R v ELLIOTT*

Few, if any, exercises of judicial discretion have been as widely reported or publicly discussed as Vincent J's exclusion of virtually the entire prosecution case in the recent Supreme Court trial of John Elliott, Peter Scanlon and Kenneth Biggins. In the main, however, interest in the case has focused on those aspects which gave the case its notoriety, rather than on the actual rulings and their significance for the law of evidence. This note attempts to fill this gap by examining two of Vincent J's rulings, both of which may have significant implications for the admissibility of statements made by accused persons in criminal proceedings and for the admissibility of unlawfully obtained evidence. The note begins, however, by setting out the background to these rulings, in particular the history of the investigation.

I THE INVESTIGATION

A *The National Crime Authority*

The National Crime Authority ('the NCA') was established by the National Crime Authority Act 1984 (Cth) ('the Act'). The Act arms the NCA with special investigative powers beyond those enjoyed by other criminal law enforcement bodies and, in particular, gives the NCA the power to compel a person to appear at a hearing before the Authority. Any such person can then be compelled to produce documents, take an oath or make an affirmation, and answer questions put to him or her.[1] These provisions of the Act effectively abolish the right of silence in hearings before the NCA.

The Act does, however, retain the privilege against self-incrimination in these hearings, allowing a person to refuse to answer questions or to produce documents on the grounds that the response might tend to incriminate him or her.[2] There are, of course, considerable differences between the privilege against self-incrimination and the right to silence. The former can only be claimed on a question by question basis, and only when the answer might tend to incriminate. The right to silence can be claimed globally and regardless of whether the answers to the questions might incriminate. A person being investigated by the NCA is, therefore, at a significant disadvantage in comparison to a person being investigated by a law enforcement body without the NCA's coercive powers.

Under the scheme created by the Act, however, the NCA's special coercive powers can only be used for the purposes of a 'special investigation'.[3] Such an investigation can only be conducted if a 'matter' has specifically been referred to

* (Supreme Court of Victoria, Vincent J, 6 May 1996 and 21 August 1996) ('*Elliott*').

1 National Crime Authority Act 1984 (Cth) ss 28–30.

2 Ibid s 30(4).

3 Ibid s 4(1).

the NCA by the Commonwealth Attorney-General, after consultation with his or her State and Territory counterparts.[4] Any notice referring a matter to the NCA must, among other things, 'describe the general nature of the circumstances or allegations constituting the relevant criminal activity'.[5] These limitations are placed on the NCA's coercive powers to prevent the NCA from being 'able to roam at will over the whole field of its jurisdiction, without having to justify its investigations to those politically accountable'.[6]

In short, the requirement of a reference is seen as one of the most important checks on the NCA's coercive powers; indeed, it was the narrowness of the reference in the *Elliott* case which ultimately brought the prosecution to an end. The Commonwealth legislation has been supplemented by equivalent legislation at the State level, empowering the NCA to investigate offences against the laws of a State when requested to do so by the relevant State minister.[7] In the *Elliott* case, for example, the NCA received references from the Commonwealth Attorney-General, but also from the Victorian and South Australian Attorneys-General to investigate possible offences under state legislation.

B *Operation Albert*

The NCA's investigation into the affairs of Elders IXL was the result of an approach made by Mr Peter Faris QC, then Chairman of the NCA, to the National Companies and Securities Commission ('the NCSC') in November 1989. The NCA had decided to take on a small number of significant cases involving white collar or corporate crime, and to that end, sought the referral from the NCSC of one or more appropriate cases. The NCSC at that time had more such cases than it could cope with. Therefore, in a letter to Faris dated 16 November 1989, Mr Henry Bosch, then Chairman of the NCSC, suggested that the NCA might be interested in investigating 'the way in which some directors of Elders IXL have gained effective control of one of Australia's major companies'.[8] The NCA accepted the offer, code-naming their investigation 'Operation Albert'.

