36/07; [2007] VSC 297

SUPREME COURT OF VICTORIA

ACC v BRERETON

Smith J

26 July, 23 August 2007 — (2007) 173 A Crim R 572; (2007) 69 ATR 173

PRACTICE AND PROCEDURE – SUBPOENA – APPLICATION TO SET ASIDE – TEST TO BE APPLIED – REFUSAL BY PERSON TO BE SWORN BEFORE EXAMINER – PERSON CHARGED WITH CRIMINAL OFFENCE – COMMITTAL PROCEEDINGS COMMENCED – APPLICATION BY ACCUSED FOR AUSTRALIAN CRIME COMMISSION TO PRODUCE DOCUMENT RECORDING REASONS FOR ISSUING THE SUMMONS FOR EXAMINATION – APPLICATION GRANTED – WHETHER MAGISTRATE IN ERROR: *AUSTRALIAN CRIME COMMISSION ACT* 2002, S28.

An examination summons was issued by an examiner pursuant to s28(1) of the *Australian Crime Commission Act* 2002 ('Act') requiring B. to attend before the examiner to give evidence. B. attended to answer the summons but refused to be sworn or make an affirmation. Two days later he was charged by the DPP under s30 of the Act in respect of the refusal. At the subsequent committal proceedings relating to the charge, B. issued subpoenas calling for the production of two categories of documents recording the reasons that the examiner was satisfied that it was reasonable to issue the summons and the reasoning for the issue. The magistrate was satisfied that the document containing the examiner's reasons be produced and refused to set aside the subpoena. Upon appeal—

HELD: Appeal dismissed.

1. There is a number of cases in which the test to be applied, including the often quoted so-called "on the cards" test, is considered. That phrase and other phrases used by judges are attempts to state ways in which the ultimate question might be approached in a particular case. The ultimate question, however, is whether there is a legitimate forensic purpose which the subpoena will serve. It is necessary to consider, among other things, the importance of the issue to which it is said the subpoena relates and the importance of the document in question in the determination of that issue.

2. The present case concerns a subpoena issued by a person charged with a criminal offence, one which also happens to carry with it a potential jail term. The existence of the document containing reasons at the relevant time for issuing the examination summons is a condition precedent to its valid issue. Evidence as to compliance with the statutory pre-condition is in the possession of the ACC and not the person accused. The accused, however, has the right to put that pre-condition in issue and it would not be right to refuse disclosure simply because there were no grounds for thinking that enforcement of the subpoena would assist the accused.

3. B. had a clear legitimate forensic interest supporting his use of the court's processes to subpoena the document sought in the second subpoena which, if it existed, was in the possession of the ACC. The consequences of the opposing argument would be extremely disturbing; for to deny an accused the right to subpoena the document would create a situation where persons could be convicted and sent to jail for failure to answer an examination summons even though that summons was invalidly issued, there being no procedure available to an accused person at his trial to test that issue.

SMITH J:

The proceedings

1. By originating motion filed on 20 December 2006 and amended on 4 April 2007, the plaintiff, the Australian Crime Commission ("ACC"), seeks the following orders:

> A. An order in the nature of *certiorari* quashing the order made on 10 November 2006 by the first defendant that, subject to any claim for public interest immunity, the plaintiff produce any documents fitting the description in Part 2 of the Schedule to the subpoena to the plaintiff dated 10 November 2006.
>
> B. An order in the nature of *certiorari* quashing the subpoena to the plaintiff issued by the first defendant at the request of the second defendant on 10 November 2006.
>
> B2 An order in the nature of prohibition preventing the first defendant from permitting the second

defendant to argue that the summons ("examination summons") issued by the plaintiff to the second defendant on 24 February 2006 pursuant to s28 of the *Australian Crime Commission Act* 2002 (Cth) was invalid.

Background

2. The examination summons referred to above was issued by an examiner pursuant to s28 (1) of the *Australian Crime Commission Act* 2002 (Cth) ("the Act") requiring the attendance of the second defendant, Michael Richard Brereton ("Brereton"), to attend before the examiner on 6 March 2006 to give evidence. He attended to answer that examination summons but refused to be sworn or to make an affirmation. Two days later he was charged by the Director of Public Prosecutions under s30 of the Act in respect of that refusal.

