*R v LB* [2011] NTCCA 4

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| PARTIES: | THE QUEEN<br><br>v<br><br>LB |
| TITLE OF COURT: | COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION |
| FILE NO: | CCA 18 of 2010 (20916896) |
| DELIVERED: | 11 MARCH 2011 |
| HEARING DATES: | 26-27 OCTOBER & 22 DECEMBER 2010 |
| JUDGMENT OF: | MILDREN, KELLY & BARR JJ |
| APPEAL FROM: | SUPREME COURT OF THE NORTHERN TERRITORY (SOUTHWOOD J) |

**CATCHWORDS:**

CRIMINAL LAW – summons to give evidence before examiner of ACC – collateral challenge to validity in criminal proceedings – defendant charged with refusing to be sworn or affirmed – whether subpoena valid – whether invalidity results in absence of power to require defendant to be sworn or affirmed or leads to discretionary exclusion of evidence – *Australian Crime Commission Act 2002* (Cth) s 28, s 30(2)

ADMINISTRATIVE LAW – *Australian Crime Commission Act 2002* (Cth) s 28 – requirement that examiner must be satisfied that it is reasonable in all

the circumstances to issue summons – power of Court to find examiner had no valid reason to issue summons

EVIDENCE – rule in *Jones v Dunkel* – circumstances under which adverse inference may be drawn from failure to call a witness

APPEAL – whether trial Judge decided case on basis not argued by parties – duty to afford natural justice – whether reasonable opportunity to be heard afforded to appellant

*Australian Crime Commission Act 2002* (Cth), s 4, s 46B, s 4A(2), s 7C, s 7C(1)(d), s 24A, s 28, s 28(1), s 28(1A), s 28(1A), s 28(1A)(c), s 28(2), s 28(4), s 28(5), s 28(8), s 30, s 30(1), s 30(2), s 30(2)(a), s 30(6)
*Criminal Code* (NT), s 414(1)(e)
*Evidence Act* (NT), s 26L

*Cross on Evidence*, 4th Aust ed, Butterworths, Sydney, 1991- (loose-leaf edition)

*Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507; followed

*AA v Board of Australian Crime Commission* [2010] FCA 553; *Australian Crime Commission v LB* (2009) 25 NTLR 30; *Australian Crime Commission v NTD8* (2009) 177 FCR 263; *Bunning v Cross* (1978) 141 CLR 54; *Ho v Powell* (2001) 51 NSWLR 572; *Jones v Dunkel* (1959) 101 CLR 298; *Payne v Parker* [1976] 1 NSWLR 191; *R v LB* (2010) 26 NTLR 209; *R v Connell, ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407; *RPS v The Queen* (2000) 199 CLR 620; *Selby v Pennings* (1995) 19 WAR 520; *SS v Australian Crime Commission* (2009) 256 ALR 474; *Walton v Gardiner* (1993) 177 CLR 378; referred to

**REPRESENTATION:**

*Counsel:*

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| Appellant: | W Zichy-Woinarski QC with Dr J Renwick |
| Respondent: | M Abbott QC with G Lewer |

*Solicitors:*

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| Appellant: | Commonwealth Director of Public Prosecutions |
| Respondent: | North Australian Aboriginal Justice Agency |

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| Judgment category classification: | A |
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*R v LB* [2011] NTCCA 4
No CCA 18 of 2010 (20916896)

BETWEEN:

**THE QUEEN**
Appellant

AND:

**LB**
Respondent

CORAM: MILDREN, KELLY & BARR JJ

REASONS FOR JUDGMENT

(Delivered 11 March 2011)

**THE COURT:**

[1] This appeal is brought by the Commonwealth Director of Public Prosecutions pursuant to s 414(1)(e) of the *Criminal Code* (NT) from an order of Southwood J made on Friday 30 April 2010 permanently staying an indictment against the respondent. The respondent was charged with a single count alleging that he was a person appearing as a witness at an examination before an examiner and when required pursuant to s 28 of the *Australian Crime Commission Act 2002* (Cth) ("the Act") either to take an oath or make an affirmation, he refused or failed to comply with the requirement, contrary to s 30(2)(a) of the Act.

**Background Facts**

[2] On 3 December 2008, the Board of the Australian Crime Commission authorised the Commission to undertake an intelligence operation, determined to be a "special operation", to determine whether "federally relevant criminal activity" had been committed, was being committed or might in the future be committed in circumstances where information indicated that: family violence was deeply entrenched in indigenous communities across most states, with women and children the most common victims; there was significant under-reporting of indigenous violence or child abuse by the victims and other persons or entities; alcohol, illegal drug and substance abuse had direct links with indigenous violence and drug abuse occurring in indigenous communities; and the availability of pornographic material had been linked to sexual behaviour being normalised among young children.