To be able to exercise its special investigative powers, the NCA sought — by means of a written submission dated 19 December 1989 — a reference from the Commonwealth Attorney-General. The submission provided the following 'Details of Relevant Criminal Activity':

> Allegations have been made to the Authority by the National Companies & Securities Commission that those directors of Elders IXL who are associated with Harlin Holdings Ltd may have committed offences under a number of Commonwealth and State Acts, and at common law.

[4] Ibid ss 4, 11(2) and 13(1).

[5] Ibid s 13(2)(a).

[6] Commonwealth, *Hansard*, House of Representatives, 7 June 1984, 3094 (Michael Duffy, Minister for Communications).

[7] See, eg, National Crime Authority (State Provisions) Act 1984 (Vic).

[8] The letter was tendered during the *voir dire* proceedings and was extracted in *Elliott*, Ruling 9, 6 May 1996, 23–4.

> Harlin Holdings Ltd (Harlin) is a company registered in the Australian Capital Territory controlled by a number of directors of Elders IXL (Elders). Majority control of Elders recently passed to Harlin, following a complex series of transactions involving not only those two companies but also other companies including the Broken Hill Proprietary Company Ltd, AFP Investments Corporation Ltd, SA Brewing Holdings Ltd and Goodman Fielder Wattie Ltd.
>
> The circumstances in which these transactions occurred imply that the Elders directors associated with Harlin (the associated Elders directors) may have committed offences under the Companies Act 1981, the Security Industry Act 1980, the Companies (Acquisition of Shares) Act 1980, the Secret Commissions Act 1905 (all Commonwealth), as well as the offence of conspiracy to defraud at common law. Associations or understandings are alleged to have existed between Harlin and other companies in relation to the control of Elders. It is alleged further that Elders tends to provide the minimum possible amount of information to shareholders, and that the personal shareholdings of Elders directors (including the associated Elders directors) continually increase as a result of the operation of 'incentive schemes'.[9]

The Attorney-General signed a draft reference on 21 December 1989. In describing 'the general nature of the circumstances or allegations constituting the relevant criminal activity' — as required by s 13(2)(a) of the Act — the reference referred back to the allegations contained in the Authority's submission set out above. The critical question in the *Elliott* case was whether this reference encompassed the transaction which became the subject of the charges: the so-called 'H fee'.

The 'H fee' was a complex series of foreign exchange transactions which netted Elders IXL a loss of $66 million, while delivering a gain of the same amount to companies associated with New Zealand entrepreneur Allan Hawkins. The transactions were secretive and contrived, thus arousing the suspicion of investigators on both sides of the Tasman. The NCA theory was that the transactions were a secret fee paid by Elders IXL to Hawkins for his role in helping to thwart the attempted takeover of Broken Hill Proprietary Company Ltd ('BHP') by Robert Holmes A'Court.[10] If the theory was correct, then payment of the fee represented a fraud against the shareholders of Elders IXL committed by those who had authorised the transactions.

The NCA used its special powers to question the four directors allegedly involved in the transactions: John Elliott, Peter Scanlon, Kenneth Biggins and Ken Jarrett. Each denied that the transactions were shams, and gave long and detailed accounts of why the transactions had been made. Elliott told the NCA that the transactions had been done with his knowledge, on his instructions and for a genuine reason. The others all told the same story. The NCA was not convinced and set out to prove that the stories told by the accused were false, using its special powers to compel testimony from other witnesses and to obtain copies of relevant documents.

This evidence tended to show that the transactions were a sham; indeed, by the

[9] Submission extracted in *Elliott*, Ruling 9, 6 May 1996, 30–1.
[10] Ibid 43–58.

end of the case the sham nature of the transactions was not even disputed by the accused. In a statement released on the day of his directed acquittal, for example, Scanlon admitted that in form the transactions were shams, but claimed that they had been used to discharge a debt genuinely and legitimately owed to Hawkins. Scanlon claimed that the choice of a sham vehicle for discharging the debt had been the work of Ken Jarrett and Ken Jarrett alone.

