



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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#### Important Information

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

10 **Pt 1 Certification:** This outline is in a form suitable for publication on the internet.

**Pt 2 Outline of propositions to be advanced in oral argument**

1. **Introduction**

(a) The trial judge made comprehensive findings of unlawful and authorised conduct on the part of the Commissioner and ICAC staff: summarised at PJ [22]-[24] {CAB 27}. She found that:

(i) the ICAC Act did not contemplate direct referral of a matter for prosecution to the Director, and s 36(1)(a) was the means by which the function in s 7(1)(a)(i) was to be effected (PJ [51]-[80])<sup>1</sup>.

20 (ii) having bypassed SAPOL, ICAC officers then undertook activities and exercised powers for the purpose of and with a view to assisting the prosecution of the appellant after the matter had been referred to the Director, rather than for the purposes of any investigation by the Commissioner of a kind authorised or contemplated by the ICAC Act (PJ [111]-[211])<sup>2</sup>.

(b) The questions of law referred at the initiative of the Director {CAB 97} were answered in the terms set out at FC [374] {CAB 182-183}. The first appeal ground concerns Qs 1, 2, 3(a), the second concerns Qs 3(b)-(d) {CAB 208}.

(c) The Full Court's analysis:

(i) was premised upon *a priori* assumptions that the purpose of conferring functions on the Commissioner in relation to corruption matters was to bypass (and exclude) the law enforcement agency (SAPOL) which conventionally commences prosecutions and acts as an investigative agency under the Director's direction (FC [150]) and, although s 36(1)(a) contemplates referral to law enforcement agencies, its evident purpose is "non-corruption" offences (FC [160]);

30 (ii) overlooks the judge's findings that the Commissioner's staff had exercised powers and undertaken activities for the purpose of assisting the Director in prosecuting the charges, such that they were effectively prosecuting the matter (eg PJ [125]). The Court apparently concluded that if what the ICAC officers were doing was investigative, it was therefore authorised.

(d) The text, context and purpose show that an investigation under the ICAC Act, and the extraordinary powers conferred in aid of such an investigation, do not extend to the gathering of evidence for, and provision of assistance to, the Director in connection with a prosecution.

2. **Question 1 (direct referral to Director) {AS [44]-[54], RS [33]-[46]}**

40 (a) The Full Court erred in finding a **textual** discordance between s 7(1)(a)(i) ("refer it for prosecution") and s 36(1)(a) ("refer a matter to the relevant law enforcement agency for further investigation and potential prosecution") (FC [145]-[146], [155]-[161]).

(i) Referral for prosecution in s 7(1)(a)(i) can only mean potential prosecution, and further investigation of some kind will inevitably be involved.

(ii) Further, and in any event, the usual course is that, in the first instance, SAPOL officers initiate prosecutions by laying an information (in summary and indictable matters<sup>3</sup>).

<sup>1</sup> The judge found that the ICAC Act did not otherwise contemplate evidence obtained during the investigation being provided to the Director with a view to a potential prosecution (PJ [87]-[110]).

<sup>2</sup> In particular, PJ [111], [113]-[118], [123]-[125], [138], [195], [200], [202], [207], [210], [211], [257]-[258].

<sup>3</sup> See, eg, Rule 12 of the *Magistrates Court Rules* 1992 (PJ [65]). AS fn 11 and 12.

