SUPREME COURT OF QUEENSLAND

CITATION:	*DBH v Australian Crime Commission & Ors* [2014] QCA 265
PARTIES:	**DBH** (appellant) **v** **AUSTRALIAN CRIME COMMISSION** (first respondent) **WILLIAM MACLEAN BOULTON** (second respondent) **JOHN PLANTA HANNAFORD** (third respondent) **BROWN** (fourth respondent) **SMITH** (fifth respondent) **JONES** (sixth respondent) **GREEN** (not a party to the appeal)
FILE NOS:	Appeal No 2889 of 2014 SC No 8528 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 October 2014
DELIVERED AT:	Brisbane
HEARING DATE:	30 July 2014
JUDGE:	Holmes, Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – FEDERAL AND STATE INVESTIGATIVE AUTHORITIES – COMMONWEALTH – AUSTRALIAN CRIME COMMISSION – where the appellant and his co-accused, the fourth, fifth and sixth respondents, were the subject of compulsory examination by the first respondent – where non-publication directions were given in respect of the examinations – where the appellant's application under s 25A(13) of the *Australian Crime Commission Act* 2002 (Cth) for transcripts of his co-accused's evidence was refused – where s 25A(13) sets out the court's power of disclosure of the material but does not prescribe the

procedure to be adopted where such evidence is sought – where the primary judge excluded the appellant and received the respondents' submissions on the application individually in in-camera proceedings – where the appellant contends he was wrongly excluded – whether the appellant was denied procedural fairness when the primary judge received submissions from the respondents in his absence

CRIMINAL LAW – FEDERAL AND STATE INVESTIGATIVE AUTHORITIES – COMMONWEALTH – AUSTRALIAN CRIME COMMISSION – where the appellant and his co-accused, the fourth, fifth and sixth respondents, were the subject of compulsory examination by the first respondent – where non-publication directions were given in respect of the examinations – where the appellant's application under s 25A(13) of the *Australian Crime Commission Act* 2002 (Cth) for transcripts of his co-accused's evidence was refused – where the appellant contended that because the primary judge's reasons were too generally expressed and her findings were redacted, she had not given adequate reasons for concluding the transcript should not be disclosed – where the judgment was redacted to prevent disclosure of the information the subject of the application – whether the primary judge's reasons for refusing the application were adequate

CRIMINAL LAW – FEDERAL AND STATE INVESTIGATIVE AUTHORITIES – COMMONWEALTH – AUSTRALIAN CRIME COMMISSION – where the appellant and his co-accused, the fourth, fifth and sixth respondents, were the subject of compulsory examination by the first respondent – where non-publication directions were given in respect of the examinations – where the appellant's application under s 25A(13) of the *Australian Crime Commission Act* 2002 (Cth) for transcripts of his co-accused's evidence was refused – where the appellant submitted that the primary judge erred in concluding that non-disclosure of the information would not inhibit his defence – where, in applying for the material, the appellant's submission had not given any indication of his proposed defences – whether the primary judge made an error of fact

CRIMINAL LAW – FEDERAL AND STATE INVESTIGATIVE AUTHORITIES – COMMONWEALTH – AUSTRALIAN CRIME COMMISSION – where the appellant and his co-accused, the fourth, fifth and sixth respondents, were the subject of compulsory examination by the first respondent – where non-publication directions were given in respect of the examinations – where the appellant's application under s 25A(13) of the *Australian Crime Commission Act* 2002 (Cth) for transcripts of his co-accused's evidence was refused – where the appellant argued that the primary judge had taken into account an irrelevant

consideration in considering the possibility of disclosure of the evidence to the Director of Public Prosecutions if the appellant brought a stay application on the basis of it – whether this was a relevant consideration

Australian Crime Commission Act 2002 (Cth), s 24, s 24A, s 25A

Alister v The Queen (1984) 154 CLR 404; [1984] HCA 85, applied
Assistant Commissioner Condon v Pompano Pty Ltd (2013) 87 ALJR 458; [2013] HCA 7, cited
Chief Examiner v Mary Brown (a pseudonym) [2013] VSCA 167, cited
DBH v ACC & Ors (No 5) [2014] QSC, related
Dodds v The Queen (2009) 194 A Crim R 408; [2009] NSWCCA 78, considered
Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (2008) 234 CLR 532; [2008] HCA 4, applied
Haj-Ismail & Ors v Madigan & Ors (1982) 45 ALR 379; [1982] FCA 231, considered
Hogan v Hinch (2011) 243 CLR 506; [2011] HCA 4, applied
Jackson v Wells (1985) 5 FCR 296; [1985] FCA 100, cited
Parkin v O'Sullivan (2009) 260 ALR 503; [2009] FCA 1096, considered
R v Bebic, unreported, Court of Criminal Appeal, NSW, 27 May 1982, considered
R v Khazaal [2006] NSWSC 1061, cited
R v Meissner (1994) 76 A Crim R 81, considered
R v Munro (No 3) [2013] ACTSC 33, distinguished
Russell v Russell (1976) 134 CLR 495; [1976] HCA 23, applied
Thomas v Mowbray (2007) 233 CLR 307; [2007] HCA 33, cited
Traljesic v Attorney-General (Cth) (2006) 150 FCR 199; [2006] FCA 125, applied
X7 v Australian Crime Commission (2013) 248 CLR 92; [2013] HCA 29, cited