To the NCA, however, the fact that each of the accused had originally provided a false version of the circumstances relating to the transactions was evidence from which the accused's consciousness of guilt could be inferred. In other words, the sham nature of the transactions, together with the fact that the accused had lied on oath about them, suggested that the transactions had involved criminal wrongdoing on the part of the four directors.

II RULING 9: LAWFULNESS AND VOLUNTARINESS

A *The Lawfulness of the Investigation*

The defence challenged the admissibility of all of the evidence obtained by the NCA through the use of its special coercive powers. The foundation for this challenge was the claim that the 'H fee' fell outside the scope of the NCA's reference. If this claim was correct, then the NCA's special investigative powers had been improperly exercised and all of the evidence gathered through the use of the special powers could be objected to on the grounds that it had been unlawfully obtained. The problem for the NCA was that it was difficult to demonstrate any real connection between the 'H fee' and the original focus of the investigation ie 'the way in which directors of Elders IXL have gained effective control of one of Australia's largest companies'.[11] According to the NCA, the 'H fee' was payment for services rendered during the battle for control of BHP and, in the judge's view, if it did have any connection to the Harlin takeover of Elders IXL, it was at best historical.[12]

Vincent J rejected arguments that the reference authorised a much broader investigation into the affairs of Elders IXL, or that the investigators had perceived — correctly or not — that there was a connection between the 'H fee' and the matter which was the subject of the special investigation:

> It is painfully obvious that the Authority neither sought, nor was it granted, a general reference to investigate the affairs of Elders IXL Ltd, its directors, or associated companies or persons.
>
> It is equally clear that, whilst the unravelling of earlier cross shareholding arrangements between BHP and Elders IXL Ltd was perceived as providing a background to and a window of opportunity for, the impugned takeover to occur, and that some understanding of them may be required, those arrangements

[11] Ibid 23–4.
[12] Ibid 75.

were not themselves the subject of investigation.[13]

It is perhaps worth noting that several eminent lawyers, including the current Commonwealth Director of Public Prosecutions, did testify on oath that a nexus between the 'H fee' and the Harlin takeover of Elders had been perceived. However, Vincent J rejected their testimony, preferring to rely on the absence in contemporaneous NCA documents of any formulation of this nexus.[14] Accordingly, the judge concluded that:

> the ultimate effect of a combination of factors which included, a confused understanding on the part of some of those involved of the matter referred for special investigation, the nature and scope of the matter itself, excessive zeal in the pursuit of 'the targets', and the absence ... of a proper measure of control by the Authority of the conduct of Operation Albert, was a failure by those involved in the investigation and the Authority as an entity to address crucial questions upon the answers to which the lawful exercise of coercive power depended.[15]

In short, the hearings into the 'H fee' were unlawful.

B *Statements by the Accused*

Ruling 9 was specifically concerned with the admissibility of the statements made by each of the accused in the course of special hearings conducted by the NCA. As already noted, the contents of these statements were not consistent in any way with the prosecution case; the accused did not confess their guilt in relation to the 'H fee', nor did they make any admissions about significant aspects of the prosecution case. The statements were not, therefore, offered to prove the truth of anything contained in them. Instead, the significance of the statements, according to the NCA, was that each of the accused had provided a false version of his knowledge of, and the circumstances relating to, the transactions which were the subjects of the charges. In short, the statements were said to be lies and — although this is not spelt out in the judgment — they were presumably being offered as evidence from which the accused's consciousness of guilt could be inferred.

C *The Voluntariness of the Statements*

The objection made to the admissibility of these statements was that they were not made voluntarily. As Vincent J pointed out, however, this was an unusual context for questions of voluntariness to arise:

> All of the accused are experienced, intelligent, business men [*sic*]. Each had access, at the relevant times, to the support, services, and advice, of legal practitioners of eminence and matching competence.
>
> The statements in question were made in the course of formally conducted

[13] Ibid 41.
[14] Ibid 41–58.
[15] Ibid 74–5.

