SUPREME COURT OF QUEENSLAND

CITATION:	*Witness J A v Scott* [2015] QCA 285
PARTIES:	**WITNESS J A** (appellant) **v** **M J SCOTT** (respondent) **ATTORNEY-GENERAL OF QUEENSLAND** (intervenor)
FILE NO/S:	Appeal No 3512 of 2015 SC No 8639 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2015] QSC 48
DELIVERED ON:	18 December 2015
DELIVERED AT:	Brisbane
HEARING DATE:	25 September 2015
JUDGES:	Gotterson and Philip McMurdo JJA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. The order made on 11 March 2015 be set aside.** **3. The appellant be discharged forthwith.** **4. The respondent pay the appellant's costs of the appeal and the proceeding in the Trial Division.**
CATCHWORDS:	APPEAL AND NEW TRIAL – RIGHT OF APPEAL – WHEN APPEAL LIES – where the appellant sought leave to appeal against an order sentencing him to two years and six months' imprisonment following a finding that the appellant's conduct constituted a distinct and "second contempt" within the meaning of s 199(8B) of the *Crime and Corruption Act* 2001 (Qld) – whether s 62 of the *Supreme Court of Queensland Act* 1991 (Qld) conferred a right of appeal against an order made in the Trial Division that a person be punished for contempt – where there was no basis for limiting the general, unambiguous and sufficient language of s 62(1) – where the respondent's argument that the appellant had no right of appeal and that s 62 did not apply was rejected – where the appellant was first sentenced to five months and 27 days imprisonment for refusal

to answer a question during 2013 Commission hearing and was then sentenced for refusal to answer the same question when he appeared in response to the same attendance notice when the hearing resumed in 2014 – whether the contempt for which the appellant was punished in 2015 was a different contempt from that for which the appellant had been punished in 2013 and if not, whether there was any power to punish him again

CONSTITUTIONAL LAW – THE NON-JUDICIAL ORGANS OF GOVERNMENT – THE LEGISLATURE – EXAMINATION OF VALIDITY OF LEGISLATION BY COURTS – challenge to the validity of the enactment of ss 199(8A) and (8B) of the *Crime and Corruption Act* 2001 (Qld) on the basis that they were an invalid intrusion on the contempt jurisdiction of the Supreme Court – where s 199 allows the court to punish for contempt of a presiding officer as if it was a contempt in relation to court proceedings but does not affect the court's power to deal with contempt in relation to its own proceedings – whether the exercise of jurisdiction under s 199(8A) and (8B) would be incompatible with the integrity, independence and impartiality of the Supreme Court as repository of federal jurisdiction invested under Ch III of the Constitution – where the limitations prescribed by ss 199(8A) and (8B) and the prescription of a mandatory minimum penalty do not affect the institutional integrity of the Supreme Court

PROCEDURE – CONTEMPT, ATTACHMENT AND SEQUESTRATION – CONTEMPT – WHAT CONSTITUTES – where the appellant had on several occasions attended, in response to a single notice requiring such attendance, to give evidence at a Crime and Corruption Commission hearing relating to the investigation of a murder and had refused to answer questions regarding the whereabouts of certain money – where the trial judge found that the appellant's refusal to answer a question regarding the whereabouts of certain money constituted a distinct contempt and a "second contempt" within the meaning of s 199(8B) of the *Crime and Corruption Act* 2001 (Qld) – where in an earlier proceeding, the appellant's refusal to answer the same question in 2013 had been found to constitute contempt under s 198 of the *Crime and Corruption Act* 2001 (Qld) and the appellant had served a sentence of five months and 27 days imprisonment as punishment – where the appellant attended a further Commission hearing in relation to the same investigation and in response to the same attendance notice in 2014 and refused to answer the same question – where the respondent who was the presiding officer of the 2014 Commission hearing certified the appellant was in in contempt and successfully applied to the court that the appellant be punished under s 199 – where the trial judge held that the appellant's refusal to answer constituted a distinct contempt from his earlier refusal – where amendments to s 199 Act inserted by the *Criminal Law (Criminal Organisations*

Disruption) Amendment Act 2013 (Qld) imposed mandatory minimum penalties and conditions under s 199(8A) and s 199(8B) – where the trial judge held that the contempt constituted a "second contempt" for the purpose of s 199(8B)(b) and therefore ordered that the appellant be punished for contempt by imprisonment for a second period of two years and six months, the mandatory minimum penalty – whether the contempt for which the appellant was punished in 2015 was a different contempt from that for which the appellant had been punished in 2013 and if not, whether there was any power to punish him again – where the respondent conceded that the question put to the appellant in 2014 was relevantly the same as that asked in 2013 and the hearing, though adjourned many times, was the same hearing attended by the appellant in response to the same attendance notice – where the trial judge erred in characterising the appellant's failure to provide the information required of him as a distinct contempt – where the appellant's persistence in his failure to provide the required information was not a distinct contempt but a manifestation of his continuing defiance of the requirements of s 190(1) – where there was no distinct contempt in 2014 there was therefore no "first" or "second" contempt under s 199(8B) because it was a contempt which began before the commencement of that provision – where alternatively, if the appellant's failure to answer constituted a distinct contempt, the 2014 contempt proceeding would constitute an abuse of process because, absent the 2013 amendments to the *Crime and Corruption Act* 2001 (Qld) there could be no proper purpose to be served by the second contempt proceeding – where the court had sentenced the appellant to a term of imprisonment fixed upon the expectation that the contempt would not be purged – appeal allowed

Crime and Corruption Act 2001 (Qld), s 4(1)(a), s 5(2), s 190, s 194, s 198, s 199, s 199(8A), s 199(8B), s 200
Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld), s 30
Supreme Court of Queensland Act 1991 (Qld), s 62

Assistant Commissioner Condon v Pompano Pty Ltd (2013) 252 CLR 38; [2013] HCA 7, applied
Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd (1986) 161 CLR 98; [1986] HCA 46, applied
Bropho v Western Australia (1990) 171 CLR 1; [1990] HCA 24, applied
Cobiac v Liddy (1969) 119 CLR 257; [1969] HCA 26, applied
Coco v The Queen (1994) 179 CLR 427; [1994] HCA 15, applied
Doobay v Diamond [2012] ONCA 580, cited
Henderson v Taylor, Information Commissioner of Queensland [2007] 2 Qd R 269; [2006] QCA 490, distinguished
Jago v District Court (NSW) (1989) 168 CLR 23; [1989] HCA 46, cited
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51; [1996] HCA 24, cited

Kirk v Industrial Court (NSW) (2010) 239 CLR 531; [2010] HCA 1, considered
Korea Data Systems Co v Chiang (2009) 305 DLR (4th) 655; [2009] ONCA 3, cited
Kuczborski v Queensland (2014) 254 CLR 51; [2014] HCA 46, applied
Kumari v Jalal [1997] 1 WLR 97, considered
Lee v New South Wales Crime Commission (2013) 251 CLR 196; [2013] HCA 39, cited
Magaming v The Queen (2013) 252 CLR 381; [2013] HCA 40, applied
McMillan v Pryce (1997) 115 NTR 19; [1997] NTSC 83, cited
New South Wales Crime Commission v Field [2004] NSWSC 1051, distinguished
O'Connor v Witness G [2013] QSC 281, discussed
Porter v The King; Ex parte Yee (1926) 37 CLR 432; [1926] HCA 9, cited
R v Foster; Ex parte Gillies [1937] St R Qd 67, cited
R v Long (No 1) [2002] 1 Qd R 662; [2001] QCA 318, considered
R v Lowrie [1998] 2 Qd R 579; [1997] QCA 434, considered
R v Queensland Television Ltd; Ex parte Attorney-General [1983] 2 Qd R 648, cited
R v Shea [2010] QCA 339, considered
Re Bolton; Ex parte Beane (1987) 162 CLR 514; [1987] HCA 12, applied
Re Colina; Ex parte Torney (1999) 200 CLR 386; [1999] HCA 57, cited
Scott v Witness J A [2015] QSC 48, overturned
Sillery v The Queen (1981) 180 CLR 353; [1981] HCA 34, applied
United States v Farah 766 F 3d 599 (6th Cir, 2014), considered
Ushkowitz v McCloskey 359 F 2d 788 (2nd Cir, 1966); [1966] USCA2 264, considered
Von Doussa v Owens (No 1) (1982) 30 SASR 367, considered
Von Doussa v Owens (No 2) (1982) 30 SASR 391, considered
Von Doussa v Owens (No 3) (1982) 31 SASR 116, considered
Walton v Gardiner (1993) 177 CLR 378; [1993] HCA 77, cited
Wood v Staunton (No 5) (1996) 86 A Crim R 183, cited
Wilkinson v Anjum [2012] 1 WLR 1036; [2011] EWCA Civ 1196, considered
Yates v United States 355 US 66; [1957] USSC 136 considered

COUNSEL: S J Keim SC, with E P Mac Giolla Ri, for the appellant
M J Copley QC for the respondent
P Dunning QC, with J Kapeleris, for the intervenor

SOLICITORS: Wallace O'Hagan for the appellant
Crime and Corruption Commission for the respondent
Crown Law for the intervenor

[1] **GOTTERSON JA:** I agree with the orders proposed by Philip McMurdo JA and with the reasons given by his Honour.

