



HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No A 30 of 2021

BETWEEN:

TROY STEPHEN BELL

Appellant

and

10

THE QUEEN

Respondent

RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION FOR PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

Part II: SPECIAL LEAVE SHOULD BE RESCINDED

2. The grant of special leave should be rescinded.
- 20 3. The *Independent Commissioner Against Corruption Act 2012* (SA) (**the ICAC Act or the Act**) was significantly amended by *The Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Act 2021* (SA) (**the Amending Act**). The amendments to the Act came into operation on 7 October 2021. Section 70 of the Amending Act provided that the ICAC Act as in force before the commencement of the amendments continues to apply in relation to any complaint or report made under that Act on or before 25 August 2021, or any investigation commenced under that Act before 25 August 2021.
4. The Act in its present form, and any judgment of this Court in these proceedings, will only apply to eight cases.¹
- 30 5. The Act in its present form is materially different to that which will be applicable in the trial of the appellant. The Independent Commission Against Corruption, of which the Commissioner is the principal officer, has now been created.² The objects of the Act as amended now state that the Commission will exercise its functions only in

¹ Affidavit of Andrew John Baker, sworn 29 October 2021.

² Amending Act, s 11.

relation to corruption in public administration.³ Related amendments have been made to achieve this objective.

6. Most significantly, ss 7(1) and 36 have been amended prohibiting the referral of an investigation into corruption in public administration by the Commission directly to a prosecution agency and permitting the Commission to refer such investigation only to a law enforcement agency (of which the Director of Public Prosecutions (**the DPP**) is not one) “who will be responsible for any further investigation and prosecution of the matter”.⁴ Assuming s 36(1a) does not exclude the DPP from prosecuting a matter referred under s 36 post the amendment of the Act, an assumption that is not free from doubt, the DPP will, henceforth, only assume conduct of the prosecution of corruption charges investigated in whole, or in part, by the Commission, after the South Australia Police (**SAPOL**) has decided to charge someone with a major indictable offence and upon the making of a charge determination,⁵ or, by administrative arrangement with SAPOL.
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7. It is trite that where an Act is amended it must be re-construed in the light of the amendment.⁶ The substance of the amendments to sections 7 and 36 is carried through to the provisions which amend ss 43, 54, 56A of the Act.⁷ Those provisions are also significant to the answers to the questions reserved.
8. On the hearing of the application for special leave to appeal, the respondent conceded that the questions reserved for the consideration of the Full Court were important questions, but the importance is no longer what it was. Whilst this Court’s answers to the questions reserved for the consideration of the Full Court will provide certainty for the possible exercise of the public policy discretion, they will do so only for eight cases (11 accused). In the circumstances, and relying upon its submissions on the application for special leave as to the judgment of the Full Court not being attended by sufficient doubt to warrant a grant of special leave, the respondent contends that the grant of special leave should be rescinded.
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³ Amending Act, s 6.

⁴ Amending Act, ss 11 and 30 the latter inserting a new s 36(1a) providing, “[f]or the avoidance of doubt, the Commission must not refer a matter directly to a prosecution authority but may only refer it to a law enforcement agency who will be responsible for any further investigation and prosecution of the matter.”

⁵ *Criminal Procedure Act 1921* (SA), s 106(1)(b).

⁶ *Commissioner of Stamps v Telegraph Investment Co* (1995) 184 CLR 453 at 463 (Brennan CJ, Dawson and Toohey JJ).

⁷ Section 11 of the Amending Act substitutes s 7 of the ICAC Act; s 40 of the Amending Act substitutes s43 of the ICAC Act; s 48 of the Amending Act amends s 54 of the ICAC Act; s 51 of the Amending Act amends s 56 A of the ICAC Act.

Part III: CONCISE STATEMENT OF THE ISSUES

9. The three questions of law reserved for the consideration of the Full Court which arise for determination in this case are set out in the Core Appeal Book (**CAB**) at 97-98 and, with the Full Court's answers, at 182-184.
10. The answer to question 1 turns on whether s 36(1)(a) is an exhaustive statement of the action that the Independent Commissioner Against Corruption (**the Commissioner**) may take upon completing an investigation, or at anytime during an investigation, into a potential issue of corruption in public administration. Ancillary to this is the question of whether the Commissioner must be vested with an express power to refer an investigation for potential prosecution.
11. Question 2 only arises for consideration if this Court holds that the Full Court erred in its conclusion on question 1. The resolution of question 2 turns on whether s 56A of the ICAC Act permits the Commissioner to provide evidence and information comprising an investigation into a potential issue of corruption in public administration to the DPP for consideration as to whether a prosecution should be instituted and for the purposes of conducting that prosecution.
12. The answer to questions 3(b), (c) and (d) turn on whether continuing to investigate charges of corruption in public administration (including by the use of coercive powers) once charges have been laid, and committing resources to assist the prosecution in preparing for trial, falls within the scope and purpose of the functions vested in the Commissioner. Question 3(a) challenges the lawfulness of variations to directions made at compulsory examinations, such variations paving the way for the evidence obtained to be used by the DPP in the prosecution of the appellant.