- (iii) The emphasis given to the expression “*the relevant* law enforcement agency” was misplaced. The words do not naturally or in context suggest that the focus of the provision is for non-corruption offences<sup>4</sup>. A30/2021
- (b) The scheme of the Act is that s 7 establishes the office of the Commissioner and broadly describes the Commissioner’s functions, but how those functions are to be exercised is mapped out in the balance of the Act (cf. FC [151]-[152]<sup>5</sup>).
- (c) Section 7(1)(a) contemplates that with respect to corruption the Commissioner must decide whether to investigate and refer it for prosecution, or to refer it to a law enforcement agency for investigation and prosecution.
- 10 (i) The former case is governed by s 24(1)(a), such that Part 4, Div 2, Subdiv 2 then applies, and the latter case is governed by s 24(1)(b).
- (ii) Part 4, Div 2, Subdiv 2 culminates in s 36. The means by which the s 7(1)(a)(i) function may be effectuated is a referral of “a matter to the relevant law enforcement agency for further investigation and potential prosecution” (pursuant to s 36(1)(a)).
- (d) The Full Court held that s 7(1)(a)(i) conferred a “capacity” or authorised an “activity” and there was no need to make more specific provision for it in Subdiv 2 because referral does not involve coercion, and therefore does not require conferral of a power (FC [167]). However:
- (i) this involves too narrow a conception of the need for official activity to be authorised (expressly or impliedly) by statute<sup>6</sup>;
- 20 (ii) since referral would often involve disclosing information gathered using compulsive powers by an office-holder it is natural to expect that the metes and bounds of referral to be expressly spelt out. Specific provision for referral having been made to identified bodies in s 36(1)(a), *Anthony Hordern*<sup>7</sup> considerations were engaged.
- (e) **Context** supports the conclusion that s 36(1)(a) is a comprehensive statement of the means of referral of a matter for potential prosecution.
- (i) Section 54(2)(b) expressly contemplates referral to a law enforcement agency and not the Director<sup>8</sup>. Disclosure “for the purposes of a criminal proceeding” (s 54(2)(c)) does not suggest direct referral for potential prosecution to the Director because there is no warrant to construe “criminal proceeding” as meaning a possible or contemplated proceeding (cf. FC [238]).
- 30 (f) With respect to **purpose** the Full Court adopted an *a priori* assumption as to the mischief of the legislation generally (FC [147]-[150]) and s 36(1)(a) specifically (FC [160]). That mischief finds no support in the text or structure of the Act, is not apparent from the extrinsic material relied upon (FC [178]) and is **inconsistent** with the passages cited by the trial judge (PJ [86]) {JB E.1035, 1045}.
- (g) The Full Court had insufficient regard to the implications of direct referral and the exclusion of the relevant law enforcement agency. Referral to police is not an “unnecessary step” (PJ [84]).
3. **Question 2 (s 56A as alternative basis for provision of material) {AS [55]-[63], RS [47]-[49]}**
- (a) The Full Court erred by concluding that s 56A provided an independent authority to provide evidentiary material to the Director (FC [224]) on the basis that “criminal proceedings” encompasses contemplated proceedings (FC [219]).
- 40 (b) Section 56A merely contemplates the ordinary processes whereby, subject to the law enforcement agency considering there is sufficient evidence to prosecute, material may be provided to the Director

<sup>4</sup> Indeed, the same expression is used in Sched 4 cl 3(3) where the focus is likely to be corruption offences.

<sup>5</sup> Contrary to FC [152], the functions in the other sub-paragraphs are the subject of more detailed provision later in the Act (for s 7(1)(b) see ss 24(2)(b), 36A, 37, 38, 40, 41, 42; for s 7(1)(ca) see s 24(2)(c); for s 7(1)(d) see s 40; for s 7(1)(e) see s 48(i)).

<sup>6</sup> See, eg, *Balog v Independent Commission against Corruption* (1990) 169 CLR 625 {JB E.142} and *Smethurst v Cmr of AFP* (2020) 94 ALJR 502 at [111] (“[t]he holder of a constitutional or statutory office cannot do anything in an official capacity except that which is authorized by the *Constitution* or by statute”).

