IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY **No. A30 of 2019**

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN: **CXXXVIII**
Appellant

10 and

THE COMMONWEALTH OF AUSTRALIA
First Respondent

AUSTRALIAN CRIMINAL INTELLIGENCE COMMISSION
Second Respondent

JEFFREY ANDERSON
Third Respondent

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AMENDED
APPELLANT'S WRITTEN SUBMISSIONS

Part I:

1. These submissions are in a form suitable for publication on the internet.

Part II:

2. The grounds of appeal raise two issues:

   a. Firstly, as a matter of statutory construction, can the Board of the ACC make
30 determinations in terms which provide for potential (but as yet not extant) investigations into any combination of: entities listed, into conduct past, present

Filed on behalf of the Appellant
ADDRESS FOR SERVICE
Patsouris & Associates Lawyers
82 Halifax Street
Adelaide SA 5000

Date of Filing:
Tel (08) 8232 1993
Fax (08) 8232 1970
DX
Ref Harry Patsouris

and future; one or more of a broad class of Commonwealth and State criminal offences; absent any connection between the underlying activities; and for the purposes of what will in practice be distinct investigations into matters which are unconnected, such that if later the staff of the ACC decide to conduct an investigation into one of those myriad of combinations it has already been prospectively and validly determined by the Board to be a "special investigation"? (CB102-103).

Put simply, whether the "important safeguards"[1] such as those inserted in s. 7C of the Act, being the result of the work of a Joint Committee of the Commonwealth Parliament[2], are able to operate at such a level of generality that permits the Board of the ACC (and as it would have it) to never consider or turn its collective mind to the application of those safeguards to a particular investigation?

Further the question arises as to whether it is open to the Board of ACC to choose to discharge its powers in a way that both examiner and an examinee are left without the information in a determination (because the particular investigation is created later) to ascertain the limits of the exercise of co-ercive power?

b. Secondly, does the Notice to Produce purportedly issued by an examiner under s21A of the *ACC Act*, and on which it insists there be compliance notwithstanding its description of it as "aberrant", impose incoherent and conflicting requirements on the appellant such that it is invalid? If so, was it correct, as the Full Court of the Federal Court did to engage in a process of construction (or reading down) of expressions within it so as to preserve its validity? (CB103).

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[1] Commonwealth of Australia, *Explanatory Memorandum to ACC Establishment Bill 2002*, p10.

[2] *Joint Committee on the NCA – Evaluation of the NCA*; *Joint Committee on the NCA - ACC Establishment Bill 2002*.

Part III:

3. The appellant does not consider that notices need to be given in compliance with s78B of the *Judiciary Act 1903 (Cth).*

Part IV:

4. The decision of the Federal Circuit Court is unreported, *CXXXVIII v Australian Criminal Intelligence Commission & Anor* [2018] FCCA 2400. The decision of the Full Federal Court is reported, *CXXXVIII v Commonwealth of Australia* (2019) 366 ALR 436; 164 ALD 33; [2019] FCAFC 54.

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Part V:

5. The Board of the Australian Crime Commission ("ACC") made two authorisations and determinations ("the HRCT Determinations"), recorded in writing,
   5.1.1 the first in 2013 was the *ACC Special Investigation Authorisation and Determination (High Risk Criminal Targets No 2) 2013*[3] ("the First Determination") and,
   5.1.2 the second in 2016 was the *ACC Special Investigation and Determination (Highest Risk Criminal Targets No. 2) Amendment No. 1 of 2016*[4] ("the Second Determination") which simply extended the operation of the First
20 Determination.

   Both were made in the purported exercise of its powers in ss. 7C(1)(d), (3) and (4) of the *ACC Act.*

6. A "Project" was approved within the ACC on 23 March 2017 purportedly within the scope of the Determinations to investigate a "Syndicate".[5] So far as it is disclosed, that Project was "seeking to understand the methodologies employed by the Syndicate".[6] The Syndicate was said to maintain "extensive connections with other SOC entities and syndicates recorded on the National Crime Target List (NCTL)". The appellant's relationship is not explained but he is said to be a "*witness*" and is "*not the subject of any present or imminent charges of confiscation proceedings*".[7] It is that Project (and

