An unfair advantage[*]

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Introduction

1. Having invoked their right to silence and awaiting their trial, the concept that an accused person can then be compelled to testify in a parallel inquisitorial process has been the source of debate for some time. On the one hand, you are faced with individual and societal interests in civil liberty. On the other, the social interest in the enforcement of criminal law and bringing those who commit a crime to justice. This tension exists and will persist, because executive governments have found aspects of the accusatorial system "an inconvenience in the investigation of criminal conduct."[1] Whilst the presumption of innocence, the privilege against self-incrimination, and the right to silence are important elements of the accusatorial system of justice, where the government enacts a law that abrogates such rights, its decision, subject to constitutional limits, must be respected.[2]

2. Not so long ago, the High Court delivered three judgments in relatively quick succession ("the trilogy").[3] Those decisions have been analysed in many judgments and in many papers. In just under a decade, what the law has demonstrated is that the application of the trilogy has, at times, been apparently inconsistent and difficult to follow.

3. The prime focus of this paper is on the application of the trilogy in subsequent cases in Queensland and the evolution of this area of the law.[4]

1982

4. While 2013 would appear to be the best year to begin this paper, *Hammond v Commonwealth of Australia* (1982) 42 ALR 327 is a helpful starting point. In that case, the appellant was charged with conspiracy to export prohibited meat. Mr Hammond was subsequently called to testify before a Royal Commission in a private session and refused to answer questions. When it was submitted that no such right existed in the Royal Commission, Gibbs CJ commented, "I am by no means satisfied that these submissions are correct. It would be necessary to find a clear expression of intention before one could conclude that the legislature intended to override so important a privilege as that against self-incrimination…."[5] His Honour said:

> "Once it is accepted that the plaintiff will be bound, on pain of punishment, to answer questions designed to establish that he is guilty of the offence with which he is charged, it seems to me inescapably to follow, in the circumstances of this case, that there is a real risk that the administration of justice will be interfered with. It is clear that the

[*] A special thanks to Andrew Kirkham QC and Jens Streit for frequently tolerating this discussion.
[**] This paper was presented at a "Country Special" - Gordon Country in 2022, mark II.
[1] *Lee v New South Wales Crime Commission* [2013] HCA 39 (*Lee No. 1*) at [2] per French CJ.
[2] Ibid at [1] and [3].
[3] *X7 v Australian Crime Commission* [2013] HCA 29, *Lee No. 1* and *Lee v The Queen* [2014] HCA 20 (*Lee No.2*).
[4] For a comprehensive analysis that focusses on *X7, Lee No.1* and *Lee No.2* I recommend reading a paper written by Davis J that his Honour wrote before his appointment to the Queensland Supreme Court bench. The paper is titled "The Right to Silence: Implication from the X7 case".
[5] *Hammond v The Commonwealth of Australia* (1982) 42 ALR 327 at 333.

questions will be put and pressed. It is true that the examination will take place in private, and that the answers may not be used at the criminal trial. Nevertheless, 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."[6]

5. Murphy J stated that "[h]e has a constitutional right to a trial by jury (see Constitution, s80). It is inconsistent with that right that he now be subject to interrogation by the Executive Government or that his trial be prejudiced in any other manner. I would take this view whether or not he has the privilege against self-incrimination."[7]

The trilogy

6. Between June 2013 and May 2014, the High Court delivered three judgments. The first was *X7 v Australian Crime Commission* [2013] HCA 29. In that case**,** the appellant was arrested and charged with drug trafficking and money laundering. Whilst in custody and awaiting his trial, X7 was summonsed to appear before the Australian Crime Commission ("ACC"), where X7 was asked questions relating to the subject matter of his pending charges. X7 eventually refused to answer questions, and, as a result, the examiner informed X7 that he would be charged with failing to answer questions. X7 commenced proceedings in the original jurisdiction of the High Court seeking injunctive relief.

7. The parties stated two questions of law. The first was whether the ACC Act empowered an examiner appointed under the ACC Act to conduct an examination of a person charged with a Commonwealth indictable offence where that examination concerns the subject matter of the offence so charged? If 'yes', then was the relevant part of the ACC Act invalid to that extent as contrary to Ch III of the Constitution?

8. By majority, the High Court held that the first question should be answered "no." Since there was no need to consider the second question, the majority did not consider the constitutional questions. Therefore, *X7* is primarily a case concerning the approach to the construction of statutes.[8] Hayne and Bell JJ, in considering the first question, were of the view that :

> Even if the answers given at a compulsory examination are kept secret, and therefore cannot be used directly or indirectly by those responsible for investigating and prosecuting the matters charged, the requirement to give answers, after being charged, would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom. No longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according only to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused person

[6] Ibid.
[7] Ibid at 336.
[8] *X7 v Australian Crime Commission* [2013] HCA 29 per Jayne and Bell JJ at [78].

is thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge.[9]

As has been explained, if an alteration of that kind is to be made to the criminal justice system by statute, it must be made clearly by express words or by necessary intendment. If the relevant statute does not provide clearly for an alteration of that kind, compelling answers to questions about the subject matter of the pending charge would be a contempt.[10]

9. The majority were of the view that without "clearly by express words or necessary intendment" to remove the right to silence, the examiner's powers were limited to examining persons who had not been charged. In doing this, Hayne and Bell JJ stated:

> "It is, therefore, important to consider whether the purpose or purposes of the ACC Act generally, or of the examination provisions in particular, would be defeated by reading the ACC Act's provisions as not permitting the examination of a person charged with an indictable Commonwealth offence about the subject matter of the charge."[11]