3. The hearing of the committal proceedings relating to that charge commenced on 10 November 2006. The abovementioned subpoena was the second of two subpoenas issued in those proceedings on 10 November 2006 and directed to the ACC. It called for the production of two categories of documents:

> (1) Any document pursuant to s28(1A) of the *Australian Crime Commission Act* 2002 which records or evidences that the examiner was satisfied that it was reasonable to issue an examination summons.
>
> (2) Any document pursuant to s28(1A) of the *Australian Crime Commission Act* 2002 which records the reasoning for the issue of the examination summons on Michael Brereton.

4. At the commencement of the committal proceedings on 10 November 2006, counsel appeared for the ACC and applied to have both subpoenas struck out as an abuse of process on the grounds that they served no legitimate forensic purpose and constituted a mere fishing expedition. The subpoena relevant to these proceedings is the second referred to above.

5. The learned Magistrate heard argument on 10 November 2006 and rejected the application to have that subpoena struck out. His reasons were as follows:

> Insofar as the second summons to witness is concerned, I am satisfied that there is a legitimate forensic purpose demonstrated in relation to the summons itself. It does not have the same protection that is argued to be available in relation to the first summons to witness, though I am not ruling upon that summons at this stage.
>
> The legitimate forensic purpose is in the context of a criminal proceeding, in the context of a person being charged with failing to take an oath or affirmation. To demand that a person, say, takes an oath or affirmation, but in the context of this proceeding, there must be, first, a summons properly issued in compliance with the powers pursuant to s28 of the *Australian Crime Commission Act* 2002. It is legitimate for a concern to be raised in relation to the exercise of that power, particularly when there is no record within the materials itself as to whether or not the examiner has put his reasons in writing.
>
> I am satisfied that that document need be produced subject to any claim for immunity or (sic) documents which meet that description. The description is that which is contained at Part 2 of the Schedule.

The statutory provisions

6. The examination summons was issued pursuant to s28 of the Act. It provides:

> **28. Power to summon witnesses and take evidence**
> (1) An examiner may summon a person to appear before the examiner at an examination to give evidence and to produce such documents or other things (if any) as are referred to in the summons.
> (1A) Before issuing a summons under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the summons.
> (2) A summons under subsection (1) requiring a person to appear before an examiner at an examination must be accompanied by a copy of the determination of the Board that the intelligence operation is a special operation or that the investigation into matters relating to federally relevant criminal activity is a special investigation.
> (3) A summons under subsection (1) requiring a person to appear before an examiner at an examination shall, unless the examiner issuing the summons is satisfied that, in the particular circumstances of the special ACC operation/investigation to which the examination relates, it would prejudice the

effectiveness of the special ACC operation/investigation for the summons to do so, set out, so far as is reasonably practicable, the general nature of the matters in relation to which the examiner intends to question the person, but nothing in this subsection prevents the examiner from questioning the person in relation to any matter that relates to a special ACC operation/investigation.
(4) The examiner who is holding an examination may require a person appearing at the examination to produce a document or other thing.
(5) An examiner may, at an examination, take evidence on oath or affirmation and for that purpose:
(a) the examiner may require a person appearing at the examination to give evidence either to take an oath or to make an affirmation in a form approved by the examiner; and
(b) the examiner, or a person who is an authorised person in relation to the ACC, may administer an oath or affirmation to a person so appearing at the examination.
(6) In this section, a reference to a person who is an authorised person in relation to the ACC is a reference to a person authorised in writing, or a person included in a class of persons authorised in writing, for the purposes of this section by the CEO.
(7) The powers conferred by this section are not exercisable except for the purposes of a special ACC operation/investigation.
The subpoena in question sought the record in writing of reasons required by s28(1A).