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[3] Appellant's Book of Further Materials 'ABM' p60-67 (*Affidavit of Harry Patsouris sworn 29 June 2018,* HIPP2).
[4] ABM58-59 (*Affidavit of Harry Patsouris sworn 29 June 2018,* HIPP2).
[5] ABM84, [5] (*Affidavit of Judith Jefferson sworn 5 July 2018,* Annexure JSJ1).
[6] ABM93, [34] (*Affidavit of Judith Jefferson sworn 5 July 2018,* Annexure JSJ1).
[7] ABM105 (*Affidavit of Judith Jefferson sworn 5 July 2018,* Annexure JSJ3).

no other matter) which was the foundation identified in the ACIC's internal documents "*Application for the Issue of a Summons*" [8] and "*Application for the Issue of a Notice*".[9] The chronology of events shows those facts resulted in the issue of the First and Second Notice and First and Second Summons to the appellant. It is also that Project which is identified in both the "*Reasons for the Issue of a Summons*" (and of the Notice).[10] No submission was made by the ACC in the Federal Circuit Court or Full Federal Court that there was any relevant investigation prior to the approval of the "project" relating to "the Syndicate" on 23 March 2017.

7. In 2018, an examiner of the ACC relying upon the Determinations issued to the appellant a first set of compulsory instruments, the First Notice to Produce and First Summons, and then shortly thereafter (as a result of defects in both) a second set, the Second Notice to Produce[11] and Second Summons,[12] in each case relying on ss. 21A and s28 of the *ACC Act*.

8. The Second Notice to Produce required the production by the appellant "forthwith at the time and place of service" of things falling within categories identified in Schedule, and the Second Summons required the appellant's subsequent attendance before an examiner and the answering of questions on oath. The internal application identified that "the agency is seeking the electronic items outlined in the Schedule to the Notice."[13] The reasons of the examiner stated his satisfaction that "*the proposed time, date and location of the production are reasonable in all of the circumstances*".[14]

Part VI:

9. Unlike its predecessor the *National Crime Authority Act 1984 (Cth)*, the *ACC Act* introduced a statutory concept of an investigation - an "ACC operation/investigation". Further, to enliven the co-ercive powers within the *ACC Act*, the Act provided for the making of a determination that such an investigation was "a special ACC operation/investigation".

10. Also, as part of the reforms that abolished the process of referrals to the former NCA

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[8] ABM82 (*Affidavit of Judith Jefferson sworn 5 July 2018,* Annexure JSJ1).
[9] ABM109 (*Affidavit of Judith Jefferson sworn 5 July 2018,* Annexure JSJ4).
[10] ABM104, ABM129 (*Affidavit of Judith Jefferson sworn 5 July 2018,* Annexure JSJ3, JSJ6).
[11] ABM73 (*Affidavit of Harry Patsouris sworn 29 June 2018,* HIPP3).
[12] ABM56 (*Affidavit of Harry Patsouris sworn 29 June 2018,* HIPP3).
[13] ABM119, [33] (*Affidavit of Judith Jefferson sworn 5 July 2018,* Annexure JSJ4).

from police agencies, the Commonwealth Parliament inserted in s. 7C of the ACC Act what it described as "important safeguards" to control the circumstances in which the co-ercive powers vested in the staff of the ACC were available to be used.

11. The conferral of such co-ercive powers by reference to both an "investigation" and "special investigation" (as defined), against a background of "important safeguards" substantially alters the framework under which any investigation can be carried out. Whatever might be the limits of an inquiry or investigation by the Commonwealth government into any matter of fact that does not require it to exercise statutory or co-ercive power, the analysis is fundamentally altered by the statutory criteria. That is so because for such an investigation it is immediately necessary to be able to define its scope, in order to determine the confines of the co-ercive power authorised by the Act.

12. It must be, as a plurality of this Court said in *Strickland v CDPP*[15] (in rejection of an argument advanced on behalf of the ACC) that:[16]

> Whatever the ambit of the ACC's powers, they are constrained by the ACC Act to be exercised only in the circumstances and only for the purposes for which the Act provides.

13. This appeal concerns the limits fixed by the creation of those statutory concepts and whether the Full Court of the Federal Court erred in finding that the Board of the ACC had observed the limits of the *ACC Act* in making the HRCT Determinations.

