

THE HON T F BATHURST AC
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CONFERENCE
‘THE FUTURE DIRECTION OF ANTI-CORRUPTION COMMISSIONS: AN
AUSTRALIAN LEGAL PERSPECTIVE’
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1. I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Turrbal and Jagera people, and pay my respects to their Elders, past, present and emerging. For two centuries, our legal system failed to recognise their connection with the land under their traditional laws and customs, and the process of reforming our law to address this history of prejudice and dispossession continues to this day. It is to avoid repeating similar injustices, whether large or small, that we must uphold an obligation to review our law with an eye to reform where it is out of step with our present values and understanding.
2. For this reason, the work of the International Society for the Reform of the Criminal Law and similar bodies is important. In particular, the theme for this year’s conference is a timely one, and one whose importance will only increase in the years to come. Around the world, in developed and developing democracies alike, we are scrutinising and questioning the work of our political and public institutions to an extent which is unprecedented in our histories. But, where there are questions, there are, sometimes, answers, and unfortunately, they may not always be the answers which we would prefer. When we start to probe and investigate more thoroughly, we seem to uncover a disturbing number of examples of maladministration, corruption and bribery. What we like to imagine as the pristine image of a fair, just, and egalitarian society starts to tarnish when we look too closely.

3. This state of affairs breeds distrust in our governing bodies.¹ Or, perhaps, it is this distrust which has motivated us to acknowledge the real problems which we continue to uncover in public administration and to start peering under stones which would otherwise have remained unturned. I do not think it is as easy to distinguish one from the other as it may seem. But either way, so be it. The more important point is that we are confronted with the reality that maladministration, corruption and bribery remain more common in governments around the world than we would like, and that, for the most part, they have been difficult to detect and investigate using traditional methods. The real question must be: what should we do about it?
4. This is a question which, as a judge, I do not think I am in a position to answer. There are many policies which could be pursued to reduce maladministration, corruption and bribery, and not all of them are “legal” solutions. They might be more subtle, such as changes in management practices within governmental institutions, or greater transparency in dealings with the public. Indeed, many of the most effective solutions might be those which lie outside the law, which, after all, is rather a blunt instrument for solving hidden systemic problems. However, which of these solutions is “better” or “best” at addressing the problem is, quite simply, a matter for the legislature to decide, and not for a judge. Particularly in this country, where we do not have an entrenched bill of rights, the discretion possessed by the legislature is quite wide.
5. Now, even here, this does not mean that the legislature gets a free pass to do whatever it pleases. Nor does it mean that the legislature has exercised this wide discretion or will attempt to do so. Indeed, to date, the legal innovations of Australian legislatures in the area of corruption investigations have been surprisingly slight. By and large, they have been content to rely on the basic model of a commission of inquiry

¹ See, eg, Mark Evans, Gerry Stoker and Max Halupka, ‘Australians’ Trust in Politicians and Democracy Hits an All-time Low: New Research’, *The Conversation* (Web Page, 5 December 2018) < <https://theconversation.com/australians-trust-in-politicians-and-democracy-hits-an-all-time-low-new-research-108161>>.

established under the prerogative of the Crown,² making incremental changes where necessary to keep up with developments in the law and changes with society. Even where legislatures have intervened to create permanent, statutory investigatory bodies, their form closely follows the precedent set by prerogative commissions of inquiry.³

6. Take the example of the New South Wales Independent Commission Against Corruption, which was one of the first such bodies to be established in the late 1980s.⁴ The Commission's principal functions relate to the investigation of "corrupt conduct",⁵ whether of its own motion, or upon a complaint or referral.⁶ It may choose to hold a private compulsory examination or a public inquiry for the purpose of an investigation,⁷ and has a power to summon witnesses to give evidence or produce documents at the examination or inquiry.⁸ It is an offence for a witness to fail to comply with the summons or to refuse to answer question put to them during the examination or inquiry.⁹ The Commission also has powers to obtain information through search warrants or notices to produce outside an examination or inquiry.¹⁰
7. This summary is necessarily selective, but it suffices to show the main types of powers which the Commission relies upon when conducting an

² See, eg, *Royal Commissions Act 1902* (Cth); *Royal Commissions Act 1923* (NSW).

