

Compelling an employee to give evidence in an inquest when their employer is subject to a related criminal prosecution

In a decision of relevance to coronial inquests and criminal prosecutions, on 24 April 2020 the High Court in *Commonwealth of Australia v Helicopter Resources Pty Ltd* [2020] HCA 16 unanimously allowed an appeal from the decision of the Full Court of the Federal Court of Australia.

These proceedings arose where an employee had been subpoenaed to give evidence in a coronial inquest and their evidence was expected to have implications for a related criminal prosecution against their employer. The High Court considered a provision that enables a representation by an employee to be taken as the admission of their employer: see s. 87(1)(b) of the *Evidence Act 2011* (ACT).

KEY POINTS

- ▶ The High Court confirmed that pursuant to s. 87(1)(b) of the *Evidence Act 2011* (ACT), which is in relevantly equivalent terms to provisions in the Commonwealth and NSW Evidence Acts, the admission of an employee within the scope of employment may be taken as the admission of their employer.
- ▶ Even having regard to this provision, the High Court determined that compelling the employee to give evidence in the inquest did not, in effect, require the employer (the accused) to assist the Crown in proving the prosecution case. Nor did it amount to compelling the employer to give evidence: [17].

BACKGROUND

The Commonwealth engaged Helicopter Resources Pty Ltd ("HR") for operations in the Australian Antarctic Territory. In 2016, a HR pilot died after falling in a hidden crevasse.

The ACT Chief Coroner held a coronial inquest into the death. At the point where most witnesses had been called, criminal proceedings were separately commenced against both HR and the Commonwealth under the *Work Health and Safety Act 2011* (Cth), including for an offence related to the death.

The HR Chief Pilot had prepared a statement for the inquest. Following a request from the Commonwealth, the Coroner issued a subpoena to compel further evidence from him.

HR brought an application for judicial review of the subpoena decision in the Federal Court, which was dismissed at first instance. The Full Court allowed HR's appeal on the basis that s. 87(1)(b) of the

Evidence Act (ACT), meant the Chief Pilot's evidence could be taken as an admission by HR itself and therefore "in effect", amounted to compelling HR to give evidence against itself. The Court considered the position for HR, as an accused, would then be "altered fundamentally".

The Commonwealth appealed the Full Court's decision to the High Court. By the time of the appeal, the coronial inquest had concluded, and the Chief Pilot had not been required to give evidence.

HIGH COURT DECISION

The High Court unanimously allowed the Commonwealth's appeal. Their Honours confirmed that a representation by an employee that is within the scope of their employment, may be taken as an admission by their employer, even where the representation is made under compulsion: see [19] and s. 87(1)(b) *Evidence Act* (ACT).

Further, the Court confirmed that no aspect of the accusatorial system of criminal justice prevents an employee being compelled to give evidence, even where that employee is a witness of "central importance" to the employer's defence, noting there is no property in a witness. This remains so despite the rule that *an accused* cannot be required to assist the Crown in proving its case: [20].

The High Court left open the issue of whether compelling a witness (other than an accused) could ever amount to a contempt of court. By the time of the decision, no potential prejudice remained for HR, as HR had already been acquitted of the offences: [28]. Moreover, the inquest had concluded.

IMPLICATIONS

This case indicates that in coronial inquests, a subpoena can be issued to an employee even where their evidence may be adverse to their employer or be taken as an admission by the employer in parallel criminal proceedings. Further, if a compulsory process is sufficiently authorised by statute, it may be invoked even if "as a matter of practical reality the result will fundamentally alter

the ability of the accused to defend charges": [22]. However, a subpoena may still be subject to challenge on the basis of contempt. The High Court did not determine this issue. Any question of contempt would ultimately turn on the facts and circumstances: [29].

In the context of criminal proceedings, including regulatory prosecutions, the case confirms that an adverse representation by an employee may be treated as an admission by their employer, where s. 87(1)(b) of the *Evidence Act* (ACT), applies.

Further, from an employment law perspective, the Court made it clear that if an employment contract seeks to prohibit an employee from giving evidence in criminal proceedings, even against their employer, such terms are "unenforceable as contrary to public policy": [20].

When considering the application of this case to future proceedings, it should be borne in mind that there are limits to the utility of the guidance provided by the High Court in this matter (as expressly noted by Edelman J at [36]-[37]), in circumstances where the questions were considered when both the coronial inquest and criminal proceedings had already concluded.

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