

## Affidavits of assistance and public interest immunity

On 13 November 2019, the High Court allowed an appeal on sentence from a decision of the NSW Court of Criminal Appeal (CCA).

The appeal was brought by an offender, "HT" (a pseudonym), who had provided assistance to law enforcement authorities. The appeal was allowed on the grounds that HT was denied procedural fairness. In summary, this was because HT and her legal representatives were denied access to an Affidavit of Assistance as a result of the CCA upholding a public interest immunity claim made by the Commissioner of Police.

**HT v The Queen & Anor [2019] HCA 40** considers the obligations of law enforcement authorities in providing information to the Court about assistance provided by offenders, where details of that assistance are subject to a claim of public interest immunity.

### KEY POINTS

- ▶ The High Court unanimously held that the appellant was denied procedural fairness in the CCA and did not consider the denial of procedural fairness to be justified.
- ▶ The Court confirmed that public interest immunity is an exclusionary doctrine and a successful claim means that the information, or document, is not produced and cannot be admitted into evidence.
- ▶ Edelman and Nettle JJ noted the competing need to comply with the requirements of s. 23 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*C(SP) Act*), and to ensure that sensitive information is not compromised, calls for a detailed legislative solution.

### BACKGROUND

HT pleaded guilty in the District Court of New South Wales to eleven counts of fraud related offences contrary to the *Crimes Act 1900* (NSW). The sentencing judge applied a discount to HT's sentence after considering an Affidavit of Assistance tendered pursuant to s. 23 of the *C(SP) Act*. The Crown had viewed the Affidavit, but not HT or their legal representatives. The Commissioner of Police had informed HT's legal representatives that, should they wish to view the Affidavit, it would need to be modified. HT's legal representatives agreed not to view the Affidavit.

The Crown appealed the sentence to the CCA on the ground that it was manifestly inadequate. In the CCA, the appellant, as respondent to the Crown appeal, formally sought access to the Affidavit. The CCA upheld a claim of public interest immunity by the Commissioner of Police over the Affidavit, and denied HT and their legal representatives access to it. The appeal was allowed, which resulted in a longer sentence of imprisonment, and a greater percentage sentencing discount.

### THE HIGH COURT'S DECISION

The Court considered that by being denied access to the Affidavit, the appellant was denied the opportunity of considering and testing the accuracy of the evidence in it, or of making submissions as to the mandatory considerations in s. 23(2) of the *C(SP) Act*. The Court noted that a successful public interest immunity claim means that the material need not be disclosed to the other party. But the non-disclosure results from the objection to the production being upheld. The application of the doctrine prevents the document from being admitted into evidence at all.

The Court noted that s. 23 mandates the Commissioner to put before the sentencing judge such evidence as is necessary to enable the judge to fully comprehend the assistance provided, and considered that orders could have been tailored to protect the sensitive information.

The Court observed that the CCA should have declined to exercise residual discretion provided by s. 5D(1) of the *Criminal Appeal Act 1912* (NSW), and should have dismissed the Crown appeal. The contents of the Affidavit remain suppressed in accordance with s. 77RE of the *Judiciary Act 1903* (Cth).

### CONTACT



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