IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S217 of 2019

BETWEEN:

COMMONWEALTH OF AUSTRALIA

Appellant

and

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HELICOPTER RESOURCES PTY LTD

(ACN 006 485 105)

First Respondent

MARY MACDONALD

Second Respondent

CORONER'S COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Third Respondent

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FIRST RESPONDENT'S SUBMISSIONS

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Part I: Certification

We certify that this submission is in a form suitable for publication on the internet.

Part II: Issues

Preliminary Issue

1. Developments in the trial (**Criminal Trial**) of the First Respondent (**HeliRes**) since the grant of special leave confirm that the Appellant is seeking an advisory opinion from the Court on three questions; the first two of which may be of use to the Appellant in other (unidentified) contexts[1] and the third of which, by reason of its highly fact-specific nature, is unlikely to have even that potential benefit for the Appellant.

2. HeliRes sought relief with "*the ultimate objective of preventing Mr Lomas from giving evidence [before the Coroner] until the criminal proceedings against it have concluded*" (TJ[4], CAB 22). That objective has now been achieved where all evidence in the Criminal Trial is now concluded; Captain Lomas has been called as a witness for the prosecution and was cross-examined by HeliRes and the Appellant as co-accused.[2]

3. HeliRes has no readily identifiable continuing legal interest in this matter. It is here as a contradictor to the Appellant's arguments. HeliRes considers itself duty bound, in that role, to seek to place evidence before the Court[3] to prove what has occurred in the Criminal Trial since the grant of leave so that the Court is able to consider whether the appeal is so hypothetical and lacking in utility that special leave should be revoked.

Substantive Issues

4. In the event the appeal proceeds to the merits, the ultimate question is whether HeliRes, as a person under criminal charge, was entitled to relief, as of the date of the Full Court's orders, in circumstances where the Coroner threatened to exercise a process of compulsory deposition over Captain Lomas, a senior employee of HeliRes with knowledge of, and control over, the matters which are the subject of the criminal charge. The deposition was to concern those very matters.

5. That ultimate question can be broken down into six issues, which should be answered as stated below. *First*, does the system of criminal justice in Australia, as invoked here in the ACT Magistrates Court, being a system which guarantees a fair accusatorial trial to the accused, know of a process whereby, after charge has been laid against one accused, either

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[1] See *Commonwealth of Australia v Helicopter Resources Pty Ltd ACN 006 485 105* [2019] HCATrans 131 at page 7.
[2] Affidavit of Mark William Mackrell sworn 4 September 2019, dealing with the progress of the Criminal Trial.
[3] Evidence can be received on the question of leave, or revocation of leave, consistently with *Eastman v R* (2000) 203 CLR 1; see *Gronow v Gronow* (1979) 144 CLR 513 at 524-5, 530 and 540, and Mason CJ in *Mickelberg v The Queen* (1989) 167 CLR 259 at 268-271.

the prosecution or a co-accused may engage in a process of compulsory pre-trial deposition designed to extract evidence on the subject matter of the charge which was not previously in existence from an employee or agent of the accused? (**No**: see **Section V.C** below)

6. *Secondly*, does the answer to the first question vary depending on whether the accused is a natural person, on the one hand, or is an association of persons – whether incorporated or unincorporated – on the other hand? (**No**: see **Section V.D** below)
7. *Thirdly*, in circumstances where it was common ground that there are no provisions in the *Coroners Act 1997* (ACT) which evince a clear intention to alter the fundamental principles of the system of criminal justice, was it a contempt of court for the Coroner to issue the subpoena to Captain Lomas for the purpose of enabling the Appellant to obtain compulsory answers from him on matters which were the subject of the Criminal Trial? (**Yes**: see **Section V.E** below)
8. *Fourthly*, does s 87(1)(b) of the *Evidence Act 2011* (ACT) (***Evidence Act***), on its proper construction, require any different answer to the above questions? (**No, if anything it confirms those answers**: see **Section V.F** below)
9. *Fifthly*, to the extent necessary, should the Full Court's decision be sustained as per the proposed Notice of Contention? (**Yes**: see **Section V.G** below)
10. *Sixthly*, did the Full Court err in rejecting the Appellant's separate defence on the ground of alleged prematurity? (**No**: see **Section V.H** below)

Part III: Section 78B

11. No s 78B Notice is considered necessary.

Part IV: The Facts

12. The facts stated by the Appellant require correction in one respect, and elaboration in another. *First*, the Inquest into Captain Wood's death had commenced by 19 January 2016 (cf AS[11]). Hearings commenced on 19 September 2017 (FC[3] CAB 89). *Secondly*, in addition to the matters stated at AS[13], the subject matter of each of the three charges laid against both the Appellant and HeliRes[4] were the risk mitigation measures which (allegedly) were reasonably practicable and not taken by each of them to ensure the safety of pilots on missions in the Antarctic[5] (see FC[5]-[11] CAB 89-91). Those charges were being prosecuted by the Commonwealth Director of Public Prosecutions (**CDPP**) on instructions from the Commonwealth Work Health and Safety Regulator (**Comcare**)

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[4] First Respondent's Book of Further Materials (**RFM**) page 4 (HeliRes) and page 91 (Appellant).
[5] *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 at 554 – 555, [19]; RFM pages 69-71 [106]-[107].

(FC[12] CAB 92). The adequacy of risk mitigation measures taken respectively by the Appellant and HeliRes were *central* to the position of the Appellant and HeliRes as co-accused in respect of the various criminal charges, were relevant to the Criminal Trial, are relevant to the Inquest, and may have affected the determination of guilt or otherwise of the Appellant and HeliRes in the Criminal Trial (FC[16] CAB 92).

13. Other material facts include:

a. Captain Lomas was and is HeliRes' Chief Pilot (FC[13] CAB 92). In that role[6] he had and has *control* of all flight crew training and *operational matters affecting the safety* of the flying operations of HeliRes (TJ[14] CAB 24).

b. The Appellant sought to cross-examine Captain Lomas at the Inquest on questions concerning the adequacy of the risk mitigation measures taken by HeliRes (FC[13] CAB 92). There would be significant overlap between that cross-examination and the facts relevant to the Criminal Trial (FC[53] CAB 102). The Coroner issued a subpoena to compel attendance for the purpose of that cross-examination (FC[15], [17] CAB 92-93) and made clear that she intended to compel Captain Lomas to give evidence at the Inquest, after charges had been laid but before the Criminal Trial (FC[175] CAB 140). The Appellant offered no safeguards that would limit use of Captain Lomas' deposition (FC[196], [206] CAB 146, 149).

c. The consequence of the Coroner's requiring Captain Lomas to give evidence before the Criminal Trial would have been to reveal matters about which he would, or may, have given evidence for HeliRes at the Criminal Trial and possibly what that evidence was. None of those matters were, prior to the Criminal Trial, known to the CDPP or to the Appellant as the co-accused (FC[187] CAB 143).

d. The prosecution's brief of evidence for the Criminal Trial did not include any statement or record of interview with Captain Lomas (FC[191] CAB 145), and at the time of the appeal below, Captain Lomas was not to be called unless the Appellant or HeliRes requested that he be called by the prosecution, or one of them called him in its own case.