Part IV: SECTION 78B OF THE JUDICIARY ACT 1903

13. Not applicable.

Part V: FACTS IN DISPUTE

14. The respondent accepts the summary of the critical facts set out in the appellant's written submissions at [6]-[21], but would add -

14.1 In March 2014 the Office of Public Integrity (**OPI**) received a complaint in respect of the appellant from the Deputy Mayor of the Mount Gambier City Council.⁸ The OPI assessed the matter as raising a potential issue of

⁸ *R v Bell* [2020] SADC 107 at [5]; **CAB 23**.

misconduct in public administration. Therefore, on 18 March 2014, the matter was referred to the Department of Education and Child Development for investigation.⁹ In response, the Department prepared an internal audit report which then was forwarded to the Deputy Commissioner.

14.2 On 12 November 2014, in the light of the Department's report, the matter was re-assessed by the Commissioner as raising potential issues of corruption in public administration. Under s 24(1)(a) of the ICAC Act, the Commissioner determined that the matter should be investigated by the Commissioner.¹⁰ That determination triggered the Commissioner's responsibility, under s 27(1) of the ICAC Act, to oversee the investigation.

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Part VI: RESPONDENT'S ARGUMENT

The ICAC and the investigation of corruption in public administration

15. The Office of the *Independent Commissioner Against Corruption* came into existence on 27 November 2014. Section 3(1) of the ICAC Act sets out the primary objects of the Act. Those objects include the establishment of the Independent Commissioner Against Corruption with functions including to further the identification and investigation of corruption in public administration. Section 3(2) of the Act declares the primary object of the Commissioner to be to investigate corruption in public administration.

20 16. The Office of the Independent Commissioner Against Corruption is created by s 7 of the Act and,¹¹ by that same section, the Commissioner is given functions including to identify corruption in public administration and to investigate and refer such corruption for prosecution, or, refer such corruption to a law enforcement agency for investigation and prosecution.¹²

17. Corruption in public administration is defined in s 5(1) of the Act as meaning conduct that constitutes specified offences created by the *Criminal Law Consolidation Act 1935* (SA), the *Public Sector Honesty and Accountability Act*

⁹ *R v Bell* [2020] SADC 107 at [5] (pursuant to section 24 (2)(b) of the *ICAC Act 2012* (SA) as it was at the time); **CAB 23**.

¹⁰ *R v Bell* [2020] SADC 107 at [6]; **CAB 23**.

¹¹ The Commissioner may be considered to hold an 'office' in the sense that he or she occupies a position to which duties attach; *R v Boston* (1923) 33 CLR 386 at 402 (Isaacs and Rich JJ); *FCT v Jayasinghe* (2017) 260 CLR 400 at [38] (Kiefel CJ, Keane, Gordon and Edelman JJ).

¹² ICAC Act, s 7(1)(a).

(1995) (SA), the *Public Corporations Act 1993* (SA), the *Lobbyists Act 2015* (SA) and extends to secondary and inchoate liability for such offences.¹³

18. A law enforcement agency is defined in s 4(1) of the Act and includes SAPOL but does not include the DPP nor the Office of the Director of Public Prosecutions (ODPP).
19. Consideration of the purposes of the Act, as stated in s 3, and the functions conferred on the Commissioner by s 7, makes plain that the prosecution of corruption in public administration forms no part of the Commissioner's functions.¹⁴ Rather, having regard to ss 3(1)(a)(i), 3(2)(a), 7(1) and 7(4), it is contemplated that the prosecution function will be performed by another, albeit that such prosecution may be founded on an ICAC investigation.
20. Following receipt of the Department's report, the present matter was reassessed as raising potential issues of corruption in public administration. That reassessment triggered s 24(1), obliging the Commissioner to determine whether the matter was to be investigated by the ICAC or referred to SAPOL or another law enforcement agency. The Commissioner determined that the matter be investigated by the ICAC.
21. In consequence of the decision made under s 24(1), the Commissioner was obliged to oversee the investigation.¹⁵ In that connection the then Commissioner could head the investigation himself or appoint a Deputy Commissioner or examiner to do so with the requirement that they report to the Commissioner.¹⁶ In addition, the Commissioner could appoint one or more legal practitioners to assist as counsel,¹⁷ could engage employees under s 12 of the Act, could make use of the services of the staff of an administrative unit, the ODPP and members of SAPOL under s 13, and, under s 14(1), could appoint examiners and investigators.
22. In the investigation of corruption in public administration the Commissioner was empowered to authorise an investigator to inspect and take copies of financial records,¹⁸ to issue a warrant authorising an investigator to enter and search a place or vehicle used by a public authority or public officer,¹⁹ to apply for a warrant from a

¹³ ICAC Act, s 5 (1)(c). The appellant is charged with offences against Part 5 CLCA.

¹⁴ See also, Parliament of South Australia, House of Assembly, Hansard, 2 May 2012 (*Independent Commissioner Against Corruption Bill*, Second Reading Speech).

¹⁵ ICAC Act, s 27(1).

¹⁶ ICAC Act, s 27(2).

¹⁷ ICAC Act, s 27(2).

¹⁸ ICAC Act, s 29A.

¹⁹ ICAC Act, s 31.

judge of the Supreme Court to enter and search a private place or private vehicle,²⁰ and to issue orders for the retention of things seized.²¹ In the present case each of these powers were used at various times.

23. Under s 29(1) of the Act the Commissioner could conduct an examination in accordance with sch 2 of the Act for the purposes of an investigation into corruption in public administration. In the present case examinations were conducted on 9 August 2016, with Robert Shelton, on 16 February 2017, with Michaela Bell, and on 14 March 2017, with Peter Fox. Under cl 3(9) and (10) of sch 2 an examiner must give a direction that, amongst other things, any evidence given before the examiner
10 must not be communicated or provided to any person save as may be permitted, if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has, or may be charged.