³ See, eg, *Independent Commission Against Corruption Act 1988* (NSW) ("*ICAC Act*"); *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).

⁴ For the development and legislative history of the Commission, see 'History and Development of the ICAC Act', *Independent Commission Against Corruption* (Web Page) <<https://www.icac.nsw.gov.au/about-the-nsw-icac/legislation/history-and-development-of-the-icac-act>>.

⁵ *ICAC Act* s 13. A complex definition of "corrupt conduct" is contained in ss 7-9.

⁶ *Ibid* s 20(1).

⁷ *Ibid* ss 30, 31.

⁸ *Ibid* s 35.

⁹ *Ibid* s 86.

¹⁰ *Ibid* ss 21, 22, 23, 40.

investigation. These powers are no doubt “coercive”, but it must be remembered that the outcome of an investigation will normally be a finding about whether or not “corrupt conduct” has occurred,¹¹ or a referral of the evidence assembled during the investigation to the Director of Public Prosecutions.¹² The Commission is not entitled to make a finding of guilt or recommend that charges be laid.¹³ Thus, the practical consequences of a report may be significant for those whose conduct is called into question, and may lead to further investigations by other bodies with a view to criminal prosecution, but, as has been emphasised on a number of occasions, carries no legal consequences.¹⁴

8. Nevertheless, it is common knowledge that the width of the coercive powers to examine witnesses invested in the Commission and other similar bodies has been the subject of criticism. There have been the usual unfavourable comparisons with the seventeenth-century Court of Star Chamber,¹⁵ whose long shadow has exerted an outsized influence in legal memory since its abolition over three and a half centuries ago. While there may be some grounds for the comparison,¹⁶ in my opinion,

¹¹ Ibid s 13(2).

¹² Ibid s 14(1).

¹³ Ibid s 74B.

¹⁴ See, eg, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 580–1 (Mason CJ, Dawson, Toohey and Gaudron JJ), quoted in *Independent Commission Against Corruption v Chaffey* (1993) 30 NSWLR 21, 51 (Kirby P). See also *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, 636 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

¹⁵ See Bridie Jabour, ‘Eddie Obeid: Corruption Inquiry is a “Sham” and “Star Chamber”’, *The Guardian* (online, 1 August 2013) <<https://www.theguardian.com/world/2013/aug/01/eddie-obeid-icac-star-chamber>>; Michaela Whitbourn, ‘Sydney Silk Geoffrey Watson Defends ICAC against “Star Chamber” Claims’, *The Sydney Morning Herald* (online, 29 October 2014) <<https://www.smh.com.au/national/nsw/sydney-silk-geoffrey-watson-defends-icac-against-star-chamber-claims-20141029-11ddto.html>>. Similar claims have been made in relation to anti-corruption commissions in other states: Isabel Dayman, ‘Leading South Australian Barrister Michael Abbott Attacks “Trial by Ambush” ICAC’, *ABC News* (online, 15 August 2018) <<https://www.abc.net.au/news/2018-08-15/leading-sa-barrister-launches-attack-on-icac/10123750>>.

¹⁶ For example, proceedings in the Court of Star Chamber were commenced summarily, and tried without a jury. Indeed, other aspects of the comparison may also be apt. The Court of Star

its rhetorical impact is somewhat diminished when it is borne in mind that the punishments imposed in the Star Chamber included the slitting of noses, the severing of ears, and being whipped while naked in front of the victim, alongside the more conventional fines and terms of imprisonment.¹⁷ I think it would be wise to bear this fact in mind before being too quick to invoke the memory of the Star Chamber.

