Lib No: 980080A

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	:	COURT OF CRIMINAL APPEAL
CORAM	:	PIDGEON J WALSH J IPP J
HEARD	:	2 FEBRUARY 1998
DELIVERED	:	27 FEBRUARY 1998
FILE NO/S	:	CCA 82 of 1997 CCA 109 of 1997
BETWEEN	:	DIRECTOR OF PUBLIC PROSECUTIONS REFERENCE UNDER SECTION 693A OF THE CRIMINAL CODE Referee AND Y AND OTHERS Respondents

Catchwords:

Criminal Law and Procedure - Evidence - Reference by Director of Public Prosecutions - Privilege of Communication sent to Parliamentary Commissioner for Administrative Investigations (Ombudsman) - Benefit of Privilege - Whether privilege can be waived - Order of speeches of counsel - Right of last reply of Crown counsel - Whether evidence adduced by cross-examination - Whether evidence adduced by witnesses of co-accused - Whether a discretion to vary order of speeches - Attempting to pervert course of justice - Whether the Crown required to prove that false information alleged to have been provided by the accused was for the purpose of other persons other than himself - Whether the Crown is required to prove the accused person knew of the nature and purpose of the investigation alleged to be the subject of the course of justice.

Parliamentary Commissioner Act 1971 s23A
Criminal Code ss636, 637, 693A

Representation:

CCA 82 of 1997

Counsel:

Referee	:	Mr J R McKechnie QC & Mr N E Gvozdin
Respondents	:	Mr G P Miller QC & Mr M I Crispe

Solicitors:

Referee	:	State Director of Public Prosecutions
Respondents	:	Max Crispe

CCA 109 of 1997

Counsel:

Referee	:	Mr J R McKechnie QC & Mr N E Gvozdin
Respondents	:	Mr M J McCusker QC & Mr J R Quigley

Solicitors:

Referee	:	State Director of Public Prosecutions
Respondents	:	Quigley Coulson

Case(s) referred to in judgment(s):

Aboriginal Sacred Sites Protection Authority v Maurice (1986) 65 ALR 247
Air Canada v Secretary of State for Trade (No 2) [1983] 2 AC 394
Australian Securities Commission v Zarro (No 2) (1992) 34 FCR 427
Buck v R (1983) WAR 372
Conway v Rimmer [1968] AC 910
Cook v Maxwell (1817) 2 Stark 183
Duncan v Cammell Laird & Co Ltd [1942] AC 624
Louis James Carter v R, unreported; CCA SCt of WA; Library No 970485; 26 September 1997

Maloney v New South Wales National Coursing Association Ltd [1978] 1 NSWLR 60
Neilson v Laugharne [1981] 1 QB 736
O'Brien v R (1963) WAR 70
R v Burns (1887) 16 Cox's Criminal Cases 195
R v Demir [1990] 2 Qd R 433
R v Lewes Justices; Ex part Home Secretary [1973] AC 388
R v Murray [1982] 2 All ER 225
R v Trevelli 1882 15 Cox Criminal Cases 289
Reg v Chief Constable, West Midlands Police, Ex parte Wiley [1995] 1 AC 274
Rogers v Home Secretary [1973] AC 388
Sankey v Whitlam (1978) 142 CLR 1
Science Research Council v Nasse [1980] AC 1028
Signorotto v Nicholson [1982] VR 413
Spargos Mining NL v Standard Chartered Aust Limited & Ors (No 1) (1989) 1 ACSR 311
The Queen v Rogerson (1991-1992) 174 CLR

Case(s) also cited:

Attorney General (NT) v Maurice (1986) 161 CLR 475
Carter v Northmore Hale Davy & Leake (1994-5) 183 CLR 121
Dietrich v The Queen (1992) 177 CLR 292
Goldberg v Ng (1995) 185 CLR 83
R v Clyne (1985) 2 NSWLR 740

Library Number : 980080A

JUDGMENT OF THE COURT:

Privilege of communication sent to the Ombudsman

Question 1

Upon the application of the Director of Public Prosecutions certain questions of law were referred to this Court for consideration and opinion pursuant to s693A of the *Criminal Code*.

These questions were formulated in consequence of issues that arose in a trial of several prison officers regarding an alleged assault and alleged cover up of that assault. At the end of the trial the accused persons were acquitted.

The first "question" so referred, in itself, incorporated several sub-questions. These sub-questions are as follows:

"(i) Where a letter is sent to the Parliamentary Commissioner for Administrative Investigations and is a 'document' within the meaning of s23A of the *Parliamentary Commissioner Act* 1971, is the privilege referred to in that subsection for the benefit of the author of such letter?

(ii) If the answer to question (i) is 'yes', can privilege be waived by the author of such letter?

(iii) If the answers to questions (i) and (ii) are 'yes', can merely the voluntary answering of questions under oath by the author of such letter and his failure to claim privilege amount to a waiver of the privilege?

(iv) If the answer to question (i) is 'no' is the privilege for the benefit of the Parliamentary Commissioner?

(v) If the answer to question (iv) is 'yes' can the privilege be waived by the Parliamentary Commissioner?

(vi) Does the application of the words 'not admissible in evidence in any proceedings' in s23A only apply to a document which is privileged?

(vii) If a document is not admissible under s23A, does the section preclude cross-examination on the contents of the document?"

These particular questions were referred to this Court in consequence of decisions made by the trial Judge during the trial, mentioned above. These decisions concerned a letter that a Crown witness had written to the Parliamentary Commissioner ("the Commissioner). The witness, in broad terms, had made a complaint about various matters relating to the accused prison officers, and this complaint subsequently gave rise to the prosecution. At the trial it transpired that the letter written by the witness to the Commissioner had come into the hands of an accused person, who proposed to cross-examine the witness on the contents of the letter. The Crown objected to this course. The trial Judge, however, after hearing argument, allowed cross-examination. Hence the reference of the sub-questions encompassed under question 1.

All the sub-questions under question 1 depend for their resolution on the proper construction of s23A of the *Parliamentary Commissioner Act*. That section provides:

> "Any document that is sent to the Commissioner or his officers or by the Commissioner or his officers in the course of, or for the purposes of, an investigation under this Act and was prepared specifically for the purposes of the investigation shall be privileged and be not admissible in evidence in any proceedings other than proceedings for perjury or any offence under the *Royal Commissions Act 1968* or under this Act alleged to have been committed in any proceedings upon such an investigation."

