



IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE OFFICE OF THE REGISTRY

No. M246 of 2015

ON APPEAL FROM THE SUPREME COURT OF VICTORIA  
COURT OF APPEAL

BETWEEN:

10

R & M

Appellants

- and -

THE INDEPENDENT BROAD-BASED ANTI-CORRUPTION  
COMMISSIONER

Respondent

**APPELLANTS' SUBMISSIONS**

**PART I: CERTIFICATION**

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1. We certify that the submission is in a form suitable for publication on the internet.

**PART II: CONCISE STATEMENT OF THE ISSUE**

2. The Appeal presents the following issue:

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Whether the Independent Broad-based Anti-corruption Commission Act, 2011 (Victoria) ("the IBAC Act") has by express words or necessary intendment abrogated the privilege against self-incrimination and the "companion rule" to allow the examination (pursuant to s. 115 of the IBAC Act) of persons who are the subject of a criminal investigation, about the subject matter of that criminal investigation.

**PART III: SECTION 78B NOTICE**

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3. The Appellants have considered whether any notice should be given in compliance with s. 78B of the Judiciary Act, 1903 and consider that no s. 78B notice is necessary or required.

Date of document:	11 December 2015	
Filed on behalf of:	The Appellants	
Appellants' Solicitor	Tony Hargreaves & Partners Lawyers	Solicitor Code: 102397
Address:	Level 11, Dominion Building, 533 Little Lonsdale Street, Melbourne Vic 3000	Telephone: 03 9605 3250 Facsimile: 03 9670 4411 Reference: PAB:CG:150114 Mr. Peter Brown Email: <a href="mailto:peter@tonyhargreaves.com.au">peter@tonyhargreaves.com.au</a>

## PART IV: REPORT OF REASONS FOR JUDGMENT IN THE COURTS BELOW

4. There are no authorised reports of the reasons for judgment of both the primary Court and the intermediate Court of Appeal. The medium neutral and internet citations are as follows:

10 Supreme Court of Victoria: [2015] VSC 374;  
<http://www.austlii.edu.au/au/cases/vic/VSC/2015/374.html>

Supreme Court of Victoria  
Court of Appeal: [2015] VSCA 271;  
<http://www.austlii.edu.au/au/cases/vic/VSCA/2015/271.html>

20 Supreme Court of Victoria  
Court of Appeal (Re: Stay  
Application) [2015] VSCA 280;  
<http://www.austlii.edu.au/au/cases/vic/VSCA/2015/280.html>

## PART V: RELEVANT FACTS

- 5 On 15 January 2015, a female identified anonymously as Person A was allegedly assaulted by the Appellants in a cell at the Ballarat Police Station. The allegations are set out in detail in the judgment of the learned trial judge, Riordan J, in R and M v IBAC Commissioner [2015] VSC 374 at [18].
- 30 6. On 19 March 2015, after reviewing CCTV footage, Victoria Police notified the IBAC pursuant to the Victoria Police Act, 2013 (Victoria) of the circumstances of the alleged assault and provided a copy of the CCTV footage to the IBAC.<sup>1</sup>
- 7 On 20 March 2015, the IBAC commenced an "own motion" investigation (called Operation Ross) pursuant to s. 64(1)(c) of the IBAC Act.<sup>2</sup> On 1 April 2015 the IBAC Commissioner issued a witness summons to each of the Appellants pursuant to s. 120 of the IBAC Act requiring attendance to be publically examined before the IBAC. Each of the Appellants was also simultaneously served with confidentiality notices pursuant to s. 42 of the IBAC Act and a Preliminary Information and Directions document which, inter alia, indicated that the scope and purpose of the public examinations was to examine allegations of serious "police personnel misconduct".<sup>3</sup>
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<sup>1</sup> Affidavit of Robert John Sutton, 8 May 2015 at [17], AB

