

Australian Crime Commission & Anor v LB [2009] NTSC 43

PARTIES: AUSTRALIAN CRIME COMMISSION

And:

THE QUEEN

v

LB

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING FEDERAL
JURISDICTION

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Australian Crime Commission Act 2002 (Cth)

Attorney-General (NSW) v Chidgey (2008) 182 A Crim R 536

R v Connell; Ex parte Hetton Bellbird Collieries Ltd (1944) 69 CLR 407;

Foley v Padley (1984) 154 CLR 349

Eglishaw v Australian Crime Commission [2006] FCA 818

Felice v County Court of Victoria (2006) VSC 12

Gideon v NSW Crime Commission (2008) 236 CLR 120

Kennedy v Baker (2004) 135 FCR 520
Malubel Pty Ltd v Elder (1998) 88 FCR 242
Ousley v R (1997) 192 CLR 69
Plaintiff S 157/2002 v The Commonwealth of Australia (2003) 211 CLR 476
RTA (NSW) v Conolly (2003) 57 NSWLR 310
Selby v Pennings (1998) 19 WAR 520
Williams v Keelty (2001) 111 FCR 175
X v Australian Crime Commission (2004) 139 FCR 413

REPRESENTATION:

Counsel:

First Applicant:	S Maharaj QC
Second Applicant:	J Renwick
Respondent:	M Abbott QC

Solicitors:

First Applicant:	Australian Government Solicitor
Second Applicant:	Office of the Commonwealth Director of Public Prosecutions
Respondent:	North Australian Aboriginal Justice Agency

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Australian Crime Commission & Anor v LB [2009] NTSC 43
No 20916896

BETWEEN:

AUSTRALIAN CRIME COMMISSION
First Applicant

AND:

THE QUEEN
Second Applicant

AND:

LB
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Published 11 September 2009)

Introduction

- [1] The respondent has been charged with a single count that contrary to s 30(2)(a) of the Australian Crime Commission Act 2002 (Cth)¹, on 24 February 2009 at Darwin, the respondent, being a person appearing as a witness at an examination before an examiner, when required either to take an oath or make an affirmation, refused or failed to comply with the

¹ Hereafter, the Act.

requirement. The respondent's trial is set down for hearing on 19 October 2009 for three days.

[2] On or about 21 August 2009 the solicitors for the respondent filed a subpoena addressed to the Australian Crime Commission. The subpoena was then served. The subpoena sought production of the following documents:

1. The minutes of the meeting of the Board of the Australian Crime Commission said to have occurred at 2.45pm on 5 February 2008 at which the Board purported to create by resolution the instrument entitled *Australian Crime Commission Special Intelligence Operation Authorisation and determination (Indigenous Violence or Child Abuse) 2007*.
2. The minutes of the meeting of the Board of the Australian Crime Commission said to have occurred at 2.07 pm on 3 December 2008 at which the Board purported to create by resolution the instrument entitled *Australian Crime Commission Special Intelligence Operation Authorisation and Determination (Indigenous Violence and Child Abuse) Amendment No 1 of 2008*.
3. Any reasons which Examiner Anderson recorded pursuant to s 28 of the Act as his reasons for being satisfied that it was reasonable in all the circumstances to issue a s 28 Summons to the respondent.

[3] On 4 September 2009, the Australian Crime Commission filed a summons seeking to set aside the subpoena served on the Australian Crime Commission on the basis that there is no legitimate forensic purpose for the issue of the subpoena and it is in the public interest not to disclose some parts of the documents sought. The summons was supported by an affidavit

of Mr Michael Outram sworn on 3 September 2009 which was read without objection.

- [4] The summons came on for hearing on 7 September 2009. The application was supported by the Commonwealth Director of Public Prosecutions.
- [5] When Senior Counsel for the Australian Crime Commission appeared by way of video conferencing on 7 September 2009, Ms Maharaj told the Court that there were no documents answering the description of the documents described in paragraph number one of the subpoena, but the other documents were in the possession of a solicitor who was in Court at the hearing of the application to set aside the subpoena. She did not tell the Court that the reason there were no documents answering the description of the documents described in paragraph number one of the subpoena was because the original determination of the Board was a resolution which had been made outside of a Board meeting under s 7J of the Act. This fact only emerged on the last day of the hearing of the application to set aside the subpoena.
- [6] On 9 September 2009, I dismissed the summons to set aside the subpoena and I granted the parties access to the documents which were subject to the subpoena and which were available in Court. I then stayed the orders of the Court pending the publication of my reasons for decision. Following are my reasons for decision.

