



GREENWAY CHAMBERS

COMPELLING ORAL EVIDENCE FROM AN
ACCUSED CORPORATION:
*HELICOPTER RESOURCES PTY LTD V
COMMONWEALTH OF AUSTRALIA*
[2019] FCAFC 25

A PAPER PRESENTED AT GREENWAY CHAMBERS
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CARMEL LEE

Greenway Chambers
Level 10, 99 Elizabeth Street
Sydney NSW 2000
DX 165 Sydney
T | 02 9151 2999
E | carmel.lee@greenway.com.au

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**COMPELLING PROVISION OF ORAL EVIDENCE DURING
PROSECUTION OF A CORPORATION:
*HELICOPTER RESOURCES PTY LTD V
COMMONWEALTH OF AUSTRALIA* [2019] FCAFC 25**

A PAPER PRESENTED AT GREENWAY CHAMBERS ON
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CARMEL LEE
GREENWAY CHAMBERS

INTRODUCTION

1. The above Federal Court case *Helicopter Resources Pty Ltd v Commonwealth of Australia* [2019] FCAFC 25 and subsequent High Court appeal is significant for prosecutors in light of developing case law regarding the compellability of evidence from an accused corporation prior to or following the commencement of a prosecution. The case highlights the possibilities of the current statutory framework and is timely in light of proposed changes to corporate criminal liability legislation.
2. This paper will first provide a factual background and procedural history of the above case. It will then examine the findings of the Federal Court, including a summary of key authorities in this area. It will then note the grounds of appeal and Submissions made by the parties before the High Court before providing some concluding remarks of what prosecutors should be aware of following the above decision.

Background Facts

3. The Commonwealth of Australia (**Commonwealth**) engaged Helicopter Resources Pty Ltd (**Helicopter**) to provide helicopter support services to the Commonwealth at the Davis Station in the Australian Antarctic Territory. Helicopter employed Captain Wood. On 11 January 2018 Captain Wood landed a helicopter across a hidden crevasse in ice. Whilst reboarding the helicopter Captain Wood slipped and fell into the crevasse. He died the following day.
4. On 19 September 2017 the hearing of a coronial inquest into the death of Captain Wood commenced under the provisions of the *Coroner's Act 1997* (ACT) which applies in the Australian Antarctic Territory through the provisions of the *Australian Antarctic Treaty Act 1954* (Cth).

Procedural History

5. On 20 December 2017 Helicopter and the Commonwealth were charged in in the Magistrates Court of the Australian Capital Territory with three offences against s32 of the *Work Health and Safety Act 2011* (Cth). The first charge related to failing to ensure so far as practicable the health and safety of workers, especially Mr Bryan Patterson an employee of Helicopter assigned to Davis Station to work with the Commonwealth. The second charge against each Defendant related to events of 28 December 2015 and related to a failure to ensure so far as reasonably practicable the health and safety of workers, particularly Captain Wood and Mr Paul Sutton (another employee of Helicopter assigned to Davis Station to work with Helicopter). Specifically the charge related to Helicopter permitting and the Commonwealth requiring the workers to land helicopters and walk on the ice surface at deep field fuel cache sites, including the site of the incident, without first assessing those sites in circumstances where landing on or traversing the ice at such sites was unsafe due to the likely presence of crevasses including crevasses hidden by snow bridges. The third charge was substantially the same as the second charge but related to events on 11 January.
6. On 31 January the Commonwealth notified the office of the Chief Coroner it requested Helicopter's chief pilot, Captain David Lomas (**Captain Lomas**) to be available for cross examination at the inquest. A detailed statement of Captain Lomas was already in evidence before the coroner. Captain Lomas was to be cross examined in relation to the following non exhaustive list of topics:
 - a. the content and implementation of Helicopter Resources policies and procedures;
 - b. the training, support and resources provided to pilots especially in relation to crevasse risk identification and management;
 - c. his responsibilities and role as Chief Pilot (including with respect to the selection of Chief Pilot);
 - d. the responsibilities and role of Senior Pilots and the Pilot in Charge;
 - e. aspects of Helicopter Resources' relationship with the Commonwealth, especially in relation to responsibilities for risk identification and management; and
 - f. Helicopter Resources' approval to conduct polar operations, low-flying, and sling-load operations.
7. Helicopter applied for the coronial inquest to be adjourned. The Commonwealth submitted that the inquest should proceed. On 12 April 2018 the Chief Coroner rejected the application by Helicopter and issued a subpoena for the attendance by Captain Lomas at the inquest. Helicopter sought judicial review of the Chief Coroner's decisions before the Federal Court. On 29 June 2018 Bromwich J dismissed Helicopter's application. On 15 February 2019 the Federal Court allowed an appeal by Helicopter and stayed the subpoena.

