jurisdiction to stay criminal proceedings where the proceedings constitute an abuse of process[76]. It is an abuse of process to conduct a criminal trial which will be unfair. It is an abuse of process to conduct a criminal trial which will result in a miscarriage of justice[77].

81. Taking then the circumstances of Lee No 2. The examination of the accused was lawful. However, the dissemination of the material was not. The High Court ultimately found that the release of the examination transcripts to the prosecuting authorities constituted a fundamental defect in the process of the trial. The Lees knew prior to the trial that the material had been released to the DPP. In those circumstances, it seems to me that the Lees could have made application to stay the criminal trial. A permanent stay may not have been granted. However, further prosecution would have been stayed until safeguards had been put in place to satisfy the court that the trial could safely proceed. In the circumstances of Lee No 2 that would have meant, at least, that a new prosecutor who had not seen the transcripts would take carriage of the matter.

*Chapter III considerations*

82. Constitutional issues were raised in X7. French CJ and Crennan J, in the minority, dealt with them but the majority did not. There is no detailed examination of constitutional issues in Lee No 1 and the point doesn't arise at all in Lee No 2.

83. It is necessary to have regard to the constitutional issues that were raised in X7.

*Section 80 trial by jury*

84. Section 80 of the *Constitution* provides as follows:

> ***"80 Trial by jury***
>
> *The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes."*

85. The *Constitution* guarantees trial by jury only for Commonwealth offences tried on indictment. Therefore, s 80 is not engaged where the examinee is charged with a State offence. That of course does not mean that Chapter III is irrelevant to the trial of State offences.

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75 (2010) 185 FCR 258

76 *Jago v District Court of New South Wales* (1989) 168 CLR 23, *Moti v The Queen* (2011) 245 CLR 456

77 *Johannsen and Chambers v The Queen* (1996) 87 A Crim R 126

86. The argument raised in X7 was that the privilege against self-incrimination is a necessary part of trial by jury[78]. As already observed, that argument was quickly dismissed. It seems to me, with respect, rightly so. There is good authority for the proposition that the privilege against self-incrimination does not form an inextricable part of trial by jury[79].

87. Section 80 *"encompasses the essential features of the institution of 'trial by jury' with all that was connoted by that phrase in constitutional law and in the common law of England"*[80]. In *Cheatle*[81] for instance, it was held that *"trial by jury"* required a unanimous verdict of twelve jurors. In *Cesan v The* Queen[82] trial by jury required the judge to be awake.

88. The exact scope of *"trial by jury"* has clearly not yet been defined and cases concerning s 80 keep arising. In *Handlen and Paddison v The Queen*[83] the accused were charged with importing drugs contrary to provisions of the *Criminal Code* (C'th). The trial judge put the case on the basis of *"joint criminal enterprise"* which is a basis of assessorial liability known to the common law, but was not a basis of assessorial liability then provided by the *Criminal Code* (C'th). The result then was that the wrong elements of the offence were put to the jury.

89. The jury convicted and there was an appeal to the Queensland Court of Appeal. On appeal, it was held that the judge had erred. Two questions then arose:

    a. Could the proviso be applied? And

    b. If the wrong elements had been put to the jury, has there been *"trial by jury"* for the purposes of s 80?

90. The constitutional argument in *Handlen and Paddison* reasoned that if the jury did not consider the correct elements, then the jury has not actually decided the case as between the Commonwealth and the accused and therefore the accused have not been *"tried"* by a *"jury"*. The Court of Appeal rejected the constitutional argument and applied the proviso[84]. Therefore, the appeal was dismissed.

91. The High Court granted special leave to Handlen and Paddison to argue both the constitutional issue and whether the proviso had been properly applied. In the end, the Court upheld the appeal on the basis that the proviso had not been properly applied and the constitutional case was not argued.

92. Even though the essential ingredients of trial by jury have not been exhaustively defined, it seems to me highly unlikely that *Sorby v The Commonwealth*[85] will be overruled. Unless there is a fundamental change of approach, I can't see that s 80 issues are seriously raised by the pre-trial examination of an accused person.

*The separation of powers*

93. In X7, it was argued that the examiner under the ACC Act had been vested with, and was exercising Commonwealth judicial power.

94. Again, this largely a Commonwealth issue, not a State issue. The *Commonwealth Constitution* vests Commonwealth judicial power upon *"courts"*. If the examiner is not a *"court"* (which he obviously is not) and the power that is vested in him is *"judicial"* power, then the grant of power is invalid.

95. There can surely be no doubt that the Commonwealth Parliament is empowered by the *Constitution* to vest powers of examination upon administrative bodies. The examiner under the ACC Act does not

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78 At [64]

79 *Sorby v The Commonwealth* (1983) 152 CLR 281 following *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330

80 *R v Snow* (1915) 20 CLR 315 at 323 and *Cheatle v The Queen* (1993) 177 CLR 541

81 (1993) 177 CLR 541

82 (2008) 236 CLR 358

83 (2011) 245 CLR 282

84 (2010) 247 FLR 261

85 (1983) 152 C LR 281

decide anything. The examiner does not make orders which alter rights. The examiner merely conducts an investigative process. There is no argument that the examination procedure is unconstitutional.

96. The argument in X7 though was a little more subtle. It concentrated on s 25A(9). That is the subsection which empowers an examiner to make directions concerning the non-publication and dissemination of material gained in the examination. The subsection says the examiner *"must give such a direction*[86] *if the failure to do so might prejudice the safety or reputation or a person or prejudice the fair trial of a person who has been, or may be, charged with an offence"* (my underlining). Therefore, the argument in X7 was that a criminal court, hearing a charge, is obliged to ensure a fair trial of the accused so, by conferring a power upon the examiner referrable to a *"fair trial"*, there is a grant of judicial power to the examiner.