> hearings. A transcript was made of each proceeding which was conducted before a member of senior counsel and no issue arises as to what actually occurred at the times that the statements were made. Prior to making the relevant impugned statements, each of the accused had his rights and obligations under the National Crime Authority Act drawn to his attention. Specifically, I am satisfied that each was aware, in general terms, of his right to refuse to answer questions put to him on the grounds of possible self-incrimination. Further, there was nothing in the form and manner of the questioning in response to which the various statements were made, which could be regarded as calculated to overbear the will of the individual concerned.[16]

The argument that the statements were involuntary was therefore constructed from wholly different material, the foundation of which was the proposition that, when the NCA used its special powers to investigate the foreign exchange transactions, the NCA was acting unlawfully. As we have seen, that argument was accepted by the judge. In addition to being unlawful, the NCA's 'deliberate policy of concealing its objectives and the actual subject matter under investigation'[17] made it impossible for the accused to know that the NCA was acting unlawfully; indeed, as the judge pointed out, the unlawfulness of the hearings only emerged on the *voir dire* into the admissibility of the statements. The significance of the hearings being unlawful, and the accused being unaware of this fact, was that the accused were:

> deprived each of them of [their] right to silence, that is, the ability to make a free choice to speak or to remain silent about the subject of inquiry. They were misled into believing that they were ... obliged to attend and to answer questions directed to the subject matter of the summons under proper compulsion of law.[18]

Had the hearings been lawful then the fact that the accused's answers were given under compulsion of law would have been beside the point; Parliament had authorised the NCA to conduct compulsory hearings and had removed the accused's choice to speak or to remain silent within them.[19] But Parliament had only removed the right to silence from lawful hearings; if the hearings were unlawful, as indeed they were, then the choice to speak or to remain silent remained for the accused. Not knowing this, however, the fact that the accused spoke cannot be attributed to them having freely chosen to speak. The statements were, therefore, involuntary.

In many ways, the approach of Vincent J is analogous to that taken by Coldrey J in *R v Li*.[20] In that case, his Honour ruled inadmissible a confession to murder made by a migrant from East Timor who was properly cautioned by the police but who clearly lacked any understanding of the fact that the right to silence entitled him to refuse to answer questions put by the police. What *Elliott* and *Li* have in common is that they reinforce the connection between voluntari-

16 Ibid 3–4.
17 Ibid 7.
18 Ibid.
19 National Crime Authority Act 1984 (Cth) ss 28–30.
20 [1993] 2 VR 580 ('*Li*')

ness and the right to silence: a statement is only voluntary if it is made in the exercise of a free and informed choice about whether to speak or remain silent.[21] The fact that neither oppressive conduct nor inducements were used to procure a confession does not itself prove that the confession was voluntary. The question must always be asked: did the accused know that they had the right to remain silent, and did they understand what that right entailed?

D *Why was Voluntariness an Issue?*

The argument that the accused's statements were only admissible if voluntary was based on a premise which no one involved in the case appears to have questioned, but for which very little authority can be cited: that the requirement of voluntariness applies not only to confessions and admissions — which has never been doubted — but also to statements led on the basis that they are lies. There is no English or Australian authority directly on point, but the Supreme Court of Canada has held that the requirement of voluntariness does indeed apply to all statements by the accused, whether led on the basis that they are true or on the basis that they are false.[22] In the landmark case of *Miranda v Arizona*,[23] the United States Supreme Court took the same view, with Warren CJ arguing that:

> no distinction may be drawn between inculpatory statements and statements alleged to be merely exculpatory. If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word.[24]

As a matter of policy this approach makes sense. The requirement of voluntariness — at least on the view of it put forward in *Elliott* and *Li* — exists to uphold the right of silence. The rationale for the right to silence is to ensure that convictions are not wrung out of the mouths of offenders. If a suspect's statement is not the result of a free and informed choice to speak or remain silent, then the policy which requires its exclusion would appear to apply in equal force whether the statement be an admission or a demonstrably false denial.