8. Throughout the above applications Helicopter submitted that Captain Lomas' evidence in the inquest would have an effect on the Defendant and their defence in the Work Health and Safety prosecution. This was based on the evidence that could be compelled from Captain Lomas and the admissibility of that evidence in the prosecution. Significantly although this case concerned the *Evidence Act 2011* (ACT) (**Evidence Act**) the provisions discussed are identical to the *Evidence Act 1995* (NSW) and *Evidence Act 1995* (Cth).

STATUTORY PROVISIONS

9. Captain Lomas, the chief pilot of Helicopter, would be unable to refuse to answer a question on the basis that it would incriminate Helicopter. Further Helicopter would be unable to claim a privilege against self-incrimination, as the privilege against self-incrimination was abolished for bodies corporate in s187 of the *Evidence Act*:

187 No privilege against self-incrimination for bodies corporate

- (1) This section applies if, under a territory law or in a proceeding, a body corporate is required to—
- (a) answer a question or give information; or
 - (b) produce a document or anything else; or
 - (c) do any other act.
- (2) The body corporate is not entitled to fail to comply with the requirement on the ground that answering the question, giving the information, producing the document or other thing or doing the other act might tend to incriminate the body or make the body liable to a penalty.

10. Section 87(1)(b) of the *Evidence Act* relates to admissions made with authority:

87 Admissions made with authority

- (1) For the purpose of deciding whether a previous representation made by a person is also taken to be an admission by a party, the court must admit the representation if it is reasonably open to find that—
- (a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter in relation to which the representation was made; or
 - (b) when the representation was made, the person was an employee of the party, or had authority otherwise to act for the party, and the representation related to a matter within the scope of the person's employment or authority; or
 - (c) the representation was made by the person in furtherance of a common purpose (whether lawful or not) that the

person had with the party or 1 or more people including the party.

- (2) For this section, the hearsay rule does not apply to a previous representation made by a person that tends to prove—
 - (a) that the person had authority to make statements on behalf of someone else in relation to a matter; or
 - (b) that the person was an employee of someone else or had authority otherwise to act for someone else; or
 - (c) the scope of the person's employment or authority.

11. Given s87 of the *Evidence Act* above, evidence given by Captain Lomas had the potential to become an admission made by Helicopter. Such an admission would be admissible in a prosecution against Helicopter. This was detailed in Helicopter's submissions to the High Court outlined at paragraph 43 below.

THE FEDERAL COURT APPEAL

Issues in the Appeal

12. The Federal Court considered the following issues in the Appeal:

- a. whether there was or will be interference with the due administration of justice amounting to contempt of court or otherwise constituting an impermissible interference with the criminal proceedings by calling the defendant's chief pilot, Captain Lomas, to give evidence to the inquest in advance of the criminal trial; and the
- b. issue of prematurity

