SUPREME COURT OF QUEENSLAND

CITATION:	*NS v Scott* [2017] QCA 237
PARTIES:	**NS** (appellant) **v** **M J SCOTT** (respondent)
FILE NO/S:	Appeal No 12153 of 2016 SC No 9032 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 286 (Douglas J)
DELIVERED ON:	13 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	20 June 2017
JUDGES:	Holmes CJ and Philippides JA and Flanagan J
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	PROCEDURE – CONTEMPT, ATTACHMENT AND SEQUESTRATION – CONTEMPT – REASONABLE EXCUSE – where the appellant was required to give evidence at an investigative hearing of the Crime and Corruption Commission relating to drug offences – where the appellant had been charged with trafficking as a result of alleged supplies to another person named in the terms of reference – where an officer involved in the investigation of the charge against the appellant was present at the Crime and Corruption hearing – where the appellant argued that he had 'reasonable excuse' not to answer questions under s 190 of the *Crime and Corruption Act* 2001 (Qld) because derivative evidence obtained as a result of his answers could be used against him at trial – where the presiding officer, taking into account the closed hearing, the direct use immunity provided for in the *Crime and Corruption Act* 2001 (Qld), and his proposed order prohibiting publication of the evidence to any prosecutor ruled against the appellant's claim of reasonable excuse – where the appellant's application for leave to appeal to the Supreme Court was refused on the basis that the orders made by the presiding officer in relation to publication were sufficient to limit the use of the information obtained from the appellant – whether the *Crime and Corruption Act* 2001 (Qld) has abrogated the fundamental principle that the onus

of proof rests on the Crown, and the companion rule that an accused cannot be compelled to assist it in meeting that onus – whether the prospective obtaining of derivative evidence against a person charged amounts to reasonable excuse under s 190(1) – whether the judge at first instance erred in failing to find that the appellant had a reasonable excuse for refusing to answer questions at the Crime and Corruption Commission hearing

Crime and Corruption Act 2001 (Qld), s 4(1)(a), s 5(2), s 176, s 180(3), s 190, s 194, s 195, s 197, s 202(1), s 331
Evidence Act 1977 (Qld), s 130
Supreme Court of Queensland Act 1991 (Qld), s 62

Crime and Misconduct Commission v WSX & EDC (2013) 229 A Crim R 286; [2013] QCA 152, cited
Hammond v The Commonwealth (1982) 152 CLR 188; [1982] HCA 42, cited
Lee v New South Wales Crime Commission (2013) 251 CLR 196; [2013] HCA 39, considered
Lee v The Queen (2014) 253 CLR 455; [2014] HCA 20, considered
R v Seller (2013) 273 FLR 155; [2013] NSWCCA 42, considered
Sorby v The Commonwealth (1983) 152 CLR 281; [1983] HCA 10, cited
Taikato v the Queen (1996) 186 CLR 454; [1996] HCA 28, considered
Witness G v Scott [2016] QSC 286, related
Witness J A v Scott [2015] QCA 285, cited
X7 v Australian Crime Commission (2013) 248 CLR 92; [2013] HCA 29, considered

COUNSEL: J W Fenton for the appellant
M J Copley QC for the respondent

SOLICITORS: A W Bale & Son for the appellant
Crime and Corruption Commission for the respondent

[1] **HOLMES CJ:** The appellant was required to give evidence at an investigative hearing of the Crime and Corruption Commission held pursuant to s 176 of the *Crime and Corruption Act* 2001 (Qld).[1] Section 190 of that Act requires that a witness answer a question asked unless he has a "reasonable excuse". The presiding officer ruled against the appellant's claim of reasonable excuse for refusing to answer questions, and the appellant's application for leave to appeal to the Supreme Court under s 195 of the Act was refused. He now appeals the latter decision to this court[2] on the shortly-stated ground that the judge at first instance erred in failing to find that he had a reasonable excuse for refusing to answer questions which "might

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1 References to the provisions of the *Crime and Corruption Act* 2001 (Qld) are to the Act as it stood in August 2016, when the appellant was required to give evidence.

2 He has the right to appeal that refusal to this court under s 62 of the *Supreme Court of Queensland Act* 1991: *Witness J A v Scott* [2015] QCA 285.

further incriminate him in relation to a criminal charge currently before the Supreme Court".

