



'The end of a criminal prosecution does not justify the adoption of any means for securing a conviction'

Unlawful conduct by the ACC results in permanent stay of criminal prosecutions

Belinda Baker reports on *Tony Strickland (a pseudonym) (and others) v Commonwealth Director of Public Prosecutions* [2018] HCA 53 (8 November 2018)



In *Tony Strickland (a pseudonym) (and others) v Commonwealth Director of Public Prosecutions* [2018] HCA 53, the High Court found that the 'extraordinary step' of ordering a permanent stay of a criminal prosecution should be taken in circumstances where the Australian Crime Commission ('ACC') had contravened the appellant's statutory and common law privilege against self-incrimination.

Background

In 2008, the ACC received information that a company which employed the appellants was involved in serious criminal activity. The ACC referred that information to the Australian Federal Police

(AFP'). The ACC also offered the AFP the use of its coercive powers to examine witnesses.

After the appellants each declined to participate in a cautioned record of interview, the ACC used its powers to require the appellants to be compulsorily examined. Unknown to the appellants, several AFP officers watched each examination from a nearby room. Following each examination, the examiner made orders under the *Australian Crime Commission Act 2002* (Cth) ('ACC Act') permitting the dissemination of the examination material and audio recordings of the examinations to the AFP and the Commonwealth Director of Public Prosecutions ('CDPP'). In an internal minute, the AFP subsequently recorded that the hearings did not add substantially to intelligence holdings, 'but did lock certain witnesses into a version of events which may prove valuable in court.'

The appellants were subsequently charged with offences against Commonwealth and Victorian law. These were serious offences. As counsel for Strickland accepted, the appellants were 'sharks', rather than 'minnows' in the alleged offending.

The primary judge ordered that each of the prosecutions be permanently stayed as a result of the conduct of the ACC. These stays were set aside by the Victorian Court of Appeal on appeal. The Court of Appeal agreed that the ACC had acted unlawfully, but concluded that the primary judge had erred in holding that the appellants had suffered an unfair disadvantage that could not be sufficiently ameliorated by trial directions.

The High Court's decision

The High Court unanimously held that the ACC had acted unlawfully and in 'blatant disregard' of provisions of the ACC Act (at [102]). The examinations were not conducted as part of an existing ACC special investigation as required by the ACC Act. Rather, the ACC had acted as a facility for the AFP to cross-examine the appellants under oath for the AFP's own purposes. Further, the ACC had contravened the ACC Act by permitting AFP officers to be present at each examination without inquiry as to who the various officers were and their roles in the prosecution of the appellant, failing to inform each appellant of the clandestine presence of those officers, and defying a statutory obligation which required non-publication of the answers given in examination where such disclosure might prejudice the fair trial of any person who may be charged with an offence.

A majority of the High Court (Kiefel CJ, Bell and Nettle JJ; Edelman and Keane JJ agreeing; Gageler and Gordon JJ dissenting)

held that the appellants' prosecutions should be permanently stayed as a consequence of the ACC's unlawful conduct.

In so finding, the plurality acknowledged that a permanent stay of a criminal prosecution is an 'extraordinary step which will rarely be justified', observing that there is a 'powerful social imperative' for those charged with criminal offences to be brought to trial (at [106]). However, the plurality continued, it is also necessary to 'ensure that the end of a criminal prosecution does not justify the adoption of any and every means for securing a conviction' (at [106], emphasis in original). For this reason, where a defect in process is so profound as to 'offend the integrity and functions of the court as such', a permanent stay will be ordered 'to prevent the administration of justice falling into disrepute' (at [107]).

The plurality emphasised that, although not constitutionally entrenched, the common law right to silence is fundamental to the Australian criminal justice system (at [101]). A defendant who had been compelled to reveal his or her defence 'can no longer decide the course which he or she should adopt at any subsequent trial according only to the strength of the prosecution case as revealed by the material provided by the prosecution before trial or to the strength of the evidence led by the prosecution at trial' (at [78]). There was real forensic disadvantage occasioned by the conduct of the ACC, which could only be eradicated by commencing the investigation again, with different investigators and no recourse to the fact or result of the previous examinations (at [85]). As the trial judge had found, it was practically impossible to 'unscramble the egg' so as to remove this improperly obtained forensic advantage (at [61]).

Of itself, this was not a sufficient basis to order a stay. However, a stay was justified in the present case by the combination of forensic disadvantage sustained and the unlawful and the ACC's reckless disregard of its statutory responsibilities (at [86]). The plurality concluded that declining to order a permanent stay would encourage infractions of the common law right to silence, and would bring the administration of justice into disrepute (at [100] and [107]).

Similarly, Keane J found that the Court of Appeal had erred in focussing on whether there was a prospect of actual forensic disadvantage to the appellants and in concluding that the trial judge could give directions to ensure the fairness of the trial (at [195]). His Honour noted that the giving of such directions would distort the evidence given at trial. Such distortion of evidence for no other reason than to accommodate the lawlessness of the ACC would bring the administration of justice into disrepute (at [195]).

In a concurring judgment, Edelman J stated that it would be an 'extremely rare case' in which orders could not be made, or undertakings given, to address a concern that a trial would bring the administration of justice into disrepute (at [265]). In particular, his Honour observed that a 'tainted' prosecution team could usually be replaced after giving undertakings in respect of the dissemination of unlawfully coerced information. However, such a course was not appropriate in the present case because the unlawful examinations substantially contributed to the preparation for, and the trial of, the appellants (at [292]). In this respect, his Honour observed that the CDPP did not suggest that it was a realistic alternative to commence the investigations 'from scratch' without the benefit of the appellants' unlawful examinations (at [292]).

In dissent, Gageler J emphasised that the power to stay proceedings as an abuse of process is a power to protect the integrity of the court's processes: 'it is not a power to discipline or to punish those who might bring proceedings or those who might stand behind them' (at [154]).

Both Gageler and Gordon JJ would have upheld the Court of Appeal's finding that any disadvantage to the appellants could have been managed by changing the prosecution team and prohibiting the investigators from mentioning the coerced questioning. Their Honours were each of the view that the public interest in having serious charges determined by a court should prevail.

Standing

An issue also arose in the High Court as to the standing of the ACC to appear on the appeals. In holding that the ACC would not be granted leave to appear, the plurality observed that where an accused is put on trial for a criminal offence, the issues are joined between the Crown and the accused: 'it is for the Crown and no one else to represent the community' (at [109]). An intervenor may be heard on a criminal appeal where the Crown embraces or supports the intervenor's contentions (at [109]). However, where the intervenor raises issues that are not 'at one' with the Crown, 'the intervenor should ordinarily not be heard' (at [109]); see also at [274], per Edelman J.