9. Now, the coercive powers of the Commission to examine witnesses do, in some respects, infringe the rights and freedoms of the individual.¹⁸ Since an investigation into “corrupt conduct” will often involve inquiring into facts which might constitute a criminal offence, a witness summoned by the Commission may wish to rely on the common law privilege against self-incrimination. In Australia, whether such an objection can be made depends solely upon the construction of the relevant legislation, since the High Court has held, on several occasions, that abrogating this privilege does not contravene our *Constitution*.¹⁹
10. The interpretive principle known as the “principle of legality” requires that any legislation which aims to abrogate the privilege against self-incrimination, which has the status of a “fundamental” common law right,²⁰ must express an “unmistakable and unambiguous” intention in

Chamber had a positive reputation for doing justice where ordinary processes were unlikely to be successful: Sir John Baker, *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 127–8.

¹⁷ Ibid 128. For more recent research on the punishments imposed by the Star Chamber, see Krista J Kesselring, ‘The Very Image of Justice? Star Chamber Records and the Art of Punishment’, *Legal History Miscellany* (Blog Post, 11 January 2019) <<https://legalhistorymiscellany.com/2019/01/11/star-chamber-records-and-the-art-of-punishment/>>.

¹⁸ I have earlier considered the legal problems in more detail for an Australian audience in a previous article: see Chief Justice T F Bathurst and Sarah Schwartz, ‘Crime Commissions and Compulsory Examinations: Whither the Right to Silence?’ (2017) 91 *Australian Law Journal* 642.

¹⁹ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *Kempsey v The King* [1944] ALR 249; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328; *Sorby v Commonwealth* (1983) 152 CLR 281.

²⁰ *Sorby v Commonwealth* (1983) 152 CLR 281, 309 (Mason, Wilson and Dawson JJ); *Reid v Howard* (1995) 184 CLR 1, 5 (Deane J), 14 (Toohey, Gaudron, McHugh and Gummow JJ).

order to do so.²¹ But, while there were early cases which held that some coercive powers to examine witnesses failed to evince such an intention,²² it would be rare for such an argument to succeed today. Most legislation now expressly provides that the privilege will not be available at a compulsory examination,²³ leaving no room for the operation of the principle. In this regard, it is something of a victim of its own success: when courts made it clear that they would not allow the privilege to be overridden except with clear language, the legislatures were more than prepared to “squarely confront” what they were intending to do and “accept the political cost”.²⁴

11. On the one hand, the near-universal abrogation of the privilege against self-incrimination in the context of modern anti-corruption commissions could suggest that legislatures may have been motivated to do so for good reason. On the other, it could suggest that, confronted with what they see as an inconvenient legal technicality, legislatures have taken the easy way out and have uniformly attempted to brush it aside with little thought. Now, any judge knows that it is always a fraught task to attempt to divine what motivated the legislature to pass a particular law, and I do not propose to try to do so in this address. Instead, it suffices to say that, even acknowledging the fact that the privilege against self-incrimination should not be dismissed lightly, I think that a reasonable case can be made supporting its abrogation in the context of anti-corruption commissions.

²¹ *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); cf *Sorby v Commonwealth* (1983) 152 CLR 281, 309 (Mason, Wilson and Dawson JJ). For more on the principle of legality, see *Attorney-General (NSW) v XX* [2018] NSWCCA 198, [137]–[140] (Bathurst CJ, Hoeben CJ at CL, McCallum J).

²² See, eg, *Sorby v Commonwealth* (1983) 152 CLR 281, 295 (Gibbs CJ), 310–11 (Mason, Wilson and Dawson JJ).

²³ *ICAC Act* s 37(2).

²⁴ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman).