[2] In his submissions, the appellant contended that the trial judge should have found that he had a reasonable excuse not to answer in circumstances where: an officer involved in the investigation of the charge against him was present at the hearing; he had raised the concern that answers to questions about his own offending could assist the police to find further evidence against him; and there was no prohibition on the use of such further evidence at his trial. More broadly, he argued that the provision for reasonable excuse was the means adopted by Parliament to ensure that the nature of criminal trials was not radically altered by permitting derivative evidence obtained from answers given under compulsion to be used against an accused. The latter proposition raises an exercise of construction in which the following provisions of the Act are relevant.

The Act's purposes and the Commission's functions

[3] The first of the two main purposes of the Act is set out in s 4(1)(a) as

> "to combat and reduce the incidence of major crime".

One of the ways in which that purpose is to be achieved is described in s 5(2):

> "The commission is to have investigative powers, not ordinarily available to the police service, that will enable the commission to effectively investigate major crime and criminal organisations and their participants."

One of the Commission's functions is to investigate major crime,[3] which entails, among other things, gathering evidence for prosecution and liaising with and providing information about major crime to other law enforcement agencies and prosecuting authorities.[4] It may give information about a possible offence to an entity or law enforcement agency it considers appropriate.[5] The Commission has the power to hold hearings in relation to anything relevant to the performance of its functions.[6] Its chairman may make arrangements with the Commissioner of Police for the establishment of a police task force to help it to carry out a crime investigation,[7] and it may second police officers to provide their services in the performance of its functions[8].

Privilege against self-incrimination, reasonable excuse and pending proceedings

[4] Section 190 of the *Crime and Corruption Act,* the provision by virtue of which the appellant was required to answer questions, is, relevantly for present purposes, in these terms:

> "**190 Refusal to answer question**

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3 Section 25.
4 Section 26.
5 Section 60(1).
6 Section 176.
7 Section 32.
8 Section 255.

(1) A witness at a commission hearing must answer a question put to the person at the hearing by the presiding officer, unless the person has a reasonable excuse.

…

(2) The person is not entitled—

(a) to remain silent; or

(b) to refuse to answer the question on a ground of privilege, other than legal professional privilege."

[5] Section 194 of the Act sets out the process by which the presiding officer must deal with a claim of reasonable excuse:

"**194 Presiding officer to decide whether refusal to answer questions or produce documents or things is justified**

(1) This section applies if a person claims to have a reasonable excuse, including a reasonable excuse based on a claim of legal professional privilege, for not complying with a requirement made of the person at a commission hearing—

(a) to answer a question put to the person; or

(b) to produce a document or thing that the person was required to produce.

(1A) The presiding officer must decide whether or not there is a reasonable excuse.

(1B) The presiding officer must decide, after hearing the person's submissions—

(a) that the requirement will not be insisted on; or

(b) that the officer is not satisfied the person has a reasonable excuse.

(2) If the presiding officer decides, after hearing the person's submissions, that the person has a reasonable excuse based on self-incrimination privilege for not complying with the requirement—

(a) the presiding officer may require the person to comply with the requirement; and

(b) section 197 applies in relation to the answer, document or thing given or produced."

The presiding officer must give reasons for the decision.[9]

[6] Section 197 of the Act renders inadmissible any answer made or document, thing or statement provided by an individual who has validly claimed self-incrimination

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9 Section 194(3).

privilege and been required to answer, with certain exceptions: where the individual consents, or where it is to be used in perjury or contempt proceedings, proceedings for an offence under the Act or confiscation proceedings. (It was common ground that the section provides a direct use immunity where privilege is properly claimed, but contains no protection against derivative use.)