The sub-questions concern the meaning and application of the words "[a]ny document ... shall be privileged and be not admissible in evidence in any proceedings". These issues have to be considered in the light of the provisions

of the *Parliamentary Commissioner Act* as a whole, and it is to those provisions that we now turn.

The long title of the Act aptly sets out its objects, namely:

> "to provide for the appointment of a Parliamentary Commissioner for Administrative Investigations for the investigation of administrative action taken by or on behalf of certain departments and authorities, for the investigation of any action taken by a member of the Police Force or Police Department and for incidental purposes."

The Act provides for the appointment of a Commissioner, known as the Parliamentary Commissioner for Administrative Investigations. Subject to certain exceptions, the Act applies to all departments of the public service and a very wide range of government authorities, including local and regional government authorities, the police force and corporations and associations over which the government can exercise control. The Commissioner is required to investigate a wide variety of circumstances. These include acts or omissions of departments or authorities to which the Act applies. Further, Parliament, itself, may refer matters for investigation to the Commissioner. The Commissioner is also authorised by the Act to conduct other investigations, either on his own motion or on a complaint made by others. Every investigation by the Commissioner under the Act "shall be conducted in private". The Commissioner is given "the powers, rights and privileges that are specified in the *Royal Commissions Act 1968*, as appertaining to a Royal Commission and the Chairman thereof".

On forming an opinion as to the subject matter of the investigation, the Commissioner is required to report his opinion, and his reasons therefor, to the principal officer of the appropriate authority, and may make such recommendations as he thinks fit. If it appears to the Commissioner that appropriate steps have not been taken within a reasonable time of his making

any report or recommendation, he may send a copy of his report and the recommendations to the Premier. In that event, he may lay before each House of Parliament such report as he thinks fit. In other instances, the Commissioner is required to report, in effect, to Parliament. In any event, the Commissioner may at any time, if he thinks fit, lay before each House of Parliament a report on any matter arising in connection of the exercise of his functions.

In terms of s22A, the Commissioner may consult the Anti Corruption Commission or the Director of Public Prosecutions concerning any investigation under the Act. The Commissioner is also entitled to disclose information obtained in the course of an investigation for the purposes of any such consultation with the Anti Corruption Commission or the Director of Public Prosecutions. Pursuant to s22B disclosure of such information may be made in other limited circumstances to the persons described therein.

It is apparent from the above provisions that the Commissioner is required to perform an important public function. He is charged with investigating a broad range of acts or omissions relating to public administration and police affairs. Accordingly, he is, in a sense, the guardian, monitor and auditor of appropriate standards in public administration and police matters. For these purposes he is cloaked with appropriate powers of investigation. The public interest in the fulfilment of the Commissioner's tasks is emphasised by his right and obligation, in the particular circumstances detailed under the Act, to report to Parliament.

Having regard to the functions of the Commissioner and the objects of the *Parliamentary Commissioner Act*, it is not surprising that the Act contains elaborate secrecy provisions. The relevant sections are ss23 and 23A. We have set out the provisions of s23A. Section 23(1) provides:

> "Information obtained by the Commissioner or his officers in the course of, or for the purpose of, an investigation under this Act, shall not be disclosed, except -
>
> (a) for the purposes of the investigation and of any report or recommendations to be made thereon under this Act;
>
> (b) for the purposes of any proceedings for any perjury or any offence under the *Royal Commissions Act 1968*, or under this Act alleged to have been committed in any proceedings upon such an investigations; or
>
> (c) as authorised by s22A or 22B."

Information given by the Commissioner to other persons may be protected pursuant to s23(1a), which provides:

> "The Commissioner may in writing direct the person to whom a document is sent by the Commissioner not to disclose to any other person any information contained in the document except for the purposes of the investigation to which the document relates, and a person to whom such a direction is given shall comply with the direction."

Section 23(2) provides that any person who discloses information contrary to s23 is guilty of an offence.

To summarise, in terms of s23(1) information obtained by the Commissioner in the course of his investigations may not be disclosed, except in the limited circumstances stipulated. In terms of s23(1a) the Commissioner may direct a person "to whom a document is sent" by him not to disclose any information contained in the document (except for the limited purposes set out therein).

Whether or not s23(1) governs the disclosure of information by persons other than the Commissioner is open to question. It is arguable that only the Commissioner is prohibited from disclosing information obtained by him. The perceived need to enact s23(1a) is consistent with such a construction. The

contrary argument is that s23(1) generally prohibits the disclosure by any person of any information to which the section applies, including the disclosure of such information in legal proceedings (save for those proceedings that fall within the exceptions set out in s23(1)(b)). Whatever the position may be in this regard, it seems that, at the trial of the prison officers to which we have referred, reliance was not placed on s23(1) to preclude cross-examination on the letter. Suffice it to say that we have not been asked any questions specifically related to s23(1) and it is not necessary to decide whether s23(1) could have been relied on.

Section 23 is to be contrasted with s23A. Section 23 is directed at the protection of *information* rather than *documents*. Section 23A, on the other hand, is concerned only with documents. Section 23A provides that certain documents "shall be privileged and be not admissible in evidence in any proceedings", except for proceedings for perjury, or any offence under the *Royal Commissions Act*, or under the *Parliamentary Commissioner Act* itself. The documents in question, that are so privileged and not admissible in evidence, are documents "sent to the Commissioner" (or his officers) or "sent by the Commissioner" (or his officers) in the course of an investigation under the Act, provided that the documents were prepared specifically for the purposes of the investigation.

There appear to be two principal differences between the protection afforded by s23 and that afforded by s23A. Firstly, while some documents sent to or by the Commissioner might contain information obtained by the Commissioner (and therefore be protected against disclosure by s23), other documents so sent might not disclose information. Documents of the latter kind would not be protected by s23 but would be privileged and not admissible in evidence pursuant to s23A. Secondly, s23(1) is only directed at information

obtained by the Commissioner, and s23(1a) only precludes disclosure of information by persons to whom the Commissioner has given a written direction pursuant to that section. Moreover, as we have pointed out, there is doubt as to whether s23(1) prohibits the disclosure of information by persons other than the Commissioner. On the other hand, s23A protects all documents of the kind referred to therein, irrespective of the identity of the person in whose possession they might be.

