IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 217 of 2019

BETWEEN:

COMMONWEALTH OF AUSTRALIA
Appellant

and

HELICOPTER RESOURCES PTY LTD ACN 006 485 105
First Respondent

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MARY MACDONALD
Second Respondent

CORONER'S COURT OF THE AUSTRALIAN CAPITAL TERRITORY
Third Respondent

APPELLANT'S SUBMISSIONS ON NOTICE OF CONTENTION

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PART I: CERTIFICATION

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

PART II: NOTICE OF CONTENTION IS REQUIRED

2. The proposed Notice of Contention (**NOC**) raises the issue whether the Coroner's subpoena to Captain Lomas gave rise a real risk of interference with the pending prosecution of the First Respondent (**Helicopter**) by conferring advantages on the prosecution and co-accused which were not available to them in the criminal process. The issue, as developed at the hearing on 10 October 2019, hinges on the claimed impermissibility of what Helicopter calls a "compulsory pre-trial deposition" of witnesses other than the accused.

10 3. Helicopter's contention that the NOC is for precaution only should not be accepted.[1] The above issue was not decided by the Full Court and could only be an alternative basis on which its decision should be upheld. Helicopter's submission that there are four "strands" to the Full Court's reasoning does not assist it: the submission requires an artificial reading of the reasons and, in any event, none of the alleged "strands" constitute a finding that the issuing of the subpoena constituted a contempt of court.

4. The Full Court's reasons make explicit that the basis for its decision was what it (wrongly) considered to be the effect of s 87(1)(b) of the *Evidence Act 2011* (Cth) in the context of the accusatorial principle. The Full Court described that issue, and only that issue, as being the "crucial and dispositive consideration" (at [189]; CAB 144). This is consistent
20 with the structure and content of its entire reasoning between [137]-[189] (CAB 131-144), as addressed in oral submissions at T 11-14, ln 377-501. Given the express language used by the Full Court, which repeatedly treated s 87 as dispositive,[2] Helicopter's attempt to treat the reasoning relying on s 87(1)(b) as merely one "strand" in the reasoning, and to extract three further and independent "strands", is unpersuasive. The contrary view would require this Court to accept that the Full Court endorsed of a novel limit on the pre-trial coercive examination of witnesses "central to the defence", despite the absence of any clear statement in its reasons to that effect or any analysis of the cases now said to support that limit.

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1 T 52, ln 2269-2274ff. In that passage, some of Helicopter's submissions are justified not as being responsive to the Appellant, or as supportive of the Full Court's reasons, but as "necessary to consider in terms of the question before you, which is whether the orders were correct at the time they were made". That effectively concedes the need for the NOC, because without the NOC the correctness of the Full Court's orders is in issue only to the extent raised by the Notice of Appeal.

2 Particularly at FFC [143], [183]-[184] and [189] (CAB 133, 142-143, 144).

5. For the above reasons, Helicopter's argument concerning pre-trial depositions and contempt of court need be decided only if Helicopter is granted leave to file the NOC out of time. Such leave should be refused.[3] No good reason has been given for its delay. Further, Helicopter has no present interest that would justify it extending the issues to be determined in this appeal beyond those decided by the Full Court. The fact that Helicopter previously had an interest in advancing this argument does not mean that it has such an interest in raising them again in this Court, even though they need not be decided to resolve the appeal: cf T 52, ln 2281-2289; T 53, ln 2331-2335. The points sought to be raised by the NOC should be left until they arise in a concrete dispute between parties that have an interest in the outcome of the dispute.

6. Argument relating to the NOC has already extended the hearing of the appeal. If the Court accepts that the NOC is necessary, but Helicopter is granted leave to file the NOC, it appears to be accepted that the costs order should be varied so that costs of the NOC follow the event: T 57, ln 2485-2492.

PART III: ARGUMENT IF THE NOTICE OF CONTENTION IS ALLOWED

7. Helicopter accepts that it was open to the prosecution to call Captain Lomas to give evidence at its criminal trial, and that this would not have involved compelling Helicopter itself: T 53, ln 2313-2317; T 62-63, ln 2744-2769. Nevertheless, it contends that if Captain Lomas had been compelled to give evidence at the coronial inquest, its criminal trial would have been fundamentally altered because the prosecution would have obtained an advantage that is not available under the rules of court, the obtaining of that advantage being said to constitute a contempt of court: T 63, ln 2772-2777; T 76-79, ln 3386-3525; see also Helicopter's Submissions (**HS**) [57(b)].

