The Queen v LB [2010] NTSC 15

PARTIES:	THE QUEEN
	v
	LB
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20916896
DELIVERED:	23 April 2010
HEARING DATES:	25 November 2009
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – Preliminary Point - Attendance before examiner of Australian Crime Commission - refusal to take an oath or make an affirmation – Validity of the determination of the board of the Australian Crime Commission – Validity of examiner's summons – Did the examiner lack jurisdiction to require the accused to take oath or make an affirmation. - Summons invalid – proceedings permanently stayed.

Australian Crime Commission Act 2002 (Cth) ss 7C, 7J, 24A, 28, 46B
Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010 (Cth)

GG v Australian Crime Commission [2010] FCAFC 15

REPRESENTATION:

Counsel:

Crown:	J Renwick
Accused:	M Abbott QC

Solicitors:

Crown:	Office of the Commonwealth Director of Public Prosecutions
Accused:	North Australian Aboriginal Justice Agency

Judgment category classification:	C
Judgment ID Number:	Sou1002
Number of pages:	31

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

The Queen v LB [2010] NTSC 15
No 20916896

BETWEEN:

THE QUEEN

AND:

LB

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 23 April 2010)

Introduction

[1] The accused is charged with a single count on an indictment dated 10 July 2009. The count pleads that contrary to s 30(2)(a) of the *Australian Crime Commission Act* 2002 (Cth)[1], on 24 February 2009 at Darwin, the accused, 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 requirement. He has pleaded not guilty.

[2] The accused has challenged the validity of the criminal proceeding against him. He has done so before a jury has been empanelled. He submits that

[1] The Act.

both the Determination of the Board of the Australian Crime Commission[2] to establish a special intelligence operation into federally relevant criminal activity involving Indigenous violence and child abuse and the unlawful sale, supply, trafficking or possession of illegal drugs in Indigenous communities[3]; and the examiner's summons requiring him to attend before an examiner at an examination to give evidence are invalid. As a result of either the invalidity of the Determination of the Board or the invalidity of the summons or both, the accused says the examiner lacked jurisdiction to require him to take an oath or make an affirmation at an examination. As the summons was invalid he could not be compelled to appear or remain at the examination, nor could he be required to take an oath or make an affirmation. The examination was in truth no examination at all.

[3] The accused asks for the following relief:

1. A permanent stay of the proceeding.

2. Alternatively, an order that the indictment be struck out.

3. Alternatively, a ruling that any evidence of what occurred at the examination is inadmissible in evidence.

Evidence

[4] The following documents were tendered in evidence: the summons issued by the examiner, Mr Jeffrey Philip Anderson, and the annexures to the

[2] Hereafter, referred to as the Board.
[3] Hereafter referred to as the special intelligence operation involving indigenous violence and child abuse.

summons (exhibit D1); a document signed by Mr Anderson entitled, Reasons for issuing the Summons pursuant to Subsection 28(1) of the Australian Crime Commission Act 2002 (exhibit D2)[4]; a letter dated 15 January 2008 from the Chief Executive Officer of the Australian Crime Commission, Mr Alastair Milroy, to Board members (exhibit D3); a redacted document containing a summary of the votes of the members of the Board (exhibit D4); a memorandum to the Chair of the Board dated 5 February 2008 (exhibit P5); and a bundle of redacted copies of emails and facsimiles being communications between the members of the Board or the staff of members of the Board and the secretariat of the Australian Crime Commission. The documents contained the votes of the members of the Board (exhibit P6).

[5] The examiner, Mr Anderson, was not called to give evidence.

The factual background

[6] On or about 15 January 2008 Mr Milroy drafted a letter to the members of the Board. The letter and a 'Board Out of Session Paper', which proposed the establishment of the special intelligence operation involving Indigenous violence and child abuse and contained the draft resolution to establish the special operation, were communicated to the members of the Board.

[7] The letter stated:

> Please find attached a proposal for the establishment of a special intelligence operation into indigenous violence and child abuse. This

[4] Hereafter referred to as, "the record of the examiner's decision to issue the summons".

proposal supports the work of the National Indigenous Violence and Child Abuse Intelligence Task Force.

While out of session voting for determinations follows a similar process to normal out of session papers, in order to ensure that the actual time and date of the casting vote can be recorded on the instrument, the resolution will be taken to have passed on receipt of the casting vote, as opposed to waiting for all members to have voted. A valid vote for determinations occurs when nine supportive votes, including those of at least two Commonwealth members, have been obtained.