[3] The Board of the Australian Crime Commission ("the ACC") has a function under s 7C of the Act amongst other things to authorise in writing the ACC to undertake intelligence operations or to investigate matters relating to "federally relevant criminal activity". The definition of "federally relevant criminal activity" in s 4 of the Act, when read with the definitions of "State" and "Territory" contained in s 4, and the definition of "federal aspect" in s 4 when read with s 4A(2), produces the result that, notwithstanding that the offences, reference to which were made in the decision of the Board, were all offences against laws of the Northern Territory, the Board was authorised

either to undertake an intelligence operation or an investigation and to determine in writing whether such an investigation is a special investigation or such an operation is a special operation.[1]

[4] Once the Board of the ACC had authorised the intelligence operation and determined it as a "special operation", an examiner appointed under s 46B of the Act had the power to conduct an examination of a person for the purposes of that special operation.[2]

[5] On 12 February 2009 an examiner, Mr J P Anderson ("the examiner"), issued a summons to the respondent requiring him to appear before the ACC on 24 February 2009 for an examination "to give evidence of federally relevant criminal activity involving indigenous violence and child abuse and the unlawful sale, supply, trafficking or possession of illegal drugs in indigenous communities".

[6] The respondent attended before the examiner on 24 February 2009, the date specified for his attendance, but it is alleged that he did not take the required oath or affirmation. He was then charged on indictment alleging an offence contrary to s 30(2)(a) of the Act. He pleaded not guilty and his trial was listed to proceed in the Supreme Court of the Northern Territory.

[7] As at the relevant time, s 28 of the Act relevantly provided as follows:

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1 See s 7C(1)(d).
2 See s 24A.

## 28. Power to summon witnesses and take evidence

(1) An examiner may summon a person to appear before an examiner at an examination to give evidence and to produce such documents or other things (if any) as are referred to in the summons.

(1A) Before issuing a summons under subsection (1), the examiner must be satisfied that it is reasonable in all the circumstances to do so. The examiner must also record in writing the reasons for the issue of the summons. The record is to be made:

(a) before the issue of the summons; or

(b) at the same time as the issue of the summons; or

(c) as soon as practicable after the issue of the summons.

(2) A summons under subsection (1) requiring a person to appear before an examiner at an examination must be accompanied by a copy of the determination of the Board that the intelligence operation is a special operation or that the investigation into matters relating to federally relevant criminal activity is a special investigation.

(3) A summons under subsection (1) requiring a person to appear before an examiner at an examination shall, unless the examiner issuing the summons is satisfied that, in the particular circumstances of the special ACC operation/investigation to which the examination relates, it would prejudice the effectiveness of the special ACC operation/investigation for the summons to do so, set out, so far as is reasonably practicable, the general nature of the matters in relation to which the person is to be questioned, but nothing in this subsection prevents an examiner from questioning the person in relation to any matter that relates to a special ACC operation/investigation.

(4) The examiner who is holding an examination may require a person appearing at the examination to produce a document or other thing.

(5) An examiner may, at an examination, take evidence on oath or affirmation and for that purpose:

(a) the examiner may require a person appearing at the examination to give evidence either to take an oath or to make an affirmation in a form approved by the examiner; and

(b) the examiner, or a person who is an authorised person in relation to the ACC, may administer an oath or affirmation to a person so appearing at the examination.

(6) In this section, a reference to a person who is an authorised person in relation to the ACC is a reference to a person authorised in writing, or a person included in a class of persons authorised in writing, for the purposes of this section by the CEO.

(7) The powers conferred by this section are not exercisable except for the purposes of a special ACC operation/investigation.

(8) A failure to comply with any of the following provisions does not affect the validity of a summons under subsection (1) of this section:

(a) subsection (1A) of this section, in so far as that subsection relates to the making of a record;

(b) subsection (2) of this section;

(c) section 29A, in so far as that section relates to a summons under subsection (1) of this section.

[8] Section 28 has since been amended to delete s 28(1A)(c) and to substitute the following provision for s 28(8):

> (8) A failure to comply with section 29A, so far as section 29A relates to a summons under subsection (1) of this section, does not affect the validity of the summons.

[9] On or about 21 August 2009, the solicitors for the respondent filed and served a subpoena addressed to the ACC. Relevant to this appeal, the subpoena sought production of the following documents:

> Any reasons which Examiner Anderson recorded pursuant to s 28 of the Act as his reasons for being satisfied that it was reasonable in all the circumstances to issue a s 28 summons to the respondent.

[10] On 4 September 2009, the ACC filed a summons seeking to set aside the subpoena on the basis, inter alia, that there was no legitimate forensic purpose for its issue. On 9 September 2009, Southwood J dismissed the summons to set aside the subpoena. In his published reasons,[3] his Honour dealt with an argument advanced by the ACC that the only permissible challenge to the summons issued by the examiner was of a very limited type, confined to invalidity on the face of the summons. The ACC's argument relied on the principles applying to warrants, which were said to apply by analogy to the examination summons in the present case. His Honour noted that there were special rules applying to collateral attacks on warrants and that those special rules had no application to the collateral challenges to the administrative acts the subject of the challenge before him.

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[3] *Australian Crime Commission v LB* (2009) 25 NTLR 30.