12. In modern times, one of the principal justifications for the privilege lies in its maintenance of an accusatorial system of justice.²⁵ Under this system, we do not seek “the truth” about whether an offence has been committed at any cost. Instead, we place the burden on the prosecution to establish the facts on which it relies to a sufficiently high standard of proof,²⁶ in order to protect a suspect from being compelled to admit to an offence and render themselves liable to “the peril and possibility of being convicted as a criminal”.²⁷ In this respect, it is a fundamental “bulwark of liberty” under the common law.²⁸ However, it is at least arguable that, as a matter of logic, relying on this justification means that the need for the privilege diminishes where there is no imminent threat of any conviction or punishment.
13. Long-standing statutory exceptions aside, the common law does not accept this proposition. The privilege applies whenever there is “reasonable ground to apprehend” that the giving of testimony or the production of documents would place a witness “in danger of conviction and punishment”.²⁹ In other words, it is only necessary to establish that there would be a “tendency” or a “real risk” that these consequences could follow.³⁰ But the legislature has a freer hand. It might form the view that, where there is no imminent threat of any conviction or punishment, there are grounds for abrogating the privilege in the pursuit

²⁵ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 501–3 (Mason CJ and Toohey J), 544 (McHugh J); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 136–7 [102]–[104] (Hayne and Bell JJ).

²⁶ *X7 v Australian Crime Commission* (2013) 248 CLR 92, 135–6 [100]–[101] (Hayne and Bell JJ); *Lee v The Queen* (2014) 253 CLR 455, 466–7 [32]–[33] (French CJ, Crennan, Kiefel, Bell and Keane JJ).

²⁷ *Lamb v Munster* (1882) 10 QBD 110, 111 (Field J), quoted in *Reid v Howard* (1995) 184 CLR 1, 14 (Toohey, Gaudron, McHugh and Gummow JJ).

²⁸ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 340 (Mason ACJ, Wilson and Dawson JJ).

²⁹ *R v Boyes* (1861) 1 B & S 311, 329–30; 121 ER 730, 738 (Cockburn CJ), cited in *Sorby v Commonwealth* (1983) 152 CLR 281, 289 (Gibbs CJ).

³⁰ See further J D Heydon, *Cross on Evidence* (LexisNexis, 11th ed, 2017) 925 [25100].

of other ends, such as, for example, in the context of corruption investigations, where knowing “the truth” about what has occurred and why it has occurred is an essential part of designing any solution to the problem and maintaining trust in the institutions of government.

14. An undesirable consequence of this legislative choice is the real possibility that incriminating answers could be used in later criminal proceedings to convict the witness, even though no proceedings were contemplated at the time. To avoid this result, where legislation abrogates the privilege, there is usually an automatic prohibition on using any evidence obtained from a compulsory examination against the witness in any civil or criminal proceedings³¹ and a power to prohibit the disclosure of that evidence to anyone other than a defined group of persons.³² Sometimes, the legislature goes further, and prohibits the use of any evidence which is uncovered as a result of evidence obtained from a compulsory examination, but such provisions are less common.³³
15. The overall effect of these legislative interventions is to replace the privilege against self-incrimination with less stringent, but still formidable, restrictions on the uses to which evidence obtained in compulsory examinations can be put. I think that it is certainly plausible for the legislature to attempt to justify these changes as a proportionate response to the problem of identifying and eliminating corruption. Different people may take different views about the merits and actual efficacy of these changes in assisting corruption investigations. But whatever their merits and actual efficacy may be, they have been accepted as a feature of the legal landscape in Australia

³¹ *ICAC Act* s 37(3).

³² *Ibid* s 112.

³³ See, eg, *Quarantine Act 1908* (Cth) s 79A, cited in Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) 332 [11.108].

for several decades. Absent any reinterpretation of the *Constitution* or will for legislative change,³⁴ it looks as though they are here to stay.

