LICENSING COURT OF SOUTH AUSTRALIA

SULLIVANS HOTEL PTY LTD T/AS ROBE HOTEL & RYAN HUGHES, AMELIA COOPE AND DAVID MURCH

JURISDICTION: S 120 Disciplinary Complaint

FILE NO: 3869, 3870, 3871 and 3873 of 2016

HEARING DATE: 21 March 2017

JUDGMENT OF: His Honour Judge Gilchrist

DELIVERED ON: 11 May 2017

VOIR DIRE ADMISSION OR REJECTION OF EVIDENCE OF ADMISSIONS ALLEGEDLY UNFAIRLY OBTAINED

Complaint has been laid against various entities in connection with the alleged sale and supply of liquor to an intoxicated person - Application by the respondents to exclude evidence of admissions contained in the transcripts of interviews that were conducted under inadequate cautions - Whether the discretion to exclude evidence unfairly obtained applies in disciplinary proceedings - ***Held*** *that even if it does the discretion is not enlivened in this case - S 23, 118, 122 Liquor Licensing Act 1997.*

Police v Gardner, Selleck and Firstlite Pty Ltd (Unreported delivered 11 November 2013)
Reid v Howard [1995] HCA 40; (1995) 184 CLR 1
Slatterie v Pooley (1840) 6 M & W 665; [1840] EngR 227; 151 ER 579
Tofilau v The Queen [2007] HCA 39; (2007) 231 CLR 396
R v Kageregere [2011] SASC 154
Mazinski v Bakka (1979) 20 SASR 350
Bilac v WorkCover/Allianz Australia (Silver Fleece Knitting Mills Pty Ltd) [2003] SAWCT 82
Weaver v NSW Law Society [1979] HCA 35; (1979) 142 CLR 201
Law Society of SA v Jordan (1998) 198 LSJS 434
Medical Board of SA v Tan (No 1) [2000] SADC 144
Rich v Australian Securities and Investments Commission [2004] HCA 42; (2004) 220 CLR 129
Police Service Board v Morris (1985) 156 CLR 307
Herron v McGregor (1986) NSWLR 246
Bunning v Cross [1978] HCA 22; (1978) 141 CLR 54

Department of Primary Industries v Duong [2013] SASC 25
R v Swaffield [1998] HCA 1; 192 CLR 159

REPRESENTATION:

Counsel:
Applicant: Brevet Sergeant M Osterstock
Respondent: Mr J Firth
Solicitors:
Applicant: Commissioner of Police
Respondent: Gilchrist O'Connell

1 On 3 August 2016 the police filed complaints against Sullivans Hotel Pty Ltd, Euralia Pastoral No 2 Pty Ltd, Mr Cyril Lampard, Ms Irene Toohey, Ms Irene Hann, Mr Colin Hann and Ms Deborah Hann trading as the Robe Hotel, Mr Ryan Hughes, Ms Amelia Coope and Mr David Murch contending that all are properly the subject of disciplinary action pursuant to the *Liquor Licensing Act 1997*.

2 Underpinning the complaints is an allegation of the supply of liquor at the Robe Hotel to an intoxicated patron on Saturday 7 November 2015. The patron subsequently died as a result of injuries that he received in a motor cycle accident that happened shortly after he left the hotel.

3 Following the accident the police conducted extensive investigations that included interviews with Mr Hann, Mr Hughes, Ms Coope and Mr Murch.

4 The police wish to rely upon the transcripts of these interviews in connection with the disciplinary proceedings against these individuals.

5 Mr Hann and the others oppose this. They contend that they were not appropriately cautioned and that the transcripts of their interviews should therefore be excluded.

6 Mr Hann is a director of one of the corporate entities that operates the Robe Hotel. He was at all relevant times the Robe Hotel's licensee manager. The police allege that he served the intoxicated patron. He was interviewed by police on 12 November 2015. He was told at the outset that the interviewing officers were from the Liquor Enforcement Branch. He was told that he was to be asked some further questions and was then told:

> "…you're not obliged to answer them but anything you do say will be recorded and given in evidence…"

7 Most of the questions that he was asked concerned issues of training of staff in connection with risk minimisation. During the course of the interview, albeit towards the end of it, he was told that the police intended to take disciplinary action against the hotel in connection with a Code of Practice breach.