The HRCT Determinations

14. The First Determination made by the ACC Board, which requires the reading together of clauses 1, 2 and 3 of Schedule 1, in conjunction with the definitions in clause 3 of the Determination, has the key features that:

    a. The purported "matter to be investigated" is described in clause 1 *temporally* in terms of activity committed "before", "on the commencement of" and "in future" by reference to date of the commencement of the determination;

    b. The content or issue of the "matter to be investigated", is whether federally relevant activity was committed, "in accordance with" the "allegations" in the "circumstances" (as defined);

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[14] ABM130 (*Affidavit of Judith Jefferson sworn 5 July 2018,* Annexure JSJ6).
[15] *Strickland v Commonwealth DPP and Others* (2018) 93 ALJR 1; 361 ALR 23; 272 A Crim R 69; [2018] HCA 53.
[16] *Strickland v Commonwealth DPP and Others* (2018) 93 ALJR 1, [72].

c. The allegations are that HRCT's (which are identified in a list) are engaged in one of more activities which included 13 classes of criminal offences (each of which contains numerous offences), including:

1. a category of "connected offences" (cl. 3(l)) which includes 10 further classes of offence, including a class of "unlawful activities" (cl. 3(l)(ix)) which include 10 further offences, and "incidental offences" ((cl. 3(l)(x)) which are connected with those offences;
2. any other "unlawful activities" that are "related to" or "connected with" these activities that involve offences against the laws of a State that have a federal aspect (cl. 3(m)).

d. The "circumstances" of what constitutes the *activity* are purportedly described in terms of a probable result - the "responsibility for HRCTs for a significant proportion of serious and organised crime" (cl. 2(a) Sch 1), in terms or what they "typically" or "may" be involved in (cl. 2)(b) Sch 1) but not so limited). Further, the circumstances are described in terms of amenability to control "its resilience to traditional law enforcement (cl. 2(c), Sch 1).

e. The "purposes" that follow from an "investigation" are similarly generally and widely drawn in terms of the collection and analysis of that "information and intelligence", it dissemination and its reporting (cl. 9(a)), to collect evidence and to facilitate apprehension and prosecution (cl. 9(b)), to reduce the incidence and effect of that crime (cl. 9(c)), and to make appropriate recommendations to the Board (cl. 9(d)).

15. That drafting formula is apparently common to other Determinations made by the Board. It is in structure and form identical to the *Financial Crimes Determination* and the *Money Laundering Determination* considered (and set out in the reasons) in *Strickland*[17] and, it has been conceded in argument before this Court, it is similar to other Determinations made by the Board of the ACC which "are in similar broad terms".[18]

16. The effect of the Determinations is to decide (and then to record) the marking out as "special" of an omnibus category of uncontemplated and not extant investigations - into any entity listed, into conduct past, present and future, into what apparently

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[17] *Strickland v Commonwealth DPP and Others* (2018) 93 ALJR 1, [20]-[25].

comprises almost all Commonwealth indictable criminal offences - absent any connection between the underlying activities, for the purposes of what will in practice be distinct investigations into matters which are unconnected. Consistent with this approach, and as described by Senior Counsel for the ACC in relation to an identical determination during an earlier argument before this Court, it is apparently only at the point of the Summons that one drills down to the focus upon the particular individual and significantly not at the point of the authorisation and determination.[19]

17. The drafting formula is not one expressly supported by the *ACC Act*, such as by adopting the terms of a form, but reflects a choice by the Board of the ACC as to how it proposed to address the requirements in s. 7C and the balance of the *ACC Act*. The origins of the formulation would appear to derive from the form of a "referral" used by Police agencies under the *National Crime Authority Act 1984 (Cth)* to refer a matter to that Authority and set out and considered by the Full Federal Court in *A1 v NCA*.[20] Assuming the correctness of its validity then, that form was one that did not contemplate the requirement of a statutory "investigation", or the safeguards, under the *ACC Act*.

The HRCT Determination does not itself create an investigation and there is a need for an investigation in fact

18. It must be the case, and so much was conceded by the ACC before the Full Federal Court, that the HRCT Determinations were not themselves capable of creating an investigation in fact. That follows from the observations of the plurality in *Strickland* that the determinations there being considered were not capable of creating an investigation in fact.[21]

19. The further step taken in *Strickland* was the recognition that it was necessary to have an investigation in fact – a "particular investigation" – in order for the exercise of the examination power. That followed from, among other matters, the necessity for decision makers to engage with whether an examination was "for the purposes of" the investigation, and whether questions from counsel were "relevant to the ACC operation/investigation."

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[18] *CXXXVIII v Commonwealth of Australia* [2019] HCATrans 206 (22 October 2019).
[19] *X7 v ACC and Anor* [2012] HCA Trans 280 (7 November 2012) (Mr Donaghue SC for the ACC).
[20] *National Crime Authority v A1* (1997) 75 FCR 274.