Part V: Argument

A. Legislative context

14. The Criminal Trial is being conducted pursuant to jurisdiction conferred by s 68 of the *Judiciary Act 1903* (Cth). Section 68(1) picks up and applies the *Magistrates Court Act*

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[6] *Civil Aviation Order 82.0* which is a law: *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2; 93 ALJR 212 at [9], [109].

1930 (ACT) (***Magistrates Court Act***) as a law respecting the procedure of the Criminal Trial. The *Magistrates Court Act* provides that a criminal proceeding commences with the laying of the information[7] and every defendant, including a corporation, is entitled to an accusatory trial[8] (FC[177] CAB 141]). Multiple provisions of the *Evidence Act* reaffirm this conclusion.[9]

15. *Magna Carta* (1297) s 29 applied as a law made by the ACT Legislative Assembly[10] and was picked up and applied by s 68 as a law respecting the procedure of the Criminal Trial.

16. The *Coroners Act 1997* (ACT), as applied by s 10 of the *Australian Antarctic Territory Act 1954* (Cth), authorised an inquisitorial enquiry[11] into deaths in the Antarctic Territory. It is *not* a law respecting the procedure for summary conviction of persons charged with offences within the meaning of s 68, and its provisions were *not* picked up and applied to the conduct of the Criminal Trial.

B. Uncontentious principles

17. The following legal propositions appear not to be in dispute. *First*, the system of criminal justice in Australia requires the accused to be given a *fair trial* employing the *accusatorial* method. These are fundamental principles of our legal system which generate specific rights and protections in the accused.[12] The provisions of the *Magistrates Court Act* and *Evidence Act* referenced above reaffirm that these principles govern the Criminal Trial.

18. *Secondly*, there is nothing in the *Coroners Act*, as the law governing the Inquest, to detract from the full application to the Criminal Trial of the right to a fair trial, the accusatorial principle or the provisions of the *Magistrates Court Act* and *Evidence Act*.

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[7] s 25.

[8] s 18A "defendant," ss 38, 53(2), 113-115, 307(1)(c). See also *Court Procedures Act 2004* (ACT) s 74N; and *Crimes Act 1900* (ACT) s 286.

[9] See, for example, s 17 (a defendant is not competent to give evidence as a witness for the prosecution), s 20 (limitations on comments regarding the failure of a defendant to give evidence), ss 26-28 (general rules about the manner in which evidence is given), ss 85-86 (protections with respect to admissions made by a defendant), s 137 (the exclusion of prejudicial evidence), s 138 (the exclusion of improperly or illegally obtained evidence), s 141 (the standard of proof in criminal proceedings), s 165B (delay in prosecution), s 184 (protections on the admission of facts and the giving of consents by defendants in criminal proceedings), s 193 (the absence of any provision for compulsory depositions), all of which provisions apply for the benefit of corporate accuseds.

[10] As to which see endnote 3 to Magna Carta on the ACT Legislation Register.

[11] See s 3BA(2)(b) of the *Coroners Act.*

[12] *Do Young Lee v R* (2014) 253 CLR 455 (***Lee (No 2)***) at 467 [32]; *X7 v Australian Crime Commission* (2013) 248 CLR 92 (***X7***) at 119 – 120 [46], [47] 136 [101], 142 – 143 [124], 153 [160]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 (***Lee (No 1)***) at 202 [1], 234 [73], 248 – 249 [125], 261 [159], 265 – 266 [175] - [176], 268 [182] 313 – 314 [318] – [319]; *Construction Forestry Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 (***CFMEU***) per Nettle J at 394 [61] – [62]; *Strickland v Commonwealth Director of Public Prosecutions* [2018] HCA 53; 93 ALJR 1 ***(Strickland)*** per Kiefel CJ, Bell and Nettle JJ at [95].

19. *Thirdly*, an association of persons formed into a corporation under s 119 of the Corporations Act, is not, by reason of that process of incorporation into an artificial legal entity, denied the benefits of a fair trial according to the accusatory method.[13]

20. *Fourthly,* that is not to deny that some features of the criminal justice system may call for particular modification where the accused is other than a natural person. The primary variation identified to date is that, by reason of the narrow majority in *Caltex* (albeit contrary to the position in some other common law countries[14]), a corporate accused cannot claim the benefit of the privilege against self-incrimination to resist a compulsory demand for production of its existing books and records, even if it is under charge[15]. Note also that under the *Evidence Act*, s 17, "*[a] defendant*" is not competent to give evidence as a witness for the prosecution. The protection here extends to *all* defendants, including corporations. The result is that whether other statutory provisions expressed in general terms authorise a subpoena against a corporation to give evidence via an officer,[16] as a modification of the common law position,[17] (consistent with the position taken in the United States[18]), s 17 prevails to protect the corporate accused.

21. *Fifthly*, as the accusatory system cannot be reduced to the privilege against self-incrimination[19], the fact that the law denies a corporation that privilege does not deny a corporation the benefit of the principle that the system of criminal justice is accusatorial.[20]

22. *Sixthly,* if (which the Appellant denies) the threatened compulsory deposition of Captain Lomas was a direct and substantial alteration of the system of criminal justice, then relief

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[13] *Environment Protection Authority v Caltex Refining Co Limited* (1993) 178 CLR 477 (***Caltex***) at 503 and 517; *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 (***Nutricia***) at 477 [80]; 490 [152] and [155].

[14] For example, the privilege against self-incrimination is available to corporations in the United Kingdom (*Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd* [1939] 2 KB 395; *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547; 1 All ER 434; *Istel Ltd v Tully* [1993] AC 45 at 53), and New Zealand (*New Zealand Apple and Pear Marketing Board v Master & Sons Ltd* [1986] 1 NZLR 191 at 196).

[15] *Caltex; CFMEU* at [73]; *Evidence Act* s 187.

