

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S100 of 2012

BETWEEN:

X7
Plaintiff

and

AUSTRALIAN CRIME COMMISSION
First Defendant

and

THE COMMONWEALTH OF AUSTRALIA
Second Defendant

**WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN
AUSTRALIA (INTERVENING)**

Date of Document: 25 October 2012

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PART I: SUITABILITY FOR PUBLICATION

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

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia intervenes pursuant to s. 78A of the *Judiciary Act 1903* (Cth) in support of the Defendants.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

- 10 4. These are set out in Part V of Second Defendant's Submissions.

PART V: SUBMISSIONS

5. The effect of the relevant provisions of the *Australian Crime Commission Act 2002* (Cth) is set out in the Second Defendant's Submissions¹.
6. Central to this matter is the decision of *Hammond v Commonwealth*² which followed shortly after *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (the *Builders Labourers Case*)³.

The Builders Labourers' Case

- 20 7. The central issue in the case was whether continuation of a public inquiry where there was "some common ground between the matters the subject of inquiry and those relating to ... proceedings in the Federal Court"⁴ relating to orders for de-registration of the BLF under s. 143 of the *Conciliation and Arbitration Act 1904* (Cth) constituted (or may have constituted) a contempt.

¹ They are also conveniently summarised in the joint judgment of Emmett and Jacobsen JJ in *Australian Crime Commission v. OK* [2010] FCAFC 61; (2010) 185 FCR 258 [66]-[81], though their Honours did not consider s.12(2) of the *Australian Crime Commission Act 2002* (Cth) which was inserted after their decision, see Second Defendant's Submission [22].

² *Hammond v. Commonwealth* [1982] HCA 42; (1982) 152 CLR 188.

³ *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* [1982] 57 HCA 31; (1982) 152 CLR 25.

⁴ *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* [1982] 57 HCA 31; (1982) 152 CLR 25 at 55 (per Gibbs CJ).

This in turn involved considering whether "there is an actual interference with the administration of justice, or "a real risk, as opposed to a remote possibility" that justice will be interfered with"⁵ such as to constitute a contempt.

8. The postulated risk was that continuation of the inquiry in public would "prejudice or bias the public mind"⁶; would be liable to "have an undesirable effect on prospective witnesses"⁷, and might "bring pressure" on the judges of the Federal Court dealing with the de-registration action⁸. Although various of their Honours came to different conclusions on these matters, critical to the reasoning of all was that the inquiry would be in public. Gibbs CJ was explicit in acknowledging that an inquiry held in public, the jurisdiction of which overlapped with matters the subject of a pending trial before a jury, would (inevitably) constitute a contempt⁹. Critical though was that that the inquiry was public¹⁰. Relevant to his Honour's judgment in *Hammond* is the observation that:

Although a commission of inquiry may lawfully be instituted and conducted into the guilt or innocence of individuals, the position will be different if its proceedings interfere with the course of justice and amount to a contempt of court. The very issue of the commission will be invalid if done with the purpose of interfering with the course of justice ... and ... the establishment of a royal commission to inquire into the question whether an offence had been committed, when a prosecution for the offence was already pending, seems to be an example. However, the continuance of the proceedings of a commission may amount to a contempt of court even though the commission was not established with any intention to interfere with

⁵ *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* [1982] 57 HCA 31; (1982) 152 CLR 25 at 56 (per Gibbs CJ).

⁶ *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* [1982] 57 HCA 31; (1982) 152 CLR 25 at 57 (per Gibbs CJ), 74 (per Stephen J), 99 (Mason J).

⁷ *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* [1982] 57 HCA 31; (1982) 152 CLR 25 at 57 (per Gibbs CJ), 74 (per Stephen J), 99 (Mason J).

⁸ *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* [1982] 57 HCA 31; (1982) 152 CLR 25 at 57 (per Gibbs CJ), 74 (per Stephen J), 99 (Mason J). Brennan J at 177 (in *obiter dictum*) expressed the matter slightly differently by postulating it as whether continuation of the public inquiry would "[tend] to the public prejudgment of the issue as to the cancellation of the registration of the BLF". With respect, it is difficult to discern from his Honour's judgment what was meant by and the relevance of "public pre-judgment" in a non-jury trial. It is likely that his Honour had in mind "prejudice or bias the public mind" in the sense referred to by Gibbs CJ, Stephen and Mason JJ.

⁹ *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* [1982] 57 HCA 31; (1982) 152 CLR 25 at 57 (per Gibbs CJ).

¹⁰ See *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 58-59 (per Gibbs CJ).

the course of justice.... For example, if during the course of a commission's inquiries into allegations that a person had been guilty of criminal conduct, a criminal prosecution was commenced against that person based on those allegations, the continuance of the inquiry would, speaking generally, amount to a contempt of court.¹¹

9. His Honour does not state why, generally speaking, this would be so, though, of course, the observation is made in the hypothesised context of a continued public inquiry.