[7] Section 331 of the Act deals directly with the circumstance where proceedings are pending against a witness. It explicitly authorises conduct which would otherwise constitute an interference with the administration of justice amounting to contempt of court, of the kind addressed by the High Court in *Hammond v The Commonwealth*.[10]

> "**331 Effect of pending proceedings**
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> (1) The commission may do any or all of the following, despite any proceeding that may be in or before a court, tribunal, warden, coroner, magistrate, justice or other person—
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> (a) commence, continue, discontinue or complete an investigation or hearing or any part or aspect of the investigation or hearing;
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> (b) give a report in relation to the investigation or hearing or any part or aspect of the investigation or hearing;
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> (c) an act or thing that is necessary or expedient for a purpose mentioned in paragraph (a) or (b).
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> (2) If the proceeding is a proceeding for an indictable offence and is conducted by or for the State, the commission must, if failure to do so might prejudice the accused's right to a fair trial, do 1 or more of the following—
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> (a) conduct any hearing relating to an investigation as a closed hearing during the currency of the proceeding;
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> (b) give a direction under section 202 to have effect during the currency of the proceeding;
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> (c) make an order under section 180(3).
>
> (3) This section has effect whether or not the proceeding commenced before or after the commission's investigation started and has effect whether or not the commission or a commission officer is a party to the proceeding.
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> (4) To remove any doubt, it is declared that—
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> (a) a proceeding for a criminal offence is in or before a court from the moment the charge is laid for the offence; and

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10 (1982) 152 CLR 188.

(b) under subsection (1), the commission may, for the investigation or hearing, require a person or witness to answer a question, or produce a document or thing, that is relevant to a proceeding brought against the person or witness for a criminal offence.

The Crime and Corruption Commission hearing

[8] The hearing concerned an investigation whose terms of reference were the investigating of organised crime involving a number of named persons, including the appellant, in offences of trafficking, supplying, producing and otherwise dealing with dangerous drugs, and money-laundering. The appellant had himself been charged with trafficking as a result of alleged supplies to another person named in the terms of reference. Counsel assisting said at the outset of the hearing that it was proposed to examine the appellant, not in order to strengthen the case against him, but to ascertain his knowledge of others' involvement in drug trafficking and related offences.

[9] The hearing was a closed one, and the presiding officer had made an order pursuant to s 180(3) of the *Crime and Corruption Act* prohibiting publication of any answers given or items produced by the appellant to any officer of any prosecuting agency involved in his prosecution. He also made a general order under s 197(5) of the Act that the appellant's answers were to be regarded as given on objection on the basis of a claim for self-incrimination privilege, so that he was taken to have made the privilege claim in each instance.

[10] The appellant was asked whether he was involved in supplying ice to another individual named in the investigation's terms of reference. He responded that he had a reasonable excuse for not answering because he was being questioned about his own offending and the police who were investigating him were present in the hearing. (In fact, one officer, who had had some involvement to an unspecified extent in the investigation relating to the appellant's trafficking charge, and who, the latter said, was present at his arrest, was at the hearing. He was performing what was described as an instructing role to counsel assisting.) The appellant said he was concerned that to answer would cause him prejudice in any criminal trial, because of the possibility that, while the evidence he gave could not be used against him, the investigating police could use it to obtain other evidence.

[11] By agreement a broader question was then formulated and asked of the appellant, as to his knowledge of drug trafficking by two other named members of the syndicate including the source of the drugs trafficked and the identity of and involvement of others in their drug trafficking network. Once again, the appellant declined to answer, claiming a reasonable excuse on the same grounds previously identified. His legal representative submitted to the presiding officer that the appellant had a reasonable excuse for not answering in that his fair trial would necessarily be prejudiced because an unfair forensic advantage would be obtained against him, contrary to the principles set out in *Lee v The Queen*[11] and *X7 v Australian Crime Commission*.[12]

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11 (2014) 253 CLR 455.

12 (2013) 248 CLR 92.

The presiding officer's ruling

[12] The presiding officer commenced his reasons by referring to the exercise described in *Crime and Misconduct Commission v WSX & EDC*[13] as entailed in determining whether reasonable excuse existed:

> "[B]alanc[ing] the respective considerations of the public interest in tracking those responsible for violent crime, and the private concerns of those who may be able to disclose those responsible."[14]