As such, the Secretariat will compile votes as received, and will advise the Board that the determination is valid upon receipt of the ninth valid vote. The secretariat will then commence the process of seeking the Chair's signature on the instrument to allow the decision to enter into force. The Chair will be advised of all comments received by Board members during the voting process as part of the process of seeking his concurrence to the instrument.

Should a vote in addition to the nine valid voltes be received before the signing of the instrument, the Chair will also be advised of comments provided. Please note the expected time elapsed between receiving the ninth vote and seeking the Chair's signature on the instrument will be minimal due to the requirement to advise the IGC of the Board's decision within 3 days of making a determination decision.

Voting will therefore close on Wednesday 30 January 2008 to allow for the IGC advices to be despatched to the Minister by the Friday as required.

[8] On 17 January 2008, Mr Tony D'Aloisio, the Chairman of Australian Securities and Investment Commission, sent an email to the Australian Crime Commission Secretariat stating he supported the proposal for the establishment of a special intelligence operation into Indigenous violence and child abuse. His position was confirmed by a further email sent by a lawyer employed by Australian Securities and Investment Commission to the Australian Crime Commission Secretariat on 21 January 2008.

[9] On 18 January 2008, the Strategic Policy Officer of the Australian Customs Service sent an email on behalf of Mr Carmody, the Chief Executive Officer of the Australian Customs Service, to the Australian Crime Commission Secretariat. The email stated that Mr Carmody supports the draft resolution to: "resolve, in the terms of the instrument *Australian Crime Commission Special Intelligence Operation Authorisation and Determination (Indigenous Violence or Child Abuse) 2007*, provided to the Board in the agenda papers for this item, to authorise the ACC to undertake an intelligence operation, determined to be a special operation, until 31 December 2008 by which time it will be reviewed".

[10] On 21 January 2008, the Conference Secretariat Officer of the Northern Territory Police, Fire and Emergency Services sent an email to the Australian Crime Commission Secretariat. Attached to the email was a document which stated that Commissioner White supported the establishment of a special intelligence operation into Indigenous violence and child abuse. Commissioner White was then the Commissioner of the Northern Territory Police Force.

[11] On 29 January 2008, a person sent an email on behalf of Mr Paul O'Sullivan, the Director General Australian Security and Intelligence Organisation, to Therese Quigg who is a member of the Secretariat of the Australian Crime Commission. The email advised that Mr O'Sullivan provided his endorsement of the Australian Crime Commission Out-of-

Session item – Indigenous Violence or Child Abuse Special Intelligence Operation Authorisation and Determination.

[12] On 29 January 2008, Ms Anita Nedwetzky sent an email to Therese Quigg attaching the Western Australia Commissioner of Police's response to the 'OOS paper of 15 January 2008'. The attached response stated that Commissioner Karl O'Callaghan did not support "the proposed resolution that the Board resolve in the terms of the instrument *Australian Crime Commission Special Intelligence Operation Authorisation and Determination (Indigenous Violence or Child Abuse) 2007* to authorise the ACC to undertake an intelligence operation, determined to be a special operation".

[13] On 29 January 2008, the Senior Executive Support Officer to the Commissioner of Police in Tasmania sent an email to Therese Quigg stating the officer would like to confirm her telephone call that morning advising that Commissioner McCreadie is happy with the proposal for the establishment of a special intelligence operation involving Indigenous violence and child abuse.

[14] On 30 January 2008, a Superintendent of Police in the Executive Support Branch of the South Australia Police sent a facsimile to Maria Kellond at the Australian Crime Commission. The facsimile attached Commissioner Hyde's response to the proposal. In the attachment the Commissioner of

Police for South Australia stated he endorsed the draft resolution contained in the 'Out-of-Session Paper dated 15 January 2008'.

[15] On 30 January 2008, the Executive Assistant to Commissioner of Police for New South Wales sent an email to Therese Quigg attaching Commissioner Scipione's response to the proposal. In the attachment the Commissioner of Police for New South Wales, Mr A P Scipione, stated he supported the resolution in the terms of the instrument *Australian Crime Commission Special Intelligence Operation Authorisation and Determination (Indigenous Violence or Child Abuse) 2007* to authorise the ACC to undertake an intelligence operation, determined to be a special operation, until 31 December 2008 by which time it will be reviewed. Mr Scipione also stated, "it is also important for the ACC to adhere to State mandatory reporting requirements to report children identified at risk of harm as a result of information they receive or obtain during the course of their work".