10. It is important to bear in mind that the ACC Act provided that a "special investigation" could be implemented if the ACC considered that "ordinary police methods" of investigation into matters were likely to not be effective. In the context of the ACC Act, "effective" had to be understood as meaning "effective to permit the laying of charges against offences."[12] The performance of that investigative function would be in no way restricted or impeded if it did not apply to accused persons who had already been charged.[13]

11. Three to four months later, the composition of the High Court bench was different. In *Lee v New South Wales Crime Commission* [2013] HCA 39 (*Lee No. 1*), Gageler and Keane JJ joined the judges who formed *X7*. Whilst the judges of the High Court who comprised the bench in *X7* held to their same view, it was Gageler and Keane JJ that made the difference. Both Gageler and Keane JJ joined the judges who formed the minority in *X7* to then form the majority in *Lee No. 1*. The issue in this case was the application of the principle of legality rather than the content of that principle.[14]

12. *Lee No. 1* was concerned with the coercive examination of the Lees after they had been charged. Therefore, whilst the issue in *Lee No. 1* was the same as was considered in *X7* (the principle of legality), it related to a different piece of legislation (the *Criminal Assets Recovery Act* 1990 (NSW)). In *Lee No. 1,* the majority considered that the words of the statute clearly disclosed an intention to abrogate the right to silence while providing adequate safeguards to ensure that any future criminal trial was conducted fairly.

13. On 21 May 2014, the High Court delivered *Lee v The Queen* [2014] HCA 20 (*Lee No. 2*). Whilst *Lee No. 1* and *Lee No. 2* concerned the same persons; it related to a different inquisitorial process that they endured. This time, it related to the *New South Wales Crime Commission Act* 1985 ("NSWCC Act"). The judgment was shorter than expected. This was

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[9] Ibid per Hayne and Bell JJ at [124].
[10] Ibid at [125].
[11] Ibid at [142]. See also *R v Leach* [2019] 1 Qd R 459 per Sofronoff P at [96].
[12] Ibid at [146].
[13] Ibid at [147].
[14] *Lee v New South Wales Crime Commission* [2013] HCA 39 at [29] per French CJ.

because of a concession by counsel for the respondent and because the Court delivered one joint judgment in which the High Court firmly restated the fundamental importance of a fair criminal trial. It is important to note that *Lee No. 2* was a criminal appeal where the issue for the Court to determine was whether there had been a miscarriage of justice. In *X7* and *Lee No. 1,* the High Court dealt with direct challenges to the power of the examiners (the principle of legality). In *Lee No. 2,* it was the consequence of the examiner disclosing the evidence from the examination and its impact on the criminal convictions. In this case, the companion rule was at the forefront of the Court's mind.[15]

14. In this case, before the Lees were charged, they were compulsorily examined under the NSWCC Act. Shortly after Jason Lee was examined, the police executed a search warrant where they found weapons, drugs and money. Both father and son were charged with offences arising from this search. The Lees were subsequently convicted after trial for drug and weapon offences. Notwithstanding the direction from the examiner of the NSWCC Act that the evidence not be published, it was improperly supplied to both the police and the ODPP. The ODPP's reason for obtaining these transcripts was for the Crown to receive a warning of the defence case theory.

15. The appeal to the Court of Criminal Appeal was unsuccessful on the basis that despite the publishing of the transcripts, the appellants had not demonstrated a practical unfairness to the Crown having obtained the evidence. The High Court rejected the suggestion that the appellants needed to establish a "practical unfairness." The Court jointly reaffirmed the fundamental principle for the prosecution to prove the guilt of an accused person, with the companion rule that an accused person cannot be required to testify. The Court said that "the publication to the DPP, in particular, was for a patently improper purpose, namely the ascertainment of the appellant's defences."[16] The Court did not need to resort to questions of policy to determine whether a miscarriage of justice had occurred because "what occurred in this case affected this criminal trial in a fundamental respect because it altered the position of the prosecution vis-à-vis the accused."[17]

16. Therefore, arming the prosecution with the evidence from the accused fundamentally altered this position and rendered the possibility of a fair trial impossible. The prosecutions' role was described as one that ensured "its case is presented properly and with fairness to the accused. It is therefore more to the point that the prosecution's possession of the appellants' evidence before the Commission put at risk the prospect of a fair trial … The prosecution should have enquired as to the circumstances in which the evidence came into its possession and alerted the trial judge to the situation, so that steps could be taken to ensure that the trial was not affected. The trial judge could have ordered a temporary stay, while another prosecutor and other DPP personnel, not privy to the evidence, were engaged.[18]… the point [*X7*] makes about what may amount to a fundamental departure from a criminal trial as it is comprehended by our system of criminal justice is relevant to this case. It is a breach of the principle of the common law, and a departure in a fundamental respect from a criminal trial which the system of criminal justice requires an accused person

[15] See *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 503 per Mason CJ and Toohey J where "the privilege against self-incrimination is distinct from what was there described as "[t]he fundamental principle that the onus of proof beyond reasonable doubt rests on the Crown" and its "companion rule that an accused person cannot be required to testify to the commission of the offence charged".
[16] *Lee v The Queen* [2014] HCA 20 at [39].
[17] Ibid at [51].
[18] Ibid at [44].

to have, for the prosecution to be armed with the evidence of an accused person obtained under compulsion concerning matters the subject of the charges."[19]

17. After *Lee No. 2,* many appellate courts heard and decided matters involving the executive's inquisitorial systems. *R v Independent Broad-based Anti-corruption Commissioner* [2016] HCA 8 is a good place to pick up the trail as it features later in this paper. The Independent Broad-based Anti-corruption Commissioner ("IBAC") commenced an investigation into the conduct of some members of the Victorian Police Force. Several officers were summoned to give evidence in a public examination. The police officers submitted that the examination should be held in private and that, in relation to one of them, that officer could not be compelled to give evidence. IBAC rejected those submissions. So too did the Victorian Supreme Court. The applicants appealed to the High Court, where they relied on the fundamental principles of the onus of proof and the companion rule where an accused person cannot be required to testify. The High Court rejected the submission and held that the companion rule had not been engaged because the appellants had not been charged and there was no prosecution pending.[20]