While adverting to *X7 v Australian Crime Commission* and *Lee v The Queen*, he took the view that s 331 of the Act manifested a clear legislative intention to alter the accusatorial criminal process, so far as self-incriminatory answers given under compulsion in relation to a pending charge might affect the course the witness might adopt at trial. He foreshadowed that after the hearing he would revoke the existing non-publication order and replace it with one which would allow publication of the appellant's evidence to Queensland Police Service officers for investigative purposes. However, it would prohibit publication to any prosecutor, so there was no risk that the appellant's ability to obtain a fair trial would be jeopardised in that way. Such prejudice as might flow to the appellant in being required to answer questions about his involvement in matters which were to be the subject of his pending trial was authorised by the legislation. That, with the fact that the hearing was closed, the non-publication orders, and the direct use immunity for which the Act provided, led him to the conclusion, on the balance described in *WSX & EDC*, that the appellant did not have a reasonable excuse for refusing to answer the question.

[13] Section 202(1) of the Act prohibits publication, with certain exceptions, of any answer given, document or thing produced at a hearing, or anything about that answer, document or thing without the Commission's written consent or contrary to its order. After the conclusion of the hearing, the presiding officer, as he had foreshadowed, revoked his original order. He replaced it with a written consent permitting publication of the information obtained from the appellant to any Queensland Police Service officer involved in the investigation, with the exception of any officer who might be an arresting officer in respect of the appellant in relation to any charges arising from the Commission's investigation. The purposes for which the information obtained could be used were described as "derivative uses", and included the making of any enquiries and the interviewing of any person in connection with the Commission's investigation. The presiding officer made an order limiting publication of the information by prohibiting its publication to any officer of any prosecuting agency involved in any prosecution of the appellant for any charge, whether arising from the investigation or otherwise.

The application for leave to appeal to the Supreme Court

[14] Section 195 permitted an appeal from that ruling with leave, which could be granted only if the court considered that the appeal had a significant prospect of success or involved an important question of law. At first instance, the appellant argued that the exception of reasonable excuse permitted him to refuse to answer questions which might lead indirectly to his incrimination by evidence derived from his answers. If Parliament had intended to alter radically the nature of a criminal trial

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13 [2013] QCA 152.

14 At [41].

by requiring a defendant to answer, thus permitting the obtaining of derivative evidence from a secret hearing, it would have said so plainly. More specifically, he contended that he could have no confidence that any trial would be conducted with appropriate procedural fairness because the investigating police were present at the hearing.

[15] The primary judge took the view that the orders made by the presiding officer in relation to publication of the appellant's answers appropriately limited the use to which the information could be put in respect of the current proceedings against the appellant. His Honour observed that the order precluding publication of his evidence to any prosecuting agency appeared to be "an attempt … to avoid the problem in *Lee v The Queen*".[15] The clarity of s 190(2) and s 331(4)(b) of the Act in removing the right to silence and the privilege against self-incrimination, even in relation to proceedings already brought against a defendant for a criminal offence, left no room for there to be an excuse for the appellant to refuse to answer the questions posed to him.

The submissions in this Court

[16] The appellant began his submissions by referring to *Taikato v the Queen*:[16] the High Court in that case had said (in the context of a "reasonable excuse" to a criminal charge) that it was for the court to determine the contents of a "reasonable excuse" defence, giving effect to its own views while also giving effect to the will of Parliament. The distinction to be drawn was between:

> "cases where the legislature could not conceivably have envisaged such a defence arising and those where it may well have envisaged such a defence being available".[17]

The same approach should be adopted here.

[17] The appellant submitted, as was clearly correct, that the privilege against self-incrimination extended to protection against disclosures which could lead to the discovery of incriminating evidence.[18] However, he did not contend that the presiding officer lacked power to put incriminating questions to him, whether the possible result was a direct or derivative use of his answers. Instead, he argued that the concept of "reasonable excuse" should be regarded as (partially) replacing the self-incrimination privilege abrogated by s 190(2), enabling a witness to refuse to provide police officers with information which would lead to the gathering of evidence against him, in that way assisting the prosecution.