There is a need for a particular investigation at the time the determination is made that that investigation is a "special investigation"

20. The appellant's argument is that, contrary to the conclusion reached by the Full Federal Court, there must at the time the special determination is made, be a *particular investigation* in existence. In existence means a particular investigation that is planned or being undertaken. That arises as a process of statutory construction from indications drawn from within the statute, most significantly:

10 A. the *temporal requirement* in the definition of "special ACC operation/investigation" and "ACC operation/investigation" in s. 4.

B. the statutory concept of an "investigation", and its characteristics, as described in the *ACC Act.*

C. the nature of the matters that the Board is required to make decisions about under the Act. Those matters imply that an investigation must be a particular investigation (and not simply areas of possible investigation) because of:

i. the consideration by the Board of a threshold issue under s. 7C(3).

ii. the requirement that the Board state in the determination that the allegations are of "federally relevant criminal activity": s. 7C(4).

20 D. the requirement that the special investigation be established in writing, given the significance of the instrument in defining the limits of the investigation and thereby allowing the scope of the co-ercive exercise of power to be ascertained by a decision-maker, and the person the subject of the exercise of the power.

21. The appellant's argument is that a construction of the *ACC Act* ought be preferred that gives the scheme an operation such that:

a. the Board determines an investigation to be special, knowing the particular investigation (and not simply topics or areas of possible investigation);

b. the Board does so considering the effectiveness of ordinary police methods in the context of that particular investigation and whether it is an investigation of

30 potential offences that are "federally relevant" (and not simply a list of what could be federally relevant);

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[21] *Strickland v Commonwealth DPP and Others* (2018) 93 ALJR 1, [71].

c. the Board's determination in writing is an effective safeguard which contains all the required information to enable the examiner (and other decisionmakers) to ascertain their obligations in exercising power, and to enable the citizen to determine the limits of co-ercive power (as opposed to leaving the matter to be ascertained from and to depend on the scope of investigation in fact).

22. In construing the provisions, it must be recognised that the powers of the ACC examiner enlivened by the HRCT Determinations are coercive and abrogate common law rights including liberty, silence in the face of criminal investigation, and the right to property. Whether those factors are expressed in terms of "the principle of legality" or more specifically in terms of the exercise of coercion in derogation of common law rights, it favours a construction of the *ACC Act* which re-inforces the application of the protections which are designed to safeguard those interests.[22] That is supported also by the overriding purpose (to be drawn from the statute, extrinsic and legislative history) which was directly expressed in terms of providing "important safeguards" on the exercise of those co-ercive powers.[23]

23. The Full Court, with respect, did not approach the matter in the way. The reasons of the Full Court[24] which mostly clearly disclose the error in its reasoning are that:

a. it is unnecessary to identify what the word "investigation" means when it is used in the *ACC Act*: [99] (CB77).

b. in the first three sentences of [101] (CB77), where the reasoning eschews the requirement for a "particular investigation" on the basis that it is "a narrowing concept". The appellant's use of the word "particular" (and indeed as the High Court has used it in *Strickland)* does not, as the Federal Court finds, blur the concept of what is an "investigation" and what is a "matter". "Matters" are simply the subject or content of a particular investigation. The significance of the notion of particular investigation instead emerges (as the plurality explained in *Strickland* at [71]) from the need to make decisions under the Act which require it to be so. That is explained in detail below.

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[22] *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1; [2015] HCA 14, [54] (French CJ, Hayne, Kiefel and Nettle JJ), [87] (Gageler J); *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).
[23] Section 15AB *Acts Interpretation Act 1901 (Cth)*; Commonwealth of Australia, *Explanatory Memorandum to ACC Establishment Bill 2002*, p10.
[24] Core Book 'CB' p48-88.

c. as explained below, other aspects of the decision of the Federal Court do not grapple with matters raised by the appellant (and by the *ACC Act*), including the temporal issue raised by the definition of "special ACC operation/investigation" in s. 4.

These are other matters are addressed below.

24. So as to be clear, the appellant's case is that the concept of an investigation itself imports the requirement of there being an identifiable investigation with an organising principle in time and/or place, involving individuals and/or groups and circumstances or events (or a combination of them) that is capable of practical investigation. That is what is meant by there being a particular investigation. No doubt whether an investigation is sufficiently particular will be a matter of fact and degree apposite to any investigation. It will require more specificity than the mere identification of topics not capable of defining an actual inquiry, and less than the kind particularisation required to formulate a criminal charge on an indictment.