[16] On 30 January 2008, an internal email was sent from Maria Kellond to Therese Quigg stating that Richard Grant had just called to say that Victorian Police supports the SIO Determination and a follow up letter was to be sent shortly. The follow up letter was not tendered in evidence.

[17] On 30 January 2008, Robert Cornall, the Secretary of the Australian Attorney-General's Department, sent an email to the Australian Crime Commission stating that he supported the proposed Special Intelligence Operation Authorisation and Determination.

[18] On 1 February 2008, a Principal Policy Officer with the Australian Federal Police sent an email to Bernice Cropper, a member of the Secretariat of the Australian Crime Commission, stating that the Chairman of the Board, the Commissioner of the Australian Federal Police, voted in the affirmative.

[19] On 4 February 2008, David Jones, on behalf of the Australian Federal Police acting in the Australian Capital Territory, sent an email to Therese Quigg stating that "the CPO has endorsed the proposed Board resolution for the establishment of an SIO into indigenous violence and child abuse".

[20] On 5 February 2008, an Inspector in the State Crime Operations Command of the Queensland Police sent a facsimile to Therese Quigg. The facsimile annexed a letter from the Commissioner of Police in Queensland. The letter stated that "the Commissioner of Police supports the approval and establishment of the SIO – IVCA".

[21] On 5 February 2005, Bernice Cropper sent a memorandum headed, Outcome of votes for SIO-IVCA to the Chair of the Board. Attached to the memorandum was a document which recorded the out of session votes of the members of the Board and the instrument of determination. The memorandum advised the Chair that: the final vote was received by the Australian Crime Commission at 2.45 pm on 5 February 2008; there were 12 votes in favour of the resolution for the special intelligence operation and one against; the Western Australian Police Service did not support the

resolution for the special intelligence operation and the New South Wales Police had provided qualified support.

[22] At 2.45 pm on 5 February 2008 Commissioner Keelty as Chair of the Board signed the instrument headed, "Australian Crime Commission Special Intelligence Operation Authorisation and Determination (Indigenous Violence or Child Abuse) 2007" which was part of annexure A to the summons to the accused.

[23] I find that on 5 February 2008, acting under s 7C of the Act, the Board authorised the Australian Crime Commission to undertake an intelligence operation relating to federally relevant criminal activity involving Indigenous violence and child abuse and the unlawful sale, supply, trafficking or possession of illegal drugs in Indigenous communities. The Board determined that the operation should be a special operation. The Determination of the Board was made outside of a meeting of the Board in accordance with s 7J of the Act.

[24] Originally the special intelligence operation involving Indigenous violence and child abuse was to be conducted until 31 December 2008. On 3 December 2008 the special intelligence operation was extended by the Board until 30 June 2009.

[25] The general nature of the circumstances constituting federally relevant criminal activity were said to be those implied from information available to Australian law enforcement agencies indicating that: familial violence is

deeply entrenched in Indigenous communities across most States with women and children the most common victims; 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 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.

[26] At 9.50 am on 12 February 2009 Mr Anderson, who has been appointed an examiner under s 46B of the Act, signed a record of his decision to issue the summons which stated as follows:

> REASONS FOR THE ISSUE OF A SUMMONS PURSUANT TO Subsection 28(1) AUSTRALIAN CRIME COMMISSION ACT 2002
>
> OPERATION: SIO IVC
>
> SUMMONS IS ISSUED TO: [LB]
>
> RETURN DATE FOR SUMMONS: 2.30pm Tuesday 24 February 2009
>
> WHERE: Australian Crime Commission at the Family Court of Australia, Ground Floor, Commonwealth Law Courts, 80 Mitchell Street, Darwin NT.
>
> DOCUMENTS REQUIRED: Nil
>
> DATE OF ISSUE OF SUMMONS: 12 February 2009

MATERIAL FACTS

I had regard to the following material for the purposes of being satisfied under subsection 28(1A) of the Australian Crime Commission Act 2002 (Cth) (the Act) that it was reasonable in all the circumstances to issue the summons:

(a) A statement of facts and circumstances dated 11 February 2009,

(b) Legal submissions dated 11 February 2009 and

(c) My general experience of the Determination.

PURPOSE OF SUMMONS

The purpose of the Summons is to require the attendance of [LB] ('the person') before an Examiner for the following reason:

> 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.