COUNSEL: P J Davis QC, with J R Jones, for the appellant
S Maharaj QC, with D de Jersey, for the first, second and third respondents
P Callaghan SC, with C Kershaw, for the fourth respondent
B H P Mumford for the fifth respondent
C Chowdhury for the sixth respondent

SOLICITORS: Peter Shields Lawyers for the appellant
Australian Government Solicitor for the first, second and third respondents
Fisher Dore Lawyers for the fourth respondent
Lawler Magill for the fifth respondent
Boe Williams Anderson for the sixth respondent

[1] **HOLMES JA**: The appellant and the fourth, sixth and seventh respondents – to whom, to preserve the effect of non-publication orders made in the Australian

Crime Commission, I shall refer as Brown, Jones and Green - were charged with importing a commercial quantity of a border controlled drug (cocaine). The fifth respondent, whom I shall refer to as Smith, was charged with possessing the drug once imported. The appellant and Brown, Jones and Smith were all the subject of compulsory examination by the first respondent, the Australian Crime Commission, under the *Australian Crime Commission Act* 2002. (The second and third respondents, it is inferred, were Commission examiners.) Non-publication directions were given in respect of their evidence, although their precise terms were not before this Court. Given that all four examinees faced the prospect of Supreme Court trials, it seems probable that the directions included the prohibition of publication of their evidence and any information identifying them.

[2] The appellant applied successfully under s 25A(12) of the Act for a certificate requiring the second and third respondents to produce the relevant evidence; but his application under s 25A(13) for the transcripts of the evidence of Brown, Jones and Smith to be made available to him and his legal representatives was refused. He appealed that decision on the grounds that the primary judge wrongly excluded him and his lawyers from the court during the hearing of his application, taking submissions from the other parties in their absence; refused his application on the basis of those submissions; failed to give adequate reasons for the refusal of the application; made an error of fact; and took into account an irrelevant consideration.

The legislation

[3] Section 24A of the *Australian Crime Commission Act* permits an examination for the purpose of a "special ACC operation/investigation", while s 25A provides for the mode of conduct of the examination and how the evidence obtained is to be dealt with. Of particular relevance here are these provisions:

> "*Confidentiality*
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> (9) An examiner may direct that:
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> (a) any evidence given before the examiner; or
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> (b) the contents of any document, or a description of any thing, produced to the examiner; or
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> (c) any information that might enable a person who has given evidence before the examiner to be identified; or
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> (d) the fact that any person has given or may be about to give evidence at an examination;
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> 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."
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> ….
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> *Courts*
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> (12) If:
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> (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."

The course of the appellant's applications under s-ss 25(A)(12) and (13)

[4] It appears from the judgment that the primary judge dealt with applications by the appellant, Brown, Jones and Smith for a certificate under s 25(A)(12) on 29 January 2013. (The applications are not before this court, but it seems likely that each applicant sought a certificate in respect of the evidence he gave in his own examination.) On the same day, the relevant transcripts and recordings were produced, and, after examining them, her Honour formed the view that it was in the interests of justice that the material relevant to each man be produced to his lawyers.

[5] In September 2013, the appellant sought a certificate requiring production of the recordings and transcripts of the examinations of each of the fourth to seventh respondents. When the matter came before the court on 16 September 2013, in a mention of the appellant's application, his counsel advised that his co-accused had been given copies of his documents (presumably his application and supporting affidavits) and on his understanding, they "all join[ed] in the application". The representatives of the co-accused seem to have been in court at this stage for the purposes of other applications in the criminal case, including a stay application. Counsel for Brown, Jones and Smith indicated their intention to file similar applications for their clients; counsel for Green said that he would not be doing so.

[6] The stay application was brought by the appellant, Brown, Jones and Smith, relying on the High Court's decision in *X7 v Australian Crime Commission*[1] on the ground that they had unlawfully been examined under the *Australian Crime Commission Act*. In the context of that application, senior counsel for the appellant tendered an Australian Crime Commission order varying the existing non-publication directions so far as the appellant's attendance for examination and the purpose for which he

1 (2013) 248 CLR 92.

attended were concerned. Nothing in the material indicates that any of the other parties had obtained similar directions. The appellant's counsel foreshadowed that if the stay application based on *X7* were not successful, another application could be made on the strength of any material made available under s 25(A)(13).

[7] On 18 September 2013, applications by counsel for the appellant, Brown and Jones for the issue of a certificate under s 25A(12), relating to their and Smith's evidence, were heard and granted. The appellant amended his application to make each of his co-accused a respondent to it. In the course of submissions on that occasion, counsel for Mr Brown indicated that when the judge came to consider whether it was in the interests of justice for the transcript of his evidence to be made available to his co-accused, he would seek to make submissions in camera.