[11] It was argued before his Honour, unsuccessfully, that there was no legitimate forensic purpose for the respondent to seek the documents specified in the subpoena. His Honour found that there was a legitimate forensic purpose, essentially to ensure a fair trial. His Honour said:[4]

> In order to prove its case against the respondent the Crown has stated that it will be relying on the presumption of regularity to prove the case against the respondent. The Crown has said so in circumstances where all of the information which is relevant to the establishment of the alleged jurisdiction of the examiner to require the respondent to take an oath or make an affirmation is within the possession of the Australian Crime Commission. The scope and purpose for which the documents are sought has been specified. The issues arising for consideration are clearly defined. The enquiry is confined to checking if the essential requirements of the relevant jurisdiction of the examiner under the Act have been complied with. The documents are relevant to those issues and the documents have been precisely identified. The production of the documents is required for there to be a fair trial. To refuse production of the documents would leave the respondent with a legitimate sense of grievance. It would leave him with no ability to test the evidence which is relied on to establish the presumption of regularity in relation to a core aspect of the Crown's case against him.

[12] There was no appeal against any part of his Honour's decision.

[13] On 25 November 2009, Southwood J dealt with some questions which had been raised concerning the validity of the determination of the Board of the ACC to establish the special intelligence operation and a challenge to the validity of the examiner's summons requiring the respondent to attend before him.

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[4] *Australian Crime Commission v LB* (2009) 25 NTLR 30 at 44 para [47].

[14] The procedure adopted was pursuant to s 26L of the *Evidence Act* (NT) which provides:

> **26L. Determination of admissibility before jury empanelled**
>
> A court dealing with a matter on indictment may, if it thinks fit, hear and determine, before the jury is empanelled, any question relating to the admissibility of evidence and any question of law affecting the conduct of the trial.

[15] The first ground concerned the validity of the determination of the Board. The learned trial Judge rejected the respondent's arguments on this ground and found that the determination of the Board was valid. There was no appeal in relation to that finding.

[16] The second ground related to the validity of the summons. The respondent argued that the summons was invalid because the examiner, before issuing the summons, had not been satisfied that it was "reasonable in all the circumstances" to issue the summons such as required by s 28(1A) of the Act. As a consequence, so it was put, the examiner lacked jurisdiction to require the respondent to take an oath or make an affirmation at the proposed examination. Southwood J upheld the respondent's case on the second ground. He concluded that the summons issued to the respondent was invalid and that the examiner lacked the jurisdiction to require the respondent to take an oath or make an affirmation.

[17] His Honour held that there must be bona fide and rational reasons for the issue of a summons to a particular person in respect of a specific special

ACC operation/investigation; that the examiner must direct his mind to how and why the issue of a summons to a particular person will further the purposes of that operation/examination; and that the examiner must consider the matters about which the person who is to be summoned is to be questioned. His Honour held that these were essential and indispensable requirements for the issue of a valid summons.

[18] At the hearing before his Honour, counsel for the respondent tendered a document signed by the examiner as a record of his decision to issue the summons. This document was prepared by the examiner in purported compliance with s 28(1A) of the Act. His Honour held that contrary to that provision, the examiner did not record in writing any reasons at all as to why the summons was issued. His Honour said:[5]

> Nowhere in the record of his decision to issue the summons did Mr Anderson state why the summons was issued or why Mr Anderson was satisfied it was reasonable in all the circumstances to issue the summons. The requirement for there to be reasons is a requirement for there to be a reasoning process which is identifiable and leads to the necessary conclusion. The record of the examiner's decision to issue the summons only records Mr Anderson's satisfaction with various aspects of the process and Mr Anderson was not called to give evidence about his reasons, if any, for being so satisfied and for issuing the summons to the accused.
>
> As no reasons for issuing the summons were recorded in writing and Mr Anderson was not called to give evidence, it follows that either he failed to turn his mind to the reasons for issuing the summons to the accused or there were no valid reasons why the summons was issued. In these circumstances, Mr Anderson could not have been satisfied that it was reasonable in all the circumstances to issue the summons to the accused. Therefore a necessary pre-condition to the

[5] *R v LB* (2010) 26 NTLR 209 at 221-222 paras [46] - [47].

issue of the summons has not been fulfilled, the summons was invalid and the examiner lacked the jurisdiction to require the accused to take an oath or make an affirmation.

[19] His Honour held that in the absence of the examiner being called to give evidence about the reasons for issuing the summons, a reasonable inference based on his failure to record the reasons for issuing the summons is that he failed to consider the reasons for issuing the summons to the accused and that in the circumstances he could not have been satisfied that it was reasonable in all the circumstances to issue the summons. In those circumstances, his Honour ordered that the proceedings should be permanently stayed.

**The Grounds of Appeal**

[20] The appellant's Notice of Appeal sets out two grounds as follows:

> (2) His Honour erred in finding invalid the summons issued pursuant to s 28 of the *Australian Crime Commission Act 2002* (Cth) ("the Act") by Australian Crime Commission Examiner Anderson to the respondent dated 12 February 2009 in so far as he concluded he was "[64… satisfied on the balance of probabilities that Mr Anderson could not have been satisfied [within the meaning of s 28(1A) of the Act] that it was reasonable in all the circumstances to issue the summons to the accused" in circumstances where:
>
> a The Examiner's reasons recited the required satisfaction under s 28(1A) of the Act and there was no suggestion that statement was made in bad faith;
>
> b Section 28(1A) of the Act does not comprise a jurisdictional fact such that on a collateral challenge to the validity of the summons it is a matter for the court itself to be satisfied that the issue of the summons was "reasonable in all the circumstances"; and

c In the alternative, the Examiner's reasons incorporated by reference a "statement of facts and circumstances" and "legal submissions" neither of which were obtained by the respondent from the Australian Crime Commission, nor tendered on the voir dire. Consequently his Honour Justice Southwood did not have the entirety of the reasons before him and thus mistook the facts or failed to take into account a material consideration in the *House v R* (1933) 48 CLR 565 sense, and was unable to conclude that the Examiner "could not have been satisfied"; and

(3) His Honour erred in concluding that the Examiner's decision could be challenged otherwise than by reason of invalidity appearing on the face of the summons, in view of the decision of the High Court in *Ousley v The Queen* (1997) 192 CLR 69.