The object of s23A, in declaring documents of the kind referred to therein to be "privileged" and "not admissible in evidence" in any proceedings other than those stipulated, is plainly to prevent documents relevant to the Commissioner's investigations from being disclosed and used in legal proceedings. Having regard to the nature of the investigations carried out by the Commissioner, the protection provided by s23A is designed to further the public interest in achieving appropriate standards in the public service.

This view of s23A is consistent with the remarks made in 1976 by the then Minister for Justice when the Bill amending the *Parliamentary Commissioner Act* by the insertion of s23A was read for the second time. The Minister observed:

> "One of the most important rights of the Commissioner relates to his authority to call for any relevant documents in the possession of a department of government or State instrumentality. Experience has shown a similar power is required in relation to the investigation of complaints against local government authorities.
>
> ...
>
> Under the provisions of the parent Act, there is no privilege attached to any document passing to or from the Commissioner, and it is considered this may create a situation of some danger for the parties, or even the Commissioner himself. If investigations are to be effective, a frank disclosure of information is essential.

> It is also necessary a complainant be able to express his complaint fearlessly, and without the risk of facing an action for defamation. To achieve this purpose it is considered desirable all original documents prepared specifically for the purpose of the investigation should be absolutely privileged, and not admissible in any proceedings."

In essence, the protection afforded by 23A (and s23) is analogous to what has become known as "public interest immunity", as this phrase is used in connection with information sought to be protected in the interests of the State. Such interests may involve, for example, the protection of information acquired by the police: ***Conway v Rimmer*** [1968] AC 910. In appropriate circumstances, as Lord Reid noted (at 953-954):

> "... [police] are entitled to Crown privilege with regard to documents, and it is essential that they should have it.
>
> The police are carrying on an unending war with criminals many of whom are today highly intelligent. So it is essential that there should be no disclosure of anything which might give any useful information to those who organise criminal activities."

As Cooper J pointed out in ***R v Demir*** [1990] 2 Qd R 433 at 434, the principle that information provided by informers to the police will be protected is supported by substantial authority of long standing. See also ***Signorotto v Nicholson*** [1982] VR 413.

Information may also be protected on the ground of public interest immunity where that is required for the proper functioning of the public service. Thus in ***Sankey v Whitlam*** (1978) 142 CLR 1 Gibbs ACJ said at 40, "The object of the protection is to ensure the proper working of government". See also ***Conway v Rimmer*** at 952. An example of documents being provided by the police to a non-curial body which attracted public immunity from disclosure is ***Rogers v Home Secretary*** [1973] AC 388, where it was accepted that the production of a document written by a police officer to such a body

might jeopardise the public service. Generally speaking, public interest immunity has been afforded in respect of documents in the possession of investigatory bodies similar to the Commission. See, for example, ***Maloney v New South Wales National Coursing Association Ltd*** [1978] 1 NSWLR 60; ***Spargos Mining NL v Standard Chartered Aust Limited & Ors (No 1)*** (1989) 1 ACSR 311.

In practice, public interest immunity has not always been easy to establish. Immunity against disclosure on this ground depends on a balancing between the public interest to protect the public service and the public interest in open justice: ***Sankey v Whitlam***. For examples of the practical difficulties in satisfying courts that immunity should be granted, see ***Conway v Rimmer***; ***Reg v Chief Constable, West Midlands Police, Ex parte Wiley*** [1995] 1 AC 274. It was, presumably, to avoid those difficulties that Parliament created the statutory immunities from disclosure contained in 23A (and s23). Section 23A, in effect, creates a statutory privilege akin to public interest immunity, save that once s23A is applicable to a document, that document is automatically privileged against disclosure, there being no balancing exercise involved as under common law.

That being the context in which s23A is to be construed, we turn to the specific questions that were asked under question 1.

> The first of the sub-questions to that question is:
>
> "Where a letter is sent to the Parliamentary Commissioner for Administrative Investigations and is a 'document' within the meaning of s23A of the *Parliamentary Commissioner Act 1971*, is the privilege referred to in that subsection for the benefit of the author of such letter?"

The close affinity between the protection afforded by s23A and public interest immunity provides the answer to this question. By its nature, public interest immunity is founded on the protection of the public interest. Hence, such

immunity can be claimed by any interested party, such as the Crown, a statutory authority, or a party to or a witness in the litigation in question: ***Sankey v Whitlam***; see also ***Aboriginal Sacred Sites Protection Authority v Maurice*** (1986) 65 ALR 247. Indeed, as was pointed out (at 44 and 68) in ***Sankey v Whitlam***, even if no claim is made by the Crown, in an appropriate case the court, of its own motion, should prevent the disclosure of a document whose production would be contrary to the public interest. In the same way, the statutory privilege created by s23A is in the public interest and for the public benefit and, therefore, any interested party, including the author of a letter of the kind described in the question, is entitled to exercise the privilege.

The answer to sub-question 1(i) is therefore "yes". For the sake of clarity, however, we emphasise that the beneficiary of the privilege under s23A is not only the author of the document but any interested party.

The next sub-question (question 1(ii)) is:

> "If the answer to question (i) is 'yes', can privilege be waived by the author of such letter?"

Again, the answer to this question lies in the affinity between statutory privilege created by s23A and public interest immunity.

In ***Australian Securities Commission v Zarro (No 2)*** (1992) 34 FCR 427 Drummond J said at 432:

> "The reason for the rule that there can be no waiver of the immunity can perhaps most clearly be seen in relation to that aspect of the rule which prohibits the disclosure of the identities of police informants, even though the prosecution may be willing to disclose an informant's identity in a particular case. The reason for the immunity is to ensure that persons from time to time in possession of valuable information concerning criminal activity will not be deterred now and in the future from giving that information to the authorities by the fear that their identities may be exposed in court proceedings arising out of the information they give to the authorities."

There is indeed ample authority that public interest immunity cannot be waived: see for example ***R v Lewes Justices; Ex part Home Secretary*** [1973] AC 388, 407; ***Air Canada v Secretary of State for Trade (No 2)*** [1983] 2 AC 394 at 436; ***Science Research Council v Nasse*** [1980] AC 1028 at 1074. As was observed by Viscount Simon LC, once it is shown that there is a public interest worthy of protection, the court should insist on its protection which is "quite unconnected with the interests or claims of the particular parties in litigation": ***Duncan v Cammell Laird & Co Ltd*** [1942] AC 624 at 642.