<sup>7</sup> *Anthony Hordern & Sons v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 {JB C.121}

<sup>8</sup> The reference to “public officer” in s 54(2)(b) does not suggest referral for prosecution to the Director (as now argued at RS [45](c)) for the reasons at Reply [10].

when he or she assumes conduct of the prosecution of an indictable offence<sup>9</sup>; its purpose is to negate a *Johns*<sup>10</sup> argument where material has been gathered in connection with an unrelated investigation. A30/2021

4. **Questions 3(b)-(d) (lawfulness of ICAC assisting prosecution) {AS [64]-[84], RS [50]-[59]}**

- 10 (a) The coercive powers conferred are expressly limited “for the purposes of an investigation” under the Act (ss 28, 29, 29A, 30, 31) and the Commissioner’s other activities must be limited accordingly.
- (b) Having regard to the judge’s findings, the real question was whether activities undertaken to assist a prosecution can properly form part of an “investigation” of the kind contemplated by the ICAC Act.
- (c) The submission of a matter for judicial decision by the laying of charges usually marks a limit on the purposes for which an investigatory body’s compulsory evidence-gathering powers may be deployed<sup>11</sup>. Recent authority<sup>12</sup> is consistent with such an approach and the Full Court took too narrow a view of those authorities (FC [267]). The Full Court erred by deprecating such a “sharp distinction” (FC [271]-[272]) and by reasoning that because SAPOL can investigate in connection with a prosecution, there could be no objection to the Commissioner having that role (FC [274]).
- (d) Text and context reinforce the limits of an “investigation” under the ICAC Act:
- (i) ICAC investigations have primacy (ss 33, 34, 35), are overseen by the Commissioner, are not susceptible to direction (ss 7, 12, 27), and are *prima facie* confidential (ss 54, 55, 56, Sched 2 cl 3 and 6); the DPP Act contemplates that investigative agencies will have responsibilities to the (independent) Director (and the Court) (ss 10, 10A and 11 DPP Act);
- 20 (ii) limited co-operation with other agencies, or involvement of police officers or DPP staff is contemplated (ss 13(3), 15). It is wrong to assume that because the Commissioner is a lawyer, or by reason of the objects of the Act (FC [183]-[185], RS [56]), any difficulty is mitigated<sup>13</sup>;
- (iii) the Act contemplates that, generally, any investigation will be at an end in respect of a particular matter which is the subject of charges (eg, Sched 2, cl 6(4) (PJ [181]-[185]) cf. FC [327]).
- (e) Seen in its proper context, therefore, s 43 is consistent with the analysis of the trial judge and does not, contrary to FC [270], demonstrate the absence of a purposive limitation (much less provide a “complete answer” (RS [54])). It merely contemplates that if an investigation (under the Act) into matters not the subject of the criminal charges is continuing, prejudice to the accused should be avoided. It does not contemplate investigation *for the purposes of prosecuting a charge*. If it did, specific provisions accommodating the involvement of ICAC in a prosecution would be expected.

30 5. **Question 3(a) (examination transcripts) {AS [85]-[92], RS [60]-[62]}**

- (a) In the present case, the provision of the transcripts to the Director for use in the prosecution was not authorised because (i) the variations did not in terms embrace that kind of use<sup>14</sup>, (ii) variations made to aid direct referral for prosecution would be for an unauthorised purpose, (iii) there was no explanation of how the circumstances seen as requiring the directions had altered and no regard was had to the protective purposes served by the non-communication regime.

Dated: 15 March 2022



**B J Doyle QC**

Counsel for the appellant

<sup>9</sup> The distributive reading contended for by the appellant is therefore natural and does not render the provision inutile (RS[49]).

<sup>10</sup> *Johns v Australian Securities Commission* (1993) 178 CLR 408 {JB C.309}.

<sup>11</sup> *Melbourne Steamship Company Ltd v Moorehead* (1912) 15 CLR 333 {JB C.378}, *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 486 at [129] {JB D.901}.

<sup>12</sup> The relevant authorities are consistent with a purposive limitation and do not establish that an investigative power can necessarily be exercised after the laying of a charge so long as it does not entail an examination of the accused personally: AS [66]-[71].

<sup>13</sup> Reliance on *NSW Crime Commission v D150* [2020] NSWSC 811 (fn 71) was misplaced: AS fn 43.

<sup>14</sup> See PJ [151], [158], [172]. The respondent’s submission that once a variation is made to permit dissemination the use is then governed by the Act generally (RS [62](i)) should be rejected and is inconsistent with the terms of the variation themselves.