[18] Section 331(4) conferred a discretion on the Commission as to whether to require an answer, and it clarified the rule in s 190(2), not the "reasonable excuse" exception in s 190(1). It was accepted that the exception could have no application in relation to questions requiring the witness to incriminate himself directly, because in that instance s 197 provided protection, rendering the answers inadmissible. But Parliament could not have intended to fundamentally alter the accusatorial criminal process by requiring him to answer so that further evidence could be gathered and used against

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15 *Witness G v Scott* [2016] QSC 286 at [26].
16 (1996) 186 CLR 454.
17 At 465.
18 *Sorby v The Commonwealth* (1983) 152 CLR 281 at 294, 310.

him, thus rendering his trial unfair. Had it intended to do so, it was necessary that it say so plainly, and it had not. Instead, providing the ability to claim reasonable excuse was the means by which Parliament ensured that it did not radically alter the nature of a criminal trial in that way. The exception of reasonable excuse should, accordingly, be construed as providing protection where a person charged with a serious crime was to be interrogated in the presence of investigating police officers who could use the information to gather further evidence for use at trial.

[19] Answers to the questions which would be put to the appellant about his sources and distribution of drugs could, it was argued, lead to the unearthing of evidence that would strengthen the case against him. In *Lee v The Queen*,[19] the High Court had observed that although the privilege against self-incrimination might be lost, it remained a fundamental principle of the common law that the prosecution must prove the guilt of an accused person and could not compel him to assist in the discharge of its onus of proof. The learned judge at first instance had erred in supposing that the orders prohibiting publication limited the use of the information given so as to address the problem in *Lee*, of the witness being forced to assist in proving the Crown case.

[20] The respondent contended that the content of "reasonable excuse" was to be determined in the statutory context, which included the abolition by s 190 of the right to silence and the privilege against self-incrimination and s 197, which prevented direct use of answers given. Whatever the content of reasonable excuse, it could not encompass refusals to answer for fear of incriminating evidence being obtained in consequence. That conclusion was reinforced by the purposes of the Act, which included combating major crime, for which purpose the Commission was given broad investigative powers; and s 331, which made it clear that hearings could be undertaken, notwithstanding the existence of concurrent criminal proceedings about the same matters, and provided for directions to be made in order to preserve the questioned person's right to a fair trial. Section 331 had by express words effected an alteration to the accusatorial judicial process. In this case, the orders made were adequate to ensure that any trial was not prejudiced. In addition, should the Crown seek to use derivative evidence at the appellant's trial, there were protections: the trial judge's discretion under s 130 of the *Evidence Act* 1977 (Qld), to exclude evidence unfairly obtained, remained untrammelled.

The relevant High Court decisions on compulsory examination

[21] The decisions of the High Court in *X7 v Australian Crime Commission* and *Lee v The Queen* loomed large in argument below, while in this court, reliance was also placed on *Lee v New South Wales Crime Commission*.[20] In *X7*, the High Court was considering Commonwealth legislation which contained provisions similar in effect to ss 190 and 197 of the *Crime and Corruption Act*, prohibiting a witness at a compulsory examination from refusing to answer questions, but preventing the direct use of questions answered. It did not, however, include provision for "reasonable excuse" for refusing to answer questions; nor was there any provision which explicitly precluded reliance on the self-incrimination privilege. And while the legislation contained a provision similar in effect to s 331(2), requiring the examiner to make non-publication directions necessary to ensure that the trial of a person who

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19 (2014) 253 CLR 455.
20 (2013) 251 CLR 196.

had been or might be charged with an offence was not prejudiced, it contained no provisions equivalent to the other subsections of s 331, as to the power to continue an investigation and require answers where criminal proceedings had been commenced.

[22] The appellant in *X7* had been charged with, but not yet tried on, an indictable Commonwealth offence. The issue raised (by case stated) was whether an examiner could lawfully require an accused person to answer questions about the subject matter of the pending charge. The majority held that to permit compulsory examination about the subject matter of the pending charge would effect a fundamental alteration to the process of accusatorial criminal justice, which at common law and by the effect of statute recognised the right to remain silent. Such an alteration to the criminal justice system could only be made by express words or necessary intendment. Neither was to be found in the relevant legislation. There was no reference to examination of a charged person, and while the legislation gave the examiner power to direct that there be no publication of what was said if it might prejudice the fair trial of a person charged, the relevant provisions did not deal specifically with the case of a witness who was being examined about the subject matter of a pending charge.