[2] **PHILIP McMURDO JA:** In May 2013, the appellant was required to give evidence at a hearing conducted under the *Crime and Corruption Act* 2001 (Qld) ("the Act"). It was a hearing to investigate a murder. The appellant was examined and answered many questions. In particular, he agreed that he had taken more than $1 million in cash from a safety deposit box, registered in his name, which he said had been deposited there by the murder victim. The appellant said that he had taken the money so that police could not confiscate it.

[3] But then he refused to say what he had done with the money. In July 2013, a judge of the Trial Division found, under s 198 of the Act, that the appellant's refusal to give evidence on that subject constituted a contempt of the presiding officer of the hearing. The fact of the contempt was undisputed. Her Honour imposed a term of imprisonment of five months and 27 days, her intention being to impose a sentence of seven months but to allow for the 33 days in which the appellant had been in custody for the matter.

[4] The appellant served that sentence before, in September 2014, he was again before a hearing of the Commission. This was indeed the same hearing in which, more than a year earlier, he had refused to say what he had done with the money. On this occasion, again he answered many more questions before being asked that same question about what he had done with the money. Again he refused to answer it.

[5] The presiding officer of the hearing then applied to a judge in the Trial Division to have the appellant dealt with for what was said to have been a distinct contempt, constituted by his refusal to give an answer to the question in September 2014. That judge found that this constituted a new contempt which was different from that for which the appellant had been punished in 2013, so that the appellant was to be punished again. Further, his Honour held that this was a "second contempt" within the meaning of that expression in s 199(8B) of the Act, with the consequence that the minimum punishment which the court could impose was two years and six months' imprisonment and it was that order which was made.

[6] By this appeal, the appellant seeks to have that order set aside, arguing that he should not have been further punished at all. Alternatively, he says that the mandatory minimum term prescribed by s 199(8B)(b) should not have been imposed, either because that provision was invalid or because, upon its proper interpretation, it was inapplicable to his case.

[7] The respondent to this appeal, who was the applicant in the Trial Division, was the presiding officer at the hearing in 2014. The Attorney-General for the State of Queensland has intervened because of the appellant's arguments, largely based upon *Kable v Director of Public Prosecutions (NSW)*,[1] that s 199(8B) is invalid because the exercise of the court's jurisdiction under that provision is incompatible with the integrity, independence and impartiality of the court as one in which federal jurisdiction has been invested under Chapter III of the Constitution.

[8] For the reasons that follow, I conclude that the appellant ought not to have been punished for his refusal to answer in 2014, or at least by the term which was imposed, so that he should now be released.

---

1 (1996) 189 CLR 51; [1996] HCA 24.

A right of appeal?

[9] The respondent submits that there is no right of appeal against this order. He argues that an appeal is a creature of statute and there is no statute which authorises an appeal against an order made in the Trial Division that a person be punished for contempt.

[10] The appellant, with the support of the Attorney-General on this question, says that there is a right of appeal conferred by s 62 of the *Supreme Court of Queensland Act* 1991 (Qld) which relevantly provides:

> "62 Appeals in proceedings in the court
>
> (1) Subject to this and any other Act, an appeal lies to the Court of Appeal from -
>
> (a) any judgment or order of the court in the Trial Division; and …"

[11] The respondent argues that s 62 does not apply in the present context, upon the basis of three cases in this court: *Henderson v Taylor* [2007] 2 Qd R 269; *R v Lowrie* [1998] 2 Qd R 579 and *R v Long (No 1)* [2002] 1 Qd R 662. In *Henderson v Taylor*, there was a purported appeal against the *dismissal* of a proceeding for punishment of an alleged contempt of the Supreme Court. The unanimous view of the court (Mackenzie, Philippides and McMurdo JJ) was that there was no right of appeal because the dismissal of a proceeding for contempt was relevantly analogous to the dismissal of a criminal charge, against which there is no right of appeal conferred by a statute unless that right is conferred distinctly.[2] But the respondent relies upon a statement in that case by Mackenzie J that the (then) source of a right of appeal against an order for the punishment of a contempt was s 254 of the *Supreme Court Act* 1995 (Qld), which has now been repealed.[3] That s 254, or its predecessor which was s 10 of the *Judicature Act* 1876, was the source of that jurisdiction was established in *R v Foster; Ex parte Gillies*[4] and *R v Queensland Television Ltd; Ex parte Attorney-General*.[5] In *Henderson v Taylor*, I noted that the correctness of that view was not in question, because the issue was the quite different one of the existence or otherwise of a right of appeal against a dismissal of a contempt proceeding.[6] This required no consideration of s 62 of the *Supreme Court of Queensland Act* 1991.

[12] In *R v Lowrie*, this court (Davies and Pincus JJA, Shepherdson J dissenting) held that there was no right of appeal against interlocutory orders of the Supreme Court made in respect of trials on indictment. Davies JA criticised the reasoning of the majority in *R v Foster* and said that to the extent that *R v Queensland Television Ltd* relied upon it, the reasoning was wrong, but added that this was not to say that the decision in that case was wrong.[7] Pincus JA distinguished *R v Foster* and *R v Queensland Television Ltd* on the basis that as contempt cases, they were clearly outside the category of an interlocutory order made in relation to a trial on indictment.[8] Davies JA did refer to s 62 of the 1991 Act (then s 69 of that Act) and doubted whether it was "intended to confer on the Court of Appeal any appellate jurisdiction not formerly possessed by

---

2 *Henderson v Taylor* [2007] 2 Qd R 269, 275 [21], 276 [26], 287-288 [74]-[75].
3 Ibid 272 [8] (Mackenzie J), see also 276 [26] (Philippides J), 288 [75] (McMurdo J).
4 [1937] St R Qd 67 (Webb and Henchman JJ, Blair CJ diss).
5 [1983] 2 Qd R 648.
6 *Henderson v Taylor* [2007] 2 Qd R 269, 288 [75].
7 *R v Lowrie* [1998] 2 Qd R 579, 583.
8 Ibid 589.

the Full Court or the Court of Criminal Appeal".[9] But he found it unnecessary to explore that question because "[t]he statutory context … with respect to proceedings on indictment remained unchanged by the *Supreme Court of Queensland Act* 1991".[10] The result is that neither of the majority judgments in *R v Lowrie* provides any significant support for the respondent's argument that s 62 does not authorise an appeal against an order of punishment for contempt. The reasoning of the majority related to what they regarded as the distinct context of an interlocutory order made in relation to a trial on indictment.

[13] In *R v Long (No 1)*, a majority of this court (Williams JA and Byrne J, McMurdo P diss) held that there was no jurisdiction conferred by (what is now) s 62 to appeal a refusal of an application for a change of the venue of a trial upon indictment. The majority judgments applied those of the majority in *R v Lowrie*. Again, they provide no authoritative support for the respondent's submission.

[14] It is unnecessary to consider the correctness of *R v Foster* and *R v Queensland Television* because the question here is whether there is any basis for limiting the general, unambiguous and apparently sufficient language of s 62(1). The reasoning in *Lowrie* and *Long* is that for proceedings on indictment, the scope of this court's jurisdiction is defined by provisions of the *Criminal Code*. A proceeding such as the present is outside the operation of those provisions. For an appeal against an order for the punishment of a contempt, there is no basis for requiring a specific conferral of jurisdiction, as would be required to provide a right of appeal against the dismissal of a contempt proceeding.

[15] It follows that the respondent's challenge to the validity of this appeal must be rejected.

The 2013 proceeding

[16] One of the purposes of the Act is to combat and reduce the incidence of major crime.[11] Those purposes are to be achieved by the establishment of the Commission which, by s 5(2), is to have "investigative powers, not ordinarily available to the police service, that will enable the commission to effectively investigate major crime". In 2012, pursuant to s 27 of the Act,[12] there was referred to the Crime and Corruption Commission[13] for its investigation "a particular incident of major crime" which was the murder of a person on 1 November 2012.

[17] By s 176(1), the Commission may authorise the holding of a hearing in relation to any matter relevant to the performance of its functions. On 1 February 2013, a delegate of the Commission authorised the holding of a hearing in relation to its investigation of this crime.

[18] By s 178, the chairman of the Commission must conduct a public hearing, but a closed hearing may be conducted by the chairman or certain other persons as decided by the chairman. On 1 February 2013, an authorised delegate of the chairman decided that she or the respondent could conduct closed hearings in relation to this investigation.

[19] Section 82 empowers the chairman of the Commission to issue a notice requiring a person to attend at a Commission hearing, until excused, (for a hearing of this kind)

---

9 Ibid 584.
10 Ibid.
11 *Crime and Corruption Act* 2001 (Qld) s 4(1)(a).
12 Then called the *Crime and Misconduct Act* 2001.
13 Then called the Crime and Misconduct Commission.

to give evidence, to produce a stated document or thing or to establish a reasonable excuse or claim for privilege. On 5 February 2013, the respondent as the authorised delegate of the chairman for the purposes of s 82, required the appellant's attendance, until excused, at a Commission hearing "for the purposes of a crime investigation … to give evidence relating to … your knowledge of the murder of [the deceased] …".

[20] The notice was served upon the appellant and on 12 February 2013 he appeared to give evidence in accordance with the notice. He took an oath and his examination commenced. It continued on the following day before the hearing was adjourned to a date to be fixed.

[21] On 24 April 2013, the respondent, as the authorised delegate of the chairman for the purposes of s 178(3), authorised Mr D M O'Connor to conduct "hearings" in relation to this investigation. On 2 May 2013, the appellant again attended to give evidence, as the respondent said in his affidavit, in accordance with the same Attendance Notice which had issued on 5 February 2013. He was asked further questions by the Commission's counsel before the hearing was adjourned.