7. The consequences of non-compliance are dealt with in s30. It provides:

30. Failure of witnesses to attend and answer questions
Failure to attend
(1) A person served, as prescribed, with a summons to appear as a witness at an examination before an examiner shall not:
(a) fail to attend as required by the summons; or
(b) fail to attend from day to day unless excused, or released from further attendance, by the examiner.
Failure to answer questions etc.
(2) A person appearing as a witness at an examination before an examiner shall not:
(a) when required pursuant to section 28 either to take an oath or make an affirmation—refuse or fail to comply with the requirement;
(b) refuse or fail to answer a question that he or she is required to answer by the examiner; or
(c) refuse or fail to produce a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed.
(3) Where:
(a) a legal practitioner is required to answer a question or produce a document at an examination before an examiner; and
(b) the answer to the question would disclose, or the document contains, a privileged communication made by or to the legal practitioner in his or her capacity as a legal practitioner;
the legal practitioner is entitled to refuse to comply with the requirement unless the person to whom or by whom the communication was made agrees to the legal practitioner complying with the requirement but, where the legal practitioner refuses to comply with the requirement, he or she shall, if so required by the examiner, give the examiner the name and address of the person to whom or by whom the communication was made.
Use immunity available in some cases if self-incrimination claimed
(4) Subsection (5) limits the use that can be made of any answers given at an examination before an examiner, or documents or things produced at an examination before an examiner. That subsection only applies if:
(a) a person appearing as a witness at an examination before an examiner:
(i) answers a question that he or she is required to answer by the examiner; or
(ii) produces a document or thing that he or she was required to produce by a summons under this Act served on him or her as prescribed; and
(b) in the case of the production of a document that is, or forms part of, a record of an existing or past business—the document sets out details of earnings received by the person in respect of his or her employment and does not set out any other information; and
(c) before answering the question or producing the document or thing, the person claims that the answer, or the production of the document or thing, might tend to incriminate the person or make the person liable to a penalty.
(5) The answer, or the document or thing, is not admissible in evidence against the person in:
(a) a criminal proceeding; or
(b) a proceeding for the imposition of a penalty;
other than:
(c) confiscation proceedings; or
(d) a proceeding in respect of:
(i) in the case of an answer—the falsity of the answer; or
(ii) in the case of the production of a document—the falsity of any statement contained in the document.
Offence for contravention of subsection (1), (2) or (3)
(6) A person who contravenes subsection (1), (2) or (3) is guilty of an indictable offence that, subject to

this section, is punishable, upon conviction, by a fine not exceeding 200 penalty units or imprisonment for a period not exceeding 5 years.
(7) Notwithstanding that an offence against subsection (1), (2) or (3) is an indictable offence, a court of summary jurisdiction may hear and determine proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.
(8) Where, in accordance with subsection (7), a court of summary jurisdiction convicts a person of an offence against subsection (1), (2) or (3), the penalty that the court may impose is a fine not exceeding 20 penalty units or imprisonment for a period not exceeding 1 year.
Legal professional privilege
(9) Subsection (3) does not affect the law relating to legal professional privilege.

The challenge to the decision – grounds

8. The plaintiff alleges that the Magistrate made a jurisdictional error and error of law on the face of the record in making the order and in refusing to set aside the second subpoena. In particular, it alleges that the magistrate so erred by finding that the second subpoena had a legitimate forensic purpose. It advances a number of reasons as to why such error should be found. They were, as stated in the Originating Motion and in oral argument as follows:

a. there was no evidence that would have permitted the Magistrate properly to conclude that it was on the cards that the documents falling within the schedule to the second subpoena would show that the Plaintiff had not complied with s28(1A) of the Act, or with any other relevant statutory requirements, or would otherwise materially assist the Second Defendant in his defence;

b. he wrongly assumed that it was necessary as a matter of law for the examination summons to disclose on its face that there had been compliance with s28(1A) of the Act;

c. he wrongly assumed that it was necessary as a matter of law for the prosecution to prove that the examiner had complied with s28(1A) of the Act when he issued the third examination summons;

d. he failed to recognise that it was not open to the Second Defendant to challenge the validity of the third examination summons on the basis of asserted non-compliance with s28(1A) of the Act because that would constitute an impermissible collateral attack on the third examination summons, the relevant summons;

e. he failed to recognise that the Second Defendant was prevented by the doctrine of *res judicata* from attacking the validity of the third examination summons because he had already attacked the validity of that examination summons in the third Federal Court proceedings, which had been dismissed;

f. he failed to recognise that the Second Defendant was estopped from attacking the validity of the third examination summons because he had unreasonably failed to advance any argument based upon the examiner's asserted non-compliance with s28(1A) of the Act as part of the third Federal Court proceedings, and/or as part of his two earlier attacks on materially identical summonses.