<sup>2</sup> Affidavit of Alexis Barbara Eddy, 15 April 2015 at [7], AB

<sup>3</sup> Affidavits of R & M, 15 April 2015 at [2], AB and AB

- 8 On 2 April 2015, Victoria Police issued a Notice of Interim Action<sup>4</sup> to each of the Appellants in which it was stated that each was “reasonably believed to have committed an offence punishable by imprisonment” and that each was suspended on pay forthwith until the Notice was withdrawn or they were charged with an offence (whichever was first to occur). Accompanying the Notice of Interim Action was a further document that indicated that each of the Appellants was subject to an investigation, that criminality was involved, and that the “primary investigator” was to be the IBAC. The suspension, which remains in force, was authorised by s. 135(1) of the Victoria Police Act, 2013 (Victoria). By letter dated 10 April 2015, Victoria Police advised that the offence was an allegation of assault committed on 15 January 2015 and that no interview would take place pursuant to s. 464 [sic] of the Crimes Act, 1958 (Victoria) until the conclusion of the IBAC public examinations and would be reassessed after that time.
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- 9 On 10 and 12 April 2015, in written submissions to the IBAC Commissioner, it was contended, inter alia, that in the circumstances the examinations should not be compelled or, alternatively, not held in public. These submissions were rejected by the Commissioner on 15 April 2015 in written reasons (later revised on 17 April 2015).<sup>5</sup> As part of those reasons, the IBAC Commissioner made a number of comments.<sup>6</sup>
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- 10 On 15 April 2015, the Appellants applied to the Supreme Court of Victoria for an interlocutory injunction restraining the IBAC from proceeding with the public examinations until the hearing and determination of an originating motion filed that day. Interlocutory orders ultimately were not required as the IBAC Commissioner determined to adjourn the public examinations and the matter proceeded to trial on 21 and 22 May 2015. By judgment delivered on 7 August 2015, the originating motion was dismissed by the learned trial judge.<sup>7</sup>
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- 11 An application for leave to appeal was made by both Appellants to the Court of Appeal of the Supreme Court of Victoria (“the Court below”) on 24 September 2015. The Appellants challenged the reasoning of the learned trial judge, Riordan J, on the basis that His Honour was in error in holding that the IBAC had the power to examine the Appellants in the
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<sup>4</sup> Affidavit of Christopher William Gorissen, 14 April 2015, at [2] – [8], AB

<sup>5</sup> AB

<sup>6</sup> At [7]: “...CCTV footage... which might reasonably be said, absent explanation by those involved to support such allegations... some of the conduct borders on gratuitous brutality, and is therefore exceptional”

At [12]: “...the applicants can and no doubt will be given every opportunity to answer the adverse allegations against them... including providing such exculpatory explanations for conduct...”

<sup>7</sup> [2015] VSC 374, AB

circumstances, and alternatively that error had infected the decision upheld by His Honour to hold public examinations. The application for leave to appeal was refused by the Court below on 30 September 2015.<sup>8</sup> An Application for a stay was refused by the Court below on 14 October 2015<sup>9</sup>. An Application for Special Leave to Appeal was granted by this Honourable Court on 13 November 2015.

## **PART VI: THE APPELLANTS' ARGUMENT**

### **10 Ground of Appeal**

12. The Ground of Appeal, the subject of the grant of special leave to appeal, turns on a question of pure statutory construction identified in paragraph 2 above.

### **The Statutory Scheme of the IBAC Act – Relevant aspects**

13. The IBAC Act came into operation on 1 July 2012.

20 14. The objects of the IBAC Act are set out in s. 8. Inter alia, they are to provide for the identification, investigation and exposure of "serious corrupt conduct" and "police personnel misconduct".

15. Pursuant to s. 22 of the IBAC Act, the Commissioner constitutes the IBAC under s. 14.

30 16. The functions of the IBAC are set out in s. 15. Inter alia, they include the identification, exposure and investigation of serious corrupt conduct ("corrupt conduct" being defined in s. 4) and "police personnel misconduct" (defined in s. 5) and the holding of examinations.

17. Section 41 permits the IBAC to provide or disclose any information it acquires to various persons or bodies (including Victoria Police) if that information is relevant to the performance, duties or powers of that person or body.

18. Section 60 permits the IBAC to conduct an investigation in relation to corrupt conduct only if it is reasonably satisfied that the conduct is serious corrupt conduct.