[8] When the material was produced and the application was brought back before the court on 24 October 2013, the appellant's counsel produced written submissions which included the following points. It was possible that the evidence given by the three respondents who had been examined could be used in cross-examination of them to establish reasonable doubt as to the appellant's guilt; if it were capable of doing so, it was desirable in the interests of justice that it be provided to him. Provision of their evidence could pose no direct prejudice to those respondents because it was not admissible against them. It was necessary for the appellant to have access to the Commission hearing transcripts in order to assess whether his co-accused's evidence was likely to give rise to a need for a separate trial and to determine whether such an application should be made.

[9] Counsel for the Australian Crime Commission mentioned that it had previously been envisaged that parts of the submissions would be made in camera. He expected that the appellant would first make his application and then the others in turn, with as-needed in camera sessions in which only the party whose Commission evidence was in question and counsel for the Australian Crime Commission would be present. The appellant's counsel opposed that course, submitting that he should not be excluded from his own application. He contended instead that the respondents should make submissions in his presence, with the primary judge either having already reviewed the material or with the material before her and the respondents referring to it by line and page number. Counsel for Mr Brown then proposed an approach in which he, in camera, identified the parts of his client's transcript that were of concern, making no submissions; but then in the presence of the appellant advanced submissions in general terms.

[10] The appellant's counsel maintained his opposition to being excluded from any part of the application. The primary judge pointed out that the purpose of proceeding in that way was to obtain assistance from the particular respondent in determining whether the relevant transcript should be provided; that could not be done in the appellant's presence, because it would reveal the material in question. The appellant's counsel proposed once more that page numbers be identified in open court and then submissions made. Counsel for the Australian Crime Commission countered that the relevant parts of the transcript should be identified in camera; to perform that process in open court ran the risk of inadvertent disclosure of content.

[11] The primary judge determined that she would proceed in this way: the material would be provided, she would examine it and each respondent would be permitted to make submissions about it in camera in the absence of the appellant and his legal representatives. She explained:

> "It would seem to me that that's the only way in which the section can operate properly. The section itself does not give guidance as to how one approaches the task. It would seem to me the only sensible way in which we can proceed, so I think we will proceed in that way."

[12] Asked for reasons, her Honour responded:

> "Well, I'm not sure you're going to get any further reasons than the ones I've just given, which is that I can't see how we can proceed other than to do it in that way, and it's not based on any essential principle, other than the section doesn't give us assistance. I can't see any other practical way in which I can approach the task, and it would seem that the fairest approach is the one that has been suggested. It's as simple as that."

The approach which Mr Brown's counsel had suggested would not be of sufficient assistance:

> "I think it needs to have the specificity, and, as has been indicated, the difficulty is there could be a slip up which would mean the whole process is compromised. I think it's far better that there be the in camera proceedings---"

[13] The primary judge proceeded, in accordance with that ruling, to hear submissions in an in camera hearing in which only Mr Brown, his counsel and counsel for the Australian Crime Commission participated. No evidence was before the court, apart from the record of the examination the subject of the application; the Australian Crime Commission provided a summary of its content as an aid to the judge. When that part of the hearing was complete, the court resumed in open court so that counsel for the Australian Crime Commission could identify some relevant principles and authorities in relation to the procedure that the court was adopting. Counsel adverted to a number of authorities involving public interest immunity claims, beginning with *Alister v R*,[2] for the proposition that it was proper that relevant material not be disclosed to parties in the process of dealing with public interest claims. Counsel referred also to a decision of Refshauge J in *R v Munro (No 3)*[3] which entailed procedure under the same provision and a decision of the Victorian Court of Appeal, *Chief Examiner v Mary Brown (a pseudonym)*,[4] concerning legislation of a similar type.

[14] The primary judge then asked counsel for the appellant whether he wished to make his argument again in relation to further in camera hearings. Counsel said that in the absence of information as to what evidence was before the court, he could make no further submission than was contained in his outline. In camera sessions then proceeded for, in turn, each of the appellant and the fourth, fifth and sixth respondents. Again, in each case only the relevant party, his legal representatives and the representatives of the Australian Crime Commission were present. The in camera sessions continued into the following day.

[15] Once the closed sessions were concluded, the proceedings were resumed in open court. Counsel for the Australian Crime Commission provided written submissions as to where the interests of justice lay, and made oral submissions in support of

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2 (1984) 154 CLR 404.
3 [2013] ACTSC 33.
4 [2013] VSCA 167.

them. The written submissions were not before this court, but counsel at the time described them as going to the law and facts known through other applications. In oral submissions he argued that the appellant was undertaking a fishing expedition and that public policy dictated that persons being examined by the Commission be free to tell the truth without the concern of distribution of that evidence to co-accused. It was not, he submitted, a situation in which there were facts known which could assist the appellant's defence.

