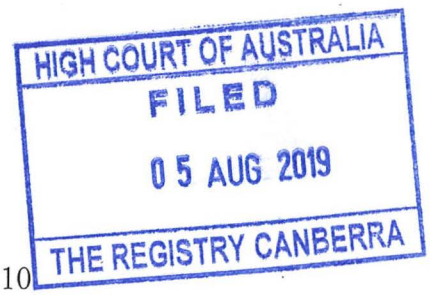
IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 217 of 2019

BETWEEN:

COMMONWEALTH OF AUSTRALIA
Appellant

and



HELICOPTER RESOURCES PTY LTD ACN 006 485 105
First Respondent

MARY MACDONALD
Second Respondent

CORONER'S COURT OF THE AUSTRALIAN CAPITAL TERRITORY
Third Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. The three issues in this appeal arise in circumstances where:

   a. a coronial inquest was commenced into the death of an employee at work;

   b. the employer of that employee was charged with criminal offences of failing to ensure the safety of its employees, including in relation to the death of the aforementioned employee; and

   c. at the inquest, a different employee of the employer was to be subpoenaed and cross-examined on matters that were within the scope of his employment and which may have been relevant to the pending prosecution of the employer in the criminal proceedings.

Filed on behalf of the Appellant by:
The Australian Government Solicitor
4 National Circuit
Barton ACT 2600
DX 5678 Canberra

Date of this document: 5 August 2019
Contact: Paul Vermeesch
File ref: 19004717
Telephone: 02 6253 7428
Facsimile: 02 6253 7383
E-mail: Paul.Vermeesch@ags.gov.au

3. In that context, the issues are:

   a. Does s 87(1)(b) of the *Evidence Act 2011* (ACT) (**Evidence Act**) have the effect that an admission made by an employee with respect to a matter within the scope of the person's employment is taken to be an admission made by the employer itself (as opposed to making a previous representation that contains such an admission admissible against the employer)?

   b. If s 87(1)(b) does have that effect, do the principles developed in the *X7* line of cases (meaning *X7 v Australian Crime Commission*[1] (***X7***), *Lee v NSWCC*[2] (***Lee No 1***), *Lee v The Queen*[3] (***Lee No 2***), and *Strickland v DPP*[4] (***Strickland***)) mean that an employee of a corporation cannot be compelled to provide evidence that is relevant to pending criminal charges against that corporation?

   c. Was it premature to conclude that the compulsory attendance of the employee for questioning in a coronial inquest was inconsistent with the accusatorial process, regardless of what answers may have been given and what safeguards may have been put in place with respect to the use and disclosure of the employee's answers?

PART III: SECTION 78B NOTICES

4. No notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: DECISIONS BELOW

5. The decision at first instance is *Helicopter Resources Pty Ltd v Commonwealth of Australia (No 2)* [2018] FCA 991.

6. The decision of the Full Court of the Federal Court is *Helicopter Resources Pty Ltd v Commonwealth of Australia* [2019] FCAFC 25 (**FCAFC Reasons**).

7. At the time of filing these submissions neither decision has been reported.

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1 (2013) 248 CLR 92.
2 (2013) 251 CLR 196.
3 (2014) 253 CLR 455.
4 (2018) 93 ALJR 1.

PART V: FACTS

8. The First Respondent (**Helicopter**) was contracted by the Appellant (the **Commonwealth**) to provide helicopter services (CAB 23 [10]).

9. On 11 January 2016, Captain David Wood, a pilot employed by Helicopter, landed a helicopter across a crevasse hidden in ice in the Australian Antarctic Territory (the **Antarctic**). When attempting to re-board the helicopter, he fell into the crevasse. He died the following day (CAB 89 [2]).

10. On 27 July 2016, Helicopter's chief pilot, Captain David Lomas, gave a detailed record of conversation to the Australian Federal Police (CAB 99 [46]).

11. On 19 September 2017, the Chief Coroner of the Australian Capital Territory commenced an inquest into the manner and cause of Captain Wood's death pursuant to the *Coroners Act 1997* (ACT) (**Coroners Act**) (CAB 89 [3]).[5]

12. On 9 October 2017, a detailed witness statement from Captain David Lomas was circulated to the parties. It was subsequently admitted into evidence (CAB 100 [52]).

13. On 20 December 2017, the Commonwealth (as manifested by the Australian Antarctic Division of the Commonwealth Department of the Environment and Energy) and Helicopter were each charged as co-accused with three summary criminal offences against s 32 of the *Work Health and Safety Act 2011* (Cth) (the **WHS Act**) in relation to three separate incidents of alleged breaches of the duty to ensure the safety of workers.[6] All three charges concerned breaches in the Antarctic. The second and third charges concerned breaches in relation to Captain Wood and another employee. The third charge arose directly out of the circumstances giving rise to Captain Wood's death (CAB 89-91 [4]-[10]). Relevantly for present purposes, the Commonwealth and Helicopter had different safety responsibilities in the Antarctic, such that they were likely to have a different position in both the inquest and criminal proceedings (CAB 91 [10], 93 [19]).