[16] See, for example, the Court Procedures Rules 2006 (ACT), which provide that subpoenas can be issued to corporations either to produce documents or to give evidence (see, for example, rr 2445, 4021 and 6601).

[17] *Smorgon v Australia and New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 481; *Caltex* at 500 per Mason CJ and Toohey J; at 512-513 per Brennan J; at 535 per Deane, Dawson and Gaudron JJ; at 551 per McHugh J; *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96 at 136 per Gummow J.

[18] While a corporation cannot itself be a "witness", in the United States a corporation may nonetheless "testify" through agents, officers or employees, who give binding answers on the corporation's behalf. See, Rule 30(b)(6) Fed. R. Civ. Pro. 5; discussed in Reilly v. Natwest Markets Group Inc., 181 F.3d 253 (2d Cir.1999) at 268; United States v Barth 745 F.2d 184 (2d Cir 1984) at 189. See also *Braswell v United States* 487 US 99 (1988) at 109-110, where the Supreme Court held that a corporate custodian's act of producing corporate records is not deemed a personal act but rather an "act of the corporation".

[19] *Caltex* per Mason CJ and Toohey J at 500, 503, 504; per Deane, Dawson and Gaudron JJ at 527, 532 – 533 and per McHugh J at 550 - 551; *X7* at 136 [102] and 153 [159]; *Lee (No 1)* at 268 [182]; *Lee (No 2)* at 467 [32]; *CFMEU* at 399 [76]; *Commissioner of Taxation v de Vonk* (1995) 61 FCR 564 at 569C – D, 586D, 589D; *Nutricia* at 482 [104], [105], 485 [123], [124], 490 [152], [155].

[20] *Melbourne Steamship Co Limited v Moorehead* (1912) 15 CLR 333 at 341, 346; *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460 (***Pioneer Concrete***) at 467 – 468; *Victoria v Australian Building Construction Employees and Builder's Labourers Federation* (***BLF case***) (1982) 152 CLR 25 at 54.3 – 5; *Hammond v Commonwealth* (1982) 152 CLR 188 ***(Hammond)*** at 198 and 206; *Nutricia* at 482 [104] and [105].

was available to be granted by the Federal Court in its supervisory jurisdiction over the Coroner as an inferior administrative tribunal (subject to any debate about prematurity).

C. Compulsory pre-trial depositions are anathema to a criminal trial

Introduction

23. Under Ground 2, the Appellant, on the assumption it is wrong on s 87(1)(b), contends that the principles developed in what it terms the "*X7 line of cases*" do not result in any offence to the system of criminal justice if an employee of a corporation under charge is compelled to provide evidence that is relevant to that charge. The Appellant here argues that it has authority in *Caltex* and *Nutricia* that "*corporations could be compelled to provide self-incriminatory documents or answers ..., even after criminal charges had been laid*": AS[53] (emphasis added); and that the compulsory examination of Captain Lomas in the Inquest would not have altered fundamentally HeliRes' position as an accused under charge "*both because [HeliRes] could already be compelled to incriminate itself in that proceeding, and because Captain Lomas was already a compellable witness for the prosecution at the trial*": AS[55] (emphasis in original).

24. The proposition for which the Appellant contends extends far beyond the position of corporate accuseds. A natural person accused, just as much as a corporate accused, may be on trial for a matter where an employee or agent of the accused who had knowledge of or control over the accused's actions is potentially a vital witness in the case (for whichever side). The prosecution could subpoena that employee or agent to give evidence against the natural person accused.[21] That evidence would be given as the evidence of the employee or agent. It would not directly attract the "companion rule", at least to the extent that that rule is stated narrowly in terms of the prosecution being unable to compel an accused to "testify" against him/herself.[22]

25. The large issue raised by the Appellant's second argument is: does the system of criminal justice know of *any* process where the prosecution (or a co-accused) can ask the court to administer a compulsory pre-trial deposition over an employee or agent of the accused?

26. Such a process would be an anathema to a criminal trial as it has long been known in the Anglo-Australian tradition. The ACT Magistrates Court, in presiding over the Criminal Trial, could not, we submit, purport to exercise any such authority, i.e. as part of its general jurisdiction to conduct the trial as a court of justice. If Parliament sought to confer such a

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[21] See, for example, *Caltex* at 535 per Deane, Dawson and Gaudron JJ.

[22] See, for example, *Lee (No 2)* at [33]. See also *X7* at [70], [87]. For an alternative, broader, formulation, see *CFMEU* at [61].

power on a court (which is not this case), it would require the clearest of language to authorise such interference with the system of criminal justice and Chapter III considerations would then arise.[23]

Earliest principle

27. A foundational principle of the common law based in *Magna Carta* s 29, as developed by the statutes of the 14th century, requires a trial *according to the law governing such trials* whenever the Crown "*goes against*" a subject.[24] The result is that criminal charges have, from no later than the 14th century, predominantly been heard and been required to be heard by common law courts pursuant to "*due process: that is common law process in which common law procedures must be followed*".[25] So it was in 1608 in *Prohibitions Del Roy*[26] the Judges of England and the Barons of the Exchequer informed James I that the King could not adjudge any case either criminal or between parties and that all such cases were to be determined and adjudged in some court of justice *according to the law and custom of England* and that no King after the conquest assumed himself to give any judgment in any case whatsoever which concerned the administration of justice within the realm; but these causes were *solely determined* in the Courts of Justice. Although the King was "*greatly offended*" by this advice and statement of the common law, it has stood since at least that time. In *Dietrich v R* Mason CJ and McHugh J reasoned that that imperial legislation was designed to ensure that only in common law courts should persons be tried for crimes and *only by recognised procedures*.[27]

Brambles

28. Consistent with that foundational principle, in *Brambles Holdings Limited v Trade Practices Commission*[28] Franki J in the Federal Court in reliance upon *Huddart-Parker & Co Pty Limited v Moorehead*[29] and *Melbourne Steamship Co Limited v Moorehead*[30] held

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[23] Compulsory pre-trial depositions should be distinguished from procedures by which the Court orders the examination of a person in advance of the trial where there are compelling reasons indicating the person cannot give evidence in the trial itself: see, for example, Court Procedures Rules 2006 (ACT) rr 6813-6833. In the present case the prosecution did not seek any such authorised pre-trial examination. Even if they had, its conduct would have been regulated (r 6819) by the procedure of the Court as if within the criminal trial itself. A court would never authorise such an examination for the purpose of the prosecution or a co-accused compelling testimony out of an officer or employee of an accused as a "dry run" to determine whether and how to call, examine or cross-examine that same person as a live witness in the criminal trial.