24. Notwithstanding the powers contained in sch 2 of the Act, nothing in the Act prevented the Commissioner or any other law enforcement agency from taking any and all non-coercive steps to obtain relevant evidence as part of an investigation into corruption in public administration. Put slightly differently, the ICAC Act does not contemplate that an investigation will be undertaken only by way of the exercise of the coercive powers vested in the Commissioner. That is, the ICAC Act assumes that statutory power is not required for every act performed in the discharge of the
20 functions vested.

25. The Commissioner may, in writing, vary or revoke a direction given under sch 2 cl 3(9) provided that such variation or revocation does not prejudice the safety or reputation of a person, or prejudice the fair trial of a person who has been or may be charged with an offence.²²

26. Schedule 2 cls 3(13) and (14) of the Act provided:

(13) If—

(a) a person has been charged with an offence; and

(b) the court considers that it may be desirable in the interests of justice that particular evidence given before an examiner, being evidence in relation to
30 which the examiner has given a direction under subclause (9), be made available to the person or to a legal practitioner representing the person,

²⁰ ICAC Act, s 31.

²¹ ICAC Act, ss 31 and 32.

²² ICAC Act, sch 2 cl 3(12) and (13).

the court may give to the examiner or to the Commissioner a certificate to that effect and, if the court does so, the examiner or the Commissioner, as the case may be, must make the evidence available to the court.

(14) If—

- (a) the examiner or the Commissioner makes evidence available to a court in accordance with subclause (13); and
- (b) the court, after examining the evidence, is satisfied that the interests of justice so require,

the court may make the evidence available to the person charged with the offence concerned or to a legal practitioner representing the person.

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27. Section 43 of the Act provided that a referral of a matter for prosecution did not preclude the Commissioner from continuing to perform functions and exercise powers in respect of that matter. The section also expressly provided that investigatory functions may continue to be performed after proceedings have been instituted (including criminal proceedings). The Commissioner is, however, to “endeavour to avoid, as far as practicable, prejudice to any person affected by the referral of proceedings or who is charged with an offence”.

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28. In the case of a person involved in the administration of the Act, control of the communication of information received is effected by s 54(1). Section 54(1) prohibits disclosure of information in relation to or connected with a matter that forms or is the subject of a complaint, report, assessment, investigation, referral or evaluation by a person involved in the administration of the Act except as required or authorised by the Act or as required or authorised by the Commissioner.

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29. Section 54(2) of the Act operates as an exception to s 54(1). The prohibition imposed by s 54(1) does not apply to disclosures made for the purposes enumerated in s 54(2) and no authorisation need be obtained from the Commissioner before such disclosure may be made. Pursuant to s 54(2)(c) of the Act, a person engaged in the administration of the Act, such as an ICAC investigator, may disclose information in relation to or connected with a matter that forms or is the subject of a complaint, report, assessment, investigation, referral or evaluation to the DPP for the purposes of a criminal proceeding. The confidentiality and use that may be made of information disclosed to the DPP under s 54(2)(c) is governed by s 54(3) of the Act. The exceptions contained in s 54(3)(b) to the command contained in the chapeau to s 54(3) are not subject to the person in possession of the relevant information obtaining authorisation from the Commissioner.

30. The publication of information disclosed under s 54 of the Act is governed by s 56 of the Act. Section 54(2) and (3) contemplate the use of disclosed information in a criminal proceeding. Accepting this, publication within the meaning of s 56 of the Act cannot extend to the use of the information in criminal proceedings. Such construction is consistent with the definition of the verb publish contained in s 4(1) of the Act.²³ The position is made plain by s 56A. That is, with respect to the disclosure of information obtained by the Commissioner under the Act in the course of an investigation into corruption in public administration by the Commissioner to the DPP, s 56A makes clear what is implicit in s 54.
- 10 31. In the construction and application of ss 54, 56 and 56A, it is to be remembered that the primary function of the Commissioner is to investigate corruption in public administration but that the Commissioner does not do so to the exclusion of all other law enforcement agencies whose functions may include investigating the same sort of conduct. That is to say, the Act provides for a regime whereby the Commissioner is aware of all complaints of corruption in public administration²⁴ known to public sector officers but need not investigate all.²⁵ Accordingly, ss 54, 56 and 56A facilitate investigation and prosecution by a range of agencies whilst at the same time ensuring control by the Commissioner of disclosure subject to the Act, and, potentially, of investigation strategy using s 34.²⁶ Further, bearing in mind s 3(1)(c) of the Act, ss 54, 56 and 56A can be considered as a reflection of that balance.
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32. An examiner issuing a summons under sch 2 cl 4 or a notice under sch 2 cl 5 must include a notation to the effect that disclosure of information about the summons or notice, or any official matter connected with it, is prohibited except in circumstances, if any, specified in the notation, if the examiner is satisfied that failure to do so would reasonably be expected to prejudice the safety or reputation of the recipient, the fair trial of a person who has or may be charged with an offence or the effectiveness of an investigation;²⁷

²³ See also, Parliament of South Australia, House of Assembly, Hansard, Wednesday 29 October 2014 at p 2489 (*Independent Commissioner Against Corruption (Miscellaneous) Amendment Bill 2014*, Second Reading Speech).