8. That submission cannot be reconciled with the authorities and should be rejected. To use statutory powers in a manner that has the effect of revealing the evidence that may be given by a person other than the accused in advance of a criminal trial is not to obtain an advantage denied by the rules of criminal procedure. In fact, committal procedures allow for that very thing to occur. As such, the examination of Captain Lomas at the inquest would not have fundamentally altered Helicopter's criminal trial.

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[3] T 48, ln 2090ff.

A. The authorities

9. As already addressed orally,[4] Helicopter's argument that it is a contempt of court to utilize statutory powers to obtain evidence that could not have been obtained under the rules of court cannot be reconciled with the ratio of *Caltex*,[5] where statutory notices to require the production of documents were upheld notwithstanding this Court's ruling (in answer to question 7) that the documents sought pursuant to those statutory notices could not be obtained under the rules of court. The argument is likewise inconsistent with *Lee No (1)*,[6] *Nutricia*,[7] and with numerous first instance decisions accepting the use of coercive powers against witnesses.[8] Those cases are not challenged.

10 10. As Helicopter places particular reliance upon *Brambles Holdings v TPC*[9] (***Brambles***) and *Pioneer Concrete v TPC*[10] (***Pioneer Concrete***), it is necessary to address those authorities in more detail. Neither case supports Helicopter's submission.

Brambles

11. In *Brambles*, the Trade Practices Commission (**TPC**) brought penalty proceedings against the defendants (including the corporate defendant Brambles). The Commission served notices under s 155 of the *Trade Practices Act 1974* (Cth) on the defendants that asked questions relevant to the pending proceedings. Those notices were challenged on two bases, being that: (a) the TPC did not have power to issue the notices as a matter of construction; and (b) the issue of the notices was a contempt of court.

20 12. On the first point, the Court held as a matter of construction that s 155 did not provide power to issue notices after proceedings had been commenced, because that section conferred power for the purpose of obtaining information to inform whether proceedings should be commenced.[11] For that reason, the s 155 notices were invalid. The Court identified the invalidity of the notices as an "important" distinction from cases where the issue of the

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4 T 28, ln 1168-1176; T 30, ln 1253-1283.
5 (1993) 178 CLR 477.
6 (2013) 251 CLR 196, [323]-[325], [335] (Gageler and Keane JJ).
7 (2008) 72 NSWLR 456, [139]-[145], [171], [182], [187] (Spigelman CJ), [201]-[202] (Hidden and Latham JJ agreeing).
8 *ASIC v Elm Financial Services Pty Ltd* (2004) 186 FLR 295, [77]-[80], [83] (Austin J); *Hak v ACC* (2004) 138 FCR 51, [22], [26] (Merkel J); *De Greenlaw v NCSC* (1989) 15 ACLR 381 (Southwell J). It is also difficult to square with *Hammond v Commonwealth* (1982) 152 CLR 188, 199 (Gibbs CJ, with whom Mason and Brennan JJ agreed); *BLF case* (1982) 152 CLR 25, 131.7 (Wilson J), see also 55 (Gibbs CJ), 97 (Mason J) and 119 (Aickin J).
9 (1980) 32 ALR 328.
10 (1982) 152 CLR 460.
11 *Brambles* (1980) 32 ALR 328, 335.

notice was held to have been authorised by statute.[12]

13. One such case referred to by the Court was *Re Hugh J Roberts*[13] (***Roberts***), where a private examination under s 249 of the *Companies Act 1961* (Cth) was unsuccessfully challenged on the basis that it could only be regarded as having been for the purpose of obtaining admissions from the examinees to be used against them in pending misfeasance proceedings. Street J held that, while an examination may be vexatious where deliberately used to defeat a court order, the use of the power after the proceedings had commenced, and in circumstances where the liquidator may obtain admissions or material that may be able to be used in the proceedings, did not make the process abusive or vexatious.[14] Franki J apparently accepted the authority of *Roberts*, which is inconsistent with the wide reading of *Brambles* urged by Helicopter.