14. By letter to the Chief Coroner dated 31 January 2018, the Commonwealth requested that Captain Lomas be available for cross-examination at the inquest. Topics

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5 The Coroners Act applies in the Australian Antarctic Territory by virtue of the *Australian Antarctic Territory Act 1954* (Cth).

6 By s 10, the WHS Act binds the Commonwealth and the Commonwealth is liable for an offence against the Act. By s 11, the WHS Act extends to every external Territory.

identified in that letter (risk mitigation measures said to be reasonably practicable and not taken by both Helicopter and the Commonwealth) were relevant to both the inquest and the criminal proceeding (CAB 91-93 [11]-[16]).

15. Helicopter sought, but the Coroner refused, an application to have the inquest adjourned pending the determination of the criminal prosecution. The Coroner issued a subpoena for Captain Lomas to attend and give evidence. Helicopter then sought, but the Coroner refused, a direction that the examination of Captain Lomas would not extend to matters arising in the criminal proceeding (CAB 100-106 [52]-[61]).

10 *Helicopter Resources Pty Ltd v Commonwealth (No 2)* [2018] FCA 991

16. Helicopter sought judicial review in the Federal Court of the Coroner's decision to issue the subpoena. The relevant basis of the application was that to require evidence to be given by Captain Lomas at the inquest would prejudice Helicopter and undermine the accusatorial nature of the criminal process in two ways. First, the Commonwealth, as co-accused, would obtain the forensic advantage of exploring and assessing the evidence that Captain Lomas might give if called in the criminal proceeding where that advantage would not be available under the ordinary rules of criminal procedure. Second, the prosecution would be armed with evidence and admissions attributable to Helicopter in the criminal proceedings (CAB 36 [37]).

20 17. On 29 June 2018, Bromwich J dismissed Helicopter's application on the basis that, although the accusatorial system would prevent the rights and privileges of an accused from being overridden in the absence of clear statutory authority, Helicopter sought to rely on "the adverse consequences to it, and the forensic advantages accruing to the prosecution or the Commonwealth, arising from any overriding of [Captain] Lomas' rights", in circumstances where Captain Lomas was in no "different position to any other witness who may be called at any inquest" (CAB 60-61 [114]-[117]). His Honour observed that the attempt to expand the operation of the accusatorial system to limit the examination of an employee was unsupported by authority (CAB 60-61 [115]).

30 18. In the alternative, his Honour held that the application was premature as no such interference with the accusatorial system may eventuate (CAB 71 [147]).

Helicopter Resources Pty Ltd v Commonwealth [2019] FCAFC 25

19. On appeal, the core issue was whether the primary judge erred in not finding that there would be impermissible interference with the administration of criminal justice (CAB 117-118 [90]). Helicopter's submissions on appeal were premised on the proposition that it was a fundamental feature of the accusatorial system of criminal justice in Australia that neither the prosecutor nor the co-accused is permitted a process of compulsory pre-trial examination of persons who may be summonsed to give evidence either as part of the prosecution or co-accused's case (CAB 114-115 [84]). This was stated to be a more general proposition than the proposition that an accused cannot be subject to compulsory questioning (CAB 123-124 [108], 124 [109], 125 [112]).

20. The Full Court approached the issue more narrowly. Its reasoning turned on whether the compelled testimony of Captain Lomas amounted to coercive questioning of Helicopter. The Full Court accepted that *EPA v Caltex Refining Co*[7] (***Caltex***) is against the proposition that the accusatorial nature of a criminal trial of a corporation means that an officer of the corporation may not be required to answer questions which tend to incriminate the corporation (CAB 131-133 [137]-[143]). However, it held that *Caltex* was limited to consideration of compulsory production of documentary evidence, and that the accusatorial principle will not permit coercive questioning of a corporate accused in the absence of a clearly conferred statutory power, citing *NSW Food Authority v Nutricia Australia Pty Ltd*[8] (***Nutricia***) (CAB 133-135 [144]-[150]).

21. The Full Court considered that there is nothing in the *X7* line of cases to suggest that the accusatorial principle does not apply to corporations in the manner described in those cases (CAB 135-139 [151]-[170], in particular at 136 [157]). Although a corporation, as an artificial person, cannot give oral evidence itself, and although there can be no property in a witness who is not a party, "speaking generally, the law recognises that the conduct and evidence of certain individuals will be treated as the conduct of an artificial person, such as a corporation, not simply because [of]

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7 (1993) 178 CLR 477 at 504 (Mason CJ and Toohey J), 512-513 (Brennan J), 535 (Deane, Dawson and Gaudron JJ), 552 (McHugh J).

8 (2008) 72 NSWLR 456.

provisions such as s 87(1)(b) … but because in acting in his or her role, the individual is … 'the embodiment of the company'" (CAB 140 [174]).

