Compulsory examinations and the right to a fair trial

Marcus Hassall reports on *X7 v Australian Crime Commission* [2013] HCA 29 and *Lee v New South Wales Crime Commission* [2013] HCA 39.

The proposition that a person with a pending criminal charge may be compulsorily examined pursuant to a parallel inquisitorial process, including about the subject-matter of the charge, is controversial. It has resulted in differing decisions of the High Court in the past.[1] Two recent decisions of the High Court, involving similar facts, again indicate divergent approaches to the question.

X7 v Australian Crime Commission

Legislation

Division 2 of Pt II of the *Australian Crime Commission Act 2002* (Cth) (the ACC Act) provides for examiners appointed under the Act to conduct compulsory examinations for the purposes of what the board of the ACC has designated as 'special' operations or investigations. Section 30 of the ACC Act provides that an examinee in such an examination may not refuse to answer questions on the basis of the privilege against self-incrimination, but that where the privilege is claimed prior to answering, the answer then given is not admissible in any criminal proceedings against the examinee (save for proceedings for giving false evidence). Further, s 25A(9) provides that an examiner 'must' give a direction prohibiting or limiting publication of evidence given in an examination 'if the failure to do so might … prejudice the fair trial of a person who has been, or may be, charged with an offence'.

Background

X7 was arrested and charged with drug trafficking and money-laundering offences. Whilst in custody, X7 was summonsed to attend an examination before the ACC. Initially, X7 was asked, and answered, questions relating to the subject matter of his pending charges. When the examination resumed after an adjournment, however, X7 declined to answer any further such questions. The examiner informed X7 that he would, in due course, be charged with the offence of failing to answer questions. The examiner made a direction pursuant to s 25A(9) of the ACC Act restricting publication of X7's evidence, and in particular prohibiting any provision of X7's evidence to officers of the Commonwealth director of public prosecutions or police officers associated with the prosecution of the offences with which X7 had been charged.

X7 commenced proceedings in the original jurisdiction of the High Court seeking injunctive relief against the ACC and its officers, and in particular restraining any further compulsory examination in respect of the matters the subject of the charged offences. The parties agreed to state two questions of law for consideration of the court:

> Does Division 2 of Part II of the ACC Act empower an examiner appointed under s 46B(1) of the ACC Act 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?

If the answer to Question 1 is 'Yes', is Division 2 of Part II of the ACC Act invalid to that extent as contrary to Ch III of the Constitution?

The decision

By majority (Hayne, Bell and Kiefel JJ, French CJ & Crennan J dissenting), the High Court held that the first question stated should be answered 'No', and that the second question therefore did not arise.

Hayne and Bell JJ were of the view that, in considering the first stated question, it was critical to bear in mind that an affirmative answer would 'fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom'.[2] Their Honours considered that:

> Permitting the Executive to ask, and requiring an accused person to answer, questions about the subject matter of pending charge would alter the process of criminal justice to a marked degree, whether or not the answers given by the accused are admissible at trial or kept secret from those investigating or prosecuting the pending charge.[3]

More particularly, Hayne and Bell JJ were of the view that merely requiring an accused to answer questions about the subject matter of a pending charge prejudices the accused in his or her defence of the pending charge 'whatever answer is given', and whether or not the answer can be used 'in *any* way' at the trial, because any admission made 'will hinder, even prevent, the accused from challenging at trial that aspect of the prosecution case'.[4] Instead

of being in the position of an ordinary accused, the particular accused 'would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination.'[5]

Hayne and Bell J held that the mooted 'fundamental alteration to the accusatorial criminal justice process' could only be made 'clearly by express words or by necessary intendment'.[6] Their honours held that the relevant provisions of the ACC Act were not sufficiently clear. In respect of a submission that the words of s 25A(9) of the ACC Act specifically contemplated the use of the examination provisions after charges being laid, their Honours held that whilst the words used 'were sufficiently general to *include* that case, … they do not deal directly or expressly with it.'[7]

In respect of three previous High Court decisions holding that compulsory examinations under bankruptcy and company liquidation legislation were permitted where the subject faced a criminal charge,[8] Kiefel J articulated the view of the majority in stating:

> … [that] trilogy of cases… [is] to be understood as the result of an historical anomaly, commencing with the divergent view taken by the Chancery Court from that of the common law and continuing through the series of legislation which preceded that dealt with in those cases.[9]