²⁴ ICAC Act, s 20.

²⁵ ICAC Act, s 24.

²⁶ *DPP (SA) v Jaunay & Another* [2020] SASFC 25 at [137] (Kourakis CJ, Kelly and Parker JJ).

²⁷ ICAC Act, sch 2 cl 6(1) and (2)(a).

Question 1: Did the Commissioner act unlawfully in referring the investigation into the appellant to the DPP in May 2017?

33. The Full Court undertook an orthodox analysis of the text, context and purpose of ss 7 and 36(1) of the Act,²⁸ concluding that s 7(1)(a) conferred a capacity on the Commissioner to refer a matter for prosecution to the DPP and that s 36(1) was not exhaustive of the options open to the Commissioner upon embarking upon an investigation into corruption in public administration.²⁹ Respectfully, this conclusion was correct.

10 34. As to the text of s 7(1)(a), the Full Court observed that the natural reading of the provision was the conferral of a capacity permitting the direct referral of an investigation to a prosecuting agency.³⁰

35. Contextually the natural reading was supported by a consideration of ss 7(1)(a)(ii), 7(2), 7(4)(a) and s 7(4)(b).³¹ The Court correctly observed:³²

20 Before the enactment of the Act, the primary responsibility for the investigation of offences defined by the Act to be corruption offences was that of SAPOL. By enacting the Act, the legislature proceeded on the basis that there should be an independent person responsible for, and able to conduct, the investigation of corruption offences. It would defeat the evident purpose of the Act if the independent person were wholly dependent on SAPOL to complete investigation of corruption offences and determine whether they should be prosecuted. This is especially so given that SAPOL officers might themselves be the subject of a corruption investigation.

36. Next the Full Court referred to the coercive powers available to the Commissioner in the course of an investigation (ss 28, 29, 29A, 30, 31, 34 and 36A)³³ before observing :³⁴

30 The fact that a specific power is not conferred on the Commissioner does not entail that the Commissioner does not have the capacity to act to exercise a function conferred by section 7. For example, the function conferred by s 7(1)(b) is to assist inquiry agencies and public authorities to address misconduct/maladministration but no specific power is conferred on the Commissioner in this respect. The same applies to the functions conferred by section 7(1)(ca) of identifying serious or systemic misconduct/maladministration, by section 7(1)(d) of evaluating practices of inquiry agencies and public authorities and by section 7(1)(e) of conducting

²⁸ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [143]-[195]; **CAB** 133-146.

²⁹ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [196]; **CAB** 146.

³⁰ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [145]; **CAB** 136.

³¹ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [146]-[149]; **CAB** 136.

³² *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [150]; **CAB** 136.

³³ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [151]; **CAB** 137.

³⁴ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [152]; **CAB** 137.

educational programs to prevent or minimise corruption or misconduct/maladministration. This is reinforced by subsection 7(4), which refers only to the performance of the Commissioner's functions and not to the exercise of the Commissioner's powers.

37. The Full Court concluded that s 7 described activities which the Commissioner could perform and activities upon which the Commissioner was authorised to expend the resources of the Office of the Commissioner.³⁵ “It authorised the Commissioner to perform those functions.”³⁶
- 10 38. Turning to s 36(1)(a), the Court observed that the referral being to *the relevant* law enforcement agency suggested that the section applied where, during the course of an investigation, evidence was discovered of an offence other than a corruption offence within the meaning of s 5 that was within the province of another law enforcement agency to investigate.³⁷ The correctness of that suggestion was reinforced by the textual reference to the referral being for *further investigation*,³⁸ consistent with the receiving law enforcement agency conducting its own investigation, and the reference to the referral being for *potential prosecution*, indicating that any prosecution would depend upon the investigation conducted subsequent to referral.³⁹
- 20 39. The Full Court then turned its attention to the concept of a matter as referred to in s 36(1)(a), noting that a matter was not confined to corruption in public administration or misconduct or maladministration in public administration in contrast to s 7(1)(a).⁴⁰
40. Having regard to context and, in particular, s 36(1)(b), the Court concluded that s 36(1)(a) was complimentary to s 7(1)(a) rather than exhaustive of the options available to the Commissioner.⁴¹
41. Having completed its textual and contextual analysis the Full Court identified the evident purpose of s 36(1)(a) as addressing the referral of matters other than corruption offences and, in particular, the referral of an allegation of an offence which is not “corruption in public administration” as defined.⁴²
42. The Full Court then referred to an additional contextual matter relevant to the construction of s 36(1)(a), namely, the legal principle to be derived from the plurality

³⁵ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [153]; **CAB** 137.

³⁶ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [153]; **CAB** 137.

³⁷ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [155]; **CAB** 137-8.

³⁸ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [156]; **CAB** 138.

³⁹ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [157]; **CAB** 138.

⁴⁰ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [158]; **CAB** 138.

⁴¹ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [160]; **CAB** 138.

⁴² *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [161]; **CAB** 139.

in *Johns v Australian Securities Commission*⁴³ (*Johns*) and the antidote contained in s 36(2),⁴⁴ concluding that this confirmed the evident purpose of s 36(1)(a) as identified.⁴⁵

43. The Full Court concluded:

10 ... there is no basis in the text, context or evident purpose of sections 7 and 36 to construe section 36(1)(a) as providing a power for carrying out the function in section 7(1)(a)(i). The differences between the provisions indicate the contrary. The function conferred by section 7(1)(a)(i) is to refer for prosecution; it is not to refer for investigation and prosecution (this function is conferred by s 791)(a)(ii). The course of action identified in section 36(1)(a) is to refer for (further) investigation and (potential) prosecution; it is not to refer for prosecution.

