



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

File Number: A30/2021  
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#### Important Information

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BETWEEN:

TROY STEPHEN BELL

Appellant

and

THE QUEEN

Respondent

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### APPELLANT'S SUBMISSIONS

#### I PUBLICATION

1. This submission is suitable for publication on the internet.

#### II CONCISE STATEMENT OF ISSUES

2. On the proper construction of the *Independent Commissioner Against Corruption Act 2012* (SA) (ICAC Act) must any referral for potential prosecution be made to the "relevant law enforcement agency" pursuant to s 36(1)(a), or may the Commissioner refer a matter directly to the Director of Public Prosecutions (**Director**)?
- 20 3. On the proper construction of the ICAC Act, following a referral of a matter for potential prosecution, are the powers and resources of the Commissioner (and his or her staff) available to be deployed for the purpose of assisting in a prosecution?

#### III SECTION 78B OF THE JUDICIARY ACT 1903 (CTH)

4. Notice is not required to be given under s 78B of the *Judiciary Act 1903* (Cth).

#### IV CITATION

5. The primary judge's decision is *R v Bell* [2020] SADC 107 (PJ) [CAB19]. The Full Court's decision is *Bell v The Queen* [2020] SASFC 116 (FC) [CAB100].

#### V NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

6. In November 2014, the Commissioner determined to investigate a potential issue of corruption involving the appellant (FC [2]).
- 30 7. Three witnesses (the appellant's wife and two important witnesses, Shelton and Fox, who had declined voluntarily to provide statements (PJ [146], [155]), were compulsorily

examined, search warrants issued under the ICAC Act were executed and other investigative steps were taken (FC [3]). A30/2021

8. The summonses contained a notation prohibiting disclosure of information about them and directions were given restricting the examinees' ability to divulge their evidence or the fact of having given evidence (FC [55]-[58])<sup>1</sup>.
9. In May 2017, the Commissioner forwarded the matter to the Director to determine whether a prosecution should be instituted (FC [4], [60]). Prior to that occurring, in April 2017, the Commissioner varied the confidentiality directions given to the examinees permitting communication of various matters to a prosecutor in the Office of the Director and to other DPP staff members (FC [59]).
10. In August 2017, the Director filed an Information in the Magistrates Court, and the appellant was later committed for trial in the District Court (FC [5], [61]). The Information was served on the appellant by an ICAC investigator (FC [64]).
11. At the relevant time, the prosecutor was required to file statements of witnesses for the prosecution, copies of documents and a document describing any other evidential material on which the prosecution relied and any other material relevant to the charge<sup>2</sup>. The relevant declaration delivery certificates were filed by an ICAC investigator, and the transcripts of the compulsory examinations were filed in the Magistrates Court in September 2017 (FC [65], [361], PJ [196]-[200]). An ICAC investigator served evidentiary material on the appellant (FC [65]).
12. In July 2018, an examiner acting under s 29A of the ICAC Act issued a notice requiring production of documents and investigators authorised by the Commissioner inspected and copied financial records of financial institutions (PJ [201], FC [6], [71]).
13. In October 2018, the Director filed an Information in the District Court (FC [7]).
14. After the commencement of proceedings, ICAC investigators prepared, filed and served witness statements in respect of reluctant witnesses who had earlier been compulsorily examined (FC [66]-[68], PJ [152], [161]-[169]). In the course of corresponding with witnesses, ICAC investigators referenced a confidentiality provision on numerous occasions (PJ [205]-[207]).

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<sup>1</sup> Pursuant to cll 6 and 3(9) of Schedule 2 of the ICAC Act respectively.

<sup>2</sup> *Summary Offences Act 1921* (SA), s 104.

15. In November 2018, the Acting Commissioner issued a notice to a Mr Wheaton pursuant to [A30/2021](#) s 29(2) and sched 2 cl 5 of the ICAC Act, requiring him to produce documents (FC [73])<sup>3</sup>.

16. As the primary judge observed:

[111] Contrary to the usual practice in the preparation of a trial of major indictable charges, the SAPOL did not play any role in relation to this matter. Rather, the ICAC investigators ... worked with legal officers of the DPP from May 2017 to the present day to prepare the matter for trial. ...

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[211] Based on the filed affidavit material, it is clear that ICAC investigators have taken on the role that SAPOL would usually perform in the preparation of major indictable charges for trial. This has included contacting witnesses, preparing declarations, arranging proofing sessions, attending proofing sessions and following up reluctant witnesses.