In ***R v Demir*** Cooper J was concerned with s47 of the *Drugs Misuse Act (Queensland)* which expressly provided that a witness was not compelled to answer questions relating to the identity of an informer. His Honour said at 435:

> "The consequence is that s47 of the Act provides an absolute protection to informers and gives the common law rule an absolute operation in respect of the matters covered by the section. ...
>
> Just as at common law the rule is not a matter of 'privilege' to be claimed or waived by the witness or the Crown, so too, in my opinion, the operation of s47 of the Act does not require that the Crown or the witness claim the benefit of the section before it comes into operation. Nor can the operation of the section be waived by either of them. The court will, whether or not the benefit of the section has been claimed, apply its provisions on its own motion, whenever, in the opinion of the presiding Judge, its application is called for."

The same reasoning, in our view, applies to s23A. Accordingly, the answer to sub-question 1(ii) is "No".

It follows that it is unnecessary to answer sub-questions 1(iii) and 1(v). In our view, the privilege cannot be waived by any person.

As regards sub-question 1(iv), as previously mentioned, the privilege can be exercised by the Commissioner (and other interested parties).

Sub-question 1(vi) is to the following effect:

> "Does the application of the words 'not admissible in evidence in any proceedings' in s23A only apply to a document which is privileged?"

As is stated in *Cross on Evidence*, 5th Australian edition at para 25,005:

> "Doctrines of privilege in the context of the law of evidence are to be understood as an exemption which is conferred by the law upon a party to litigation or upon a witness in litigation. This exemption is one from the normal obligation of a citizen to provide the judicial arm of the State with the information and documents which are required for the determination of the litigation."

As Lord Denning noted in ***Neilson v Laugharne*** [1981] 1 QB 736 at 746, , until 1973, what is now known as public interest immunity, was regarded as "Crown privilege". The phraseology "public interest immunity" is a relatively modern development. Thus in 1976, when s23A became part of the *Parliamentary Commissioner Act 1971*, the phrase "shall be privileged and be not admissible in evidence ..." was not inapt to convey what the Minister for Justice intended, namely that "original documents prepared specifically for the purpose of the investigation should be absolutely privileged, and not admissible in any proceedings". In other words, such a document would not be admissible in any proceedings because it was "absolutely privileged". The privilege created by s23A results in the document being inadmissible in evidence; the inadmissibility of the document depends on it being privileged under the section. The two concepts are tied to each other. It follows, therefore, that the answer to question 1(vi) is "yes".

Question 1(vii) is to the following effect:

> "If a document is not admissible under s23A, does the section preclude cross-examination on the contents of the document?"

As the foundation of the statutory privilege created by s23A is public interest, secondary evidence of that document is also not admissible in evidence. As Bayley J stated in ***Cook v Maxwell*** (1817) 2 Stark 183 at 186; 171 ER 614 at 615:

> "[I]f the document cannot, on principles of public policy, be read in evidence, the effect will be the same as if it was not in evidence, and you may not prove the contents of the instrument."

This is confirmed by ***O'Flaherty v McBride*** (1920) 28 CLR 283. In that case, Rich J (who delivered the judgment of the court), after referring (at 288) to the rule that "evidence of affairs of State is excluded when its admission would be against public policy", observed that that rule, when operating to exclude the admission of a particular document would also operate to exclude "all secondary evidence of its contents".

Once the contents of the instrument cannot be proved, cross-examination on the contents of the document is precluded.

Accordingly, the answer to question 1(vii) is "yes".

Order of Counsels' Addresses

Question 2 raises a number of questions as to the order of counsels' final addresses and the right of the Crown to reply last. Before referring to the circumstances in which it is claimed that the questions arise we shall set out the sections of the *Criminal Code* dealing with final addresses. They read:

> **"Evidence in Defence**
>
> 636. At the close of the evidence for the prosecution the proper officer of the court is required to ask the accused person whether he intends to adduce evidence in his defence."
>
> **"Speeches by counsel**
>
> 637. Before any evidence is given at the trial of an accused person the counsel for the Crown is entitled to address the jury for

the purpose of opening the evidence intended to be adduced for the prosecution.

If the accused person or any of the accused persons, if more than one, is defended by counsel, and if such counsel or any of such counsel says that he does not intend to adduce evidence, the counsel for the Crown is entitled to address the jury a second time for the purpose of summing up the evidence already given against such accused person or persons for whom evidence is not intended to be adduced.

At the close of the evidence for the prosecution the accused person, and each of the accused persons, if more than one, may by himself or his counsel address the jury for the purpose of opening the evidence, if any, intended to be adduced for the defence, and after the whole of the evidence is given may again address the jury upon the whole case.

Where the only witness to the facts of the case called by the defence is the accused person, he shall be called as a witness immediately after the close of the evidence for the prosecution.

If evidence is adduced for an accused person, the counsel for the Crown is entitled to reply.

If evidence is adduced for one or more of several accused persons, but not for all of them, the counsel for the Crown is entitled to reply with respect to the person or persons by whom evidence is so adduced, but not with respect to the other or others of them.

Provided that the Attorney General is entitled to reply in all cases, whether evidence is adduced by any accused person or not.

In this section the expression, 'Attorney General' does not include Minister for Justice."

The circumstances in which an adverse ruling was made against the Crown in the trial under consideration were that six of the seven accused persons were represented by the one counsel and each, when called upon under s636, elected to give evidence in his defence. The seventh accused person was

represented by separate counsel and when called upon, elected not to call evidence. The Crown claimed the right to reply last in respect of this accused person. The grounds on which this was claimed are set out by his Honour in his reasons for refusing the request. His Honour said that the Crown claimed that, in the cross-examination of a Crown witness by counsel for the seventh accused person, the ground work was laid for the calling of evidence to show partiality or bias on the part of that witness. The witness, during this cross examination, denied bias. The witness concerned was a prison officer. Counsel for the six accused persons called his superior officer as witness to rebut the denials as to bias made by the Crown witness. This defence witness testified that there was a relationship of familiarity, inconsistent with the duties of a prisoner officer, between the prison officer who was the crown witness and the alleged victim, a prisoner in Canning Vale. The superior officer reported the matter. It was claimed that this was evidence led on behalf of the seventh accused person. His Honour said that, without question, it was evidence which supported the case of all the accused.