[23] It was a fundamental principle that the onus of proof rested on the prosecution; the "companion rule" was that the prosecution could not compel the accused to assist it.[21] Even if the answers were to be kept secret, the requirement to give answers after being charged would fundamentally change the accusatorial criminal process, because the accused person would have to decide on his or her course at trial in relation to plea, challenges to evidence, and adducing evidence, according to the answers given at the examination.

[24] French CJ and Crennan J, in the minority, construed the legislation as authorising the examination of a person charged with respect to the subject matter of the charged offences. In reaching that conclusion, it was relevant, they considered, that the legislation contained no explicit preservation of privilege against self-incrimination once charges were laid, but there was protection against direct use of answers given subject to such a claim, which would apply whether a charge had been laid or not; and the examiner was required by the legislation to give any directions necessary to preserve a fair trial, in terms which extended to a pending trial. The public interest in the continuing investigation of serious and organised crime was to prevail over the private interest in the ability to claim the privilege, but the interest in an open and fair trial was protected by the prohibition on direct use of answers and the provision for directions, which could protect against both direct and indirect use of the evidence given.

[25] In considering the prospect of use of derivative evidence, their Honours made this observation:

> "Given the onus on the prosecution to prove an offence, and the non-compellability of an accused, in the absence of a factor such as the independent sourcing of evidence it is not possible to reconcile a fair trial with reliance on evidence against a person at trial which derives

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[21] In *R v Independent Broad-based Anti-corruption Commissioner* (2016) 256 CLR 459,the High Court made it clear that the principle that an accused person could not be compelled to assist the prosecution to discharge its onus of proof applied only where there was a prosecution under way.

> from compulsorily obtained material establishing that person's guilt, or disclosing defences".[22]

However, their Honours acknowledged that there were some circumstances in which the admission of derivative evidence was not inconsistent with a fair trial; it might depend on the significance of the derivative evidence or whether it was available from independent sources. They noted in this context the judgment of Bathurst CJ in *R v Seller*,[23] in which the latter expressed the opinion that answers tending to indicate the availability of admissible evidence – for example the location of bank accounts – could probably be used without prejudicing a fair trial. In any event, a trial judge had a discretion to exclude evidence and a power to control any use of it amounting to an abuse of process.

[26] In *Lee v New South Wales Crime Commission*, a provision of the *Criminal Assets Recovery Act* 1990 (NSW) permitted the Supreme Court to make an order for examination by the Court, or an officer of the Court, of a range of persons, including those with interests in property subject to criminal confiscation orders. The issue was whether such an order could be made so as to permit examination of a person charged about the subject matter of the charge.

[27] One of the *Criminal Assets Recovery Act*'s objects was to provide for confiscation of property where it was found to be more probable than not that the person had engaged in serious crime-related activities, which included the commission of an offence, whether or not the person had been charged, tried, acquitted or convicted. The Act contained equivalent provisions to ss 190 and 197 of the *Crime and Corruption Act*, abrogating the privilege against self-incrimination but preventing direct use of the answers given. However, it specified that derivative evidence was not rendered inadmissible purely by reason of the fact that it was obtained as a result of answers given under compulsion or against a claim of privilege against self-incrimination. Significantly, it provided that the fact that criminal proceedings had commenced was not a ground for staying proceedings (which included applications for examination orders). It also provided for the making of orders in relation to publication where a person had been charged with an offence.

[28] The majority in the High Court held that the provisions of the Act manifested a clear legislative intention that the Court could make an order for the examination of a person charged with criminal offences about conduct the subject of the charges. Gageler and Keane JJ observed that the principle of legality was met where legislation made it clear through its objects, terms or context that the legislature had turned its attention to the question of the abrogation or curtailment of a right, freedom or immunity and had determined that it should be so abrogated or curtailed. The principle could have only limited application in construing legislation the objects of which included the abrogation or curtailment of a particular right in respect of which it was sought to invoke the principle. French CJ and Crennan J, also in the majority, made observations to similar effect.

[29] The minority, consisting of Hayne J, Kiefel J (as she then was) and Bell J, observed that general words would rarely be enough clearly to manifest an intention to abrogate fundamental rights, because they would usually be ambiguous. In the case before them, the general words of the section which provided that the existence of

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22 At page 123.