17. The matter was initially listed for trial in October 2019 but was vacated and re-listed to be heard in July 2020 (FC [75]). On 1 June 2020, the appellant filed an application seeking a permanent stay (FC [77]). It was only on 30 June 2020 that the Commissioner revoked the non-communication directions issued to the examinees (FC [79]).

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18. On 7 August 2020, the primary judge upheld many of the appellant's contentions, including that the Commissioner acted unlawfully in referring the matter directly to the Director and in exercising various powers and performing a prosecutorial role, contrary to the proper construction of the Act (PJ [22]-[24], [125]). She held that the consequence of SA Police being bypassed was that the ICAC investigators stepped beyond the performance of the statutory functions of the ICAC into the arena of criminal proceedings (PJ [257]).

19. However, and despite finding that the consequence had been actual or at least a perception of forensic disadvantage to the appellant<sup>4</sup> (PJ [24], [258]), the judge declined to grant a stay, finding that the appellant had not suffered a forensic disadvantage such as to warrant a stay on the basis that any trial would be irretrievably unfair (PJ [261]), and the conduct of ICAC was not such that allowing the prosecution to proceed would so much bring the administration of justice into disrepute that it should be stayed (PJ [265]).

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<sup>3</sup> The notice prohibited him from making disclosure except in certain circumstances. It was later cancelled: FC [76].

<sup>4</sup> The appellant was served with an authorisation which, on its face, restricted his ability to disclose matters, that he had lost the benefit of the application of provisions of the DPP Act, that two witnesses and his wife who were compulsorily examined were prohibited for almost three years from speaking to his lawyers about their evidence given at the examinations, and that one of those witnesses may have been given the impression they were required to participate in the prosecution by providing statements and attending proofings with the DPP and that they were bound by secrecy. Further, a power was unlawfully exercised to obtain financial records from banks and a credit union, and a power was unlawfully exercised to obtain documents from Mr Wheaton: PJ [258].

20. The appellant filed a notice of appeal against the refusal of the stay. The Director filed a notice of contention on the appeal and made separate application for the referral of questions of law [CAB93]. The proceedings<sup>5</sup> were heard before a commonly constituted Full Court and reasons were given answering the reserved questions in terms which, with limited exceptions<sup>6</sup>, were to the effect that the referral and conduct of the prosecution had been lawful and not inconsistent with the ICAC Act<sup>7</sup>.

10 21. The appellant sought special leave to appeal against the Full Court's judgment on the questions of law reserved and its dismissal of the appellant's appeal in which he sought a stay. The Director having conceded that no point will be taken against a re-agitation of the stay question in the event that this Court's judgment is favourable to the appellant, the Court granted special leave in respect of the questions of law but refused the allied application for special leave to appeal<sup>8</sup>.

## VI SUCCINCT STATEMENT OF ARGUMENT

22. Whether the ICAC Act contemplates direct referral by the Commissioner to the Director, and whether it contemplates the Commissioner or his or her staff undertaking activities or exercising powers in aid of a prosecution are, and were treated by the Courts below as being, related questions.

20 23. The primary judge held that the power of referral for prosecution to the relevant law enforcement agency in s 36(1)(a) was exhaustive of the general function described in s 7(1)(a)(i) (PJ [78]); the ICAC Act did not contemplate the Commissioner providing assistance for the purposes of any prosecution, which was to be conducted by the Director with the assistance of South Australia Police in the conventional way (PJ [84], [86], [115]). The primary judge made findings that the Commissioner's staff had engaged in conduct for the purpose of advancing the prosecution and there is no suggestion in the primary judge's findings that there was some ICAC investigation independently continuing after the referral for prosecution (PJ [24], [111], [113], [122], [123], [125], [200], [202], [207], [211], [257]).

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<sup>5</sup> The Commissioner also instituted a separate proceeding seeking declaratory relief.

<sup>6</sup> See, in relation to filing declarations and delivery certificates and subpoenas: FC [304]-[324], [366]; in relation to the delay in revoking non-communication and non-disclosure directions: FC [323]-[324], [329], [336], [356]; in relation to wrong inclusion of non-disclosure notations: FC [336], [362]. The Court also concluded that there were communications with witnesses that were "less than ideal": FC [337]-[345], [365].

<sup>7</sup> The answers appear at FC [374]. The Court's treatment of the stay issue is at FC [348]-[373]

<sup>8</sup> *Bell v The Queen* [2021] HCA Trans 132.

24. By contrast, the Full Court considered that not only was it open to the Commissioner to refer matters directly to the Director for the purposes of a prosecution (FC [160]), but that the ICAC Act contemplated that prosecutions would be carried out without South Australia Police involvement (FC [149]-[150]). Indeed, that so long as what the Commissioner was doing subsequently could be described, in functional terms, as “investigation”, the Commissioner could work with the Director in respect of a prosecution by gathering evidence, dealing with witnesses and even exercising compulsory powers (FC [271]-[272]).