[22] The hearing resumed on 29 May 2013, when the appellant was further questioned. He was asked about a safe deposit box registered in his name which, when located by police a fortnight earlier, had been found to contain nearly $750,000 in cash. The appellant's evidence was that this cash had been placed in the box by the deceased man and was linked to that man's involvement in illegal drug activity. He gave evidence of other cash which had been placed in the box by the deceased. The appellant said that he had removed approximately $1 million from the box on 22 April 2013, and that on 8 January 2013, he had removed approximately $800,000 from it. The appellant said that he had removed all of this money in order to prevent it from being confiscated by the police. But the appellant then indicated, according to the respondent's affidavit, "that he would not answer questions in relation to the current whereabouts of the money he had removed".[14] The appellant was allowed to take some legal advice before being further questioned later that day. He "continued to maintain that he would not answer questions about the topic of the whereabouts of the money he had removed".[15] The presiding officer, Mr O'Connor, then asked the appellant:

> "Where is the money that you removed from the reserve vault on the 8th of January and the 22nd of April 2013?"

The appellant responded:

> "I'm not prepared to say."

[23] After hearing submissions from the Commission's counsel and a lawyer representing the appellant, Mr O'Connor determined that he should certify the appellant as being in contempt. He adjourned the hearing so that he could issue a certificate of contempt and informed the appellant that he was not excused from further attendance at the hearing, which he adjourned to a date to be fixed.[16]

[24] Section 190 then relevantly provided as follows:

> "190 Refusal to answer question

---

14 Respondent's affidavit [20].
15 Respondent's affidavit [21].
16 Respondent's affidavit [23].

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

Maximum penalty – 85 penalty units or 1 year's imprisonment.

(2) The person is not entitled –

(a) to remain silent; or

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

[25] By s 194, the presiding officer was to decide whether or not there was a reasonable excuse for a refusal to answer a question or produce documents of a hearing of this kind. However, the appellant could and did not claim such an excuse.

[26] Part 3 of Chapter 4 of the Act provides for the procedure by which a person might be held to be in contempt of the presiding officer conducting a Commission hearing and for the punishment of that contempt. Sections 198 to 200 then provided as follows:

"198 Contempt of person conducting commission hearing

(1) A person is in contempt of the presiding officer conducting a commission hearing if the person –

(a) insults the member while the member is conducting the hearing; or

(b) deliberately interrupts the hearing; or

(c) at the hearing, contravenes a provision of this Act relating to the hearing; or

(d) creates or continues or joins in creating or continuing, a disturbance in or near a place where the presiding officer is conducting the hearing; or

(e) does anything at the hearing or otherwise that would be contempt of court if the presiding officer were a judge acting judicially.

(2) The presiding officer may order that a person who under subsection (1) is in contempt of the commission at a hearing be excluded from the place where the hearing is being conducted.

(3) A commission officer, acting under the presiding officer's order, may, using necessary and reasonable help and force, exclude the person from the place.

199 Punishment of contempt

(1) A person's contempt of the presiding officer conducting a commission hearing may be punished under this section.

(2) The presiding officer may certify the contempt in writing to the Supreme Court (the *court*).

(3) For subsection (2), it is enough for the presiding officer to be satisfied that there is evidence of contempt.

(4) The presiding officer may issue a warrant directed to a police officer or all police officers for the apprehension of the person to be brought before the Supreme Court to be dealt with according to law.

(5) The *Bail Act 1980* applies to the proceeding for the contempt started by the certification in the same way it applies to a charge of an offence.

(6) The court must inquire into the alleged contempt.

(7) The court must hear –

(a) witnesses and evidence that may be produced against or for the person whose contempt was certified; and

(b) any statement given by the person in defence.

(8) If the court is satisfied the person has committed the contempt, the court may punish the person as if the person had committed the contempt in relation to proceedings in the court.

(9) The *Uniform Civil Procedure Rules 1999* apply to the court's investigation, hearing and power to punish, with necessary changes.

(10) The presiding officer's certificate of contempt is evidence of the matters contained in the certificate.

(11) The person is not excused from attending before a commission hearing in obedience to an attendance notice only because the person is punished or liable to punishment under this section for contempt of the presiding officer.

200 Conduct that is contempt and offence

(1) If conduct of an offender is both contempt of the presiding officer conducting a commission hearing and an offence, the offender may be proceeded against for the contempt or for the offence, but the offender is not liable to be punished twice for the same conduct.

(2) In this section –

offender means a person guilty, or alleged to be guilty, of contempt of the presiding officer conducting a commission hearing."

[27] Acting under s 199(2), the presiding officer certified the appellant's contempt as a failure by the appellant to answer a question which had been put by the presiding officer.

[28] The complaint of contempt came before a judge in the Trial Division on 25 June 2013. Her Honour's reasons record that the contempt was admitted and that the issue for determination was the appropriate penalty. In her judgment delivered on 1 July 2013, her Honour found that the appellant "was in contempt of the presiding officer on 29 May 2013". It was ordered that he be imprisoned for a term of five months and 27 days.

The reasons for judgment record that counsel for the Commission had submitted that an appropriate penalty was eight to ten months' imprisonment and counsel for the respondent had submitted the penalty should be seven months' imprisonment partly suspended.

[29] The judgment discussed the applicability or otherwise of various provisions of the *Penalties and Sentences Act* 1992 (Qld). Her Honour noted the applicability of the *Uniform Civil Procedure Rules* 1999, (according to s 200(9)) and referred to, amongst others, rules 930 and 931. Rule 930(2) provides that where the court decides that a person has committed a contempt, the court may punish the person by making an order that may be made under the *Penalties and Sentences Act* 1992 (Qld). Rule 931(2) provides that if a respondent in a contempt proceeding is imprisoned for a term, the court may order the respondent's discharge from prison before the end of the term.

[30] Her Honour noted that "at common law, the Court has an inherent power to impose imprisonment of indefinite duration".[17] Her Honour was not asked to consider whether an indefinite imprisonment of the appellant should be ordered, in order to coerce the appellant to provide the information which he had refused to provide. Her Honour appeared to accept that there was no prospect that the appellant would do so, from this passage in the judgment:[18]

> "As a result of the respondent's contempt, the CMC was not provided with information as to the whereabouts of a large sum of money, and it was denied the opportunity to forensically examine the money and any packaging associated with it."

[31] Although the appellant was ordered to serve that term of imprisonment, it remained open to him to purge his contempt and to seek a further order from the court by which he would be discharged before the end of the term, under r 931(2). But the appellant did not do so and served his sentence.

The 2014 proceeding

[32] On 9 April 2014, a delegate of the chairman for the purposes of s 178(3) of the Act authorised several persons, including the present respondent, to conduct closed hearings in relation to this investigation.

[33] On 2 June 2014, the appellant again attended to give evidence. Again, he did so in response to the attendance notice dated 5 February 2013.[19] He was examined by counsel for the Commission on a number of subjects before the examination revisited the question of the money which had been in the safe deposit box. The respondent then asked the appellant the question: "Where is the money that you removed from the reserve vault on 8 January and 22 April 2013?". The appellant responded by saying that he had a "reasonable excuse" for not answering that question. The respondent ruled against that objection and the hearing was then adjourned in order to give the appellant an opportunity to challenge that ruling in the Supreme Court pursuant to s 195(1)(b) of the Act. The appellant did file an appeal against the ruling on 12 June 2014, but discontinued the appeal on or about 21 August 2014.

[34] On 11 September 2014, the appellant again appeared to give evidence at the resumed hearing, in response to the same attendance notice of February 2013.[20] He was examined

---

17 *O'Connor v Witness G* [2013] QSC 281, 7.
18 Ibid 5.
19 Respondent's affidavit [33].
20 Respondent's affidavit [41].

by counsel for the Commission on a number of subjects before the examination again revisited the subject of the money which had been removed. The respondent again asked him to reveal the whereabouts of the money. The appellant responded: "I'm not prepared to say".

[35] After hearing submissions from counsel for the Commission and for the appellant, the respondent determined that it was appropriate to certify the appellant as being in contempt. The respondent adjourned the hearing to a date to be fixed, and told the appellant that he was not excused from further attendance.

[36] The respondent certified that he was satisfied that the appellant was in contempt because, on 11 September 2014, he had "refused to answer a question put to the appellant by me, the presiding officer, without reasonable or lawful excuse".[21]

[37] The respondent's application to this court came before a judge in the Trial Division on 3 October 2014. In a reserved judgment, his Honour ordered that the appellant be punished for contempt by imprisonment for a period of two years and six months.[22]

[38] His Honour's reasoning as to the fact of the contempt was as follows. The proof of the contempt required it to be established that the appellant had failed to answer a question put to him by the presiding officer and that the appellant did not have a "reasonable excuse" for that failure. His Honour said that the first element was not in contest.[23]

[39] His Honour held that it could not be a reasonable excuse that the appellant was exposed to punishment for contempt for a refusal to answer in September 2014, if that was the outcome for which the Act provided. And as no other excuse was propounded, his Honour concluded that the "certified contempt" was proved.