23 (2013) 273 FLR 155.

criminal proceedings was not a ground for a stay were not sufficient to compel a conclusion that the Act in question had worked a fundamental alteration to the process of criminal justice. The intention to abrogate a witness' privilege against self-incrimination of itself did not evidence the intention that the legislation was to apply to a person whose trial for a serious crime was pending or in progress, and other provisions of the Act manifested no clear intention to effect a fundamental alteration to the accusatorial process of criminal justice.

[30] In *Lee v The Queen*, the relevant legislation contained a provision requiring the New South Wales Crime Commission to give a non-publication direction in respect of evidence given for the publication might prejudice the fair trial of the person. Transcripts of witnesses' evidence before the Commission were made available to the prosecuting agency prior to their trial on drug charges, contrary to the non-publication orders made in the Commission. In a unanimous judgment, the High Court noted the importance French CJ and Crennan J had attributed in *X7* to non-publication directions as a safeguard of the fairness of an examined person's trial. The court reiterated the fundamental principle that it fell to the prosecution to prove the guilt of an accused person and the companion rule, that a person charged could not be compelled to assist in the discharge of the prosecution's onus of proof. The protective purposes of the non-publication provision would usually require the quarantining of evidence given by a person to be charged from those involved in the prosecution of the charges. The failure to meet that purpose had the consequence that the appellants' trial had departed in a fundamental respect from that which should be provided by the criminal justice system; the balance of power had shifted to the prosecution. The appellants' convictions were set aside and a new trial ordered.

Consideration

[31] The larger question on this appeal is whether the *Crime and Corruption Act* has abrogated the fundamental principle that the onus of proof rests on the Crown, and the companion rule that the accused cannot be compelled to assist it in meeting that onus, by permitting a person charged to be required to give answers which may lead to the obtaining of derivative evidence. The appellant's argument is that the purpose of the reasonable excuse exception is to prevent that result, replacing the protection formerly provided by the self-incrimination privilege in respect of evidence which might give rise to derivative use. The second, narrower question arises if the answer to that question is affirmative; it is whether in the particular circumstances of this case, in which an officer involved in the investigation of the appellant was present for the hearing, the appellant's concern that derivative evidence might be used against him at his trial, there being no prohibition on that occurring, could amount to reasonable excuse.

[32] The starting point for consideration of these questions is to recognise that the Act distinguishes between entitlement to refuse to answer on the basis of self-incrimination privilege and reasonable excuse for such a refusal on the basis of the privilege. Section 190(2) deals with the first; s 194(2) contemplates the second, because it provides for the presiding officer firstly, to decide whether there is a reasonable excuse on that basis, and secondly, if he or she decides that there is, to exercise a discretion as to whether to require the witness to answer notwithstanding, in which case there is only a protection against direct use. In this case, the presiding officer decided that there was not a reasonable excuse, but the possibility of a different result which s 194(2) raises is relevant in considering the appellant's argument that

the reasonable excuse exception is the legislative mechanism by which an accused is protected from giving answers in relation to the charges against him which may then be used to obtain evidence against him.

[33] Section 190(2) on its face removes any *entitlement* to rely on the self-incrimination privilege; and, unlike the legislation in *X7*, the Act makes it clear that it is not to be construed as operating differently when charges have been laid. The necessary intendment of s 331(4)(b) is that the removal of the privilege against self-incrimination effected by s 190(2) applies whether or not the witness has been charged and whether or not the questions concern the subject matter of the charge. The subsection would have no work to do if a person charged could not be subject to examination about the alleged offence. It plainly is designed to effect a change to the accusatorial process of criminal justice by permitting the accused person to be questioned about the subject matter of his charge, notwithstanding the prejudice to his defence (identified by the majority in *X7*) which may result. The risk of prejudice to the accused's right to a fair trial is specifically recognised in s 331(2), which provides remedial mechanisms.