16. However, this does not mean that anti-corruption commissions have had free reign to exercise coercive powers to examine witnesses. There have long been suggestions that, even if the privilege against self-incrimination has been expressly abrogated, there may yet be other limitations which might affect the exercise of such powers. One which received particular attention is the possibility that it may be a contempt of court for an executive commission of inquiry to exercise coercive powers to examine a witness where they have already been charged an offence related to the subject matter of the examination.³⁵ Ultimately, the High Court held that it was in the early 1980s.³⁶ The Court stated that “the fact that the [witness] has been examined, in detail, as to the circumstances of the alleged offence, is very likely to prejudice him in his defence”,³⁷ and there was therefore a “real risk that the administration of justice will be interfered with”.³⁸ The Court therefore restrained the commission from continuing with the examination.
17. The nature of the alleged prejudice identified by the Court as the basis for the contempt was not expanded upon in any detail until more recently, when the Court had the opportunity to reconsider it in two cases decided in 2013.³⁹ In those cases, the prejudice was explained to

³⁴ See Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) 335–6 [11.125]–[11.126], which recommended a further inquiry to examine issues surrounding the abrogation of the privilege. In the years following the report, neither the executive or legislature has taken any further action to implement this recommendation.

³⁵ *Clough v Leahy* (1902) 2 CLR 139, 161 (Griffith CJ); *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 85–6 (Latham CJ).

³⁶ *Hammond v Commonwealth* (1982) 152 CLR 188.

³⁷ *Ibid* 198 (Gibbs CJ).

³⁸ *Ibid*.

³⁹ *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.

inhere in the fact that “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”.⁴⁰

18. The “fundamental alteration” was stated to be that an accused person could no longer “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”.⁴¹ Instead, the accused would have to conduct their defence in light of the answers they had already given in evidence at the earlier inquiry. To the extent that this restricted the capacity of the accused to conduct their defence, it amounted to an implicit lessening of the burden placed on the prosecution to establish its case to the required standard. This has later been said to involve a breach of the “companion rule”, that is, the rule that the prosecution must establish its case without the assistance of the accused.⁴²
19. Importantly, it can be seen that this form of prejudice will arise even if the investigating authorities or the prosecution did not have any access to the evidence which the witness had given at the compulsory examination. Its existence depends only upon the fact that the compulsory examination occurred after the witness was charged. Thus, it is not prejudice which arises as a result of the circumstances of a particular case, but a prejudice which is inherent whenever there is a compulsory examination of a witness who has been charged with an offence about matters relating to that offence. Since this prejudice is

⁴⁰ *X7 v Australian Crime Commission* (2013) 248 CLR 92, 142–3 [124] (Hayne and Bell JJ).

⁴¹ *Ibid.*

⁴² *X7 v Australian Crime Commission* (2013) 248 CLR 92, 153 [159] (Kiefel J); *Lee v The Queen* (2014) 253 CLR 455, 467 [33] (French CJ, Crennan, Kiefel, Bell and Keane JJ).

seen as striking at the assumptions which underpin the accusatorial system of justice, it is often referred to as “systemic” prejudice.⁴³

20. Now, I think that, at the very least, the existence of such systemic prejudice must be taken to be established. It has been acknowledged by each of the present members of the High Court, although perhaps with varying degrees of enthusiasm.⁴⁴ The larger question is how the presence of systemic prejudice has affected the resolution of the issues concerning anti-corruption commissions which come before the courts. Again, it may be accepted that, as I have mentioned, it constitutes an “interference with the administration of justice” sufficient to ground a charge of contempt against an executive commission of inquiry. However, the position in respect of an anti-corruption commission will, in general, be different. Unlike executive commissions of inquiry, they tend to be established pursuant to statute, which can authorise what might otherwise be a contempt.⁴⁵ What impact, then, does systemic prejudice have in this context?
21. We return to the principle of legality. The existence of systemic prejudice has been viewed by some judges of the High Court as a fundamental derogation from the accusatorial system of justice by breaching the “companion rule” which I mentioned earlier. If this is the case, then the legislature could only be taken to have authorised a commission to conduct a compulsory examination of a witness in circumstances where there is systemic prejudice if there are clear words or necessary intendment.⁴⁶ However, not all judges have agreed that the presence of systemic prejudice attracts this presumption. Some

⁴³ See *Onley v Commissioner of the Australian Federal Police* [2019] NSWCA 101, [349]–[350] (Basten JA). In the same case, I described it as “inchoate prejudice”: [128] (Bathurst CJ).