[24] See Stephenson and Marcham: Sources of English Constitutional History, page 121.

[25] See Priestley JA's discussion in *Adler v District Court of New South Wales* (1990) 19 NSWLR 317 at 346 – 351.

[26] 12 Co.Rep. 64, 77 ER 1342.

[27] (1992) 177 CLR 292 at 307.

[28] (1980) 32 ALR 328.

[29] (1909) 8 CLR 330 at 379 – 380.

[30] (1912) 15 CLR 333. At 341, Griffith CJ emphasised that from the time when the Attorney-General institutes a prosecution, the matter becomes "*subject to the judicial power*", and the provision there in issue, s 15B of the *Australian Industries Preservation Act 1906*, could not be used for the purpose of "*collecting evidence in a pending suit*". Plainly, an inquisitorial exercise such as the issuing of a subpoena to appear to give evidence amounts to the "*collection*" of evidence.

that s 155 of the *Trade Practices Act 1974* (Cth) did not authorise out-of-court interrogatories directed to a defendant in an extant court proceeding on the subject matter of the proceeding[31] and that the service of such interrogatories was a contempt of court.[32] The dispositive reasoning at 338 to 339 turned on two alternative bases: *first*, the purpose for which the notice was served being to obtain information which could not be obtained by a process in the Court, and *secondly* the notice being an attempt to obtain an advantage in Court proceedings which could not otherwise have been obtained. Either was sufficient to show a clear interference with the Court so as to constitute a contempt. In *Pioneer Concrete*[33] Gibbs CJ indicated agreement with the conclusion and reasoning in *Brambles.*

10 *Caltex*

29. In *Caltex* there were two notices: a notice to produce issued pursuant to Court Rules (**Notice to Produce**) and a notice issued pursuant to s 29 of the *Clean Waters Act 1970* (NSW) (**Statutory Notice**). Both required the production of the same documents before commencement of the criminal trial of Caltex. Mason CJ and Toohey J, with McHugh J writing separately, first dealt with the Notice to Produce. They concluded that the privilege against self-incrimination was not available to a corporation and that consequently Caltex was required to comply with the Notice to Produce. They upheld the Statutory Notice even though Caltex was under charge on the basis that production was required in any event by the Notice to Produce as part of the law governing the criminal trial.[34] Brennan J held that
20 the service of the Statutory Notice was authorised by the Act for reasons immaterial to this case. Deane, Dawson and Gaudron JJ (who, with Brennan J reasoning on a different basis, would have found production was not required by the Notice to Produce) would have read down s 29 so that it did not *"cut across the procedures specifically provided for the conduct of a prosecution by the rules of court"*.[35]

30. The Appellant's submissions on *Caltex* err in three respects. *First*, AS[49] to [51] erroneously proceed on the basis that the reasoning in *Caltex* was to the effect that the provision authorising the service of the Statutory Notice was to be construed as requiring production by the corporate defendant outside the court process, without reference to whether the corporate accused could be required to provide the same production pursuant
30 to the Notice to Produce issued in accordance with the rules governing the conduct of the

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[31] At 335.
[32] At 341.
[33] At 467 – 468.
[34] Per Mason CJ and Toohey J at 507 and per McHugh J at 557.
[35] At 537.

criminal trial. As shown above, the reasoning of six members of the Court was to the contrary (albeit they split 3-3 on what the position was with the Notice to Produce).

31. *Secondly*, AS[53] claims that *Caltex* is authority that a corporation under charge can be compelled to provide self-incriminatory documents or answers to assist the prosecution. This is a misreading of these judgments. The majority on the Notice to Produce did not rule, even obiter, on the question of compelled answers; and in their reconciliation of their conclusions with their understanding of the accusatorial system they recognized quite explicitly that compelling a corporation under charge to assist the prosecution by the bringing into existence of fresh evidence post-charge would likely create a far greater interference with the system of criminal justice than merely requiring the production of existing books and records; and one which had far lesser justification in terms of the need to investigate corporations and hold them to account.[36]

32. *Thirdly*, the Appellant overlooks that the strong statements in favour of the accusatorial principle found in the dissenting judgments of Deane, Dawson and Gaudron JJ[37] were not disapproved of or contradicted by the majority judgments.[38] Those statements are in line with the subsequent development of that principle in this Court.

33. In *Lee (No 1)* Kiefel J referred with approval to the reasoning of Gibbs CJ in *Pioneer Concrete* and McHugh J in *Caltex* referred to above.[39] Gageler and Keane JJ referred to contempt which results either from the prosecution gaining advantages which the rules of procedure would otherwise deny or the denial of legitimate forensic choices available to an accused in the criminal trial.[40]

Conclusion

34. The Appellant has produced no authority under which, after the criminal process has been commenced against an accused, the Court is empowered to assist the prosecution by compulsory pre-trial examination of employees or agents of the accused. Nor has it produced any authority to enable the Court to assist *one co-accused* against *another* by any such process. That absence is telling. It reflects how a fair accusatory criminal trial is run.

35. From the *prosecution's perspective*, it is an executive body entrusted with the solemn task of deciding whether to move the weight of the state's criminal law against a person and if so which charges to prefer. By filing charges, it asserts it has the evidence to prove the

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[36] At 502-503 (per Mason CJ and Toohey J); at 555-556 (per McHugh J).
[37] At 527.
[38] See for example at 503 (per Mason CJ and Toohey J); at 546 (per McHugh J).
[39] At 276 [211].
[40] At 315 [322].

guilt of the accused beyond reasonable doubt on those charges.[41] It has strict prosecutorial duties to behave with fairness towards the accused.[42] It has disclosure obligations, and it has obligations in terms of calling material witnesses.[43]

36. The prosecution is given no compulsory power over potential witnesses. If they decline to speak with the prosecution, that is their choice. If they are associated with the accused, they will often so decline. Indeed, they may be directed by the accused so to decline, or reminded of their obligations of confidentiality.

37. From the *court's perspective*, its role is to hold a fair balance between prosecution and accused, and between two co-accused. It is no part of the judicial function for the court to lend its compulsory powers to assist the prosecution (or one co-accused) in collecting the evidence to be led against an accused.[44]

38. From the *accused's perspective*, he, she or it is entitled to decide what plea to make or maintain, what evidence to challenge and what defences to run or witnesses to call solely according to the strength of the evidence disclosed or later called by the prosecution: *Strickland* at [78]; *X7* at [124], [157]. Such choices are to be made *against evidence assembled by the prosecution by the procedures deemed by law to be fair within an accusatory criminal trial*. Such procedures simply do not include compulsory pre-trial depositions.