The application of the law in Queensland

18. In *R v Harper* [2015] QCA 273, the appellant had been convicted of drug offences. He had been examined by the ACC about relevant matters, although this was before he was charged with the offences of which he was convicted. Investigating police officers had been present at his examination. Based upon information they had from the examination, they obtained a search warrant and searched the premises where they found evidence that was used against him at his trial. They also learnt from the examination about his potential defences that he might advance at his trial. One of the grounds he advanced was that the examination yielded an unfair advantage in the favour of the prosecution. The Court saw as important that the prosecutor had not obtained the transcripts of his evidence before the ACC. Mullins J held that the prosecution was not significantly advantaged at the trial. The evidence of what had been found during the search was described as "peripheral to the issues at the trial". The information about the likely defences at the trial was insignificant. This was because the investigating officers, from other sources, had anticipated the defence case and knew that they should gather evidence to meet it.

19. In *X v Callanan* [2016] QCA 335, the Court of Appeal dismissed an appeal against a challenge to summons a witness. In that case, a person identified as "Z" was shot and killed. A year or two later, the Crime and Misconduct Commission issued a notice to the appellant to appear at a hearing. The appellant unsuccessfully challenged the validity of that notice. The presiding officer of the Commission, the respondent, subsequently prohibited the publication of any answer given or document or thing produced at the hearing or anything about any such answer, document or thing; and any information that might enable the existence or identity of the appellant to be ascertained, to any officer of any prosecuting agency with carriage of, or involvement in, any prosecution of the appellant for any charges, whether arising from the investigation or any other investigation.

20. The respondent also ordered that all answers given by the appellant in the proceedings were taken to be answers given under objection on the grounds of the privilege against self-

[19] Ibid at [46].
[20] *R v Independent Broad-based Anti-corruption Commissioner* [2016] HCA 8 at [73].

incrimination. At the hearing, the respondent asked the appellant the whereabouts of the firearm used in Z's shooting. The appellant declined to answer on the grounds of reasonable excuse and claimed that the purpose of the question was to make derivative use of his answer. The location of the firearm could be used to further investigate Z's killing and as evidence against him in a future criminal trial. The respondent found that the appellant did not have a reasonable excuse to decline to answer the question.

21. The appellant applied for leave to appeal to the Supreme Court seeking an order that the respondent's decision be set aside and declaration relief that the appellant was entitled to refuse to answer questions insofar as those questions asked anything of his knowledge of the circumstances surrounding Z's murder. The Court of Appeal rejected the submission that *R v IBAC* was not binding. The Court saw that the Crime and Corruption Commission was an investigative body without the power to charge or prosecute. McMurdo P said:

> "This Court must construe the common law privilege against self-incrimination and the companion principle in light of the plurality's binding decision in *IBAC*. But in any case, although the respondent suspected the appellant had committed an offence when he questioned him under the Act, the Commission is an investigative, evidence gathering body without general powers to itself charge suspects or prosecute criminal offences…
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> …nothing said in *X7* supports the appellant's contention that the companion principle is engaged prior to the actual charging of the person claiming its protection, at least where "charging" is broadly construed as including the point at which those with the power to charge a person, suspect he or she has committed an offence. That wider construction of "charging" does not assist the appellant as the respondent had no power to charge him for the matters the Commission was investigating.
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> The companion principle was not engaged in this case. When the respondent required the appellant to answer his question as to the whereabouts of the firearm used in Z's shooting, the appellant had not been charged and no prosecution had commenced. It did not matter that the respondent had formed a suspicion that the appellant had committed a criminal offence as the respondent could not charge him and was not an officer of a prosecuting authority."[21]

22. In *R v Elfar; R v Golding; R v Sander* [2017] QCA 149, the appellants were convicted of importing drugs. Each appellant appealed against their conviction on several grounds. Importantly, for this paper, was the ground that the indictment ought to have been permanently stayed because, after being charged, the appellants had been compulsorily but unlawfully examined about the relevant events.

23. The appellant's relied on *X7,* where it was held that the *Australian Crime Commission Act* 2002 (Cth) did not authorise an examiner to require a person charged with an indictable offence to answer questions about the subject matter of that offence. For Elfar and Golding, it was submitted that irrespective of the strength of the prosecution case, the consequence of those examinations was that there was such a defect in the trial process that the convictions resulted from a miscarriage of justice. A related complaint was that the prosecution did not disclose material which was relevant to "the extent to which the content

[21] *X v Callanan* [2016] QCA 335 [24], [25], and [27].

of the ACC hearings had been disseminated" into a question of "which customs officers and AFP agents were present at the ACC hearings of each of the appellants."

24. It was said that it appeared as though the appellants could not have given evidence at their trial, which was exculpatory, without contradicting the evidence given to the ACC. It was noted on the appeal that neither appellant claimed that the evidence to the ACC was untrue, inaccurate or incomplete. Neither appellant offered any indication of what exculpatory evidence they might have given at the trial but for the suggested impediment from his ACC examination.

25. If either of the appellants did have some exculpatory evidence they could have given, the disclosure of that evidence at a pre-trial application would have been problematic. But the same concern could not be said of their position in the appeal. To succeed, it was said, it was incumbent upon each appellant to demonstrate how this predicament and electing whether to give evidence at their trial existed as a real and not merely theoretical consequence of the examination.