[21] At the hearing of the appeal, a further ground was added in the following terms:

3. The proceedings leading to the judgment appealed from miscarried because the respondent did not identify to the Court, sufficiently or at all, that he was then arguing that an element of the offence charged was that there was a valid summons pursuant to which the respondent appeared before the Examiner; accordingly his Honour:

(a) Applied the wrong procedures;

(b) Denied the Appellant procedural fairness; and

(c) Failed to rule on the issue said to have been raised by the respondent.

[22] This ground replaced ground 3 in the original Notice of Appeal, which had been abandoned at the hearing.

**Ground 2**

[23] Counsel for the appellant submitted that the examiner's reasons recited the required satisfaction under s 28(1A) of the Act and that there was no suggestion that the statement was made in bad faith.

[24] As noted previously, s 28(1A) required the examiner to record in writing the reasons for the issue of the summons and these reasons, or purported reasons, were tendered in evidence. The reasons recorded the following:

> I had regard to the following material for the purposes of being satisfied under subsection 28(1A) of the *Australian Crime Commission Act 2002* (Cth) (the Act) that it was reasonable in all the circumstances to issue the summons:
>
> (a) A statement of facts and circumstances dated 11 February 2009,
>
> (b) Legal submissions dated 11 February 2009 and
>
> (c) My general experience of the Determination.

[25] Under the heading "Consideration", the examiner recorded the following:

> Based upon my consideration of the statement of facts and circumstances, the legal submissions and my experience of the Determination referred to above;
>
> (1) I was satisfied that the operation was within the terms of the Determination and that the Determination was still operative.
>
> (2) I was satisfied that it was reasonable in all the circumstances that the Summons be issued to the person.
>
> (3) I was satisfied that it was reasonable in all the circumstances that the Summons be issued in the terms approved by me.

(4) I was satisfied that the summons does, so far as it reasonably practicable, set out the general nature of the matters in relation to which it is intended to question the person.

(5) I was satisfied that, in the particular circumstances of the special ACC operation to which the examination relates, it would prejudice the effectiveness of the special ACC operation for the summons to state beyond that which it does the general nature of the matters in relation to which the examiner intends to question the person.

(6) I was satisfied that this was an appropriate Summons for the inclusion of a notation pursuant to subsection 29A(1) of the Australian Crime Commission Act 2002, in the terms approved by me, because if such a notation were not included it would reasonably be expected to prejudice the effectiveness of the operation and that failure to do so might be contrary to the public interest.

[26] This document constituted the only reasons which were tendered in the Court below.

[27] Certainly the examiner stated that he was satisfied that it was reasonable in all the circumstances to issue a summons to the respondent, so in that sense the examiner's reasons did recite the required satisfaction under s 28(1A).

[28] We accept also that s 28(1A) of the Act does not comprise a jurisdictional fact such that, on a collateral challenge to the validity of the summons, it is a matter for the Court itself to be satisfied that the issue of the summons was reasonable in all the circumstances.

[29] The question then is whether the examiner could have attained that satisfaction reasonably in the sense explained in numerous authorities of the High Court referred to in the joint judgment of Gleeson CJ and Gummow J

in *Minister for Immigration and Multicultural Affairs v Jia Legeng*,[6] and the cases referred to in footnote 52.

[30] It is sufficient to refer to one of those cases, *Minister for Immigration and Multicultural Affairs v Eshetu*,[7] where Gummow J reviewed the relevant authorities. His Honour quoted with approval passages from the judgment of Latham CJ in *R v Connell, ex parte The Hetton Bellbird Collieries Ltd*,[8] where the Chief Justice said:

> [Where] the existence of a particular opinion is made a condition of the exercise of power, legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist…
>
> It should be emphasised that the application of the principle now under discussion does not mean that the court substitutes its opinion for the opinion of the person or authority in question. What the court does do is to inquire whether the opinion required by the relevant legislative provision has really been formed. If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it was shown that the opinion was arbitrary, capricious, irrational, or not bona fide.

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6 (2001) 205 CLR 507 at 532 [73]
7 (1999) 197 CLR 611 at 652-654 [133]-[137].
8 (1944) 69 CLR 407 at 430 and 432.