97. In X7, this was rejected on the basis that nothing in the ACC Act purported to remove or restrict the powers of a criminal court to ensure a *"fair trial"* or to make the examiner's decision under s 25A(9) binding on the trial judge[87].

98. I respectfully suggest that the conclusion in X7 on this point is obviously right. However, it is not beyond imagination that a statute such as the ACC Act could be drafted in such a way as to offend the separation of powers principle. For example, if a power was vested in the examiner to consider the impact of the examination upon the trial, fashion directions to ensure a fair trial and those directions were binding upon the trial judge, then there would be an issue. This is because there would be an effective transfer of the judicial function to ensure a fair trial to the executive body, namely the examiner.

99. However, the constitutional relationship between judicial and executive powers has been considered by the High Court many times. The constitutional validity of administrative inquisitorial bodies is well settled. A Commonwealth Act would not deliberately be written in such a way as to vest Commonwealth judicial power on an administrative body. Given the prominence of these principles within the *Constitution* and therefore within the arrangement of Commonwealth affairs, I think it highly unlikely that an examiner would, by error of Commonwealth draftsmen, be vested with Commonwealth judicial power.

**LEGISLATIVE AUTHORISATION OF EXECUTIVE INTERFERENCE WITH THE TRIAL PROCESS**

100. This is a point based on *Kable*[88]. *Kable* of course is authority for the proposition that no Commonwealth or State legislation is valid if it is such as to deprive the courts of their *"institutional integrity"* and therefore make the courts inappropriate receptacles for the grant of Commonwealth judicial power under Chapter III of the *Constitution*.

101. *Kable* was decided in 1996. Apart from a Queensland Court of Appeal case[89], there were no successful challenges to legislation based on the *Kable* principle until *International Finance Trust Co Ltd v New South Wales Crime Commission*[90]. There have since been a number of successful challenges. *Kable* arguments are indeed fashionable.

102. *Kable* arises in any circumstances where legislation affects the essential qualities that distinguish courts from other bodies[91]. In relation to the types of issues that are raised by X7 and Lee No 1, the *Kable* principle is most likely to arise where the statute authorises an examination which impermissibly interferes with the criminal trial of the charge which the person being examined faces.

103. The *Kable* principle does not preclude the legislative modification of common law rules of procedure of criminal trials, including those which reverse the onus of proof on issues other than the ultimate

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86 To restrict publication

87 At [65]

88 *Kable v Director of Public Prosecutions (New South Wales)* (1996) 189 CLR 51

89 *Re Criminal Proceeds Confiscation Act* 2002 (Qld) [2004] 1 Qd R 40

90 (2009) 240 CLR 319

91 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at [63], *Wainohu v New South Wales* (2011) 233 CLR 141 at [44]

issue of guilt[92] , or those which alter the standard of proof[93]. As already seen, privilege against self-incrimination may be altered or abolished[94]. It is well established that pre-trial disclosure may be legislatively mandated and there has never been challenge for instance to the statutory requirement to serve notices of alibi.

104. It seems to me that if the *Kable* principle is to be engaged by the type of legislation that is here under consideration, then it is likely to arise if the legislative provisions operate so as to restrict the trial judge's powers by reference to decisions made and steps taken by the examiner[95].

105. If an examiner under Commonwealth legislation was authorised to make a finding, and that finding was then binding upon the trial judge in the criminal case, then s 80 may be infringed, but it might also be held that the examiner was exercising Commonwealth judicial power. If the examiner was similarly empowered under State legislation, then s 80 would not apply and it would not be objectionable that State judicial power had been reposed upon an administrative entity. However, the fact of an administrative decision made in exercise of executive power binding a judge exercising judicial power when conducting the criminal trial of the examinee would, no doubt, affect the institutional integrity of the court conducting the trial and the legislation would be invalid.

106. It is of course not productive to speculate as to the many other ways in which the *Kable* principle might arise in relation to legislation which vests powers of examination.

**CONCLUSIONS**

107. As already opined, Lee No 2 is really a case which applies well settled principles. X7 and Lee No 1 are more likely to have long term ramifications.

108. However, X7 and Lee No 1 are much more to do with the principles of construction of statutes than they are constitutional principles.

109. The principle of legality has not been questioned in the cases and indeed has been affirmed. The two cases though show, yet again, how difficult it can be to construe English language used in a statutory setting.

110. It is well recognised that there is a powerful trend towards more statutory law and less reliance by governments upon common law rules and principles. As that trend continues, questions of statutory interpretation will become more and more common which will, no doubt, lead to the further development of principles designed to ensure, as much as possible, a uniform approach to the interpretation of statutes.

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92 *Commonwealth v Melbourne Harbour Trust Commissioners* (1992) 31 CLR 1, *Williamson v Oh* (1926) 39 CLR 95, *Orient Steam Navigation Co Ltd v Gleeson* (1931) 44 CLR 254 and *Milicevic v Campbell* (1975) 132 CLR 307

93 *Nicholas v The Queen* (1998) 193 CLR 173 at [94] and *Thomas v Mowbray* (2007) 233 CLR 307 at [113]

94 *Sorby v Commonwealth* (1983) 152 CLR 281 at 308

95 *State of South Australia v Totani* (2010) 242 CLR 1