Submissions of Helicopter

13. Before the Federal Court on appeal Helicopter submitted that authorities supported the following arguments:

- a. the Australian criminal justice system is accusatorial which is both a general principle and one that provided specific rights and protections to the accused;
- b. the above applied whether the accused was an individual or corporation;
- c. the principle could not be reduced to a principle against self-incrimination;
- d. although the law denies a corporation the privilege against self-incrimination it does not deny the corporation the benefit of the principle that the system of criminal justice is for all accused;
- e. the interference with the accusatorial system of criminal justice is contempt of court;

- f. such contempt can take the form of an administrative enquiry commenced or continuing following the commencement of criminal proceedings which creates a real risk that justice according to the law in criminal proceeding would be interfered with by:
- i. creating a risk that the accused would be denied the opportunity to decide the course to be adopted in trial in answer to a charge according only to the strength of the prosecution's case revealed by evidence provided by the prosecution prior to trial or the strength of evidence led by the prosecution at trial;
 - ii. exercising coercive powers to enquire into substantially the same subject matter as the criminal charges; or
 - iii. exercising coercive powers with the effect that a party to criminal proceedings obtains an advantage unavailable under the rules of criminal proceedings.
14. Helicopter submitted that once evidence was compelled from Captain Lomas there were a number of ways the evidence could be used in the criminal trial. These included restricting the legitimate forensic choices of Helicopter by obtaining through compulsory processes evidence when there was no procedure in the criminal process to obtain such evidence, thus providing admissible evidence to the prosecutor that could be used against Helicopter by tendering a transcript of any adverse evidence against Helicopter under s87(1)(b) of the *Evidence Act*. Further the Commonwealth would obtain a benefit of compulsory evidence from Captain Lomas which may assist it to decide whether to maintain a current plea of not guilty, what evidence to call and what witnesses to challenge.
15. Helicopter submitted that the coercion created a fundamental change in the accusatorial system of criminal justice. There was a substantial interference with the course of criminal justice creating a real risk to the process and therefore a contempt of court. As such the appropriate remedy was to restrain the contempt through an injunction or prohibition.
16. Finally Helicopter submitted that the criminal justice system did not know of a process for the compulsory pre-trial deposition of the officers or agents of an accused. Such compulsory pre-trial deposition had the effect of altering the accusatorial system, disadvantaging the accused, by requiring the accused inform its decisions on how to plead or maintain a plea based not just on the prosecution's case but also against the answers extracted from the officer or agent and where there was a prospect that the answers would get to the prosecution it would provide them with an advantage not otherwise available to them in the criminal justice system. Further protections provided in recent years in other cases to ensure there were procedures in place to prevent the provision of compelled evidence to the prosecution were not available in the current case.

Submissions of the Commonwealth

17. The Commonwealth submitted that the appellant's submissions attempted to expand the concept of what constituted the accusatorial process. The Commonwealth submitted that the distinguishing feature of the accusatorial process was that the accused was not required to answer questions from the prosecuting authorities from the investigation stage through to the end of trial. Captain Lomas was not accused of any offence. He was a compellable witness in any case brought against Helicopter. The officers of a corporation could be compelled to give evidence against the corporation unless they were able to also claim the privilege personally.
18. The Commonwealth submitted that were Captain Lomas to give evidence there was no evidence that this would end up with the prosecutor let alone in a form that would permit the prosecution to use the material at a criminal trial. Should the matter go back to the Coroner, the Coroner could ensure steps were taken to safeguard the conduct of the criminal trial by ensuring the evidence was held without the prosecutor or the Commonwealth being present. Further, if the inquest was adjourned pending the resolution of the criminal charges it was likely to add to the delay and cost of the proceedings, and went against the wishes of Captain Wood's widow. The Commonwealth submitted that Helicopter had to establish a real risk rather than a remote possibility of interference in the criminal trial, something they had failed to do.