40 19. Section 64 permits, inter alia, the IBAC to conduct an investigation in accordance with its police personnel conduct investigative functions on its own motion. (That is what occurred in the case of the Appellants).

20. Section 70 of the IBAC Act permits an investigation to commence or continue despite the fact that proceedings (whether civil or criminal)

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<sup>8</sup> [2015] VSCA 271, AB

<sup>9</sup> [2015] VSCA 280, AB

related to or connected with the subject matter of the investigation are in existence, provided that the IBAC must take all reasonable steps to ensure that those proceedings are not prejudiced by the conduct of the investigation.

21. Section 74 provides that the IBAC may refer, inter alia, any matter under investigation to a "prosecutorial body".
- 10 22. Part 6 of the IBAC Act deals with examinations. Section 115 provides the power for IBAC to hold an examination and s. 116 deals with the method of holding an examination. Section 117 provides that, prima facie, examinations are to be held in private unless the IBAC considers on reasonable grounds that there are "exceptional circumstances" and that the other conditions in s. 117(1) and (2) are satisfied. (In the case of the Appellants, the IBAC determined to hold the examinations in public. Challenges to that determination failed before the IBAC, the learned trial judge and the Court below.)
- 20 23. Section 120 allows the IBAC, for the purpose of an investigation, to issue a witness summons to a person to give evidence if the IBAC is satisfied that it is reasonable to do so, having regard, inter alia, to the evidentiary value of the information sought to be obtained from the person. (In the case of the Appellants, witness summonses were issued in accordance with this section).
- 30 24. Section 144(1) abrogates the privilege against self-incrimination that a person summonsed to appear would otherwise enjoy. A use immunity is provided (with certain exceptions) by s. 144(2). Derivative use immunity is not provided. Sections 132 and 136 are ancillary and facilitative provisions.
- 40 25. Part 7 deals with Recommendations, Actions and Reports. Sections 162(5) & (6) and 165(5) & (6) prohibit the IBAC from including in certain reports any information which would prejudice any criminal investigation or proceedings or other legal proceedings of which it is aware, or include any statement that a specified person is guilty of, or has committed, is committing or is about to commit any criminal or disciplinary offence or should be prosecuted for same. Section 164 prescribes the actions the IBAC may take after conducting an investigation, which includes the power under s. 190 for the IBAC itself to bring criminal proceedings for an offence in relation to any matter arising out of an IBAC investigation.
26. The IBAC Act was enacted before a series of decisions of the High Court was delivered in respect of similar and related issues raised by this Appeal – X7 v Australian Crime Commission<sup>10</sup>, Lee v NSW Crime

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<sup>10</sup> (2013) 248 CLR 92

Commission<sup>11</sup>, Lee v R<sup>12</sup>, AFP v Zhao<sup>13</sup> and CFMEU v Boral Resources (Vic) Pty. Ltd.<sup>14</sup>. The IBAC Act has not been amended as a result of any of these decisions, in contrast to the amendment by the Federal Parliament of the Australian Crime Commission Act, 2002 to overcome the decision in X7.<sup>15</sup>

### The Principle of Legality

10 27 The question of statutory construction raised by this Appeal is informed by the principle of legality. That principle was described in X7.<sup>16</sup> It applies where a legislative provision by general words appears to overthrow fundamental principles, infringe rights or depart from the general system of law. In this case, s. 144 of the IBAC Act has been held by the Court below to abrogate the privilege against self-incrimination otherwise enjoyed by all persons. This abrogation alters to a marked degree the accusatorial nature of the criminal justice system with respect to those summoned to appear before the IBAC. In so holding, the Court below has erroneously found that the general words in s. 144 allow a departure from the general system of law to a marked degree in respect of persons reasonably believed to have committed a criminal offence, such as the Appellants.

20 28 In Victoria, a person suspected of committing a criminal offence and facing questioning by police has certain rights provided by s. 464A of the Crimes Act, 1958 (Victoria). These rights include the right to remain silent (which includes invoking the privilege against self-incrimination). The "investigating official" is compelled by law to advise the suspect of that right. In the case of the Appellants, the IBAC Examiner is purportedly empowered by ss. 132, 136 and 144 of the IBAC Act to compel answers from the Appellants relating to the subject matter of the investigation, including the possible commission of criminal offences by the Appellants. The "use immunity" provided by s. 144(2) may well be illusory in circumstances where the IBAC itself is empowered by s. 190 to bring proceedings against the Appellants for criminal offences, including those the subject matter of its investigation. It is a matter of public record that the IBAC has, in the past, instituted such criminal proceedings (for indictable offences) against other examinees in a similar position.