⁴⁴ See *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 315–16 [323]–[324] (Gageler and Keane JJ).

⁴⁵ Cf *Pioneer Concrete (Vic) Pty Ltd v Trade Practices Commission* (1982) 152 CLR 460, 473 (Mason J).

⁴⁶ See, eg, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 264–5 [171]–[173], 266 [176] (Kiefel J).

have doubted that the effect on the accusatorial system of justice could be anything more than “anodyne” in certain circumstances.⁴⁷ Nevertheless, even if they have not been prepared to give systemic prejudice the same weight as others, they have at least recognised the “companion rule” as a relevant factor to be taken into account in construing legislation conferring coercive powers to examine witnesses.⁴⁸

22. Even so, at a practical level, the recognition of systemic prejudice and its impact on the accusatorial system of justice as a factor to be taken into account in construing legislation is unlikely to have much of an impact on the work of anti-corruption commissions. Unlike other criminal intelligence organisations with a broader remit, many investigations conducted by anti-corruption commissions by the very nature occur prior to the relevant parties being charged with an offence. Generally speaking, their investigative powers are most useful where the evidence of the alleged maladministration, corruption or bribery which is available is slight and insufficient for the purposes of deciding whether or not charges should be laid. In these circumstances, the High Court has made it clear that the “companion rule” is not engaged because the witness has not yet been charged with an offence.⁴⁹
23. In reaching this conclusion, the Court stated that to extend the rule to apply where charges have not been laid would be to “extend its operation beyond the rationale identified in the authorities”.⁵⁰ Logically, this seems to imply that the Court held the view that the systemic prejudice resulting from a compulsory examination would not arise prior to the charges being laid. It may be that the Court had a number of

⁴⁷ Ibid 315–16 [323]–[324] (Gageler and Keane JJ).

⁴⁸ See *R v Independent Broad-based Anti-corruption Commissioner* (2016) 256 CLR 459, 472 [43]–[46] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ), 477–8 [68]–[70], 479–80 [73]–[75] (Gageler J).

⁴⁹ Ibid 473 [48] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

⁵⁰ Ibid.

practical reasons from rejecting the extension of the rule,⁵¹ but ultimately, the decision turned on the fact that, even if it is accepted that systemic prejudice is not present during an examination prior to being charged and will only arise at a later time if and when charges are ultimately laid,⁵² the legislature must have nevertheless intended to permit the examination to occur given the scope and objects of the type of investigations to be conducted by an anti-corruption commission. At the very least, this appears to be the basis upon which Justice Gageler reached the same result.⁵³

24. A significant consequence of this reasoning is to narrow the possible bases upon which exercises of coercive powers by anti-corruption commissions can be challenged. While the “companion rule” and the existence of systemic prejudice may still be relevant when a witness is being examined after charges have been laid, these situations will probably be the exception, rather than the norm. To my mind, this means that, whatever the merits of a policy which allows an anti-corruption commission to exercise coercive powers to examine witnesses, in Australia, the legal position has been settled. At a practical level, the exercise of these powers by anti-corruption commissions will not be limited by the “companion rule” or the presence of systemic prejudice. Where there may be some doubt about the scope of the powers conferred on a commission, the legislature can act to overcome these doubts by expressing its intentions in plain language.
25. Further, I think that there is something to be said for the view that a prohibition on using any evidence obtained from a compulsory examination in later proceedings, and a power to restrict the dissemination of that evidence from prosecutors and other investigators,

⁵¹ Ibid 473–4 [48]–[51] (French CJ, Kiefel, Bell, Keane, Nettle and Gordon JJ).

⁵² Ibid 477–8 [68]–[69] (Gageler J).

⁵³ Ibid 479–80 [73]–[75] (Gageler J).

go a long way, in a practical sense, to reducing the prejudice which a witness might suffer by reason of any later prosecution.