44. The Full Court further analysed the nature of the functions contained in s 7 in the light of the distinction between powers and functions drawn by the primary Judge and embraced by the appellant. The Court considered the functions in s 7 to be more than mere objects of the Office of the Commissioner and that a reading of the Act as a whole made clear that s 7 authorised the Commissioner to take the actions referred to therein.⁴⁶ This conclusion was said to be supported by ss 16(1), 43, 56A(1)(b)(i) and the legislative history of ss 7 and 36(1).⁴⁷

20 45. The appellant contends:

a. that because s 36(1)(a) stipulates to whom a referral may be made, in contrast to s 7(1)(a), it is intended to be prescriptive and exhaustively so.⁴⁸

This contention should be rejected. Prescription in s 36(1)(a) is required because it empowers the Commissioner to take action in relation to matters that otherwise fall outside the purview of her functions. The investigation or partial investigation of a matter that does not have a sufficient territorial to South Australia and its referral to another polity forms no part of the Commissioner's functions.⁴⁹

30 b. where the Commissioner decides to investigate a potential issue of corruption in public administration under s 24(1)(a) of the Act, Part 4, Division 2, Subdivision 2 of the Act is engaged. The final provision in that subdivision is s 36, suggesting at

⁴³ (1993) 178 CLR 408 at 424 (Brennan J, with whom Dawson and Gaudron JJ agreed).

⁴⁴ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [162]-[163]; **CAB** 139.

⁴⁵ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [163]; **CAB** 139.

⁴⁶ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [165]-[167]; **CAB** 139-140.

⁴⁷ *Bell v The Queen; R v Bell* [2020] SASCFC 116 at [169]-[175]; **CAB** 139-142.

⁴⁸ Appellant's Written Submissions at [45].

⁴⁹ *Lipohar v The Queen* (1999) 200 CLR 485.

least structurally, that it is intended to be the power controlling the referral of a matter for prosecution.⁵⁰

This contention should be rejected. The structural must yield to text, context and purpose. Further the submission equates the matter referred to in s 24(1)(a) with the matter referred to in s 36(1)(a) (both, the argument must proceed, must be an investigation into a potential issue of corruption in public administration having a sufficient territorial connection to South Australia). “A matter” becomes “the matter”, and the matter, by dint of the inextricable relationship to s 24(1)(a), can only be an investigation into a potential issue of corruption in public administration and any incidental offence thereto. Another jurisdiction of the Commonwealth could only have an interest in a matter of that kind if it also happened to have a sufficient territorial nexus to that jurisdiction. To construe the ambit of s 36(1)(a) as being controlled by s 24(1)(a) and subdivision 2 as if it were a code, confines significantly the breadth of the power contained in s 36(1)(a) contrary to the natural meaning of the text.

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- c. section 54(2)(b) contemplates that any referral of a matter for prosecution will occur by way of a law enforcement agency, inquiry agency public authority or public officer.⁵¹

This contention should be rejected. Section 54(2)(b) contemplates the referral of a matter in accordance with the Act to, amongst others, a public officer. A public officer is defined in s 4 by reference to those persons and officers identified by schedule 1. The DPP is a person appointed to an office by the Governor.⁵² In the circumstances, s 54(2)(b) is not at odds with the Full Court’s construction. In fact, it is entirely consistent in that it contemplates a referral not accounted for by s 36(1) providing a further indication that s 36(1) is not exhaustive.

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- d. the purpose of s 36(1)(a), articulated by the Full Court as the referral of matters apart from corruption offences, seems unlikely having regard to the text, structure, objects and purposes of the Act.⁵³

The contention should be rejected. With the exception of SAPOL, the law enforcement agencies to which a matter may be referred under s 36(1)(a) are all

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⁵⁰ Appellant’s Written Submissions at [46]-[47].

⁵¹ Appellant’s Written Submissions at [48].

⁵² *Director of Public Prosecutions Act 1991* (SA), s 4.

⁵³ Appellant’s Written Submissions at [50].

entities created by other polities of the federation for the purposes of those polities. Corruption offences, being the short hand expression used for corruption in public administration as defined in s 5, would not be referred to such entities as they are of no concern to the related polities. Insofar as a referral may be made to SAPOL, that is possible but unlikely, given the primary object of the Commissioner.⁵⁴

10 e. a power to refer an investigation direct to the DPP for potential prosecution is necessary in order that the Commissioner not fall foul of the legal principle derived from *Johns*,⁵⁵ and, the concept of the Commissioner possessing a *capacity* is unhelpful in construing s 36(1) in that it diverts attention from text, context and purpose.⁵⁶

The contention should be rejected. Referral of an investigation direct to the DPP would not offend *Johns*. The information and evidence obtained by the Commissioner, including in the exercise of coercive powers, is obtained in the performance of the function prescribed by s 7(1)(a).

20 As for the Court's holding that s 7(1)(a) confers a capacity, it may be debated whether such characterisation is correct. However, the point, consistent with the holding, is that a natural person having particular qualifications is appointed to a statutory office to which attaches functions which he or she is obliged to perform for reward. Implicitly the officer holder is duty bound to perform the functions vested in the office held. To assist, powers may be conferred, but coercive powers are only required where the ability to compel others to act is necessary.