[31] If there is simply no evidence at all upon which the decision could have been formed by a reasonable person who correctly understood the law, then similarly the basis for the exercise of the power is absent.[9]

[32] Contrary to the submissions of the appellant, in our opinion, Southwood J did not hold that compliance with s 28(1A) of the Act was a jurisdictional fact which entitled him to be satisfied that the issue of the summons was reasonable in all of the circumstances. What his Honour held was that the record of reasons for the issue of the summons in this case was not a record of reasons at all. For example, his Honour said that nowhere did the examiner state anywhere in the record why he considered that the accused was a person likely to be able to provide information or intelligence about relevant criminal activity or how he might be able to identify persons involved in the relevant criminal activity or that he himself was a person who may be engaged in relevant criminal activity.[10]

[33] There is in fact nothing on the face of the reasons document to indicate any of that material. There is no material which identifies even who LB is. He could be anybody. There is nothing to suggest in the reasons that LB has anything to do with indigenous persons, that he is privy to any information or likely to be privy to any information relevant to the inquiry. For all we know, and for all the learned Judge knew, there was nothing to show that LB

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9 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 656-657 paras [144]-[145] per Gummow J.

10 *R v LB* (2010) 26 NTLR 209 at 224-225 para [59].

knew anything about these matters or might be expected to know anything about any of these matters.

[34] In our opinion, it is clear from the reasons of the learned Judge that he did not treat compliance with s 28(1A) as a jurisdictional fact. His Honour's approach was to consider the reasons and to decide whether those reasons showed that there were facts upon which the examiner could be satisfied that it was reasonable to issue the summons. That approach is in accordance with the relevant authorities.

[35] We would therefore dismiss this contention.

**Alternative Argument**

[36] Alternatively, the appellant submitted that the examiner's reasons incorporated by reference a "statement of facts and circumstances" and "legal submissions" neither of which were tendered on the voir dire. Consequently, it was put that his Honour did not have the entirety of the reasons before him and therefore was unable to conclude that the examiner "could not have been satisfied".

[37] We were referred to the decision of Foster J in *AA v Board of Australian Crime Commission*,[11] where a similar submission was considered. His Honour said:[12]

> The statement of facts and circumstances and legal submissions must also be considered in order to come to a view as to whether or not the

[11] [2010] FCA 553.
[12] *AA v Board of Australian Crime Commission* [2010] FCA 553 at [178].

> reasons document truly does meet the requirements of s 28(1A). Those documents are not in evidence. It is likely that they are highly relevant to the determination of the present question. In the absence of those documents, I am not prepared to find that the reasons document (which includes the statement of facts and circumstances and the legal submissions) do not adequately record the examiner's reasons for the issue of the summons.

[38] However, in our opinion, there is no substance to this submission. Whilst it is true that the reasons document refers to these other documents as providing facts which the examiner considered, nowhere does the reasons document itself explain the relevance of any of that material, or set out any reasoning process by reference to that material. Further, if these documents were incorporated by reference, so as to form part of the examiner's reasons, why were they not produced on subpoena? An examination of other decisions in the Federal Court shows that the kind of reasons that were supplied in this case are formulaic.[13] The Full Court observed:[14]

> The Examiner's reasons, as we have noted, are laconic, formulaic and often unhelpful. They appear to tick boxes. The Statement of Facts and Circumstances was uninformative.

[39] Exactly the same criticisms can be made of the statement of reasons in this case.

[40] We do not agree that the failure to produce the statement of facts and circumstances and legal submissions in this case advances the matter in favour of a finding that the learned trial Judge's decision was wrong. The decision of Foster J was on a different point, namely whether it was possible

[13] See *Australian Crime Commission v NTD8* (2009) 177 FCR 263.
[14] *Australian Crime Commission v NTD8* (2009) 177 FCR 263 at [73].

to say that the reasons document (which presumably incorporated other documents by reference) failed to comply with s 28A without reference to the incorporated documents.

[41] Furthermore, it is necessary to bear in mind the course of the proceedings. The respondent subpoenaed the examiner's reasons to which we have already referred. On the hearing of the voir dire, the only evidence tendered were the reasons provided by the examiner. These were tendered by counsel for the respondent. Counsel for the appellant led no evidence. The reasons on their face were not reasons at all. By their nature, reasons imply that the examiner has considered the facts and the law and by a process of reasoning reached a certain conclusion. The statement of reasons did nothing of the sort. The respondent having raised the issue in this way, it was open to the learned trial Judge to take into account that the Crown called no evidence. No explanation was given to the learned trial Judge as to why the examiner was not called to give evidence or as to why the remaining documents were not tendered by the Crown. In those circumstances, it was open to the learned trial Judge to draw the inference that such evidence would not have supported the Crown's case in accordance with the well known principle in *Jones v Dunkel*[15] and more confidently draw an inference that there were no reasons.[16]

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[15] (1959) 101 CLR 298.
[16] *RPS v The Queen* (2000) 199 CLR 620 at 632.

[42] In *Payne v Parker*,[17] Glass JA said that whether the principle can or should be applied depends upon whether the conditions for its operation exist.

> These conditions are three in number: (a) the missing witness would be expected to be called by one party rather than the other, (b) his evidence would elucidate a particular matter, (c) his absence is unexplained.