A. Inferences from the temporal requirement in the definition of ACC special operation/investigation

25. The definition of "special ACC operation/investigation" and "ACC operation/investigation" in s. 4, both require the investigation be one that the ACC "... *is conducting*" (emphasis added). That definition engages with the terms of s. 7C(3) and the other provisions of the ACC Act that refer to a "special investigation".

26. For an investigation to be able to be conducted in the present tense, there must be a particular investigation in existence (or as a minimum one that is in fact planned) to which the special determination can relate.

27. It is not open to make a determination that an investigation is to be special in a form which anticipates the creation of any number of a combination of possible future investigations at some unknown point in the future.

28. There is no context which supports a construction that the temporal aspect of the definition in s. 4 is to be disregarded.

B. Inferences to be drawn from the statutory concept of an "investigation"

29. For the ACC to determine an investigation to be special, depends on whether there is an "investigation" at that time as that expression is used within the *ACC Act*. There are

a number of indicia that assist in characterising an investigation as something which is "particular":

a. *Content and subject matters.* Investigations are into "*matters*". That expression is undefined and is a protean concept. It is given content by the requirement that the matters "relate to federally relevant criminal activity". That is by definition "criminal activity", where the crime is an offence against Commonwealth or Territory law or against State with a federal aspect. The identification of that activity implies that "matters" are conduct, circumstances, states of affairs or associated mental states.

10 b. *The action:* Investigations, under the *ACC Act* must be able to be "*carried out*": s. 12(1), *ACC Act*. To be able to be "carried out" investigations must either expressly, or implicitly, describe a matter capable of giving rise to tasks - in the nature of making observations, the collection of material or the asking of questions. The Act further identifies "*entering upon land*", "*searching*" for things in various places and the "*seizing of things*": s. 22. The carrying out of the investigation has "*participants*" who are directly involved in its investigations. It can be seen that there is an immediate tension between the creation of an abstract topic which does not anticipate any issue, and the conduct of an investigation into it by participants which is carried out and where actions are performed.

20 c. *Output*: One product of ACC "investigations" is "evidence": s. 12.

d. *Conclusion.* At least some special investigations are anticipated to have a conclusion. That follows because in the case of those to whom a summons has been issued, the notation in that summons is "cancelled" by operation of law if the ACC has "concluded the … investigation": s. 29A(4). That relieves the person the subject of the summons of the obligation of non-disclosure which is a criminal offence under s. 29B(1).

30. This combination of matters support the proposition that what is meant when "*investigation*" is used in s. 7C is a particular investigation. The adjective "*particular*"
30 emphasises simply that there is an investigation into matters about which there is an organising principle in time, place, circumstance, or event (or a combination of these) that is capable of formulating the basis for inquiry. That is necessary so that its investigation has the characteristics of being able to be "carried out", is capable of generating "evidence" and is capable of "concluding".

31. That can be contrasted with circumstances where there is no organising principle, but only a topic, for example "*People that might have committed one or more of 39 categories of offence*", "*Criminal offending in Australia*" or "*Organised crime between 2016 and 2018*". These topics are expressed with generality and are not in anticipation of a particular investigation as that concept is used in the Act and could not alone form the basis for an investigation.

32. In arguing that a determination must relate to a particular investigation that does not mean that a determination of a special investigation cannot be anticipatory. There is no reason in principle why a special determination cannot be framed for a particular investigation that will commence in the near future, or in an identified sequence provided that the investigation is particular. However, the more anticipatory it is the greater the risk it is not particular. The issue becomes stark when the intent is to make a determination about something so unformulated that it is in truth not an investigation at all.

"Particular ACC investigations"

33. That the Act when it refers to an investigation means a particular investigation is a concept embodied in the Act itself. The scheme enshrines notions of responsible government, by empowering the Minister to "give directions or furnish guidelines" to the Board with respect to the "performance of its functions": s18(1). From that general grant the scheme limits the Minister's power to do so (without additional consent of a Committee) to:

> ...give any directions or furnish any guidelines to the Board under subsection (1) with respect to:
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> (a) particular ACC operations/investigations; or ...