CONSIDERATION

Based upon my consideration of the statement of facts and circumstances, the legal submissions and my experience of the Determination referred to above;

1) I was satisfied that the operation was within the terms of the Determination and that the Determination was still operative.

2) I was satisfied that it was reasonable in all the circumstances that the Summons be issued to the person.

3) I was satisfied that it was reasonable in all the circumstances that the Summons be issued in the terms approved by me.

4) I was satisfied that the Summons does, so far as is reasonably practicable, set out the general nature of the matters in relation to which it is intended to question the person.

5) I was satisfied that, in the particular circumstances of the special ACC operation to which the examination relates, it would prejudice the effectiveness of the special ACC operation for the Summons to state beyond that which it does the general nature of the matters in relation to which the examiner intends to question the person.

6) I was satisfied that this was an appropriate Summons for the inclusion of a notation pursuant to subsection 29A(1) of the Australian Crime Commission Act 2002, in the terms approved by me, because if such a notation were not included it would reasonably be expected to prejudice the effectiveness of the operation and that a failure to do so might be contrary to the public interest.

[27] Neither the document referred to by Mr Anderson as "a statement of facts and circumstances dated 11 February 2009" nor the document referred to as "Legal submission dated 11 February 2009" were tendered in evidence.

[28] At 9.52 am on 12 February 2009, Mr Anderson issued a summons to the accused which was served on him. It required the accused to attend before Mr Anderson at an examination at 2.30 pm on 24 February 2009. The summons did not state the general nature of the matters in relation to which the accused was to be questioned. Instead, the summons stated Mr Anderson summonsed the accused "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". In effect, the accused was only informed that he was being summonsed for the purposes of the special intelligence operation involving Indigenous violence and child abuse.

[29] 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 contains the resolution of the Board of the Australian Crime Commission extending the duration 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 states it is made under s 7C of the Act by resolution of the Board. It is signed by the Chair of the Board and is the instrument which contains the original Authorisation and Determination of the Board that there be a special operation involving Indigenous violence and child abuse. The document states that the Board has considered whether methods of collecting criminal information and intelligence that do not involve the use of powers in the Act have been effective.

[30] On 24 February 2009, the respondent appeared before Mr Anderson. He did so in response to the summons that was served on him and his refusal to be sworn or affirmed was in response to that summons.

The argument of the accused as to the validity of the resolution of the Board

[31] As to the validity of the Determination of the Board to establish a special operation involving Indigenous violence and child abuse, Senior Counsel for the accused, Mr Abbott, made the following submissions.

[32] Under s 24A of the Act, an examiner may only conduct an examination for the purposes of a special ACC operation/investigation. Relevantly to this

proceeding, a special ACC operation/investigation means an intelligence operation the ACC is undertaking which the Board has determined to be a special operation in accordance with the provisions of s 7C(1)(c) and (d) and (2) of the Act.

[33] The Board may make a determination that an intelligence operation is a special operation either at a meeting of the Board held under s 7D of the Act or by a resolution made outside of a Board meeting under s 7J of the Act, which states:

> (1) This section applies to a resolution:
>
> (a) which, without being considered at a meeting of the Board, is referred to all members of the Board; and
>
> (b) of which:
>
> (i) if subparagraph (ii) does not apply—a majority of those members (not including the CEO); or
>
> (ii) if the resolution is that the Board 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—at least 9 Board members (not including the CEO but including at least 2 eligible Commonwealth Board members);
>
> indicate by telephone or other mode of communication to the Chair of the Board that they are in favour.
>
> (2) The resolution is as valid and effectual as if it had been passed at a meeting of the Board duly convened and held.

[34] Unless the Board has discharged its functions in accordance with s 7C(1)(c) & (d) and (2) of the Act and s 7J(1)(b)(ii) of the Act the Determination of the Board that an intelligence operation is a special intelligence operation would be invalid and an examiner would have no power or jurisdiction to conduct an examination because, for the purposes of the Act, there would be no special intelligence operation on foot.

[35] Under s 7J of the Act, a proposed resolution that an intelligence operation is determined to be a special intelligence operation must be referred to all members of the Board; and at least 9 members of the Board, including at least two eligible Commonwealth members of the Board, must vote in favour of the resolution before such a resolution is passed. Mr Abbott argued that s 7J requires the participation of all members of the Board and for the Chair to carry out his role in the same manner that he would at a Board meeting held under the provisions of s 7D, s 7E, s 7F and s 7G of the Act. The Chair must be available to answer any questions and to interact with the members of the Board. The votes of all of the members of the Board must be communicated personally and directly to the Chair and he must be responsible for collating all votes.