Hammond

- 10 10. The facts of *Hammond* were substantially different to the facts in this matter. Between committal and trial, Hammond was compelled to appear at an inquiry. He was sworn and, although the inquiry was in "confidential session"¹², in the presence of the investigating police officers, Hammond was asked questions directly relevant to the matters the subject of the charge. Indeed, the Court proceeded on an understanding that Hammond would have been required to answer questions "designed to establish that he is guilty of the offence with which he is charged"¹³. There existed a legislative protection precluding any answer being admitted in evidence in a subsequent civil or criminal proceeding¹⁴.

- 20 11. The essence of Gibbs CJ's (with whom Mason J agreed) reasoning is:

30 ...the fact that the plaintiff has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence. In the *Builders Labourers' Case* I expressed the opinion that, if during the course of a commission's inquiries into allegations that a person had been guilty of criminal conduct, a criminal prosecution was commenced against that person based on those allegations, the continuance of the inquiry would, generally speaking, amount to a contempt of court, and that the proper course would be to adjourn the inquiry until the disposal of the criminal proceedings. Of course, the present inquiry is not simply into allegations against the plaintiff. It is an inquiry into alleged malpractices in connexion with

¹¹ *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* [1982] 57 HCA 31; (1982) 152 CLR 25 at 54 (per Gibbs CJ).

¹² *Hammond v. Commonwealth* [1982] HCA 42; (1982) 152 CLR 188 at 194 (per Gibbs CJ). It is unclear from the report the nature of the confidentiality order made. Clearly, the order was different to the nature of the provisions of the *Australian Crime Commission Act 2002* (Cth).

¹³ *Hammond v. Commonwealth* [1982] HCA 42; (1982) 152 CLR 188 at 198 (per Gibbs CJ).

¹⁴ *Hammond v. Commonwealth* [1982] HCA 42; (1982) 152 CLR 188 at 196-197 (per Gibbs CJ).

the export of beef that are said to have caused immense damage to the reputation of our meat industry. It would be neither necessary nor right to adjourn this inquiry because a prosecution had been commenced against the plaintiff. But the public interest can be met, and the interest of justice at the same time safeguarded, if the inquiry proceeds to its conclusions without further examination of the plaintiff.¹⁵

12. As with his Honour's judgment in the *Builders Labourers' Case*, his Honour does not expand upon the reasons for the conclusion that "examination, in
10 detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence".

13. Brennan J's conclusion was more broadly based:

It is sufficient for present purposes to appreciate that it is a principle deep-rooted in our law and history that the Crown may not subject an accused person to compulsory process to obtain his answers upon the issue of his guilt of an offence with which he has been charged.¹⁶

14. This proposition is expressly contrary to the reasoning of Gibbs CJ in the *Builders Labourers' Case*¹⁷, which is set out above, and not relied upon by Gibbs CJ, Mason, Deane JJ in *Hammond*. The authorities relied upon by his
20 Honour, in particular trials of Sir Nicholas Throckmorton and John Udall, are not entirely apposite¹⁸.

15. Deane J, like Gibbs CJ, considered the matter resolved by answering the question "whether the conduct of the inquiry by the Commissions in the present matter involves, in the circumstances, such an interference with the due administration of justice in the criminal proceedings against the plaintiff in the County Court"¹⁹. His Honour's answer is:

... extracurial inquisitorial investigation of the involvement of a person who has been committed for trial in the matters which form the basis of the criminal proceedings against him constitutes, in my view,

¹⁵ *Hammond v. Commonwealth* [1982] HCA 42; (1982) 152 CLR 188 at 198 (per Gibbs CJ).

¹⁶ *Hammond v. Commonwealth* [1982] HCA 42; (1982) 152 CLR 188 at 202-203 (per Brennan J).

¹⁷ *Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation* [1982] 57 HCA; (1982) 152 CLR 25 at 54 (per Gibbs CJ).

¹⁸ As to Sir Nicholas Throckmorton, see generally Patterson, *The Trial of Nicholas Throckmorton* (1998). As to Udall, he features prominently in the various writings of Christopher Hill.