The challenge – preliminary issues

9. I note that a further basis was advanced[1], namely that, even if it was "on the cards" that the examiner had not complied with s28(1A) of the Act, the existence, sufficiency or form of any reasons that may be recorded in documents falling within the schedule to the second subpoena was irrelevant to the validity of the relevant examination summons, and therefore irrelevant to any matter in the committal proceeding. In the course of argument, however, Counsel for ACC conceded that the existence of a document recording the reasons of the examiner for issuing the examination summons was a condition precedent to the valid exercise of the power to issue the examination summons.[2] In my view, that concession was properly made.

10. Counsel also submitted that the validity of the examination summons was not a relevant issue in the proceedings because a valid examination summons was not a pre-condition to the obligation to give evidence. Counsel submitted that anyone who happened to be present before an examiner could be required to give evidence on oath or affirmation. Counsel submitted that once Brereton chose to attend, the validity of the summons ceased to be relevant. Without going into the highly questionable merits of this argument, it requires that the reality of the case be ignored. The reality of this case is, and was, that Brereton was summonsed to attend an examination. There is and was no evidence that he voluntarily attended. Plainly he attended in response to the summons and the refusal to be sworn or to affirm was in response to that summons. Its validity could be raised by Brereton as an issue.

11. In the course of oral submissions, Counsel for ACC also advanced argument that ss28(2) and 28(3) specified the documentation, and content of it, to be given to the person to be examined. Counsel submitted that this revealed a parliamentary intention to limit the material required to be supplied to an accused person. In my view, the Parliament was not attempting an exhaustive statement on such matters and sensibly left all procedural, evidentiary and discovery matters to be resolved by the courts in the ordinary way as issues arose.

12. As to the alleged errors mentioned in paragraphs (b) and (c) above, a fair reading of the learned Magistrate's reasons does not, in my view, support the allegations made. He did not assume that the examination summons had to disclose on its face that there had been compliance with the provision requiring a record of the reasons. The learned Magistrate, at most, noted the evidentiary fact that there was nothing in the materials before him indicating whether or not the examiner had put his reasons in writing. The matters upon which he relied in finding a legitimate forensic purpose are those stated earlier in his reasons and the reference to the materials is simply to something that, at most, reinforced a conclusion already reached. Further, the reasons do not indicate that he assumed that the prosecution had to prove in every case that the examiner had complied with the relevant provision when issuing the third examination summons as an element of the offence. On the contrary, the reasons point to the learned Magistrate accepting the proposition that it was open to the accused to challenge the validity of the summons. There was, as Counsel for the plaintiff properly conceded in this proceeding, a condition precedent to the validity of the issuing of the examination summons – namely, the existence of a document recording the examiner's reasons for issuing the examination summons, such document to be in existence before the examination summons was issued. Ultimately, it mattered not whether this was a matter on which the prosecution or the defence bore the onus of proof. It was plain that Brereton chose to put in issue the question of whether that pre-condition had been satisfied. While the Act significantly qualifies the right to silence there is nothing in the Act which:

- prevents a person charged with the offence in question putting in issue the validity of the examination summons; or

- limits the ways in which that validity may be challenged.

The pre-conditions are no doubt specified because of the significant in-roads made to the right to silence and the need to ensure that the power is properly exercised.

13. Brereton was, therefore, entitled to put the pre-condition in issue on the basis that he did, namely, whether a document containing the reasons for issuing the examination summons was in existence at or prior to its issue.

14. I turn to the remaining and major challenges made.
Challenge: (a) No evidence that it was "on the cards" that the document subpoenaed would materially assist Brereton

15. Counsel submitted that, on the evidence before the learned Magistrate, there was no basis upon which he could conclude properly, or at all, that allowing Brereton's subpoena to be executed would materially assist Brereton in establishing non-compliance with the requirement that a document containing the reasons for issuing the examination summons had existed at or prior to its issue.