34. The identification of the meaning of "particular ACC investigations" is informed by the underlying purpose of the distinction drawn in s. 18. The Minister may unfettered give directions to the ACC Board on issues of policy, and which are of general application, but cannot give direction regarding the ACC Board's approval of a particular investigation.

C. Inferences to be drawn from the matters that the Board is required to make decisions about, or be satisfied of, before making a determination

35. The construction that there be a particular investigation is materially supported by threshold factors that must be considered at the time the determination is made by the ACC Board.

36. The threshold tests (s. 7C(3)) and the delimiting of the investigation in the instrument (s. 7C(4)) were both described in the explanatory memorandum to the *ACC Establishment Bill* as an "important safeguard".[25] That legislative background, as pointed out by Crennan J in argument in *X7 v Australian Crime Commission,*[26] arose in the context of public debate, contributed to by law enforcement and the legal profession, which is ventilated in reports of the Joint Committees of the Houses of the Commonwealth Parliament.[27] That debate identified difficulties that had arisen in defining, the scope of power of the NCA to co-ercively question. The purpose informing s. 7C was to have safeguards that include the requirement in the authorisation instrument to ensure the proper confinement of the questioning process.

37. Prior to making a determination the Board is required to "consider" whether ordinary methods of investigation into the matters are likely to be effective at understanding, disrupting or preventing the federally relevant criminal activity. The Act sets apart the decision to make a determination, from all other decisions of the Board, by requiring a special quorum of the Board for the making of such a determination: s. 7G(4).

38. It is unnecessary to decide whether it can make a determination if it is satisfied ordinary methods would be effective.[28] The relevant issue is whether it is meaningful to speak of undertaking that analysis in circumstances where a particular investigation is not then in contemplation.

39. Absent a particular investigation it is not meaningful to make any evaluation of its effectiveness (as opposed to simply concluding the result). The longer the

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[25] Commonwealth of Australia, *Explanatory Memorandum to ACC Establishment Bill 2002*, p10.

[26] *X7 v ACC and Anor* [2012] HCA Trans 280 (7 November 2012).

[27] *Joint Committee on the NCA – Evaluation of the NCA*; *Joint Committee on the NCA - ACC Establishment Bill 2002*.

[28] That said it would be a curious result if a determination could be validly created if after considering the issue, the Board had decided ordinary methods of investigation would suffice.

Determination operates, and the wider its terms, the less coherent must be any deliberation about that matter.

40. The position of the ACC to this point has assumed that an evaluation which is not made of the particular investigation can be sufficient. A difficulty with that position arises from the grafting of what is said in the HRCT Determination to be an investigation on to an extensive list of offences. That list of offences is in substance a list of offences (directed at being all encompassing of any potential combination of future events) which list cannot lend itself to any "meaningful" consideration of whether ordinary methods of investigation will likely be effective to that class. Indeed, if a determination could include a class of offences that extends the breadth of the *Criminal Code* and includes "predicate offences" and offences incidental (see the summary above at (14)(c)), it follows that what is in truth often and apparently capable of being addressed by ordinary methods of investigation, is in fact being treated as requiring methods that are extraordinary. That factor points as a matter of inference to the need under the Act for a particular investigation to be identified in the determination.

41. Further, prior to making a determination it is apparent that the Board is required (s/ 7C(4)) to form a state of satisfaction that:

    a. there are "*circumstances or allegations*", that "*constitute*" "*the federally relevant activity*";

    b. the "*relevant crime*" or "*relevant crimes*" are or include an offence or offences against a law of the Commonwealth, the State or a Territory.

42. As they are the matters that it is required to explicitly address in the determination instrument, it follows they are matters that are matters about which the Board must be satisfied when determining. That is apparent because unless the offences are "federally relevant offences" it has no power to make a determination: s. 7C(1)(d). That limit follows from the limits on Commonwealth legislative power to empower the Board to make a determination about an offence that did not conform to the category of being federally relevant.

43. It can be seen that this provision is a further safeguard that the action undertaken by the ACC will be lawful, and that the Board has considered the relationship between the investigative activity to be undertaken and the scope of its authority.

44. On the construction that has been advanced by the ACC, there could be no satisfaction by the Board that there is in existence any particular investigation that meets those

requirements. Instead, on the ACC's construction it is sufficient that it intends (or hopes) that what occurs later would fall within those limits. In short, the safeguard effected by the vesting in the Board the ultimate approval (by authorisation and determination) does not serve its purpose, because it is not exercising the oversight contemplated by the Act.

