SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**R v Collaery (No 8)**
Citation:	**[2020] ACTSC 200**
Hearing Date:	25 May 2020
Decision Date:	25 May 2020 (ruling) and 26 May 2020 (reasons)
Before:	Mossop J
Decision:	Rule that ss 24 and 25 apply to the hearing under s 27(3).
Catchwords:	**NATIONAL SECURITY** – STATUTORY INTERPRETATION – Section 27(3) hearing under the *National Security Information (Criminal and Civil Proceedings Act) 2004* (Cth) – where there will be disclosure of national security information – whether ss 24 and 25 of the Act apply to the hearing – whether the hearing is a "federal criminal proceeding" under the Act – it is – ss 24 and 25 apply
Legislation Cited:	*Acts Interpretation Act 1901* (Cth), s 15AA *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s 111 *Judiciary Act 1903* (Cth), s 79 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), ss 13, 14, 15A, 19, 21, 22, 24, 25, 26, 27(3), 31
Parties:	The Queen (Crown) Bernard Collaery (Defendant)
Representation:	**Counsel** R Maidment QC and C Tran (Crown) P Boulton SC, C Ward SC and R Khalilizadeh (Defendant) J Kirk SC, A Mitchelmore SC, T Begbie and D Forrester (Attorney-General (Cth)) **Solicitors** Commonwealth Director of Public Prosecutions (Crown) Gilbert + Tobin (Defendant) Australian Government Solicitor (Attorney-General (Cth))
File Number:	SCC 195 of 2019

MOSSOP J:

Introduction

1. At the commencement of the hearing under s 27(3) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act), Senior Counsel for the defendant sought a ruling as to whether ss 24 and 25 of the NSI Act applied during the

hearing. Those sections set out the procedure to be adopted where a party anticipates that there will be a disclosure of "national security information", as defined in the Act. Senior Counsel anticipated that, if those sections applied, then, in the absence of orders under s 22 of the NSI Act, the sections would be triggered by his cross-examination of the witnesses called by the Attorney-General. In my view that was likely, because the nature of cross-examination of those witnesses would almost inevitably go beyond the information disclosed in their affidavits and hence go beyond the scope of the existing s 22 orders.

2. This was an issue which had been the subject of correspondence between the parties prior to commencement of the hearing. This correspondence led to the Attorney-General suggesting that s 22 orders be made which would, except in particular circumstances, permit cross-examination to proceed without triggering ss 24 or 25. Senior Counsel for the defendant indicated that, if it was necessary, the defendant would reach an agreement with the other parties which would permit the court to make orders under s 22, but would only do so if that course was legally necessary. The defendant contended that it was not legally necessary because the hearing under s 27(3) was not a "criminal proceeding" within the meaning of s 13 of the NSI Act. If the hearing was not a "criminal proceeding", then it was not a "federal criminal proceeding" to which ss 24 and 25 applied.

3. Sections 13 and 14 of the NSI Act provide:

> **13 Meaning of criminal proceeding**
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> (1) In this Act, criminal proceeding means a proceeding for the prosecution, whether summarily or on indictment, of an offence or offences.
>
> (2) To avoid doubt, each of the following is part of a criminal proceeding:
>
> (a) a bail proceeding;
>
> (b) a committal proceeding;
>
> (c) the discovery, exchange, production, inspection or disclosure of intended evidence, documents or reports;
>
> (d) a sentencing proceeding;
>
> (e) an appeal proceeding;
>
> (f) a proceeding with respect to any matter in which a person seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth (within the meaning of subsection 39B(1B) of the Judiciary Act 1903) in relation to:
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> (i) a decision to prosecute a person for one or more offences against a law of the Commonwealth; or
>
> (ii) a related criminal justice process decision (within the meaning of subsection 39B(3) of that Act);
>
> (g) any other pre-trial, interlocutory or post-trial proceeding prescribed by regulations for the purposes of this paragraph.
>
> (3) To avoid doubt, a re-trial, and proceedings relating to the re-trial (including those mentioned in subsection (2)), are part of the same criminal proceeding as the trial.

14 Meaning of federal criminal proceeding

In this Act, federal criminal proceeding means a criminal proceeding in any court exercising federal jurisdiction, where the offence or any of the offences concerned are against a law of the Commonwealth.

4. No regulations have been made for the purposes of s 13(2)(g).

Submissions

5. Senior Counsel for the defendant, Mr Boulton, submitted that not every hearing related to a prosecution fell within the scope of s 13(1). He submitted that if it were to apply then this would lead to a degree of circularity because, if notice was required to be given during the course of the s 27(3) hearing, then that in turn would give rise to the possibility of a certificate under s 26 and hence the necessity to conduct a further hearing under s 27(3) within the existing hearing under that subsection. He submitted that there was no guidance in the NSI Act as to how this issue should be addressed.

6. He accepted that, because s 19 operates only within a "federal criminal proceeding", the general power to make orders relating to the disclosure, protection, storage, handling or destruction of national security information would, on his interpretation, have no application. He submitted that any issues relating to the nondisclosure of answers given during the course of cross-examination would need to be dealt with pursuant to the court's inherent powers or, alternatively, pursuant to statutory powers outside the scope of the NSI Act.