The factual background

[7] On 12 February 2009, Mr J Andrews, who has been appointed an examiner under the Australian Crime Commission Act, issued a summons requiring the respondent to appear before him. The summons was served on the respondent. It required him to attend before Mr Anderson at 2.30 pm on Tuesday 24 February 2009.

[8] The operative part of the summons stated:

The Australian Crime Commission is conducting a special operation pursuant to a determination of its Board, a copy of which is annexed to this summons as annexure A.

Being satisfied that it is reasonable in all the circumstances to do so, pursuant to subsection 28(1) of the Australian Crime Commission Act 2002, I summon you to:

- (a) attend at 2.30 pm on Tuesday 24 February 2009 before an examiner at an examination to be held for the purposes of the said special operation at the Family Court of Australia, [...], to give evidence of federally relevant criminal activity involving Indigenous violence and child abuse and the unlawful sale, supply, trafficking or possession of illegal drugs in Indigenous communities; and
- (b) attend from day to day unless excused or released from further attendance.

[9] Annexure A to the summons was comprised of two documents. The first document was a document headed, “Australian Crime Commission Special Intelligence Operation Authorisation and Determination (Indigenous Violence or Child Abuse) *Amendment No. 1 of 2008* (emphasis added)”. The document essentially contained a resolution of the Board of the Australian Crime Commission extending the period of operation of the special

operation until 30 June 2009. The second document was a document headed, “Australian Crime Commission Operation Authorisation and Determination (Indigenous Violence or Child Abuse) 2008”. The document is expressed to be a document made under s 7C of the Act by resolution of the Board. It is signed by the Chair of the Board of the Australian Crime Commission.

[10] Of potential significance the document headed, “Australian Crime Commission Operation Authorisation and Determination (Indigenous Violence or Child Abuse) 2008” contained the following paragraphs:

4. Authorisation

Pursuant to paragraph 7C(1)(c) and subsection 7A(b) of the Act, the Board Authorises the ACC to undertake the intelligence operation mentioned in Schedule 1 relating to federally relevant criminal activity until 31 December 2008.

6. Determination

Pursuant to paragraph 7C(1)(b) and 7C(2) of the Act, the Board:

- (a) has considered whether methods of collecting criminal information and intelligence that do not involve the use of powers in the Act have been effective; and
- (b) determines that the intelligence operation mentioned in Schedule 1 is a special operation.

[11] Paragraph 2 of Schedule 1 of the above document set out the circumstances in which the authorisation and determination were made by the Board of the Australian Crime Commission. Paragraph 2 states:

The general nature of the circumstances constituting federally relevant criminal activity that may have been, may be being, or may in the future be, occurring are those implied from information available to Australian law enforcement agencies indicating that:

- (a) familial violence is deeply entrenched in Indigenous communities across most States with women and children the most common victims;
- (b) significant under-reporting of Indigenous violence or child abuse by victims, agencies, and community members is likely with intimidation, community hostility to outside intervention, and corruption helping to conceal the true nature of child abuse and violence; and
- (c) alcohol, illegal drug and substance abuse has direct links to Indigenous violence or child abuse and indirectly contributes to gross social dysfunction with the misuse of alcohol, cannabis and volatile substances allegedly occurring mainly in Indigenous communities.

[12] The summons to the respondent also had an Annexure B which set out the respondent's rights and obligations under s 29B of the Australian Crime Commission Act and a set of explanatory notes annexed to it. Paragraph 6 of the explanatory notes stated, "You will be required to take an oath or make an affirmation and truthfully answer the questions which you will be asked."

[13] The summons did not state the general nature of the matters in relation to which the respondent was to be questioned. Instead, the summons provided a formulaic summary of the nature of the special operation that was being conducted by the Australian Crime Commission.

[14] On 24 February 2009 the respondent appeared before Examiner Anderson.