8 Ms Coope was at the relevant time a duty manager at the hotel. She was interviewed on 12 November 2015 and was informed at the outset that the interviewing officer was from the Liquor Enforcement Branch. She was told:

> "For the purpose of this conversation we need just to remind you that the video recorder is on. I am going to ask you some questions in relation to an incident and some occurrences at the Robe Hotel

> on the seventh of November, last Saturday. You're not obliged to answer my questions, but [sic] you do say is being recorded and may be given in evidence, do you understand that?"

9 She was asked questions about what she did at work on the day and of the dealings she had with the patron and how he seemed. She was asked some questions about the training that she had received.

10 Ms Coope was re-interviewed on 21 December 2015. She was again told at the outset that the interviewing officers were from the Liquor Enforcement Branch. She was then told:

> "I'm going to ask you some more questions, ah, as a result of further investigations that we've made. You don't have to answer my questions, anything that you do say is being recorded and may be used in evidence at a later date, do you understand that?"

11 She was asked some more questions about her dealings with the patron and how he seemed. It was then put to her that there seemed some discrepancy between what she observed and the patron's alcohol reading. There was then some discussion about the virtues of CCTV and about her training and that maybe some refresher training might be helpful.

12 The interview concluded with her being told that the purpose of the interview was to make her aware of what had happened in connection with the investigation, to inform her of the new information and to give her an opportunity to respond to it. It was never suggested to her at any time that she might be the subject of any action.

13 Mr Hughes was at the relevant time a manager of the hotel. He was interviewed on 12 November 2015. He was informed at the outset that the interviewing officer was from the Liquor Enforcement Branch. He was told:

> "For the purpose of this conversation the video recorder has been activated. I am going to ask you some questions in relation to the events surrounding the Robe Hotel on the seventh of November of this year, last Saturday. You don't have to answer my questions, but anything you do say is being recorded and may be given in evidence. Do you understand that?"

14 He was asked about his background in the industry. He was then asked about the events of 7 November 2015 and of his dealings with the hotel's patrons that day and in particular the patron who later died. He was then asked some questions about the hotel's training in the responsible service of alcohol.

15 Mr Hughes was re-interviewed on 21 December 2015. He was again told at the outset that the interviewing officers were from the Liquor

Enforcement Branch. The police referred to the earlier interview and Mr Hughes was then told:

> "At the Robe Police Station and during the conversation, we did it on video, and I gave you a caution that you didn't have to answer anything and anything that you did say was being recorded and may be used in evidence…Ok, that applies to this conversation, so just so we are absolutely clear you don't have to answer any of my questions or have any responses to anything said but anything you do say is be (sic) recorded and may be given in evidence."

16 He was asked whether he had learnt anything since they last spoke. He was then asked some questions about his dealing with the patron. He was advised of the patron's alcohol reading, which was very high, and he was asked how he might have got in such a state. There was then a discussion about the virtues of CCTV. They then had a conversation around the meaning of intoxication and the interview concluded. It was never suggested to him at any time that he might be the subject of any action.

17 Mr Murch was at all relevant time a casual barman at the hotel. He interviewed on 12 November 2011. He was told at the outset that the interviewing officers were from the Liquor Enforcement Branch. He was then told:

> "Um the video recorder is activated now you don't have to answer my questions but anything you do say is being recorded and may be used in evidence do you understand that?"

18 He was asked about his training. He was then asked about the events of 7 November 2015 of what he did at work that day and of his dealings with the patron.

19 Mr Murch was spoken to again on 21 December 2015 and was told:

> "… this is a follow up interview from our previous interview um as I sated last time you're not obliged to answer any of the questions or anything I put to you today and anything you do say is being recorded and may be given in evidence. Do you understand that still applies?"

20 Most of the questions focussed on his work that day and he was invited to comment on the anomaly in connection with the patron's high reading. It was never suggested to him at any time that he might be the subject of any action.

The issue

21 As a general proposition evidence of what one person reports as to what another person has said is inadmissible because it cannot be assumed

> what the first person said is true and without them being cross-examined about it the person's truthfulness cannot be tested. The receipt into evidence of an admission made by a party to proceedings that is against interest is an exception to the hearsay rule. The rationale for admitting such evidence is that it can be presumed that the party would not have made an admission against interest unless it were true.[1]

22 This of course assumes that that the account of what was said is accurate and that the admission was voluntary. The accuracy of the account of what was said is not an issue in this case. An admission that is not voluntary in the legal sense is inadmissible because the presumption that what was said is true cannot be made. Again, that is not an issue in this case.

