SUPREME COURT OF QUEENSLAND

CITATION:	*Hamdan v Callanan; Younan v Callanan* [2014] QCA 304
PARTIES:	**In Appeal No 3266 of 2014:** **HAYSAM HAMDAN** (appellant) **v** **JOHN DAVID CALLANAN** (respondent) **In Appeal No 3267 of 2014:** **PAUL YOUNAN** (appellant) **v** **JOHN DAVID CALLANAN** (respondent)
FILE NO/S:	Appeal No 3266 of 2014 Appeal No 3267 of 2014 SC No 10192 of 2011 SC No 10190 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2014
JUDGES:	Muir and Gotterson JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – GENERALLY – where each of these appeals, which were heard together, is an appeal from orders made by the primary judge dismissing the appellants' application for a statutory order of review of the decision of the respondent, as delegate of the Chairperson of the Crime and Misconduct Commission to issue an attendance notice to the appellants – where the appellants are suspects in a murder investigation – where the appellants contend that statute should not be interpreted to curtail

common law rights and freedoms unless expressly authorised or permitted as a matter of necessary implication by the text, context, and purpose of the statute – where the appellants contend that the privilege against self-incrimination should not be abrogated by statute in respect of an uncharged suspect – whether the primary judge erred in finding that the respondent's decision to issue an attendance notice on the appellants, made in purported reliance on s 82 of the *Crime and Misconduct Act* 2001 (Qld) was authorised by the Act – whether the primary judge erred in finding that the respondent's decision did not involve an error of law

Crime and Misconduct Act 2001 (Qld), s 5(2), s 27, s 28, s 74, s 82, s 177(2), s 181, s 183, s 185(2), s 274, s 275(a), Sch 2
Royal Commissions Act 1902 (Cth), s 6A(2)

Bropho v Western Australia (1990) 171 CLR 1; [1990] HCA 24, cited
Corporate Affairs Commission (NSW) v Yuill (1991) 172 CLR 319; [1991] HCA 28, cited
Environment Protection Authority v Caltex Refining Co Pty Ltd (1993) 178 CLR 477; [1993] HCA 74, cited
Hamilton v Oades (1989) 166 CLR 486; [1989] HCA 21, cited
Hammond v The Commonwealth (1982) 152 CLR 188; [1982] HCA 42, considered
Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330; [1909] HCA 36, considered
Lee v New South Wales Crime Commission (2013) 251 CLR 196; (2013) 87 ALJR 1082; [2013] HCA 39, considered
Lee v The Queen (2014) 88 ALJR 656; [2014] HCA 20, considered
Potter v Minahan (1908) 7 CLR 277; [1908] HCA 63, cited
Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328; [1983] HCA 9, considered
Sorby v The Commonwealth (1983) 152 CLR 281; [1983] HCA 10, considered
X7 v Australian Crime Commission (2013) 248 CLR 92; [2013] HCA 29, considered
Younan v Crime Reference Committee & Anor; Hamdan v Crime Reference Committee & Anor [2014] QSC 24, considered

COUNSEL: A Boe, with P Morreau, for the appellants
M J Copley QC for the respondent

SOLICITORS: Nyman Gibson Stewart Criminal Lawyers for the appellants
Crime and Corruption Commission (Queensland) for the respondent

[1] **MUIR JA:** Each of these appeals, which were heard together, is an appeal from orders made by the primary judge on 7 March 2014 dismissing the appellants' application for a statutory order of review of the decision of the respondent, as delegate of the Chairperson of the Crime and Misconduct Commission (CMC) to

issue an attendance notice to the appellants, pursuant to s 82 of the *Crime and Misconduct Act* 2001 (Qld)[1] (the Act).