The relevant provisions of the Australian Crime Commission Act

- [15] The Australian Crime Commission is established by s 7 of the Act. The Australian Crime Commission consists of the CEO, the examiners and the members of the staff of the Australian Crime Commission.
- [16] The functions of the Australian Crime Commission are to: collect, correlate, analyse and disseminate criminal information and intelligence and maintain a national data base of that information and intelligence; undertake when authorised by the Board, intelligence operations; investigate, when authorised by the Board, matters relating to federally relevant criminal activity; provide reports to the Board on the outcomes of those operations or investigations; provide strategic criminal intelligence assessments, and any other criminal information and intelligence, to the Board; provide advice to the Board on national criminal intelligence priorities; and undertake such other functions as are conferred on the Australian Crime Commission by other provisions of the Act or any other Act².
- [17] The Board is established by s 7B of the Act. The Board consists of the following members: the Commissioner of the Australian Federal Police; the Secretary of the Australian Attorney General's Department; the Chief Executive Officer of Customs; the Chair Person of the Australian Securities and Investments Commission; the Director-General of Security holding office under the Australian Security Intelligence Organisation Act 1979 (Cth); the Commissioner or head of the police force of each State and the

² Section 7A of the Act.

Northern Territory; the Chief of Police of the Australian Capital Territory and the CEO of the Australian Crime Commission. The Board forms an important part of the external governance arrangements of the Australian Crime Commission.

[18] The functions of the Board are to: determine national criminal intelligence priorities; provide strategic direction to the Australian Crime Commission and to determine the priorities of the Australian Crime Commission; authorise, in writing, the Australian Crime Commission to undertake intelligence operations or to investigate matters relating to federally relevant criminal activity; determine, in writing, whether such an operation is a special operation or whether such an investigation is a special investigation; determine, in writing, the class or classes of persons to participate in such an operation or investigation; to establish task forces; disseminate to law enforcement agencies or foreign law enforcement agencies, or to any other agency or body of the Commonwealth, a State or a Territory prescribed by the regulations, strategic criminal intelligence assessments provided to the Board by the Australian Crime Commission; report to the Inter-Governmental Committee on the Australian Crime Commissions performance; and undertake such other functions as are conferred on the Board by other provisions of the Act³.

³ Section 7C of the Act.

- [19] The Board functions by convening⁴ and conducting⁵ Board meetings at which various resolutions may be passed or by passing resolutions outside of Board meetings under s 7J of the Act. The Board may, with unanimous agreement of all the members of the Board (not including the CEO), establish committees to assist in carrying out the functions of the Board.
- [20] The Board cannot determine that an intelligence operation is a special operation, or that an investigation into matters relating to federally relevant criminal activity is a special investigation, unless at least nine Board members (including at least two Commonwealth Board members) vote in favour of making the determination⁶. Likewise, outside of a Board meeting the members of the Board cannot resolve to determine that an intelligence operation is a special operation, or that an investigation into matters relating to federally relevant criminal activity is a special investigation, unless nine members of the Board (not including the CEO but including at least two Commonwealth Board members) indicate by telephone or other mode of communication to the Chair of the Board that they are in favour of such a determination⁷.
- [21] Before determining that an intelligence operation is a special operation the Board must consider whether methods of collecting criminal information and intelligence that do not involve the use of powers under the Act have

⁴ Section 7D of the Act.

⁵ Sections 7E to 7H of the Act.

⁶ Subsection 7G(4) of the Act.

⁷ Subsection 7J(1)(b)(ii) of the Act.

been effective⁸. This requirement acknowledges the special coercive powers that the Australian Crime Commission has and is consistent with the principle, if not the requirement, that the special powers of the Australian Crime Commission should ordinarily only be used when ordinary law enforcement methods prove ineffective in combating serious crime.

[22] An examiner is to be appointed by the Governor-General by written instrument⁹. A person may not be appointed as an examiner unless he or she is enrolled as a legal practitioner, and has been so for at least five years¹⁰. An examiner has the power under the Act to conduct an examination for the purposes of a special Australian Crime Commission operation or special Australian Crime Commission investigation¹¹. A special Australian Crime Commission Operation or a special Australian Crime Commission investigation is either an intelligence operation that the Australian Crime Commission is undertaking and that the Board has determined to be a special operation; or an investigation into matters relating to a federally relevant criminal activity that the Australian Crime Commission is conducting and that the Board has determined to be a special investigation¹².