22. Nevertheless, the Full Court ultimately accepted that, in the absence of s 87(1)(b) of the Evidence Act, the rule that an accused person cannot be required to testify (the companion rule) would not be engaged on the facts of this case, because by calling Captain Lomas the prosecution would not be seeking to compel the person charged with the crime (i.e. Helicopter) to assist in the discharge of the prosecution's onus of proof (CAB 142 [183]). However, it held that, because of s 87(1)(b), Captain Lomas' evidence would be "prospectively" admissible not merely as evidence of a witness of fact, but as evidence of an admission by Helicopter itself (CAB 142-143 [184]-[185]). For that reason, the Full Court held that to require Captain Lomas to give evidence would be fundamentally (and impermissibly) to alter Helicopter's position as an accused in the criminal proceedings, because Helicopter had a common law right to decide how to meet the case without the prosecution or co-accused having any entitlement to know how Helicopter would defend the charge (CAB 143-144 [187]-[189]).

23. The Full Court also held that it would not withhold relief on the basis that the application was premature because the appeal had been decided at the level of principle (CAB 148 [204]).

PART VI: ARGUMENT

24. The Commonwealth's argument involves three alternative propositions, acceptance of any one of which would require the appeal to be allowed. Those propositions are:

a. The Full Court's reliance on s 87(1)(b) of the Evidence Act was misplaced, because that provision does not have the effect that an employee's evidence becomes evidence of the employer itself. Where it applies, its sole operation is to make an employee's evidence admissible against the employer.

b. The accusatorial principle, as developed in the *X7* line of cases, does not apply to a corporate accused in the same manner that it applies to a natural person. Specifically, it does not prevent an employee of a corporation from being compelled to give oral evidence that incriminates the corporate accused with respect to a pending charge.

c. The Full Court erred in concluding that the application of Helicopter was not premature, because at the time this proceeding was commenced any risk of interference in the criminal proceeding was notional rather than real.

A. Section 87(1)(b)

25. Section 81(1) of the Evidence Act provides that "[t]he hearsay rule and the opinion rule do not apply to evidence of an admission".[9] An "admission" is defined as a "previous representation that is — (a) made by a person who is or becomes a party to the proceeding (including a defendant in a criminal proceeding); and (b) adverse to the person's interest in the outcome of the proceeding".[10]

10 26. Section 87 facilitates the operation of the above provisions, by providing for three circumstances in which "a previous representation made by a person is also taken to be an admission by a party" (meaning that it is "taken" to satisfy par (a) of the definition of "admission"). It is the second of those circumstances that is relevant to this appeal, which is where (relevantly) a representation was made by an employee of the party, and the representation related to a matter within the scope of the person's employment (s 87(1)(b)) (the **employment limb**).[11]

27. The Full Court held that the employment limb "altered the common law" in two relevant respects. *First*, it altered the common law requirement that "an employee's admission was only admissible if the employee had authority to speak; it was not
20 enough that the matter spoken about was within the scope of employment" (CAB 142-143 [184]). It is not controversial that s 87(1)(b) modified the common law in that respect. *Secondly*, however, the Full Court also found that s 87(1)(b) had the additional effect of altering the common law rule that "[o]ral evidence given by an officer of a corporation is that of the witness, not that of the corporation" (CAB 143 [184]). The Full Court held that s 87(1)(b) modified that rule by making the evidence of an employee "admissible, not merely as evidence of a witness of fact, but as evidence of an admission by the [corporation] itself" (CAB 144 [189]). It was on that basis that the Full Court made its critical finding, which was that if Captain Lomas was compelled to give evidence in the inquest, that would be contrary to the

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9 Section 81(2) facilitates the admission of evidence that is necessary to contextualize the admission.

10 Dictionary, Part 1, Schedule 1.

11 Section 87(2) provides that the hearsay rule does not apply to representations necessary to prove the relevant authority, employment or scope of employment or authority.

companion rule that an accused person cannot be required to testify to assist in the discharge of the prosecution's onus of proof (CAB 142 [183], 142-143 [184], 144 [189]).

28. The second effect identified by the Full Court was not based on any identified aspect of the text, purpose or context of s 87(1)(b). Further, it is not supported by the passage in *Cross on Evidence*[12] referred to at [184] of the Full Court's reasons (CAB 142-143). As such, the basis upon which the Full Court reached the conclusion that s 87(1)(b) had that effect is opaque. But, however that conclusion was reached, it is erroneous. In order to explain why, it is helpful to start with the common law position, before considering whether s 87(1)(b) alters that position. To so proceed is not to fall into the error of construing uniform evidence legislation by reference to the common law,[13] for the issue in question is whether the common law has been displaced.

At common law, evidence of an officer or employee of a corporation is evidence of the witness, not the corporation

29. At common law, it is well settled that oral evidence given by an officer or employee of a corporation is the evidence of the witness, not evidence of the corporation. That is so even where the corporation is bound by admissions in that evidence.

30. This issue was examined in *Smorgon v Australia and New Zealand Banking Group Ltd.*[14] In that case, Stephen J considered whether s 264(1)(b) of the *Income Tax Assessment Act 1936* (Cth), which conferred power on the Commissioner of Taxation to require any person to "attend and give evidence", empowered the Commissioner to require a corporation to attend and give evidence.[15] His Honour concluded that it did not. He explained:[16]

> A corporation cannot, of course, itself "give evidence". It may authorize an individual to depose to facts on its behalf and is obliged to do so in the course of litigation when required to make discovery of documents, answer interrogatories and the like. But it is not then itself giving evidence, the oath remains that of the

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12 Heydon J D, *Cross on Evidence* (11th ed, LexisNexis Butterworths, 2017), [35635].