26. It followed that neither of the appellants had proved that by the evidence given to the ACC that they were unfairly deprived of the chance of an acquittal. It was further argued that the content of their evidence to the ACC might have been unlawfully disseminated, thereby affecting the fairness of the trial. However, as the Court noted, it was already conceded that the prosecutor did not know the content of the material at their trial.

27. In *R v Leach* [2019] 1 Qd R 459 (*Leach No. 2*)[22] the issue of compulsive examinations and their potential to threaten an accused's right to a fair trial formed the centrepiece of the challenge in the Queensland Court of Appeal. In February 2010 the Australian Taxation Office served a notice on the appellant requiring him to give evidence and to produce documents. Failure to comply would result in punishment amounting to either fines or imprisonment.

28. The Crown case at trial was that the appellant lodged numerous BAS with the ATO claiming GST refunds on behalf of the trustees of the two trusts on the basis of his dishonest assertions that they had incurred expenses. As a result, it was alleged that the ATO caused $1,311,761 to be paid into accounts that the appellant controlled. It was further alleged that he attempted to obtain payment of a further $260,420. In the process of responding to enquiries by the ATO during an audit, it was alleged that that appellant used false documents with the intention of inducing the ATO officers to accept the documents as genuine, and if they did, dishonesty obtaining a gain. It was also alleged that the appellant dishonestly applied to his own use $1,083,271 held in his firm's trust account on behalf of the executors of the estate of Mrs De Graff by using those funds to pay a refund to the ATO.

29. Following the ATO's examination of the appellant, the matter was referred to the CDPP. In doing so, the material obtained from the compulsory examinations were disclosed with the brief of evidence. In addition to this, at his trial, the Crown tendered the recording of the compulsory examination to demonstrate lies.

[22] This decision was heard on 7 February 2018 and delivered on 22 June 2018 before *Strickland v R* [2018] HCA 53 that was delivered on 8 November 2018.

30. The Court of Appeal quashed the convictions and ordered a retrial. The basis was that the Crown's use of material obtained under compulsion constituted a miscarriage of justice. Sofronoff P (with whom Philippides JA agreed) held the following:

    a. If the statute abrogates the privilege against self-incrimination, it does not follow that such evidence can then be tendered when its use would interfere with the administration of justice.[23]

    b. Evidence obtained from an inquisitorial process which, under a statute, abrogates the privilege against self-incrimination from a person who has not been charged, and which is evidence that, upon the person being charged, would disclose the defence case theory or aspects of it or in some way provide confidence to the Crown case theory or aspects of it, it should not be disclosed to a prosecutor and cannot be used by a prosecutor against the accused.

    c. The provision to the prosecutor of an accused's evidence, obtained under compulsion and without the protection of any privilege against self-incrimination, is a departure in a fundamental respect from the requirements of a fair trial.

    d. That the disclosure to the CDPP of the evidence given under compulsion in this case, and its subsequent use by the CDPP to prepare for the appellant's prosecution and its admission as evidence at the appellant's trial, conflicted with the fundamental principle of the common law that the onus of proof rests on the prosecution and conflicts with the companion rule.[24]

    e. The use of the material obtained in this case distorted the usual process because the appellant could no longer determine the course that he would follow at his trial according only to the strength of the prosecution case.[25]

31. In relation to the principle of legality, Sofronoff P said "I doubt, whether an Australian legislature could validly pass a law to alter the criminal process so as to compel a person to give self-incriminatory evidence for the executive to use in order to formulate a criminal charge against that person and then as evidence to secure that person's conviction."[26] Statutes authorising such interrogations by using general words capable of being read so as to abrogate the operation of the principle will not be read as having that effect unless the purposes of the legislation in question would otherwise be defeated.[27]

32. *Strickland v R* [2018] HCA 53, which was delivered after *Leach No. 2*, involved appeals from the Court of Appeal of Victoria. The judge at first instance permanently stayed the prosecution of the appellants. In that case, the appellants were compulsorily examined by the Australian Crime Commission ("the ACC") in 2010 before being charged with their offences. The principal issue in each case was whether the ACC acted so much in disregard of the ACC Act that the prosecution should be stayed.

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[23] *R v Leach* [2019] 1 Qd R 459 at [88].
[24] Ibid at [97].
[25] Ibid at [99]-[100].
[26] Ibid at [69].
[27] Ibid at [96].

33. Before being examined, each appellant had exercised their right to silence when offered a formal interview. By the time that the appellants were compulsorily examined, the ACC was aware that the AFP regarded them as suspects and persons "who may be charged." Several AFP officers watched the examinations from a nearby room. Their presence was not known to the appellants. After the examinations, the examinations were disclosed to both the AFP and the CDPP.

34. At first instance, the primary judge found that a decision had been made by the AFP's lead investigator that if the appellants would not voluntarily answer their questions that they would force them to answer their questions under the ACC's coercive powers. Even though the lead investigator was not the statutory office holder with the legal responsibility for the interviews, the lead investigator dictated who should be coerced and what questions they should be asked. The lead investigator considered that this process would yield the prosecution a forensic advantage of locking each appellant into a version of events.

35. The primary judge found that the examiner was aware that the appellants had been regarded as suspects by the AFP at the time of their examinations and that they had declined to participate in cautioned interviews. There were multiple failures concerning the examiner's obligations. The primary failure was the non-publication orders which undermined the appellants' right to a fair trial.

36. The primary judge found that the information obtained from the examinations was used to compile the prosecution's brief of evidence against the appellants in circumstances where the AFP had no entitlement to receive such information. Therefore, the prosecution had gained an unfair forensic advantage. In addition, some of the investigators who were present during the examinations or privy to the information from the examination continued to be involved in the investigative and Court process.