[23] An examination normally involves the examiner interrogating a person who has been summoned to appear before the examiner for the purpose of being interrogated about information that is relevant to a particular special

⁸ Subsection 7C(2) of the Act.

⁹ Subsection 46B (1) of the Act.

¹⁰ Subsection 46B (3) of the Act.

¹¹ Section 24A of the Act.

¹² Section 4 of the Act.

operation or a particular special investigation. Under s 28 of the Act an examiner may summon a person to appear before an examiner at an examination to give evidence and to produce such documents or other things (if any) as are referred to in the summons. It is an offence for a person to fail to attend before an examiner as required by a summons issued by an examiner¹³ and an examiner may apply to a Judge of the Federal Court for a warrant for the arrest of a person if there are reasonable grounds to believe a person who is the subject of the warrant is likely to abscond, has absconded or is otherwise attempting to evade service of the summons¹⁴.

[24] Before issuing the summons, the examiner must be satisfied that it is reasonable in all the circumstances to do so¹⁵. The examiner must also record in writing the reasons for the issue of the summons¹⁶. The record may be made before, at the time of or so soon as is practicable after the issue of the summons. Unless the examiner issuing the summons is satisfied that in the particular circumstances of the special Australian Crime Commission operation or investigation to which the examination relates it would prejudice the effectiveness of the operation or investigation, a summons is required to set out, so far as is reasonably practicable, the general nature of the matters in relation to which the person is to be questioned at the examination¹⁷.

¹³ Subsection 30 (1) of the Act.

¹⁴ Subsection 31 (1) of the Act.

¹⁵ Subsection 28(1A) of the Act.

¹⁶ Subsection 28(1A) of the Act.

¹⁷ Subsection 28 (3) of the Act.

[25] The examiner may regulate the conduct of proceedings at an examination as he or she thinks fit¹⁸. The purpose of an examination is to uncover or obtain information and investigate facts that are relevant to a special operation or special investigation. A person giving evidence at an examination may be represented by a legal practitioner¹⁹. An examiner may, at an examination, take evidence on oath or affirmation and for that purpose the examiner may require a person appearing at the examination to give evidence either to take an oath or to make an affirmation in a form approved by the examiner; and an examiner may administer an oath or affirmation to a person appearing at an examination²⁰. It is a criminal offence to refuse or fail to take an oath or make an affirmation when required to do so by an examiner²¹. Likewise, it is a criminal offence to refuse or fail to answer a question that an examiner requires a person to answer. The maximum penalty for these offences is five years imprisonment.

Subsection 30(2)(a) of the Act

[26] Subsection 30(2)(a) of the Act states:

A person appearing as a witness at an examination before an examiner shall not:

- (a) when required pursuant to section 28 either to take an oath or make an affirmation - refuse or fail to comply with the requirement;

¹⁸ Subsection 25A (1) of the Act.

¹⁹ Subsection 25A (2)(a) of the Act.

²⁰ Subsection 28(5) of the Act.

²¹ Subsection 30 (2)(a) of the Act.

[27] Subsection 30(6) of the Act states:

A person who contravenes subsection (1), (2) or (3) is guilty of an indictable offence that, subject to this section, is punishable, upon conviction, by a fine not exceeding 200 penalty units or imprisonment for a period not exceeding 5 years.

[28] The essential physical elements of the offence created by s 30(2)(a) and s 30(6) are as follows:

1. The respondent is a person who appeared as a witness at an examination before an examiner.
2. The respondent was required to take an oath or make an affirmation by the examiner or a person who is authorised to administer an oath and an affirmation.
3. The accused refused or failed to take an oath and he refused or failed to make an affirmation.