[2] It is convenient to quote from the primary judge's reasons in order to further identify the nature of the proceedings at first instance and the facts that gave rise to those proceedings:[2]

> "[2] The factual background is that a man named Omega Ruston was shot dead on the Gold Coast Highway on 26 January 2009. While driving, he and his two passengers became involved in an argument with the occupants of another car. Mr Ruston pulled over to the side of the highway. The second car pulled over as well, and a man seated in the back of it produced a gun and shot Mr Ruston dead.
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> [3] On 23 March 2009 the Crime Reference Committee (CRC) referred the investigation of the murder of Mr Ruston to the CMC. On 2 April 2009 the second respondent authorised the holding of an investigative hearing into the murder of Mr Ruston pursuant to s 176 of the Act. On 3 April 2009 the second respondent issued an attendance notice to Mr Younan. On 21 May 2009 Mr Younan applied for a statutory order of review of the decision to refer the investigation of the murder of Mr Ruston to the CMC, and of various other decisions, including the other two just mentioned. On 21 August 2009 Dutney J dismissed that application.
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> [4] On 11 October 2011 the second respondent, acting as chairperson of the CMC pursuant to s 82(1)(a) of the Act, issued a notice requiring Mr Hamdan to attend at a CMC hearing on 14 November 2011 and a notice requiring Mr Younan to attend at a CMC hearing on 16 November 2011. That led to the institution of these current two proceedings, which have had a somewhat protracted passage through this Court. In both proceedings the relief sought was originally wider, but, pursuant to amended applications, was limited on the trial before me to a review of the second respondent's decisions to issue the two attendance notices just described. The second respondent was therefore the only respondent against whom relief was sought. Having regard to the amended applications for statutory review, and the concessions made (and not withdrawn) in written outlines of argument, four grounds were argued in support of the applications which were (using the numbering from the amended applications):
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> > '7. The decision was not authorised by the enactment under which it was purported to be made, namely, s 82 of the Act.

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1 The *Crime and Misconduct Act* 2001 (Qld) was renamed the *Crime and Corruption Act* 2001 (Qld). The parties agreed that reprint 5A of the *Crime and Misconduct Act* 2001 (Qld) contains the relevant provisions. Accordingly, all references to the Act refer to reprint 5A.

2 *Younan v Crime Reference Committee & Anor; Hamdan v Crime Reference Committee & Anor* [2014] QSC 24 at [2]–[4].

> 8. The making of the decision was an improper exercise of power conferred by the enactment under which it was purported to be made, in that it involved failing to take a relevant consideration into account in the exercise of the power.
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> 9. The decision was an improper exercise of power, … in that it involved taking an irrelevant consideration into account …'
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> …
>
> 12. The decision involved an error of law.'" (citations omitted)

Grounds of appeal

[3] The grounds of appeal were that:

(a) The primary judge erred in finding that the respondent's decision "to issue an attendance notice on the appellants, made in purported reliance on s 82 of the [Act]" was authorised by the Act; and

(b) The primary judge erred in finding that the respondent's decision did not involve an error of law.

[4] That ground was particularised as follows:

1. The primary judge erred in finding that the relevant provisions of the Act abrogated the right to silence and the privilege against self-incrimination of persons suspected of having committed the crime to which the inquiry relates.

2. In considering abrogation, the primary judge failed to properly characterise, and give due regard to, the position of persons suspected of having committed the crime to which the inquiry relates.

3. In considering abrogation, the primary judge failed to identify, and give due regard to, all of the common law rights and privileges affected by the respondent's decision.

The appellants' argument

[5] The appellants' argument may be summarised as follows. A statute will not be interpreted to curtail common law rights and freedoms unless that is expressly authorised or permitted as a matter of necessary implication by the text, context, and purpose of the statute. If there is more than one interpretation available, the courts will choose that interpretation which avoids or minimises the adverse impact of the statute on the common law rights and freedoms.[3]

[6] The privilege against self-incrimination is a substantive common law right, not merely a rule of evidence.[4] It comprises the immunity of a person suspected of

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3 *X7 v Australian Crime Commission* (2013) 248 CLR 92.

4 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [104] per Hayne and Bell JJ.

a crime from being compelled to answer questions put by police and other persons in authority and encompasses the rights and privileges of a person suspected of, but not charged with, an offence.[5] The privilege against self-incrimination is distinct from the "fundamental principle" that the onus of proof rests with the Crown and its companion rule that an accused person cannot be compelled to testify to the commission of the offence charged (the right to silence). Each of these common law principles is relevant to the question of legislative intention when considering purported abrogation.[6] It is also a fundamental principle of the common law that a trial is an accusatorial process in which the Crown must prove the guilt of the accused beyond reasonable doubt and, in so doing, "… cannot compel the accused to assist it in any way".[7] Furthermore, an accused has the right not to be tried unfairly, a right extending to the whole course of the criminal process.[8]