From a technical viewpoint, however, the merits are all the other way. Confessions and admissions are prima facie inadmissible not because they are confessions and admissions but because they are hearsay. At common law, there is no independent rule of exclusion applying to confessions and admissions in criminal proceedings. There is only the hearsay rule and the exceptions to that rule, of which voluntary confessions and admissions in criminal proceedings is one.

[21] Cf *R v Azar* (1991) 56 A Crim R 414, where the New South Wales Court of Criminal Appeal held that lack of awareness of the right to silence would not, on its own, prevent a confession from being voluntary.

[22] *Piche v The Queen* (1970) 11 DLR (3d) 700.

[23] 384 US 436 (1996).

[24] Ibid 477.

Unlike confessions and admissions, false statements are not led to prove the truth of what they assert; their relevance lies in the fact that what they assert is untrue and can be proven to be untrue. Unless one is prepared to accept the absurd notion that by concealing the truth a suspect impliedly asserts his or her guilt, false statements are not hearsay and should not need to meet the requirements of an exception to the hearsay rule in order to be admissible.[25]

In hearsay terms, the fact that the requirement of voluntariness is an exception to the hearsay rule, and the false statements were not hearsay, means that there was no need for the judge in the *Elliott* case to apply the requirement of voluntariness to the accused's false statements. The fact that the judge did apply the requirement therefore suggests that voluntariness has grown from its origins in the hearsay rule into an independent rule of admissibility.[26]

III RULING 13: PUBLIC POLICY

Ruling 13 dealt the final blow to the prosecution case. It concerned the admissibility of all of the evidence obtained through the use of the NCA's special powers other than the statements made by each of the accused. As with the exclusion of those statements, the foundation of Ruling 13 was the finding in Ruling 9 that the NCA had been acting unlawfully in using its special powers to gather evidence relating to the 'H fee'. The fact that the NCA had used its special powers almost as a matter of course meant that virtually the entire remaining prosecution case was open to exclusion. All that was really left after Ruling 13 was the testimony of Ken Jarrett who had pleaded guilty to a lesser charge and was prepared to testify for the prosecution. However, on its own, his evidence would have been unlikely to have resulted in conviction.

A *The Public Policy Discretion*

Once the unlawfulness of the means by which the evidence was gathered had been established, it was open to the judge to exclude the evidence in the exercise of the public policy discretion. This discretion, sometimes referred to as the

[25] For a discussion of the scope of the hearsay rule in light of its extension to implied assertions, see especially Andrew Palmer, 'Hearsay: A Definition that Works' (1995) 14 *University of Tasmania Law Review* 29. For a specific ruling that lies are not hearsay, see *Mawaz Khan v The Queen* [1967] 1 AC 454, 462.

[26] This is consistent with the approach taken in the Evidence Act 1995 (Cth and NSW) ('the uniform evidence legislation'). This legislation has now been proposed for adoption in Victoria: Scrutiny of Acts and Regulations Committee (Victoria), *Review of the Evidence Act 1958 (Vic) and Review of the Role and Appointment of Public Notaries* (1996); Victoria, *Government Response to the Recommendations of the Scrutiny of Acts and Regulations Committee Report — Review of the Evidence Act 1958 (Vic) and Review of the Role and Appointment of Public Notaries*, tabled in the Legislative Assembly of the Victorian Parliament on 8 April 1997. Under the legislation, the rules dealing with admissions and confessions in civil and criminal proceedings are placed in a separate and discrete part of the legislation, namely 'Part 3.4 — Admissions'. Among other changes, the legislation replaces the common law voluntariness rule with two other rules, the first of which renders inadmissible admissions influenced by violent, inhuman or degrading conduct, and the second of which excludes potentially unreliable admissions by the accused in criminal proceedings.

discretion in *Bunning v Cross,*[27] requires the judge to weigh the competing public policy considerations of, on the one hand, ensuring that the guilty are convicted and, on the other, ensuring that the law is obeyed by those entrusted with its enforcement. In exercising the discretion, Vincent J was careful to take into account all of the considerations identified in *Bunning v Cross* as being relevant to its exercise. It is, therefore, unlikely that the judge's use of his discretion could be successfully challenged.