Lee v New South Wales Crime Commission

Legislation

Section 31D(1)(a) of the *Criminal Assets Recovery Act 1990* (NSW) (the CAR Act) provides that, if an application is made for a confiscation order under the Act, the Supreme Court may make an order for the examination on oath of 'the affected person' or another person 'concerning the affairs of the affected person, including the nature and location of any property in which the affected person has an interest'. Such an examination is to take place 'before the court'. As with the provisions of the ACC Act considered by the court in *X7*, the CAR Act provides direct use immunity on an examinee in respect of any answer given in an examination, provided the privilege against self-incrimination is claimed. The CAR Act at the relevant time[10] also conferred on the Supreme Court power to make non-publication orders for the purpose of preventing or minimising prejudice to an examinee facing criminal charges.[11]

Unlike the ACC Act, the CAR Act also contained provisions that expressly permitted derivative use to be made of answers given in an examination;[12] and stated that the fact criminal proceedings have been instituted is not a ground on which the Supreme Court could stay proceedings under the Act.[13]

Factual background

Jason Lee and Wok Seong Lee (the appellants) were charged with drug and money-laundering offences. The New South Wales Crime Commission (NSWCC) applied for confiscation orders in respect of property of the first appellant, and later applied for an order for the examination of both appellants.

At first instance Hulme J declined to make examination orders on the basis that the appellants were awaiting trial and the proposed examination would expose them to questioning about matters relevant to the charges against them. The NSWCC appealed to the NSW Court of Appeal, which unanimously (Beazley, McColl, Basten, Macfarlan and Meagher JJA) reversed the decision of Hulme J and ordered that the appellants each be examined on oath before a registrar of the Supreme Court.

The decision

By majority (French CJ, Crennan, Gageler and Keane JJ, Hayne, Bell and Kiefel JJ dissenting), the High Court dismissed the appeal.

The majority comprised separate judgments of French CJ and Crennan J and a joint judgment of Gageler and Keane JJ. Each of the majority judgments disavowed the proposition that the 'principle of legality' (relied on in effect, though not in terms, by the majority in *X7*) inhibits a legislature's ability to override the protections usually afforded to those accused of criminal offences. Similarly, the majority held that the bankruptcy and corporate insolvency cases were not a mere 'historical anomaly' in elevating the public interest over the common law's consideration for the individual.[14] Gageler and

Keane J observed:

> The principle [of legality] ought not … be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.[15]

It was significant to the reasoning of the majority that the proposed examination under consideration in *Lee* was to be conducted before an officer of the NSW Supreme Court, rather than before an executive body.[16] This provided greater assurance that the relevant examination could be conducted in such a way as to avoid a real (as opposed to merely possible) risk to the administration of justice.[17]

Hayne J, in a vigorous dissenting judgment, expressed the view that the questions for determination by the court were indistinguishable from those which had been determined by the majority in *X7*, and that, unless *X7* was to be overruled, the doctrine of precedent required that it be applied.[18] His Honour observed succinctly:

> All that has changed between the decision in *X7* and the decision in this case is the composition of the Bench. A change in composition in the Bench is not, and never has been, reason enough to overrule a previous decision of this Court.[19]

Conclusion

It will remain a matter for debate whether *Lee* was in fact on all fours with *X7*, and whether the majority in *Lee*, in reaching a different conclusion to the majority in *X7*, sidestepped the doctrine of precedent. In either case, it appears likely that further litigation will be required before there is complete clarity as to the limits of the legislature's ability to provide for the compulsory examination, in parallel inquisitorial proceedings, of persons with pending criminal charges.

Endnotes

1. See *Hammond v The Commonwealth* (1982) 152 CLR 188 and *Hamilton v Oades* (1989) 166 CLR 486.
2. At [124].
3. At [70].
4. At [71]. Emphasis contained in the original.
5. At [124].
6. At [125].
7. At [83], Keifel J agreeing at [157].
8. *Rees v Kratzmann* (1965) 114 CLR 63; *Mortimer v Brown* (1970) 122 CLR 493; *Hamilton v Oades* (1989) 166 CLR 486; [1989] HCA 21.
9. At [161].
10. And later the *court Suppression and Non-publication Orders Act 2010* (NSW).
11. Section 62 of the CAR Act, later repealed and replaced by the *Court Suppression and Non-publication Orders Act 2010* (NSW) – see especially s 8(1)(a) and (e).
12. Section 13A(3) of the CAR Act.
13. Section 63.
14. See French CJ at [38], Crennan J at [126], and Gageler and Keane JJ at [313]-[317].
15. At [313]
16. See for example French CJ at [19], [55]–[56], and Gageler and Keane JJ at [340].
17. See in particular Gageler and Keane JJ at [340].
18. At [62].
19. At [70].

A member of the bar spotted this street sign on a recent trip to Brisbane.