7. Ms Mitchelmore, who argued the point for the Attorney-General, submitted that the text and context of ss 24 and 25 indicated that the provisions would apply to the s 27(3) hearing. She submitted that it was not open to rely upon the terms of s 13(2) in order to establish a negative implication about the scope of s 13(1), in circumstances where s 13(1) was in general terms and s 13(2) was an inclusive subsection only included for the avoidance of doubt. She made reference to the terms of ss 19, 21, 24, 25 and 31. She identified that, for the purposes of the s 27(3) hearing, any disclosure of additional national security information did not necessarily require the making of a s 26 certificate and holding a s 27(3) hearing. She submitted that such disclosure could be dealt with by an agreement and the making of orders under s 22 or, alternatively, by a decision by the Attorney-General not to make a certificate under s 26. This latter course would be made easier if, once the issue arose, the court made orders under s 19 in relation to that information. In any event, she submitted that any practical difficulties that would arise in the conduct of the hearing were not an answer to the question of construction.

Reasons

8. Following the conclusion of the argument, I ruled that ss 24 and 25 did apply to the conduct of the hearing under s 27(3). I reserved my reasons. These are my reasons.

9. The definition in s 13(1) is one which relies upon the purpose of the proceeding. That is made clear by the use of the word "for" in the expression "a proceeding for the prosecution … of an offence or offences".

10. The s 27(3) hearing is clearly a proceeding for the prosecution of Mr Collaery. Whilst it does not itself constitute the trial of the allegations before a jury, it is clearly a proceeding necessary for, and for the purpose of, the prosecution of Mr Collaery. That is because it is a step along the way to the conduct of such a trial.

11. The definition of "criminal proceeding" must be considered in the context of the NSI Act as a whole, which makes a binary distinction between criminal proceedings and civil proceedings. Any proceeding which is not a criminal proceeding is a civil proceeding: see s 15A. In that context, it makes sense that an interlocutory process required as a necessary step for the purposes of the trial of an accused on criminal charges be characterised as a criminal proceeding.

12. I accept the submission made on behalf of the Attorney-General that it is not possible to use a provision such as s 13(2), which is included "To avoid doubt", to create a negative implication as to the content of the term defined in s 13(1).

13. This interpretation of the scope of "criminal proceeding" and hence "federal criminal proceeding" is consistent with the scheme of the NSI Act. Sections 24 and 25 apply in federal criminal proceedings. Where under s 26 a nondisclosure certificate is issued, the obligation to hold a hearing under s 27(3) arises. Section 27(3) applies "in a federal criminal proceeding" where such a certificate has been issued. The s 27(3) hearing leads to orders made under s 31. An order under s 31 is an order which then operates in relation to those federal criminal proceedings to regulate the disclosure of the information the subject of the certificate.

14. The effect of the interpretation contended for by the defendant would be that, notwithstanding that the proceedings prior to the s 27(3) hearing and following the hearing and the making of orders under s 31 were federal criminal proceedings, the hearing itself was not a "federal criminal proceeding" and hence not caught by the obligations in ss 24 and 25. It might be plausible to suggest that the regime in ss 24 and 25 ceased to have effect in a s 27(3) hearing if, at that point, control upon the disclosure of information shifted decisively from the Attorney-General to the court. However, the plausibility of that suggestion is denied by the fact that, if the proceedings under s 27(3) were not federal criminal proceedings, then the general power of the court under s 19 of the Act to make orders in relation to the disclosure, protection, storage, handling or destruction of national security information would not exist during the s 27(3) hearing. That is because the powers in s 19 are qualified so that they only exist in a "federal criminal proceeding". Therefore, if the defendant's submissions were correct then there would be no source of power within the NSI Act itself to regulate new disclosures of national security information in the proceedings and, instead, the court would have to rely upon its inherent powers to control the proceedings and other statutory provisions picked up by s 79 of the *Judiciary Act 1903* (Cth), such as s 111 of the *Evidence (Miscellaneous Provisions)) Act 1991* (ACT). Having regard to the overall purpose of the NSI Act that is not an interpretation which would best achieve the purpose or object of the Act: *Acts Interpretation Act 1901* (Cth) s 15AA.

15. While the operation of ss 24 and 25 does have potential to interfere with cross-examination in a case such as this, it is open to limit the extent of any difficulties by the making of orders under s 22 or by the combination of orders under s 19 and a decision by the Attorney-General under s 26(7). That will not avoid the process being a cumbersome one in certain possible scenarios, but the existence of those possible circumstances is not sufficient to compel an interpretation other than the one that I have reached, having regard to the text and structure of the legislation.

16. I note that, following the making of my ruling, the defendant sensibly agreed to the making of orders under s 22 which would minimise, if not eliminate, the scope of difficulties that may arise by reason of the operation of ss 24 and 25.

I certify that the preceding sixteen [16] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Mossop.

Associate:

Date: 29 July 2020