37. The practical effect of the examinations was that the appellants had been constrained to make legitimate forensic choices in their trials. The primary judge found that it was practically impossible to "unscramble the egg" to remove the forensic advantage that the prosecution had obtained or ameliorate the disadvantage of the appellants. Short of creating a new investigative team, the primary judge found it impossible to ensure sufficient quarantining of all the investigative officers and the prosecutorial team. It was ruled that the prosecution should be permanently stayed.

38. The Court of Appeal[28] considered that the primary judge had erred in finding that the prosecution was unfairly advantaged. The Court of Appeal reasoned that the appellants had failed to identify any evidence which was to be relied upon by the prosecution, but for the examinations, would not have been obtained by the prosecution. In the alternative, the Court of Appeal found that even if the investigators had derived some assistance from the examinations in "guiding" and "refining" subsequent searches, the case against the appellants rested almost entirely on documents and had not been materially affected by the results of the examinations. Nor had the appellants sought to establish that information obtained during the examinations assisted the prosecution. Their Honours said if a claim of specific forensic advantage was to be pursued, then it was incumbent on each of the appellants as a matter of fairness to put to each prosecution witness the advantages which

[28] Cf the reasoning in *R v Elfar; R v Golding; R v Sander* [2017] QCA 149.

it was said that the witness obtained from the examination to enable the CDPP to call evidence in rebuttal.

39. Their Honours added that, although not mandatory, a change in prosecutorial team and the ability of the trial judge to make directions preventing the investigators from disclosing the contents of the ACC examinations to the prosecutor, or the CDPP from leading evidence, or prohibiting certain matters from being referred to in cross-examination, would ensure that the appellants received a fair trial.

40. The High Court did not agree. The prosecution did obtain a forensic advantage from the examinations. If nothing else, they were able to compel the appellants to answer questions that they had lawfully declined to answer and thereby locking them into a version of events that they could not credibly depart from at trial.

41. The Court stated that it needed not to be informed or persuaded of specific respects in which the person's defence will or may be compromised in order to conclude that the forensic disadvantage from an unlawful compulsory examination is significant. The Court stated:

> "[I]t is also no answer to the forensic disadvantage thus created to say that it may be overcome by the appointment of prosecutors who know nothing of the examinations… The lack of clear records of dissemination makes it extremely difficult to assess how and by whom the examination product has been used to build the prosecution case or how it might inform prosecution witnesses' responses to questions asked in cross-examination at trial… [D]espite such admissions as the appellants might appear to have made in the course of their examinations, they remain lawfully entitled to put the Crown to proof and so, without advancing any form of positive defence, to throw as much doubt as is honestly possible upon the quality of the Crown case… Apart from the forensic advantage this conferred on the prosecution … it is a circumstance that deprives the appellants of the ability to test the basis of the selection or to raise the reasonable possibility that the selection does not reveal the true facts… The Court of Appeal suggested that any forensic disadvantage of this kind could be overcome by an instruction to the witness that the witness not explain his or her actions by reference to what he or she learned, or believed he or she had learned, from the examinations. The suggestion that witnesses could be directed to avoid reference to the examinations, while truthfully answering questions concerning the basis for the selection of documents, has an air of unreality to it in light of the primary judge's finding of the extent of the use made by the AFP of the unlawfully obtained information to guide the selection of the materials included in the prosecution brief… Nor is it an answer to the forensic disadvantage identified to say, as the Court of Appeal considered it to be, that it was incumbent on the appellants to demonstrate the respects in which the prosecution had been thereby advantaged… Regardless, therefore, of the extent to which the examination product was or was not of assistance to the prosecution in constructing the Crown case, the only sure way of wholly eradicating the effects of the unlawful examinations and the unlawful dissemination of the examination product would be to begin the investigation again, with different investigators, without access to the fact or results of the previous examinations. Short of that, the prejudice to a fair trial is at least to a significant extent incurable."[29]

[29] *Strickland v R* [2018] HCA 53 at [80] – [85].

42. After *Leach No. 2*, but after the hearing and before the decision in *Leach No. 4*,[30] the New South Wales Court of Criminal Appeal in *R v Kinghorn* [2021] NSWCCA 313 considered whether the law as applied in *Leach No. 2* had the effect that answers compelled under taxation legislation had the effect that the investigative authorities and prosecuting authorities should not have dissemination and/or should not have had access to and/or should not have used the content of the accused's compulsory examination.

43. The Court noted that *Leach No. 2* was inconsistent with an earlier NSWCCA decision of *Yates v R (1991) 102 ALR 673* and also inconsistent with two decisions of the Court of Appeal of Western Australia in *A v Maughan* (2016) 50 WAR 236; [2016] WASCA 128 and *Zanon v Western Australia* (2016) 50 WAR 1; [2016] WASCA 91. The Court also noted that *IBAC* was not considered in *Leach No.2* and that *IBAC* was inconsistent with *Leach No. 2*.

44. The Court was of the opinion that *IBAC* established that the companion rule has no application prior to charges being laid. The Court was "fortified" in that conclusion by the Western Australian decisions of *Zanon* and *Maughan.* The Court held that the accusatorial principle, the companion rule and the application of those principles did not prevent either the investigators or the prosecutors from having access to and using information obtained through a compulsory examination. If there was to be a limitation on the use of such material, then it would be necessary to find a legislative constraint on the use to be made post-charge.[31] Further, the content of the compulsory examination was admissible in the respondent's trial for the limited use to prove false or misleading statements made during the s 264 examination.

45. Even if the fundamental principle and the companion rule were engaged, neither were constitutionally entrenched so far as to invalidate any legislative provision said to be in breach of either the principle or the rule.

46. *R v Leach; R v Leach; Ex Parte Commonwealth Director of Public Prosecutions* [2022] QCA 7 (*Leach No.* 4) followed a ruling in *CDPP v Leach (No 3)* [2020] QDC 42 where the primary judge quashed the indictment on the basis that the unlawful disclosure and use of the interview transcript breached Mr Leach's fundamental right to a fair trial. The primary judge did not, however, order a permanent stay and considered that the Crown case was not "irrevocably lost."