Any contrast between the duties, powers and obligations attaching to the office of Commissioner to be exercised in the performance of prescribed functions and the content of the executive power of the Commonwealth vested in the Queen and exercisable by the Governor-General, is apt to mislead. The historical and constitutional context informing the content of s 61 of the Constitution involves considerations very different to an implication drawn from the fact of the statutory creation of an office for reward to which functions are attached.

⁵⁴ ICAC Act, s 3(2)(a).

⁵⁵ Appellant's Written Submissions at [52].

⁵⁶ Appellant's Written Submissions at [52] citing *Williams v The Commonwealth* (2012) 248 CLR 156 at [204] (French CJ).

- f. the unlikelihood of direct referral being permitted so as to avoid jeopardising an investigation into SAPOL conducted by the Commissioner only begs the question whether the text and structure of the Act permits the Commissioner to act *in lieu* of SAPOL by assisting the DPP.

10 The Full Court's point has two aspects;⁵⁷ first, the purpose in creating an independent investigative agency tasked with investigating corruption offences would be frustrated if any investigation undertaken by that agency was, in effect, subject to the scrutiny of another law enforcement agency that could determine whether or not the matter be referred for prosecution. Second, that such frustration was not likely intended gains added weight when regard is had to the fact that members of the second agency may themselves be the subject of the investigation. The analysis is orthodox. It does not, with respect, beg the question whether the text and structure of the Act permits the Commissioner to act in the place of SAPOL by assisting the DPP in the preparation of a matter for prosecution because that question concerns what may or may not be done by the Commissioner once a prosecution is commenced, not whether the Commissioner may refer an investigation direct to the DPP for potential prosecution.

20 To similar effect it may be noted that if the appellant's construction of s 36(1)(a) were accepted it would have the added consequence of preventing the Commissioner from referring a matter, where an investigation into corruption in public administration had been conducted and completed, to a prosecution agency, notwithstanding s 7(1)(a), and, notwithstanding the evident purpose to create an independent investigative body. Rather the unnecessary step would have to be taken of referring the matter to a law enforcement agency (generally investigative agencies) for referral, if that agency considered a referral warranted, to a prosecution agency.

46. Section 36(1) expands the dispositive options available to the Commissioner. Such construction is not inconsistent with the text of s 36(1). Contextually it gives work to all of s 7(1)(a)(i) to do where the alternate construction would not do so. Further it is
30 consistent with s 43 which speaks of the referral of a matter for *prosecution or investigation and prosecution* and s 56A(1) which provides for the provision of evidence or information obtained by the lawful exercise of powers under the Act (*i.e.*

⁵⁷ See above at [35].

by the Commissioner) to prosecution authorities. Further again, it is consistent with the purpose of s 36(1).

The second question

47. Having regard to the legislative history of s 56A, the Full Court determined that the purpose of the section was the same as that of s 36(2) (*i.e.* as an antidote to the *Johns* principle), but noted s 56A to be broader in application.⁵⁸ The operation of s 56A(1)(b), it was said, expanded the purposes for which statutory powers available to the Commissioner could be exercised.⁵⁹ The text of the section taken in isolation permitted the provision of information to a prosecution authority for the purpose of “deciding whether to institute, instituting and conducting criminal proceedings”,⁶⁰ and a consideration of context and purpose did not detract from that meaning.⁶¹ The Court concluded:⁶²

Section 7(1)(a)(i) confers on the Commissioner the capacity, as an integral part of a referral for prosecution, to provide to the Director evidentiary material obtained in the course of the investigation (subject to consideration of the confidentiality provisions of the Act). There is no need to have recourse to section 56A. However, section 56A on its proper construction also confers this capacity on the Commissioner.

48. The appellant contends that the purpose of s 56A(1)(b)(i) is confined to addressing the principle derived from *Johns*, that the section cannot be construed distributively as permitting the Commissioner to provide evidence directly to a prosecution authority, and that the section applies only in relation to extant proceedings.⁶³

49. It is true that s 56A(1)(b)(i) does not expressly identify who may provide evidence or information to a law enforcement agency or prosecution authority under s 56A(1). However, the class of person who may do so is identified - those who may exercise powers in relation to suspected corruption, misconduct or maladministration in public administration. There can be no doubt that this class includes the Commissioner. If this is accepted, plainly s 56A (1) does contemplate the provision of evidence or information obtained by the Commissioner directly to prosecution authorities. Further, if a distributive interpretation was not intended, no need arose to refer to prosecution authorities at all as the objective could have been achieved

⁵⁸ *Bell v The Queen; R v Bell* [2020] SASCF 116 at [208]; **CAB** 148.

⁵⁹ *Bell v The Queen; R v Bell* [2020] SASCF 116 at [209]; **CAB** 148.

⁶⁰ *Bell v The Queen; R v Bell* [2020] SASCF 116 at [215]; **CAB** 149.

⁶¹ *Bell v The Queen; R v Bell* [2020] SASCF 116 at [216][218]; **CAB** 149-150.

⁶² *Bell v The Queen; R v Bell* [2020] SASCF 116 at [224]; **CAB** 151.

⁶³ Appellant’s Written Submissions at [59]-[63].

simply by permitting the provision of evidence and information to law enforcement agencies. Use by those agencies, in turn, would have permitted disclosure to prosecuting authorities. The only reason to make specific reference to prosecution authorities is to facilitate the direct provision of evidence and information. Respectfully, the appellant's construction of s 56A(1) is untenable.