[29] “Examination” is not defined in the Act. However, the only examination that an examiner may conduct is an examination for the purposes of a special Australian Crime Commission operation or investigation. For a person to appear at an “examination” within the meaning of s 30(2)(a) of the Act the person’s appearance must be an appearance which is contemplated by the Act and the examination must be an examination which is authorised by the Act. The examination will not be an examination which is authorised by the Act if the relevant determination by the Board was not a determination that was authorised by the Act and was invalid or if the summons served on the person was a summons which was not authorised by the Act and was invalid. Alternatively, a person’s appearance may not be an

appearance that was contemplated by the Act if the summons was invalid.

In such circumstances an examiner will not have the jurisdiction to require a person to take an oath or make an affirmation.

[30] Relevantly, the determination of the Board will not be authorised or will be beyond the power granted to the Board by the Act and will be invalid if either s 7G(4) or s 7J(1)(b)(ii) of the Act are not complied with or if the Board failed to consider whether methods of collecting the criminal intelligence that do not involve the use of powers under the Act have been effective. Relevantly, the summons will be an unauthorised summons or beyond the power of the Act and will be invalid if the examiner failed to consider if it was reasonable in all the circumstances to issue the summons or if the examiner was not satisfied it was reasonable in all the circumstances to issue the summons. If any of these set of circumstances existed the examiner would be acting in excess of jurisdiction or beyond the power granted by the Act in requiring the respondent to either take an oath or make an affirmation. This interpretation follows from the coercive nature of the Act and the plain terms of the relevant sections of the Act. Such a construction of the provisions of s 28(1A) of the Act is further supported by s 28(8) which specifies the defects which do not affect the validity of a summons. The matters referred to in this paragraph constitute fundamental safeguards against the misuse of the coercive provisions of the Act.

[31] It is also arguable that the examiner's state of satisfaction about the reasonableness of issuing a summons would not be in accordance with an

essential and indispensable requirement of the Act if his state of satisfaction was unreasonable or if it was founded on an incorrect understanding of the law. It is arguable that a reasonable and legally correct state of satisfaction is a necessary jurisdictional fact²². If this is the correct interpretation of the Act then an examiner would have no jurisdiction to require a person to take an oath or make an affirmation if his state of satisfaction about the reasonableness of issuing a summons to a person was unreasonable.

[32] Senior Counsel for the Australian Crime Commission correctly conceded that s 16 of the Act is only engaged in circumstances where the determination of the Board was not lawfully made because of an error of law which did not go to jurisdiction, or because of a failure to comply with a provision of the Act which was not an inviolable jurisdictional restraint: *Plaintiff S 157/2002 v The Commonwealth of Australia*²³. The protection give by s 16 of the Act is not triggered where the determination of the Board was not lawfully made because of jurisdictional error, or failure to comply with an inviolable jurisdictional restraint.

The respondent's reasons for seeking the documents

[33] The respondent seeks disclosure of the contents of each of the documents that are the subject of the subpoena in order to determine if all of the essential or indispensable requirements for the examiner's jurisdiction under

²² *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407; *Foley v Padley* (1984) 154 CLR 349.

²³ (2003) 211 CLR 476.

the Act to require the respondent to take an oath or make an affirmation had been met.

[34] The respondent argues that for an examiner to have jurisdiction to require a witness to take an oath or make an affirmation there must be compliance with the following essential requirements of the Act:

1. There must be a valid resolution of the Board of the ACC:
 - (a) In respect of a resolution that an intelligence operation be determined to be a special operation at least nine of the 13 Board members of the ACC, including at least two eligible Commonwealth Board members must have voted in favour of the resolution;
 - (b) The voting must have occurred at a duly constituted Board meeting presided over by the Chair of the Board;
 - (c) Before voting on the resolution the Board must have considered whether ordinary methods of collecting criminal information and intelligence have been effective);
 - (d) The resolution passed by the Board and reduced to writing must authorise the ACC to undertake the intelligence operation; determine that the operation is a special operation; and create each of the instruments referred to in para 5 hereof.
2. There must be a valid Summons issued by an Examiner

The Examiner having received the written determination of the board in compliance with the Act must then before issuing the Summons be satisfied that it is reasonable in all the circumstances to issue the Summons (s 28(1)(A)); and record in writing his reasons for the issue of a Summons (s 28(1)(a)).

