Crime and Corruption Commission hearings – key points

Crime and Corruption Act 2001

- Witness may be represented (181)
- 197 restricts use of privileged answers, documents or other things produced under compulsion
- 183 allows for an order prohibiting publication about answers given or information which might enable identification of any person who has or is to give evidence
- 197 and 183 do not prevent the discovery of 'secondary evidence which may be discovered as a consequence of the investigation learning of the evidence provided' (*O'Connor v OP* [2016] QSC 38 per Henry J)
- Blanket privilege order may be made under 197(5) – presiding officer may order that all answer or a class of answer given or documents is to be regarded as having been given or produced on objection, thus saving the need to claim privilege on each question (in the absence of the claim of privilege, the response or information *could* be admissible in other proceedings)
- Hearing not bound by the rules of evidence (180)(b) but *is bound* by the rules of fairness and may be informed any way considers appropriate (180(c)
- Failure to take an oath is an offence under s 183 but can also be punished as contempt under s 199 (*O'Connor*)
    - Note MP for failing to take oath is 5 years vs 10 years for contempt – if client is adamant they will not cooperate in any form, it would be in their interests to simply refuse to swear the oath, bringing an end to the matter and not repeatedly acting in competent by refusing to answer successive questions
- Hearings are closed unless otherwise opened under s 177
- S 188 (documents) and 190 (answers) provides claims of reasonable excuse in response to questions and request for documents – only valid privilege is LPP
    - Corruption investigations have wider privilege under s 192, extending to public interest immunity and parliamentary privilege
- At common law, *Lee v The Queen* (2014) 253 CLR 455 prohibits the giving of the witness' information to any prosecutors prosecuting that person, due to the fundamental breach of a right to fair trial
- S 331 clarifies that investigations may commence despite criminal proceedings having commenced
- Witness protection powers conferred under s 338 of the CC Act or may utilise powers under the *Witness Protection Act 2000*
- The onus to raise a reasonable excuse is on the defendant but, once, raised, its for the CCC to provide there was no reasonable excuse BRD (*Smith v PRQ* [2022] QSC 123)

<u>Issue of reasonable excuse in cases</u>

***SQH v Scott* [2022] QSC 16 (Justice Williams)**

- Appeal under s 195 about decision of a presiding officer under s 194 (decision about whether refusal to answer is justified) – jurisdiction conferred to SC
- Claim of reasonable excuse was that the witness was already charged with related offences of trafficking and that his giving of answers had the capacity of constraining his forensic choices in those proceedings – piggybacked *Human Rights Act* ground as to limitation on self incrimination principles

In *NS v Scott* [2018] 2 Qd R 397, the Chief Justice also stated that "in particular circumstances" a charged person who fears a derivative use of answers may have a reasonable excuse. An example of this would be questions designed to incriminate the witness by eliciting the nature of the defence, in order to "arm the prosecution with the means of rebutting it". The respondent concluded that the forensic purposes of the examination did not establish such an intention

Smith v PRQ [2022] QSC 123 (Dalton J)

- Presiding officer rejected claim of reasonable excuse based on fear of person safety, in circumstances where the witness was shot by the persons the CCC was investigating and had ongoing fears
- PRQ did not appeal, but challenged the subsequent contempt charge in the Supreme Court
- Dalton J found it was a reasonable excuse as the fear was objectively established by the circumstances of the witness being shot and the commission seeking to identify those not yet charged
- Contrasted to *Crime and Misconduct Commission v WSX & EDC* [2013] QCA 152 where the risks of harm were far more subjective and there was no evidence as to the level of risk