[36] Mr Abbott said that Mr Milroy's letter dated 15 January 2008[5] established the following deliberative and voting procedure:

1. a paper setting out the proposal would be sent to all members of the Board;

[5] See par [7] above

2. Board members would be asked to indicate their support to the Secretariat (not the Chair as required by the Act);

3. the resolution will be taken to have passed on receipt of the casting vote as opposed to waiting for all members to have voted;

4. a valid vote would occur when nine supportive votes including those of at least two Commonwealth members have been obtained;

5. the Secretariat would compile the votes when received;

6. the Secretariat would advise the Board that the determination is valid upon the receipt of the ninth valid vote;

7. thereafter, and only after the receipt of the ninth valid vote the Secretariat would then commence the process of seeking the Chairs signature on the instrument to allow the decision to enter into force; and

8. the CEO unilaterally informed the members of the Board that voting would close on 30 January 2008.

[37] Mr Abbott stated that the procedure established by Mr Milroy was contrary to the provisions of s 7J of the Act because: there was to be no interaction between the Chair and other members of the Board; the members of the Board were not required to communicate their votes directly to the Chair; the votes were to be collated by the Secretariat of the Australian Crime Commission; and the resolution of the Board would be taken to have been passed on the receipt of the ninth valid vote rather than after all members of the Board had voted.

Consideration of the accused's arguments about the validity of the Determination of the Board

[38] The accused's arguments as to the validity of the Determination of the Board that the intelligence operation is a special intelligence operation cannot be sustained.

[39] The purpose of s 7J of the Act is to enable the Board to make decisions without a formal meeting of the Board being held. Section 7J provides for this by allowing decisions of the Board to be made by resolution out of session. The section does not require the Chair to carry out his role in the same way he would at a Board meeting under the provisions of s 7D, s 7E, s 7F and s 7G of the Act. Nor does s 7J require the members of the Board to communicate their votes directly and personally to the Chair. There is no statement in the text of the section to this effect. Nor is it necessary to imply such a requirement.

[40] Subsection 7J(1) of the Act states the members of the Board may indicate by telephone or other mode of communication to the Chair of the Board that they are in favour of a resolution. The words, "other mode of communication" are wide enough to include all modes of communication and are also wide enough to include both direct and indirect modes of communication. It is apparent from the documents tendered in evidence that there is a secretariat which provides administrative support to the Australian Crime Commission and to the Board and that each of the members of the Board has their own administrative support personnel. In my opinion, so long as the votes are duly recorded and collated and the Chair of the Board is informed of the nature and content of the votes of all members of the

Board, then email communication or facsimile communication of a Board member's vote between respective administrative personnel falls within the provision of s 7J(1) of the Act.

[41] In accordance with s 7J of the Act, the documents tendered in evidence establish that: the proposed resolution was reduced to writing and was circulated to all members of the Board; all members of the Board voted on the proposed resolution about the special operation involving Indigenous violence and child abuse; the votes of all of the members of the Board were recorded in writing and collated by the Secretariat of the Australian Crime Commission; 12 members of the Board including two Commonwealth Board members voted in favour of the Determination of the Board that the operation involving Indigenous violence and child abuse is a special operation; the content and nature of each Board member's vote was communicated to the Chair of the Board by members of the Secretariat of the Australian Crime Commission; the resolution was not taken to have been passed until the last vote was received by the Secretariat of the Board; the Chair noted the resolution was carried by the required majority of members of the Board; and the Chair signed the appropriate written instrument. There was no evidence to suggest the members of the Board did not have an opportunity to communicate with each other or the Chair, if they chose to do so, before casting their votes. Nor is there any evidence to suggest they were not adequately briefed about the resolution or that they failed to give consideration to whether methods of collecting the criminal information and

intelligence which do not involve the use of powers in the Act have been effective.

[42] While neither the Chair or the other members of the Board were called to give evidence, the documents tendered as exhibits D5 and D6 were admissible in evidence under s 69 of the *Evidence Act* 1995 (Cth) which is applicable to proceedings in this Court[6]. I accept Dr Renwick's submission that where letters or emails are provided by the administrative staff of a member of the Board indicating the Board member's support for a proposed out of session resolution those staff are persons who might reasonably be supposed to have had personal knowledge of the asserted fact and those representations were made for the purposes of the Board's activities.