[43] As to the first condition, his Honour said:[18]

> The first condition is also described as existing where it would be natural for one party to produce the witness: *Wigmore*, par. 286, or the witness would be expected to be available to one party rather than the other: *O'Donnell v Reichard*, or where the circumstances excuse one party from calling the witness, but require the other party to call him: ibid, or where he might be regarded as in the camp of one party, so as to make it unrealistic for the other party to call him: ibid, *Regina v Burdett*, or where the witness' knowledge may be regarded as the knowledge of one party rather than the other: *Earl v Castlemaine District Community Hospital*, or where his absence should be regarded as adverse to the case of one party rather than other: ibid. It has been observed that the higher the missing witness stands in the confidence of one party, the more reason there will be for thinking that his knowledge is available to that party rather than to his adversary.

[44] We consider that this condition was plainly made out. The prosecution brought by the Director of Public Prosecutions on behalf of the Commonwealth Crown was seeking to enforce the provisions of the Act. The examiner was clearly in the camp of the Crown or at least would be expected to be available to the Crown rather than the accused. It is difficult to see how the case against the respondent could be proved at trial without the examiner being called as a witness. The purpose of the prosecution was

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[17] [1976] 1 NSWLR 191 at 201.
[18] *Payne v Parker* [1976] 1 NSWLR 191 at 201-202.

to enforce provisions of the Act, in which the examiner had an interest as a member of the ACC.[19] He was certainly not a friendly witness to the defence. The circumstances were such as to require the Crown rather than the defence to call this witness. As to the second condition, plainly his evidence would elucidate the question of what matters he took into account in his process of reasoning. Thirdly, his absence was unexplained. In those circumstances, the inference was able to be drawn.

[45] Counsel for the appellant submitted, however, that the failure to provide any reasons for the issue of the summons, nevertheless, did not affect the validity of the summons. Counsel relied upon the provisions of s 28(8) of the Act referred to above. We were referred to the decision of Jagot J in *SS v Australian Crime Commission,*[20] where his Honour held that to conclude otherwise would be contrary to the express will of the Parliament as embodied in that provision.

[46] The difficulty with this argument is that it would negate any power by the Court to consider whether in fact the examiner had considered the facts and the law correctly in accordance with the decisions of the High Court to which we have earlier referred. All that s 28(8) provides is that the failure to properly record the reasons is not in itself sufficient to enable a finding to be made that the summons was invalid. But once the Court is called upon to find as a fact whether or not the examiner did have the relevant satisfaction,

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[19] see s 7(2).
[20] (2009) 256 ALR 474 at para 92.

that is a different question. In the circumstances of this case, the accused did all that could be reasonably expected of him to put before the Court such material as disclosed the reasons of the examiner. Those reasons were defective and in those circumstances, it is our opinion that the learned Judge's conclusion was correct. Furthermore, we reject the view of Jagot J that drawing a *Jones v Dunkel* inference would be converting "mere conjecture and suspicion into inference".[21] The learned Judge approached the issue on the basis that the accused bore the onus of proof. It was submitted by Mr Abbott QC that this was too favourable to the Crown and that the Crown bore the onus of proof beyond reasonable doubt, referring to *Selby v Pennings*.[22] It is not necessary to decide this question. Even if the respondent bore the onus, the principle in *Jones v Dunkel* still applies regardless of who bears the onus.[23] Whatever may be the position in administrative law cases, in a criminal trial the issue cannot be buried in obfuscation by the manner in which it was done in this case.

[47] We would therefore reject the second ground of appeal.

**Ground 3**

[48] Southwood J found that the summons was invalid because the examiner had not satisfied himself that it was reasonable in the circumstances to issue the summons. His Honour found that if the summons were invalid, the examiner had no jurisdiction to require the respondent to take an oath or affirmation;

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[21] See para 94 at 499.
[22] (1995) 19 WAR 520 at 549-550 per Owen J.
[23] *Ho v Powell* (2001) 51 NSWLR 572 at [15]-[16]; *Jones v Dunkel* (1959) 101 CLR 298 at 320-321; *Cross on Evidence*, 4th Aust ed, Butterworths, Sydney, 1991- (loose-leaf edition) para 1215.

if a person is not lawfully required to attend an examination, he cannot be required to take an oath or make an affirmation at an examination.[24]

[49] In the earlier proceedings between the ACC and the accused, his Honour had said:[25]

> [29] …For a person to appear at an "examination" within the meaning of s 30(2)(a) of the Act the person's appearance must be an appearance which is contemplated by the Act and the examination must be an examination which is authorised by the Act. The examination will not be an examination which is authorised by the Act if the relevant determination by the board was not a determination that was authorised by the Act and was invalid or if the summons served on the person was a summons which was not authorised by the Act and was invalid. Alternatively, a person's appearance may not be an appearance that was contemplated by the Act if the summons was invalid. In such circumstances an examiner will not have jurisdiction to require a person to take an oath or make an affirmation.
>
> [30] …Relevantly, the summons will be an unauthorised summons or beyond the power of the Act and will be invalid if the examiner failed to consider if it was reasonable in all the circumstances to issue the summons or if the examiner was not satisfied it was reasonable in all the circumstances to issue the summons. If any of these set of circumstances existed the examiner would be acting in excess of jurisdiction or beyond the power granted by the Act in requiring the respondent to either take an oath or make an affirmation. This interpretation follows from the coercive nature of the Act and the plain terms of the relevant sections of the Act. Such a construction of the provisions of s 28(1A) of the Act is further supported by s 28(8) which specifies the defects which do not affect the validity of the summons. The matters referred to in this paragraph constitute fundamental safeguards against the misuse of the coercive provision of the Act.