[16] Counsel for the appellant indicated that he wished time to respond in writing, noting that in the Australian Crime Commission's submissions were

> "things that have given me an indication of what may have been raised while we were outside of the court, and we can now address those things."

The primary judge acceded to that request, allowing the appellant a month to make his submissions. The remaining respondents indicated that they did not wish to make submissions.

[17] The appellant's further written submissions are before the court. They commence with a complaint about the disadvantage at which the appellant is said to have been placed by being excluded from the in camera hearings and an assertion that the court should release the transcript of those hearings and allow the appellant to make full submissions. The balance of the submissions contains authorities on the meaning of the phrase "the interests of justice" and the appellant's response to the Australian Crime Commission's submissions.

[18] As to the second, the appellant rejected the submission that he was conducting a fishing expedition, arguing that the potential use of the material to make a separate trial application and to highlight any reasonable doubt of guilt were proper forensic bases for the application and were essential to his fair trial. He was not seeking the material in order to make a stay application, as the Commission had asserted, although that was not to say that such an application would not be made after the material was considered. If the material revealed some reason for doing so, that would be a basis for disclosure. If provision of the material were to disadvantage any of the other accused, the proper course was to stay the proceedings against them, not to inhibit the appellant in his defence. There was no evidence that any person's safety would be prejudiced by provision of the material. No reference was made in the submissions to any prospective line of defence or any aspect of the prosecution case which the appellant might particularly wish to challenge.

The judgment

[19] On 28 February 2014, the appellant's application for release to him of his co-accused's evidence was refused. A redacted version of the judgment was before this court. After setting out the history of the matter at some length and the scheme of the legislation, the primary judge first gave reasons for the procedure adopted in relation to the application before making her findings in respect of each transcript. In explaining her choice of procedure, her Honour referred to principles and procedures adopted in *Alister*, *Thomas v Mowbray*[5] and *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police*[6] as indicating that the requirements of

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5 (2007) 233 CLR 307.

6 (2008) 234 CLR 532.

procedural fairness could be modified by statutory means or by reason of the application of public interest immunity principles. Her Honour referred to the discussion of Tate JA in *Chief Examiner v Mary Brown* of the procedure to be adopted under Victorian legislation in a similar form (the *Major Crime (Investigative Powers) Act* 2004 (Vic)) and the relevance of the fact that the legislation was silent as to who could apply for transcripts of evidence given to an examiner.

[20] *Chief Examiner v Mary Brown* concerned, as this appeal does, legislation which authorised an investigating body to take evidence in private sessions and to make non-publication orders in respect of it. Section 43 of the *Major Crime (Investigative Powers) Act*, in similar terms to s 25A, concerned restriction of the publication of evidence. It contained equivalent provisions for non-publication orders and for the court to give a certificate as to the possible desirability of providing evidence to a person charged. The lacuna in s 25A(13), as to the procedure to be adopted once evidence was provided to the court in compliance with a certificate, was met to some extent in the Victorian Act by s 43(4A), which said that in that event, the court was to give the Chief Examiner, the Chief Commissioner of Police and any witnesses whose interests were involved in the non-publication order, the opportunity to make submissions as to whether or not the evidence should be made available to the person charged or his lawyer.[7] The court was then to examine the evidence and to consider any submissions made under the section and, if satisfied that the interests of justice required it, make the evidence available.

[21] In that case, the Chief Examiner had made a non-publication order with exceptions, which included permitting the evidence to be published by police and prosecutors for the purpose of investigation and prosecution of offences. That order was held at first instance to be beyond power in permitting the release of evidence for the purpose of prosecution. The Court of Appeal upheld that ruling on appeal by the Chief Examiner. Whether the interests of justice required disclosure of evidence for the purposes of a prosecution was a decision to be made by the court through the mechanism provided by s-ss 43(4) and (5), the equivalents of s 25A(12) and (13). Relevantly to this case, Tate JA, delivering the leading judgment, noted that the sub-sections were silent as to who was to make the application to the court, but they did not appear to contemplate that it would be the person charged:

> "such a scenario would be unlikely as, if a non-publication order has been made and remains in effect, the person charged ought to have no knowledge of the evidence given (or even of the fact of the examination)."[8]

[22] Tate JA concluded that the proper course was for the court to give the examining authority and the examinee the opportunity to make submissions as to whether the evidence should be made available to the person charged. Section 43(4A) did not provide for either the person charged or the prosecution to make submissions on the significance of the evidence, consistent with an understanding that at that stage neither would be aware of it. Only as the result of a decision in favour of disclosure of the evidence would the person charged come to know of it.

[23] The primary judge, having adverted to that part of Tate JA's judgment set out in the preceding paragraph, continued:

> [45] "In my view that is the process which should be adopted in this application. That is after the evidence is 'called for' and

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7 Section 43(4)A.