D. Inferences to be drawn from the need for writing and the need to attach that instrument

45. A determination that an investigation is a special investigation must be "in writing": s. 7C(1)(d). It is variously required to "describe", "state" or "set out" either descriptions, conclusions or purposes: s. 7C(4). That requirement, and its purposes, stands opposed to a concept that the scope of an investigation can be ascertained by proof of objective circumstance. This is because the particular investigation must be the subject of the decision and recorded in writing, such that the executive decisionmakers in the process can variously perform their statutory functions, and sensibly ascertain their limits on power, and those the subject of coercion can determine the limits of their obligation to comply.

46. Significant aspects of the coercive powers of the *ACC Act* can be seen to interlock with that requirement for writing because numerous provisions of the *ACC Act* anticipate that a state of satisfaction can be reached. That requires reference to the written instrument recording the determination that an investigation is special. These provisions point to a construction that the particular investigation has been addressed in the determination and the instrument recording it. Specifically:

    a. the examiner must be satisfied that the examination is "for the purposes of a" special ACC … investigation": s24A.

    b. the examiner being satisfied that the issue of a summons under s28 is "reasonable in all the circumstances" and in the case of the issue of some summonses "reasonably necessary for the purposes of the relevant special ACC … investigation.": s28(1)(c) and (d).

    c. the examiner making a "notation" (with the effect of prohibiting disclosure of the contents of the summons) only if satisfied that failure to do so would reasonably be expected to prejudice "the effectiveness of *an* … investigation": s29A(2). Given it is a summonses, the reference to an investigation must be to a special investigation.

d. a Judge of the Federal Court must determine whether the evidence on a future examination or documents produced in relation to a future notice are "relevant to" and "could be of particular significance" to the special ACC operation/investigation" in order to make an order to deliver a travel document to an examiner: s24(1).

e. search warrants may only be issued with respect to a thing or "things of a particular kind connected with a special ACC … investigation".[29]

47. In each case, the decision of an administrative decisionmaker (or decision made by a judicial officer acting *persona designata*) assumes the ability to make an assessment (in the sense of considering or rationalising) of the particular circumstances not only being within the ambit of a special investigation in fact, but being of "relevance to", "of particular significance to", "connected with" or "for the purposes of" and so on, to that special investigation. As it was expressed by the High Court one cannot "sensibly" undertake that task in the absence of a particular investigation.[30]

Necessity to attach the determination to a summons

48. A further indication that what is required as a matter of construction is a particular investigation, is the requirement that any summons issued by an ACC examiner has attached to it the "*determination of the Board that ...the investigation into matters relating to federally relevant criminal activity is a special investigation*": s28(2).

49. The power of the examiner to "question" the person summonsed is "in relation to any matter that relates to a special ACC …investigation". The power to require a person summonsed to produce a document or other thing (s28(4)) is "for the purpose of the special investigation."

50. Obedience to those requirements is achieved by a statutory obligation (s30(2)), the failure to comply with which is an offence (s30(6)). That obligation is also enforceable as a contempt of the ACC (ss34A-D). In either case, the sanction for non-compliance includes imprisonment. In the case of the criminal offence there is a maximum penalty of 5 years imprisonment.

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[29] A similar logic applies to the powers which do not require a special investigation, but an ACC investigation: see here s19A and s20 of the *ACC Act*.

[30] *Strickland v Cth DPP and Others* [2018] HCA 53, [71].

51. In those circumstances, it is clear that the purpose of the attachment of the determination is to enable the examinee to be able to ascertain the limits of the examiner's authority from the face of the instrument. Absent that capacity, the limits on the examiner's authority are from the perspective of the examinee unknown and unknowable. Indeed, from the examinee's perspective the examinee does not know what the federally relevant criminal activity might or might not be.
52. The alternative construction, that it can be ascertained by objective facts posterior to the determination process and not recorded in writing, leaves an examinee, seeking to ascertain the limits on the examiner's power having to approach a court in circumstances where the examinee is unable to determine the limits on that power, and subject to the ACC adducing evidence as to the scope and nature of the investigation it is in fact then conducting.