The second area referred to by the Crown was the cross-examination by counsel for the seventh accused person of a witness called on behalf of the other six accused persons. His Honour said that she was cross-examined notably as to the evidence of a report (Exhibit 5) which ultimately had been put in evidence. His Honour said that this did not result in further evidence of the facts related by the witness, but, his Honour said it was submitted on behalf of the Crown that it leant some support for the evidence she gave.

The third area referred to by the Crown at trial and, as summarised by the trial Judge, was a witness called on behalf of the six accused persons, who gave evidence in relation to a file, which was in the custody of the

superintendent of Casuarina Prison. He was cross-examined by counsel for the seventh accused person concerning the contents of the file.

His Honour, in giving his reasons, commenced by saying that no evidence was called at all on behalf of the seventh accused person and there was no document tendered on his behalf. His Honour then said that the seven accused persons had not been jointly charged. They had, as a matter of convenience, been charged upon one indictment, but each stood trial separately and independently of the other. His Honour said they are not co-accused in the strict sense. His Honour made reference to two authorities, namely ***O'Brien v R*** (1963) WAR 70 and ***Buck v R*** (1983) WAR 372. He referred to some observations of Wickham J, who said that the verb "adduced" when used in s637 was being used in the sense of calling evidence as distinct from obtaining evidence by cross examination. His Honour said that he would follow this. He therefore took the view that, within the meaning of s637, evidence had not been adduced for the accused person concerned and so there was no right of reply by the Crown in respect of that accused person. His Honour went further. He referred to the fact that the case of ***Buck v R*** indicated he had a discretion. He concluded by saying "I should say in addition adopt the view that I do have a discretion and the discretion should be exercised favourable to (the accused person)". (AB222).

The questions arising from this ruling which the Director of Public Prosecutions has asked to be referred to this Court are:

> "Q2. (i) Where on a trial against 2 or more accused, one accused does not give evidence but a co-accused adduces evidence which tends to rebut the Crown case against all of the accused, has evidence been adduced for the accused who did not give evidence, within the meaning of s.637 of the *Criminal Code*, so as to entitle the Crown to reply?

(ii) Where on a trial against 2 or more accused, counsel for an accused who does not give evidence cross-examines a Crown witness about matters alleging bias by that witness and, subsequently, evidence of bias by that Crown witness is given by a witness called by a co-accused, has evidence been adduced for the accused who did not give evidence, within the meaning of s.637 of the *Criminal Code*, so as to entitle the Crown to reply?

(iii) Where on a trial of 2 or more accused, counsel for an accused who does not give evidence cross-examines a witness called by a co-accused and adduces evidence not adduced in evidence-in-chief, has evidence been adduced for the accused who did not give evidence, within the meaning of s.637 of the *Criminal Code*, so as to entitle the Crown to reply?

(iv) If on a trial of 2 or more accused where one or more of the accused are separately represented by counsel and evidence has been adduced for each accused, does the trial Judge have any discretion as to the order of closing addresses by counsel for the Crown and defence?"

His Honour made his ruling on 21 November 1996 prior to the decision of this Court in ***Louis James Carter v R***, unreported; CCA SCt of WA; Library No 970485; 26 September 1997. In that case this Court examined the history of earlier practice and earlier legislation which was the source of s637. It did this because it was accepted that as regards the proper construction of s637, it is necessary to go beyond the *Code*. The section cannot be read literally as it is incomplete and in particular, it is silent on any right of the accused person to address the jury if he or she elects not to give evidence. A number of terms used in s637 had acquired a special meaning and there is every indication that there was the intent to incorporate in the *Code* the practice prevailing at the time of its enactment. The Court examined the cases

of both ***O'Brien*** and ***Buck*** and noted that there was an inconsistency between them, and that the case of ***O'Brien*** had not been referred to in ***Buck***. The Court held in ***Carter*** that if a document is produced by an accused person who does not elect to give evidence the Crown has the right of reply last. The Court held that, if there is a discretion as referred to in ***Buck***, it is one which should be exercised having regard, *inter alia*, to the nature and quality of the documents produced and to the extent to which the documents advance the defendant's case. The Court did not go further because in that case, counsel for the accused person had produced a large number of documents.

The case of ***Buck*** in so far as it relates to the procedure under s637 of the *Code* was dealing with the question whether the tendering of a document by the defence gave counsel for the Crown the right of reply. Wickham J's reasons on this point were seen by the trial Judge in ***Carter*** and by this Court as a dissenting judgment. We propose to examine the question in the light of what was said in ***Carter***. The relevant paragraphs in s637 bearing on the questions asked are:

> "If evidence is adduced for an accused person, the counsel for the Crown is entitled to reply.
>
> If evidence is adduced for one or more of several accused persons, but not for all of them, the counsel for the Crown is entitled to reply with respect to the person or persons by whom evidence is so adduced, but not with respect to the other or others of them."

The question to be asked in the first instance is whether the circumstances set out in each of the questions result "in evidence being adduced for an accused person" within the meaning of the first of the above paragraphs.

There are three circumstances where the Crown claimed before the trial Judge and where the Director claims in the questions asked of this Court which

result in evidence being adduced for an accused person. The first area is that counsel for the accused person concerned may cross-examine a witness called by a co-accused person so as to put on the record evidence favourable to the accused person that is well outside the area of the evidence-in-chief of that witness. The second area is that other accused persons may call evidence favourable to the accused person who does not give evidence or, which may directly or even exclusively relate to that particular accused person. The third area is the area which the Crown claims happened in this particular case and is the main area on which the Crown focused its argument. That is, the accused person by the cross-examination of his counsel, induced another accused person to call a witness in rebuttal of the answers given.

Firstly, we shall consider the first area raised and that is where counsel for an accused person who does not give evidence cross examines a witness called by a co-accused and thereby places on the record evidence not adduced in evidence in chief. This is the question raised by question 2(iii) As there was, for the reasons referred to in ***Carter,*** an intent by the legislature when enacting s637 to incorporate the earlier practice, we propose to make reference to it to see if it assists in answering this and the other questions. The matter is referred to in detail in ***Carter*** and we shall do no more than make a brief summary of what was said in that case. Section 637 is headed "Speeches by Counsel" and the section in the main deals with speeches by counsel and makes reference to provisions that apply if an accused is defended by counsel. The source of the section as well, as ss21 and 22 of the *Evidence Act*, was the practice formulated by 12 of the Judges of the Kings Bench in 1837 following the passing of the *Prisoner's Counsel Act 1836* (6 & 8 William 1V Chapter 114), which provided that accused persons indicted for felony were entitled to full defence by counsel and were also entitled to copies of the depositions. It

would appear from the resolutions passed at this meeting that one of the main reasons for the resolutions was the law then prevailing requiring the production of a document if a witness was referred to it and the production of a document could cause the loss of the right of last reply. The rules formulated set out the position as to this right when witnesses were referred to depositions. They also dealt with the question when Law Officers appeared for the prosecution.