14. In *Brambles*, it was common ground (incorrectly, as subsequent cases revealed) that a corporation could claim the penalty privilege, and therefore that the TPC could not obtain discovery or require answers to interrogatories pursuant to the ordinary rules of court. In other words, the penalty privilege was thought to deny the right to discovery or interrogatories that would ordinarily be available,[15] and that indeed was the reason that the TPC had sought to rely instead on s 155 notices. Whatever the position would have been had the statutory notices been valid (and thus might have authorized the impugned conduct), in circumstances where the notices were invalid their issuance "was a clear attempt to procure an advantage by threatening a party with criminal proceedings if it did not do something, which the law did not require it to do".[16] *Brambles* therefore does not purport to prohibit the valid use of a statutory power to obtain information by means outside the ordinary processes of the court, particularly where that would not circumvent an affirmative limitation on the court's power.

Pioneer Concrete

15. In *Pioneer Concrete*, civil proceedings had been instituted to which the TPC was not a party, and the question was whether the existence of those proceedings prevented the TPC from exercising its statutory power under s 155 to obtain information that overlapped with

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[12] *Brambles* (1980) 32 ALR 328, 335-336.
[13] (1970) 91 WN (NSW) 537.
[14] *Roberts* (1970) 91 WN (NSW) 537, 539E-540B.
[15] *Brambles* (1980) 32 ALR 328, 335.
[16] *Brambles* (1980) 32 ALR 328, 340.

the issues in the pending proceeding. Chief Justice Gibbs, with whom Brennan J agreed,[17] indicated provisional agreement with *Brambles*,[18] but did not give it the expansive reading for which Helicopter contends. Instead, Gibbs CJ emphasised that not every investigation into facts which are the subject of a pending proceeding constitutes a contempt of court. Indeed, on the facts Gibbs CJ held that there was no intention to interfere with justice, and no real risk that the exercise of the s 155 powers would in the circumstances have that effect.[19] Accordingly, the exercise of that power did not involve a contempt, notwithstanding the pending proceedings. Justice Mason reached the same conclusion, stating:[20]

> It may be that the plaintiffs in the Ro-Mix proceedings will subpoena such answers as may be given in response to the notices and tender them in evidence as admissions in those proceedings. But I cannot see how this use of the material demonstrates that the issue and service of the notices is for a purpose foreign to the Commission's functions, is otherwise beyond power or is a contempt.

16. Thus, even though Mason J foresaw that evidence brought into existence as a result of the s 155 notices might ultimately be tendered as an admission in the pending proceedings (that being closely analogous to the possibility about which Helicopter complained), Mason J rejected the argument that the exercise of the power constituted a contempt of court. The case demonstrates that the fact that an exercise of statutory coercive powers may have some effect on pending proceedings (including on the evidence available to be tendered in those proceedings) it not itself sufficient to support the conclusion that the exercise of those powers constitutes a contempt of court.

17. As was discussed at the hearing,[21] McHugh J referred to *Pioneer Concrete* in *Caltex*. The relevant passage needs to be read as a whole. His Honour said:[22]

> Obtaining evidence under a statutory power for the purpose of assisting a party in pending litigation does not necessarily constitute an interference with the procedures of the courts. The evidence gathering procedures of a party are not limited to the use of court procedures. No interference with the processes of the courts or the course of justice occurs merely because a party avails itself of a statutory power to obtain evidence during the course of pending litigation. The mere use of such a power during the pendency of litigation is not a contempt of court even when the sole purpose of the exercise of the power is to assist a party to obtain evidence for use in that litigation. To constitute contempt, the party must exercise the power in such a way that it interferes with the course of justice. Thus, there might be a contempt if the exercise of the statutory power "would give such a party advantages which the rules of procedure would otherwise deny him" [citing *Pioneer Concrete* at 468]. But something more is required than that the party exercised the power for the purpose of obtaining evidence for use in pending litigation.

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17 *Pioneer Concrete* (1982) 152 CLR 460, 475.
18 *Pioneer Concrete* (1982) 152 CLR 460, 468.
19 *Pioneer Concrete* (1982) 152 CLR 460, 468.
20 *Pioneer Concrete* (1982) 152 CLR 460, 474 (emphasis added).
21 T 30, ln 1528-1594.
22 *Caltex* (1993) 178 CLR 477, 558-559 (emphasis added). See also at 517 (Brennan J).