8 At [98].

> produced to the court; both the witness and the ACC should have the right to make submissions on the relevance or importance of the evidence. I do not consider, however, that the [appellant] has a right to make submissions at that point in time about that evidence. Whilst the 'person charged'… may indeed be the [appellant] and indeed the initiator of a process whereby the court considers information that was before the ACC examiner, that does not entitle the [appellant] to make submissions about the very evidence which is the subject of the application. I note that the section does not provide that an opportunity is to be afforded to either of those parties to make submissions.
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> [46] In my view counsel for the application has no right to the information the subject of the application prior to the court's determination, even if that information is required to assist them in advancing their arguments on that application. Given there is no right to that information, I can see no procedural unfairness to an [appellant] if that information is referred to orally in an in-camera session rather than in writing in an open session given that counsel for the respondents indicated to the court that they felt constrained in advancing their arguments in open court."

[24] Her Honour went on to record that the procedure which she had adopted was designed:

> "…to allow counsel for each respondent to take the court in an unfettered way to the content of each respondent's examination in the absence of the [appellant]".[9]

This was, she said, the only practical way of proceeding, given that the examining officer would not vary his non-publication directions. The in camera hearings had merely allowed counsel to make oral rather than written submissions and counsel for the appellant was excluded only for the purpose of allowing the respondents' counsel to refer to the transcript. Her Honour made this observation:

> "In my view in the open court hearings counsel for DBH was aware of the general basis of each respondent's submissions opposing the application but without specific reference to the transcript of that particular respondent".[10]

[25] The primary judge made findings in respect of each respondent, redacted in part, and drew some more general conclusions. Her findings were, in summary, as follows. Each respondent had been given assurances by the examiner to the effect that his evidence would remain confidential and that his co-accused would not become aware of it. Nothing was revealed by any one of them which was not already generally known by the others. There were no contradictions or inconsistencies in their accounts. Brown and Jones had been examined about matters which went beyond the charges. Nothing in the transcripts raised issues of exculpation in relation to the appellant. Important issues of public policy were raised. She was not satisfied that non-disclosure of the information would prevent the appellant from receiving a fair trial.

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9 At [47].

10 At [48].

[26] The primary judge reviewed authorities on the balancing exercise involved in determining where the interests of justice lay. She reprised the findings she had made about the absence of any contradictory, novel or exculpatory material in the respondents' transcripts and expressed herself not satisfied that non-disclosure of the evidence would inhibit the appellant in his defence. Her Honour took into account also the wishes of the respondents that their evidence not be released. She went on to consider the purpose for which the transcripts were sought, given that they could not be put to the respondents in cross-examination. It was likely, she considered, that the contents of the examinations would be used to make a further argument for a stay of the indictment. Any such application would require the tender of the transcripts, which would then alert the Director of Public Prosecutions to the respondents' respective versions of events, resulting in an unfairness to them. There was, she added, a clear public interest in those examined being encouraged to be frank, the likelihood of which would be reduced if the prospect of disclosure loomed. On balance, her Honour said, she could see no compelling reason for release of the transcripts and "very good reason" to retain their confidentiality.

The appellant's submissions on appeal

[27] The appellant submitted that the primary judge should have adopted the measures which least restricted his rights to procedural fairness while meeting public interest concerns. That could have been done by having each party in open court make his submissions by reference to page and paragraph of the transcript, identifying the nature of his objection to its release or, if there were concern about the possibility of mistakes, reducing those submissions to writing. Alternatively, the transcript could have been released to counsel on appropriate undertakings or the primary judge could have read the transcripts and then identified the topics upon which the appellant should make submissions.

[28] The appellant's exclusion from the court meant that he did not know what submissions the respondents had made and could not respond to them. More had occurred in camera than the mere identification of particular passages in the transcripts. Her Honour had indicated that the respondents were able in closed session to make "unfettered submissions", and the judgment indicated that counsel for Smith had submitted that there was no evidence in his transcript exculpatory of the appellant or having the potential to provide an avenue for investigation. The respondents had been able to make submissions and advance arguments, but he was not permitted to engage in that process. The primary judge had also failed to identify the considerations she thought relevant, after having heard those submissions, before inviting the appellant to respond. His written submissions could not address the matters in issue because he was ignorant of them.

[29] The appellant complained of her Honour's reasoning at paragraph [45], adopting the logic of Tate JA in *Chief Examiner v Mary Brown*. That logic was itself flawed. It did not follow that in every case the person charged would not know the fact of an examination. That would depend on the terms of the non-publication direction; yet Tate JA had spoken generally of the lack of opportunity under the legislation for the person charged to make submissions. In the present case, the appellant was in fact in possession of that information. It was apparent from what her Honour had said at paragraph [45] of the judgment that she had followed the *Mary Brown* case and concluded that the appellant had no right to make submissions at all.

[30] Further complaint was made of her Honour's statement at paragraph [46] of her judgment that since the appellant had no right to the respondents' evidence, there was no procedural unfairness to him if it were referred to orally in camera rather than in writing in an open session. It was accepted that the appellant did not have the right to have access to the transcripts, but that was beside the point; he had the right to apply for them to be made available to him and to procedural fairness on that application. Her Honour had expressed the view that the appellant's counsel "was aware of the general basis of each respondent's submissions", but nothing had occurred to warrant such a view.