The procedure was then a matter of practice. The practice was changed to a degree and given legislative force by the *Criminal Procedure Act 1865 (Denman's Act)* 28 and 29 Victoria Ch18. This Act was enacted in this State in almost identical form in an enactment entitled *"An Act to Amend the Law of Evidence and Practice on Criminal Trials 1871 34 Victoria No 5).* This again made provision as to what was to occur when accused persons were represented by counsel. The Act provided that if any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding Judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended whether he or they intend to adduce evidence. This provision carried through to s636 of the *Code*. It referred to the order of speeches by counsel. It contained some provisions which aimed to alleviate the rules made by the Judges resulting in the defence losing a right of last reply in certain circumstances when depositions were put to witnesses. These provisions have carried through to ss 21 and 22 of the *Evidence Act 1906*.

Carter's case referred to a number of decisions where it was stated or accepted that the producing of a document was adducing evidence for an accused person resulting in the Crown having the right of last reply. We can find no case which suggests that the asking of questions in cross-examination, having the effect of bringing out new matters favourable to an accused person,

is adducing evidence or would give the Crown a right to reply last. No such case was referred to us. The texts appearing at the time of the first enactment of the *Criminal Code* make reference to the producing of documents as affecting the right of last reply but do not refer to cross-examination. We shall set out two of those texts. Firstly it is stated in *Roscoe's Criminal Evidence* 12th ed (1895), p192:

> *"Right to Reply.* Wherever any witnesses other than the person charged are called for the defence, or any documents put in on behalf of the defendant, at any time in the course of the trial, the counsel for the prosecution will have a right, at the conclusion of the defence, to address the jury in reply."

A proposition to similar effect was set out in the editions of *Archbold* current at the time. We shall quote from the 23rd edition (1905):

> "If any witness other than the defendant is called for the defence or any document is put in evidence for the defence, the counsel for the prosecution has the right to reply."

We shall make a passing reference to that portion of the first passage which referred to the fact that if the person charged is the only witness called for the defence, the defence still had the right to reply last. This was provided for in s3 of the *Criminal Evidence Act 1898 (Imperial)* and when the *Criminal Evidence Act 1899* was enacted in this State, it had an identical section, namely s5. This provided that in cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply. This section was repealed by the *Criminal Code* in 1902 and was not included in s616 which was in similar terms to s637.

We mentioned that s637 was seen both in ***Carter*** and in ***O'Brien*** as intending to incorporate the practice prevailing at the time of its enactment. We can find no evidence of a practice whereby asking questions in

cross-examination of any witness including a witness called by a co-defendant affected the right of reply. The asking of questions in cross-examination is one of a number of possible meanings of the word "adduced" when used in the section but for the reasons to which we have referred we do not consider it was its intended meaning. We do not consider that the asking of questions in cross-examination in the circumstances referred to in the question is adducing evidence and we would answer question 2(iii) in the negative.

We shall now consider the first question which asks that if a co-accused adduces evidence, which tends to rebut the Crown case against all the accused, has evidence been adduced by the accused who has not given evidence? This combination of circumstances was not covered by *Denman's Act*. This resulted in Judges in individual cases determining the procedure. It is to be noted that in some cases the Judge or Judges laying down a rule refused to lay down any inflexible rule. For example, in ***R v Burns*** (1887) 16 Cox's Criminal Cases 195 Day and Wills JJ having consulted, ruled that each case must be judged by its special circumstances and refused to lay down any inflexible rule. *Phipson* in the 5th ed published in 1911 summarised the general practice resulting from the procedure determined by Judges in a number of such cases. The first proposition stated by *Phipson* is that if the offence is joint and the evidence called by defendants giving evidence affects the defendants generally, the prosecution has a general reply. This proposition was followed by this Court in ***O'Brien*** where Sir Albert Wolff said at p75:

> "When a person jointly charged with another gives evidence which not only supports his own case but supports the case of his co-accused, he is giving evidence for the defence and I read the paragraph in question of s637 of the Code in the light of this enactment which has been carried into the Evidence Act of 1906 (s8). It is true that the paragraph of the Code goes on to say that - 'the Crown is entitled to reply with respect to the person or persons by whom evidence is so adduced but not with respect to

> the other or others of them'. In my opinion, the opening words of this paragraph are sufficient to cover this case in that evidence was adduced for one or more of the accused, in this case only two, and that gave the counsel for the Crown the right to reply. Admittedly the preposition 'by' in the third line creates some difficulties, but I think the paragraph should be read as a whole and should be construed in the light of the common law practice which obtained before the Code."

The accused in ***O'Brien*** were charged with a joint offence. However, in the trial now under consideration, the offences were not joint. Each of the accused were indicted on separate offences. This important point was noted by the trial judge. It is stated in *Phipson* in respect of persons on the one indictment that if the offences are distinct or the defences separate (*eg alibi*) the accused persons who did not call evidence address the jury last. One of the authorities quoted in support of this is ***R v Trevelli*** 1882 15 Cox Criminal Cases 289. A reading of the reasons of Hawkins J in that case shows, however, that even in separate offences circumstances can arise where evidence adduced by one accused person supporting the case of an accused person who does not give evidence results in the prosecution having the right of last reply. We shall set out the reasons of Hawkins J (at 290):

> "**Hawkins, J** - In a case like the present, when eleven defendants are charged in the same indictment, containing ninety-four counts, made up of various distinct misdemeanours alleged to have been committed on different days, some by several of the defendants jointly, others by most of the defendants separately I do not think that the calling of witnesses for one defendant entitles the counsel for the prosecution to a general reply upon the whole case as against all the other defendants. Where in an indictment against several defendants one of them calls evidence which is applicable to the cases of all, I think there is a general right of reply which the counsel for the prosecution must exercise according to his discretion. But where the evidence called by one prisoner does not affect the cases of the others, as for instance where one prisoner calls witnesses to prove an *alibi* for himself only, and the

> evidence of those witnesses does not affect the case as against the others, the reply ought to be confined to the case of that one prisoner. So where, as in the present case, one prisoner is separately charged in the same indictment with an offence altogether distinct and unconnected with the offence charged against another or others of the prisoners, the calling of witnesses by that one prisoner to rebut the charge made against him does not entitle the counsel for the prosecution to a general reply upon the whole case as against all the prisoners. If, however, from the witnesses called for one prisoner evidence is elicited in favour of others indicted with him, then I think the right to reply should be extended to the cases of such other prisoners so far as such evidence affects their cases."