16. I was referred to a number of cases in which the test to be applied, including the often quoted so-called "on the cards" test, is considered.[3] In my view, that phrase and other phrases used by judges are attempts to state ways in which the ultimate question might be approached in a particular case. The ultimate question, however, is whether there is a legitimate forensic purpose which the subpoena will serve. It is necessary to consider, among other things, the importance of the issue to which it is said the subpoena relates and the importance of the document in question in the determination of that issue.

17. A complication in applying judicial statements in the present case is that the purpose of the subpoena was to establish whether the document existed or not and the case of the defendant would be best advanced if the person answering the subpoena did not do so and said that the document had not existed.

18. In forming a view as to whether there was a legitimate forensic purpose for the subpoena, it is instructive to refer to the passage in Gibbs CJ's judgment in *Alister v R* where his Honour spoke of the need to not allow mere fishing expeditions and how it "may be enough that it appears to be 'on the cards' that the document would materially assist the defence". His Honour shed light on what he meant by giving an example of such a situation in the following words:

> If, for example, it were known that an important witness for the Crown had given a report on the case to ASIO, it would not be right to refuse disclosure simply because there were no grounds for thinking that the report could assist the accused. To refuse discovery for only that reason would leave the accused with a legitimate sense of grievance, since he would not be able to test the evidence of the witness by comparing it with the report, and would be likely to give rise to the reproach that justice had not been seen to be done.[4]

19. In the present case, we are concerned with a subpoena issued by a person charged with a criminal offence, one which also happens to carry with it a potential jail term. It is conceded by Counsel for ACC that the existence of the document containing reasons at the relevant time for issuing the examination summons is a condition precedent to its valid issue. In this case, as would ordinarily be the case, evidence as to compliance with the statutory pre-conditions is in the possession of the ACC and not the person accused. The accused, however, has the right to put that pre-condition in issue. To use the words of Gibbs CJ "it would not be right to refuse disclosure simply because there were no grounds for thinking that" enforcement of the subpoena would assist the accused.

20. In approaching the issue of whether a subpoena issued by an accused person has a legitimate forensic purpose in criminal proceedings, the following words of Brennan J should also always be borne in mind:

> The right of an accused person to compulsory process as of course to secure witnesses has been acknowledged for nearly three centuries. It is so basic and important an aspect of our criminal procedure that a trial to which the right is denied cannot be, in my opinion, a trial according to law. There is no distinction to be drawn in this respect between a subpoena *ad testificandum* and a subpoena *duces tecum*... Of course, the applicants did not know and do not know now whether ASIO have possession of any document admissible in aid of the defence case, but the right to compulsory process cannot be dependent upon the party's ability to prove the existence and content of a document when the party has reasonable grounds to believe that the document exists and seeks to obtain it by subpoena. That would eviscerate the right and limit its enforcement to occasions when the party already has in his possession secondary evidence of the original document the production of which the subpoena is intended to secure.

Later he stated:

> This is a criminal case. The obligation to produce documents under a subpoena issued to a Government instrumentality in a criminal case is not merely an obligation incurred by the Crown or a Crown instrumentality as a party to litigation to give such discovery to its adversary as is necessary to dispose fairly of the case. In a criminal case it is appropriate to adopt a more liberal approach to the inspection of documents by the Court. The more liberal approach is required to ensure, so far as it lies within the court's power, that the secrecy which is appropriate to some of the activities of Government furnishes no incentive to misuse the processes of the criminal law. The procedure safeguards are neither easy to define nor simple to apply. On the one hand, they may prove to be ineffective to prevent injustice in a particular case; on the other, there is a risk that they may breach the tightness of security that is desirable in the public interest. It is of the essence in a free society that a balance is struck between the security that is desirable to protect society as a whole and the safeguards that are necessary to protect individual liberty. But in the long run the safety of a democracy rests upon the common commitment of its citizens to the safeguarding of each man's liberty, and the balance must tilt that way...[5]

21. In my view, Brereton had a clear legitimate forensic interest supporting his use of the court's processes to subpoena the document sought in the second subpoena which, if it existed, was in the possession of the ACC. The consequences of the opposing argument would be extremely disturbing; for to deny an accused the right to subpoena the document would create a situation where persons could be convicted and sent to jail for failure to answer an examination summons even though that summons was invalidly issued, there being no procedure available to an accused person at his trial to test that issue.