[43] In the circumstances, the accused's arguments that the Determination of the Board is invalid are rejected by the Court. The Determination of the Board that there be a special operation involving Indigenous violence and child abuse is valid.

The accused's arguments about the invalidity of the examiner's summons

[44] Mr Abbot argued that the summons was invalid because Mr Anderson failed to comply with the requirements of s 28(1A) of the Act. The argument was developed as follows below.

[6] s 5 and s 182 Evidence Act 1995 (Cth).

[45] Subsection 28(1A) of the Act created three conditions which were applicable to the issue of a summons by an examiner. The first condition was a precondition. The precondition is: an examiner must be satisfied it is reasonable in all the circumstances to issue the summons to the person who is required to attend at the examination. The second condition is: the examiner must record in writing the reasons for the issue of the summons. The third condition is: the record is to be made before the issue of the summons, or at the same time as the issue of the summons, or as soon as practicable after the issue of the summons.

[46] Contrary to s 28(1A) of the Act, Mr Anderson did not record in writing any reasons at all as to why the summons was issued. Nowhere in the record of his decision to issue the summons did Mr Anderson state why the summons was issued or why Mr Anderson was satisfied it was reasonable in all the circumstances to issue the summons. The requirement for there to be reasons is a requirement for there to be a reasoning process which is identifiable and leads to the necessary conclusion. The record of the examiner's decision to issue the summons[7] only records Mr Anderson's satisfaction with various aspects of the process and Mr Anderson was not called to give evidence about his reasons, if any, for being so satisfied and for issuing the summons to the accused.

[47] As no reasons for issuing the summons were recorded in writing and Mr Anderson was not called to give evidence, it follows that either he failed

[7] See par [26] above.

to turn his mind to the reasons for issuing the summons to the accused or there were no valid reasons why the summons was issued. In these circumstances, Mr Anderson could not have been satisfied that it was reasonable in all the circumstances to issue the summons to the accused. Therefore a necessary pre-condition to the issue of the summons has not been fulfilled, the summons was invalid and the examiner lacked the jurisdiction to require the accused to take an oath or make an affirmation.

[48] Mr Abbott also argued that the failure of Mr Anderson to record in writing the reasons for the issue of the summons alone meant the summons to the accused was invalid. Subsection 28(8) does not save a summons from invalidity if an examiner completely fails to record the reasons for issuing the summons. The Explanatory Memorandum for the Bill that inserted s 28(8) into the Act stated that the purpose of the subsection was to make it clear that an examiner can record his or her reasons for issuing a summons before, at the same time, or as soon as practical after the summons has issued. Subsection 28(8) merely saves a summons from invalidity when an examiner does not comply with the times stipulated in s 28(1A)(a) to (c) of the Act. The purpose of the subsection is not to relieve an examiner of the requirement to record the reasons for issuing the summons.

The Crown's arguments about the validity of the examiner's summons

[49] Counsel for the Crown, Dr Renwick argued that the accused has not made out any jurisdictional error as to the issue of the summons. The onus lay on

the accused, on the balance of probabilities, to establish invalidity. The accused has failed to discharge the burden of proof.

[50] The accused has not proven that Mr Anderson could not and should not have been satisfied that it was reasonable in all the circumstances to issue the summons. In his recorded reasons for the issue of the summons Mr Anderson stated he was satisfied that it was reasonable in all the circumstances that the summons be issued to the person; that evidence is uncontradicted; and s 28(8) of the Act provides in terms that a failure to make a record in writing of the reasons for the issue of the summons does not affect the validity of a summons.

[51] Further, Dr Renwick stated the discretion to issue a summons is wide. All that is required is that the examiner must be satisfied that it is reasonable in all the circumstances to do so. This is not a case where the issue of the summons turns upon satisfaction as to a state of affairs formed reasonably upon the material before the decision maker.

The application of s 28(1A) of the Act

[52] Subsections 28(1), (1A) and (7) of the Act state:

> (1) An examiner may summons 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.

(1A) Before issuing a summons under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the summons. The record is to be made:

(a) before the issue of the summons; or

(b) at the same time as the issue of the summons; or

(c) as soon as practical after the issue of the summons.

…

(7) The powers conferred by this section are not exercisable except for the purposes of a special ACC operation/investigation.

[53] According to the text of s 28(1A) of the Act, and what is necessarily implied into the subsection, the following conditions apply to the issue of a summons by an examiner:

1. There must be bona fide and rational reasons for the issue of a summons to a particular person in respect of a specific special ACC operation/investigation.