13 See *Papakosmas v The Queen* (1999) 196 CLR 297 at 302 [10] (Gleeson CJ and Hayne J); *IMM v The Queen* (2016) 257 CLR 300 at 311 [35] (French CJ, Kiefel, Bell and Keane JJ).

14 (1976) 134 CLR 475 (***Smorgon***).

15 *Smorgon* (1976) 134 CLR 475 at 480-481.

16 *Smorgon* (1976) 134 CLR 475 at 481 (emphasis added).

> individual, upon whom alone the sanctions which are designed to deter perjury may operate. The corporation may be bound by admissions contained in the evidence of such a duly authorized individual but the evidence will remain that of the individual witness.

31. Justice Stephen observed that it was improbable that the legislature would intend that any particular officer could be cross-examined as the corporation, for that officer might know nothing first-hand about the particular matters inquired after, would be under no obligation to inquire about those matters, and even if he did have knowledge of the relevant matters, his evidence would be at best second hand.[17] Instead, evidence about a corporation must be elicited from the natural persons who "direct its affairs and serve its interests", and not from the corporation itself.[18] Justice Stephen specifically recorded that he had not "disregarded those important areas of the law in which mental states have come to be attributed to corporations, the state of mind of the individual being treated as that of the corporation".[19] However, he considered that the cases concerning the attribution of mental state to corporations involved quite different issues to whether a corporation could itself give evidence.[20]

32. Justice Stephen supported his conclusion that oral evidence by an officer of a corporation is evidence of that officer, and not of the corporation, in part by reference to *Penn-Texas Corporation v Murat Anstalt*,[21] where the English Court of Appeal likewise held that answers given by an officer of a corporation "would be his answers, based upon his own memory and knowledge; and though any admission by him would no doubt be binding on the company, the evidence would still be his evidence and not that of the company".

33. Consistently with the above, in *Caltex*[22] all seven Justices accepted the distinction between evidence of an employee of a corporation, and evidence of the corporation itself. Citing both *Smorgon* and *Penn-Texas Corporation*, Mason CJ and Toohey J

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17 *Smorgon* (1976) 134 CLR 475 at 481.

18 *Smorgon* (1976) 134 CLR 475 at 481.

19 *Smorgon* (1976) 134 CLR 475 at 482.

20 *Smorgon* (1976) 134 CLR 475 at 482-483.

21 [1964] 1 QB 40 at 56 (Willmer LJ, Davies LJ agreeing at 73) (emphasis added); *Smorgon* (1976) 134 CLR 475 at 483-484.

22 (1993) 178 CLR 477 at 504 (Mason CJ and Toohey J), 512-513 (Brennan J), 535 (Deane, Dawson and Gaudron JJ), 552 (McHugh J).

held that "[o]ral evidence given by an officer of a corporation is that of the witness, not that of the corporation".[23] Justice Brennan said that the "immunity from an obligation to testify as to one's own guilt ... is irrelevant to a corporation, for a corporation cannot be a witness".[24] Justice McHugh likewise noted that "a corporation itself cannot give evidence".[25] As to the dissentients, although Deane, Dawson and Gaudron JJ would have upheld the existence of the privilege against self-incrimination for a corporation, they recognized that even if the privilege applied it would have application only in the "relatively confined area of the production of documents or the answering of interrogatories".[26] It was not relevant to oral evidence, because "a corporation cannot be a witness in proceedings" and "when an officer or employee is called, even in criminal proceedings against the corporation, the officer or employee may not refuse to answer upon the basis that the answer would tend to incriminate the corporation".[27]

34. It is clear from *Caltex* (and the authorities discussed above) that, during Helicopter's criminal trial, its employees could be called by the prosecution and compelled to answer questions that would incriminate Helicopter. That would not be contrary to any rule against the accused being compelled to assist the prosecution or to testify, because the evidence of Helicopter's employees cannot be equated with evidence of Helicopter itself. Nor could Helicopter's employees claim privilege, for the privilege is not a privilege against incrimination; it is a privilege against *self*-incrimination.[28] For that reason, "[o]ne never reaches the question of compulsion because there is no testimony capable of being given by the [corporation]".[29]

Section 87: Text, purpose and statutory context

35. Contrary to the reasoning adopted by the Full Court, s 87(1)(b) of the Evidence Act does not modify the position summarized above. Section 87(1)(b) is relevantly concerned only with whether an admission by an employee is admissible against an

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23 *Caltex* (1993) 178 CLR 477 at 504.
24 *Caltex* (1993) 178 CLR 477 at 512-513.
25 *Caltex* (1993) 178 CLR 477 at 551.
26 *Caltex* (1993) 178 CLR 477 at 535.
27 *Caltex* (1993) 178 CLR 477 at 535.
28 *Caltex* (1993) 178 CLR 477 at 535; *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs* (1985) 156 CLR 385 at 393 (Gibbs CJ, Mason and Dawson JJ).
29 *DFWBII v CFMEU* (2015) 323 ALR 294 at [136]; [2015] FCA 47 at [136] (Mortimer J).

employer. It says nothing about the separate question of whether the admission is made by the employer. Accordingly, while that provision does expand the circumstances in which a previous representation made by an employee will be admissible against that person's employer (the **first effect**), it does not change the identity of the person to whom the admission is to be attributed (the **second effect**).