The argument of the Australian Crime Commission

[35] In her written submissions Ms Maharaj QC made the following arguments:

1. There is no legitimate forensic purpose for the production of the documents that are the subject of the subpoena filed by the respondent. The accused cannot amount an attack in these proceedings (collateral or otherwise) against the determination of the Board or the summons issued by the examiner, as these documents do not go to any element of the charge under s 30(2)(a) and are otherwise not relevant. The physical elements of the offence with which the respondent is charged do not include the validity of the summons or the determination.
2. Any attack on the validity of the summons issued by the examiner on the basis that either the determination or the process in issuing the summons are faulty that goes behind the face of the determination or the summons constitutes a collateral attack of the type not permitted in these proceedings.
3. The Court ought to find the respondent's attacks on the summons and the determination to be hopeless as all similar attacks in the Federal Court on various summonses issued under s 28 and other similar determinations have failed. The Court ought to find these judgments to be highly persuasive and reject outright the respondent's re-run of arguments rejected comprehensively by various judges of the Federal Court in Direct challenges.
4. Even if the Court was to find that legitimate forensic purpose exists regarding the subpoenaed documents, the Court ought to uphold in whole or in part (as claimed) the claims for public interest immunity and or legal professional privilege. The documents over which public interest immunity is claimed are immune from production because the public interest in non-disclosure far outweighs any consideration pointing to disclosure. These claims are supported by the affidavit of Mr Outram.

[36] The first argument was developed in the Australian Crime Commission's written submissions as follows. The attack being contemplated by the respondent on the determination of the Board and the summons issued by the examiner is an attack on administrative acts. The act of an examiner in issuing a summons under s 28 of the Act, and the act of the Board of the

Australian Crime Commission in authorising an investigation or operation under s 7C of the Act are administrative acts in the exercise of a statutory power. The validity of such administrative acts can be challenged in proper proceedings in the Federal Court but they cannot be put in issue in criminal proceedings.

[37] The first argument of the Australian Crime Commission appears to be based on the presumption of validity as stated by Gummow J in *Ousley v R*²⁴ namely, “the validity of an administrative act or decision and the legality of steps taken pursuant to it are presumed valid until the act or decision is set aside in appropriate proceedings”. Further, it was contended that the onus was on the respondent who wished to challenge the validity of the administrative acts to make good the challenge²⁵ and the respondent should not be allowed to fish for a basis upon which to try and make good the challenge.

[38] The first argument of the Australian Crime Commission cannot be sustained. It misunderstands the context in which the statements of Gummow J, which are relied on by the Australian Crime Commission, were made in *Ousley v R*²⁶. The reasoning in *Ousley v R* supports the contrary position where the administrative act is beyond the statutory power conferred on the authority

²⁴ (1997) 192 CLR 69 at 130; see also *Malubel Pty Ltd v Elder* (1998) 88 FCR 242 per ... at 249.

²⁵ *Egglishaw v Australian Crime Commission* [2006] FCA 818 at [54]; *Williams v Keelty* (2001) 111 FCR 175 at [235] [236]; *Kennedy v Baker* (2004) 135 FCR 520 at [85] and [86]; *X v Australian Crime Commission* (2004) 139 FCR 413 at [22].

²⁶ (1997) 192 CLR 69.

or person who made the decision²⁷. The validity of an administrative act may be challenged collaterally in a criminal proceeding if the administrative act is beyond the statutory power conferred on the authority or person who performed the administrative act.

[39] The second argument was developed in the Australian Crime Commission's written submissions as follows. Even if the Court was able to entertain a collateral challenge to the validity of the determination of the Board and the summons issued by the examiner, the permissible challenge is a challenge of a very limited type. It is confined to the invalidity on the face of the document evidencing an administrative decision. The principles which apply to warrants in this regard apply by analogy to administrative decisions in this case. No authority was relied on in support of this argument.

[40] The second argument of the Australian Crime Commission cannot be sustained either. There are special rules applying to collateral attacks on warrants²⁸. Those special rules have no application to collateral challenges to the administrative acts which may be subject to challenge in this criminal proceeding. Administrative acts of both patent and latent invalidity may be subject to challenge in this criminal proceeding. In my opinion the principles discussed in *Selby v Pennings*²⁹ are equally applicable in this criminal proceeding.