[7] When considering the legislature's intent regarding abrogation of a suspect's common law rights and privileges, it is not sufficient to consider only the person's right to silence at the investigation stage, which might appropriately be referred to as that person's self-incrimination principle. The full extent of the rights canvassed in *X7 v Australian Crime Commission*[9] and subsequently adopted in *Lee v New South Wales Crime Commission*[10] and *Lee v The Queen*[11] must be considered.[12]

[8] In finding as she did, the primary court judge erroneously limited her characterisation of the rights purportedly abrogated by the Act to those attached to the individual.[13] She did not also consider the "radical" alteration of the process of criminal justice represented by the Act, which feature was determinative in *X7*, recognised by majority in *Lee v New South Wales Crime Commission*[14] and reiterated in *Lee v The Queen*.[15]

[9] The primary judge failed to consider two "fundamental principles of the common law": the accusatorial nature of the criminal justice process (with the burden of proof beyond reasonable doubt placed with the prosecution) and the potential for the appellants' fair trial rights to be compromised. In order to permit the issuing of notices to effect a compulsory examination of the appellants as suspected of the offences under investigation, the Act must manifest an intention to affect not only their personal privileges but also the other fundamental principles of the common law discussed above. The Act does not manifest any such intention.

Applicable principles of statutory construction

[10] The propositions stated by the appellants in paragraph [5] to [7] above are largely uncontroversial. As for the contentions in paragraphs [8] and [9], there is little to be

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5 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [41] per French CJ and Crennan J; [105] and [109] per Hayne and Bell JJ.

6 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [102] per Hayne and Bell JJ.

7 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [42] and [47]; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 527 cited in *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [47] per French CJ and Crennan J.

8 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [37]–[38] per French CJ and Crennan J.

9 (2013) 248 CLR 92.

10 (2013) 87 ALJR 1082.

11 (2014) 88 ALJR 656.

12 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [103] per Hayne and Bell JJ.

13 *Younan v Crime Reference Committee & Anor; Hamdan v Crime Reference Committee & Anor* [2014] QSC 24 at [14].

14 (2013) 87 ALJR 1082 at [54] per French CJ; [125] per Crennan J; and [318] per Gageler and Keane JJ.

15 (2014) 88 ALJR 656 at [32]–[33].

gained from analysing the primary judge's reasons in order to see whether she erred as alleged. If, as a matter of construction, the relevant provisions of the Act abrogated the appellants' right to silence, the appeal must fail. If they did not, the appellants will succeed.

[11] Whether such provisions abrogated the right to silence depends on whether the legislature has, in the provisions of the Act, "made its intention in that regard unambiguously clear".[16] Some of the other ways in which the test to be applied have been expressed are referred to below. They all tend to amount to much the same thing and the outcome of this case does not depend on any fine distinctions or different nuances between the various formulations.

[12] Argument before this Court proceeded, correctly, on the assumption that Parliament could abolish or interfere with established common law protections, including the right to refuse to answer questions, the answer to which may tend to incriminate the person asked.[17] The right against self-incrimination was accepted by the respondent, at least implicitly, as a fundamental freedom or principle which attracted the "principle of legality".

[13] It is a "settled principle that statutory provisions are not to be construed as abrogating fundamental rights or important common law rights, privileges and immunities in the absence of clear words or necessary implication to that effect".[18]

[14] In *Lee v New South Wales Crime Commission*, Kiefel J, referring to *Potter v Minahan*,[19] stated that it was a requirement of the principle of legality that a statutory intention to abrogate a fundamental freedom or principle must be expressed with "irresistible clearness".[20]

[15] Hayne and Bell JJ, in this context, observed that "… such an alteration can be made if it is made clearly by express words or necessary intendment".[21]

[16] In *X7*,[22] French CJ and Crennan J used the formulation "clear words or necessary implication to that effect".[23]

[17] In their reasons in *Lee*, Gageler and Keane JJ warned against undue extension of the principle of legality:[24]

> "The principle extends to the protection of fundamental principles and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from

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16 *Bropho v Western Australia* (1990) 171 CLR 1 at 18 cited with apparent approval by Gageler and Keane JJ in *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at [309].