26. Now, my comments so far this morning might be taken to suggest that I think that the Australian legal system has given the green light to legislatures and anti-corruption commissions to act however they please with little in the way of consequences. That could not be further from the truth. While there are certain propositions which I take to be well-settled, I think that important legal challenges for anti-corruption commissions still lie ahead. Unlike what I have been discussing so far, these challenges do not relate to the powers conferred on anti-corruption commissions, but rather, the ability of the courts to respond when commissions unlawfully or illegally exceed their powers. I think there are two main issues: first, the power of a court to stay later proceedings which are affected by an earlier unlawful exercise of power; and second, the scope to restrain an unlawful exercise of power before it occurs by seeking judicial review.
27. It is well-known that a court has a power to stay proceedings to prevent an abuse of process and to ensure a fair trial,⁵⁴ although it follows from what I have said so far that there will be no grounds for staying a prosecution merely because, without more, there has been a prior compulsory examination. This would be to grant a stay where it had not been demonstrated that there was any prejudice in the circumstances of the particular case.⁵⁵ Instead, it is necessary to show that an exercise of power has been attended with a “defect in process” which is “so profound as to offend the integrity and functions of the court”.⁵⁶ In a recent case, the High Court was confronted with circumstances where a criminal intelligence commission had, in effect, permitted federal police

⁵⁴ See, eg, *Jago v District Court (NSW)* (1989) 168 CLR 23; *Dupas v The Queen* (2010) 241 CLR 237; *Moti v The Queen* (2011) 245 CLR 456.

⁵⁵ *X7 v The Queen* [2014] NSWCCA 273, [109]–[111] (Bathurst CJ).

⁵⁶ *Strickland v Director of Public Prosecutions (Cth)* [2018] HCA 53, [106] (Kiefel CJ, Bell and Nettle JJ); cf [172]–[173] (Keane J), [292] (Edelman J).

to use the statutory powers of one of its authorised examiners to summon witnesses to compulsory examinations.⁵⁷ No consideration was given by the examiner whatsoever to the responsibilities they had under the legislation to restrict the disclosure of the evidence obtained to the police, who observed the examinations in secret.⁵⁸ The High Court found that the disregard for the law by the commission and the police and the dissemination of the evidence was such that later criminal prosecutions of the witnesses ought to be permanently stayed.

28. Even where the breaches of the law are not as flagrant as they were in that case, there may still be a basis for a court to intervene, although this intervention will probably fall short of permanently staying the proceedings. In another case which reached the High Court, the New South Wales Crime Commission had provided the prosecution with the transcript of a compulsory examination of a witness in breach of an order which restricted dissemination of the transcript.⁵⁹ The prosecution did not know of and did not inquire about the provenance of the transcript.⁶⁰ The witness was later charged with an offence and convicted.⁶¹ However, a unanimous High Court held that the disclosure of the transcript to the prosecution caused the trial to be “altered in a fundamental respect”.⁶² The Court quashed the conviction, but ordered a new trial, and stressed the importance of the trial being conducted by a prosecution which was not privy to the prejudicial transcript.⁶³
29. These powers of courts place an important qualification on how the evidence obtained at an examination can be used, even if it is not

⁵⁷ Ibid [53] (Kiefel CJ, Bell and Nettle JJ).

⁵⁸ Ibid [57] – [58] (Kiefel CJ, Bell and Nettle JJ).

⁵⁹ *Lee v The Queen* (2014) 253 CLR 455.

⁶⁰ Ibid 462 [16] (French CJ, Crennan, Kiefel, Bell and Keane JJ).

⁶¹ Ibid 461 [11] (French CJ, Crennan, Kiefel, Bell and Keane JJ).

⁶² Ibid 470 [43] (French CJ, Crennan, Kiefel, Bell and Keane JJ).