23 In the criminal law the rules regarding the receipt into evidence of admissions against interest are not limited to enquiring whether the account is accurate and the admission is voluntary. An admission can satisfy these requirements but a court may nevertheless resolve not to receive the evidence.

24 Gleeson CJ summarised the law in connection with this in *Tofilau v The Queen.*[2] He explained that a court has the discretion to not admit evidence of admissions against interest where it would be unfair to the accused because the admission has been made in circumstances where the rights and privileges of the accused person have been compromised; where the admission has been made in circumstances tainted by improper police conduct in which case considerations of public policy might lead the court to conclude that it is unacceptable to admit the statement; and in cases where the court finds that its prejudicial effect in the sense of the danger of its misuse, outweighs its probative value. These categories are not mutually exclusive.

25 In *R v Kageregere*,[3] Kourakis J (as he then was) spoke of the discretion in terms of striking the balance between the public interest in the efficient police investigation of offences and the competing public interest in fair trials. He described it as an "evaluative judgment" that took into account "the extent to which the interviewee's capacity to choose has been compromised, the likelihood … that he or she would be prosecuted" and whether there was any and if so what "impropriety associated with the questioning and the reliability of the statement".

26 The issues in this case is whether the discretion applies to these proceedings, given that they are not criminal proceedings, and if it does,

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[1] *Slatterie v Pooley* (1840) 6 M & W 665, 669; [1840] EngR 227; 151 ER 579, 581.
[2] [2007] HCA 39; (2007) 231 CLR 396.
[3] [2011] SASC 154.

whether in the circumstances of this case it should be invoked to exclude the admissions.

27 The arguments put forward by Mr Hann and the others are as follows.

28 They submitted that there was no doubt that when the police were conducting these interviews they were exercising the powers conferred by s 122 of the Act. That section provides amongst other things that an authorised officer may require any person who is in a position to provide information relating to the sale, purchase or supply of liquor, to answer any questions put by the authorised officer on that subject. It also makes it an offence for a person to fail without reasonable excuse to answer to the best of the person's knowledge information and belief, a question put by an authorised officer. Section 122(4) provides that "A person may decline to answer a question put under this section if the answer would tend to incriminate the person of an offence."

29 They said that the police should have informed them at the outset that they were being interviewed in accordance with the powers conferred by s 122 of the Act; that they might be the subject of a charge of sale or supply of liquor to an intoxicated person; and that they were obliged to be advised as follows:

> "You are required to answer these questions and it is an offence not to do so unless you believe you have a reasonable excuse. A reasonable excuse includes, but is not limited to, an answer which may tend to incriminate you of an offence."

30 They said that this was required because without it, they were not in a position to make a genuinely informed choice as to whether to speak or to remain silent.

31 They rely upon the judgment of Magistrate Fahey in *Police v Gardner, Selleck and Firstlite Pty Ltd*[4] where in connection with a very similar matter involving similar cautions, he held in connection with a criminal prosecution that the statements should be excluded.

32 That case concerned a prosecution in connection with the sale of liquor to an intoxicated person, a Mr Short. On 30 April 2011, Mr Short consumed numerous drinks at the Crown Inn Hotel at Kingston. He was clearly intoxicated and was taken to a room in the hotel to sleep off his intoxication but sadly died during the night. On the following day Mr Gardner and Ms Selleck were interviewed by the police and no warning was given. It would seem that they thought they were making the statements as potential witnesses in connection with an expected Coronial Inquest. Without notice the police later attended the Crown Inn

[4] Unreported delivered 11 November 2013.

Hotel on 1 June 2011 and asked to have a "private chat" with Mr Gardner. The private chat was in fact a formal interview. After the interview was completed the police asked to speak with Ms Selleck. Although the police had possession of the transcripts of the prior interviews they were not provided to Mr Gardner and Ms Selleck. Prior to the second interview the police did not inform Mr Gardner and Ms Selleck that they were not being treated as simply witnesses, but rather they were being treated as suspects for an offence. At the time of the second interview each received a caution in the general terms: "I'm going to ask you some further questions you are not obliged to answer them but anything you do say may be taken down and given in evidence."