2. The examiner must record in writing the reasons for the issue of the summons to the person.

3. Before issuing the summons the examiner must be satisfied that it is reasonable in all the circumstances to do so.

[54] The first condition referred to in par [53] above is an implied condition. The condition is necessarily implied from: the express requirement in subsection 28(1A) of the Act that the examiner is to record in writing the reasons for the issue of the summons; the limited purposes for which a

summons may be issued by an examiner under s 28(1) of the Act[8]; the qualifications of an examiner[9]; the coercive nature of the power to issue a summons; and the requirement that an examiner must be satisfied that it is reasonable in all the circumstances to issue the summons. In accordance with this implied condition the examiner must direct his mind to how and why the issue of a summons to a particular person will further the purposes of the relevant special ACC operation/investigation[10]. The examiner must consider the matters about which the person, who is to be summonsed, is to be questioned. Subsection 28(3) of the Act states that, subject to certain considerations, the summons shall set out the matters in relation to which the person, who is to be examined, is to be questioned.

[55] The third condition is not the same condition as the first condition. An examiner is required to record the reasons for the issue of the summons not the grounds on which he is satisfied that it is reasonable to do so. However, unless an examiner directs his mind to the nature of the relevant special ACC operation/investigation, and to the reasons for the issue of the summons including the nature of the matters about which the person who is to be summonsed is to be questioned, an examiner could not be satisfied that it was reasonable in all the circumstances to issue a summons to a witness. Unless there are bona fide and rational reasons for issuing the summons to a particular witness for the purpose of a specific special ACC

[8] See s 28(7) of the Act
[9] See s 46B of the Act
[10] *GG v Australian Crime Commission* [2010] FCAFC 15 per Jessup and Tracey JJ at par [31].

operation/investigation an examiner could not be satisfied it was reasonable to issue the summons.

[56] Both the first and third conditions are essential and indispensable requirements for the issue of a valid summons under the Act. If they are not fulfilled the summons issued by an examiner will be invalid and an examiner will not have jurisdiction to require a person who appears at an examination in response to the summons to take an oath or make an affirmation. If a person is not lawfully required to attend at an examination, he cannot be required to take an oath or make an affirmation at the examination.

[57] In the record of the examiner's decision for issuing the summons, under the heading, Material Facts, Mr Anderson stated:

> I had regard to the following material for the purposes of being satisfied under subsection 28(1A) of the Australian Crime Commission Act 2002 (Cth) (the Act) that it was reasonable in all the circumstances to issue the summons:
>
> (a) A statement of facts and circumstances dated 11 February 2009,
>
> (b) Legal submissions dated 11 February 2009 and
>
> (c) My general experience of the Determination.

[58] Under the heading, Purpose of the Summons, he stated

> The purpose of the Summons is to require the attendance of [LB] ('the person') before an Examiner for the following reason: to give evidence of federally relevant criminal activity involving Indigenous violence and child abuse and the lawful sale, supply, trafficking or possession of illegal drugs in Indigenous communities.

[59] Based upon his consideration of the 'statement of facts and circumstances', the 'legal submissions' and his general experience of the Determination of the Board, Mr Anderson then goes on to record his satisfaction about various matters in the record of his decision to issue the summons. He does not state anywhere in the record of the examiners decision to issue the summons that he had regard to either the 'statement of facts and circumstances' or the 'legal submissions' for the purpose of considering the matters about which the accused may be questioned or how or why questioning the accused would further the purposes of the special operation. For example, Mr Anderson does not say the accused is a person who is likely to be able to provide information or intelligence about relevant criminal activity or who is able to identify persons involved in relevant criminal activity or that the accused is a person who may be engaged in relevant criminal activity. He does not do so in circumstances where the Act directs him to record the reasons for issuing the summons.

[60] In my opinion, Mr Anderson failed to record the reasons for the issue of the summons to the accused. The statements of Mr Anderson, which are set out in pars [57] and [58] and referred to in par [59], above are not a record of the reasons for issuing the summons to the accused. The statement in par [58] above only records that the accused is to give evidence for the purposes of the special intelligence operation involving Indigenous violence and child abuse. It is no more than a general statement of the purpose for which an examiner may issue a summons in respect of the special operation.

Nowhere in the record of the examiner's decision to issue the summons does Mr Anderson state why the accused is to be questioned nor does he state the matters about which the accused is to be questioned.

