

## Case Law update for prosecuting agencies

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### Unlawful use of compulsorily obtained interviews and the right to a fair trial

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April 2020

*CDPP v Leach (No 3)*<sup>1</sup> considers a defendant's fundamental right to a fair trial in circumstances where the defendant was compelled to participate in an interview by an investigating authority, and that interview was unlawfully disclosed to and relied on by the prosecuting agency.

#### Background

Leach was compelled by the ATO<sup>2</sup> 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 CDPP. In doing so, the referring ATO investigator provided to the CDPP the transcript of Leach's compulsory examination. That transcript was disseminated to CDPP employees, it formed the basis of prosecutorial evidentiary considerations, and it was used to obtain statements from witnesses. Thereafter, Leach was charged with 44 dishonesty-related offences.

Following an unsuccessful application to have the prosecution stayed,<sup>3</sup> at the trial in 2017, 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.

Leach was convicted of all charges, however he successfully appealed his convictions to the Court of Appeal.<sup>4</sup> By majority, the Court of Appeal held that the disclosure to the CDPP of the evidence given by Leach under compulsion, the CDPP'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. Presently, that decision is the leading authority in Queensland regarding the improper use of compulsorily obtained evidence.

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<sup>1</sup> [2020] QDC 42.

<sup>2</sup> Exercising their powers under the *Taxation Administration Act 1953* (Cth).

<sup>3</sup> On the basis of the CDPP's access to the compelled evidence.

<sup>4</sup> *R v Leach* [2018] QCA 131.

In 2019, Leach filed a writ in the High Court of Australia seeking declarations that he could not receive a fair trial. The High Court remitted the matter to the District Court for determination. *Leach (No 3)* constitutes the District Court's decision.

### **Leach (No 3)**

In short, Leach submitted that by virtue of the compelled interview he was forced to reveal his defence. The interview clearly provided the CDPP with a forensic advantage and it was widely disseminated. The prosecution had to be stayed, otherwise it would be impossible for Leach to receive a fair trial (for which an accused has a constitutional right).

The CDPP ultimately submitted that most of the evidence had been obtained independently of the interview or had already been in the possession of the ATO. Further, that the steps taken by the CDPP since the Court of Appeal's decision meant that Leach could have a fair trial. Those steps included the appointment of a new prosecution team, no reliance on the interview at trial, the quarantining of all documents relating to the interview, and the revised preparation and particularisation of the case without recourse to the interview.

The Court found that the matters requiring consideration included: '*...whether there was a deliberate breach of the law by the authorities (or a mistake), whether the illegality has affected the cogency of the evidence, the ease with which the evidence could have been legally collected, the seriousness of the offence, the seriousness of the unlawful conduct by the authorities, and the intention of the parliament.*'<sup>5</sup>

Rather than granting a stay, the Court quashed all charges,<sup>6</sup> finding as follows:

- The disclosure of the interview to another ATO investigator was not unlawful, but disclosure to the CDPP was.<sup>7</sup> The investigator was entitled to use the interview to continue her investigations (including speaking to witnesses but she was not permitted to disclose its contents to witnesses;<sup>8</sup>
- The interview was unlawfully disclosed to the CDPP and was unlawfully used in the preparation of the brief of evidence in the charges.<sup>9</sup> The prosecution relied in part on the interview to draft the charges<sup>10</sup> and a new prosecution team does not change that fact;<sup>11</sup>
- There had been a fundamental alteration of the accusatorial nature of the trial, but some of the evidence had not been tainted and could be used, so the matter was not 'irrevocably lost';<sup>12</sup>
- The steps taken by the CDPP were apt to ensure a fair trial with new charges and evidence untainted by the compulsory interview.<sup>13</sup> A 'fresh' legal team could appropriately conduct the trial afresh and the jury will be instructed to only have regard to the evidence in the trial.<sup>14</sup>

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<sup>5</sup> [2020] QDC 42 at [299].

<sup>6</sup> Leaving open the possibility of new charges with untainted evidence being laid.

<sup>7</sup> *Ibid* at [240] – [242].

<sup>8</sup> *Ibid* at [295].

<sup>9</sup> *Ibid* at [326].

<sup>10</sup> *Ibid* at [321].

<sup>11</sup> *Ibid* at [323].

<sup>12</sup> *Ibid* at [328] – [329].

<sup>13</sup> QDC 42 at [343].

<sup>14</sup> *Ibid* at [344].

In making its decision, the Court commented that whilst there is nothing wrong with the ATO engaging in compelled interviews prior to charging, '*...the ATO needs to be careful not to disclose the interview to the prosecuting authority, or the contents of the interview to witnesses.*'<sup>15</sup>

### **The implications of *Leach (No 3)* for prosecuting authorities**

The decision analyses, at length, the following principles that can be 'distilled' from the relevant authorities on this issue and which prosecuting agencies need to have regard to (subject, of course, to the statutory context in which a prosecution is brought):<sup>16</sup>

1. *'The prosecution ought not be provided with, or make any use of, any evidence or information from compelled evidence which may tend to show that any documents or transactions, apparently regular on their face, in fact tend to support the charges;*
2. *The prosecution ought not be provided with, nor make any use of, any defences disclosed by the accused by compelled evidence;*
3. *The evidence which the prosecution is to call is not to be influenced by compelled evidence;*
4. *The accused can decide the course he or she will adopt at trial and answer to the charge only according to the strength of the evidence able to be led by the prosecution at the trial unaided by any of the above matters;*
5. *The accused is not to be compromised by the unlawful subsequent use by the prosecutor of compelled evidence;*
6. *The prosecutor must prove the guilt of the accused and the accused may not be by compelled evidence, forced in any way, to confess his or her guilt; and*
7. *Consequently, the process for investigation, charge, prosecution and trial of the indictable offence is entirely accusatorial.'*

**For further inquiries or assistance, please contact Sarah Ford, Senior Associate, Gilshenan & Luton Legal Practice on 3361 0240 or [sford@gnl.com.au](mailto:sford@gnl.com.au)**

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<sup>15</sup> Ibid at [349].

<sup>16</sup> Ibid at [274].