39. If the result in a given case is that the prosecution finds itself with insufficient information to determine whether to request a subpoena to enable it to call a particular witness; or that the evidence of a witness which it calls "cold" under subpoena proves unhelpful to its case; or that thereby a prosecution fails – that is just the working out of the fundamental balance of fairness struck when the State seeks to move the courts to apply the sanction of conviction and punishment against a subject.

D. No difference arises if the accused is a corporation

Considerations of principle

40. The criminal justice system is designed to operate fairly, so that *all accuseds* have the same level of protections as each other within a fair accusatory trial.

41. Persons can choose to interact with the law as natural persons or in associations, corporate or otherwise. Whatever the choice, persons will regularly need the assistance of employees

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[41] *R v Puddick* (1865) 176 ER 662; *R v Apostilides* (1984) 154 CLR 563.
[42] See, for example, *Legal Profession (Barristers) Rules 2014* (ACT), rules 62 - 65
[43] For example, the CDPP "Statement on Prosecution Disclosure" which the CDPP Prosecution Guidelines ([8.1]) provide is to be complied with subject to any laws which are applicable in the prosecution of the relevant offence.
[44] See again *Brambles* at 334.3, 338.9.

or agents to carry out their affairs. Where those affairs come under the purview of the criminal law, no compelling reason can be identified for treating the choice as to the legal form in which to conduct one's affairs as the basis to accord the protections of a fair accusatorial trial identified in **Section C** to some accuseds but not others.

Response to Appellant's arguments

42. The Appellant commences (AS[46], [47]) as if the question is limited to whether there is an interference with the accusatorial principle, as enunciated in what it terms "*the X7 line of cases*", in turn meaning whether there is offence to the fundamental principle or "companion rule" as identified in the *X7* cases. This approach is too narrow.

10 43. While the accusatorial system of justice finds *expression*[45] in fundamental principles such as the prosecution at all times bearing the onus of proof and in the "companion principle", it cannot be *reduced* to such principles.[46] The Full Court correctly recognised this[47]. The accusatory system is but an aspect of the broader concept of a fair trial according to law.[48]

44. The relevant rule in *Potter v Minehan*[49] quoted by Hayne and Bell JJ in *X7*[50] concerns a departure from *the general system of law*. That system includes the rights and privileges which an accused person has between the laying of charges and the commencement of the trial[51]. The Appellant's argument falls to be assessed by reference to what has grown up as a fair trial according to law under the accusatory method.

45. In *CFMEU*[52] Nettle J referred to the reasoning of Mason CJ, Toohey and Brennan JJ in

20 *Caltex* and Spigelman CJ in *Nutricia* to which the Court below referred at FC[148] and [149]. The impact of compulsory depositions on the accusatory process is distinguished from the compulsory production of documents by the fact that the compulsory deposition brings into existence *new evidence* in response to an exercise of investigative power.[53] The significance of interference thereby caused is underlined by the cases in which civil courts have restrained the conduct of compulsory depositions outside the court's own processes

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[45] See, for example, *CFMEU* at [61] per Nettle J.
[46] See Lord Devlin in *Connelly v DPP* [1964] AC 1254 at 1347; Deane J in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 57 and Mason CJ and Toohey J in *Dietrich v R* (1992) 177 CLR 292 at 300 (see also Deane J at 328).
[47] FC[146] and [147] CAB 134.
[48] *X7* at [99]-[101] per Hayne and Bell JJ; as to the concept of a fair trial, see *Dietrich v The Queen* (1992) 177 CLR 292.
[49] (1908) 7 CLR 277 at 304.
[50] (2013) 248 CLR 92 at 132 [86]; see also *Lee (No 1)* per Kiefel J at 266 [178], 268 [182] and 271 [193] and per Gageler and Keane JJ at 310 [313].
[51] *X7* at [105].
[52] At 399 [78].
[53] Per Mason CJ and Toohey J in *Caltex* at 503.

to prevent interference with the court's *adversarial* process.[54] The compelling of answers to questions after a charge is laid thereby constitutes a more significant impingement upon the criminal justice system than the mere production of documents or other real evidence. That is good reason why the inferior position accorded to a corporation in the production of books and records is not carried over to the present situation where compulsion is sought to be used, *after charge*, to bring *new evidence* into existence against the accused.

46. At AS[53]-[55] the Appellant offers various arguments why a corporation might be placed in a lesser position to a natural person accused all of which miscarry because they start with the wrong comparison.

47. The correct comparison, as noted above, is between the prosecution seeking to exert compulsion over employees or agents of a *natural person* accused and the prosecution seeking to do the very same thing over employees or agents of *associations of persons* as accuseds. If the submissions in **Section D** are correct, the natural person accused has valuable protections in such a case. Why would the law deny to an association of persons (corporate or otherwise) like protections, once similarly under charge?

48. As seen at [29]-[33] above, and contrary to AS[53] first sentence and AS[55] second sentence, *Caltex* is no authority for any such distinction.

49. Nor is *Nutricia*, the reasoning of which is mischaracterized at AS[52]- [53].

50. The Full Court correctly analysed *Nutricia* at FC[144]-[150]. Nutricia had been charged with offences arising out of its supply of food to *Woolworths*. Notices were issued under s 37 of the *Food Act 2003* to obtain information, documents and evidence. Of the four not set aside, two concerned supply of food to *Coles*, which was self-evidently beyond the existing charges; and while the other two concerned supply to *unidentified persons which could have extended to Woolworths*, they included a statement to the effect that the material produced would not be used in relation to the existing charges.[55]

51. *Nutricia* contains strong statements by Spigelman CJ that a corporation under charge is entitled to the benefits of the accusatory system, in a recognition of the imbalance of power between the State and all of its subjects, including corporations. This is so notwithstanding a corporation's inability to claim the privilege against self-incrimination.[56] Once a charge

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[54] As referred to at FC [108] CAB 123 and 124 citing *Jones v Treasury Wine Estates Ltd* [2016] FCAFC 59; *Pathway Investments Pty Limited v National Australia Bank Ltd (No 2)* [2012] VSC 495 at [8] and [9]; *Century Corporation v Peat Marwick Mitchell & Co* (1990) 24 FCR 463 at 493; *Armstrong v Armstrong* (1892) P 98.
[55] *Nutricia* at [8].
[56] *Nutricia* at [104], [105], [152], [155]. See also *Melbourne Steamship Co Limited v Moorhead* (1912) 15 CLR 333 at 341, 346; *Pioneer Concrete* at 467-468; *BLF* at 54; *Hammond* at 198 and 206.

is laid, the prosecutor is necessarily asserting that it has the evidence to prove beyond reasonable doubt the guilt of the accused, corporate or otherwise.