47. In response to *Leach No. 2*, the CDPP took a number of steps to ensure that the earlier disclosure of the transcript of the compulsory examination by the ATO to the CDPP did not impact upon the retrial. Those steps were summarised by the primary judge in this way:[32]

> "Firstly, the CDPP has appointed a new team of prosecutors with no previous knowledge or connection with the matter to conduct the re- trial without access or regard to the compulsory interview or any related material.
>
> Secondly, the CDPP will not rely upon any part of the compulsory interview as part of its case.

[30] See [46]-[58] below.
[31] *R v Kinghorn* [2021] NSWCCA 313 per Bathurst CJ and Payne JA at [140].
[32] *Leach No. 3* at [335] – [339].

Thirdly, the CDPP has removed or redacted all material relating to the compulsory interview from the brief of evidence.

Fourthly, the CDPP has quarantined all physical and electronic copies of recordings of the compulsory interview, transcripts and summaries of the interview and all other material relating to the interview. I am satisfied on the evidence that all such material is stored securely and can only be accessed by officers not involved in the continued prosecution of the defendant, and cannot be accessed by other staff or external persons.

Fifthly, the decision to re-try the defendant on the charges contained in the indictment was taken in accordance with prosecution policy of the Commonwealth without reliance upon or regard to the compulsory interview material. Whilst the particulars of the charges remain the same, the sufficiency of the particulars have also been reconsidered without any reliance upon or regard to the compulsory interview material."

48. The situation in *Leach No. 4* was different to that considered in *Leach No. 2*. The compulsory evidence would not be used in either the preparation of the case or on the conduct of the trial. That meant that the CDPP could only proceed to trial on the basis that the prosecution team neither knew nor had access to the compulsory evidence. Any CDPP decisions would be based exclusively on lawfully obtained evidence and the CDPP would have to settle a new indictment and conduct their trial based on lawfully obtained evidence. The complaint advanced by Mr Leach was that a fair trial was not possible because a fair trial is one that is accusatorial in character, second, the prosecution cannot compel an accused to assist it, third, key prosecution witnesses had been unlawfully compromised (i.e. consciously or subconsciously exposed to the unlawfully obtained evidence), and fourth, the CDPP could not undo the unlawful conduct of the ATO.[33]

49. The primary judge considered, whilst applying *Leach No. 2*, that the disclosure of the compulsory examination to the CDPP was not authorised. The primary judge summarised the relevant authorities and summarised the applicable principles in this manner:

"The following principles may be distilled from the cases:

(a) The prosecution ought not be provided with, nor make any use of, any evidence or information from compelled evidence which may tend to show that any documents or transactions, apparently regular on their face, in fact tend to support the charges;[34]

(b) The prosecution ought not be provided with, nor make any use of, any defences disclosed by the accused by compelled evidence;[35]

(c) The evidence which the prosecution is to call is not to be influenced by compelled evidence;[36]

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[33] *R v Leach; R v Leach; Ex Parte Commonwealth Director of Public Prosecutions* [2022] QCA 7 (*Leach No.* 4) per Bond JA at [80].
[34] "*R v Leach No.2* at [58]."
[35] "*Lee v The Queen* (2014) 253 CLR at [41]."
[36] "*X7* at [124]; *Strickland v DPP (Cth)* (2018) 361 ALR 23 [2018] HCA 53 at [76]."

(d) The accused can decide the course he or she will adopt at trial and answer to the charge only according to the strength of the evidence able to be led by the prosecution at the trial unaided by any of the matters identified in (a) to (c) above;[37]

(e) The accused is not to be compromised in the decision referred to in (d) by the unlawful subsequent use by the prosecutor of compelled evidence;[38]

(f) The prosecutor must prove the guilt of the accused and the accused may not be compelled by evidence, forced in any way, to confess his or her guilt;[39] and

(g) Consequently, the process for investigation, charge, prosecution and trial of the indictable offence is entirely accusatorial.[40]"

(Footnotes re-numbered)

50. The primary judge was of the view that the investigator was entitled to use the information derived from the compulsory examinations for the purpose of her investigations, but he concluded that the investigator was not entitled to disclose the contents of the examinations to the witnesses.

51. As part of the investigation, the investigator executed a search warrant in order to obtain financial records of trust ledgers. The foundation, in part, of the warrant was derived from Mr Leach's compulsory examination. The primary judge excluded the evidence obtained from the search warrant on the basis that in obtaining the warrant, the investigator relied, in part, on information obtained from the compulsory examination.

52. Even though the CDPP engaged an entirely new prosecution team and that the impermissible evidence had been quarantined, that did not change the fact that the original indictment that was before the Court had been settled when the CDPP had access to the impermissible evidence. Therefore, based on *Leach No. 2*, the indictment was quashed. However, since there was other evidence that was or could be lawfully obtained by the CDPP, it could still settle a new indictment based on the lawfully obtained evidence. This was the reason why the primary judge refused a permanent stay.

53. Mr Leach advanced three grounds of appeal asserting that the primary judge erred in not ordering a permanent stay.[41] Bond JA (with whom Fraser and Morrisson JJA agreed) found that first, it did not automatically follow that simply because there had been a trial that miscarried because the CDPP had access to the pre-charge compulsory examination that there could never thereafter be a fair trial. The steps referred to at [47] above were explicitly contemplated in *Lee No. 2*.[42]

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[37] "*X7* at [124]."
[38] "*Lee v The Queen* (2014) 253 CLR at [51]."
[39] "*Leach* at [51]."
[40] "*X7* at [46], [101]-[102], [124], [159]-[160]; *Lee (No. 1)* at [159] and *Lee (No. 2)* at [32]."
[41] *R v Leach; R v Leach; Ex Parte Commonwealth Director of Public Prosecutions* [2022] QCA 7 (*Leach No.* 4) per Bond JA at [70] – [72].
[42] Ibid at [85].

