Volume 40 Number 11 December 2013

Brief®

The Law Society OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

Asbestos Diseases Compensation Bill 2013

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To What Extent Does *X7 v Australian Crime Commission* Remain 'Useful' Law?

A recent article by Courtney Robertson (*Brief*, September 2013, page 12) discussed the decision in *X7 v Australian Crime Commission* [2013] HCA 29. That case concerned the purported compulsory examination of an accused, by an Examiner of the Australian Crime Commission. The High Court held that the *Australian Crime Commission Act 2002* (Cth) (ACC Act) **did not** authorise an examination of an accused person on subject matter common to their pending charges.

On 9 October 2013, the High Court published its reasons in *Lee v New South Wales Crime Commission* [2013] HCA 39. The Court held in *Lee* that the *Criminal Assets Recovery Act 1990* (NSW) (CAR Act) **did permit** a compulsory examination of an accused on subject matter common to their pending charges; and that the mere fact of those charges was no reason to refuse or delay an examination order. The Court upheld an order[2] that Mr Lee be so examined.

Plainly, no consideration of *X7* is complete without a consideration of *Lee*.[3] It is suggested that a reader who thought a principle of general application could be identified in *X7* will struggle to maintain that position in the wake of *Lee*. It is further suggested that *X7* may no longer reflect the law.

The ACC Act and the CAR Act each contain general provisions that abrogate the common law privilege against self-incrimination.[4] The objects of the ACC Act (criminal intelligence gathering) and the CAR Act (confiscation of the fruits of relevant illegal activity) are plainly different. It is suggested, however, that both have as their clear aim the prevention and deterrence of crime. It is suggested those differences do not provide a sound jurisprudential basis for the different outcomes in *X7* and *Lee*.

A notable difference between the ACC Act and the CAR Act is the manner in which answers given in examinations may be disclosed. The ACC Act prohibits publication of evidence given in an examination where doing so "might … prejudice the fair trial of a person who has been, or may be, charged with an offence".[5] In stark contrast evidence given in a CAR Act examination may be disclosed by the NSW Crime Commission to "such persons or bodies as the Commission thinks appropriate".[6] Further, it is the practice of the NSW Crime Commission to disclose such material to the NSW Police and the DPP (NSW).[7] It is suggested the potential for 'harm' to a fair criminal trial is far greater under a CAR Act examination than an ACC Act examination. One might have expected an opposite outcome in the two cases.

AN ALTERNATIVE EXPLANATION OF THE DIFFERENCE OF APPROACH

The majority in *Lee* did not overturn *X7*, at least not expressly. The minority in *Lee* found that *X7* applied to the facts before them.

It is suggested that although *X7* must remain 'good' law, it is no longer particularly 'useful' law. There has been a change in the composition of the High Court with the appointment of Keane and Gageler JJ, and that appears to be the only basis to explain the difference in outcome between the cases.

X7 was decided by French CJ, Hayne, Crennan, Kiefel and Bell JJ. *Lee* was heard by the same judges together with Keane and Gageler JJ. The *X7* majority (Hayne, Kiefel & Bell JJ) are now the *Lee* minority. The *X7* minority (French CJ and Crennan J) have maintained their position, rather than following the *X7* majority.

In their 76 paragraph judgment, Keane and Gageler JJ make only two references to *X7*, both at [322]. Their Honours indicate their agreement with the joint *X7* **minority** (French CJ and Crennan J) as to the context in which *Hammond v The Commonwealth*[8] must be understood. The difference of outcome in *Hammond* compared to *Hamilton v Oades*[9] has previously been the discussion of much judicial writing.[10]

The lead minority decision in *Lee* was written by Kiefel J[11] who held at [213] that *X7* 'should be followed'. In his concurring judgment Hayne J advances four bases on which he says *Lee* turns. The first and second are, in effect, that the court should follow *X7*.

At least at one level, the divergence on the current High Court bench appears to come down to a difference of opinion on whether *Hammond* was exceptional or *Hamilton v Oades* was exceptional. The majority treat *Hammond* as exceptional. They note that police officers who were investigating the underlying criminality were to be present at the examination.[12] The majority make no criticism of the finding by the Court of Appeal that:

> *Hammond … is not a case which lends itself to the extraction of principle. As noted by Gibbs CJ, the matter was heard and determined as a matter of urgency, within three days.*[13]

In contrast, Kiefel J holds that *Hamilton v Oades* "had a special historical context", namely the established practices that permit the

examination of bankrupts and is "to be understood by reference to it".[14] Similarly Hayne J says "Companies legislation … has a long pedigree which informed its construction. The CAR Act provisions are novel".[15] Justice Kiefel goes on to hold, the "irrelevance [of *Hamilton*] is confirmed by *X7*".[16] The minority are also critical of the Court of Appeal (and by necessary implication, the majority) for attempting to limit *Hammond* on the basis that it was decided urgently.[17]

A WAY FORWARD?