52. Spigelman CJ held that the legislative scheme sufficiently evinced an intention to establish a regulatory system which allowed compulsory examination of persons *pre-charge* but not *post-charge.*[57] The consequence in *Nutricia* was that, as the statutory notices were issued to the corporation at a time when it was under charge, they *would* have been set aside as a contempt of court save only that there was an express or implied undertaking that the information would not be used in respect to the existing charges.[58]

53. The further suggestion in AS[55] fourth sentence that Captain Lomas is already compellable as a witness in the Criminal Trial misses the relevant comparison and fails to appreciate the significant alteration of the balance within the Criminal Trial once he is compelled to speak in the Inquest: see further **Section E** below.

54. The undeveloped suggestion in AS[55] fifth sentence that the Court should fashion a further, special diminution of the corporate accused's rights because of "*the difficulties of prosecuting corporations*" should be dismissed. The Appellant points to no evidence or other material to justify such a discrimination. Nor does it point to any comparable common law jurisprudence which has taken such a step.

Conclusion

55. The Appellant's argument risks the criminal trial becoming little more than the production by the prosecution to the court of admissions compelled out of the employees or agents of the accused by a parallel administrative enquiry. The argument also upsets the delicate balance of fairness struck between co-accuseds within a criminal trial. There is no reason why the Court should allow the criminal trial to be so diminished in fairness for any accuseds, whether natural persons or corporations.

E. The subpoena was restrainable as a contempt on the facts here

Principles of the law of contempt

56. An interference with the accusatorial system of criminal justice may constitute a contempt of court.[59] Contempt can take the form of an administrative enquiry commenced or continued following the commencement of a criminal proceeding which, as a matter of

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[57] *Nutricia* at [161].
[58] *Nutricia* at [177].
[59] *McGuiness v Attorney-General (Vic)* (1940) 63 CLR 73 at 84.8 – 85.4; *BLF Case* at 53.8 – 54.5, 94.9 – 95.7, 129.3 – 129.8, 130.7 – 132.1, 161.2 – 161.8; *Hammond* at 198.7, 202.8, 206.8, 207.5; *Lee (No 1)* at 219 [33], 271 – 273 [194] – [197], 314 [320], [321]; *Walton v Gardiner* (1992) 177 CLR 378 at 395 – 396; see also the Respondent's submissions in *Caltex* at [68] to [73].

practical reality,[60] creates a real risk as opposed to a remote possibility of an interference with justice according to law in the criminal proceeding.[61]

57. Such interferences may include: (a) creating the risk that an accused person will be denied the opportunity to decide the course to be adopted at trial in answer to the charge according only to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial or the strength of the evidence led by the prosecution at the trial;[62] or (b) exercising coercive powers with the effect that a party to the criminal proceeding obtains an advantage unavailable under rules of criminal procedure;[63] or (c) more generally, an extra-curial inquisitorial investigation, through compulsory process, of the involvement of a person under charge in the matter the subject of the charge.[64]

58. Each of these principles is attracted here, as we explain with a "before and after" analysis.

Before: the position without the subpoena

59. Within a fair accusatory Criminal Trial, the prosecution and the co-accuseds had the following respective options properly open to them. The *prosecution* could ask the Court to issue a subpoena requiring Captain Lomas to attend and give oral evidence in the prosecution case. It could invite Captain Lomas to confer with it beforehand, to answer questions and to create a statement of his evidence. But it had no executive power, and no available court process, to compel him to speak with it.

60. The *Appellant*, as the co-accused, could ask the prosecution to call Captain Lomas in its case and if so cross-examine him; and it could otherwise cross-examine him if he was called in HeliRes' case or call him in its own case; but, like the prosecution, it had no means to compel him to co-operate with it in advance.

61. *HeliRes* had available to it a wide range of options:

a. Its fundamental right was to decide whether to maintain its plea of not guilty, what evidence to challenge and what evidence to lead solely by reference to the prosecution brief of evidence and subsequently such evidence as was led at trial: *Strickland* at [78];

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[60] *Lee (No 1)* at 315 [323].
[61] *BLF case* at 56; *Nutricia* at 472 [57].
[62] *X7* at 131 [85], 135 [99], 136 [101], 142 – 143 [124]; *Lee (No 2)* at 467 [32]; *Lee (No 1)* at 229 [54], 268 [182], 270 [188] – [190], *Strickland* at [77] – [81].
[63] *Pioneer Concrete* at 467 – 468; *Caltex* at 507, 559; *Nutricia* at 470 [52] to 472 [59] and 490 [155]; *Lee (No 1)* at 276 [211].
[64] *Brambles* at 388-389; *Huddart Parker Pty Ltd v Moorehead* (1909) 8 CLR 330 at 379-380; *BLF* at 54; *Hammond* at 198-199, 205-207; *Lee No 1* at 274 [204], 292 [264]; *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118 at 132G-133C (in a passage not affected by the appeal to the High Court) and *Nutricia* at [52]-[59].

b. As the brief supplied prior to the trial did not include a statement from Captain Lomas,[65] one option was to defend the Criminal Trial on the basis that Captain Lomas would not give evidence and his evidence would be unavailable to any party in the Criminal Trial;

c. Another option was to conduct the Criminal Trial knowing that it could determine on closure of the prosecution case whether to call Captain Lomas in its defence;

d. A further option was to press the prosecution to call Captain Lomas pursuant to its prosecutorial duties, knowing that it would then be able to adduce evidence in cross-examination of him, including evidence of which the prosecution was not aware.

After: the position with the subpoena

62. HeliRes would have been placed in the following position if the subpoena had gone forward in the Inquest:

a. the proposed cross-examination at the Inquest was to be conducted by counsel representing the Appellant, the co-accused in the Criminal Trial; it was to concern the adequacy of HeliRes' risk management measures, which was at the heart of the Criminal Trial;

b. that cross-examination was not just of any employee of HeliRes; it was of Captain Lomas who, by reason of CAO 82.0, had *control* of the very subject matter of the Criminal Trial;

c. the Appellant had put in place no procedures to immunize the cross-examination of Captain Lomas from any of the parts of the Appellant involved in the Criminal Trial; whether in its role as co-accused (i.e. officers of AAD or solicitors and counsel acting on its instructions in the Criminal Trial) or as prosecutor (i.e. passing on the cross-examination to Comcare which was instructing in the prosecution or for the CDPP or its counsel);

d. the Coroner had no self-evident power to shield the cross-examination from public view;

e. from the moment Captain Lomas gave his first answer on questions going to the heart of the Criminal Trial, HeliRes would know that its core employee concerned with the facts of the Criminal Trial was on record, likely available to the prosecution and co-accused, as to his version of events concerning whether and how HeliRes had put in place risk mitigation measures at issue in the Criminal Trial.