18. While it is true that the penultimate sentence in the above passage contains a qualification, that qualification should not be read as consuming the general rule to which his Honour refers. This passage explains McHugh J's reasons for concluding that the s 29 notices were valid, notwithstanding that they had been issued for the sole purpose of obtaining evidence from Caltex for use against it in pending criminal proceedings (and notwithstanding the majority holding that the same documents could not have been obtained pursuant to the rules of court). In that context, McHugh J's reference to "advantages which the rules of procedure would otherwise deny him" cannot sensibly be read as applying simply where statutory powers are used to obtain information that the rules of procedure did not affirmatively confer a power to obtain. To the contrary, subject to a qualification where a statutory power is used for the purpose of circumventing a restriction in the ordinary rules of procedure (such as a privilege, as occurred in *Brambles*), statutory powers may be used to obtain evidence that the party would not otherwise have been able to obtain. That is so whether that evidence is sought for use in pending proceedings, or for purposes unrelated to gathering evidence for a pending proceeding.

19. In this case, the subpoena was not issued to circumvent any rule of procedure that prevented the prosecution or the Appellant from speaking to or obtaining evidence from Captain Lomas (there being no such rule). There is no finding that the subpoena was issued for the purpose of gathering evidence for use in the criminal proceeding at all, and there is no basis to infer that this was the Coroner's purpose. As to the effect of the subpoena, even if that effect had been that the prosecution or appellant would have obtained advance knowledge of the evidence that might be given by Captain Lomas were he to be called as a witness at Helicopter's trial (being evidence that they were entitled to compel at the trial in any event), an effect of that kind does not give rise to contempt (as *Pioneer* illustrates). Specifically, the obtaining of such knowledge does not involve obtaining an advantage "denied" by the ordinary rules of procedure.

B. Criminal procedure allows compulsory powers to be exercised against witnesses

20. Helicopter relies on what it describes as an accused's "right not to reveal the nature of its defence prematurely": T 63, ln 2780. It does not limit this "right" to revelation by the accused, instead contending that, once charges have been laid, it is a contempt of court for statutory powers to be used to obtain information from any person who is "central to the

defence",[23] because to do so would involve "a fundamental alteration of the accusatorial trial to which [the accused is] entitled": T 52-53, ln 2285-2288; see also HS [57(c)]. In addition to the above arguments based on authority, that submission should be rejected for the following reasons.

21. ***First***, police and prosecutors are entitled to seek and obtain information from persons other than the accused about how an accused might defend a charge. Investigators necessarily seek information from persons who have knowledge of an alleged crime. Such people may or may not co-operate. If they do co-operate, they may reveal information that indicates the way in which an accused is likely to defend a charge. If that occurs, then prosecutors will have exactly the same knowledge of the evidence that the witness may give at the trial as they would have if the witness refused to co-operate, but was then compelled to speak. Accordingly, it cannot be a fundamental alteration to the accusatorial process for the prosecution to learn such information.

22. In its oral submissions Helicopter sought to avoid this difficulty by contending that it had a right to prevent its employees from speaking to the prosecution prior to the trial.[24] Initially, Helicopter placed significant emphasis on this point. The argument depended on a strained reading of the relevant contractual rights.[25] But more importantly, as was pointed out during the hearing, even if the contractual provisions purported to give Helicopter such a right, to that extent they were unenforceable as contrary to public policy.[26] Furthermore, any attempt by Helicopter to prevent potential witnesses from assisting in relation to a proceeding may, depending on the circumstances, also have involved contempt,[27] an indictable offence,[28] and/or a contravention of general protections for employees.[29]

23. That aspect of its argument having collapsed, Helicopter is left with the proposition that, despite the fact that Captain Lomas was free to inform the Coroner or the prosecution

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[23] T 86, ln 3832; T 87, ln 3850; T 88, ln 3894-3904.

[24] See variously T 59-60, ln 2605-2615; T 61-62, ln 2680-2713; T 67, ln 2942-2952; T 68-69, ln 3018-3067.

[25] The relevant contractual provisions refer only to the disclosure of commercial information, and appear to say nothing as to the disclosure of information concerning an accident or safety procedures: see Affidavit of Rod Pulford sworn 18 May 2018, [5], and RP-3 and RP-4 in Helicopter's Second Supplementary Further Material, 5, 11-14.

[26] *A v Hayden* (1984) 156 CLR 532, 553-557 (Mason J), 574 (Wilson and Dawson JJ), 587 (Brennan J), 595 (Deane J); *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464, 489-491 [80]-[86] (Campbell J), followed in *Richards v Kadian* (2005) 64 NSWLR 204, 223 [78] (Beazley JA).