40 29 Thus, examinees in the position of the Appellants face the real prospect of the examiner becoming their ultimate prosecutor with the

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<sup>11</sup> (2013) 251 CLR 196

<sup>12</sup> (2014) 88 ALJR 656

<sup>13</sup> (2015) 89 ALJR 331

<sup>14</sup> (2015) 89 ALJR 622

<sup>15</sup> See Law Enforcement Legislation Amendment (Powers) Act, 2015, Act No. 109, 2015 assented to 30 June 2015.

<sup>16</sup> Per Hayne and Bell JJ at [86] – [87], per Kiefel J at [158]

examiner being able to use derivatively the product of the examination both for the purposes of and in their prosecution. Further, the examiner is able thereby to facilitate proof of the prosecution case against persons in the position of the Appellants in the full knowledge of any defences. The "companion rule" is obviously thereby breached. The real prospect of forensic advantage being given to the IBAC or prosecutor, identified in X7 as causing serious inroads into the accusatorial process, highlights the potential vice caused by s. 190. The need is thus made clear for express words or necessary  
10 intendment to achieve such a fundamental inroad.

30. There is no express reference anywhere in the IBAC Act to an examination of a person the specific subject of an investigation, let alone a person who has been charged with, but not yet tried for, an offence relating to the subject matter of an investigation. Sections 117, 120(2)(a), 162 and 165 do not deal specifically with the cases of such persons. Section 70 does not deal with a situation prior to proceedings being on foot or commenced and may well be restricted in interpretation to protecting the IBAC from allegations of contempt. As  
20 was described by Hayne and Bell JJ in X7, the "words used are sufficiently general to *include* that case, but they do not deal directly or expressly with it".<sup>17</sup>

31. The Respondent in the Court below placed reliance upon s. 60(2) which provides that the IBAC must not conduct an investigation into corrupt conduct unless it is reasonably satisfied that the conduct is serious corrupt conduct (as defined in s. 4). It was contended that this indicates the clear intention of the legislature to provide that persons the subject of an investigation were intended to be compellable  
30 examinees as the threshold for satisfaction was so high. However, this contention suffers from the same vice as the contention that suggests an interpretation that s. 70 allows an examination of a person charged, or that persons in the position of the Appellants are compellable examinees, for the reasons set out below.

32. Close analysis of the relevant legislative provisions reveals that an investigation into the conduct of a person or persons (whether charged or not) may proceed under the Act. This applies to s. 60 and s. 64 investigations. There are no restrictions on the carrying out of such  
40 investigations, save for the restriction that, consistent with the principle of legality, the person or persons the subject of such investigations (such as the Appellants in this case) are not compellable examinees. It would have been a simple matter for the legislature to provide for the contrary if that was its intention. It has failed to do so, notwithstanding the relevant decisions in X7 and subsequent cases. In X7,<sup>18</sup> Hayne and Bell JJ commented that the performance of the investigative

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<sup>17</sup> At [183]

<sup>18</sup> At [147]

function under the ACC Act was in no way restricted or impeded if the power of compulsory examination did not extend to the examination of a person who had been charged with, but not yet tried for, an offence about the subject matter of the pending charge. Their Honours reiterated that the general provisions made for compulsory examination, when read in their context, did not imply, let alone necessarily imply, any qualification to the fundamentally accusatorial process of criminal justice. Moreover, the Statement of Compatibility, tendered at the time the IBAC Bill was being debated in the Parliament, and relied upon by the Learned Trial Judge<sup>19</sup>, explained that it was not expected that the IBAC Bill would impact upon criminal proceedings.<sup>20</sup> The intention was always that if IBAC discovered evidence of criminal conduct which was of sufficient probative force to permit prosecution, IBAC could refer a matter to a "prosecutorial body". It is of note that in the IBAC's Reasons at [7],<sup>21</sup> it concluded that "*absent explanation from those involved*", the CCTV vision of the Appellants supported the allegations of assault.