63. The subpoena would confer advantages on the *prosecution* not available within the Criminal Trial: (a) the prosecution now would have a fresh body of material from which to decide whether to call Captain Lomas in its case and if so how to question him; (b) if it called him, it would have a record which it might choose to use against him as a prior

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[65] FC[191] CAB 145.

inconsistent statement[66]; (c) it would have an indication of the likely lines of defence of HeliRes by reference to which it could seek to supplement its evidence accordingly (including by pursuing lines of enquiry, including as to other potential witnesses, emerging from the pre-trial testimony of Captain Lomas); and (d) irrespective of the debate over s 87(1)(b) of the *Evidence Act*, it would have the option to tender the record of cross-examination as evidence "binding" HeliRes, without needing to call him orally.

64. At the same time, such a course would confer comparable advantages on the *Appellant* as the co-accused not otherwise available to it within the Criminal Trial, specifically advantages in deciding how to shift blame from itself to HeliRes as its co-accused.

65. Finally, it would have radically limited the options of *HeliRes* within the Criminal Trial: (a) HeliRes would have been required to conduct the Criminal Trial on the basis that Captain Lomas' out-of-court statements would be known to those representing the CDPP and Appellant and available to be tendered against it; (b) HeliRes would no longer be able to decide the course which it would adopt at the Criminal Trial according only to the strength of the prosecution case; instead it would be required to decide what plea to enter or maintain, what evidence to challenge and what evidence to adduce or lead at trial according to the answers which Captain Lomas had been compelled to give at the Inquest (cf *Strickland* [78]); (c) those limitations on HeliRes' defence would arise once Captain Lomas had given at least one answer in the course of the examination which could arguably be construed as an admission of guilt or otherwise against the interest of HeliRes (cf *Strickland* [79]); (d) any admissions which Captain Lomas might make to the Coroner would erode HeliRes' entitlement to put the Crown to proof in the Criminal Trial without advancing any form of positive defence and to throw as much doubt as is honestly possible upon the quality of the Crown case (cf *Strickland* [81]).

66. It may be accepted that it would have been open to HeliRes to call Captain Lomas in the Criminal Trial to explain any adverse statement that he had made at the Inquest (as submitted at AS [38]). The submission highlights the substantive narrowing of HeliRes' options by reason of any compulsory examination of Lomas. Under ordinary criminal procedure, it had a choice whether to call him or not; now its choice is radically restricted.

Conclusion

67. The Full Court therefore correctly concluded at FC[172], [174] and [187]-[189] CAB 139-144 that allowing the subpoena to stand would have effected a fundamental alteration in

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[66] See ss 43, 60 and 106(2)(c) of the *Evidence Act*.

favour of the State (or in the present case in favour also of a co-accused who happens to be another emanation of the State) of the balance struck by law in the manner in which the prosecution (or the co-accused) is permitted to go about assembling the case for trial, with inevitable impacts on rights of HeliRes as the accused in its defence of the Criminal Trial. The subpoena constituted an extra-curial inquisitorial investigation of the involvement of HeliRes on the matters the subject of the charge. This was a contempt of court within the settled principles noted above.

F. Section 87(1)(b)

The Appellant's argument

10 68. The Appellant argues at AS[25]-[45] that the Full Court decision stands or falls on an erroneous understanding of the effect of s 87(1)(b) of the *Evidence Act*. The Appellant attributes to the Full Court a finding that s 87(1)(b) altered the common law in two respects; the second being that it rendered any compelled answers from Captain Lomas in the Inquest prospectively admissible in the Criminal Trial not just *against* HeliRes (as would be the common law position) but now making them admissions *by* HeliRes. The Appellant asserts such change would alter the well settled position that, where an employee gives oral evidence in a trial against the employer that is the evidence of the employee. The Appellant argues that it is only by reason of this erroneous understanding of s 87(1)(b) that the Full Court has founded relief – the prosecution can already compel Captain Lomas to
20 give oral evidence for the prosecution at the Criminal Trial which will be *his* evidence, so it is gaining no new or different advantage if it can compel his evidence at an earlier point in time in the Inquest and then tender it against HeliRes as *his* admissions, not *HeliRes'* admissions at the trial.

First answer

69. The first answer is that, even if the Appellant were right about s 87(1)(b), it would not eliminate the fundamental alteration to the accusatorial system of criminal justice which is worked by the subpoena. Once Captain Lomas is compelled to answer *any* questions in the Inquest going to the subject matter of the charge, the prosecution and the co-accused have access to fresh material which they cannot obtain within the Criminal Trial, material which
30 they can use to their advantage and to the prejudice of HeliRes in the various ways noted in **Section E** above. A substantial alteration to the balance within the Criminal Trial *has immediately occurred and continues to occur*, whatever be the precise means by which the prosecution or the Appellant choose to take advantage of the compelled material.

70. As noted, they may use his compelled testimony in a variety of ways (both direct and derivative): as a means to answer likely defences; as a basis to decide whether to call him in their cases; as a means to identify other witnesses or lines of enquiry which may enable further evidence to be harnessed; as a means to cross-examine him on a prior inconsistent statement; or ultimately by tender under s 87(1)(b). All of these options work fundamental interferences with the criminal justice system.

71. This is so, whether or not the record of Captain Lomas' answers goes in under s 87(1)(b) as admissions by Lomas which *bind* HeliRes (the Appellant's view) or as admissions *by* HeliRes (the better view, as explained below). The advantages gained by the prosecution and the co-accused and the prejudices suffered by HeliRes are the same on either view. The Full Court correctly so reasoned.[67] The question of construction of s 87(1)(b) raised by the Appellant is irrelevant to the resolution of the appeal.

Second answer

72. The Appellant's argument about "double effects" mischaracterizes the reasoning of the Full Court and in doing so elides two separate matters. On the one hand, Captain Lomas can be compelled by the prosecution to give oral evidence in the prosecution case. If this happens, it is *his* evidence that is given, not the evidence of HeliRes. Section 87 says nothing about any situation where a witness gives oral evidence in court; it is about, and only about, the exceptions to the admission of hearsay evidence. The Full Court cannot sensibly be read as suggesting to the contrary.