[61] In the absence of Mr Anderson being called to give evidence about the reasons for issuing the summons to the accused, a reasonable inference based on his failure to record the reasons for issuing the summons is he failed to consider the reasons for issuing the summons to the accused. In the circumstances he could not have been satisfied that it was reasonable in all the circumstances to issue the summons.

[62] My opinion, in this regard, is buttressed by the fact that in the record of the examiner's decision to issue the summons Mr Anderson makes the following remarks:

> I was satisfied that the summons does, so far as is reasonably practical, set out the general nature of the matters in relation to which it is intended to question the person.

and

> I was satisfied that, in the particular circumstances of the special ACC operation to which the examination relates, it would prejudice the effectiveness of the special ACC operation for the summons to state, beyond that which it does, the general nature of the matters in relation to which the examiner intends to question the person.

[63] Yet nowhere in the record of the examiner's decision to issue the summons, does Mr Anderson state, beyond that which is set out in par [59] above, the general nature of the matters in relation to which the accused is to be

questioned. Both in the record of his decision to issue the summons and in the summons, Mr Anderson simply states the accused is "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". Either there was no need for Mr Anderson to make the second statement referred to in par [62] above, or he did not address his mind to the matters about which the accused was to be questioned. It is not as if he stated in the record of his decision to issue the summons that either the 'statement of facts and circumstances dated 11 February 2009' or the 'legal submissions dated 11 February 2009' contained details of the matters about which he would be questioning the accused.

[64] It follows from the above that, on the evidence before the Court, I am satisfied on the balance of probabilities that Mr Anderson could not have been satisfied that it was reasonable in all of the circumstances to issue the summons to the accused. No one could be so satisfied without having had due regard to the reasons for issuing the summons and the matters about which the accused was to be questioned.

[65] I do not, however, accept Mr Abbott's submission that, at the time the summons was issued[11], the requirement to record in writing the reasons for the issue of the summons was an essential and indispensable requirement for

[11] The summons was issued before Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010 (Cth) was enacted and the amendments that Act made to s 28 of the Act are prospective.

the issue of a valid summons under the Act. As s 28(1A) states that the written reasons for issuing the summons could be recorded as soon as practicable after a summons was issued, it follows that, theoretically at least, the reasons for issuing a summons could be recorded after an examination had taken place. Both parties correctly submitted, the effect of s 28(8) of the Act was that a failure to record in writing the reasons for issuing the summons within the times stipulated by s 28(1A)(a) to (c) of the Act did not affect the validity of a summons.

[66] If it was not mandatory for an examiner to record the reasons for issuing the summons in writing before a summons is issued, or at the very latest before an examination takes place, such a requirement cannot be said to be an essential and indispensable requirement of the issue of a valid summons.

[67] Subsection 28(1A) of the Act is divided into two parts, one part deals with the requirement for an examiner to be satisfied in all the circumstances that it is reasonable to issue a summons, the other part deals with the recording in writing or the making of a record of the reasons for the issue of a summons. Section 28(8) of the Act states in terms that the failure to comply with the provisions of a 28(1A) in so far as those provisions relate to the making of a written record does not affect the validity of a summons.

[68] Since the accused attended at the examination before Mr Anderson, s 28(1A) and s 28(8) of the Act were amended and repealed respectively by the *Crimes Legislation Amendment (Serious and Organised Crime) Act* (No 2)

2010 (Cth). Subsection 28(8) of the Act was replaced with a new subsection stating that a failure to comply with requirements set out in s 29A of the Act will not invalidate the summons.

[69] Subsection 28 (1A) of the Act now states as follows:

> (1A) Before issuing a summons under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the summons. The record is to be made:
>
> (a) before the issue of the summons; or
>
> (b) at the same time as the issue of the summons.

[70] The purpose of the amendments made to s 28(1A) of the Act by the *Crimes Legislation Amendment (Serious and Organised Crime) Act* (No 2) 2010 (Cth) was to narrow the operation of s 28(1A) so that the reasons for issuing the summons must be recorded by the examiner at or before the time the summons was issued. An examiner will no longer be able to record the reasons why a summons was issued after the summons has been issued and a failure to record the reasons for issuing the summons in writing will invalidate the summons.

[71] In my opinion, the summons issued by Mr Anderson to the accused was invalid. Mr Anderson lacked the jurisdiction to require the accused to take an oath or make an affirmation and the proceeding should be permanently stayed.