Questions 3 (b), (c) and (d)

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50. The argument in relation to questions 3(b), (c) and (d) raises the question of whether the Commissioner may continue to investigate a matter of corruption in public administration, and provide evidential material gathered in the course of doing so, once a prosecution has been commenced.
51. The appellant contends that the functions and powers of the Commissioner are to be construed subject to a “purposive limitation”, being that the functions of the Commissioner and her powers in relation to a particular investigation of corruption in public administration cease to have any operative capacity or effect in relation to a matter once a prosecution is commenced.⁶⁴
52. It may be accepted that unbounded statutory power must be exercised having regard to the scope, object and subject matter of the Act by which the power is conferred.⁶⁵
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53. The contention is that the proffered limitation is a necessary implication constraining the exercise of all powers and the performance of all functions in relation to the investigation of a corruption offence by the Commissioner because of numerous “difficulties and tensions” that arise if the contrary view is taken.⁶⁶ Two illustrations of such difficulties are provided; the inability for an investigation to co-exist with the duties of the DPP under the DPP Act, and, the inability to reconcile the maintenance of secrecy and confidentiality which attend an investigation by the Commissioner with a public prosecution.⁶⁷ The respondent contends that neither illustration support the suggested implication.

⁶⁴ Appellant's Written Submissions at [80]; In short, the Commissioner's role ceases upon charges being laid; she cannot “undertake activities or exercise powers (even if they are broadly investigative in character) for the purposes of an extant prosecution”.

⁶⁵ *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504-505 (Dixon J); *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 105-6 (Williams, Webb and Kitto JJ); *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [21]-[22] (Gaudron and Gummow JJ), [31]; *W R Carpenter Holdings Pty Ltd v FCT* (2008) 237 CLR 198 at [31] (The Court).

⁶⁶ Appellant's Written Submissions at [82].

⁶⁷ Appellant's Written Submissions at [82].

54. The respondent relies upon s 43 of the Act as providing the complete answer to the appellant's argument. The appellant's contention that s 43 be construed as limited in operation to "some aspect of a matter for the purposes of ascertaining whether other issues of corruption or maladministration warrant further action, or whether other persons apart from the accused should be charged" reads in a limitation that the text cannot support.⁶⁸ The proviso contained in s 43 acknowledges that the performance of functions or exercise of powers in the circumstances contemplated *will* prejudice a person affected by a referral or proceedings or who is charged with an offence, but enjoins the Commissioner, Deputy Commissioner, examiner and investigator *to endeavour to avoid, as far as practicable, prejudice.*
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55. Further, as to the first illustration, the absence of any obligation on the part of the Commissioner to undertake investigations requested by the DPP,⁶⁹ and the absence of a power vested in the DPP to give directions to the Commissioner,⁷⁰ gives rise to no conflict capable of supporting the suggested implied limitation. True the DPP is dependent upon the cooperation of the Commissioner should a request be made, but the position is no different to other prosecutions where the investigative agency is not SAPOL.
56. For the Commissioner to cooperate voluntarily with the DPP, once a prosecution of a corruption offence has been commenced, is for the Commissioner to act consistently with the primary object of the Commissioner's Office.⁷¹ After all, the investigation of corruption in public administration is a means to an end, and not an end in itself, the end being a determination of whether a particular person has committed such offence. That end is not achieved with the laying of charges. In *X7 v Australian Crime Commission* Hayne and Bell JJ referred to the acquisition of further information, post charge and pre-trial, as serving "no purpose unless it is to make the person's conviction more probable".⁷² Respectfully, that statement is inaccurate. It overlooks the content of the DPP's overarching duty to prosecute fairly in the public interest. As a "minister of justice" it is no part of the DPP's function to pursue a conviction at all costs.⁷³ Thus, whilst the acquisition of further information may be to
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⁶⁸ Appellant's Written Submissions at [78].

⁶⁹ *Director of Public Prosecutions Act 1991* (SA), s 10.

⁷⁰ *Director of Public Prosecutions Act 1991* (SA), s 11.

⁷¹ ICAC Act, s 3(2)(a).

⁷² (2013) 248 CLR 92 at [110].

⁷³ *Alister v The Queen* (1984) 154 CLR 404 at 429-430 (Murphy J) citing C Humphreys, *The Duties and Responsibilities of Prosecuting Counsel* [1955] Crim LR; see also, *R v Lucas* [1973] VR 693 at 705 Newton J and Morris AJ; *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 (Deane J); *Dyers v*

make a person's conviction more probable, it may also be with a view to obtaining information that exculpates, resulting in a prosecution being brought to an end by the DPP. The point to be had is that there is no bright line conclusion of the investigative function short of a plea or conviction being returned. Even then, on occasion, further investigation is not unknown.