[40] The primary judge distinguished the appellant's conduct in 2014 from his 2013 conduct in this way:[24]

> "Although the 11 September refusal was an act of the same character as the earlier refusal, it is not the same act. And while in some circumstances, repeated refusals to answer a question might present as a series of so closely connected events that the conduct should be seen as one episode constituting one, continuing refusal, the respondent's refusals to answer the separate questions put on different occasions about the money cannot be regarded as having occurred in one episode. Those refusals, though identical in their essentials, are distinct acts, separated in time by months during which the respondent was imprisoned for contempt for refusing to answer the first time." (Footnote omitted).

A footnote within that para referred to Australian and United States authorities to which I will return.

[41] His Honour rejected an argument which he characterised as a suggestion that the 2014 proceeding was an impermissible attempt to re-litigate the Court's decision in 2013. His Honour said that the judge who decided the 2013 application was punishing for

---

21 Respondent's affidavit [50].
22 *Scott v Witness JA* [2015] QSC 48.
23 Ibid 6 [29].
24 Ibid 9 [36].

a refusal to answer the question put in 2013 and "was not purporting also to punish for misconduct that had not then happened."[25] Therefore, his Honour concluded, to punish the appellant for his refusal to answer in 2014 in no way called into question the decision by which he was punished for the earlier refusal.[26]

[42] His Honour rejected another argument for the appellant, which he characterised as a contention that the general law did not allow for a futher punishment for contempt in refusing to answer a question, after a finite sentence has been imposed for an earlier refusal to answer the same question.[27] His Honour further held that "the position that might obtain under the general law is not to the point if s 199(8B)(b) is engaged."[28]

[43] Section 199(8B) was one a number of provisions inserted by the *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013 (Qld), which took effect on 17 October 2013. It is necessary to set out in full some of these provisions:

> "198 …
>
> (4) To remove any doubt, it is declared that the following contraventions relating to a hearing may be certified in writing to the Supreme Court under section 199 as a contempt of the presiding officer—
>
> (a) a failure by a person, under section 183, to take an oath when required by the presiding officer;
>
> (b) a failure by a person, under section 185 or 188, to produce a stated document or thing at a commission hearing under an attendance notice or a section 75B requirement without reasonable excuse;
>
> (c) a failure by a person, under section 190 or 192, to answer a question put to the person at the hearing by the presiding officer without reasonable or lawful excuse.
>
> 199 …
>
> (8A) However, if—
>
> (a) the contempt that is certified is—
>
> (i) a failure by a person, under section 183, to take an oath when required by the presiding officer; or
>
> (ii) a failure by a person, under section 185 or 188, to produce a stated document or thing at a commission hearing under an attendance notice or a section 75B requirement without reasonable excuse; or
>
> (iii) a failure by a person, under section 190 or 192, to answer a question put to the person at the hearing by the presiding officer without reasonable or lawful excuse; and

---

25 Ibid 9 [38].
26 Ibid 9 [39].
27 Ibid 9 [40].
28 Ibid 10 [43].

(b) the court is satisfied the person has committed the contempt;

the court must punish the person in contempt by imprisonment to be served wholly in a corrective services facility.

(8B) The minimum punishment the court must impose is—

(a) for a first contempt—imprisonment for the term decided by the court; or

(b) for a second contempt relating to a hearing dealing with the same subject matter as that dealt with in a hearing in which the person's contempt was first certified—2 years and 6 months imprisonment; or

(c) for a third or subsequent contempt relating to a hearing dealing with the same subject matter as that dealt with in at least 2 hearings in each of which the person's contempt was certified—5 years imprisonment.

(8C) The maximum punishment the court may impose is at the discretion of the court.

(8D) A person punished by imprisonment under subsection (8A) may be brought before the commission to ascertain whether the person wishes to purge the contempt.

(8E) A person imprisoned under subsection (8A) may be brought before the Supreme Court, on the person's or the commission's application, for a declaration that the person has purged the contempt.

(8F) The court may order the person's discharge from prison before the end of the term—

(a) if it is satisfied that the person has purged the contempt; and

(b) it has heard the commission's submissions in relation to the application and the person's discharge from prison."

[44] For s 199(8B) the primary judge accepted that the 2013 conduct constituted "a first contempt" and that the 2014 conduct was "a second contempt relating to a hearing dealing with the same subject matter as that dealt with in a hearing in which the person's contempt was first certified". His Honour rejected a submission that this involved a retrospective operation of s 199(8B), which was to be avoided by interpreting the provision so that it applied only where the "first contempt" occurred after s 199(8B) took effect. His Honour reasoned that it would not give the provision a retrospective operation by allowing for a first contempt before the commencement of the operation of s 199(8B), because the provision did not purport to increase the penalty for contempts committed before its commencement; rather his Honour reasoned, to take into account the 2013 conduct as a first contempt would be simply "to acknowledge an historical fact".[29]

---

29 *Scott v Witness JA* [2015] QSC 48, 10 [48].

[45] The primary judge considered a submission for the appellant that the 2014 conduct was not a "second contempt" because that expression could not "include a mere repetition of conduct that has previously been punished as a contempt".[30] His Honour perceived an "assumption" within this argument "that a person could not twice be punished for the repetition, on separate occasions, of a refusal to comply with a lawful direction to answer a question …".[31] His Honour rejected that premise as being incorrect under the general law, according to cases which he then discussed.

[46] The first of these cases was a judgment of the English Court of Appeal in *Wilkinson v Anjum*.[32] In that case a father abducted his young daughter, taking her from England to Pakistan. On his return to England, he received an application brought by the child's mother, which resulted in an order that the father should immediately disclose the location of the child. The order also required the father to cause the child to be returned to England forthwith. The father did not comply with those orders. In 2010, a second judge (Mostyn J) sentenced him to two years' imprisonment for contempt of court and made a fresh order that he supply information about the location of the child. The father contravened that order and in 2011, a third judge held that he was in contempt of the order of Mostyn J and imposed a further term of imprisonment of one year, cumulatively upon the two year term imposed by Mostyn J.

[47] For the father it was argued that there had been but one single course of conduct, so that it was wrong for the father to be punished twice for it.[33] In the present case, the primary judge set out this passage from the judgment of McFarlane LJ (with whom Hughes and Tomlinson LJJ agreed):[34]

> "[I]t must in my view be permissible as a matter of law for the court to make successive mandatory injunctions requiring positive action, such as the disclosure of information, notwithstanding a past failure to comply with an identical request. A failure to comply with any fresh order would properly expose the defaulter to fresh contempt proceedings and the possibility of a further term of imprisonment."

The primary judge also set out this passage from the judgment of Hughes LJ:[35]

> "… there may be successive or repeated contempts of court constituted by positive acts disobeying an order not to do them. For my part, I am quite satisfied that there may also be consecutive or successive contempts of court constituted by repeated omissions to comply with a mandatory order positively to do something. However, where the latter is in question, it is plain that there may well come a time when further punishment will be excessive. When that will be is a matter of fact for each case."

It may be noted that what was said by McFarlane LJ was more concerned with whether a fresh injunction could be granted, thereby exposing the defaulter to a fresh contempt proceeding, a question which does not arise in the present appeal.

[48] McFarlane LJ referred to a decision of the Court of Appeal in *Kumari v Jalal*,[36] where following a divorce, the husband was ordered to deliver up items of property by a certain

---

30 Ibid 11 [53].
31 Ibid 11 [55].
32 [2012] 1 WLR 1036; [2011] EWCA 1196.
33 *Wilkinson v Anjum* [2012] 1 WLR 1036, 1042 [21].
34 Ibid 1045 [37].
35 Ibid 1047 [51].
36 [1997] 1 WLR 97.

date. When he failed to do so, he was committed for contempt and sentenced to a term of imprisonment. On his release he took no action to return the items and the wife applied a second time to have him committed for contempt. The primary judge held the husband to be in contempt of the original order and sentenced him to a further term of imprisonment. The husband's appeal was allowed, upon the basis that there had been but one distinct breach of the order which happened when the husband failed to return the goods by the date specified within it. Having been sentenced for that breach, he could not be sentenced again. Neill LJ (with whom the other members of the court agreed) said:[37]

> "[B]oth as a matter of principle and on authority, if there is a breach of an order to do a certain act by a certain date, such as the delivery of goods, and that non-compliance is visited with a penalty, the breach cannot be the subject matter of a further committal order. If the failure by the alleged contemnor has continued, then it is necessary to go back to court and obtain a further order."

In contrast, in *Wilkinson* there had been a further order and it was the breach of that second order for which the disputed penalty was imposed.

[49] Returning to the present case, the primary judge discussed some Canadian cases and set out a passage from a judgment of the Ontario Court of Appeal,[38] which quoted this passage from another judgment of that court:[39]

> "To permit only one penal sanction for the ongoing breach of an order deprives the court of the ability to impose measured, but incremental, sanctions to obtain compliance with that order. In other words, if the court can impose only one period of incarceration for a civil contempt, then it cannot address, in any meaningful way, a contemnor's continuing defiance."