Consideration of the Court

19. The Court considered 6 key authorities in relation to whether the actions of the Commonwealth to compel evidence from Captain Lomas amounted to interference in the criminal trial. These would later be referred to as the "X7 line of cases" in one of the grounds of appeal to the High Court. The authorities were: *Environmental Protection Authority v Caltex Refining Co Pty Ltd* [1993] HCA 74; 178 CLR (**Caltex**), *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 456 (**Nutricia**), *Lee v New South Wales Crime Commission* [2013] HCA 1; CLR 531 (**Lee No 1**) and *Lee v The Queen* [2014] HCA 20, 253 CLR 455 (**Lee No 2**), *X7 v Australian Crime Commission* [2013] HCA 29; 248 CLR 92 (**X7**), and *Strickland v Commonwealth Director of Public Prosecutions* [2018] NSWCCA 252; (2008) 72 NSWLR 456 (**Strickland**).
20. *Caltex* concerned a corporation charged in the Land and Environment Court with several offences under the *Clean Waters Act 1970* (NSW). Prior to the charges being heard Caltex was served with notices requiring production of documents. The purpose of the notices was to obtain information and evidence for use against Caltex in the prosecutions. The majority held that s29(2)(a) of the *Clean Waters Act 1970* (NSW) could be used to obtain evidence against a corporation even though the notice had been issued after the commencement of the prosecution and for the purpose of obtaining evidence and information for use in those prosecutions. Mason CJ and Toohey J held that it did not follow that a privilege of individuals against self-incrimination protected individuals from being compelled to produce incriminating books and documents that it was an essential part of a criminal justice system or that the unavailability of corporations to claim a privilege against self incrimination would compromise the system. The prosecution onus and companion rule would remain

unimpaired. In making the above comments their Honours addressed a justification of Gleeson CJ in *Caltex Refining Co Pty Ltd v State Pollution Control Commission* (1991) 25 NSWLR 118 at [127] for corporations to have a privilege against self-incrimination: an aspect of an individual's privacy and dignity and, significantly, holding a proper balance between the powers of the State and the rights and interests of citizens including corporate citizens, as well as preservation of an accusatorial system of criminal justice.

21. Mason CJ and Toohey J stated that the books and records of a corporation constituted the best evidence of their business transactions and activities, privilege on these materials did not make sense when officers of a corporation were bound to testify against it unless they could claim privilege personally. Their Honours held that "oral evidence given by an officer of a corporation is that of the witness not the corporation" (at [507]) and a corporation could not be a witness. A corporation was obliged to give discovery and produce documents but the obligation to swear or affirm an affidavit or produce documents was performed on or behalf of a corporation by an officer or agent, the obligation could not be performed by the corporation personally. The production of documents by the corporation was in the public interest to bring relevant evidence in civil and criminal proceedings.
22. The Federal Court found that Caltex stood against the proposition that accusatorial nature of the criminal trial of a corporation meant that an officer of a corporation may not answer questions which tended to incriminate the corporation.
23. In *Nutricia*, Criminal proceedings had been instituted by the NSW Food Authority against a company alleging contraventions of the *Food Act 2003* (NSW). The Food Authority issued 6 notices to the respondent to provide information and documents. Each notice contained detailed questions by way of interrogatories. Four notices of six were upheld on the basis that the notices stated any material produced would not be used in relation to the existing charges. At [136] Spigelman CJ stated that the issuing of interrogatories to prove elements of the offence the subject of charges was such impingement on the integrity of the courts that parliament could intend that a statutory power would be deployed in that way unless expressly stated.
24. At [152] Spigelman CJ said:

The self-incrimination immunity should now be regarded as one manifestation of a broader principle and the broader principle may have other manifestations which are available to corporations. The process of historical development was identified in the dissenting judgment of Deane J, Dawson J and Gaudron J in *Environment Protection Authority v Caltex Refining Co*, in a manner which is not affected by their Honour's conclusion that the self-incrimination immunity is available to a corporation.