25. For reasons to be developed, it is respectfully submitted that the Full Court erred in failing to find that:

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- (1) section 36(1)(a) was relevantly exhaustive of the power to refer for potential prosecution<sup>9</sup>;
  - (2) the function and powers of the Commissioner were curtailed by the purpose for which they were conferred, which on proper construction did not extend to the purpose of assisting in a prosecution.

**Legislative framework: public prosecutions in South Australia and the ICAC Act**

26. Under the *Director of Public Prosecutions Act* 1991 (SA) (**DPP Act**), the position and Office of the Director is established (ss 4 and 6). The Director has the power to lay charges for indictable offences and to prosecute them (s 7(1)).

27. When an accused is put on trial for a criminal offence, the issues are joined between the Crown and the accused and it is for the Crown, who appears by the Director on the trial of an indictable offence, and no one else, to represent the community<sup>10</sup>.

28. That said, relevant legislation in South Australia contemplates and caters for the continued involvement of South Australia Police in and in respect of a prosecution<sup>11</sup>, and there remain,

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<sup>9</sup> Although a subsequent amendment cannot bear on the proper construction of earlier provisions, it is noted for completeness that the *Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Act* 2021 (SA), passed on 23 September 2021, introduces a new s 36(1a): “For 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” .

<sup>10</sup> *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at [109], referring, *inter alia*, to Blackstone, *Commentaries on the Laws of England* (1765), bk 1, c 7, pp 258-259. See also *Nemer v Holloway* (2003) 87 SASR 147 at [25].

<sup>11</sup> The purpose of SA Police includes protecting the community in relation to crime and disorder by the provision of services to uphold the law and preserve the peace: s 5 of the *Police Act* 1988 (SA). The *Criminal Procedure Act* 1921 (SA) contains provisions dealing with the commencement of



of course, various common law powers and duties which attend the role of police officers [A30/2021](#) in connection with charging and prosecuting defendants<sup>12</sup>.

29. The DPP Act accommodates the continued involvement of South Australia Police in respect of public prosecutions. By s 10, the Commissioner of Police must, so far as it is practicable to do so, comply with any request from the Director to investigate, or report on the investigation of, any matter. By s 10A, a police officer in charge of the investigation of an indictable offence has a duty to disclose to the Director all documentary material collected or created in the course of the investigation that might reasonably be expected to assist the case for the prosecution or defence<sup>13</sup>.

10 30. Importantly, under s 11, the Director may give direction or furnish guidelines to the Commissioner of Police or other persons investigating, or prosecuting, offences on behalf of the Crown<sup>14</sup>, but, as will be seen, those directions would not bind the Commissioner having regard to s 7(2) of the ICAC Act.

31. The ICAC Act came into force in December 2012. In his second reading speech on the introduction of the Act, the Attorney-General said<sup>15</sup>:

... I wish to make clear that the ICAC will perform an **investigative role and will not have any capacity to lay charges or prosecute a matter, this responsibility will remain with existing law enforcement and prosecuting agencies.** ...

and, after referring to the need for ICAC investigations to be conducted in private, observed:

20 Under the process set out in this Bill, **once a matter investigated by the ICAC has been referred to SA Police for determination as to whether, based on the evidence collected**

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indictable matters in the Magistrates Court by SA Police and the obligation upon SA Police then to provide the Director a “preliminary brief” in relation to the matter (s 106).

<sup>12</sup> The *Summary Offences Act* 1953 (SA) contains detailed procedures that apply where a person is arrested by a police officer without a warrant, without derogating from the powers, privileges, duties and responsibilities a constable has by the common law (ss 75-82). The act of arresting is intrinsically bound up with an intention to charge: see, eg, *State of New South Wales v Robinson* (2019) 266 CLR 619. Justice may require that the person who effectively sets criminal proceedings in motion accept the form of responsibility, or accountability, imposed by the tort of malicious prosecution: see, eg, *A v State of New South Wales* (2007) 230 CLR 500 at [38].

<sup>13</sup> This duty is owed to the Director, but the broader duty of the prosecution to disclose relevant material is owed to the Court (*Cannon v Tahche* (2002) 5 VR 317 at [57]). A failure in its discharge may require the quashing of a verdict of guilty: *Mallard v The Queen* (2005) 224 CLR 125 at [17].