36. Section 87(1)(b) relevantly states:

> (1) For the purpose of deciding whether a previous representation made by a person is also *taken to be* an admission by a party, the court must admit the representation if it is reasonably open to find that …
>
> (b) when the representation was made, the person was an employee of the party … and the representation related to a matter within the scope of the person's employment … (italicized emphasis added)

37. As to the first effect, the italicized words provide that, for the specific purpose of determining whether an admission made by a person who is not a party is to be treated as if it were an admission by a party (and thus to be capable of being an "admission" as defined) the court must admit the representation if the specified condition is satisfied. However, nothing in the text of s 87(1)(b) equates the person who made the previous representation with the party. To the contrary, the section recognizes that those persons are distinct. It is that distinction that creates the occasion for the facilitative operation of s 87, by changing the circumstances in which a representation made by a person who is not a party is admissible against a different person who is a party.

38. The effect of s 87(1)(b) is that "it is not necessary for the court to be satisfied that it is reasonably open to find that the person who made the previous representation had actual or ostensible authority to make the representation"[30] before it may be admitted against a party. In that way, it assists a party who hears a previous representation made by a person in circumstances where it is reasonable to rely on that representation as binding upon another, particularly where any unfairness to the party against whom the representation is adduced can be mitigated by the capacity of that party to call the person who made the representation to give evidence to explain the

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30 Odgers S, *Uniform Evidence Law* (13th Edition, 2018), 645 [EA.87.90].

apparent admission.[31] Given the potential under s 87(1)(b) for an admission to be admissible against an employer even if the person who made the admission did not have any authority to make it, the capacity for the employer to attempt to rebut or explain an apparent admission by an employee may be particularly important. That points against construing s 87(1)(b) as having the second effect of deeming an admission to have been made by the employer itself.[32]

39. In attributing the second effect to s 87(1)(b), the Full Court may have been distracted by the fact that Helicopter is a corporation. However, nothing in the text of s 87(1)(b) confines its operation to corporate employers. To the contrary, s 87(1)(b) applies in respect of natural person employers and corporate employers alike. In respect of a natural person employer, while it is sensible to speak of a previous representation by an employee being admissible against that employer, it would not be sensible to suggest that this meant that the representation was made by the natural person employer (who is more obviously a different person, with capacity to speak for him or herself). Thus, if criminal charges were laid against a natural person employer, and an employee was called as a prosecution witness against that employer, it would not occur to anyone to suggest that this would be contrary to the accusatorial system of justice, because there would be no question of the accused employer being required to testify or otherwise assist the prosecution. The same would be true if, instead of calling the employee at trial, a previous representation of the employee was tendered against the employer in reliance on of s 87(1)(b).

40. There is no textual basis for the legal operation of s 87(1)(b) to vary depending on the legal character of the employer. Accordingly, if s 87(1)(b) does not deem an admission of an employee to be an admission by an employer who is a natural person, the same must be true for a corporate employer.

41. For that reason, while s 87(1)(b) would make any admissions made by Captain Lomas about a matter within the scope of his employment admissible against Helicopter, it does not follow that any such admissions would be "evidence of an admission by [Helicopter] itself" (CAB 144 [189]). The Full Court's conclusion to the contrary is inconsistent with the passages from *Smorgon* and *Penn-Texas*

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31 *Evidence (Interim)* [1985] ALRC 26, 422 [755].

32 *Evidence (Interim)* ALRC Report 26, p 423 [755].

Corporation quoted above, which expressly recognize that the fact that an employee may make an admission that is binding on a corporation does not mean that the evidence is to be equated with evidence of the corporation. Such evidence remains the evidence of the employee.

42. The operation that the Full Court attributed to s 87(1)(b) involves a significant and unwarranted departure from the established common law position. Further, it would have the effect that s 87(1)(b) – when taken together with the *X7* line of authorities – would throw a cloak of immunity over the evidence of corporate employees at any time where criminal proceedings against the corporation are pending or within contemplation. That would inevitably stifle the investigation and regulation of corporations at a federal and State level in every uniform evidence legislation jurisdiction.

43. Finally, to construe s 87(1)(b) as deeming a representation to have been made by a person other than the person who in fact made it would be out of step with the wider statutory context within which s 87 appears. Each of the provisions in Part 3.4 (and indeed the Evidence Act as a whole) is a procedural provision that governs the admission of evidence.[33] The leading provision for present purposes, s 81(1), does no more and no less than disapply the hearsay and opinion rules to particular representations. The balance of provisions in Part 3.4 then contract, expand or otherwise govern the operation of s 81(1). All these provisions are "methods for ascertaining facts",[34] rather than provisions that are intended to change facts. It would be inconsistent with the procedural nature of these provisions to construe s 87(1)(b) as having the substantive effect of deeming a change in the identity of the person who made an admission, particularly as it is a procedural provision that has the effect of extending another procedural provision (s 81(1)).