33 The Magistrate viewed the video on the interview and found that Ms Selleck appeared nervous and uncomfortable during the interview. He found that her will in connection with making admissions was overborne. He came to a similar conclusion in respect of Mr Gardner. In respect of the latter he was concerned that the questioning by the police commenced with the invitation to have a private chat.

34 Following a voir dire the learned Magistrate declined to receive into evidence the transcripts of interviews of Mr Gardner and Ms Selleck. Although the Magistrate used the expression "will was overborne" a reading of his judgment as a whole indicates that he did not conclude that the admissions were involuntarily made. He declined to receive the evidence because he concluded that the circumstances surrounding the obtaining of the admissions were unfair.

35 They submit that the decision is significant in two respects.

36 First, that it establishes that the caution used here is inadequate and that in connection with these proceedings I should follow the approach used in criminal proceedings and come to the same conclusion as the Magistrate and refuse to admit the evidence.

37 Second, that I should find that in light of the fact that the officers from the Liquor Enforcement Branch are continuing to use a caution similar to that criticised by the Magistrate in that case, it is apparent that the officers have not responded to that criticism. As I understand it they contend that this Court should exercise its discretion to exclude the evidence to fortify that criticism.

38 They submitted that what is at stake here is the fundamental privilege against self-incrimination and that it is a substantive right of universal application that is not limited to criminal proceedings.

39 In support of this submission reference was made to the joint judgment of Toohey, Gaudron, McHugh and Gummow JJ in *Reid v Howard* where their Honours said:

> "There is simply no scope for an exception to the privilege, other than by statute. At common law, it is necessarily of general application - a universal right which, as Murphy J pointed out in *Pyneboard Pty Ltd v Trade Practices Commission*, protects the innocent and the guilty. There is no basis for excepting any class or category of person whether by reference to legal status, legal relationship or, even, the offence in which he or she might be incriminated because, as already indicated, its purpose is the completely general purpose of protecting against 'the peril and possibility of being convicted as a criminal'. For the same reason, there can be no exception in civil proceedings, whether generally or of one kind or another. Moreover, it would be anomalous to allow that a person could refuse to answer questions in criminal proceedings or before investigative bodies where the privilege has not been abrogated if that person could be compelled to answer interrogatories or otherwise make disclosure with respect to the same matter in civil proceedings."[5] (footnotes omitted)

40 The police contended that there is no unfairness. Next they said that in any event, because these are disciplinary proceedings, which have as their focus the protection of the public, I should not be too concerned about the issues of fairness that the respondents have raised. They submitted that I could be comforted by the fact that s 23(b) of the Act declares that the Court is not bound by the rules of evidence but may inform itself on any matter as it thinks fit. They submit that the evidence is probative and should be admitted into evidence.

Analysis

41 A survey of the cases indicates that a powerful factor that has influenced the common law development of the discretion in criminal cases to decline to admit admissions against interest is the perceived need to express judicial condemnation of unfair police practices, especially when what is involved is a deliberate course of action which might to lead to widespread and arbitrary infringements on civil liberties, statutory rights or common law privileges, such as the right against self-incrimination.

42 Whether the same discretion applies in connection with these proceedings, given that are not criminal proceedings is a vexed question.

43 In *Mazinski v Bakka*,[6] King CJ expressed the view that the courts should seriously consider assuming the discretionary power in civil cases.

[5] [1995] HCA 40 at para 15; (1995) 184 CLR 1 at 14.
[6] (1979) 20 SASR 350.

However Wells J, with whom White J agreed, stated that there was no such general discretion in civil cases to exclude admissible evidence. Wells J said that the only qualification was that a court exercising civil jurisdiction court could reject the evidence where it was obtained "by means of conduct that was deliberately and cynically criminal or otherwise outrageous", by employing its residual power to prevent an abuse of its processes.[7]

44 In *Bilac v WorkCover/Allianz Australia (Silver Fleece Knitting Mills Pty Ltd)*[8] Auxiliary Justice Olsson surveyed a number of cases on this issue discussed this issue and I think a fair summation is that in connection with civil cases, the need to express judicial condemnation of unfair practices in connection with the gathering of evidence is not a relevant factor in terms of admissibility, unless the conduct involved is so egregious as to compromise the integrity of the court if the evidence is allowed to be tendered.