⁶³ Ibid 470–1 [44] (French CJ, Crennan, Kiefel, Bell and Keane JJ).

sought to be admitted as evidence, even if it has not been relied upon to uncover further evidence, and even if it has been obtained prior to charges being laid. To my knowledge, no legislative inroads have yet been made into these powers, and I should note that I certainly do not intend for that comment to be taken as an encouragement to do so. The power of a court to stay proceedings to prevent an abuse of process or to avoid bringing of the administration of justice into disrepute is essential components of our legal system. Indeed, even in Australia, I would have thought that any attempt to restrict or narrow this power might soon run into constitutional difficulties,⁶⁴ although we have not had to confront these problems yet.

30. The existence of these powers is as an important safeguard on the rights of witnesses. If an anti-corruption commission is going to exercise its coercive powers to examine a witness, it must scrupulously act within the lawful limits of those powers as conferred by statute. If it does not, it could lead to courts setting aside later convictions and even permanently staying criminal proceedings, neither of which are desirable outcomes. There is also the potential for courts to intervene at a much earlier stage through the means of judicial review. An unlawful or illegal excess of power by an anti-corruption commission will usually permit a court to give some form of relief at the time that it occurs. Establishing that this is the case may be more or less difficult depending upon the terms of the statute,⁶⁵ but it is clear that the “companion rule” is likely to be a relevant consideration in the exercise of many of these powers.⁶⁶

⁶⁴ See *Strickland v Director of Public Prosecutions (Cth)* [2018] HCA 53, [257] (Edelman J), citing *Dupas v The Queen* (2010) 241 CLR 237, 243–4 [15] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Hogan v Hinch* (2011) 243 CLR 506, 552 [86] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

⁶⁵ See, eg, *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240.

⁶⁶ See, eg, *Strickland v Director of Public Prosecutions (Cth)* [2018] HCA 53, [94] (Kiefel CJ, Bell and Nettle JJ), cf *Macdonald v The Queen* (2016) 93 NSWLR 736, 759 [101], 760 [107] (Bathurst CJ).

31. A contrast may be drawn with the explicit statutory role that courts have in reviewing compulsory examination orders in their proceeds of crime jurisdiction.⁶⁷ The power to grant a stay of such an order is a discretion conferred and controlled by statute,⁶⁸ and the existence of possible future prejudice by reason of a risk of disclosure of the contents of the examination to the prosecution or investigators is a relevant, although not determinative, consideration.⁶⁹ An exercise of this discretion will involve looking at the procedures put in place to minimise the risk of disclosure,⁷⁰ and whether they are, on balance, sufficient, so as to avoid any impact on subsequent court proceedings. This procedure provides an interesting example of the types of matters which may be relevant to the exercise of the rather more generally expressed powers of anti-corruption commissions to make orders imposing restrictions on the publication and disclosure of evidence,⁷¹ and thus, how courts might interpret these powers in proceedings brought for judicial review.
32. In my opinion, the issues presented by the power of a court to stay subsequent proceedings and the possibility of judicial review are the two most significant legal challenges facing anti-corruptions commissions today. The key decision on the debates about the abrogation of the privilege against self-incrimination and the effect of systemic prejudice have largely already been made by the legislature, and, as I have said, with some plausible justification for doing so. Thus, it will not be these matters of broad principle which will be in issue going forward. Instead, it will be how courts deal with the effects of unlawful and illegal exercises of power of anti-corruption commissions in particular cases, and how those commissions and legislatures respond in order to

⁶⁷ *Proceeds of Crime Act 2002* (Cth) s 180.

⁶⁸ *Ibid* s 319

⁶⁹ See, eg, *Onley v Commissioner of the Australian Federal Police* [2019] NSWCA 101.

⁷⁰ *Ibid* [45]–[64] (Bathurst CJ).

⁷¹ *ICAC Act* ss 31(9), 31A, 112.

minimise the risks of convictions being quashed and later criminal proceedings being stayed.

33. But this does not mean that we should treat these cases any more lightly than we do when considering issues of broad principle. On the contrary, it will require us to scrutinise the particular circumstances of each case with even more care to ensure that the rights of a witness who has been summoned to attend a compulsory examination by an anti-corruption commission are not infringed. Thank you.