As will be apparent from the following passages of his judgment, Vincent J gave great weight to the fact that the provisions breached by the NCA were part of a statutory scheme deliberately designed to protect citizens from the excessive use of coercive powers of investigation:

> Although I am not persuaded that there has been any deliberate abuse of those powers, I am satisfied that they were certainly employed in a regrettably casual fashion with little indication that any significant regard was had to important constraints set out in the Act under which the National Crime Authority was established.[28]
>
> The Authority chose, it would appear, to employ coercive powers wherever possible disregarding alternative methods of enquiry for securing evidence, for example, search warrants. The large amount of documentary material emanating from the Authority which I have read is notably and sadly deficient of any suggestion of awareness on the part of those involved in Operation Albert of the exceptional nature of the coercive powers with which the Authority had been entrusted.[29]
>
> As a consequence of the approach adopted, this Court is presented with a situation in which virtually every piece of significant evidence has been obtained in contravention of the requirements of a carefully constructed scheme, one of the objectives of which was to protect members of this community from unauthorised arbitrary intrusions into their lives and affairs.[30]
>
> The present case involves no single act of improper or unlawful behaviour nor simply the actions of some over zealous [*sic*] investigator but the exercise of coercive power by one of the most powerful agencies in this country. Those entrusted with such power must exercise it with a commensurate sense of responsibility. This, in a given case at minimum, requires that some measure of attention be given to the lawfulness of its exercise in the circumstances.[31]
>
> When the body concerned fails to honour its obligations in the substantial and continuing fashion that has been evident in this case, for the purpose of securing 'curial advantage' from its activities, the Court must consider whether as a matter of public policy the fruits of its unlawful activities should not be used as evidence. As I have already stated, that is the view which I have felt con-

[27] (1978) 141 CLR 54.
[28] *Elliott*, Ruling 13, 21 August 1996, 23.
[29] Ibid 24.
[30] Ibid 30.
[31] Ibid 30–1.

> strained to adopt in this present case.[32]

The effect of Vincent J's exercise of his discretion was, of course, more than usually devastating to the prosecution, in that it rendered inadmissible virtually the entire prosecution case. Nevertheless, the idea that evidence should be excluded if it was obtained through a deliberate or reckless breach of statutory provisions designed to safeguard the rights of citizens is entirely consistent with the approach taken by several members of the High Court in *Pollard v The Queen*.[33] Deane J, for example, in that case, referred to the 'extreme' situation where:

> the incriminating statement has been procured by a course of conduct on the part of the law enforcement officers which involved deliberate or reckless breach of a statutory requirement imposed by the legislature to regulate police conduct in the interests of the protection of the individual.[34]

Although the context was very different from *Elliott*, a similarly expansive view of the public policy discretion is evident in the even more recent High Court decision of *Ridgeway v The Queen*.[35] The reason why Vincent J's exercise of the discretion had such an enormous impact on the outcome of *Elliott* is not, therefore, due to his Honour being out of step with the approach suggested by the High Court, but rather due to the fact that almost all of the NCA's evidence had been unlawfully obtained.

B *Fruits of the Poisonous Tree*

The use by Vincent J of the phrase 'fruits of its unlawful activities',[36] in the last of the paragraphs extracted above from *Elliott*, should not be taken as indicating the existence in Australia of a 'fruits of the poisonous tree' doctrine.[37] In the United States, evidence obtained through a breach of a suspect's constitutional rights is, in general, inadmissible.[38] This rule clearly gives primacy to the public policy of ensuring that those entrusted with enforcing the law do themselves obey it, at the expense of the public policy in favour of convicting the guilty. This contrasts with the situation in Australia, where unlawfully obtained evidence is prima facie admissible, subject to the judge's exercise of a discretion which recognises the claims of both public policies.