<sup>14</sup> The guidelines acknowledge that the first contact the Director’s Office has with most criminal matters is through South Australia Police once charges for major indictable offences have been laid and a date for the provision of declarations has been set by the Court. The Office then assumes the conduct of matters until their final resolution: Director of Public Prosecutions South Australia, *Statement of Prosecution Policy & Guidelines* (October 2014), p 2.

<sup>15</sup> Second Reading Speech in the Parliament of South Australia, House of Assembly, Hansard, 15 February 2012, *Independent Commissioner Against Corruption Bill*, p 1357, 1360.

**by the ICAC, a charge or charges are to be laid, the normal processes and procedures of a criminal prosecution will apply.** In other words, subject to any suppression order, the charge or charges and the identity of the accused will then become public and the matter will proceed as per any other criminal offence, through the criminal justice system to finalisation. A30/2021

32. A primary object of the Act is to establish the ICAC with functions designed to further the identification and investigation of corruption in public administration (s 3(1)). Section 7(1) provides that there is to be an ICAC with broadly expressed functions including, relevantly:

(a) to identify corruption in public administration and to—

(i) investigate and refer it for prosecution; or

10 (ii) refer it to a law enforcement agency for investigation and prosecution;

33. Section 7(2) makes explicit that the Commissioner is not subject to the direction of any person in relation to any matter. The Commissioner's staff are answerable to him or her<sup>16</sup>.

34. Part 4 of the Act sets out "Procedures and powers", and, importantly, in ss 23-24, prescribes a process of assessment and triaging of complaints, reports or matters, according to whether they raise a potential issue of corruption in public administration, a potential issue of misconduct or maladministration in public administration, or some other issue.

35. In respect of a potential issue of corruption, adopting a structure that may be seen as reflecting the structure of s 7(1)(a) (above), s 24 then provides:

**24—Action that may be taken**

20 (1) If a matter is assessed as raising a potential issue of corruption in public administration that could be the subject of a prosecution, the matter must be—

(a) investigated by the Commissioner; or

(b) referred to South Australia Police or other law enforcement agency.

36. If the matter raises a potential issue of corruption and is dealt with under s 24(1)(a), a suite of provisions in Subdivision 2 ("Action in relation to corruption") of Division 2 of Part 4 then apply, including powers to compel examinations and production of documents<sup>17</sup>.

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<sup>16</sup> A Deputy Commissioner appointed under the Act is responsible for assisting the Commissioner as directed by the Commissioner (s 9). The Commissioner may engage employees who are not Public Service employees (s 12) and may appoint suitable persons to be examiners and investigators (s 14). There is an Office of Public Integrity which is responsible to the Commissioner (ss 17-18).

<sup>17</sup> The Commissioner must oversee the investigation (s 27). There are powers to require the provision of a written statement of information verified by statutory declaration (s 28), a compulsory examination may be conducted and a person may be required to produce documents (s 29), and a written notice authorising an investigator to inspect and take copies of financial records may be given (s 29A). Further compulsory powers including search warrants and seizure powers arise exist in ss 30-32.



37. The final provision of the subdivision is as follows:

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**36—Prosecution and disciplinary action**

(1) On completing an investigation or at any time during an investigation (whether relating to a potential issue of corruption in public administration or of misconduct or maladministration in public administration), the Commissioner may do either or both of the following:

- (a) refer a matter to the relevant law enforcement agency for further investigation and prosecution; and
- (b) refer a matter to a public authority for further investigation and potential disciplinary action against a public officer for whom the authority is responsible.

10 (2) The Commissioner may disclose to the relevant law enforcement agency or public authority any evidence or information that the Commissioner has in respect of the matter. ...

38. A “law enforcement agency” includes South Australia Police<sup>18</sup> but **not** the Director.

39. In the final Division of Part 4, s 43 (“Referral of matter etc does not limit performance of functions”) provides as follows (underlining added):

The Commissioner, the Deputy Commissioner, an examiner or an investigator may perform functions or exercise powers in respect of a particular matter despite the referral of the matter for prosecution or investigation and prosecution, the institution of any proceedings before a judicial body or the charging of a person with an offence (but in any such case the Commissioner, Deputy Commissioner, examiner or investigator must endeavour to avoid, as far as practicable, prejudice to any person affected by the referral or proceedings or who is charged with the offence).

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40. Part 6 of the Act (“Miscellaneous”) contains a number of provisions respecting secrecy, confidentiality and the private nature of proceedings before the Commissioner.

41. Section 54 (“Confidentiality”) provides that except as required or authorised by the Act or by the Commissioner, a person who is, or has been engaged in the administration of the Act must not directly or indirectly 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 under the Act. That is subject to exceptions set out in s 54(2)<sup>19</sup> which include:

- (b) for the purposes of referring a matter in accordance with this Act to a law enforcement agency, inquiry agency, public authority or public officer; or
- (c) for the purposes of a criminal proceeding or a proceeding for the imposition of a penalty; ...