33. There is no warrant for "reading in" words of necessary intendment. Explicit words or references to an examination power in respect of such persons are simply wholly absent from the IBAC Act.

### **Companion Rule**

34 The legislative protections of preventing the publication of evidence given in private examinations to third party prosecution authorities, as discussed in X7, Lee v NSW Crime Commission and Lee v R in considering analogous, but not identical, legislation, are not present in the IBAC Act. Pursuant to s. 41, the IBAC may disseminate any evidence or information it obtains in the course of an investigation to any prosecution authority. There is no requirement of prior judicial order or judicial supervision. The potential impact on the fair trial of a person is not a matter for consideration by the IBAC in making such a disclosure (although that is a consideration in the publication of a Special or Annual Report or where there are civil or criminal proceedings on foot that relate to, or are connected with, the subject matter of the investigation - see ss. 70, 162 and 165).

35 Similar to the analysis conducted by the majority of the High Court in X7, the question is whether the legislature has provided for the examination of persons in the position of the Appellants. If it is accepted that the whole process of criminal justice, commencing with the investigation of crime and culminating in a trial of an offence, is accusatorial, then a procedure that allows for the examination of the

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<sup>19</sup> [2015] VSC 374 at [81] AB

<sup>20</sup> See Victorian Parliamentary Debates (Hansard), Legislative Council, 3 May, 2012 at p. 2466.

<sup>21</sup> AB

10 Appellants in the circumstances outlined must amount to an interference with that accusatorial process. Whether a person is reasonably believed to have committed a criminal offence (as is the case with the Appellants), or whether a person has been charged with that offence, should not affect the analysis of whether there has been an interference with that process. As Nettle J explained in CFMEU v Boral Resources (Vic) Pty. Ltd.<sup>22</sup>, the onus of proof and the companion rule (namely, that the prosecution cannot compel an accused person to assist in the discharge of its onus of proof) “embody the notion that the liberty of the individual will be weakened if power exists to compel a suspected person to confess to his or her guilt” (emphasis added).<sup>23</sup>

36 The IBAC Act cannot be held to impinge upon the companion rule, unless it does so by express words or necessary intendment. A general examination power, such as that conferred in the IBAC Act, does not expressly do so. The companion rule remains even if the privilege against self-incrimination has been wholly or partly abrogated.

20 37 In X7, Hayne and Bell JJ discussed the right to silence as being a significant feature of the accusatorial system of criminal justice. Their Honours stated:

*“The notion of an accused person’s “right to silence” encompasses more than the rights that the accused has at trial. It includes the rights (more accurately described as privileges) of a person suspected of, but not charged with, an offence, and the rights and privileges which that person has between the laying of charges and the commencement of the trial.”*<sup>24</sup>

30 38 Their Honours further stated that, at every stage, the process of criminal justice is “accusatorial” and that holding was crucial to the task of construction of the legislative provision then under consideration. Their Honours’ conclusion was that to allow an examination pursuant to the general provisions under consideration would effect a fundamental alteration to the process of criminal justice. Their Honours made clear, that fundamental alterations to the process of criminal justice can only be made if made clearly by express words or necessary intendment.<sup>25</sup>

40 39. The “cardinal principle” that Gibbs CJ enunciated in Sorby v The Commonwealth of Australia,<sup>26</sup> namely that the burden of proof of guilt of a person charged with a criminal offence rests upon the Crown, is equally applicable at all stages of the criminal process, and was central to the majority reasoning in X7.