[27] See eg *Watson v Collings* (1944) 70 CLR 51, 58 (Rich J); *Australian Building Construction Employees' and Building Labourers' Federation v Viner* (1982) 63 FLR 253, 274-275 (Evatt and Deane JJ).

[28] See, eg, *Criminal Code Act 2002* (ACT), s 709A; *Crimes Act 1958* (Vic), s 256ff.

[29] See *Fair Work Act 2009* (Cth), s 340 and the definitions of "workplace right" (s 341), "workplace law" (s 12, which includes laws dealing with OH&S matters) and "adverse action" (s 342).

of the evidence he would give in advance of the trial without that having any adverse effect on the accusatorial system, there would nevertheless have been a fundamental alteration of that system if he was compelled to provide that same information in advance of the trial. That cannot be correct.

24. ***Second***, it involves no alteration to the accusatorial system for the prosecution to compel persons other than the accused to reveal the evidence that they would be able to give in advance of the criminal trial. To the contrary, that is an established feature of the committal system. While committal evidence may regularly take the form of written statements, if a potentially relevant witness refuses to speak to investigators, that person may be called during the committal and compelled to give evidence in chief, or be cross-examined, thereby revealing to the prosecution, the accused and any co-accused what evidence that witness would be able to give if called at the trial.[30] The ability of prosecutors to compel a reluctant witness to give evidence at the committal is important to ensuring that prosecutors are able to comply with their obligations to call relevant witnesses,[31] thereby to reduce the risk of miscarriages of justice.[32]

25. Nor are such powers confined to committals. For example, Pt 4.3 of the *Criminal Procedure Act 2009* (Vic) provides for compulsory examinations by prosecutors *prior to committal*, for the very purpose of enabling the prosecution to obtain evidence from reluctant witnesses.[33] That power has been used, for example, in an occupational health and safety prosecution, to compel evidence from potential witnesses who were employees of the defendant employer and were involved in the incident giving rise to the prosecution.[34]

26. While Helicopter disavows any attack on the committal system, it provides no principled explanation for why that system does not present an insurmountable hurdle to the acceptance of its argument. In light of the committal process, it cannot be "fundamental" to the accusatorial system of justice that the prosecution not be aware prior to trial of the

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30 In the ACT, see *Magistrates Court Act 1930* (ACT), ss 90AA-90AB.

31 *State Drug Crime Commission (NSW) v Chapman* (1987) 12 NSWLR 447, 450 (Allen J). More generally, see *Whitehorn v The Queen* (1983) 152 CLR 657, 664 (Deane J); cited with approval in *The Queen v Apostilides* (1984) 154 CLR 563, 576 (Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ).

32 *Mallard v The Queen* (2005) 224 CLR 125, [17] (Gummow, Hayne, Callinan and Heydon JJ).

33 The precursor to Pt 4.3 was s 56A which was inserted into the *Magistrates' Court Act 1989* (Vic) in 1999 in order to create: "a procedure to allow reluctant witnesses to be called to court and questioned to obtain their evidence prior to the committal proceeding. This power has become necessary to combat an increasing problem where persons or institutions refuse to cooperate with investigating authorities to provide statements, thereby jeopardising complex prosecutions ...": Legislative Assembly, Second Reading Speech, Magistrates' Court (Amendment) Bill, 29 October 1998, p 888.

34 See *O'Grady v Magistrates Court of Victoria* [2016] VSC 156.

evidence that may be given by witnesses who are "central to the defence". Helicopter provides no basis for drawing a persuasive distinction that would permit the compulsory pre-trial revelation of the evidence of such witnesses in a committal, while nevertheless holding that the revelation of the same evidence in an administrative proceeding that occurs for a purpose unrelated to the criminal proceeding (such as an inquest) would fundamentally alter the accusatorial system.