It must be remembered that, at this time, an accused person did not have a general right to give evidence himself. Negus J in ***O'Brien*** said that s637 is expressing the common law as set out in such cases as ***R v Trevelli.*** We have indicated that the section is to be interpreted on the basis that there was the intention to incorporate the practice then prevailing. We consider that this practice is expressed by Hawkins J.

In the present case, although the charges were separate they did not come into the category of being distinct and unconnected in the way mentioned by Hawkins J. The evidence called by the other accused persons rebutted the prosecution case against the prisoner concerned and, in particular, supported the suggestion of bias raised in cross examination in questions asked by counsel for the accused person who did not give evidence. We consider in these circumstances evidence was adduced for the accused person concerned within the meaning of the s 637. This interpretation of the section provides the answers to both questions 2(i) and 2(ii) each of which must be answered in the affirmative.

The final question relating to the order of addresses is question 2(iv) asking whether there is any discretion. In our view, this question arises

because his Honour's final remarks could be interpreted that he had a general discretion to vary the order of addresses, even if it is clearly shown significant evidence had been adduced for an accused person. The Director claims that the section gives the prosecution a right and consequently it is not open to the court to take this away. If the evidence adduced for an accused person was of significance, then the general rule is that the Judge should not vary what has been laid down by Parliament. This general rule, however, does not exclude a discretion to be exercised in a proper case. This must arise because it is a rule of practice in a trial and, if its rigid application would lead to an injustice, there must be some room for a Judge to give relief against it and we would see this as being the intent of Parliament when laying down rules of practice. It was referred to in the case of ***Buck v R*** which dealt with the production of documents. Burt CJ held that that brought it within the section and it has been interpreted that Wallace J agreed on that point. (See *Carter v R*). Reference was made to the Victorian cases, but this is an area which has not been dealt with by legislation in Victoria. In that State it is in essence a matter of practice. The type of discretion discussed in ***Buck v R*** was examined in ***Carter v R*** which examined the nature of the discretion. Counsel for a defendant who ultimately does not give evidence may, in the course of the trial, put in evidence an insignificant document not realising that the defendant may elect not to give evidence. This discretion has been exercised in the past by allowing such document to come off the record or even, without that formality, of varying the order. We would see a discretion as referred to in ***Carter v R,*** namely a discretion to be exercised having regard to the extent and significance of the evidence actually adduced by the accused person concerned and having regard to the fairness of the trial.

Question 3 - Attempting to pervert the course of justice

The question of law raised at trial and referred to the Court of Criminal Appeal is as follows:

> "Where an accused person has been charged with attempting to pervert the course of justice under s143 by providing false or misleading information intending to result in a miscarriage of justice, does the Crown have to prove that the information provided was for the purpose of deflecting, impeding or hindering investigations of other persons rather than himself."

Section 143 of the *Criminal Code* provides that:

> "Any person who attempts to obstruct, prevent, pervert, or defeat the course of justice is guilty of a crime, and is liable to imprisonment for 7 years."

During his summing up to the jury the learned trial Judge, *inter alia*, directed them as follows:

> "Well, if you find that element proved, that is, elements 1, 2 and 3 proved beyond a reasonable doubt then you go to the fourth element and that is this: that the accused whose case is under consideration embarked upon that course of lying in relation to the particular you have under consideration intending this to result in some miscarriage of justice, but not in relation to his own culpability, but for the purpose of deflecting attention from and impeding or hindering investigations in respect of some other officer.
>
> Now, it is sufficient for the crown's case to prove that the accused whose case you are considering intended to impede or hinder investigations concerning himself and others, but it is not sufficient if the crown fails to prove beyond reasonable doubt intent to impede investigations concerning others. It is not sufficient if the crown proves only an intent to hinder investigations concerning himself.
>
> The accused must be proved to have told the lie or - the lie in question intending to impede or hinder or prevent disciplinary or criminal proceedings against some other officer before you may return a verdict of guilty of this particular element, finding this

element proved. A person does not commit the crime of attempting to pervert the course of justice who tells a lie in the course of an interview concerning his own culpability with the intent of putting the investigating authority onto a false scent.

If all that the accused person is doing is saying, 'I am lying to protect myself ' that is not an attempt to pervert the course of justice. You can probably understand that practically every trial that comes to this court that results in a verdict of guilty the accused person has lied to protect himself. He is not guilty of an attempt to pervert the course of justice. It is only when he does so to deflect attention from someone else or to implicate someone else that he is attempting to pervert the course of justice."

In ***The Queen v Rogerson*** (1991-1992) 174 CLR Mason CJ at 277 and 278 stated:

"It is well established at common law and under cognate statutory provisions that the offence of attempting or conspiring to pervert the course of justice at a time when no curial proceedings are on foot can be committed (*Reg. V. Murphy* (1985), 158 C.L.R., at p. 609; *Vreones; Sharpe; Kane; Rev. V. Spezzano* (1977), 76 D.L.R. (3d) 160; *Thomas).* That is because action taken before curial or tribunal proceedings commence may have a tendency and be intended to frustrate or deflect the course of curial or tribunal proceedings which are imminent, probable or even possible. In other words, it is enough that an act has a tendency to frustrate or deflect a prosecution or disciplinary proceeding before a judicial tribunal which the accused contemplates may possibly be instituted, even though the possibility of instituting that prosecution or disciplinary proceeding has not been considered by the police or the relevant law enforcement agency (*Reg. V. Spezzano* (1977), 76 D.L.R. (3d), at p. 163). So, in *Kalick v. The King* ((1920) 55 D.L.R. 104, at p. 109), it did not matter whether the police officer intended to institute a prosecution; it was sufficient that, being apprehensive of a prosecution, the accused gave a bribe to prevent it. Action taken to prevent the institution of a prosecution is as much an interference with, or impairment of, the administration of justice as action taken to obstruct the conduct of a prosecution after it has been commenced.