The Determinations in this case do not create a "special investigation"

53. One matter raised previously by the ACC, namely its general purpose and function, cannot aid it in response to these arguments. The ACC Board can decide the areas of focus for national law enforcement, can lawfully authorise investigations, and can confer upon those investigating them co-ercive powers. It can authorise particular investigations after they have commenced and before. There is no element of frustration of those purposes raised by the appellant's argument. What the appellant says it cannot do under the *ACC Act*, as it purports to do, is without regard to any particular investigation, authorise a topic or topics or category of issues and then later treat an investigation as authorised and avoid thereby its obligation of oversight. In short, the appellant's case is that the administrative approach chosen by the ACC - which no doubt is convenient and expedient by lessening the burden of work of the Board - is not open under the *ACC Act*.
54. The combination of matters above, show that the HRCT Determinations do not describe an investigation, and nor do they describe "matters", "allegations" or "circumstances" that relate a special investigation.

The terms of the Notice to Produce – Ground 2

55. The requirements in the Second Notice as far as its drafting style is concerned adopt both the formula from a warrant and a subpoena, producing the result that it was

necessary to produce "*forthwith at the time and place of service*" items in the applicant's "*possession, custody or control*". The nature of the items listed in the Schedule to the notice, included physical items which could apparently be at the home and workplace of the appellant.

56. The result is a notice which creates a requirement with which it is not possible to comply because of the incoherent requirements of producing items that one has but cannot then obtain, immediately on service of the Notice.

57. No judge of the Federal Court, nor even the ACC, suggested the terms of the warrant were able to be understood or complied with without reconciliation of the identified tension. That incoherence on the appellant's case was sufficient to demonstrate its invalidity.

58. A Notice, or any similar instrument, such as a warrant, that contains obligations which are inherently inconsistent is invalid because it exceeds the power to make it. That is so because it defies the very purpose it is intended to serve – to give notice of what the recipient is required to do in the face of risk of sanction. Its practical purpose and operation[31] - to make a requirement with which an individual must immediately comply to turn over items - means it is invalid for the reasons given by Logan J.

59. It is also invalid in this case, because such a Notice is expressly conditioned for its issue on the examiner being satisfied that "the issuing the notice is reasonable in all the circumstances": s. 21A(1). Such a satisfaction was expressed. Reasonableness of the exercise of the power includes the terms on which it is exercised. With respect, the imposition of such a requirement is not reasonable in the sense that expression is used. There is no intelligible or rational justification for the imposition of a requirement in those terms (and the ACC has not sought to identify one in its defence of the Notice). The rationality stands to be assessed without any value judgment as to whether or not the items were required – the irrationality inheres in the terms by which those items are required.

60. Contrary to the approach taken by a majority of the Full Court of the Federal Court, a warrant or a notice to produce is not an instrument, in contrast to a statute or to delegated legislation, that is to be read down to preserve its validity. That is so whether by giving primacy to one part of the Notice over another (as Bromwich J did at [30] (CB60) by confining the things in the Schedule by what could be produced "*forthwith*

at the time and place of service" and not giving the expressions custody and control their apparent effect), or by reading down the words "possession, custody or control" in the Schedule (as Charlesworth J did at [144] (CB87-88)), in order to resolve the incoherence. It is simply invalid, and if items are still sought, a new notice must be issued.

61. Howsoever the issue of the validity of the Determination is resolved, it is desirable that a view be expressed by this Court about the approach taken by the Full Federal Court to the Second Notice to Produce. That is so because in its absence, other courts will inevitably consider themselves bound, or at least stand to be influenced, by an approach to Notices, and similar instruments, which preserves their validity by reading down their terms.

Part VII:

The appellant seeks order that:

1. The appeal be allowed and the orders of the Federal Circuit Court dated 31 August 2018 and Full Court of the Federal Court dated 3 April 2019 be set aside.
2. A declaration that the second Summons and second Notice to Produce are invalid.
3. The second respondent pay the appellant's costs of the appeal to the High Court, and the proceedings in the Full Federal Court and Federal Circuit Court.

Part VII:

The appellant estimates that its oral argument will require 2 hours.

Dated: 5th December 2019

M L Abbott QC
Gilles Street Chambers
Telephone: 08 8232 3146
michael@michaelabbott.com.au

C Jacobi
Edmund Barton Chambers
Telephone: 0437 810 110
cjacobi@ebchambers.com.au

[31] See for the functions of such instruments, Feldman, *The Law relating to entry, search and Seizure* (Butterworths, London, 1986), [5.02].

ANNEXURE – LIST OF LEGISLATION

1. *Australian Crime Commission Act 2002 (Cth)* as in force on 4 September 2013, 8 June 2016 and 28 June 2018.