57. As to the second illustration, a primary object of the Act is to achieve an appropriate balance between the public interest in exposing corruption and the public interest in avoiding undue prejudice to a person's reputation, "recognizing that the balance may be weighted differently in relation to corruption in public administration".⁷⁴ Sections 54(2)(c), 54(3)(b)(ii), 56A(1)(b) and schedule 2 cls (13) and (14) are examples of how the Act achieves or provides for the balance where a prosecution is commenced. That these provisions may be misunderstood, as arguably occurred in the present case, cannot be relied upon to support the proposed implication.
58. The appellant also refers to his loss of the benefit of s 10A of the DPP Act.⁷⁵ Whilst the Commissioner owes no such duty to the DPP, it remains the case that the duty of disclosure owed by the DPP to a trial court in the prosecution of a corruption offence investigated and directly referred to the DPP by the Commissioner, is as fulsome as that owed in a matter where SAPOL is the investigating agency.
59. The appellant's example of the Commissioner compulsorily examining a witness who the defence indicates it intends to call as marking a significant alteration to the accusatorial process should not be accepted.⁷⁶ Firstly, the example commences from a position of the accusatorial process first being altered by the defence in advising the prosecution of the name of a non-alibi, non-expert witness. Secondly, to accept the proposition is to accept that there is property in a witness, something that, notwithstanding that the process is accusatorial, is anathema to the process. Thirdly, the proposition overlooks the prosecutor's duty to call all witnesses who may give material evidence on a fact in issue, irrespective of whether such evidence assists the prosecution case.⁷⁷

The Queen (2002) 210 CLR 285 at [11] (Gaudron and Hayne JJ); *Boucher v R* (1954) 110 CCC 263 At 270 (Rand J).

⁷⁴ ICAC Act, s 3 (1)(c).

⁷⁵ Appellant's Written Submissions at fn 43.

⁷⁶ Appellant's Written Submissions at [83].

⁷⁷ *ASIC v Hellicar* (2012) 247 CLR 345; *The Queen v Apostilides* (1984) 154 CLR 563; *Whitehorn v The Queen* (1983) 152 CLR 657; *Richardson v The Queen* (1974) 131 CLR 116.

Question 3(a)

60. Transcripts of examinations conducted with Mr Shelton, on 5 August 2016, with Mrs Bell, on 16 February 2017, and with Mr Fox, on 14 March 2017, were provided to the DPP in May 2017.
61. The question is asked against the background of the directions given by the examiner under sch 2 cl 3(9) of the ICAC Act, in respect of Mr Shelton, on 9 August 2016, Mr Fox, on 14 March 2017, and Mrs Bell, on 16 February 2017 (**the relevant directions**). On 24 April 2017, each of the relevant directions were varied permitting the communication of any evidence given by each of Mr Shelton, Mr Fox and Mrs Bell in the course of their examinations, or any information that might enable those persons to be identified as having given evidence, to the DPP, Ms Emily Telfer SC a practitioner on the DPP's staff, and to such other member of the staff of the DPP as from time to time may be nominated by him. The purpose of the variations, as stated in the instruments of variation, was to allow the ODPP to consider the then product of the investigation. On 15 June 2017, the Fox direction was further varied.
62. Answering each of the appellant's contentions *in seriatim* -
- i. The power contained in sch 2 cl 3(9) of the Act is one to control by direction the communication of evidence *etc.* given at an examination by persons present with the exception of those engaged in the administration of the Act. Importantly, a direction, and any exception or variation, controls what may be communicated and the mode of communication, but not the use of material once communicated nor its further disclosure. The protection that the power is intended to provide is secured by the non-communication of material or the selective communication of material. Once the material is communicated in accordance with a variation, s 54(3) controls its use.
 - ii. sections 7, 36, 43, 54 and 56A of the Act all contemplate that evidence obtained in the course of an investigation into corruption in public administration may be used in a prosecution. That is so irrespective of whether the Commissioner may refer an investigation directly to the DPP or may only refer a matter to a law enforcement agency for further investigation and prosecution.
 - iii. the appellant does not identify how the fairness of his trial has been or will be prejudiced by the variations of the relevant directions. The variations have not

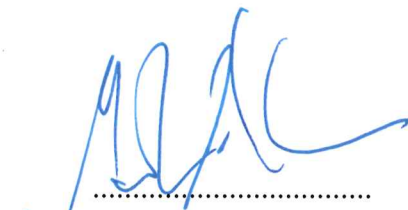
resulted in prospective jurors being appraised of information such that there is a risk that they will be unable to consider the evidence to be adduced at trial impartially and objectively, or will be overwhelmed in some way such that there is a risk that the jurors might afford the evidence adduced weight that it cannot reasonably attract.

- iv. as mentioned, making the evidence given in an examination available for a prosecution is very much contemplated by the Act.

Part VI: ESTIMATE OF TIME TAKEN TO PRESENT ORAL ARGUMENT

63. The respondent estimates that it will require approximately 1 hour to present oral
10 argument.

Dated: 29 October 2021



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Director of Public
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**IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY**

No A 30 of 2021

BETWEEN:

TROY STEPHEN BELL

Appellant

and

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THE QUEEN

Respondent

**ANNEXURE TO THE RESPONDENT'S SUBMISSIONS
STATUTORY PROVISIONS REFERRED TO IN SUBMISSIONS**

1. *Independent Commissioner Against Corruption (CIPIC Recommendations) Amendment Act 2021* (SA) ss 6, 11, 30, 40, 48, 51 (as at 7 October 2021).
2. *Independent Commissioner Against Corruption Act 2012* (SA), ss 3, 4, 5, 7, 12, 13, 14, 23, 24, 29, 36, 43, 54, 56, 56A, Sch 2 (as at 4 September 2017 to 30 June 2020).
- 20 3. *Director of Public Prosecutions Act 1991* (SA), ss 6, 7 10, 10A and 11 (current)
4. *Criminal Procedure Act 1921* (SA), s 106 (current)