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<sup>18</sup> The definition in s 4 also extends to identified police forces and integrity and anti-corruption bodies of other jurisdictions.

<sup>19</sup> Section 54(3) deals with the position of a person who receives information knowing it is connected with an investigation etc. under the ICAC Act. Again, an embargo, subject to exceptions, is imposed.

42. Section 56 (“Publication of information and evidence”) prohibits, other than where [A30/2021](#) authorised by the Commissioner or a court, the publication of information of particular kinds. Section 56A (“Use of evidence or information”) deals, inter alia, with the use, provision and receipt of information and evidence arising from one investigation in connection with another.

10 43. In relation to examinations for the purposes of an investigation into corruption (as contemplated by s 29), more detailed provision is located in Schedule 2, and there is a specific regime (apparently adapted from similar regimes in other jurisdictions<sup>20</sup>) by which an examiner must, where failing to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who may be charged with an offence, make a non-communication direction. That direction can be varied by the examiner. Where a person has been charged and the court considers that it may be desirable in the interests of justice that the accused should have access to the evidence, a certificate may be given requiring that information to be made available to the court. Thereafter, if the court considers it is in the interests of justice, it may require that evidence to be made available to the accused<sup>21</sup>.

### **Referral for potential prosecution**

#### ***Question 1: whether Commissioner acted unlawfully in referring directly to Director***

20 44. The text and structure of the ICAC Act support the conclusion of the primary judge that the power pursuant to which referral for prosecution contemplated by s 7(1)(a)(i) is to be effected is to be located in s 36(1)(a). Question 1 should be answered “yes”.

45. *First*, s 7(1)(a)(i) is expressed in general terms as a “function”, and it does not identify to whom a matter may be referred for potential prosecution<sup>22</sup>. Section 36(1)(a)(i), by contrast,

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<sup>20</sup> See s 24A of the *Australian Crime Commission Act 2002* (Cth) as it stood at the time relevant to *X7 v Australian Crime Commission* (2013) 248 CLR 92 and *DBH v Australian Crime Commission* [2014] QCA 265. Cf. s 43 of the *Major Crime (Investigative Powers) Act 2004* (Vic), considered in *Chief Examiner v Brown* (2013) 44 VR 741.

<sup>21</sup> Schedule 2, cll 3(9)-(14). The Full Court accepted (FC [247]) that in order to provide examination transcripts to the Director, a specific variation was required even if there was a power of referral generally to the Director. The Court rejected, however, the contention that sub-cll 3(13) and (14) were the proper mechanisms by which a non-communication direction could be varied so as to permit disclosure for the purpose of the institution or conduct of criminal proceedings (FC [232]), without considering this Court’s judgment in *Lee v R* (2014) 253 CLR 455.

<sup>22</sup> Although s 7(1)(a)(i) refers to referral for prosecution it is submitted that, on any view, this must contemplate potential prosecution, because the Commissioner has no power to direct a prosecution.

is specific, and stipulates to whom the matter is to be referred (viz, the relevant law enforcement agency). A30/2021

46. *Secondly*, whilst s 7(1)(a)(ii) speaks of referral to a law enforcement agency, in context, this appears to identify a contrast with s 7(1)(a)(i), and to contemplate a situation where the Commissioner decides not him or herself to investigate the matter.
47. *Thirdly*, and relatedly, the two broad courses of action identified in s 7(1)(a)(i) and (ii) correspond with the decision that must be made in respect of a potential issue of corruption in public administration that could be the subject of prosecution in s 24(1)(a) and (b), which forms part of Subdivision 1 of Division 2 of Part 4 (“Assessment and action that may be taken”). It is only if the Commissioner decides to investigate rather than refer at this juncture (that is, the Commissioner proceeds pursuant to s 24(1)(a)) that the provisions in Subdivision 2 then apply (“Action in relation to corruption”). That subdivision contains the powers and procedures applicable to an investigation by the Commissioner into corruption. Section 36 is the final provision in the subdivision. The structure of the subdivision thus suggests that s 36(1)(a) is the means by which a matter is to be referred for potential prosecution.
48. *Fourthly*, other provisions, such as s 54(2)(b), appear to contemplate that any referral of a matter will have been to a law enforcement agency, inquiry agency, public authority or public officer (each such referral being reflected in specific referral provisions), contraindicating that the statute contemplates direct referral of a matter for prosecution to the Director.
49. The Full Court, rejecting the primary judge’s conclusion (that s 7(1) expressed functions not powers) and the appellant’s contention (that if s 7(1)(a)(i) expressed a broad power, the *Anthony Hordern* principle<sup>23</sup> demanded that it was limited by s 36(1)(a)), held that:
- (1) not only was s 7(1)(a)(i) itself a source of authority, it was one which was not confined to referral to a law enforcement agency (FC [145]); and

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<sup>23</sup> In *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, Gavan Duffy CJ and Dixon J said that “[w]hen the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power”. See *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 230 CLR 370 at [54], *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [50].