25. At [155] Spigelman CJ said:

The accusatory system is, in my opinion, a fundamental element of our traditional method of determining criminal guilt. A public authority which formally alleges criminal conduct by a person must prove it. As recognised in the reasons of Mason CJ and Toohey J [at 503 and 507-508] and the observations of Deane J, Dawson J and Gaudron J [at 527], the accusatory

system is not co-extensive with the privilege against self-incrimination. It is derived, as many other aspects of our criminal procedure are derived, from the recognition of the imbalance of power between the State and its citizens. That imbalance extends to corporations.

26. At [160] – [161] Spigelman CJ said:

...The formal presentation of a charge is a critical step in the criminal justice process. As I have indicated above, a prosecuting authority must be taken to assert that, at that point, it is able to establish guilt beyond reasonable doubt. From that point the accusatory nature of our criminal process should be given full effect and, in that regard, would lead to the same conclusion as the application of the doctrine of contempt.

Accordingly, Parliament should be taken not to have intended to impinge upon the accusatory nature of our system of criminal justice, after charges are laid, in the absence of express words or necessary intendment. However, the legislative scheme under consideration creates a regulatory system where such an intention can be inferred with respect to pre-charge investigation.

27. The Federal Court found that it was one thing to require a corporation to produce to a prosecuting authority, another to compel a corporation to answer questions.

28. *X7* concerned an individual who had been charged with three indictable Commonwealth offences being questioned by the Australian Crime Commission (**ACC**). The High Court found that the *Australian Crime Commission Act 2002* (Cth) did not authorise an examiner to require a person charged with a Commonwealth indictable offence to answer questions about the offence charged. The court found that the above act could not authorise the compulsory examination of a person charged with but not yet tried for an indictable Commonwealth offence about the subject matter of the pending charge. Further even if an answer could not be used in any way at the trial, any admission made in the examination would hinder or even prevent the accused from challenging at trial the accused's case.

29. *Lee No 1* concerned two persons charged with various criminal offences. Following the charge the Crime Commission applied to have them examined before the Court. Section 13A of the CAR Act provided that a person being examined was not excused from answering any question or producing any document on the ground it may incriminate them. In this case the Court found that the Act expressly contemplated its application for persons facing criminal charges, and clearly showed that the privilege against self-incrimination was repealed irrespective of whether the examinee had been charged with a criminal offence.

30. In *Strickland* the appellants were compulsory examined by the ACC in 2010 prior to being charged with those offences. The principle issue was whether the ACC acted so much in disregard of the requirements of the *Australian Crime Commission Act 2002* (Cth) that it was an unlawful violation of each appellant's common law right to silence, and that the prosecutions should be stayed. The High Court found that there was not an ACC investigation on foot, and that the questioning was for an unlawful purpose of assisting the Australian Federal Police to compel the appellants to give answers to

questions about offences of which they were suspected but had declined to answer, thereby locking the appellants into a version of events they could not credibly depart from at trial.

31. The Federal Court found that the principles of criminal justice would have bearing on whether Captain Lomas could be compelled to give evidence at the inquest:
 - a. before being charged Helicopter had no right to refuse to produce documents on the grounds it may incriminate it;
 - b. the use of compulsory procedures in a way that is unjustifiably oppressive on a party to a court proceeding can amount to conduct that is an abuse of the court's process or a contempt; and
 - c. the exercise of compulsory powers in administrative proceedings could amount to an abuse of process that a superior court could stay.
32. Although there was no property in Captain Lomas as a witness, s87(1)(b) of the *Evidence Act* had the effect that in acting in his role he may be the "embodiment of the company". If Captain Lomas was required to give evidence the requirement would interfere with the due course of justice in that trial.
33. The court stated at [178]:

It is also clear, in our opinion, that once criminal charges are laid against a corporation, a separate executive inquiry may not, by means of interrogatories, seek to compel that corporation to assist the executive inquiry by answering questions on matters which relate to those criminal charges or, it may be said, for the purposes of those criminal proceedings. One example is *Nutricia*, which we have considered above and which was accepted before us by each side as being correct. Thus, in relation to the inquest, the Coroner could not act, under s43 of the ACT *Coroners Act*, to require the appellant, which has been charged with criminal offences, to produce a relevant document or other thing to the Coroner where that document or other thing related to the criminal charges. That is because if the Coroner did so, she would be interfering with the administration of justice in the criminal proceeding, even though the appellant could be required in the criminal proceeding to produce the document or other thing: *Caltex*.