17 See e.g. *Hamilton v Oads* (1989) 166 CLR 486 at 494 per Mason CJ; *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at [315]–[317] per Gageler and Keane JJ.

18 *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at [126] per Hayne J.

19 (1908) 7 CLR 277 at 304.

20 (2013) 87 ALJR 1082 at [171] per Kiefel J.

21 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 141 [119].

22 (2013) 248 CLR 92 at 141.

23 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 109 [24].

24 *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at [313].

> being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature."

[18] Their Honours further explained that:[25]

> "The principle of construction is fulfilled in accordance with its rationale where the objects or terms or context of legislation make plain that the legislature has directed its attention to the question of the abrogation or curtailment of the right, freedom or immunity in question and has made a legislative determination that the right, freedom or immunity is to be abrogated or curtailed. The principle at most can have limited application to the construction of legislation which has amongst its objects the abrogation or curtailment of the particular right, freedom or immunity in respect of which the principle is sought to be invoked. The simple reason is that '[i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve'." (citations omitted)

[19] The approach expressed in the above paragraph is consistent with that articulated by Mason ACJ, Wilson and Dawson JJ in *Pyneboard Pty Ltd v Trade Practices Commission*:[26]

> "In deciding whether a statute impliedly excludes the privilege much depends on the language and character of the provision and the purpose which it is designed to achieve. The privilege will be impliedly excluded if the obligation to answer, provide information or produce documents is expressed in general terms and it appears from the character and purpose of the provision that the obligation was not intended to be subject to any qualification. This is so when the object of imposing the obligation is to ensure the full investigation in the public interest of matters involving the possible commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation. In such cases it will be so, notwithstanding that the answers given may be used in subsequent legal proceedings."

The relevant provisions of the Act

[20] It is now necessary to refer to the relevant provisions of the Act.

[21] Section 4 of the Act identifies its "main purposes" as:

> "(a) to combat and reduce the incidence of major crime; and
> (b) to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector."

[22] Those purposes are to be achieved by the establishment of a CMC with "investigative powers, not ordinarily available to the police service, that will enable

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25 *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at [314].

26 (1983) 152 CLR 328 at 341; see also *Sorby v The Commonwealth* (1983) 152 CLR 281 at 309 per Mason, Wilson and Dawson JJ. See also the observations of Dawson J in *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 332–333 referred to by French CJ in *Lee v New South Wales Crime Commission* (2013) 87 ALJR 1082 at [30].

the commission to effectively investigate major crime".[27] "Major crime" relevantly means criminal activity that involves an indictable offence punishable on conviction by a term of imprisonment not less than 14 years, criminal paedophilia, organised crime or terrorism.[28]

[23] Section 274 establishes a Crime Reference Committee (CRC) which has responsibility for referring major crime to the CMC for investigation.[29] The CRC can also refer "a particular incident of major crime" for investigation.[30] Any such referral must identify matters including at least one of:[31]

> "(i) the persons involved, or suspected of being involved, in the particular incident of major crime;
> (ii) the activity constituting, or suspected of constituting, the particular incident of major crime."

[24] A general referral may also identify "the persons involved, or suspected of being involved, in the major crime".[32]

[25] The CRC may make a specific referral only if satisfied that:[33]

> "(a) the police service has carried out an investigation into the particular incident of major crime that has not been effective; and
> (b) further investigation into the particular incident of major crime is unlikely to be effective using powers ordinarily available to police officers; and
> (c) it is in the public interest to refer the particular incident of major crime to the commission for investigation."

[26] A general referral may be made only if the CRC is satisfied that it is in the public interest.[34]

[27] In furtherance of its investigative function, the CMC has power to require a person to give a CMC officer a stated document or thing the chairperson believes, on reasonable grounds, is relevant to a crime investigation.[35] The person must comply with the notice unless the person has a reasonable excuse.[36] Failure to comply is not an offence if the document or thing is subject to legal professional privilege or self-incrimination privilege.[37] Where privilege is claimed, a CMC officer must consider the claim and may withdraw the subject requirement or notify the person that he may be required to attend before a CMC hearing to establish the claim.