It is to be noted that the court there referred to an "ongoing breach" and a "continuing defiance", rather than to distinct acts. The passage was applied, as the primary judge in the present case noted, in upholding the imposition of a further penalty for a "continuing unwillingness to comply" with an order against a judgment debtor that he provide responsive answers to questions in an examination in aid of the execution of a judgment.[40]

[50] The primary judge cited some cases from the United States, the first of which was *Ushkowitz v McCloskey*,[41] a decision of the United States Court of Appeals for the Second Circuit. When they appeared before a grand jury, three witnesses had refused to answer questions as to the whereabouts of a person. They were sentenced to terms of imprisonment for contempt. After serving their terms, they were again summoned to appear, they refused to answer and were sentenced to further terms for contempt. Again after serving those terms, they were again summoned, they refused to answer and were sentenced to imprisonment for a third time. The court held that:[42]

> "[The] appellants were not tried or punished more than once for a single offense. Each episode before the grand jury was a separate and distinct contempt. The conduct for which the sentences were imposed

---

37 *Kumari v Jalal* [1997] 1 WLR 97, 101.
38 *Doobay v Diamond* [2012] ONCA 580 [35]–[37].
39 *Korea Data Systems Co v Chiang* [2009] ONCA 3 [44].
40 *Scott v Witness JA* [2015] QSC 48, 12 [64].
41 359 F 2d 788 (2nd Cir, 1966).
42 Ibid 788, 789-790.

> was similar conduct, but it was engaged in on three occasions separated from each other by appreciable periods of time …
>
> The occasions on which they refused to answer were separated from each other not only by time, but by the prison terms which were imposed as punishment in order to induce a change in their contumacious conduct …"

The primary judge also cited, but did not discuss, a judgment in 2014 of the United States Court of Appeals, Sixth Circuit in *United States v Farah*.[43] The defendant Farah was convicted of wilfully disobeying an order requiring his testimony by deposition for use in a criminal prosecution of a group of some 30 defendants. Those charges were severed into separate trials of different defendants and in the first of them, Farah refused to testify. The trial judge found him to be in civil contempt and ordered Farah's detention for the remainder of the trial unless he purged the contempt by testifying. On the next day, Farah again refused to testify and remained in custody. At a subsequent hearing, Farah was found guilty of criminal contempt and was sentenced to a term of four months' imprisonment. Subsequently an order was made that Farah's testimony by deposition be taken for the purpose of the trial of other defendants within the group. At the deposition, he persisted in his refusal to provide evidence and indicated that he would not testify in any of the trials of group members. He was charged with criminal contempt for refusing to testify at the deposition. He was convicted and appealed. He argued that his refusal to testify at the deposition was a continuation of his conduct in the first trial, which was the subject of his prior contempt conviction. The government argued that this was a distinct contempt. By a majority, the court accepted Farah's argument, holding that this was a continuing contempt which began with Farah's refusal to testify in the first trial, conduct for which he had already been charged and punished. It did not matter that the prosecution of the 30 defendants had been separated into different trials, because Farah's testimony which was sought for the second and subsequent trials "concerned the same subject matter – evidence of the gang's conspiratorial child sex trafficking activities".[44]

[51] *United States v Farah* applied a decision of the Supreme Court of the United States in *Yates v United States*,[45] where the defendant Yates was called as a witness in a prosecution for conspiracy to violate the Smith Act. She refused to answer questions as to whether certain of her friends were communists and was held in contempt and detained in prison until she answered. Four days later in the same trial, she again refused to answer the same questions. Some 11 questions were then asked (each about a different person) and she was held in criminal contempt for each refusal and sentenced to one year of imprisonment on each, to be served concurrently. The Supreme Court reduced the 11 punishments to one, holding that there had been only one "continuous contempt" in the period spanning the two days on which she appeared as a witness at this trial. It was held that she had "carved out an area of refusal" within which she "remained … in all her subsequent refusals".[46] Writing for the majority, Clark J said:[47]

> "[T]he prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already

---

43 766 F 3d 599 (6th Cir, 2014).
44 Ibid [3].
45 355 US 66 (1957).
46 Ibid 73-74.
47 Ibid 73.

> has refused answers … The Government admits … that only one contempt would result if Mrs Yates had flatly refused on [the first day] to answer *any* questions and had maintained such a position. We deem it *a fortiori* true that where a witness draws the lines of refusal in less sweeping fashion by declining to answer questions within a generally defined area of interrogation, the prosecutor cannot multiply contempts by further questions within that area. The policy of the law must be to encourage testimony; a witness willing to testify freely as to all areas of investigation but one, should not be subject to more numerous charges of contempt than a witness unwilling to give any testimony at all."

[52] In the present case, *Yates* was cited by the primary judge, in a footnote to the passage from his judgment which I have set out above at [39], where his Honour distinguished *Yates* upon the basis that the conduct in that case "should be seen as one episode constituting one, continuing refusal", whereas the present case involved distinct refusals "on different occasions".

[53] His Honour also there noted two Australian cases, which he said focussed "on the measure of punishment rather than on whether repeated contraventions constitute distinct contempts".[48]

[54] The primary judge then discussed the judgment of this court in *R v Shea*.[49] The respondent to that appeal was charged on indictment with two counts of refusing to answer a question at an examination as directed by the examiner, an offence under s 30(2)(6) of the *Australian Crime Commission Act* 2002 (Cth). In September 2007, the respondent had appeared under a summons to give evidence at such an examination, when he refused to answer any questions. He was then directed to answer a particular question, which was whether he knew a certain person, and still refused. He was charged with refusing to answer and in May 2008, he pleaded guilty and was sentenced to 12 months' imprisonment. Whilst still in custody under that sentence, he was served with another summons in similar terms to the first. He appeared in answer to that summons in August 2008, when he answered several questions before refusing to answer any further. He was directed to answer a certain question as to whether he had been involved in drug trafficking since his appearance before the Commission in September 2007. Again he refused. He was directed to answer another question as to his relationship with a certain person which he refused to do. The two counts on the relevant indictment concerned his refusal to answer those two questions as directed. At first instance he was granted a stay of the proceedings on the indictment because they were, in the words used in *Walton v Gardiner*:[50]

> "… unjustifiably vexatious and oppressive for the reason that it [was] sought to litigate anew a case which [had] already been disposed of by earlier proceedings".

[55] The appeal was allowed. Critical to the outcome was the fact that the two questions, which were the subject of the counts on the indictment, had not been asked in the earlier examination. An offence of the kind alleged occurred where there was a refusal to answer a question which the examiner had required the defendant to answer. Accordingly, as Holmes JA (as the Chief Justice then was) noted, the respondent could not

---

48 *Construction, Forestry, Mining and Energy Union v Williams* (2009) 262 ALR 417; [2009] FCAFC 171; *Grocon v Construction, Forestry, Mining and Energy Union (No 2)* [2014] VSC 134.

49 [2010] QCA 339.

50 (1993) 177 CLR 378, 393.

have pleaded *autrefois convict* nor *autrefois puni* under s 16 of the *Criminal Code*.[51] Her Honour said that the case "was not in any sense a case already disposed of by earlier proceedings [and] it did not entail 'multiple prosecutions arising out of the one set of events'. The factual bases for the second set of charges were entirely distinct from those of the first."[52] Therefore the second indictment was not a litigation anew of a matter already dealt with and "all that had happened was that the respondent had previously been sentenced for *similar conduct*" (emphasis added).[53]

[56] In the present case, the primary judge rejected a submission that *Shea* decided, in effect, that a second prosecution founded on a second refusal to answer the *same* question would inevitably have constituted an abuse of process.[54] His Honour added:[55]

> "And the applicant's success would not see the respondent twice punished for refusing to answer the question posed in 2013: instead, it would see him punished for the first time for his refusal to answer the question posed last year."

[57] It was upon this analysis of these authorities that the primary judge concluded that under the general law, there is no impediment to a person "twice be[ing] punished for the repetition, on separate occasions, of a refusal to comply with a lawful direction to answer a question posed pursuant to authority … conferred by statute."[56]

[58] The primary judge then returned to the question whether a "second contempt", as that term is used in s 199(8B)(b), "comprehends the repetition of a refusal to answer a particular question posed after the witness has served the imprisonment 'decided by the court' for the first refusal".[57] He discussed the argument for the present appellant that his second refusal to answer the question could not be a "second contempt", because of the principle of legality.[58] His Honour said that:

> "[86] To regard the s 199(8B) gradations in the mandatory minimums as not comprehending repetition of earlier conduct that constituted contempt would not give effect to their apparent coercive purpose."

[59] The primary judge then concluded that the appellant had to be sentenced under s 199(8B) and imposed the mandatory minimum sentence of two and a half years.

Was this a different contempt?

[60] It is necessary to consider first whether this was a different contempt from that for which the appellant had been punished in 2013 and if not, whether there was any power to punish him again.

[61] By September 2014, s 190(1) of the Act had been amended, although not materially, so that it was (and is) as follows:

> "190 Refusal to answer question
>
> (1) A witness at a commission hearing must answer a question put to the person at the hearing by the presiding officer, unless the person has a reasonable excuse.

---

51 *R v Shea* [2010] QCA 339, 8 [15].
52 Ibid 10 [21].
53 Ibid 10 [23].
54 *Scott v Witness JA* [2015] QSC 48, 16 [80].
55 Ibid 17 [82].
56 Ibid 11 [55].
57 Ibid 11 [52].
58 Ibid 11 [54], citing *Lee v NSW Crime Commission* (2013) 251 CLR 196; [2013] HCA 39.

> Maximum penalty – 200 penalty units or 5 years imprisonment."

[62] The appellant was found to be in contempt by a contravention of s 190(1) which was constituted by the *act* of refusing to answer a question. The primary judge reasoned that this was a separate contempt from that which occurred in 2013, because it was a different act. It seems that his Honour was not asked to consider whether the contempt was constituted by an omission rather than an act.