The *Lee* minority leaves open the possibility that Parliament could construct a statute that not only expresses "[a]n intention to abrogate an examinee's privilege against self-incrimination", but that also separately and expressly, "evidence[s] an intention … to apply [the scheme of examination] to a person charged with a serious crime whose trial is pending or in progress".[18] It is to be hoped that Parliaments will strive for such greater clarity in future statutes and perhaps amendments to existing ones.

Until then, or until the correctness of *X7* is directly challenged in the High Court, the situation is likely to remain as it is. Perhaps regrettably two recent applications for special leave on the general subject have been refused.[19]

As the matter stands, judges at first instance, and intermediate Courts of Appeal, and consequently those appearing before the same, must either:

- Accept the correctness of Hayne J's observation in *Lee* that "All that has changed between the decision in *X7* and the decision in this case is the composition of the Bench"[20]; or
- Strive to identify a common thread that runs through the common law of Australia, as embodied in *Hammond, Hamilton, X7* and *Lee*, all of which are good law and binding upon them. Presumably courts will have to determine whether specific schemes are closer in object and nature to the CAR Act or the ACC Act.

Given the above-mentioned similarities between the ACC Act and the CAR Act, it is suggested the former approach, suggested by Hayne J is correct. *X7* and *Lee* are inconsistent. As the most recent authority, *Lee* ought be applied to other schemes that provide for compulsory examination; ironically for the reasons Hayne J advocated the application of *X7* to the CAR Act in *Lee*. The latter approach of trying to find a consistency between *X7* and *Lee* does not reflect a sound basis in principle, particularly given the different regimes for disclosure of answers in the respective statutes.

NOTES

1. ¥ The views expressed in this article are the views of the author.
2. Made in *New South Wales Crime Commission v Lee* [2012] NSWCA 276, before the decision in *X7* was published.
3. Of note, *Lee* was argued before *X7* was handed down. After *X7* was handed down the parties and interveners in *Lee* were invited to make supplementary submissions on *X7*, which they did; [2013] HCA 39 at [53], [123], [170] and [257].
4. Section 13A of the CAR Act and s 30(4) of the ACC Act.
5. See s. 25A(9).
6. See s. 7(a) of the *New South Wales Crime Commission Act 1985* (NSW).
7. *New South Wales Crime Commission v Lee* [2012] NSWCA 276 at [71].
8. (1982) 152 CLR 188. Mr Hammond was to be examined in a private hearing of a Royal Commission on matters pertaining to charges that were then pending against him. The police officers who had laid the charges were to be present at his examination.
9. (1989) 166 CLR 486. Mr Oades was to be examined under s. 541 of the Companies (New South Wales) Code before the Supreme Court of New South Wales on matters relating to the affairs of a company, which was the subject of a winding-up order. Mr Oades had criminal charges pending (which concerned the affairs of the company) and objected to being questioned. The Court of Appeal ordered that he was not to be compelled to answer any questions, the answers to which might tend to incriminate him in respect of any of those charges. The High Court allowed an appeal by the liquidator.
10. A particularly current analysis of the authorities may be found in the decision in *Commissioner of the AFP v Mulder* [2013] NSWSC 621 at [65] and following.
11. Hayne and Bell JJ indicate their agreement with Kiefel J's reasons at [58] and [255] respectively.
12. Keane and Gageler JJ at [321], Crennan J at [118] incorporating the comments made in her joint judgment with French CJ in *X7*, at [32] thereof.
13. [2012] NSWCA 276 at [26] per Basten JA. Beazley JA, McColl JA and Macfarlan JA agreed.
14. Kiefel J at [241]–[252], in particular [243].
15. At [72].
16. At [252].
17. Kiefel J at [207].
18. Kiefel J at [253].
19. *SD v New South Wales Crime Commission* [2013] HCATrans 210 and *Seller & McCarthy v The Queen* [2013] HCATrans 204.
20. At [70].