[28] The chairperson may issue an attendance notice requiring a person to attend a CMC hearing in relation to a crime investigation to give evidence, produce a stated

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27 *Crime and Misconduct Act* 2001 (Qld), s 5(2).
28 *Crime and Misconduct Act* 2001 (Qld), Schedule 2.
29 *Crime and Misconduct Act* 2001 (Qld), s 274 and s 275(a).
30 *Crime and Misconduct Act* 2001 (Qld), s 27(1)(a).
31 *Crime and Misconduct Act* 2001 (Qld), s 27(3)(b).
32 *Crime and Misconduct Act* 2001 (Qld), s 27(5)(b)(i).
33 *Crime and Misconduct Act* 2001 (Qld), s 28(1).
34 *Crime and Misconduct Act* 2001 (Qld), s 28(2).
35 *Crime and Misconduct Act* 2001 (Qld), s 74(1) and (2).
36 *Crime and Misconduct Act* 2001 (Qld), s 74(5).
37 *Crime and Misconduct Act* 2001 (Qld), s 74(7) and Schedule 2.

document or thing or establish a reasonable excuse or claim of privilege.[38] Failure, without reasonable excuse to attend, is a criminal offence.[39]

[29] The CMC has power to hold hearings which, although generally not open to the public, may be opened if the CMC considers that opening the hearing will make the subject investigation more effective and would not be unfair to a person or contrary to the public interest.[40]

[30] A witness at a CMC hearing may be legally represented and may be subjected to cross-examination.[41] It is an offence for a person attending a hearing to give sworn evidence not to take an oath if required to do so.[42]

[31] Section 185 makes it plain that where documents or things are required to be produced by a person at a CMC hearing under a hearing notice, he or she cannot rely on privilege against self-incrimination. Legal professional privilege, however, may constitute a "reasonable excuse" for failure to produce a document or thing.[43] The provisions of s 190 in relation to answering questions at a CMC hearing are similar.

[32] If a claim of reasonable excuse based on self-incrimination privilege is upheld, the claimant may nevertheless be obliged to comply with the requirement and produce the document or answer the question as the case may be. The person then has the protection of s 197.

[33] These provisions, in very plain terms, abrogate the privilege against self-incrimination.

[34] Section 197 applies if, before answering a question or producing a document, a person claims self-incrimination privilege and, absent the provisions of the Act, the person would not have been obliged to answer the question or produce the document by virtue of self-incrimination privilege and the person is required to answer the question or produce the document. Where the section applies, the answer or document is not admissible in evidence against the individual in any civil, criminal or administrative proceeding without the person's consent.

The appellants' reliance on *X7 v Australian Crime Commission*[44]

[35] The appellants placed great reliance in their submissions on the approach taken by the majority in *X7*.[45] In that case the Court was dealing with the use by the Australian Crime Commission (the ACC) of its compulsory powers under the *Australian Crime Commission Act* 2002 (Cth) (the ACC Act) to ask questions of a person "relating to the subject matter of the offences with which he had earlier been charged".[46] Both the majority and the minority reasons placed particular emphasis on the circumstance in which the plaintiff, who was required to attend a compulsory examination before an ACC examiner, had been charged. For example, French CJ and Crennan J observed:[47]

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38 *Crime and Misconduct Act* 2001 (Qld), s 82(1).
39 *Crime and Misconduct Act* 2001 (Qld), s 82(5).
40 *Crime and Misconduct Act* 2001 (Qld), s 177(2).
41 *Crime and Misconduct Act* 2001 (Qld), s 181.
42 *Crime and Misconduct Act* 2001 (Qld), s 183.
43 *Crime and Misconduct Act* 2001 (Qld), s 185(2).
44 (2013) 248 CLR 92 .
45 (2013) 248 CLR 92.
46 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 102, [3].
47 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 122–123.

> "Compulsory examination by a member of the executive after a charge has been laid might prejudice the fair trial of the person examined where the prosecution is, as a result, afforded an unfair forensic advantage, being an advantage which would not otherwise be obtainable under ordinary rules of criminal procedure…
>
> 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 from compulsorily obtained material establishing that person's guilt, or disclosing defences."

[36] French CJ and Crennan J concluded that the safeguards provided in the examination provisions were capable of precluding the prosecution from obtaining an unfair forensic advantage in a trial.[48] They found that the subject provisions of the ACC Act empowered an examiner appointed under s 46B(1) of the ACC Act to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerned the subject matter of the offence so charged and that the subject provisions were not invalid to that extent as contrary to Ch III of the Constitution.