[63] On 11 September 2014 the appellant did not simply remain silent when asked the question. He said that he was not prepared to say where the money was. The appellant's saying these words was an act by him. But the contravention was not by that act, but rather by his failure to answer the question. Section 190(1) was and is in terms which impose an obligation. A contravention of s 190(1) occurs because the witness does not do what the section requires. Put another way, a person in contempt in this circumstance is punished not for what he says but what he fails to say in answer to a question put to him at a hearing.

[64] Consistently with s 190(1) being contravened by an omission, s 198(4) and s 199(8A)(a) each describe a contravention of s 190 as "a failure by a person … to answer a question put to the person at the hearing".

[65] When the appellant failed to answer the question when it was put to him on 29 May 2013, he became in contempt of the presiding officer. That contempt, constituted by his failure to answer, persisted as long as the hearing continued and the contempt was not purged. In other words this was a continuing contempt.

[66] The difference between a continuing contempt and a series of distinct contempts is illustrated by the judgment of the High Court in *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd*.[59] The respondent there had obtained an interlocutory injunction to restrain the appellants from imposing and maintaining a ban on the provision of goods or services to the respondent's abattoirs. The appellant union maintained a picket line on and after the date of injunction (12 June 1985) and on 21 June 1985, Bowen CJ found that the union was in breach of the order and fined the union $10,000 "in respect of breach of [the] order … of 12th June 1985" and further ordered that the union pay a fine of $2000 per day "so long as the breach continue[d]".[60] On 18 July 1985 the contempt application again came before Bowen CJ who ordered that a writ of sequestration should issue against the union. An appeal by the union, against the orders imposing the fines and directing the issue of the writ for sequestration, to the Full Court of the Federal Court was dismissed and the union appealed to the High Court. One of its arguments was that the imposition of a daily fine of $2,000 was "an anticipatory punishment for future default in complying with a Court order" which was beyond the court's power. But the majority (Gibbs CJ, Mason, Wilson and Deane JJ) said that this was an incorrect description of the imposition of the daily penalty. They said:[61]

> "In our opinion, the Chief Judge imposed the daily fine in respect *of a then presently existing contempt which was continuing* in conformity with an attitude of determined disobedience earlier expressed by the

---

59 (1986) 161 CLR 98; [1986] HCA 46.
60 Ibid 103.
61 Ibid 113-114.

> secretary of the Union. *It was not a case of successive contempts. There was one contempt which began with the refusal of the Union to abide by the interlocutory injunction … and was continuing on 21 June 1985* when the matter was before Bowen CJ. There will often be elements of futurity in orders of a court which are designed to bring a contempt of court to an end. At stake is the public interest in vindicating the authority of the court and maintaining respect for the law. In principle, there is no good reason in appropriate circumstances for denying a court access to such a means of bringing a contempt to an end. There are ample precedents where courts have taken strong measures in order to coerce compliance with an order of the court. In the case of an individual contemnor, he may be imprisoned until the contempt is purged. The committal to prison is of a conditional nature, remaining in force until the contempt comes to an end or further order is made. As soon as the contempt is purged, the offender is entitled to release ex debito justitiae."
>
> (Emphasis added).

Brennan J dissented, holding that if the amount of the fine was to be according to the period during which a contempt continued, the fine could not be ordered until there had been a judicial determination of the length of that period and of the consequent amount of the fine.[62] But Brennan J did not disagree with the majority view that this was a single continuing contempt, rather than a case of successive contempts.

[67] An example of a continuing contempt by failing to answer questions during an inquiry conducted under a statutory authority is found in a series of judgments of the Full Court of the Supreme Court of South Australia in 1982, each called *Von Doussa v Owens*. The applicant had been appointed under the *Securities Industry Act* 1979-1980 to investigate matters involving certain companies. The respondent Owens gave evidence at the investigation, in the course of which he declined to answer a question contrary to the requirement of the applicant. Under the *Securities Industry (South Australia) Code*, the applicant certified to the court that Owens had failed, without reasonable excuse, to comply with his requirement as the Inspector. The Code provided that in that event, the court might enquire and, amongst other things, order the witness to comply with the requirement of the Inspector within such period as the court fixed. On 13 May 1982, Owens was ordered to comply with the applicant's requirement within 28 days, by providing information in response to the question or questions which he had not answered.[63]

[68] Owens failed to answer the questions in spite of the order and an application was made to the Full Court that he be dealt with for being in contempt of court. The court held him to be in contempt and issued a writ of attachment.[64] That order having been made on 11 August 1982, Owens was taken into custody. On 7 October 1982, whilst still refusing to answer the questions, Owens applied to be discharged arguing that he had been sufficiently punished for his contempt of court. On that day, the Full Court refused his application. King CJ then said:[65]

> "This investigation is still in progress in that the inspector has not, we are told, lodged his report, and the applicant still has the opportunity

---

62 Ibid 117.
63 *Von Doussa v Owens (No 1)* (1982) 30 SASR 367.
64 *Von Doussa v Owens (No 2)* (1982) 30 SASR 391.
65 *Von Doussa v Owens (No 3)* (1982) 31 SASR 116, 118.

> to purge his contempt by giving the answers required. His *continuing non-compliance with the Court's order* to do so amounts to a deliberate and considered persistent defiance of the authority of the law."
>
> (Emphasis added).

On 3 November 1982, Owens again applied for an order that he be discharged from custody. This application was successful. By a majority (Mitchell and Wells JJ, Zelling J diss), the court decided that, practically speaking, there was no remaining opportunity by that stage for the contempt to be purged so that the time had come for the court "to consider what is the appropriate penalty for the contempt of which the respondent has been guilty."[66] Having regard to the time that Owens had been in custody he was discharged immediately. *Von Doussa v Owens* illustrates both the characterisation of a persistent refusal of this kind as a single continuing contempt and the flexibility of a court's powers to be exercised for either or both coercive and punitive purposes.

[69] The notion of a continuing contempt is relevant here although, where a witness fails to answer a question at a hearing, the witness also commits an offence. The contempt is subject to a different statutory regime which provides, for example, for different and heavier penalties for a failure to answer as a contempt than for the offence. The minimum penalties prescribed by s 199(8B) do not apply to an offence. The statutory regime employs the court's rules for the punishment of a contempt and expressly provides for the purging of a contempt.[67]

[70] In the 2013 judgment the finding which was made as to the fact of the appellant's contempt was that the judge was satisfied "that the respondent was in contempt of the presiding officer on 29 May 2013." A finding in those terms was explained by the appellant's admission of the contempt as described in the presiding officer's certificate of contempt pursuant to s 199(2) which was in these terms:[68]

> "I am satisfied that there is evidence that the witness is in contempt of the presiding officer conducting a CMC hearing in that, at a CMC hearing the witness failed to answer a question put to the witness by me, the presiding officer".

That certificate was issued on 29 May 2013. It cannot be thought that her Honour considered that the contempt was confined to that day and had not continued. As I have discussed, the appellant was sentenced on the premise that by reason of the contempt, the Commission was and would remain deprived of information which an answer to the question would have provided.

[71] The appellant's contempt was in his failure to provide the information which the question required of him, a failure which commenced on 29 May 2013 and was persisting at the time that he was punished by the 2013 judgment. It was because the contempt persisted after the 2013 judgment that the appellant remained able to purge his contempt as long as the hearing continued. He was punished by the 2013 judgment upon the basis that he would persist in his failure to provide the information. But the sentence which was imposed was subject to the qualification that under UCPR r 931, the court could order his discharge before the end of the term.

[72] The hearing which he attended on 29 May 2013 was adjourned many times but it was the same hearing which the appellant attended on 11 September 2014. As I have discussed,

---

66 Ibid 119.

67 *Crime and Corruption Act* 2001 (Qld) s 199(8E).

68 *O'Connor v Witness G* [2013] QSC 281, 4.

on each occasion on which he attended he did so in response to the same attendance notice. The primary judge treated the two as the same hearing, noting that the Commission had done so.[69]

[73] It is conceded by the respondent to this appeal (and by the Attorney-General supporting his submissions in relevant respects) that the question which was put in September 2014 is relevantly the same as that which he was asked on 29 May 2013. In September 2014, his response to that question was a persistence in his failure to provide the information which the question sought. This was not a distinct contempt but simply a manifestation of his continuing defiance of the requirements of s 190(1) and the authority of the Commission.

[74] It follows, in my respectful opinion, that the primary judge erred in characterising this as a distinct instance of contempt. That was critical to his conclusion that the appellant was to be further punished. The court has a power to make several orders against a contemnor for a continuing contempt. But where, as here, the contemnor has been punished not by an interim order but by a judgment which has determined the appropriate penalty for a continuing contempt which will not be purged, the court can make no further order. Because it was not a distinct contempt in 2014, it was not a "second contempt" under s 199(8B). Nor was it a "first contempt", because it was a contempt which began before s 199(8B) commenced to operate. The court having enquired into the alleged contempt should have dismissed the proceeding which the present respondent had commenced.

[75] At least for this reason, the appeal should be allowed, the order made on 11 March 2015 set aside and the appellant discharged.

Alternative argument: abuse of process

[76] If, contrary to my conclusion, there was a distinct contempt by the appellant's failure to answer the question in 2014, I would accept the appellant's submission that the 2014 contempt proceeding was an abuse of process and that it ought to have been dismissed accordingly.

