

Case Law update for prosecuting agencies

Evidentiary considerations: Use of compulsorily obtained evidence in prosecutions

September 2018

*R v Leach*¹ considers the implications of coercive powers and compulsive examinations on the criminal justice system. It provides a reminder for prosecutors of the fundamental fairness principles which underpin an accused's right to a fairly conducted criminal prosecution, and how those principles can be forgotten in the face of compelled evidence.

The issue

Legislation which provides for coercive powers and compulsory examinations² is now common, and the exercise of these powers by investigative and regulatory bodies happens regularly. Often, the legislative provisions under which these powers are exercised abrogate the compelled person's ability to claim privilege against self-incrimination.

The issue is not always the lawfulness of the compelled examination, but rather, the use and dissemination of the evidence obtained under compulsion (including any further evidence derived from the compulsorily obtained evidence), and the resultant impact on an accused's right to a fair trial.

R v Leach

The facts

Leach was compelled by the ATO³ to answer questions and produce documents under examination. The applicable legislation made it an offence for a compelled person to refuse to answer questions, even where the answer may tend to incriminate that person.

Following the examination, the ATO referred Leach to the DPP. In doing so, the referring ATO investigator provided to the DPP the transcript of Leach's compulsory examination. That transcript was disseminated to DPP employees, and witness statements were provided by the investigating ATO officer, as well as the two ATO

¹ *R v Leach* [2018] QCA 131.

² For example, by way of an interview or a hearing.

³ Exercising their powers under the *Taxation Administration Act 1953* (Cth).

officers who interviewed *Leach* under compulsion. Thereafter, *Leach* was charged with 44 dishonesty-related offences.

Following an unsuccessful application to have the prosecution stayed,⁴ at trial, the contents of the compulsive examination:

- Were tendered and played for the jury;
- Were referred to in the prosecutor's closing address; and
- Were referred to by the Judge in his summing up and directions to the jury.

Ultimately, the prosecution relied on the compelled evidence as evidence of *Leach*'s 'consciousness of guilt', and in doing so, identified six alleged lies told by *Leach* during the examination.

The decision

By majority, and most relevantly for prosecutors, the Court of Appeal held that the disclosure to the DPP of the evidence given by *Leach* under compulsion, the DPP's use of that evidence to prepare for their prosecution, and its admission as evidence at the trial, constituted a miscarriage of justice. The convictions were quashed, and a retrial was ordered.

Practical tips for prosecuting authorities

1. 'Compelled evidence' can include evidence beyond oral evidence given under compulsion. In that regard, prosecutors need to be cognisant of derivative evidence which has come into existence as a result of the compelled examination.
2. It is incumbent upon prosecutors to familiarise themselves with their applicable legislation, and any restrictions that legislation places on the use and disclosure of compelled evidence.
3. Prior to receiving a brief from a referring investigator/agency, the prosecutor should enquire as to the existence of any compelled evidence, and make an assessment as to the appropriateness of receiving that evidence.
4. Where a prosecutor is already in possession of compelled evidence, careful consideration must be given to the appropriateness of that possession and the prosecutor's continued involvement.
5. Prosecutors must remain alive to the consequences and prejudices that can flow as a result of the improper possession, use, and misuse of compelled evidence (including derivative evidence).

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⁴ On the basis of their access to the compelled evidence.