²⁷ *Gideon v NSW Crime Commission* (2008) 236 CLR 120 at [23]; *Ousley v R* (1997) 192 CLR 69 at 79-80, 87, 105, 124, 147-148; *Selby v Pennings* (1998) 19 WAR 520.

²⁸ *Selby v Pennings* (1998) 19 WAR 520 per Ipp J at 535 F-G.

²⁹ (1998) 19 WAR 520.

[41] The third argument of the Australian Crime Commission does not merit further comment.

[42] I have dealt with the fourth argument of the Australian Crime Commission below.

Legitimate forensic purpose

[43] In order to establish an entitlement to access the documents which are the subject of the subpoena the respondent must demonstrate a legitimate forensic purpose for accessing the documents. A mere fishing expedition is not allowed.

[44] Numerous authorities have established that the resolution of this issue involves a consideration of the following questions:

1. Have the documents to which access is sought been precisely identified?
2. Has the legal purpose for which the documents are sought been clearly articulated?
3. Is there a possibility that the subpoenaed documents contain material relevant to the defence?

[45] There is considerable divergence in the authorities as to what level of possibility must be demonstrated in order to resolve the third question which is referred to above. The level of possibility ranges from “not merely hypothetical”³⁰ to “a reasonable chance”³¹ that the materials sought will

³⁰ *Felice v County Court of Victoria* (2006) VSC 12.

³¹ *RTA (NSW) v Conolly* (2003) 57 NSWLR 310.

assist the defence to “a reasonable possibility or on the cards”³² that the materials sought will assist the defence.

[46] It seems to me that the level of possibility required to be demonstrated in order to resolve the third question set out in par [44] above will vary depending on the purpose for which the documents are sought and the circumstances in which they are sought. The three questions set out in par [44] above are all interrelated. Ultimately, what has to be considered is whether the defence has a legitimate forensic purpose for seeking production of the documents. In resolving this question regard must always be had to whether such documents are necessary for the conduct of a fair trial between the prosecution and the accused.

[47] In my opinion the respondent has a legitimate forensic purpose for seeking the documents that are the subject of the subpoena. In the circumstances which exist in this case the enquiry sought to be undertaken by the respondent is a proper inquiry. The respondent is not merely fishing, nor is he undertaking checking at large. In order to prove its case against the respondent the Crown has stated that it will be relying on the presumption of regularity to prove the case against the respondent. The Crown has said so in circumstances where all of the information which is relevant to the establishment of the alleged jurisdiction of the examiner to require the respondent to take an oath of make an affirmation is within the possession of the Australian Crime Commission. The scope and purpose for which the

³² *Attorney-General (NSW) v Chidgey* (2008) 182 A Crim R 536.

documents are sought has been specified. The issues arising for consideration are clearly defined. The enquiry is confined to checking if the essential requirements of the relevant jurisdiction of the examiner under the Act have been complied with. The documents are relevant to those issues and the documents have been precisely identified. The production of the documents is required for there to be a fair trial. To refuse production of the documents would leave the respondent with a legitimate sense of grievance. It would leave him with no ability to test the evidence which is relied on to establish the presumption of regularity in relation to a core aspect of the Crown's case against him.

[48] The case is quite a different case to the case of *Attorney-General (NSW) v Chidgey*³³. In any event that case is not authority for the proposition that all checking in all circumstances amounts to an illegitimate forensic purpose.

Public Interest Immunity

[49] I accept Mr Abbott QC's submission that when the affidavit of Mr Outram is properly analysed there is no claim for legal professional privilege and the claim for public interest immunity is confined to those passages highlighted yellow in the minutes of the meeting of the Board of the Australian Crime Commission held on 3 December 2008. As to the relevant parts of those minutes I have upheld the Australian Crime Commission's claim for public interest immunity in relation to one of the passages marked yellow and that

³³ (2008) 182 A Crim R 536.

passage has been masked in the documents which are to be made available to the parties. I have upheld that claim for public interest immunity on the basis that that passage reveals information about the thinking, priorities, strategy, deliberations and modus operandi of the Board in relation to the special operation which is the subject of this case. No ground for public interest immunity can be sustained in relation to the other passage highlighted yellow. That passage simply repeats information that has been published in the report of another enquiry.