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[24] *R v LB* (2010) 26 NTLR 209 at 224 para [56]; at 227 para [71].
[25] *Australian Crime Commission v LB* (2009) 25 NTLR 30 at 39-40; paras [29] - [30].

[50] In the previous paragraph of his Honour's judgment, his Honour said:[26]

> The essential physical elements of the offence created by s 30(2)(a) and (6) are as follows:
>
> 1. The respondent is a person who appeared as a witness at an examination before an examiner.
>
> 2. The respondent was required to take an oath or make an affirmation by the examiner or a person who is authorised to administer an oath and an affirmation.
>
> 3. The accused refused or failed to take an oath and he refused or failed to make an affirmation.

[51] It is to be noted that the Commonwealth of Australia was a party to the earlier proceedings and was represented by Dr Renwick, who also appeared as counsel for the DPP at the hearing of the s 26L application. Mr Abbott QC appeared as counsel for the accused in both proceedings. No appeal was lodged against his Honour's decision. Both parties referred to his Honour's decision in order to support their contentions during the hearing of this ground of appeal.

[52] What we think is clear from his Honour's reasons is that his Honour regarded an invalid summons as depriving the examiner of any jurisdiction to compel the respondent to take an oath or to give evidence on affirmation and, moreover, that the examination was not an examination authorised by the Act. If his Honour be correct, the examiner's lack of jurisdiction was a factual matter, or a matter of evidence, which presumably his Honour regarded as going to the first element of the offence, which required proof that the accused appeared as a witness at an examination before an

[26] At p 39, para [28].

examiner. If there were no examination authorised by the Act, there was no "examination before an examiner". It was also a factual matter which went to the second element of the offence. If there were no power in the examiner to require the respondent to take an oath or make an affirmation, he could not be *required* to do so by the examiner.

[53] Counsel for the appellant submitted that the proceedings before Southwood J on the s 26L application did not proceed in that way, but that both parties approached the matter on the basis that if the summons were invalid, the examiner acted illegally thus giving rise to a *Bunning v Cross*[27] discretion to exclude the evidence that the respondent had either been required to take an oath or affirmation, or had refused to do so when required. Thus it was put by the appellant, that (1) counsel for the appellant had indicated that in the event that his Honour found that the summons was invalid, thereby enlivening his discretion, counsel had expressly reserved the right to be heard on whether or not the discretion should be exercised in favour of the respondent; (2) the learned Judge did not give counsel for the appellant that opportunity but decided the matter on a basis not argued by counsel for the respondent; and therefore (3) the hearing had miscarried because natural justice had not been afforded to the appellant.

[54] Both parties had filed written submissions in relation to the matter before Southwood J, and it is clear that the respondent's written submissions proceeded upon the basis that if the summons were invalid, it gave rise to a

[27] (1978) 141 CLR 54.

discretionary exclusion. However, at the commencement of the respondent's counsel's oral submission, he made it clear that he had changed his position when he told his Honour that it was his submission that a failure to comply with s 28 was fatal, and does not lead to a mere discretionary exclusion:[28]

> ….it in fact leads to invalidity or unlawfulness of the entire process and leads to the conclusion that the examination was, in truth, no examination at all.

[55] After that, the following exchange occurred:

> HIS HONOUR: Yes. Now, do you say if that's accepted , then one of the elements of the offence charged on the indictment is not made out?
>
> MR ABBOTT: Yes, your Honour, because he was not a person appearing at an examination.
>
> HIS HONOUR: Yes.
>
> MR ABBOTT: Because, as I'll tell your Honour in my submission, for there to be an examination, there has to be a valid summons, and for there to be a valid summons, there has to be compliance with s 28(1A) of the *Australian Crime Commission Act*.
>
> HIS HONOUR: Now, do you say the consequence of that is what, directed acquittal?
>
> MR ABBOTT: The consequence of that is that whatever happened in a room where there was an examiner and where there was LB is not a proceeding which is caught by the *Australian Crime Commission Act*.

[28] AB 15.10-AB 16.5.

[56] Following this exchange, Mr Abbott QC, in direct answer to questions from the Court, said that the consequences of his submission, if accepted, is that the indictment would be struck out as disclosing no offence. As Mr Abbott QC developed his oral submissions, it is plain that he was advancing the argument that the first element of the offence, required proof that the respondent was appearing as a witness at a *valid* examination, which required that the summons was a valid one.[29] He also submitted that the appellant's contention that an invalid summons would not doom the prosecution was incorrect, that there could be no examination within the meaning of the Act without a valid summons, and "that the coercive powers of an examiner to require a person to take an oath or affirmation pursuant to s 28(5) do not apply because they are only the powers an examiner may use at an examination, nor the coercive powers in s 28(4), they don't apply".[30] At the end of his oral submission, Mr Abbott QC said:

> So, your Honour, for those reasons we say that what occurred in the case of LB was no examination whatsoever; that the necessary conditions and preconditions referable to a valid examination were not complied with and that your Honour should so find pursuant to S.26L that this is a question of law or a question of mixed fact and law, and your Honour should therefore rule that no valid examination took place, which would, in our submission mean that no offence could possibly be created because the examiner would not be empowered to administer or attempt to administer an oath or affirmation or to require LB to answer questions.[31]

[29] AB 34.7.
[30] AB 36.5.
[31] AB 50.7.