C. The special position of the accused

27. The *X7* line of authority is concerned only with the limits on the compulsory examination of an accused. This was recognised by the Full Court (at [183]; CAB 142), which explains its focus on whether s 87 of the Evidence Act had the effect that to compel evidence from Captain Lomas was to compel evidence from Helicopter itself. The fundamental error in Helicopter's submission in support of the NOC is that it depends on extending principles that this Court has formulated specifically in relation to an accused to a much wider and ill-defined group, being persons described as witnesses who are "central to the defence". That proposed extension is unprincipled, for it ignores the unique position of the accused in the accusatorial system of justice. While the fundamental rule and the companion rule protect the accused from being required to assist the prosecution, they do not impede the prosecution in attempting to secure the conviction of an accused based on the evidence of other witnesses. It is no doubt for that reason that Helicopter is unable to point to a single authority which supports the principle that witnesses cannot be compellable to give evidence in advance of a criminal trial.

28. Helicopter's argument that the protection of the accusatorial principle extends beyond the accused to prevent the pre-trial compulsion of witness who are the "central to the defence" was fluid. During oral argument, such persons were variously said to include persons who: (a) attract the operation of s 87; (b) were a guiding mind of a corporate accused; (c) were an agent of the accused; (d) are "in the camp" of the defence; or (e) had an intimate involvement in the facts in issue.[35]

29. Many of those categories are wide, and include persons who may or may not actually be central to an accused's defence. For example, the suggested principle as applied by reference to s 87 would prevent prosecutors from having any advance knowledge of the evidence of any employees with respect to matters within the scope of their employment.

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[35] T 86, ln 3832; T 87, ln 3850; T 88, ln 3894-3904.

That development would have sweeping implications for criminal proceedings against corporations. The notion of special rules for witnesses "in the camp" of the accused is likewise problematic in the criminal context, for it wrongly implies that the prosecutor can call only witnesses favourable to their "camp".[36] And Helicopter's suggestion that the prosecution is not entitled to advance notice of the evidence of persons who are "intimately involved in the facts in issue" is simply untenable (cf T 88, ln 3898-3900). Such witnesses are the very people whose evidence police and prosecutors must consider in deciding whether criminal charges should be laid at all. The accusatorial system is not offended if, for example, a tax agent is compelled to reveal matters about a client charged with a tax offence (cf T 69, ln 3047-3052). The evidence of the tax agent is not evidence about the accused's defence. It is simply evidence of a highly material witness. It does not offend the accusatorial system for the prosecution to have advance knowledge of that evidence, even if the evidence has a forensic effect on the position an accused can plausibly take in defending a charge.

30. Finally, Helicopter overstates the extent to which the accusatorial system as it presently operates in Australia entitles an accused not to disclose information prior to trial. In particular, its submission that the prosecution is entitled to nothing beyond a plea of not guilty is inconsistent with the many pre-trial disclosure requirements which apply to an accused in criminal proceedings. Criminal procedure provisions in all jurisdictions variously provide for mandatory pre-trial disclosure by an accused as to the nature of the proposed defence, the matters of fact and law in issue, expert reports; alibi evidence (both particulars of the evidence and details of any witness) and numerous other matters.[37] In the ACT, this includes the potential for the accused to be ordered to disclose any defence that the accused proposes to raise and limits on witness availability. This occurs after the accused has been committed to stand trial but prior to the hearing.[38] In light of the significant pre-trial disclosures that can be compelled from an accused personally, including on the most serious of charges, it is difficult to see how the pre-trial compulsion of evidence from a person who is not an accused, and who indeed is a compellable witness for the prosecution at trial, can involve a fundamental and impermissible alteration to the accusatorial system.

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[36] *R v Shaw* (1991) 57 A Crim R 425, 450 (Nathan J); approved in *R v Kneebone* (1999) 47 NSWLR 450,461 [52]-[53] (Greg James J).

[37] See e.g. *Court Procedure Rules 2006* (ACT) Pt 4.3, Div 4.3.4 (see in particular rr 4733-4744, concerning the pre-trial questionnaire); *Crimes Act 1900* (ACT), s 288 (alibi evidence); *Criminal Procedure Act 1986* (NSW), ss 141, 143 and 150; *Federal Court of Australia Act 1976* (Cth), s 23CF; *Criminal Procedure Act 2009* (Vic), ss 50, 51, 183; *Criminal Code Act 1989* (Qld), ss 590A-590C; *Criminal Procedure Act 1921* (SA), ss 123-124; *Criminal Procedure Act 2004* (WA), s 62.

[38] See *Court Procedure Rules 2006* (ACT) rr 4733-4744, and Form 4.10, Items 16 and 25.

31. For those reasons, if leave is given to file the NOC out of time, the NOC should be dismissed with costs.

Dated: 29 January 2020

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