45 It would follow that if these proceedings were to be regarded as akin to civil proceedings the discretion as it applies in criminal matters would not apply.

46 The difficulty is that disciplinary proceedings are neither criminal nor civil. They are sui generis,[9] that is to say they are a unique genre of proceedings. It is settled law that a court or tribunal dealing with such proceedings may resolve issues in a way that might not conform to approaches that would apply in ordinary adversarial proceedings.[10]

47 It follows that it is not simply a matter of classifying the proceedings as criminal or civil. The Court must determine for itself the scope of the discretion.

48 Although this Court has been at pains to stress that in the exercise of its disciplinary jurisdiction the Court is not meting out punishment, there is no getting away from the fact that the orders of the Court can have very negative consequences for those who are the subject of disciplinary action.[11] It is therefore tempting to think that this provides a compelling reason to adopt the approach taken in criminal proceedings in connection with determining the admissibility of confessions.

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[7] Above cited at 381.
[8] [2003] SAWCT 82.
[9] See *Weaver v NSW Law Society* [1979] HCA 35 at para 13; (1979) 142 CLR 201 at 207 per Mason J: *Law Society of SA v Jordan* (1998) 198 LSJS 434 at 465 per Doyle CJ; and *Medical Board of SA v Tan (No 1*) [2000] SADC 144 at para 29 per Chief Judge Worthington, Members Heysen, Pickering and Chessell.
[10] *Law Society of SA v Jordan* (1998) 198 LSJS 434 at 465 per Doyle CJ.
[11] In *Rich v Australian Securities and Investments Commission* [2004] HCA 42 at para 41; 220 CLR 129, McHugh discussed striking similarities between the approach to sentencing in the criminal law and the fashioning of a sanction in connection with disciplinary proceedings.

49 That said, there are important differences. Criminal proceedings deal with crimes and their focus is to bring those who commit crimes to justice and to punish them for doing so. In contrast to this, disciplinary proceedings deal with misconduct and in the context of the Act their focus is to protect the public from the misconduct of those who fall within the reach of s 118. This distinction is not merely a matter of words. It is real.[12] Importantly, the police have put on the record that they will not be charging any of the interviewees in connection with this matter. In cases where it is clear that the disciplinary proceedings are the sole proceedings and that a prosecution will not follow,[13] I think that the public interest in being protected by the misconduct of those covered by the Act generally trumps the competing public interest of the respondents being treated fairly.

50 This suggests to me that in such cases the need to express judicial condemnation of unfair practices in connection with the gathering of evidence is not a relevant factor in determining whether to receive evidence of admissions against interest in disciplinary proceedings before this Court, unless the conduct of the police is of the type discussed by Wells J in *Mazinski v Bakka*.

51 The conduct of the interviewing officers in this case could not be so described. It follows that the application to exclude the evidence should be refused.

52 In case I am wrong in concluding that the discretion as it applies in criminal cases does not apply, I will now determine whether, if it did apply, it would result in the admissions being excluded.

53 It is understandable why the Magistrate in *Police v Gardner, Selleck and Firstlite Pty Ltd* reached the conclusion that he did. Albeit that they received a form of caution when they were later interviewed, Mr Gardner and Ms Selleck could have been excused for thinking that the further interview was still in the context of their belief that they were potentially witnesses in an upcoming Coronial Inquest. The Magistrate found that the purpose of the later interviews was to obtain evidence in connection with a proposed prosecution of the persons being interviewed. It is implicit that the Magistrate concluded that in light of the earlier interview, Mr Gardner and Ms Selleck needed to be alerted to the purpose of the later interview when it commenced and that the caution given did not achieve that result.

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[12] See, for example: *Police Service Board v Morris* (1985) 156 CLR 307 at 403 per Gibbs CJ.

[13] For the reasons explained by McHugh JA in *Herron v McGregor* (1986) NSWLR 246 the position might well be otherwise if a prosecution might follow. It might be that the police should be required to declare whether they will not subsequently prosecute and that if they do not do so the disciplinary proceedings should be stayed until the prosecution has been completed.