[37] The focus of the reasons of Hayne and Bell JJ, who arrived at a contrary conclusion,[49] was on whether the safeguards contained in the ACC Act for the protection of examinees were sufficient to prevent the examination resulting in an unfair trial. Their Honours remarked that there was no express reference in the ACC Act to the examination of a person who has been charged with, but not tried for, an offence about the subject matter of the pending charge.[50] Their Honours then noted that:

> "The words used in s 25A(9) (and in s 29A(2)) have ample work to do in respect of the examination of persons who may be suspected of wrong-doing but who, before examination, have not been charged with any offence. It is the generality of the words used in the ACC Act, including in ss 25A(9) and 29A(2), and the absence of *specific* reference to examination of a person who has been charged about the subject matter of the pending charge, which presents the issue for determination in this case."

[38] The focus of the discussion thereafter remained on post-charge questioning.[51]

[39] After considering the fundamental nature of the "right to silence", their Honours observed that:[52]

> "The laying of a charge marks the first step in engaging the exclusively judicial task of adjudicating and punishing criminal guilt."

[40] The nature of an accusatorial trial was then explored and, in particular, the accused's right to silence without any inference of guilt being able to be drawn.[53] Their Honours then observed:[54]

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48 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 124–125, [58]–[61].

49 See *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 129–130, [78]–[79] for a briefer statement of the questions.

50 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 131, [83].

51 See *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 131–134, [85], [87]–[89], [91], [92] and [94]–[95].

52 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 138, [110].

53 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 140, [117].

54 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 140, [118].

> "The preceding description of the investigation, prosecution and trial of an indictable Commonwealth offence demonstrates that, at every stage, the process of criminal justice is accusatorial. It is against this background that the provisions of the ACC Act, particularly s 28(1), must be construed. If these provisions were to permit the compulsory examination of a person charged with an offence about the subject matter of the pending charge, they would effect a fundamental alteration to the process of criminal justice."

[41] The reasons later discussed the ways in which the adversarial process would be fundamentally altered even if answers given at a compulsory examination were kept secret and were not able to be used directly or indirectly by those responsible for investigating and prosecuting the matters charged.[55]

[42] Kiefel J agreed "substantially" with the reasons of Hayne and Bell JJ.

[43] As this proceeding concerns the abrogation of the self-incrimination privilege in respect of an uncharged suspect, the guidance to be obtained from *X7* is necessarily limited except, of course, in relation to the matters of principle identified in the reasons.

Consideration

[44] Gibbs CJ observed in *Sorby v The Commonwealth*,[56] that the argument that compulsory examination of a suspected person is inconsistent with the right to trial by jury was unanimously rejected in *Huddart, Parker & Co Pty Ltd v Moorehead*.[57] A little later in his reasons, the Chief Justice said:[58]

> "Similarly, it is no necessary impairment of federal judicial power that a person who may subsequently come to be tried has been compulsorily interrogated before the trial."

[45] In their joint reasons in *Sorby*, Mason, Wilson and Dawson JJ addressed the plaintiffs' argument that s 6A(2) of the *Royal Commissions Act* 1902 (Cth) constituted an impermissible interference with judicial power and, alternatively, infringed s 80 of the Constitution. Section 6A(2) provided:

> "A person is not entitled to refuse or fail to answer a question that he is required to answer by a member of a Commission on the ground that the answer to the question might tend to incriminate him."

[46] The plaintiffs relied on *Hammond v The Commonwealth*,[59] in which it was held that:[60]

> "…the Commissioner's examination of the plaintiff with respect to matters touching the pending criminal charge constituted an improper interference with the due administration of justice in the proceedings and amounted to contempt of court."

[47] The joint judgment noted that in *Hammond*, unlike *Sorby*, the witness under examination had been charged. The difference between these two circumstances was then explored:[61]

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55 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 142–143, [124].
56 (1983) 152 CLR 281.
57 (1909) 8 CLR 330.
58 *Sorby v The Commonwealth* (1983) 152 CLR 281 at 299.
59 (1982) 152 CLR 188.
60 *Sorby v The Commonwealth* (1983) 152 CLR 281 at 306.
61 *Sorby v The Commonwealth* (1983) 152 CLR 281 at 306–307.