¹⁹ *Hammond v. Commonwealth* [1982] HCA 42; (1982) 152 CLR 188 at 206 (per Deane J).

an improper interference with the due administration of justice in the proceedings against him in the criminal court and contempt of court.²⁰

16. His Honour's reasoning leading to this conclusion is:

10 It was submitted on behalf of the Commonwealth that it has not been shown that the inquiry by the Royal Commissions into the plaintiff's involvement in matters the subject of criminal proceedings involves any substantial risk of serious injustice or serious prejudice. That submission struck me as unattractive at the time when it was made. I have found that it deteriorates upon closer consideration. The pending criminal proceedings against the plaintiff are brought by the Commonwealth. The parallel inquisitorial inquiry into the subject matter of those proceedings is being conducted under the authority of the Commonwealth. As I have said, the conduct of that inquisitorial inquiry is to no small extent following the general form of a criminal trial shorn of some of the privileges and safeguards which protect an accused in such a trial. The plaintiff has been compelled to be sworn as a witness and has been subjected to questioning in the course of that inquiry. Indeed, his refusal to answer questions has led to his being charged, on the information of an officer of the Australian Federal Police, with an offence under the *Royal Commissions Act 1902* (Cth). It is not, in my view, necessary to go beyond these things. In themselves, they constitute injustice and prejudice to the plaintiff.²¹

17. Central to his Honour's reasoning was that Hammond had already been charged for refusing to answer. If this matter were put to one side, (with respect), his Honour does not articulate why, in a circumstance where answers given can not be used in a trial, it is obviously and necessarily "an improper interference with the due administration of justice in the proceedings against him in the criminal court and contempt of court"²².

18. Spender J (dissenting in) *Australian Crime Commission v OK*²³ expressed
30 objection to the effect of the provisions on an accused person's right to silence²⁴. With respect, this concern is misplaced in this regime; where the compelled evidence can not be used against the accused.

²⁰ *Hammond v. Commonwealth* [1982] HCA 42; (1982) 152 CLR 188 at 206 (per Deane J).

²¹ *Hammond v. Commonwealth* [1982] HCA 42; (1982) 152 CLR 188 at 207 (per Deane J).

²² *Hammond v. Commonwealth* [1982] HCA 42; (1982) 152 CLR 188 at 206 (per Deane J).

²³ *Australian Crime Commission v. OK* [2010] FCAFC 61; (2010) 185 FCR 258.

²⁴ See *Australian Crime Commission v. OK* [2010] FCAFC 61; (2010) 185 FCR 258 at [32]-[45].

What could be the prejudice in this matter

19. Having regard to the limitations prescribed by the relevant provisions of the *Australian Crime Commission Act 2002* (Cth) the conceivable actual prejudice to an accused in X7's position, at their trial, could only be²⁵ that an accused may be discouraged from exercising their right to give evidence at their criminal trial in the following scenarios.
20. *First scenario.* The accused gives false evidence at the examination. The only use that can be made of the false answer is in a prosecution for giving false evidence at the examination; see s.30(5)²⁶. At any subsequent prosecution for giving false evidence to the examination, truthful evidence which the accused gave at trial could be used as proof of falsity. On this understanding, the accused may be dissuaded from exercising his/her right to give evidence at trial because he/she may be concerned that the truthful evidence would be used in the later false evidence prosecution.
21. *Second scenario.* A perhaps more likely scenario is this; at the examination, the accused does not have the protections present at a trial, such as disclosure of the Crown's evidence to be adduced at trial and of relevant other evidence, before giving evidence or deciding whether to give evidence. The accused answers questions put at an examination on this basis. Later, and (say) after disclosure, the accused realises that answers given at the examination are wrong. Still, the only use that can be made of the wrong answer at the examination is in a prosecution for giving false evidence at the examination; see s.30(5). Here also, at any subsequent prosecution for giving false evidence at the examination, truthful evidence which the accused gave at trial could be used. Here too, the accused may be discouraged from exercising his/her right to give evidence at trial through concern that the truthful evidence would be used in the later false evidence trial.

²⁵ Discounted is the possibility that X7 could be required to provide information which could assist investigative and prosecuting authorities in discovering further evidence against him. In this matter, the risk of this is eliminated by the order made on 2 February 2012 pursuant to s.25A(9).

²⁶ Neither party address s.30(5)(c) – the use of evidence in confiscation proceedings. No party addresses whether the regime would be an improper interference with any confiscation proceeding; and so this issue is not addressed.

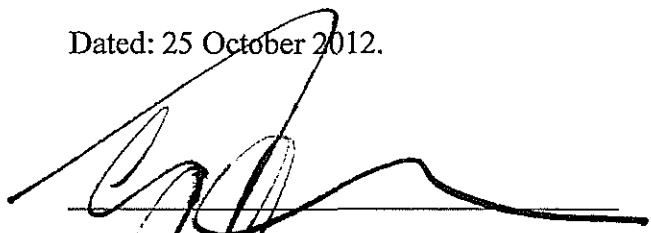
22. Any issue of validity of the provisions arising from this *second scenario* is overcome by the existence of the power exercisable under s.25A(9) and the acknowledgement of the Second Defendant in its Submission at [19.3].
23. No issue of validity likely arises from the *first scenario*.

PART VI: LENGTH OF ORAL ARGUMENT

24. It is estimated that the oral argument for the Attorney General for Western Australia will take 10 minutes.

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Dated: 25 October 2012.



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