(2) although broad enough to encompass referral to South Australia Police in [A30/2021](#) contemplation of a potential prosecution of a corruption offence, the evident purpose of s 36(1)(a) was in fact to refer **non-corruption offences** to law enforcement agencies (FC [160])<sup>24</sup>.

10 50. Respectfully, the evident purpose of s 36(1)(a) identified by the Full Court (being one directed towards referral of matters apart from corruption) seems unlikely having regard to the text and structure of the ICAC Act, and its co-location with s 36(1)(b) which appears to concern misconduct or maladministration by a public officer. Together with corruption in public administration, these concepts are the touchstone of the objects and purposes of the Act and the Commissioner (ss 3, 5 and 7).

51. Further, it is submitted that the Full Court erred to the extent that it considered there was no need for a specific or express conferral of a power to refer a matter for potential prosecution to the Director on the basis it did not involve an element of coercion (FC [167]), echoing the respondent's submission below that anyone can refer a matter to the Director (PJ [72]).

20 52. But referral would routinely involve the disclosure of evidence gathered using statutory powers, and at least in those cases, there is a duty not to disclose information obtained except for the relevant statutory purpose<sup>25</sup>. Further, the limited utility in resorting to analogies with the capacities of a natural person has been recognised in other contexts<sup>26</sup>. Whether or not in other contexts the concept of referring a matter for potential prosecution is an act that requires some specific authority or power is not a helpful inquiry given that the Parliament saw fit, in s 36(1)(a), to confer an express power or authority. The question is whether, having regard to the scheme of the Act, including the *prima facie* attachment of secrecy and confidentiality to things said and done in the course of an investigation, s 36(1)(a) represented an exhaustive statement of the authorised means by which the Commissioner could refer a matter for the purpose of potential prosecution.

53. At FC [149]-[150], the Full Court gave as a further reason for its conclusion regarding direct referral that, because corruption offences might involve the police, it would jeopardise the independence and efficacy of the Commissioner's work if matters had to go via police with

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<sup>24</sup> The Full Court also held that s 54(2)(b) is "evidently intended to apply to non-corruption offences".

<sup>25</sup> *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 424.

<sup>26</sup> Cf. *Williams v The Commonwealth* (2012) 248 CLR 156 at [204].

the consequence the Commissioner could not control the pace of future investigation and referral for prosecution. A30/2021

54. Respectfully, however, that supposition as to the statutory mischief, and the means deemed necessary to meet it, only begs the question whether the text and structure of the ICAC Act (and, in the case of ambiguity, any relevant extrinsic material) supports a conclusion that the Commissioner may properly act in lieu of South Australia Police by assisting the Director in the prosecution of indictable offences following a referral to the Director. For reasons developed below, it is submitted there is no proper basis for supposing that this was a particular mischief that the Parliament sought to address.

10 ***Question 2: if no power of direct referral, did s 56A authorise provision of the material?***

55. The Full Court considered that whilst there was no need to go beyond s 7(1)(a)(i), s 56A also conferred on the Commissioner the capacity to provide to the Director evidentiary material obtained in the course of the investigation (FC [224]).

56. In terms, the question only arises if the Full Court's conclusion respecting s 7(1)(a)(i) is incorrect. If the conclusion has been reached that the ICAC Act contemplates that referral for potential prosecution is to be by s 36(1)(a), and not otherwise, it would be a surprising result if s 56A(1) was a source of authority to achieve referral by another means. But putting to one side the contingent way in which question 2 is framed, and approaching the construction of the Act as a whole, it is submitted that s 56A(1), which has a limited purpose, and which operates "Subject to this Act", ought not be construed as a tail that wags the dog. 20

57. In context, s 56A should not be seen as a positive or free-standing conferral of authority to disclose or disseminate information that has been gathered under the Act pursuant to compulsory powers or which is otherwise *prima facie* confidential. Rather, it operates to negate what otherwise might be implied restrictions upon *prima facie* authorised use and disclosure.