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<sup>22</sup> (2015) 89 ALJR 622

<sup>23</sup> At [62]

<sup>24</sup> At [105]

<sup>25</sup> At [118] – [119]

<sup>26</sup> (1983) 152 CLR 281 at 295-6

40. The IBAC Act lacks the features that have resulted in legislation being construed as permissibly impinging upon the accusatorial process. The IBAC Act does not have the features of the legislative provisions considered by the Queensland Court of Appeal in Hamdan v Callanan<sup>27</sup> which provided as their justification the fact that avenues of investigation into major crime, other than the examination of the identified suspects, were ineffective. In contrast, the IBAC Act contemplates the routine use of examination powers at all stages of investigations. Such general provisions do not necessarily imply any intended impingement upon the accusatorial process. On the contrary, the legislature has made clear that IBAC powers are not to be exercised in a way that would have such a consequence. Sections 70, 162 and 165 of the IBAC Act are examples of that.
41. In Lee v NSW Crime Commission, French CJ (as a member of the majority) made the point that the executive character of the examination under challenge in X7 was an important, if not critical, consideration of the majority's reasoning.<sup>28</sup> In coming to the conclusion that the CAR Act there under consideration allowed a person charged to be compulsorily examined, His Honour, in considering the application of the principle of legality, placed emphasis on the fact that the statutory powers were to be exercised judicially by a court. That fact allowed a more liberal constitution of those powers than in the case in which they were conferred on a non-judicial body.<sup>29</sup>
42. The legislation there under consideration is to be contrasted with the IBAC Act where:
- The objects of the IBAC Act do not expressly contemplate its application to persons in the position of the Appellants, or indeed to persons facing criminal charges;
  - The conferring of the power on the IBAC to summons a person for compulsory examination and the power to conduct the examination itself do not have attached the traditional judicial safeguards to prevent prejudice.
  - The IBAC itself may use the fruits (derivatively and in abrogation of the companion rule) of the examination to form the basis of a prosecution against the examinee for criminal offences brought by the IBAC itself pursuant to s. 190.<sup>30</sup>

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<sup>27</sup> [2014] QCA 304 at [23]–[25] and [51]

<sup>28</sup> At [47]

<sup>29</sup> At [56]

<sup>30</sup> In this regard the decision in Lee v The Queen (2014) 88 ALJR 656 at 662-6 [32] - [34], [45] – [46] and [51] is illuminative of this Court's jealous protection of the integrity of the companion rule.

## Errors in the reasoning of the Court below

- 43 The Court below placed reliance upon s. 70 as providing that the IBAC's powers of investigation may commence or continue despite the fact that criminal proceedings that relate to, or are otherwise connected with, the subject matter of the investigation are on foot or have been commenced.<sup>31</sup> The Court rejected the submission on behalf of the Appellants that the sole or main purpose of the operation of s. 70 was to overcome the issue of a possible contempt of court being committed by the conduct of an investigation while the subject matter of the investigation was before the courts. The Court below held that the operation of s. 70 was not so limited.<sup>32</sup> The conclusion of the Court below is erroneous because s. 70 would still have work to do with respect to the examination of persons other than a suspect or a person who had been charged. If the conclusion of the Court below is correct, then that conclusion would apply equally to an examinee pre- and post-charge. Such a conclusion is incompatible and inconsistent with the conclusions of the majority in X7. It is also inconsistent and incompatible with the Court below's own conclusions<sup>33</sup> where it held that the IBAC may not have the power of compulsory examination of a person who had been charged unless that power was expressed in clear and unambiguous terms.
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44. Further the Court below contrasted the position of the Appellants to the class of persons who had been charged. Their Honours regarded the Appellants as being in an "*amorphous group of persons who may or may not be "of interest" or "suspected" or "possibly of interest" in respect of alleged criminal conduct that is under investigation*". As the majority of the High Court found in X7, such a sharp distinction is not apt. The Appellants, along with persons who have been charged, are part of the group of persons subject to the accusatorial process of justice. Moreover, there is ample work for an investigation by the IBAC in examining persons in relation to the alleged offending behaviour of the Appellants, such persons not being in a category, as the Appellants are, of persons reasonably believed to have committed a criminal offence (and who have been suspended from duty as a result). Also, in the words of the IBAC Commissioner, the Appellants are in the category of persons having to provide an explanation as to why the CCTV footage does not support allegations of (criminal) assault by the Appellants on Person A.
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45. Contrary to the statements of principle by the majority of the Court in X7, which statements were endorsed by French CJ in Lee v NSW Crime Commission (endorsing the comments of Gibbs CJ in Sorby v The Commonwealth of Australia (see paragraph 39 above) as to the

<sup>31</sup> [2015] VSCA 271 at [28] – [30].