22. Counsel submitted that the protection intended to be given by the requirement was to provide an audit trail for those who have a supervisory role to play in relation to the ACC so that thereby the rights of the individual are protected. He referred to the analysis of Finn J in *Barnes v Boulton* [2004] FCA 1219; (2004) 139 FCR 356. In that case, the person being examined under the relevant provisions, having attended and been sworn, then argued through her counsel that only after she was provided with a copy of the reasons for the issue of the summons could the examination proceed before the examiner.[6] The examiner rejected that submission. The person being examined then sought judicial review of that decision of the examiner. Counsel submitted that as a matter of statutory construction, the applicant was entitled to be provided with a copy of the reasons. Finn J considered the right of the person being examined to the reasons of the examiner for issuing the summons in that context. In the course of his reasons, he stated a number of propositions as background to the construction issue, including:

> • that the examiner was under no general common law obligation to provide reasons for his decision to issue the summons,[7]
>
> • the examiner's reasons could not be obtained under the provision of s13 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) because the decision to issue the summons was in a class of decisions relating to the administration of criminal justice to which that section did not apply,[8]
>
> • the reluctance of the courts to compromise a criminal investigation by requiring premature disclosure of information concerning that investigation[9],
>
> • the requirement to create a record of an official decision being a well-recognised means of enhancing the integrity of decision making and to be a "pre-requisite to effective accountability", be this to Parliament or otherwise.

23. His Honour went on to analyse the provisions of ss28 and 29 and concluded that the provisions did not themselves give the person being examined any right of access to the document recording the reasons of the examiner for issuing the summons. This was described as a deliberate legislative judgment and it was further stated that:

> the clear purpose of s28(1A) is both to focus and enhance decision making and to provide an accountability mechanism by requiring the creation of an 'audit trail'. Under s59 of the *ACC Act* that record is potentially available on request to the portfolio Minister and to the Parliamentary Joint Committee on the Australian Crime Commission, constituted under Part III of the *ACC Act*:... as is not uncommon with investigative agencies, the Parliament has counter-balanced the secrecy regime it has erected to ensure the effectiveness of the ACC's investigations with a measure of public accountability through a dedicated parliamentary oversight committee...a right such as the applicant propounds would be an alien presence in such a statutory scheme.

24. Thus his Honour was faced with the question whether, within the context of the examination hearing, the legislation dealing with such examination itself, and without more, gave the person being examined the right to receive from the examiner access to a document stating the examiner's reasons for issuing the summons. His Honour did not have to consider the issue in the context of a criminal trial where an issue is raised as to satisfaction of a precondition to a valid examination summons and the document recording the reasons is sought using a subpoena. That is the present context and is very different. There is every reason to allow the usual trial procedures to operate. There would be little comfort to an accused person sitting in gaol after sentence to find out subsequently through the actions of a parliamentary committee that the conviction was invalid. On the evidence before me, it is not necessary for the ACC to take its extreme position. Its legitimate concerns about compromising the investigation are adequately met by public interest privilege, the matter expressly reserved by the learned Magistrate.

25. I turn to the remaining grounds.

Errors (d), (e), (f) – Impermissible collateral attack and various forms of estoppel

26. It is clear from *Ousley v R*,[10] that, unless some specific reason existed, Brereton could make a collateral attack to the validity of the examination summons which he was alleged not to have complied with when he refused to be sworn or make an affirmation. Counsel for ACC submitted, however, that there were particular reasons why the collateral attack was impermissible, being the matters raised in these grounds. They comprise the arguments that the doctrine of *res judicata* or the *Anshun* principle apply.