58. In the appellant's submission, s 56A(1)(a) negates an implication that, applying *Johns v Australian Securities Commission*<sup>27</sup>, might otherwise preclude information gathered in one investigation from being used in another investigation, for that reason alone. In terms it does not deal with disclosure or dissemination beyond an investigation under the Act.

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<sup>27</sup> *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 424.



59. Contrary to FC [218], the evident purpose of s 56A(1)(b) is to be gathered from its concluding phrase “whether the investigation, proceedings or action relate to, or arise from, the same matter or a different matter” A30/2021
60. That is to say, where the Act would otherwise *ex facie* contemplate or result in evidence or information from one investigation (the original investigation) being “provided” or “received and used” in the manner identified in sub-paragraphs (i) and (ii), the mere fact that the subsequent “investigation, proceedings or action” relates to a matter which differs from the original investigation does not render that provision, receipt or use unlawful.
61. Further, contrary to FC [215], there is no sufficient basis in the text of s 56A(1)(b)(i) to draw a positive implication that the ICAC Act contemplates provision of evidence gathered by the Commissioner directly to prosecution authorities. The verb phrase “may be provided to, and may be received and used by” is not to be understood as operating distributively with respect to each of the entities and activities that follow in sub-paragraphs (i) and (ii).
62. That is to say, in respect of s 56A(1)(b)(i), the provision contemplates that evidence may be provided to law enforcement agencies, or received and used by prosecuting authorities (in the latter case, without stipulating the immediate source of the evidence or information), and does not give rise to a conferral (expressly or by implication) of a power on the Commissioner to provide evidence or information to prosecuting authorities.
63. Nor is there any warrant to construe “proceedings” as extending beyond extant proceedings to contemplated proceedings, as the Full Court did in this context (FC [214]-[215]), and also in connection with s 54(2)(c) (FC [238]).

**Acting in aid of a prosecution following referral of a matter**

***Questions 3(b), (c) and (d): lawfulness of things done for purpose of prosecution***

64. As earlier submitted, the primary judge’s findings entailed that between referring the matter to the Director in May 2017 and up to the date of the (ultimately vacated) trial in July 2020, the Commissioner’s staff were engaged in activities, and exercised powers, for the purpose of the prosecution. There was no suggestion of some independent and continuing ICAC investigation.
65. There was no challenge to any primary or basal finding of fact by the primary judge, and indeed particular of the questions of law formulated by the Director and referred for the Full Court’s consideration accepted as their premise (conformably with the primary judge’s



findings) that the Commissioner had acted “for the purposes of [the] prosecution” or “for the purposes of the conduct of [the] prosecution by the Director” (Questions 3(b) and (d)).

66. Respectfully, whilst the Full Court noted the limits of the presumption considered in *X7 v Australian Crime Commission*<sup>28</sup>, the Court failed properly to consider the purposive limits of the Commissioner’s powers (which limits, it will also be submitted, extended to its activities generally). Indeed, the answers given to Questions 3(b)-(d) appear to turn entirely on the character of the activity undertaken or power exercised, without reference to any question of purpose (FC [374]).
67. The decision in *X7* concerned whether the power to compulsorily examine a person as part of a “special ACC operation/investigation” could extend to examining a person the subject of a charge. The premise for analysis was that the questioning was for the ACC’s otherwise authorised purposes. Notwithstanding that confidentiality might effectively attach to and continue in respect of any answers given, and notwithstanding the apparent breadth of the power to examine, the Court held that the legislation did not, with the requisite clarity, reveal an intention to authorise what could be described as a departure from an important predicate of the accusatorial process. The Court was not required to consider the propriety of an investigation which had **as its purpose** the gathering of evidence for an extant prosecution<sup>29</sup>.
68. In *R v IBAC*<sup>30</sup>, the Court declined to extend the constructional presumption in *X7* to the examination of a person who was not yet charged, even though charges might be judged to be likely because the person was reasonably believed or suspected of having committed an offence. However, as the plurality emphasised in *Strickland v Commonwealth Director of Public Prosecutions*<sup>31</sup>, where the examinations in question preceded the laying of a charge, *R v IBAC* was decided on the premise that the compulsory powers were exercised lawfully and for the purpose for which the statute conferred the powers.
69. In *Strickland*, the unlawfulness arose notwithstanding the acknowledged limits of the constructional presumption in *X7*, because, as the plurality observed<sup>32</sup>, whatever the ambit of the ACC’s powers, they were constrained by the ACC Act to be exercised only in the circumstances and only for the purposes for which the Act applies, and there they had been

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<sup>28</sup> (2013) 248 CLR 92.

<sup>29</sup> Albeit Hayne and Bell JJ observed, at [110], that the gathering of evidence after probable cause was established could only serve a purpose of making a conviction more likely at [95]-[96].