> "It is of the essence of contempt of court, except contempt scandalizing the court, that it be committed in relation to proceedings. For this purpose 'proceedings' includes pending proceedings and this expression must be given a sufficiently broad meaning in criminal cases to cover a person who has been arrested and charged: *James v. Robinson*; *R. v. Daily Mirror; Ex parte Smith.* But it may not be sufficient that the institution of proceedings may be imminent or expected. In *James v. Robinson*, articles which were such as to tend to prejudice the fair trial of Robinson were published in a newspaper on 10 February 1963. At the time of publication, Robinson was then at large and being sought by police officers in connexion with two killings which occurred on 9 February 1963. He was subsequently arrested and charged with wilful murder. It was held in this Court that the articles were not punishable as a contempt because there were no pending proceedings…
>
> It would seem to us to follow from *James v. Robinson* that the possibility, or even the strong probability, that a witness called to testify before a Royal Commission will be charged with an offence provides an unlikely basis for a finding of contempt against the Commission in the event that the witness is questioned about matters which are relevant to the offence. He may never be charged. Indeed, any other approach would effectively prevent some Royal Commissions from fulfilling their task. This could be so in the present case, where the terms of reference require the Commissioner to investigate whether a particular person has been engaged in activities which involve contravention of the laws of the Commonwealth or of Queensland. The fact-finding activities of Royal Commissions are often a necessary aid to the executive, the Parliament and the public in bringing to light serious mischiefs which require a remedy, and in some instances an urgent remedy. It would impose a severe restriction on the capacity of the executive and of Parliament to introduce prompt reforms if Commissions were compelled to postpone the examination of witnesses with respect to their possible involvement in criminal offences until such time, if ever, as their criminal liability has been finally determined by the courts."

[48] The appellants' argument is essentially that the relevant provisions of the Act do not abrogate self-incrimination privilege in the case of a person suspected of a major crime under investigation by the CMC because the application of the relevant provisions of the Act to claims of privilege by a suspect was not expressly stated. It was submitted that the provisions of the Act can usefully apply to persons who are not suspects.

[49] The distinguishing of *X7* is peripheral to the central issue in this case: does a legislative intention to abrogate the privilege against self-incrimination emerge with sufficient clarity from the provisions of the Act to satisfy the various tests identified earlier?

[50] In my opinion this question must be answered affirmatively. It is apparent from the stated purposes of the Act and the provisions relating to the CRC that the persons who are suspected of a major crime will often be those or amongst those who are required to produce a stated document or thing at a CMC hearing or to give evidence on oath.

[51] A "specific referral" to the CMC by the CRC may be made only if police investigations have been carried out and if further police investigations using powers ordinarily available to police officers are unlikely to be effective. It tends to follows from the general scheme of the Act, even without reference to s 27(5), that suspects are likely to be identified before the CMC becomes involved in a matter.

[52] Sections 185, 190 and 194 in clear and specific terms abrogate the privileges against self-incrimination in the ways and to the extent set out in the provisions discussed above.

[53] There is no qualification or restriction in s 185, s 190 or s 194 in respect of persons suspected of implication in the major crime under investigation. Clearly, the attention of the legislature has been directed to the abrogation of the privilege against self-incrimination. It is manifest from the Act's provisions that the legislature has determined that the privilege is abrogated notwithstanding that it is a "basic and substantive common law right", which "includes the rights (more accurately described as privileges) of a person suspected of, but not charged with, an offence".[62] To borrow from the above observations in *Sorby*, it does not appear from the character and purpose of these provisions that they were intended to be subject to qualification. The object of imposing the obligation to produce documents or things and to answer questions is to ensure the full investigation in the public interest of matters involving the commission of offences which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available absent statutory compulsion.

[54] If the appellants' construction is adopted, much of the purpose of the provisions of under consideration would be negated.

Conclusion

[55] For the above reasons, I would order that the appeal be dismissed with costs.

[56] **GOTTERSON JA:** I agree with the order proposed by Muir JA and with the reasons given by his Honour.

[57] **MULLINS J:** I agree with Muir JA.

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62 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [104] & [105] per Hayne and Bell JJ.