27. The argument relies upon the attacks previously made by Brereton upon the validity of examination summonses in proceedings brought on by him in the Federal Court, including the examination summons in respect of which the criminal charge was brought. It is put that these challenges did not include the issue to which the contested subpoena relates (the existence of the record of reasons) but were, nonetheless, in terms challenges to the validity of the summonses in which the issue sought to be raised at the committal could have been raised. Counsel submitted that the cause of action relating to the challenge to the validity of the examination summons merged in the judgment. Alternatively, it was put that the issue now sought to be raised should have been raised in the proceeding in the Federal Court, and the circumstances are such that the *Anshun* principle should apply.

28. To understand the issues raised, it is necessary to refer to the history of earlier and related proceedings involving ACC and Brereton.

• First examination summons – On 13 May 2005, the ACC had previously issued a summons to Brereton pursuant to s28 of the *Australian Crime Commission Act* 2002 (Cth) ("the Act") which required him to attend and answer questions before an examiner of the ACC appointed pursuant to the Act (the first examination summons).

On 17 June 2005, Brereton commenced proceedings in the Federal Court of Australia to have the first examination summons set aside. That application was dismissed by a single judge of the Federal Court on 16 September 2005 (the first Federal Court judgment).

• Second examination summons – On 16 September 2005, the ACC issued a further examination summons to Brereton pursuant to s28 of the Act which required him to attend and answer questions before an examiner appointed pursuant to the Act (the second examination summons).

The second examination summons was identical to the first examination summons, save that the date and time for attendance specified in the second examination summons differed from that in the first examination summons.

On 20 October 2005, Brereton commenced proceedings in the Federal Court seeking to have the second examination summons set aside (the second Federal Court application).

• Appeal – On 6 October 2005, Brereton had commenced an appeal against the first Federal Court judgment.

The application relating to the second examination summons was referred to a Full Court of the Federal Court of Australia to be heard together with the appeal against the first Federal Court judgment.

On 15 February 2006, a Full Federal Court dismissed the appeal from the first Federal Court judgment, and dismissed the second Federal Court application.

• Third examination summons – On 28 February 2006, the ACC issued a further examination summons to Brereton pursuant to s28 of the Act (the third examination summons). This is the examination summons directly involved in these proceedings. The third examination summons was identical to the earlier summonses, save that the date and time for attendance specified in the third examination summons differed from that in the two earlier examination summonses. As noted above, on 6 March 2006, Brereton attended before an examiner and refused to take an oath or affirmation when required to do so by the examiner.

On the same day, Brereton commenced proceedings in the Federal Court seeking to have the third examination summons set aside. On 5 June 2006, the third Federal Court application was dismissed by consent.

• High Court Proceedings – Shortly prior to that, on 19 May 2006, an application for special leave to appeal against the judgment of the Full Federal Court handed down on 15 February 2006 was dismissed.

Thus prior to the challenge to the subpoena in the present committal proceedings, Brereton had sought to challenge the validity of each of the examination summonses directed to him. The material sought under the subpoenas in the criminal proceedings was directed to the issue of the validity of the third examination summons. The issue relied upon in the challenge to the validity of the summons in the criminal proceedings had not been raised in any of the Federal Court challenges to the validity of the three examination summonses.

29. Returning to the argument advanced for the ACC, it is in my view a remarkable argument. It assumes that estoppel principles developed in the common law for civil proceedings have an application in criminal proceedings. Counsel was unable to refer me to any authority that supported such an extension of the law. It would be surprising if there were when regard is had to the different nature and purpose of civil and criminal proceedings and the special position of an accused person in a criminal proceedings[11]. Such authority as there is in the area supports the conclusion that it is inappropriate to apply such civil trial doctrines to criminal proceedings[12].

30. I note that arguments were raised about the width of the prohibition order that was sought and its precise meaning but in view of the concession made about pre-conditions to the validity of the summons and the conclusions I have reached on the estoppel arguments, it is unnecessary to consider and rule upon those arguments.

Discretionary considerations – fragmentation of the criminal proceedings

31. For the foregoing reasons, the substantive arguments advanced by the ACC fail. Counsel for Brereton also raised discretionary issues.