[77] A contempt proceeding of this kind has a number of purposes: the coercion of the witness into compliance with the Act, the punishment of the witness, the denunciation of the contempt and the deterrence of like conduct by other witnesses.[70] When the appellant was sentenced in 2013, there was no basis for thinking that each of those purposes was not considered by that judge. Her Honour referred to what she described as the relevant factors for the assessment of a proper punishment for a contempt of this type by reference to the judgment of Dunford J in *Wood v Staunton (No 5*).[71] She also referred to UCPR r 931(2) by which the court could order the discharge before the end of the term of a person imprisoned in these circumstances. But the term of imprisonment was fixed upon the expectation that the contempt would not be purged. The 2013 judgment was the court's determination of the appropriate punishment for the permanent withholding of the information which an answer to the question would have provided.

---

69 *Scott v Witness JA* [2015] QSC 48, 11 [51].

70 There being no distinction under the Act between what have been described as civil and criminal contempts as contempt of courts, a distinction of doubtful relevance in any case: *Witham v Holloway* (1995) 183 CLR 525, 530-535, 538-545.

71 (1996) 86 A Crim R 183, 185.

[78] Absent the 2013 amendments, there could have been no proper purpose to be served by this second contempt proceeding in 2014. The court had sentenced the appellant to a term of imprisonment which had been fixed upon the basis that the appellant's failure to answer the question would not be remedied. That involved a balancing of the relevant considerations, including the purposes of punishment and coercion.

[79] The position was no different because of the 2013 amendments. If those amendments were engaged because this was a distinct contempt and a "second contempt" in the sense of s 199(8B)(b), it would not follow that there was any proper purpose to be served by this proceeding. The amendments did not specifically address the particular circumstances here, where the "second contempt" did not make the appellant's conduct more worthy of punishment than that for which he had already been punished in 2013.

[80] In *Walton v Gardiner*,[72] Mason CJ, Deane and Dawson JJ said:[73]

> "The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness."

Their Honours noted, by reference to what Gaudron J had said in *Jago v District Court (NSW)*[74] that the power of a court "to control its own process and proceedings is such that its exercise is not restricted to defined and closed categories, but may be exercised as and when the administration of justice demands."[75] One example given by their Honours was where, notwithstanding that the circumstances do not give rise to an estoppel, the proceedings before a court would be "unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings."[76] In my view, the present case would be of that kind, if there was a distinct contempt in 2014, because it was in substance the same case as in 2013, namely for the punishment for the failure to disclose what had happened to the money.

[81] A similar argument of abuse of process was considered but rejected by Bell J sitting in the Supreme Court of New South Wales, in *New South Wales Crime Commission v Field*.[77] Field was the subject of orders made under the *Criminal Assets Recovery Act* 1990 (NSW), restraining dealings with his interest in property and requiring his examination on oath concerning his affairs and those of certain other persons. An order was made which required his attendance before a registrar of the court to be examined. When Field appeared before the registrar he refused to be sworn and examined and his counsel informed the court that Field wished to remain silent until after the completion of his criminal trial on a charge of the importation of narcotics. The Crime Commission moved that Field be found guilty of contempt of court for his failure to comply with the examination order. When that application came before her Honour, Field's counsel again said that he wished to remain silent until after the completion of his criminal trial. It seems that the contempt proceeding was then

---

72 (1993) 177 CLR 378; [1993] HCA 77.
73 Ibid 392-393.
74 (1989) 168 CLR 23, 58.
75 Cited in *Walton v Gardiner* (1993) 177 CLR 378, 394.
76 Ibid 393.
77 [2004] NSWSC 1051.

adjourned. The following year, Field was found guilty at his trial for which he was sentenced to imprisonment for 13 years commencing in January 2001 with a non-parole period of seven years. In 2003, Bell J convicted Field of contempt of court and sentenced him to 12 months' imprisonment which was ordered to commence on 5 June 2007, having regard to his term of imprisonment for the drug offence. It would appear that the finalisation of the contempt proceedings was delayed by Field's medical condition. In November 2004, the Commission again moved to have Field examined on oath pursuant to the examination order. Field argued that any attempt to secure compliance with the examination order amounted to an abuse of process of the court. He argued that it was oppressive for the Commission, which was moving to have him dealt with by way of the imposition of a determinate sentence for contempt, to come back to the court to seek further enforcement of the examination order. Bell J rejected that argument because of the particular basis upon which she had sentenced him. As her Honour recorded, his stance on that occasion had been that he was unwilling to comply with the examination order until the criminal proceedings that were then pending against him were finalised and he had been sentenced upon that basis. If he was to refuse to be examined after the finalisation of those proceedings, and consequently punished for contempt, he would be punished for a different and more extensive defiance of the court's order. For that reason, Bell J was not persuaded that to require him to be subject to the examination order would be to allow the processes of the court to be made instruments of oppression or injustice.[78]

[82] In contrast, the 2013 order was to punish the appellant upon the basis that he would never supply the information as to the whereabouts of the cash.

[83] For that alternative reason I would allow the appeal, set aside the order of the primary judge and discharge the appellant. It should be noted that at the hearing of this appeal, counsel for the respondent objected to the appellant arguing an abuse of process. The objection was from an apprehension that the appellant was alleging that the respondent (and perhaps others within the Commission) had acted maliciously in repeating the question in 2014 and in bringing the contempt proceeding in the court. However that was not the appellant's argument.

Section 199(8B)

[84] In view of my conclusions thus far, it is unnecessary to consider the appellant's arguments as to the effect or otherwise of s 199(8B) but I should record my views about them.

[85] If, contrary to my conclusion, this was a distinct contempt and the proceeding was not an abuse of process, there would be a question as to whether it was a "second contempt" in the sense of that expression in s 199(8B)(b). There is no definition of "first contempt", "second contempt" or "third or subsequent contempt". Clearly such contempts must be of a kind as described in s 199(8A). And as a contempt of a kind described in s 199(8A) must fall within one but only one of paras (a), (b) and (c) of s 199(8B), the meaning of (for example) "a second contempt" must be consistent with the meaning of "a third or subsequent contempt".

[86] I have referred already to the appellant's argument, which the primary judge rejected, that this could not have been a "second contempt" because that would give ss (8B) a retrospective operation and it is to be presumed that a retrospective operation was not intended. I respectfully agree with the primary judge's reasoning for rejecting

---

78 Ibid [24]-[25].

that argument. The amendment did not affect what should be the punishment for a distinct contempt which had occurred prior to the amendment.

[87] However, there would still be a question as to whether, upon its proper construction, para (b) can be engaged where there has not been a previous contempt which engaged para (a) of ss (8B). Subsection 199(8A) requires, in the case of contempts to which it applies, the imposition of a term of actual imprisonment. For this provision to apply to a contempt which preceded the date upon which it commenced to operate, clear words to that effect would have been required. Therefore "the contempt" in s 199(8A) must be confined to one which occurred only after the commencement of the amendment. Subsections (8B) through (8F) apply only where a person is punished under ss (8A). There are express words to that effect in ss (8D) and (8E). Subsection (8F) is apparently referable to an occasion referred to in ss (8E). Further "the term" in ss (8F) must be a reference to the term of imprisonment as required by ss (8A) because there is no other "term" to which s 199 refers.

[88] Subsection (8B) prescribes the minimum term which must be imposed where a term of imprisonment is imposed under ss (8A). Subsection (8B)(a) does not prescribe a mandatory term of imprisonment for any contempt other than one which is within ss (8A).

[89] A "second contempt" must have a characteristic in common with another contempt which has been certified. But that other contempt must be that which was "first certified". Moreover it must not only have that common characteristic but it must be a "second" contempt. That is a description of a contempt by its place in a sequence. The same may be said of a third or subsequent contempt within ss (8B)(c). According to the language of ss (8B), a contempt is a second contempt because it was preceded by a first contempt and so on.

[90] The alternative interpretation, upon which the appellant was sentenced, was that there could be a second contempt without a preceding first contempt. Upon that interpretation there could also be a third contempt without a first and second contempt. Upon that interpretation, the legislative intention was that where a contempt had been preceded by another contempt (relating to a hearing dealing with the same subject matter), the minimum punishment would be two and a half years' imprisonment regardless of whether the first contempt had required the imposition of any term.

[91] In my respectful view, the primary judge erred in this respect also. Any ambiguity as to the breach of these mandatory sentencing provisions should be construed in favour of the subject: See, eg, *Cobiac v Liddy*,[79] *Sillery v The Queen*,[80] *McMillan v Pryce*.[81] More generally, clear words are required for the legislation to significantly interfere with fundamental rights: *Re Bolton; Ex parte Beane*,[82] *Bropho v State of Western Australia*;[83] *Coco v The Queen.*[84]

[92] At least for this reason then I would have held that the contempt, if a contempt distinct from that in 2013, was not a second contempt under s 199(8B)(b), because there had been no "first contempt" within that provision.

---

79 (1969) 119 CLR 257, 269 (Windeyer J).
80 (1981) 180 CLR 353, 357 (Gibbs CJ), 359 (Murphy J).
81 (1997) 115 NTR 19, 23.
82 (1987) 162 CLR 514; [1987] HCA 12, 523 (Brennan J).
83 (1990) 171 CLR 1; [1990] HCA 24, 18.
84 (1994) 179 CLR 427; [1994] HCA 15, 437-438.

[93] The next of the appellant's arguments was not advanced to the primary judge. It is that para (b) is engaged only where the hearing to which the so-called second contempt related was a different hearing from that in which the earlier contempt was certified. Paragraph (b) could be engaged where there are two hearings. But the appellant's argument is that the second contempt must relate to a different hearing.