73. On the other hand, if the subpoena is allowed, while the evidence of Captain Lomas to the Inquest is *his* evidence, if the prosecution seeks to prove it in the Criminal Trial, at that point the evidence is that of *the person who heard it (or of the transcript)*. Section 87 then has its role to play: it assists in determining whether that evidence, which is hearsay in character, is admissible by way of an exception which traces though s 81 back to the primary rule of inadmissibility in s 59.

74. So there is no tension between the Full Court's conclusion that s 87(1)(b), within its sphere of operation, views the out-of-court statement of Captain Lomas as an admission *by HeliRes* as the accused and the position that when Lomas gives oral evidence to either the Inquest or the Criminal Trial that is *his* evidence.

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[67] See FC[172] (second and third sentences), [173]-[176], [187] and [188] (cf FC[189] which, in the light of what went before, should be read as the Court identifying a consideration which put the conclusion beyond doubt rather than one strictly necessary to it).

75. Nor is anything gained by the suggestion (AS [44]) that if Captain Lomas can be compelled to give oral evidence in the Criminal Trial, s 87(1)(b) could not sensibly operate to produce a different result at the Inquest. This misunderstands the Full Court's approach to the operation of s 87(1)(b), which is not directed to what may have occurred at the Inquest, but rather to what that provision would enable the prosecution to achieve in the Criminal Trial. Specifically, it would enable the prosecution to: tender proof of the out-of-court statements of Captain Lomas; avoid the need to call him; and restrict the forensic choices of HeliRes.

Third answer

76. In any event, the Appellant has misunderstood the prior position at common law and the nature of the change effected by s 87(1)(b), as we now explain.

77. The *common law* governing the admission of evidence against an employer, whether a natural person or a corporation, in a civil or criminal trial, involved three propositions:

a. statements made out of court by employees, whether compelled or not, were not admissible under the hearsay rule unless they were admissions made with the authority of the employer;

b. admissions made by senior officers in the ordinary course of business were ordinarily taken to be made with authority and were therefore admissible;

c. where the exception was established, the effect of admissibility of the relevant proof was that the statement went into evidence *as an admission by the employer.*[68]

78. Section 87(1)(b) effected only one change to the common law. It made the out-of-court statement by employees such as Captain Lomas admissible against the employer – natural person or corporate – in an *additional circumstance*, namely where the employee was speaking about a matter within the scope of the person's employment. In such a case, the employer accused could no longer protect itself against the ability of the prosecution or a co-accused to prove such statement by withdrawing authority to speak on its behalf.

79. The change exacerbates the interference to the system of criminal justice which occurs if an accused under charge finds its employees subject to compulsory depositions about matters which are within their employment and the subject of the charge. The prosecution will now be able to tender the statement, as an admission by the accused, and not need to call the employee in its case. The accused may then be forced to call the employee to explain or rebut the statement. That is the very position in which HeliRes finds itself. The

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[68] See, e.g. *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100 at 123 per Latham CJ, 129 per Dixon J, 132 per McTiernan J.

Full Court was right to emphasise this as a crucial and dispositive (but not the only) feature which established the contempt: FC[189].

80. Contra the Appellant, s.87(1)(b) did not work any change in the *person* who is taken to have made the admission. As was the case at common law, if the statement goes in, it goes in as an admission *by the accused*. Indeed, it has to. Tracing the relevant provisions through the *Evidence Act* confirms this result.[69] Indeed, other protective provisions of the Act only make sense on this hypothesis.[70]

G. Notice of Contention

81. All arguments in Section E are reflected in the reasons of the Full Court. To the extent there is any doubt, leave is sought to rely upon the proposed Notice of Contention.

H. Prematurity

82. The Full Court was right to find that the case was to be decided at a level of principle which overrides issues of any need to condition or control the questioning of Captain Lomas at the Inquest (FC[204] CAB 148). In any event, the Full Court's stay of the subpoena was in no way premature. It was not possible to delay any decision until after Captain Lomas had been examined at the Inquest, as by that time the advantages identified above at [63]-[64] would already have accrued to the Appellant and prosecution (and the resulting disadvantage already suffered by HeliRes). In circumstances where no protections were offered as to the use of Captain Lomas' evidence, and the Coroner had indicated that she intended to permit cross-examination without restriction,[71] the threat to HeliRes' right to a fair accusatorial trial was imminent at the time of the Full Court's decision.

Part VII: Time estimate

83. HeliRes estimates that it requires 2 ¼ hours to present its oral argument.

Dated 5 September 2019

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[69] See the definition of "*previous representation*" in Part 1 of the Dictionary to the *Evidence Act*; the "hearsay rule" in s 59, which renders "*previous representations*" inadmissible for a hearsay purpose; the exception to the hearsay rule in s 81, which provides that the hearsay rule does not apply to evidence of an "admission"; the definition of "*admission*" in Part 1 of the Dictionary; and the link between the exception in s 81 and "*a previous representation made by a person*" other than a party provided by s 87(1)(b).

[70] See, for example, ss 85, 86, 189(2) and (3), and the definition of "admission" in Part 1 of the Dictionary.

[71] FC[175] CAB 140.

ANNEXURE

LIST OF LEGISLATIVE PROVISIONS REFERRED TO

(PD No 1 OF 2019)

No.	*Document*	*Version*
1.	*Judiciary Act 1903* (Cth)	01 Jul 2016 to 24 Aug 2018 (C2016C00836)
2.	*Corporations Act 2001* (Cth)	12 Apr 2018 to 30 Jun 2018 (C2018C00131)
3.	*Civil Aviation Order 82.0* (Cth)	28 Feb 2015 to 07 Nov 2018 (F2015C00204)
4.	*Coroners Act 1997* (ACT)	26 Apr 2018 to 20 Jun 2019 (R44)
5.	*Evidence Act 2011* (ACT)	26 April 2018 to 4 December 2018 (R7)
6.	*Magistrates Court Act 1930* (ACT)	26 Apr 2018 to 31 Aug 2018 (R84)
7.	*Court Procedures Act 2004* (ACT)	16 Nov 2017 to 4 Dec 2018 (R49)
8.	*Crimes Act 1900* (ACT)	25 Apr 2018 to 31 Aug 2018 (R116)
9.	*Magna Carta (1297) 25 Edw 1 c 29* (ACT)	Published 5 Jul 2002 (R1)
10.	Court Procedures Rules 2006 (ACT)	1 Jan 2018 to 31 Dec 2018 (R51)
11.	Legal Profession (Barristers) Rules 2014 (ACT)	Published 4 Sep 2014