44. In conclusion on this point, once it is recognized that Helicopter's employees could lawfully be compelled to give evidence against Helicopter during the criminal trial, s 87(1)(b) cannot sensibly be relied upon to prevent those employees from being compelled to give evidence at an earlier time. Just as oral evidence given by such an employee at the criminal trial would not be evidence given by Helicopter, the same is

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33 See *Nicholas v The Queen* (1998) 193 CLR 173 at 191 [26] (Brennan CJ).

34 *Wigmore on Evidence*, cited in *Nicholas v The Queen* (1998) 193 CLR 173 at 191 [25] (Brennan CJ).

true of oral evidence given to the Coroner, even if that evidence is admissible against Helicopter at trial under an exception to the hearsay rule by reason of s 87(1)(b).

45. For the reasons stated above, the Full Court erred. Specifically, it erred in finding that the effect of s 87(1)(b) was that any admission made by Captain Lomas was to be equated with an admission made by Helicopter itself. As that finding was critical to its conclusion (CAB 144 [189]), the appeal should be allowed.

B. The accusatorial principle

46. Further or alternatively, the Full Court erred in treating the accusatorial principle enunciated in the *X7* line of cases as if it were applicable, without substantial modification, to a corporate accused (CAB 135-144 [151]-[189], in particular 136 [157] and 144 [189]). At [189] (CAB 144), the Full Court said:

> [T]he crucial and dispositive consideration in relation to the issue of interference is that if Captain Lomas were compelled to give evidence in the inquest, as a matter of practical reality, the appellant's position as an accused corporation in the criminal proceedings would be altered fundamentally: *Strickland* at [77]-[81].

47. The direct application of the *X7* line of authority (including *Strickland*) to a corporate accused involved error, because there are important differences between a natural person and a corporate accused that must be taken into account when determining how the accusatorial principle applies in the prosecution of a corporate accused.[35] The most important such difference is that a corporate accused is not able to claim the privilege against self-incrimination, meaning that it is lawful to compel such an accused to provide information that is then used against the corporation to assist in the proof of the alleged crime.[36] That is not to deny that the accusatorial principle is

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35 Indeed, the Full Court stated the effect of the accusatorial principle overly broadly even in relation to individuals, in suggesting that the appellant has a right to decide how to meet the case "without the prosecution or co-accused having any entitlement to know, beyond the appellant's plea of not guilty, how it will defend the charge" (at [187]). That statement is too broad. It would be more accurate to state that the prosecution cannot compel the accused to reveal how it will defend the charge, unless legislation requires the provision of some additional information, as is common with pre-trial disclosure requirements: see the discussion in *Lee No 1* (2013) 251 CLR 196 at 259 [153] (Crennan J). Even absent legislative modification, there is nothing to prevent a person (such as a witness) voluntarily informing the prosecution how an accused proposes to defend a charge.

36 See Evidence Act s 187, which has been recognized as re-enforcing the position at common law that was established by *Caltex*: see *CFMEU v Boral Resources (Vic) Pty Ltd* (2015) 256 CLR 375 at [2] (French CJ, Kiefel, Bell, Gageler and Keane JJ), [82]-[83] (Nettle J).

distinct from the privilege against self-incrimination.[37] It is, however, to recognize that this Court's decision in *Caltex* powerfully illustrates that the requirements of the accusatorial system of justice are not the same with respect to corporations as they are with respect to natural persons.

48. *Caltex* concerned a proceeding under the *Clean Waters Act 1970* (NSW) in which Caltex had been charged with criminal offences relating to polluting the Pacific Ocean.[38] After charges had been laid, the prosecutor served a notice on Caltex under s 29(2)(a) of that Act requiring the production of documents relating to the offences. Caltex resisted the notice on the basis of the privilege against self-incrimination, and on the bases that there was no power to issue the notice after charges had been laid or that it had not been validly issued.[39] By majority, this Court held that a corporation could not claim the privilege against self-incrimination,[40] and upheld the notice. The result was that Caltex was compelled to provide incriminating documents to the prosecution, notwithstanding the fact that charges had already been laid and that the documents were sought for the very purpose of assisting the prosecution.[41]

49. In passages that appear to be the foundation for the terminology used in the *X7* line of cases,[42] Mason CJ and Toohey J, and separately McHugh J, considered whether the capacity to compel a corporation to produce incriminating books or documents was contrary to "an essential element in the accusatorial system of justice".[43] Mason CJ and Toohey J concluded that it was not, stating:[44]

> The fundamental principle that the onus of proof beyond reasonable doubt rests on the Crown would remain unimpaired, as would the companion rule that an accused person cannot be required to testify to the commission of the offence charged.

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37 See, eg, *Lee No 2* (2014) 253 CLR 455 at [32], noting that "[t]he privilege against self-incrimination may be lost, but the [fundamental] principle remains"; *Nutricia* (2008) 72 NSWLR 456 at [155].