[57] In view of his Honour's earlier judgment in the application to set aside the subpoena, the argument as developed by Mr Abbott QC could hardly have come as a surprise to Dr Rennick. No application was made for an adjournment. After Mr Abbott QC finished his oral submissions, Southwood J asked Dr Rennick whether he intended to call the examiner, to which he said no. His Honour then raised whether that might lead to an inference that the examiner could do no better than what was in his reasons. Dr Rennick submitted to the contrary.[32] Dr Rennick then responded to that submission by Mr Abbott QC; he submitted that the summons was not invalid for reasons which he expressed and, submitted that if there were any invalidity, it could only lead to the possible exclusion of evidence on the basis that the evidence was unlawfully obtained and that proof of a valid summons was not required to prove any element of the offence.

[58] In these circumstances, it cannot be said that the appellant was denied procedural fairness. It was open for his Honour to decide the issues on the basis that he did and, in those circumstances, assuming that his Honour's construction of the relevant provisions of the Act was correct, it was not necessary for his Honour to consider whether the evidence ought to be excluded in the exercise of his discretion. Dr Rennick had submitted that the proper remedy, if the determination was invalid, was a stay. Although no similar concession was made in relation to the remedy which Southwood J ultimately granted, it is clear that a permanent stay is

[32] AB 51.

appropriate if it appears that the case is hopeless because the Crown cannot bring any evidence to prove its case.[33] It was not argued that a permanent stay was not the appropriate remedy.

[59] However, Mr Zichy-Woinarski QC's principal submission was that his Honour misconstrued the relevant provisions. It was submitted that the power to take an oath under s 28(5) of the Act did not depend upon a valid summons, and an offence against s 30 is not dependent upon there being a valid summons. His submission went so far that if a person appeared before an examiner without a summons at all, the examiner could require him to be sworn or affirmed. This argument was put notwithstanding that there was no appeal from his Honour's earlier decision in the subpoena proceedings to which the Commonwealth was a party, in which his Honour decided otherwise. No point was taken by Mr Abbott QC that the matter was res judicata, nor that there was an estoppel and it is necessary that we decide this question for ourselves.

[60] Our attention was drawn to s 30(1) of the Act and the offence created by s 30(6). It was put that in that case, the legislature had specifically provided as an element that a person has been served with a summons. Section 30(1) provides:

> A person served, as prescribed, with a summons to appear as a witness at an examination before an examiner shall not:

[33] *Walton v Gardiner* (1993) 177 CLR 378 at 393 per Mason CJ, Deane & Dawson JJ; at 411 per Brennan J.

(a) fail to attend as required by the summons; or

(b) fail to attend from day to day unless excused, or released from further attendance, by the examiner.

[61] Counsel for the appellant submitted that if the legislature had intended to make the service of a summons an element of an offence against s 30(2), it would have inserted words similar to the form of words used in s 30(1). However, in our opinion it is clear that s 30(1) and s 30(6) are intended to deal with the specific problem of punishing a person who fails to answer a summons, as a means of compelling attendance. Section 30(2) is intended to deal with the situation where a person who has been summoned to appear as a witness, fails to either take the oath or make an affirmation. The words in s 30(2), "appearing as a witness", are apt to describe a person who has received a valid summons to so appear. When one turns to s 28(1), it is clear that the Parliament intended to provide a power in an examiner to "summon a person to appear before an examiner at an examination to give evidence". Without such a power, an examiner could not compel attendance of a person to appear as a witness to give evidence. Once the witness has appeared at an examination, s 28(5) empowers the examiner to require "a person appearing at the examination" to give evidence on oath or affirmation. However, the power to compel attendance is conditioned upon a valid summons, which depends upon the examiner "being satisfied that it is reasonable in all the circumstances" to issue the summons.[34] Not every

[34] s 28(1A).

person in the world is a compellable witness. The purpose of s 28(1A) is to provide the foundation for compellability, i.e. that the examiner must be satisfied that it is reasonable to do so. Although the test is not a high one, the coercive powers of these provisions are clearly designed to ensure that the authority of examiners is not abused and to provide some measure of protection for the public.

[62] In our opinion, the scheme of the Act contemplates that the power to insist upon the taking of an oath or affirmation means that a person can only be *required* or compelled to take the oath if the summons is valid. If the examiner had no power to issue the summons, it is difficult to see how a person is, in terms of s 28(2), required to appear before an examiner at an examination and, unless he is so compellable, in our opinion, he is not "appearing as a witness". Even if a person did appear voluntarily without a summons, that does not mean that the witness could be required to be sworn. The witness may change his or her mind. His or her status as a witness would then change; the person would no longer be appearing as a witness.

[63] In our opinion, Southwood J was right, and the cases on warrants to which we were referred are not relevant.

[64] In our opinion, ground three is not made out.

**Conclusion**

[65] In our opinion, the appeal must be dismissed.