54. Second, Mr Leach was not the subject of compulsory examination after being charged. Nor was he the subject of an unlawful pre-charge compulsory examination. The powers exercised by the ATO investigator were lawful.[43] The issue was the subsequent disclosure of that information.

55. Third, the use of the information obtained from the compulsory examination by the ATO investigator was not unlawful. Therefore, the search warrant was lawfully obtained.[44]

56. Fourth, "the critical question on the stay application was whether the use in a subsequent prosecution of evidence (derivative evidence) which was, at least in some way derived from the lawful use of information lawfully obtained during the lawful pre-charge compulsory examination must be seen to conflict with the 'fundamental principle of the common law' that the onus of proof rests on the prosecution or with its 'companion principle' that the prosecution cannot compel an accused to assist it."[45] Bond JA stated that it "is clear that the use of such derivative evidence will not necessarily conflict with those principles. Whether a conflict arises will depend on the nature of the evidence in question and the circumstances of the case, including whether the evidence is available from independent sources."[46] Further, answers obtained during a compulsory examination that directed the investigator to the availability of other admissible evidence was a proper use of the function.[47] However, if the material disclosed defences or explanations that an accused might use at trial, the integrity of the trial could be jeopardised.[48] Bond JA held that the "proposed use of the derivative evidence for the purposes of the retrial does not conflict with either the fundamental principle or the companion principle."[49]

57. Bond JA held that it was open to the primary judge to form the view that the steps proposed by the CDPP were apt to ensure a fair trial.

58. In terms of the Court's consideration of *R v Kinghorn*, Bond JA noted that since the hearing of the appeal, the New South Wales Court of Criminal Appeal heard argument and subsequently refused to follow *Leach No. 2* and took a "wholly different approach to the construction of statutory provisions." However, since the parties did not challenge *Leach No. 2* and noting that *Kinghorn* did not support the arguments advanced by Mr Leach, it was unnecessary to resolve the conflict between *Leach No. 2* and *Kinghorn*.

The evolution

59. The appellant in *Ortensio Lucciano v the Queen* [2021] VSCA 21 was convicted after a trial for largely historical sexual offences. A feature, which the Court described as "wholly unique", was that the subject matter of the charges had been litigated in civil proceedings brought by the complainant against the applicant before the criminal charges were laid. The principal ground of appeal was that separately and in combination, the consequences of the civil trial relating to substantially the same allegations being heard prior to the hearing of

[43] Ibid at [86].
[44] Ibid at [87] and [96].
[45] Ibid at [88].
[46] Ibid at [88 (a)].
[47] Ibid at [88 (b)] citing *R v Seller* (2013) 232 A Crim R 249 per Bathurst CJ at 278 [102].
[48] *R v Leach; R v Leach; Ex Parte Commonwealth Director of Public Prosecutions* [2022] QCA 7 (*Leach No.* 4) per Bond JA at [88 (b)] citing *R v Seller* (2013) 232 A Crim R 249 per Bathurst CJ at 279 [104].
[49] *R v Leach; R v Leach; Ex Parte Commonwealth Director of Public Prosecutions* [2022] QCA 7 (*Leach No.* 4) per Bond JA at [88 (f)].

criminal charges, and the 57-year delay between the alleged offending and the criminal trial, resulted in the applicant's criminal trial being unacceptably unfair, thereby giving rise to a substantial miscarriage of justice.

60. In 2015, the complainant's solicitor sent a letter of demand to the applicant. Civil proceedings were commenced a short time later, which resulted in the applicant filing his defence later that year. On 28 February 2016, the complainant reported the matter to the police. She made a formal statement to the police on 16 March 2016. The civil trial commenced in October 2016. In that case, counsel for the complainant made submissions which were, to the effect, that the complainant had not made an official police statement. The matter proceeded to trial, which resulted in the applicant being ordered to pay damages. Shortly after that, the applicant was arrested and interviewed by police. He gave, it was said, a 'no comment interview.' The criminal trial took place in September 2019. The applicant testified that the alleged conduct never occurred. On appeal, the applicant sought to establish that in light of the whole of the conduct of the trial, the process was so unacceptably unfair that there had been a substantial miscarriage of justice. It was said that the earlier proceedings acted as a "dress rehearsal" for the criminal proceedings.

61. The question raised on the appeal was said to be "novel." The applicant highlighted areas where he suffered significant prejudice. The first was characterised as "presumptive prejudice". That was because he defended the civil trial in the manner he did without knowing the actual position, which was that his criminal prosecution was imminent. He was, effectively, forced to defend the civil trial in the way he did. He had to testify because the complainant's testimony would have gone unanswered had he not given evidence. Whilst his evidence was not coerced, the practical effect was that he was deprived of his right not to give evidence. Once his version was committed to the record, it also had the effect of committing him to this version.

62. The Court referred to *X7* and stated that while it was true that the appellant was not coerced to testify, he faced further difficulties. For example, the applicant was required to give discovery. When settling their indictment and preparing their case theory, the Crown would have enjoyed the advantage of knowing the applicant's version and being forewarned of the defence case theory. The question before the Court focused on the applicant's ability to have a fair trial. The Court said that it brought "into play issues going beyond the impact on the accusatorial process. In particular, the question arises what role the applicant may have had in acquiescing, by silence or otherwise, in that impact."