The legislative regime and the exclusion of the appellant

[31] The procedure which the primary judge adopted involved departure from two common law principles: that of open justice and that of natural justice. So far as the first is concerned, it has long been accepted that the rule of open justice may give way, where the need to preserve confidentiality requires it.[11] The appellant did not contend that the primary judge was obliged to hear the respondents' submissions in open court, acknowledging, at least implicitly, that the circumstances fell within an exception to the open justice principle. The complaint underlying the first and second grounds of appeal was rather one of denial of procedural fairness in his exclusion from the closed sessions in which the respondents were permitted to make submissions; raising the question of what is required of the Court in that regard when it is acting under s 25(A)(13) of the *Australian Crime Commission Act*.

[32] Sub-sections 25(A)(12) and (13) of the Act provide little guidance as to the process to be adopted when evidence given before an examiner is sought. Lacking as it does any equivalent to s 43(4A) of the *Major Crime (Investigative Powers) Act* 2004 (Vic), the Act contains no basis for supposing that the right to make submissions on an application under s 25A(13) is limited to any particular party. The appellant complained the primary judge had, in her paragraph [45], wrongly adopted Tate JA's reasoning to conclude that he had no such right. However, I think it is plain from the qualification "at that point in time" that her Honour was limiting her remarks to the lack of entitlement of a party in the appellant's position to make submissions concurrently with the Australian Crime Commission and the examinee when they directly addressed the relevance of the evidence in question. It is clear that her Honour did not take the view which the appellant ascribes to her; having already received oral and written submissions on his behalf, she permitted his counsel to make further submissions in response to the Australian Crime Commission's final submissions before deciding the application.

[33] The requirements of procedural fairness are not fixed, and they may certainly be modified by Parliament.[12] Section 25A of the *Australian Crime Commission Act* makes it clear that the confidentiality of evidence the subject of a non-publication direction is to be preserved unless and until an order for its release is made under s 25(A)(13). The appellant accepted as much. In requiring the court to consider the subject matter of an application without disclosing it to the applicant, the legislature has effected a substantial modification of the rules of procedural fairness, although it is one which aligns with common law practice in public interest immunity

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11 *Russell v Russell* (1976) 134 CLR 495 at 520; *Hogan v Hinch* (2011) 243 CLR 506 at 553-4; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 559-60.

12 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 per Crennan J at 596, cited with approval in *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 87 ALJR 458 at 493.

claims.[13] The question is whether that modification of procedural fairness extends to denying an applicant access to the submissions of an examinee with the contrary interest of preserving the material's confidentiality.

[34] In my view, it does, as a matter of necessary implication from the terms and structure of s 25A. The starting point is that the only category of evidence in respect of which a court may consider granting a certificate under sub-section (12) is evidence which has been the subject of a non-publication direction under s 25A(9). Such a direction can, and probably will, extend, not only to the evidence given, but to information which might permit the identification of the examinee or the fact that he or she may give, or has given, evidence. In the ordinary course, the person charged will not know the identity of those who have given evidence, much less have any hint of its content.

[35] It is conceivable that the person charged may apply for evidence, acting on an informed guess as to who has been examined.[14] The court, however, has no licence to confirm or deny the correctness of such a guess by making the applicant aware of the identity of examinees or what has been said. There is no provision in the section for it to act in disregard of a non-publication direction made under s 25A(9). Its only power of disclosure lies under s 25A(13): to make the evidence available upon satisfaction that the interests of justice require it. Where non-publication directions exist - as they did in this case - it follows that the person charged must seek, first, the s 25A(12) certificate and then the evidence itself under sub-section (13), in ignorance of whether any such evidence actually exists, let alone who gave it.

[36] In the present case, the appellant's originating application sought a certificate under s 25A(12) of recordings and transcripts of recordings of the examinations of his four co-accused. None of the affidavit material discloses why they were identified in that way, but it seems quite probable that his lawyers made an educated guess that if he had been examined, so would have been his co-accused. Assuming it to have been a guess, it proved correct in the cases of Brown, Jones and Smith. As much must have been apparent when each of those respondents sought a stay of the proceedings on the ground that he had been examined unlawfully. At any rate, from the first mention of the appellant's application on 16 September 2013, counsel for all parties referred freely in open court to the fact of their clients' examinations. Nothing in the material makes it clear on what basis it was done, having regard to the existence of the non-publication orders.

[37] The fact that the appellant did learn, in circumstances which are not entirely clear, who the examinees were cannot affect consideration of the extent to which the provision modifies the requirements of procedural fairness. Section 25A is designed to protect the interests of the person examined, particularly his right to a fair trial, in the context of a broader public interest to which the legislation is addressed, in the investigation of serious and organised crime. The latter is assisted by ensuring that examinations under s 25A proceed uninhibited by fears of disclosure of their content. In accordance with those purposes, the section prevents any disclosure of the subject matter of an examination up until the point at which the judge decides, if he or she does so decide, to release the evidence.