<sup>32</sup> At [30] AB

<sup>33</sup> At [38] AB

importance of the companion principle as part of the principle of legality), the Court below has concluded that the IBAC has the power to conduct examinations of persons who are the subject of ongoing criminal investigations (and who have not been charged with any offence) because there are no words of relevant limitation<sup>34</sup>. Yet the Court below concluded that the absence of any words of relevant limitation did not mean that persons who had been charged with an offence could be examined by the IBAC in relation to the subject matter of their charge. This overall approach to statutory construction was in error. Furthermore, the Court below found that the absence of any words of relevant limitation tended to suggest that no such limitation was contemplated or intended by the Parliament when the IBAC Act was enacted. That conclusion fails to take into account that the IBAC Act was enacted prior to the significant decisions delivered by the High Court in the period 2013 – 2015. In any event the answer is not to be found by seeking words of “relevant limitation”. That reverses or inverts the necessary task of statutory construction required.

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46. Furthermore, the approach to statutory construction by the Court below was in error because it ought to have found that what was required of the legislature to abrogate or restrict a fundamental freedom or principle, or to depart from the general system of law in impacting upon the rights that would otherwise enure to persons in the Appellants' position in the accusatorial process of criminal justice, were provisions expressed with irresistible clearness. The alteration to the process of criminal justice affecting persons in the Appellants' position could only be made if that alteration was made clearly by express words or necessary intendment. That was the approach that the Court below ought to have adopted, and in failing to do so, was in error. Further, the Court below gave no, or no proper, consideration to the effect on the companion rule of its statutory interpretation. Finally, there was no consideration as to the significance of s. 190 in the interpretive process.

47 The proper conclusion ought to have been that, on its proper construction, the IBAC Act does not empower the IBAC to examine the Appellants in the present case, with the consequence that the IBAC was not empowered to issue witness summonses to examine the Appellants.

48. The Appeal should be allowed and the orders sought made.

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<sup>34</sup> At [39] AB

## PART VII: APPLICABLE STATUTORY PROVISIONS

The applicable statutory provisions are still in force in that form, as at the date of making these submissions.

## PART VIII: ORDERS SOUGHT BY THE APPELLANTS

The Appellants seek the following orders:

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1. The Appeal be allowed.
2. The Order of the Court of Appeal of the Supreme Court of Victoria made on 30 September 2015 that the Applicants' application for leave to appeal be refused be set aside, and in lieu thereof, it be ordered that:

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- 2.1 the applications for leave to appeal be granted;
- 2.2 the appeals be allowed;
- 2.3 there be an order in the nature of certiorari quashing the decision of the IBAC to hold an examination under Part 6 of the Independent Broad-based Anti-corruption Commission Act, 2011 (Vic.) ("the Act") of each of the Appellants in connection with the subject matter of the investigation referred to as Operation Ross;
- 2.4 there be an order in the nature of prohibition preventing the IBAC from examining each of the Appellants under Part 6 of the Act in connection with the subject matter of the investigation referred to as Operation Ross;
- 2.5 there be a declaration that the IBAC is not empowered to hold an examination of the Appellants under Part 6 of the Act in connection with the subject matter of the investigation referred to as Operation Ross;
- 2.6 the Respondent pay the Appellants' costs of the appeal, including the reserved costs, and the costs of the Appellants in the proceeding in the Trial Division of the Supreme Court of Victoria, including any reserved costs.

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3. The Respondent pay the Appellants' costs, including any reserved costs.

**PART IX: TIME ESTIMATE FOR ARGUMENT**

It is estimated that a period of 2.5 hours will be required for the presentation of the Appellants' oral argument.

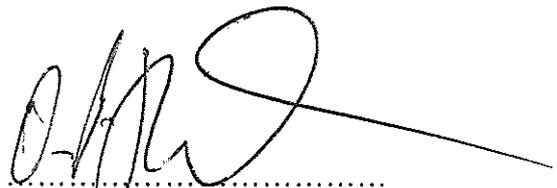
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Dated 11 December 2015

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