38 *Caltex* (1993) 178 CLR 477 at 488-489 (Mason CJ and Toohey J).

39 *Caltex* (1993) 178 CLR 477 at 488-489 (Mason CJ and Toohey J).

40 A conclusion upheld in *Daniels v ACCC* (2002) 213 CLR 543 at [31] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

41 That result was noted, without criticism, in *Boral* (2015) 256 CLR 375 at [3] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

42 See *X7* (2013) 248 CLR 92 at [102] (Hayne and Bell JJ), [159] (Kiefel J).

43 *Caltex* (1993) 178 CLR 477 at 503. See also at 550 (McHugh J).

44 *Caltex* (1993) 178 CLR 477 at 503. That reasoning was followed and approved by Nettle J in *Boral* (2015) 256 CLR 375 at [74]-[75], [81].

50. That paragraph constitutes an express finding that it is not contrary to the accusatorial system of justice to compel a corporation to produce incriminating documents, even when that occurs after a prosecution has commenced and for the express purpose of assisting the prosecution.[45] Mason CJ and Toohey J went on to explain why that was so, pointing out that the extent to which statute had interfered with the privilege in relation to corporations indicated that the privilege is "not a fundamental aspect of the accusatorial system of justice".[46] Their Honours also had regard to the importance of it being possible to enforce laws against corporate defendants, noting that the best evidence of corporate transactions was corporate books and documents, meaning that restricting access to such documents would have "a disproportionate and adverse impact" on prosecution of corporations.[47] That was particularly undesirable given that "a corporation is usually in a stronger position vis-à-vis the state than is an individual", which "made corporate crime and complex fraud one of the most difficult areas for the state to regulate effectively".[48] Their Honours also emphasized that it would make no sense to allow a corporation to claim privilege over documents given that officers of the corporation could be compelled to testify against the corporation (there being no privilege against incriminating others, and no contravention of the accusatorial principles because the testimony would be that of the officers, not the corporation).[49]

51. The other members of the majority in *Caltex* reasoned similarly. Justice Brennan observed that if corporations could claim the privilege against self-incrimination then "the liability of corporations to criminal sanctions would frequently be unenforceable" because proof of liability would often depend substantially on documents in the corporation's possession or control.[50] To the same effect, McHugh J thought that the essential reason that the privilege should be denied to corporations was that the diminishment of the public interest in detecting and

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45 The Full Court's statement at [178] is inconsistent with this aspect of *Caltex*. While that paragraph begins with a discussion of interrogatories, it progresses to refer to the production of documents. In *Caltex*, this Court upheld a notice requiring the production of documents of the very kind that the Full Court asserted would be impermissible.

46 *Caltex* (1993) 178 CLR 477 at 504.

47 *Caltex* (1993) 178 CLR 477 at 504.

48 *Caltex* (1993) 178 CLR 477 at 500.

49 *Caltex* (1993) 178 CLR 477 at 504.

50 *Caltex* (1993) 178 CLR 477 at 515-516.

punishing corporate crime so that the integrity of the adversary system could be maintained for an artificial entity was too high a price to pay.[51] In *CFMEU v Boral Resources (Vic) Pty Ltd*,[52] Nettle J affirmed the ongoing relevance of these considerations, observing that "the extent of corporate crime and misfeasance in contemporary society is such that the considerations which informed the result in *Caltex* are at least as compelling today as they were then". Recognizing that the applicable principles apply only in modified form to corporations, Nettle J said that contempt proceedings "directed against corporations ought not to be conceived of as so much trenching on the liberty of the subject that they call for the untrammelled application of the fundamental principle and the companion rule".[53]

52. In *Nutricia*, the New South Wales Court of Appeal engaged in a similar analysis. In that case, the NSW Food Authority had instituted criminal proceedings against Nutricia for alleged contraventions of the *Food Act 2003* (NSW). It then issued six notices pursuant to s 37 of that Act containing questions in the form of interrogatories to Nutricia, which concerned further contemplated proceedings with respect to the same subject matter as the pending charges. Nutricia challenged the notices, contending that they would allow the prosecutor to obtain an advantage not available under the procedural rules of court in which the proceedings were pending. The Court of Appeal (Spigelman CJ, with whom Hidden and Latham JJ agreed)[54] rejected that argument, in part in reliance on the difficulties involved in proving contravention of regulatory statutes by corporations.[55]

53. In both *Caltex* and *Nutricia*, it was accepted that corporations could be compelled to provide self-incriminatory documents or answers to assist the prosecution, even after criminal charges had been laid. By contrast, it is clear from the *X7* line of cases that it would be inconsistent with the accusatorial system of justice to act in the same way when charges were pending against a natural person.[56] The distinction illustrates that the *X7* line of cases, all of which concern the prosecution of natural persons, cannot simply be picked up and applied to corporate defendants. To the contrary, as *Caltex*

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51 *Caltex* (1993) 178 CLR 477 at 556.

52 (2015) 256 CLR 375 at [57]. See also at [70]-[71], [73].

53 *Boral* (2015) 256 CLR 375 at [69].