34. Finally the appeal was not premature as it concerned an issue of principle.

Findings by the Federal Court

35. The Federal Court made the following findings:
 - a. anything said by Captain Lomas in the inquest could be tendered against Helicopter as an admission by it in the criminal proceedings via s87(1)(b) of the *Evidence Act 2011* (ACT);
 - b. this would alter the way Helicopter would conduct itself in criminal proceedings;

- c. this would go against the accusatorial principle by disadvantaging the employer or advantaging the co-accused; and
- d. the application was not premature as it relates to a matter of principle.

SPECIAL LEAVE TO APPEAL

36. The Commonwealth's application for special leave to appeal was heard by the High Court on 21 June 2019. In its application for special leave the Commonwealth submitted it would pay the reasonable costs of Helicopter incurred in the High Court appeal if Helicopter would appear as contradictor, otherwise the Commonwealth would seek to appoint an amicus curie. Significantly, the Commonwealth submitted it had the following concern should special leave be refused:

...this case, if it stands, is a Full Federal Court authority that the Commonwealth regulators would be expected to honour. It is not easy to see how a further case to test the principle could be generated if regulators cannot properly exercise coercive powers against employees of corporations after they have been charged. This is a matter of significance for ASIC, the ACCC, the Australian Crime Commission – all the bodies that exercise powers of these kinds (submissions by Commonwealth on application for special leave to appeal 21 June 2019)

37. Helicopter submitted that it did not have a commercial interest in the outcome of an appeal to the High Court, and that Helicopter would be required to assist the Court in the answer of a wholly moot question. Special leave was granted to the Commonwealth on the following conditions: that there would be no interference with the orders for costs which were made below and that the Commonwealth would pay the Helicopter's solicitor client costs to be taxed on a reasonable basis of the appeal regardless of the outcome.

HIGH COURT APPEAL

38. The High Court appeal was heard on 10 October 2019. The High Court was asked to decide on the following questions:

- a. Ground One: Does s87(1)(b) of the *Evidence Act 2011* (ACT) have the effect that an admission made by an employee with respect to a matter within the scope of their employment is taken to be an admission made by the employer itself?
- b. Ground Two: If s87(1)(b) does have that effect, do the principles in the X7 line of cases mean that an employee of a corporation cannot be compelled to provide evidence that is relevant to pending charges against that corporation?
- c. Ground Three: Was it premature to conclude that the compulsory attendance was inconsistent with the accusatorial process regardless of what answers may be given and safeguards put in place?

39. On 5 February 2020 the High Court continued the hearing. Parties made submissions relating to whether special leave should be revoked. A key submission by Helicopter was that an appeal that had already begun on an almost moot point was now completely theoretical given that whilst the matter had been on appeal the criminal trial had concluded without Captain Lomas having been called to give evidence.