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13 *Alister v The Queen* (1984) 154 CLR 404.

14 *R v Munro (No 3)* also seems to have been such a case. The solicitor for the person charged filed an affidavit with the names of persons who he considered might have given relevant evidence in examinations before the Commission. Only one had in fact. Refshauge J did not identify that individual to the applicant but instead ordered the Director of Public Prosecutions to serve him so that he had the opportunity to make submissions. In the event, he did not appear.

[38] The purpose of s-ss 25A(9), (12) and (13) would be defeated if an applicant were not excluded from any submission which focused on the content of the examination; yet an examinee could not make effective submissions against disclosure without doing so. In the present case, the appellant suggested, as an example, that there would be no difficulty in his being made aware that one of the respondents did not want a passage disclosed because it indicated that he had been involved in other criminal activity. But that in itself would reveal a subject of evidence given. If there were some entitlement to be made aware of the submissions of an examinee, it could not extend to anything that would identify him or anything which revealed the content of his examination. Such an entitlement would be hollow. An applicant could be provided with broad submissions – that the transcript would not assist him in defending the charges or that the un-named examinee had a fear for his personal safety if the transcript were disclosed – but nothing which would enable a meaningful response could be disclosed without identifying the examinee or giving an indication of the effect of his examination.

[39] It is exceptional that an applicant should be excluded from access to the submissions of another party. But the context here is one of a procedural, not a substantive application; there are no rights of property or liberty affected. It is not, in the end, such a remarkable result that the confidentiality of material which has been found to be of such sensitivity that a direction has been made for its non-publication should prevail over the applicant's access to information.

[40] Again, the conclusion is one which accords with common law practice. Courts have dealt with public interest immunity claims without providing the applicant for the material the subject of the claim either with it or with the affidavit material tendered in support of the claim. An early instance is *R v Bebic*,[15] in which the court considered that disclosing an affidavit supporting a public interest claim might prejudice that claim, so that the public interest required that it not be disclosed. In *Dodds v R*,[16] a trial judge had a statutory power to allow an officer, in respect of whom there was an "assumed identity approval" in force, to appear under an assumed name. The Court of Appeal held that the trial judge's decision to withhold from counsel a confidential envelope, which contained details in respect of the officer's approvals and would have revealed their identities, was proper. The statutory provision had the obvious purpose of protecting the identity of such law enforcement officers. The public interest in maintaining the witnesses' anonymity outweighed any prejudice in the appellant's counsel being unable to satisfy himself that the officers had the requisite assumed identity approvals. It was, the court noted, a serious step to decide to have regard to material which had not been made available to other parties; whether it was appropriate would depend on the nature of the information involved and the issue to which it was relevant.

[41] Similar procedures were adopted in *R v Khazaal*,[17] *R v Meissner*[18], *Parkin v O'Sullivan*,[19] and *Haj-Ismail & Ors v Madigan & Ors*.[20] In the last case, Lockhart J observed that, while he had initially had some doubt as to whether he should refuse disclosure of the Attorney-General's grounds for objection to the production of documents, it was:

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15 Unreported, NSW Court of Criminal Appeal, 27 May 1982.
16 (2009) 194 A Crim R 408.
17 [2006] NSWSC 1061.
18 (1994) 76 A Crim R 81 at 85.
19 (2009) 260 ALR 503 at 509-511.
20 (1982) 45 ALR 379.

> "...really only another facet of the established practice whereby the courts may themselves inspect documents where objection is taken to their production",

citing *Bebic* in that regard.[21] Crennan J appeared to endorse such a practice in *Gypsy Jokers* when she said:

> "In ruling on a claim for public interest immunity, a court may look at information in documents which is not revealed to a party seeking them, and a court may resolve a claim finally without one of the parties being shown certain material relied on for determination of a proceeding."[22] (Citations omitted)

[42] Those cases concerned affidavit material tendered in support of public interest immunity claims, but it is difficult (as the primary judge observed) to see why any different approach should be taken to objections to production made orally. The point of the submissions, as for the public interest immunity claim affidavits, is to give the reasons why the confidentiality of the material should be preserved. The rationale for not giving the applicant access to the submissions of the parties resisting production of the material he seeks is the same as in public interest immunity claims: to preserve the confidentiality of that material.

[43] The appellant suggested that the transcript could have been released to his lawyers on appropriate undertakings. The dangers inherent in such a step were canvassed by Rares J in *Traljesic v Attorney-General of the Commonwealth*.[23] In particular, he cited a passage from the judgment of Wilcox J in *Jackson v Wells*[24] which includes this statement:

> "Without reflecting in any way upon the integrity of any counsel or solicitor, difficulties are likely to arise where counsel appearing in, and advising their clients in respect of, protracted and complex proceedings acquire information which they are not free to use or to pass on to their clients. During the heat of battle an unwitting disclosure may occur. Frank and full advice becomes impossible."[25]

Those comments are entirely applicable to the present case. It would be untenable to expect counsel to examine the transcript of the co-accused for the purpose of ascertaining whether he could discern any advantage to his client in it and then, were provision of it refused, to put the entirety of the information from his mind for the purposes of the trial. I do not think that the primary judge made any error in not taking that course.