> Accordingly, I agree with Brennan and Toohey JJ that an act which has a tendency to deflect the police from prosecuting a criminal offence or instituting disciplinary proceedings before a judicial tribunal, or from adducing evidence of the true facts, is an act which tends to pervert the course of justice and, if done with intent to achieve that result, constitutes an attempt to pervert the course of justice and can ground the offence of conspiring to pervert the course of justice."

The Director of Public Prosecutions contends that an accused can attempt to pervert the course of justice by deflecting, impeding or hindering an investigation of himself. It is further said that there is no requirement that the provision of misleading information has the purpose of deflecting, impeding or hindering investigations of other persons rather than the provider of the misleading information. See: ***R v Murray*** [1982] 2 All ER 225.

Having regard to the dicta of Mason CJ and Brennan and Toohey JJ in ***The Queen v Rogerson*** (supra) it is, with respect, apparent that his Honour erred in directing the jury that only deflecting intention from someone else or implicating someone else could constitute the offence. There is no such limitation imposed under the relevant section of the *Criminal Code* nor any binding authority to support such a restriction on the operation of the section.

We conclude therefore that the answer to the question is "no".

Question 4 - Section 143

The question of law referred to the Court of Criminal Appeal is as follows:

> "On a charge of attempting to pervert the course of justice by providing false or misleading information, does the need to prove that an act has a tendency to pervert the course of justice by frustrating or deflecting a possible criminal prosecution and that the act was intended to have that effect require evidence that the accused knew the nature and purpose of the investigation at the time of giving the information?"

The Director of Public Prosecutions submits that:

> "(1) A Trial Judge in determining the elements to be proved on a charge of attempting to pervert the course of justice is bound by the High Court decision in *The Queen v Rogerson* (supra).
>
> (2) There is no requirement that there be evidence that at the time of the investigation a prosecution for a particular or identifiable offence was in contemplation either by the accused or by investigating officers."

When further addressing the jury the learned trial Judge, *inter alia,* directed them as follows:

> "The five elements then are these: first of all that there was an investigation of an officer or officers in progress. Here the crown's case is that investigations were in connection with an alleged assault upon Derek Chapman. The investigations were with a view to determining whether disciplinary or criminal proceedings would be preferred against an officer or officers.
>
> You must determine therefore whether there was an investigation with a view to determining whether disciplinary or criminal proceedings would be preferred. Was there an investigation of that nature and it follows from this that the crown must then prove beyond a reasonable doubt - this is all in relation to this first element - that the accused whose case you have under consideration knew of the nature and purpose of the investigation. That is the first element."

It is clear from ***The Queen v Rogerson*** (supra) that the Crown must establish as an element of the offence that the accused must have in contemplation the possible institution of a prosecution or disciplinary proceeding. See: Mason CJ at 227.

There is no additional requirement that the accused "knew of the nature and purpose of the investigation".

We conclude therefore that the answer to the question is "No".

Answers to Questions

Q1	(i)	Where a letter is sent to the Parliamentary Commissioner for Administrative Investigations and is a 'document' within the meaning of s23A of the *Parliamentary Commissioner Act* 1971, is the privilege referred to in that subsection for the benefit of the author of such letter?	Yes
	(ii)	If the answer to question (i) is 'yes', can privilege be waived by the author of such letter?	No
	(iii)	If the answers to questions (i) and (ii) are 'yes', can merely the voluntary answering of questions under oath by the author of such letter and his failure to claim privilege amount to a waiver of the privilege?	No answer required
	(iv)	If the answer to question (i) is 'no' is the privilege for the benefit of the Parliamentary Commissioner?	No answer required
	(v)	If the answer to question (iv) is 'yes' can the privilege be waived by the Parliamentary Commissioner?	No answer required
	(vi)	Does the application of the words 'not admissible in evidence in any proceedings' in s23A only apply to a document which is privileged?	Yes
	(vii)	If a document is not admissible under s23A, does the section preclude cross-examination on the contents of the document?	Yes
Q2	(i)	Where on a trial against 2 or more accused, one accused does not give evidence but a co-accused adduces evidence which tends to rebut the Crown case against all of the accused, has evidence been adduced for the accused who did not give evidence, within the meaning of s637 of the *Criminal Code*, so as to entitle the Crown to reply?	Yes
	(ii)	Where on a trial against 2 or more accused, counsel for an accused who does not give evidence cross-examines a Crown witness about matters alleging bias by that witness and, subsequently, evidence of bias by that Crown witness is given by a witness called by a co-accused, has evidence been adduced for the accused who did not give evidence, within the meaning of s637 of the *Criminal Code*, so as to entitle the Crown to reply?	Yes

(iii)	Where on a trial of 2 or more accused, counsel for an accused who does not give evidence cross-examines a witness called by a co-accused and adduces evidence not adduced in evidence-in-chief, has evidence been adduced for the accused who did not give evidence, within the meaning of s637 of the *Criminal Code*, so as to entitle the Crown to reply?	No
(iii)	Where on a trial of 2 or more accused, counsel for an accused who does not give evidence cross-examines a witness called by a co-accused and adduces evidence not adduced in evidence-in-chief, has evidence been adduced for the accused who did not give evidence, within the meaning of s637 of the *Criminal Code*, so as to entitle the Crown to reply?	No
(iv)	If on a trial of 2 or more accused where one or more of the accused are separately represented by counsel and evidence has been adduced for each accused, does the trial Judge have any discretion as to the order of closing addresses by counsel for the Crown and defence?	Yes
Q3	Where an accused person has been charged with attempting to pervert the course of justice under s143 by providing false or misleading information intending to result in a miscarriage of justice, does the Crown have to prove that the information provided was for the purpose of deflecting, impeding or hindering investigations of other persons rather than himself.	No
Q4	On a charge of attempting to pervert the course of justice by providing false or misleading information, does the need to prove that an act has a tendency to pervert the course of justice by frustrating or deflecting a possible criminal prosecution and that the act was intended to have that effect require evidence that the accused knew the nature and purpose of the investigation at the time of giving the information?	No