Submissions of the Commonwealth

40. The Commonwealth made following submissions. First, in relation to Ground One that nothing in the text of s87(1)(b) equates the person who made the previous representation with the party against who that representation may be admissible. Rather s87(1)(b) facilitated the admissibility of statements made by one person (a non-party) against another (a party). The finding that s87(1)(b) altered the common law rule that “oral evidence given by an officer of a corporation is that of the witness, not of the corporation” was incorrect as there was nothing in the text or extrinsic material that it altered above common law position was admissible against the corporation.
41. In relation to Ground Two, the accusatorial principle the Commonwealth submitted that there is no authority that has applied the principle to compulsory processes to obtain evidence from persons other than the accused. Further, the accusatorial principle applied to natural persons (who are entitled to the privilege against self-incrimination) and failed to take account of:
- a. S187 of the Evidence Act which subsequently reduced the capacity of a body corporate to refuse to produce information or documents relevant to a prosecution case;
 - b. The long legislative history of compelling officers and employees of corporations to attend compulsory examinations to give evidence that may subsequently be admitted in criminal trials.
 - c. Evidence of an employee will not “lock in” a corporate accused, or limit the instructions that the corporate accused can give, because a corporate accused may lead contradictory evidence from other employees without risk of perjury and need not conduct its case consistently with the evidence of any particular employee.
42. In relation to Ground Three the Commonwealth submitted that the primary judge’s finding on prematurity was correct, as the manner in which the Federal Court decided the matter did not relieve it of the obligation to consider whether any impermissible interference with Helicopter’s trial could be cured by appropriate orders in either the coronial inquest or criminal proceedings.

Submissions of Helicopter

43. In relation to Ground One Helicopter submitted that a compelled examination would lead to the production of a transcript containing the statements of Captain Lomas which would be available for tender in the criminal trial subject to the admissibility rules. Section 87(1)(b) had the effect that out of court statements made by an employee of a

party (whether a natural person or a corporation) on employment matters, if adverse to the interests of a party could be admitted as an admission by the party. This would be admissible against the party under s81 of the *Evidence Act* as proof of the truth of matters asserted by way of exception to the hearsay rule in s59 of the *Evidence Act*.

44. The above situation would change the common law by broadening the category of cases in which such a result could be achieved, thus limiting the ability of an accused to ensure that out of court statements made by an employee to do not bind the accused. Thus calling Captain Lomas to give evidence would confer an advantage on the prosecution that was not available within the general justice system.
45. In relation to Ground Two Helicopter submitted that the Commonwealth's submissions rested on false premise that *Caltex* and *Nutricia* stood for the proposition that a corporation who had been charged could be compelled to incriminate itself by making answers. Rather a general system of law governing the criminal trials in Australia recognised in the *Magistrates Court Act 1930 (ACT)*, *Evidence Act* and *Court Procedure Rules* provided that Helicopter was entitled to a fair accusatorial trial the key features of which included:
 - a. the fundamental principle;
 - b. the companion rule, meaning that Helicopter could not be compelled to testify for the Commonwealth or assist it in the discharge of its onus of proof;
 - c. no power to issue interrogatories (*Nutricia*);
 - d. the general protections identified in the cases *X7*, *Lee No 2* and *Strickland*;
 - e. the ordinary progression of evidence at the trial as regulated by the *Evidence Act*; and
 - f. the absence of pre-trial depositions of its likely witnesses.
46. In relation to Ground Three Helicopter submitted that the Federal Court made no error in rejecting the separate prematurity defences as the Court was right to find the case could be decided at a level of principle that overrides issue of any need to condition or control the questioning of Captain Lomas at the Inquest.

LESSONS FOR PRACTITIONERS AT THIS TIME

47. Two key lessons emerge for practitioners in light of the Federal Court judgment and the ongoing High Court proceedings outlined above. First, practitioners should be mindful of what (if any) oral evidence is compelled by a prosecutor from a corporation or employees of a corporation once a prosecution has begun. The forum in which the evidence is compelled and the rules of that forum may also have significance.
48. Secondly, practitioners should be careful of what evidence is compelled through unrelated proceedings by a prosecutor prior to the initiation of a prosecution and seek to avoid findings against the prosecutor similar to those outlined in *Strickland* (that a

separate proceeding had been instituted for an unlawful purpose to assist the Australian Federal Police to compel answers from a witness prior to that witness being called in the criminal trial).

CARMEL LEE
GREENWAY CHAMBERS

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