[44] Finally, it was suggested that the primary judge could have identified topics on which she would hear submissions from the appellant. The appellant again offered the example of criminal activity disclosed by a respondent; the primary judge could have enquired of him as to whether such activity could be relevant to his application. Again it is impossible to see how that could have been done to any purpose without disclosing content: the nature of the criminal activity. In theory, the matters identified in the judgment – the absence of inconsistent or exculpatory

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21 At 389.
22 At 595.
23 (2006) 150 FCR 199 at 209-211.
24 (1985) 5 FCR 296.
25 At 307-308.

material, the fact that two respondents were cross-examined about matters going beyond the charges – might have been raised with the appellant. But it would be simply pointless to ask the appellant to address matters identified at that level of generality.

[45] On the other hand, the appellant was in a position to make submissions on any point he thought relevant to her Honour's consideration of the transcripts, and to some extent he did so, both before and after the hearing. Those submissions were not completely uninformed as to the type of argument made against him, as was demonstrated by counsel's response that the Australian Crime Commission's submissions had

> "given [him] an indication of what may have been raised while we were outside of the court";

although, necessarily, he had no knowledge of the specific aspects of the transcript addressed. That statement, no doubt, was the source of her Honour's observation in the judgment that counsel

> "was aware of the general basis of each respondent's submissions opposing the application".

The appellant might have gone further than he did, to identify the type of defence he might want to run or to highlight any areas of the Crown case of particular significance in his defence. No such submissions were in fact made, but there was nothing preventing him from doing so.

[46] I conclude that the primary judge did not deny the appellant procedural fairness when she received submissions from the respondents in his absence. That step was no more than was necessary to preserve the confidentiality of the evidence. The further step suggested by the appellant, of apprising him in general terms of the topics raised, would have done nothing to improve his opportunity to be heard on the application. And it would not have been an appropriate or prudent step to provide the transcripts to counsel on an undertaking. In the context of s 25A's constraints and objects, the procedure which her Honour did adopt, of permitting the appellant to make oral and written submissions which could include the matters potentially raised in the transcripts which would be of interest to him, was fair.

The adequacy of the reasons

[47] The appellant complained that the primary judge's reasons were inadequate because she had addressed only in general terms the question of where the interests of justice lay, and the passages in which she made findings about the particular respondent's evidence were heavily redacted. But redaction of transcript content was inevitable to prevent disclosure of the information the subject of the application. In *Gypsy Jokers*, Crennan J observed:

> "In circumstances where confidential material is part of the material before a court, but is not available to a party or cannot be published at large, a judge's reasons can be formulated in general terms so as to 'convey an adequate account of the litigation and the reasons underlying the orders'".[26] (Citation omitted)

[48] The primary judge, without disclosing content, gave her reasons for concluding that the transcript should not be revealed: that the respondents' evidence revealed

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[26] At 596.

nothing new in relation to the charge which the appellant faced; that there were no inconsistencies in their accounts; that there was nothing exculpatory; that the respondents did not wish their transcripts released; that there was some prospect that if there were an application for a stay, the Director of Public Prosecutions would become aware of the respondents' versions of events; and the public interest in encouraging co-operation in Australian Crime Commission examinations. There was no lack of clarity as to why she had refused the application. The legislation reposed in her the task of assessing the confidential evidence and where the public interest lay as to its release; to give detail of that evidence in order to explain her conclusion would have defeated the purpose of the exercise.

Error of fact

[49] The appellant asserted that the primary judge's conclusion that non-disclosure of the information would not inhibit the appellant in his defence was drawn without any basis for it, because she had not asked about possible defences nor examined the Crown case in any detail. But her Honour's statement was that she was not satisfied that the appellant would be inhibited in his defence. He, after all, was the applicant for release of the material; as has already been pointed out, it was entirely open to him to put before her Honour submissions indicating the kind of defence he proposed to run. He did not do so. He can hardly complain, then, that the primary judge, in the absence of that information, could not be satisfied that lack of the evidence would inhibit his defence.

Irrelevant consideration

[50] It was argued that the primary judge had taken into account an irrelevant consideration, the possibility of a stay application being brought. Contrary to the appellant's contention that this was speculation on her Honour's part, counsel had foreshadowed the prospect of a further stay application on the basis of the confidential evidence if it were provided to him. Such an application could not be made without disclosure of the evidence to the Director of Public Prosecutions, with consequences for the respondents' interests. Her Honour's approach was consistent with the concern in s 25A(9) to avoid prejudicing the fair trial of an examinee; it cannot be said that the possibility of disclosure through a stay application was irrelevant in the balancing exercise.

Order

[51] I would dismiss the appeal.

[52] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the order proposed by her Honour.

[53] **GOTTERSON JA:** I agree with the order proposed by Holmes JA and with the reasons given by her Honour.