54 There is no hint in any of the transcripts that any of the interviewees under consideration here, were being interviewed in connection with their potential prosecution for a criminal offence. None of them could have been reasonably expected to have been aware of that possibility. As such, if the police wished to rely upon admissions made in those interviews for the purposes of prosecuting an interviewee, there would be a compelling argument that it would be unfair of them to do so, and that the admissions should therefore in the exercise of the court's discretion be excluded as happened in *Police v Gardner*.

55 Similar considerations would also apply in connection with a prosecution following this disciplinary action.[14]

56 As it is, as indicated above, the police have not and have made it clear that they will not be charging any of the interviewees in connection with this matter in the future. This is significant because it provides a clear point of distinction to the issue at stake in *Reid v Howard.* It also significant bearing in mind what Kourakis J said in *R v Kageregere*.[15]

57 It is particularly significant in the case of Mr Hann, because it reveals that there is no sense of unfairness in connection with his interview, the caution he was given, and the circumstances surrounding his admissions against interest.

58 He was responsible for the running of the hotel. He knew from the outset that he was being interviewed by officers of the Liquor Enforcement Branch. He was told that he was not obliged to answer the questions that were to be asked and he was told that what was being said was being recorded and may be given in evidence. In the circumstances, I struggle to see how he could not have failed to appreciate that the purpose of the interview was to extract information from him about the supply of liquor to an intoxicated person, not in the context of a Coronial Inquest, or in connection of some other potential proceeding, but rather in connection with the hotel's role in how that supply came to be. The advice that the recording could be used in evidence could only reasonably be taken by him as meaning as against the hotel. His reaction when he was told that disciplinary action was being taken against the hotel is telling. He having observed that there were procedures at the hotel that needed rectification, he made no complaint when he was told that such action would be taken. There is no hint that he was in any way surprised. Having read and re-read the transcript of his interview, I did not get any sense of trickery or subterfuge or that the interviewing officer flagrantly or deliberately ignored Mr Hann's common law and statutory rights. To the contrary,

[14] *Herron v McGregor* (1986) NSWLR 246.
[15] [2011] SASC 154.

when read as a whole, my sense of it is that Mr Hann was well aware as to where the interview was heading.

59 The position in respect of the other interviewees is a little different and the position is not so clear.

60 Even though all were told that they were being interviewed by the Liquor Enforcement Branch, I do not think that they, as a casual barman, (Mr Murch) a duty manager, (Ms Coope) and a hotel manager, (Mr Hughes) can necessarily be taken to have understood that when the police talked about the recording of their answers being used as evidence, that it was contemplated by them that it was evidence that could be used against them personally. They could have been excused for thinking that the police meant that it could be used as evidence in connection with a Coronial Inquest, or in connection with some other potential proceeding against another entity.

61 I suspect that the police may have contemplated laying a complaint for disciplinary action against them before the interviews commenced. I think it is likely and I so find that they did so before the interviews were completed. If the police were being scrupulously fair, they should have informed the interviewees of that fact as soon as the possibility of potential disciplinary action loomed. Thus there is an element of unfairness surrounding the making of the admissions.

62 But the mere fact of an element of unfairness is not of itself, enough. What is required is the exercise of the evaluative judgment that Kourakis J spoke of in *R v Kageregere*.

63 The evidence falls well short of establishing that the failure of the police to be scrupulously fair and their failure to give an exemplary caution was as the result of a calculated disregard of the rights of the interviewees or their defiance to the approach by the Magistrate in *Police v Gardner*. It cannot be said that the circumstances in which the admissions were made were so unfair as to demean the integrity of this Court if the evidence of the admissions was received.[16]

64 To put it another way, and to adopt the words used in *R v Swaffield*, taking into account all of the circumstances of the case, the admission of this evidence and the fact that it may contribute to a finding that it is appropriate to take disciplinary action against Mr Murch, Ms Coope and Mr Hughes, does not come at a price which is unacceptable, having regard to contemporary community standards.[17]

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[16] *Bunning v Cross* [1978] HCA 22; (1978) 141 CLR 54 at 78 per Stephen and Aitken JJ.
[17] [1998] HCA 1; 192 CLR 159 at para 69.

Conclusion

65 I refuse the application to exclude the evidence of the transcripts of interviews.