[34] Nor does the Act leave any room for reading a limitation into s 331(4)(b) to the effect that answers cannot be required where they may result in the obtaining of derivative evidence. Section 190(2) does not distinguish between the prospect of self-incrimination through the direct use of answers given and the prospect of self-incrimination through the derivative use of answers given. Section 331(4)(b), in giving power to ask questions about the subject matter of the appellant's charges, clarifies the Commission's power, given in s 331(1), to continue and complete an investigation notwithstanding a pending trial. Those powers are conferred in the context of an Act which gives the Commission investigative power in relation to major crime and provides the investigative hearing as a tool for that purpose. Use of the evidence obtained to enable police officers to investigate further and obtain more evidence is consistent with the Commission's statutory function of investigating crime, which includes the gathering of evidence for prosecution. The capacity to second police officers or secure the assistance of a police task force to assist the Commission in the exercise of its functions further supports the view that information may be provided to police officers for investigative purposes. The legislature has expressed its intention "with irresistible clearness"[24] that a witness can be compelled to answer even if the result may be the obtaining of further evidence in relation to a charge against him.

[35] The intention manifest in the provisions I have discussed weakens the appellant's proposition that Parliament cannot have intended an accused person to be required to give answers which may enable the gathering of further evidence against him, as well as the further contention that the reasonable use exception is intended to provide a mechanism to prevent that occurring. Section 194(2) further undercuts the latter argument; it raises the possibility that a claim in such circumstances might amount to reasonable excuse, but it also precludes the conclusion that it must do so. The provision leaves it to the presiding officer to decide whether any claim based on self-incrimination constitutes reasonable excuse and then gives that officer the discretion to require an answer; it is clear from the conferring of that power and discretion that the legislature did not intend by the reasonable excuse provision to

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24 *Potter v Minahan* (1908) 7 CLR 277 at 204.

provide any general or complete protection against self-incrimination through derivative use.

[36] Plainly enough, in particular circumstances, a charged person who fears a derivative use of his answers may have a reasonable excuse. An example might be an accused person who is asked to answer questions designed to incriminate him by eliciting the nature of his defence, in order to arm the prosecution with the means of rebutting it. But there is no general rule that an accused's concern as to the obtaining of derivative evidence will constitute a reasonable excuse.

[37] It remains necessary to consider whether the primary judge should have found that the circumstances of this case, in which an investigating officer in relation to the charge against the appellant was present at the hearing, the answer to the question asked could result in the finding of further evidence, and there was no prohibition on the prosecution's using any such evidence at the trial, combined to amount to reasonable excuse. By virtue of the presiding officer's orders, the police officer who was present at the hearing could not communicate the appellant's answers to the prosecuting agency, which is no doubt what the primary judge was alluding to in his reference to *Lee v The Queen*. However, he was not prevented from seeking further evidence, on the basis of those answers, to add to the prosecution brief.

[38] The evidence did not make clear the status of the officer as at the time of the hearing, although given his "instructing" role, it seems likely that he had become part of the Commission's investigation team. However that may be, the mere fact of his presence and possible involvement in seeking further evidence is of no practical consequence if further investigation could in any event be undertaken by other police officers who had no involvement in the earlier investigation of the appellant and could similarly furnish evidence obtained to the prosecution. The real question is whether the prospect of additional evidence thus obtained being used at trial, which was not prohibited by the presiding officer's orders, amounted to a reasonable excuse for refusing to answer.

[39] As was acknowledged in the joint judgment of French CJ and Crennan J in *X7* and in Bathurst CJ's judgment in *R v Sellar*, the use of derivative evidence does not necessarily prejudice a fair trial. It will depend on the nature of the evidence, and whether it is available from other sources. Those are not matters likely to be apparent at a Commission hearing. If there were a question of unfairness in the adducing at trial of evidence thus obtained, it would be open to the appellant to apply for its exclusion on the ground of unfairness, under s 130 of the *Evidence Act* 1977 (Qld). Given the availability of that recourse, the prospective obtaining of derivative evidence and its provision to the prosecution did not amount to a reasonable excuse under s 190(1).

Conclusion

[40] The judge at first instance correctly dismissed the application for leave to appeal on the basis that the appellant had not shown a reasonable excuse to refuse to answer the question posed to him. I would dismiss the appeal with costs.

[41] **PHILIPPIDES JA:** I agree that the appeal should be dismissed with costs for the reasons stated by the Chief Justice.

[42] **FLANAGAN J:** I agree with the orders proposed by the Chief Justice and with her Honour's reasons.