The mandatory rule of exclusion in the United States is supplemented by a doctrine which also renders inadmissible any evidence obtained through the use of the unlawfully obtained evidence. If, for example, a suspect confessed to murder in circumstances involving a breach of their constitutional rights and, as a result of the confession, the police discovered the murder weapon, then the

[32] Ibid 34.
[33] (1992) 176 CLR 177.
[34] Ibid 204.
[35] (1995) 184 CLR 19.
[36] *Elliott*, Ruling 13, 21 August 1996, 34.
[37] The phrase comes from *Nardone v US*, 308 US 338, 341 (1939) (Frankfurter J).
[38] This is, of course, a gross simplification: see generally Edward Cleary, *McCormick on Evidence* (3rd ed, 1984) ch 15.

weapon would be regarded as 'the fruits of the poisonous tree' and be ruled inadmissible. In Australia, on the other hand, the admissibility of the confession would be determined by a combination of the voluntariness rule and the fairness and public policy discretions; the murder weapon would be regarded as admissible, subject to the exercise of the public policy discretion. Nothing in *Elliott* changes this situation.

C *The Uniform Evidence Legislation*

Section 138 of the uniform evidence legislation,[39] currently proposed for adoption in Victoria,[40] preserves the public policy discretion, but with one significant change. At present, it is for the party which seeks the exclusion of the evidence to show that this is required by the public interest. Under s 138, on the other hand, the onus is reversed, and the party seeking admission of illegally or improperly obtained evidence must satisfy the court that the balance of public interest favours its admission. This reform was justified by the Australian Law Reform Commission with the argument that:

> the policy considerations supporting non-admission of the evidence suggest that, once the misconduct is established, the burden should rest on the prosecution to persuade the court that the evidence should be admitted. After all, the evidence has been procured in breach of the law or some established standard of conduct. Those who infringe the law should be required to justify their actions and thus bear the onus of persuading the judge not to exclude the evidence so obtained.[41]

This reform may not, however, prove to be as significant as its architects intended. In most cases, the greatest difficulty facing a party wishing to challenge the admissibility of evidence on public policy grounds will not be in persuading the judge to exclude evidence which the judge accepts to have been unlawfully obtained. Rather, the greatest difficulty will usually be in persuading the judge that the evidence was indeed obtained unlawfully. This will often require the judge to prefer the testimony of a single accused to that of several investigators. Moreover, few defendants will be able to afford the resources devoted by the accused in the *Elliott* case to proving that the evidence was obtained unlawfully. Indeed, Vincent J commented in *Elliott* that it was only 'after weeks of argument'[42] that the true position emerged. The reversal of the onus of persuasion in the uniform evidence legislation does nothing to make proof of illegality any easier.

IV CONCLUSION

It seems clear, then, that Vincent J's rulings in the *Elliott* case provide a couple of small, but arguably significant, pushes to the law of evidence. First, the

[39] Evidence Act 1995 (Cth and NSW).
[40] See discussion in above n 26.
[41] Australian Law Reform Commission, *Evidence,* Interim Report No 26 Vol 1 (1985) 536–7.
[42] *Elliott*, Ruling 9, 6 May 1996, 80.

judge's application in Ruling 9 of the requirement of voluntariness to allegedly false statements suggests that the requirement of voluntariness is in the process of growing from its origins in the hearsay rule into an independent rule of admissibility. Secondly, the judge's willingness to exclude the unlawfully obtained evidence which was the subject of Ruling 13 suggests — at least on the part of Vincent J — a strong judicial belief in the importance of the rule of law, and in the need for those who enforce the law to themselves obey it. The extent to which these philosophical preferences are shared by other judges remains to be seen, but what is made clear by the *Elliott* case is that the discretion in *Bunning v Cross* provides ample opportunity for such preferences to be indulged.

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