54 *Nutricia* (2008) 72 NSWLR 465 at [201], [202].

55 *Nutricia* (2008) 72 NSWLR 465 at [162], [171].

56 See, eg, *Lee No 2* (2014) 253 CLR 455 at [32]-[33], quoted in the FCAFC Reasons at [166].

shows, in the context of corporate defendants the relevant principles must be substantially modified (not least to take account of the inability of a corporation to give oral evidence, and the unavailability of the privilege against self-incrimination to corporations).

54. In this case, a subpoena was issued to Captain Lomas in the coronial inquest pursuant to s 43 of the Coroners Act, in order to facilitate his cross-examination for the purposes of the inquest. Helicopter challenged that subpoena on the basis that it would confer an advantage on the prosecutor and co-accused in the criminal proceeding that could not otherwise be obtained pursuant to the procedures available to the prosecution and co-accused in the criminal proceeding. That challenge therefore closely resembled that advanced in *Caltex*, which of course failed. Here, in upholding the challenge to the subpoena, the Full Court erred. While it correctly recognized that "*Caltex* stands against the proposition that, of itself, the accusatorial nature of a criminal trial of a corporation means that an officer of the corporation may not be required to answer questions which tend to incriminate the corporation" (CAB 133 [143]), it erroneously distinguished *Caltex* on the basis of s 87(1)(b). Then, having concluded that s 87(1)(b) would convert any admission by Captain Lomas into an admission by Helicopter itself, the Full Court simply assumed that the principles identified in *Strickland* were applicable.

55. That reasoning involved error. Even if any admissions made by Captain Lomas could be equated with "admissions by [Helicopter] itself" (CAB 144 [189]) (which of course is denied), it does not follow that to compel the making of those admissions was inconsistent with the accusatorial system of justice. In fact, the cross-examination of Captain Lomas would not have "altered fundamentally" Helicopter's position as an accused in the criminal proceeding, both because Helicopter could already be compelled to incriminate itself in that proceeding, and because Captain Lomas was already a compellable witnesses for the prosecution at the trial. Further, considerations such as the difficulties of prosecuting corporations as compared to natural persons would be relevant considerations in that analysis. The Full Court erred by applying *Strickland* without regard to the fundamental differences between the way in which the accusatorial system of justice operates with respect to a corporate accused and a natural person. For that reason, independently of the errors concerning s 87(1)(b), the appeal should be allowed.

C. Prematurity

56. The primary judge held that, in circumstances where there was no evidence as to Captain Lomas' position in relation to being called or giving evidence, it was premature to determine whether there should be a restriction on the basis upon which he might be called, or whether the Coroner had sufficient power to protect against interference with the criminal proceedings (CAB 71 [148]). It is respectfully submitted that his Honour's reasoning was correct.

57. The Full Court held that the appeal could be decided "at the level of principle which overrides issues of any need to condition or control the questioning of Captain Lomas" (CAB 148 [204]). In so holding, the Full Court erred. The manner in which the Full Court decided the matter did not relieve it of the obligation to consider whether any impermissible interference with Helicopter's trial could be cured by appropriate orders in either the coronial inquest or the criminal proceeding.

58. If Captain Lomas had been examined, he may not have made statements against Helicopter's interests, such that his statements would have fallen outside the definition of an "admission" and would have been inadmissible despite s 87. Even if he did make admissions against Helicopter's interests, and even assuming no orders were made quarantining those admissions from the prosecution, the existence of those admissions would not have prevented Helicopter from contradicting them at the trial by other evidence (unlike the position where a natural person accused has given a version of events under oath in a different forum).[57] Further, the admissions may have been excluded during the criminal trial under ss 90, 135, 136 or 137 of the Evidence Act (including if their admission would have resulted in unfairness to Helicopter).[58] In light of all those matters, there was no proper basis for the Full Court to conclude in the abstract that s 43 of the Coroners Act could not properly be exercised to compel Captain Lomas to give evidence in the coronial inquest.

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57 Cf *Strickland* (2018) 93 ALJR 1 at [75].

58 See, eg, *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd (No 4)* [2006] NSWSC 90 at [28] (McDougall J); *Em v The Queen* (2007) 232 CLR 67 at [56], [78] (Gleeson CJ and Heydon J).

PART VII: ORDERS SOUGHT

(1) The appeal be allowed.

(2) Order 2(a) of the Full Court of the Federal Court be set aside, and, in its place, order that:

(a) the originating application be dismissed;

(b) Order 1 by Griffiths J on 30 April 2018 be discharged.

(3) The Commonwealth shall pay the first respondent's reasonable costs on a solicitor/client basis regardless of the outcome of the appeal.

10 **PART VIII: ESTIMATE FOR ORAL ARGUMENT**

59. The Commonwealth estimates that it will require up to 2 hours for oral argument.

Dated: 5 August 2019

STEPHEN DONAGHUE
Solicitor-General of the Commonwealth
T: (02) 6141 4139
stephen.donaghue@ag.gov.au

JULIA WATSON
Owen Dixon Chambers West
T: (03) 9225 6642
juliawatson@vicbar.com.au

Counsel for the Appellant