32. The challenged decision of the learned Magistrate was an interlocutory decision made at a very early stage of criminal proceedings. Counsel for Brereton submitted that even if there was a *prima facie* case of error in that decision, the relief sought should be refused on the grounds that this Court should not interfere in the interlocutory processes of the criminal proceeding while that proceeding is pending.[13]

33. In light of the conclusions I have reached on the substantive argument, it is unnecessary to reach a final view on this point. I should record, however, that the argument advanced for Brereton is plainly arguable and I would not want my decision in this case to be treated in any way as a precedent supporting similar challenges to interlocutory decisions in criminal proceedings. I note, however, that the criminal proceedings were not brought by the ACC but by the DPP and that the only way the ACC itself could challenge the decision made in respect of the subpoena appears to have been by bringing the present proceeding. But another significant matter to be weighed in the balance in exercising the discretion would be the reality that the legitimate concerns of the ACC could be addressed in any event by the application of the principles of public interest immunity, as the learned Magistrate recognised and foreshadowed applying.

Conclusion

34. For the foregoing reasons, the proceeding should be dismissed.

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[1] See Particular (g).
[2] And so abandoning the relief sought in Order B2, see para 1 above.
[3] *R v Saleam* (1989) 16 NSWLR 14; 39 A Crim R 406*; DPP v Selway, Ruling no. 2* [2007] VSC 244; (2007) 16 VR 508; (2007) 212 FLR 243; (2007) 172 A Crim R 359; *Felice v County Court of Victoria & another* [2006] VSC 12 at [42]-[50]; *R v Mokbel* [2005] VSC 410 [45] p8*; DPP v Selway* [2007] VSC 244, [3]2 [10]; (2007) 16 VR 508; (2007) 212 FLR 243; (2007) 172 A Crim R 359.
[4] *Alister and others v R* [1984] HCA 85; (1984) 154 CLR 404, at 414; (1983) 50 ALR 41; (1984) 58 ALJR 97.
[5] *Alister v R*, above, at 456.
[6] At 358.
[7] At 362, citing *Public Service Board (NSW) v Osmond* [1986] HCA 7; (1986) 159 CLR 656; 63 ALR 559; (1986) 60 ALJR 209.
[8] Referring to Schedule 2, Para (e) of the *ACC Act*; and *Harper v Costigan* [1983] FCA 303; (1983) 72 FLR 140; (1983) 50 ALR 665.
[9] Later he commented that that issue was reflected in s28(3) and s29A of the Act, at 363.
[10] [1997] HCA 49; (1997) 192 CLR 69; (1997) 148 ALR 510; (1997) 17 Leg Rep C1.
[11] For discussion of those differences, see, for example, Australian Law Reform Commission, Report No 26, Interim, Evidence, chapter 3 and ALRC Report No 38, Evidence, chapter 3.
[12] *DPP v Humphrys* [1977] AC 1; [1976] 2 All ER 497; (1976) 63 Cr App R 95; [1976] 2 WLR 857; *Rogers v*

R [1994] HCA 42*;* (1994) 181 CLR 251; (1994) 123 ALR 417; (1994) 68 ALJR 688; 74 A Crim R 462; *Pearce v R* [1998] HCA 57; (1998) 194 CLR 610; (1998) 156 ALR 684; (1998) 72 ALJR 1416; (1998) 103 A Crim R 372; (1998) 15 Leg Rep C1; *R v Carroll* [2002] HCA 55; (2002) 213 CLR 635; (2002) 194 ALR 1; 77 ALJR 157; (2002) 23 Leg Rep C1.

[13] Counsel referred to a number of authorities including *Sankey v Whitlam* [1978] HCA 43*;* (1978) 142 CLR 1; 21 ALR 505; 53 ALJR 11; 37 ALT 122; *Beljajev v DPP* [1995] VicRp 34; [1995] 1 VR 533; (1994) 126 ALR 481; 8 VAR 1; *Atlas v DPP* and others [2001] VSC 209; (2001) 3 VR 211; (2001) 124 A Crim R 180; *Felice v County Court of Victoria and Australian Crime Commission* [2006] VSC 12.

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