



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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**IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY**

No A 30 of 2021

BETWEEN:

TROY STEPHEN BELL
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: This Outline of the propositions to be advanced in oral argument is in a form suitable for publication on the internet.

Part II: Outline of the propositions to be advanced in oral argument.

1. The grant of special leave to appeal should be rescinded (RS [2]-[8]).¹

- The questions reserved are no longer of the same degree of importance.
 - *ICAC (CPIPC Recommendations) Amendment Act 2021 (SA)*, ss 11, 30, 40 [JBA Pt B, pp 90, 92]
 - Affidavits of A J Baker, sworn 29 October 2021, and J R Henderson, sworn 19 November 2021: 8 matters (including this one), 11 accused.
- The judgment is not attended by sufficient doubt to warrant a grant of special leave in the interests of the administration of justice.
 - FC JBA Pt A - s 7, p 19 ; s 36, p 37.
CAB : s 7 - pp 135-137, [145]-[153] : s 36 - pp 137-139, [155]-[164]
Other textual indicators - pp 140-141, [170]-[172] : Leg. history - pp 141-142, [173]-[170] : Further contextual indicators - pp 143-144, [180]-[185]
Principle of legality - pp 144-146, [186]-[195]
 - *Judiciary Act 1903 (Cth)*, s 35A.

2. Question 1 - is s 36(1)(a) exhaustive? (RS [33]-[46]).

- Full Court CAB pp 135-146, [145]-[196]
- Section 7(1)(a)(i) – the textual/contextual indicators relied upon by the appellant do not assist him (AS [44]-[48])

¹ In this document, AS means the Appellant's written submissions-in-chief, RS, the Respondent's written submissions, and ARS, the Appellant's Reply submissions.

- Section 7(1)(a) does not identify to whom a matter may be referred for prosecution because it will not be known (AS [45]);
 - The contrast between ss 7(1)(a)(i) and (ii) reflects the fact that if the Commissioner investigates, no referral for further investigation is required (AS [46]);
 - The structural submission would have force if Pt 4 Div 2 Subdiv 2 was a code which it is not (AS [47]);
 - Section 54(2)(b) is equivocal at best, having regard to the fact that information may be provided to a prosecution agency under s 54(2)(c) (AS [48]).
- As to s 36(1)(a), it must be construed in light of:
 - in particular, ss 3(2)(a), 7(1)(a)(i) and 24(1)&(7).
 - the presumption that state legislation is generally concerned with State matters;
 - the fact that:
 - s 36(1) is not a modification of an assessment under s 23 (s 24(1)&(7), hence “a matter” is not “the matter/the investigation”.
 - the conferral of statutory functions on an office holder for fee or reward carries with it a duty to perform the functions conferred.

3. Question 2 - is s 56A(1)(b) empowering? (RS [47]-[49]).

- Full Court CAB pp 148-151, [208]-[224]
- The opening words to s 56A(1) - *Subject to this Act (but despite any other Act or law)* - indicate the section is empowering.
- The ordinary meaning of the text of s 56A(1)(b) includes the *provision* of evidence of information. It is not a section that simply governs receipt and use, with the power to provide to be found elsewhere (RS [49] : CAB 148, [209] : AS [58])
- The distributive operation of s 56A(1)(b)(i) accords with the natural reading of the section (AS [61]-[62]).
- The application of the verb phrase “may be provided to, and may be received and used by” to s 56A(1)(b)(ii) suggests the natural reading of s 56A(1)(b)(i) as being the correct reading.
- “for the purposes of ... proceedings”: the phrase is of wide import; receipt for the purposes of considering whether to prosecute is receipt for the purposes of proceedings (CAB 149, [213]-[215], [218] ; AS [63]).

4. Questions 3 (b), (c) and (d) - continuing to investigate, the provision of evidence and information obtained, and assisting the ODPP post-charge: a purposive limitation ? (RS [50]-[59]).

- The appellant’s characterisation of any investigation conducted post-charge as being “for the purpose of assisting a prosecution” is inaccurate (ARS [13]); CAB, p 163 FC [273].
- The Full Court’s description of conduct undertaken as “investigative” amounts to a conclusion that the conduct fell within the scope and purpose of the functions invested and the powers conferred;

CAB, p 162, 163; [271]-[272]: *The ICAC Act 2012*, JBA Pt A at pp 14 (s 3(2)), 17 (s 5), 19 (s 7(1) and 25 (s 24(1)).

- The contention that the power to investigate is constrained by the commencement of a prosecution is founded on suggested difficulties that are more illusory than real (AS [82]-[83]); (RS [55]-[59]): The contention does not account for summary matters.
- Section 43 denies the existence of the proposed limitation : “may perform functions or exercise powers in respect of a particular matter despite the referral of the matter for ... prosecution”.

5. Questions 3 (a) - the provision of transcripts of compulsory examinations (RS [60]-[62]).

- Full Court CAB p 151-153, [225]-[233]
- The argument in the courts below concerned the power to provide the transcripts, not the terms of the variations themselves. It should be similarly confined in this Court.
 - If not, the proper consideration of the outcome of the investigation by the DPP and the ODPP contemplates use in a potential prosecution.

CAB p 113, [59]

- The April 2017 variations made under sched 2 cl 3(11) paved the way for the disclosure of the transcripts to the DPP under s 56A(1).
- The power contained in sched 2 cl 3(11) is not constrained by s 36(1)(a); (AS [90]).
- A variation permitting use of a transcript by the DPP does not amount to an “effective cancellation of the non-communication direction”; (AS [91]). Use within the criminal justice system is constrained. The power to vary to permit disclosure is not antithetical to the legislative scheme.

Dated: 15 March 2022



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