63. The Crown accepted that it had used the transcript of the civil trial in its preparation for the criminal trial. Therefore, the applicant could point out that particular evidence he had given in the civil trial had been deployed against him in the criminal trial. The Crown was also able to use the evidence of other witnesses that the applicant had called during the civil trial. The Court said, "taken individually, the items of actual prejudice relied on by the applicant are perhaps not of great moment. Taken together, of course, they are more significant. But more importantly, they serve to illustrate … [that] the risk of prejudice was not merely theoretical. A civil trial had been fought on multiple factual issues which were litigated again in a criminal trial, and the prosecution was afforded real advantages from that profound departure from the accusatorial system of criminal justice[50]… the presumptive and actual prejudice to which the applicant pointed, and in particular arising

[50] *Ortensio Lucciano v the Queen* [2021] VSCA 21 at [31].

from the prior conduct of the civil trial, for which he cannot fairly be held responsible, amply demonstrate that it was not possible for there to be a fair trial in this case[51]… It resides especially in the very fact of the prior conduct of the civil trial, amplified by the tangible advantages that gave to the prosecution. Nor is it necessary to decide whether a trial could fairly have taken place if not for the holding of that civil trial. But the prejudice going beyond the holding of the civil trial is also real. It includes the loss of potentially significant evidence on contested matters…"[52]

64. Three months later, *Villan v State of Victoria* [2021] VSC 354 was heard by Keogh J. The issue, in this case, was different to the cases considered above. The plaintiff alleged that in the mid-1980s, when he was a student at a State High School, that he was sexually abused by a person ("EFG"). The State denied the abuse occurred and intended to call EFG to testify. The civil trial commenced with a jury but was aborted after the plaintiff stated that whilst he had not made a criminal complaint, he was informed that he could complain at any time and, in fact, intended to do so.

65. As a result of the plaintiff's expressed intent, the trial was aborted to allow EFG to obtain legal advice. Counsel for EFG subsequently submitted to the Court that he was unwilling to testify and would oppose any application for him to do so.

66. The issue, in that case, turned to whether the Court should issue a certificate under s 128 of the *Evidence Act* 2008 (Vic). The effect of s 128 is to abrogate the common law privilege against self-incrimination. The balance struck by giving a certificate under s128(5) does not provide the witness with complete protection. The Court had to resolve the issue of whether it was in the interests of justice to compel EFG to testify.

67. In deciding whether it was in the interests of justice to compel EFG to testify, the Court cited *X7* and *Lucciano.* The Court held that it was not in the interests of justice to compel EFG's testimony for the following reason:[53]

    a. The subject matter of EFG's testimony would be identical to any allegation made against him in the criminal jurisdiction.

    b. The criminal charges were expected to be laid against EFG.

    c. EFG's evidence may be used intentionally or inadvertently, by the complainant and other witnesses, investigators and the prosecution to understand and respond to the forensic position which EFG would be forced to adopt by giving his evidence.

    d. EFG's credibility and reliability would be attacked, which would expose him in an unjust sense.

    e. A suppression order would not protect EFG from prejudice.

[51] Ibid at [47].
[52] Ibid.
[53] *Villan v State of Victoria* [2021] VSC 354 at [19].

68. A consequence of EFG being required to give evidence is that he would be forced down a particular forensic path which would bind him in a subsequent criminal case and may have the effect of requiring that he prove matters which he should not have to prove.[54]

69. EFG was not required to testify. The consequence to the civil trial was significant. If the defence could not call EFG, the matter could not be fairly litigated. As a result, a temporary stay of the proceedings was ordered. Considering that EFG had not even been charged, the delay is expected to be significant.

Conclusion

70. The application of *X7, Lee No. 1* and *Lee No. 2* has been difficult to follow in Queensland. As noted, *Lee No. 2* did not resolve the dispute between *X7* and *Lee No. 1*.

71. *Leach No. 2* and *Leach No. 4* sit comfortably with *X7*, *Lee No. 2* and *Strickland*. Whilst some will attempt to settle the dispute between *Leach No. 2* and *Kinghorn* through the application of different provisions of the Act, the dispute as to the construction of the fundamental principle of the common law and the companion rule cannot be easily resolved. As Bond JA said *Kinghorn* took a "wholly different approach to the construction of statutory provisions." A chief reason cited for *Kinghorn* not following *Leach No. 2* was that Sofronoff P did not draw a distinction in the timing of the compulsory examination to the accused's charge date.[55] It would be difficult, however, to argue that no consideration was given to *IBAC* since that decision attracted substantial consideration in *Strickland* which *Leach No. 2* considered.[56]

72. The two Victorian cases capture the evolution of the authorities, which has its genesis in *X7* and *Lee No. 2*. Coercive hearings are not required before the principles in *X7* and *Lee No.2* are invoked. Circumstances where an accused person is required, rather than being compelled, to testify or to reveal their hand, can be enough to either gift the Crown a forensic advantage or to burden the defence with a forensic disadvantage. These situations have the potential to include parallel proceedings in a disciplinary or employment law setting, a domestic violence court hearing, or even, at a stretch, a defamation case.[57]

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[54] Ibid at [20].
[55] Cf *Leach No. 2* per Sofronoff P at [102] to *Kinghorn* per Bathurst CJ and Payne JA at [123].
[56] On 15 March 2022, the High Court considered *Bell v The Queen* [2022] HCATrans 30 in circumstances where there was potential for the High Court to comment on the conflict that exists between *Leach No.* 2 and *Kinghorn*. Unfortunately, for this paper, the High Court granted the respondent's application to revoke the grant of special leave. A review of the transcript reveals that neither *Leach No 2* or *Kinghorn* were raised.
[57] On that note, it is understood that Besanko J applied *Lucciano* and *Villan* in ruling that "Person 66" would not be compelled to testify in the Ben Robert-Smith's defamation trial.