[94] The terms of para (b) if read alone, would not strongly support that argument. However the argument is supported by the terms of para (c), which is engaged where the contempt relates to a hearing dealing with the same subject matter as that dealt with in "*at least 2 hearings in each of which the person's contempt was certified ...*". There could not be a third contempt out of the same hearing in which there had been two earlier certifications of the person's contempt. And there would be no apparent reason for requiring that the three contempts must have occurred in more than one hearing, but need not have occurred in more than two hearings.

[95] The terms of para (c) indicate the correctness of the construction of para (b) for which the appellant contends. A second contempt which engages para (b) is one which relates to a different hearing from the first, just as a third contempt which engages para (c) relates to a different hearing from the two hearings to which the earlier contempts had related. The consequences of that construction are not unusual. The burden of mandatory minimum terms could not be imposed for conduct within the one hearing. Were it otherwise, then upon the respondent's contention that a failure to answer the same question constitutes a distinct contempt, the repetition of that question within the one hearing could lead to an accumulation of terms of two and a half and five years. Similar results could follow from, for example, a failure to answer three distinct questions but within the one hearing.

[96] The term "hearing" is not specifically defined for s 199(8B). It takes its meaning from other sections of the Act and in particular s 176 by which the Commission may authorise the holding of a hearing. As I have discussed,[85] there was but one hearing here.

[97] Therefore I would accept both of the appellant's arguments as to why, on the proper interpretation of s 199(8B), it did not require the term which was imposed. Had I concluded that there was a distinct contempt in 2014 and not an abuse of process, I would have allowed the appeal, set aside the order made and re-sentenced the appellant. In that case, having regard to the basis upon which the appellant was punished in 2013 and to the further period of his imprisonment by the 2014 orders, I would have ordered his immediate discharge.

Appellant's constitutional argument

[98] This argument, which was not made to the primary judge, challenged the validity of ss 199(8A) and (8B) upon the basis that they were enacted beyond the competence of the Queensland Parliament.[86]

[99] The appellant's argument appeared to have two elements. The first, which sought support from *Kirk v Industrial Court of New South Wales*,[87] was that the provisions were an invalid intrusion upon the power of the Supreme Court of Queensland to exercise what the argument described as its contempt jurisdiction. The power to deal with contempts of court has been described as "a power incidental to the function of

---

85 See [32], [33], [70].

86 The appellant's outline of argument appeared to go further, challenging the validity of the entirety of s 199. However in the course of the hearing, the argument was confined to these subsections.

87 (2010) 239 CLR 531; [2010] HCA 1.

superintending the administration of justice".[88] It was argued that just as the supervisory jurisdiction of the Supreme Court to enforce the limits of state executive and judicial power is a defining characteristic of the court, so too is the court's power to deal with contempt. By prescribing a mandatory minimum punishment for a contempt, ss 199(8A) and (8B) were said to intrude upon that essential power of the court.

[100] The second element to the appellant's argument sought support from *Kable v Director of Public Prosecutions (NSW)*.[89] It was argued that the exercise of jurisdiction under ss 199(8A) and (8B) would be incompatible with the integrity, independence and impartiality of the Supreme Court as a court in which federal jurisdiction has been invested under Ch III of the Constitution. Part of this argument emphasised that the jurisdiction in question was one which was to be exercised for the benefit of the performance of a function of the executive government, namely the investigation of criminal activity or other purposes for which the Commission is able to conduct a hearing under the Act.

[101] As to the first element, the essential difficulty with the argument is that it failed to distinguish between the court's power to control its own process by dealing with contempts of court and the statutory jurisdiction to punish for acts which are described as contempts of the presiding officer of a hearing conducted by the Commission. The exercise of that statutory jurisdiction does not intrude upon the court's power to regulate its own process by punishing for contempts of court. It is true that by ss 199(8) and (9) the court may punish for a contempt of the presiding officer as if that was a contempt in relation to proceedings in the court and may apply the relevant procedural rules for such a contempt. But that is not to say that the court's power to deal with a contempt in relation to its own proceedings is affected by s 199. Consequently the appellant's argument has no support from *Kirk*.

[102] As the second element was developed in the appellant's submissions, it became reliant upon the fact that these provisions required minimum levels of punishment. It was not argued that absent those requirements, the integrity, independence and impartiality of the Supreme Court would be affected by conferring a jurisdiction upon it to punish for an interference with the performance of a function of the executive government. Therefore the argument became limited to ss 199(8A) and (8B).

[103] In *Assistant Commissioner Condon v Pompano Pty Ltd*[90] French CJ said:[91]

> "The 'institutional integrity' of a court is said to be distorted if it no longer exhibits in some relevant aspect the defining characteristics which mark a court apart from other decision-making bodies. The defining characteristics of courts include:
>
> - the reality and appearance of decisional independence and impartiality;
> - the application of procedural fairness;
> - adherence as a general rule to the open court principle;
> - the provision of reasons for the courts' decisions.
>
> Those characteristics are not exhaustive." (Footnotes omitted).

---

88 *Porter v The King; Ex parte Yee* (1926) 37 CLR 432, 443; [1926] HCA 9 (Isaacs J), cited in *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 395 [16]; [1999] HCA 57 (Gleeson CJ and Gummow J).

89 (1996) 189 CLR 51; [1996] HCA 24.

90 (2013) 252 CLR 38; [2013] HCA 7.

91 Ibid 71 [67].

The limitations prescribed by ss 199(8A) and (8B) upon the court's powers conferred by s 199 do not affect characteristics to which the Chief Justice there referred or, more generally, the institutional integrity of the Supreme Court. The specified minimum penalty is to be imposed only if the court makes its own conclusion that the person has committed the contempt.[92] The prescription of a mandatory minimum penalty in that event does not affect the institutional integrity of the court, just as the prescription of a mandatory minimum sentence is not on that account alone inconsistent with Ch III: See, *Magaming v The Queen*[93] and *Kuczborski v Queensland*[94] where the plurality said that:[95]

> "[I]t is at 'the heart of judicial power' to determine whether a person has engaged in conduct which is forbidden by law and, if so, to make an order as to the consequences which the law imposes by reason of that conduct."

[104] For these reasons, had it been necessary to apply ss 199(8A) and (8B), I would have rejected the argument that they were invalid.

Orders

[105] I would order as follows:

1. Allow the appeal.
2. Set aside the order made on 11 March 2015.
3. Order the discharge of the appellant forthwith.
4. Order the respondent to pay the appellant's costs of the appeal and the proceeding in the Trial Division.

[106] **PETER LYONS J:** I have had the advantage of reading in draft the reasons for judgment of Philip McMurdo JA. I gratefully adopt his Honour's description of the factual background and statutory context to this appeal. I agree with his Honour's conclusions that the appellant has a right of appeal to this Court; that the contempt for which the appellant was sentenced in 2013 was his failure to answer the question then asked; and that that was a continuing contempt.

[107] In the course of oral submissions for the Attorney-General, the relevant provisions of the Act were said, in effect, to identify conduct to which the appellation "contempt" was made applicable; and to provide for its punishment. In doing so, the Act extended the operation of relevant aspects of the general law to such conduct, as well as the operation of what was described as the relevant "statutory architecture" found in the *Uniform Civil Procedure Rules* 1999 (Qld) (with necessary changes). In my view that is a sufficiently accurate description of the effect of the Act for present purposes.

[108] Contempt under the Act is not limited to conduct which would amount to contempt of court in proceedings over which a judge is presiding in the judge's judicial capacity. Indeed, the basis on which the learned primary Judge found the appellant to be in contempt was his non-compliance with s 190(1); which is contempt by virtue of s 198(1)(c).

---

92 *Crime and Corruption Act* 2001 (Qld) s 199(8).
93 (2013) 252 CLR 381, 396 [49]; [2013] HCA 40 (French CJ, Hayne, Crennan, Kiefel and Bell JJ).
94 (2014) 254 CLR 51; [2014] HCA 46.
95 Ibid 118 [225].

[109] Leaving aside questions of a single course of conduct, it seems to me that a natural reading of the statutory provisions would lead to the result that a failure to answer a question on a second occasion when it is asked by the presiding officer would amount to a contempt, unless either s 190(1) or s 198(1)(c) does not then apply. I can see no reason to reach either conclusion. There is nothing in the language of the Act to support either conclusion. An important contextual consideration is that these provisions form part of a statutory regime which adopts what might be regarded as extraordinary means to facilitate the investigation of serious crimes. There may be good reason to repeat the question on a later occasion, for example, because the answer has become more significant, and whatever motive the witness had for refusing to answer previously has ceased to be operative. It seems to me difficult to conclude that the legislative provisions were not intended to operate in such circumstances.

[110] Once it is accepted that s 190 requires a witness to answer a question asked by the presiding officer on a second occasion, it seems to me that this amounts to a fresh "statutory command", analogous to the further orders identified by Philip McMurdo JA in his discussion of *Wilkinson v Anjum*. The witness's failure to answer on that occasion is, it seems to me, a separate contravention of a provision of the Act relating to a hearing, and thus a separate contempt.

[111] While I would not allow the appeal on this basis, I agree that the 2014 proceedings were an abuse of process. Otherwise I agree with the reasons for judgment of Philip McMurdo JA. I agree with the orders proposed by his Honour.