<sup>30</sup> (2016) 256 CLR 459.

<sup>31</sup> (2018) 266 CLR 325 at [95]-[96].

<sup>32</sup> (2018) 266 CLR 325 at [72], [74].

used for the AFP's purposes, and not for the purposes of an ACC special [A30/2021](#) operation/investigation.

70. The question of the compellability of witnesses apart from an accused or prospective accused arose in *Commonwealth v Helicopter Resources Pty Ltd*<sup>33</sup>, but in circumstances where, by contrast with *Strickland*, there was and could be no suggestion that the Coroner's proceedings were for some foreign purpose, and no finding was made of improper purpose by the Commonwealth<sup>34</sup>. The Court was concerned with whether the likely effect of compelling the giving of evidence of a witness whose evidence might prejudice a defendant to criminal proceedings was sufficient to preclude or limit the exercise of the compulsive power. After observing that *Strickland* had nothing to do with the lawfulness of compulsory interrogation of potential third party witnesses, the plurality observed that, as *R v IBAC* showed, if an **otherwise lawful** compulsory investigative procedure is sufficiently authorised by statute, it may be invoked notwithstanding that the **practical effect** may be to produce evidence which may be potentially contrary to the ultimate interests of an accused<sup>35</sup>.
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71. In these circumstances, whilst it can be accepted that the constructional presumption invoked in *X7*, which turned on the effect of a compulsory examination of a person charged with an offence, was not engaged, the Full Court erred by proceeding on the basis that there was effectively no purposive limit on the Commissioner's powers or activities so long as they could be described, functionally, as "investigative" (FC [267], [270]).
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72. The starting point ought to have been the proposition that the functions and powers of a statutory body are circumscribed by the purposes for which they are conferred<sup>36</sup>.
73. The identification of the purpose required attention to text and context (including, it is submitted, the extrinsic material earlier referred to<sup>37</sup>), but against the background of the recognition in numerous authorities that where investigative powers and functions are conferred, a real question arises as to whether it is intended that they should be exercised after the stage is reached where charges have been laid.

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<sup>33</sup> (2020) 377 ALR 191; [2020] HCA 16.

<sup>34</sup> This was a point emphasised by Edelman J at [40].

<sup>35</sup> (2020) 377 ALR 191; [2020] HCA 16 at [22].

<sup>36</sup> *Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 at 535. See also the authorities cited by Edelman J in *Commonwealth v AJL20* (2021) 391 ALR 562; [2021] HCA 21 at [124] and [130].

<sup>37</sup> See paragraph [31] above.

74. So, in *Melbourne Steamship Company Ltd v Moorehead*<sup>38</sup>, the majority accepted the appellant's contention that the power given by s 15B of the *Australian Industries Preservation Act 1909* (Cth) was not able to be used in aid of, ie. for the purpose of assisting, pending criminal proceedings. Although it may be accepted that the creation of an investigative body with special powers and functions presupposes a mischief in respect of which ordinary police methods are not judged as sufficient, as Spigelman CJ has observed<sup>39</sup>:

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The difficulties often attendant upon the enforcement of a regulatory statute are not, in my opinion, a decisive consideration in an interpretive exercise with respect to the period *after* the regulatory authority has determined that it has sufficient evidence to lay charges for an offence which it must establish beyond reasonable doubt. The degree of interference with the ability to ensure that the public interest, which the statute is designed to serve, is attenuated so that the another public interest should be permitted to prevail. In my opinion, the laying of charges which submit the matter for judicial decision, should be regarded as a fundamental transformation of a character which Parliament should be taken to understand and respect.

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75. It is accepted that, ultimately, each legislative scheme must be considered according to its own circumstances, and it may be relevant to consider the nature of the powers conferred and the extent to which they differ from curially available powers<sup>40</sup>, but it is not without significance that, in respect of other corruption bodies with similar statutory arrangements, it has been concluded that the body is primarily an investigative body (whose investigations are intended to facilitate the actions of others in combating corrupt conduct) as distinct from a law enforcement agency<sup>41</sup>. In other words, it does not follow from the fact that a body is investigative in character that the limits of the investigative role are unaffected by the institution of criminal proceedings to be prosecuted under separate legislation which legislation contemplates the involvement of police.

76. For that reason the Full Court erred (FC [271]-[272]) by deprecating any relevant distinction between an investigative activity before and after the laying of a charge. The relevance in this case of the laying of a charge resided in the question whether the Parliament

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<sup>38</sup> (1912) 15 CLR 333. This and earlier authority of the High Court was considered in *Brambles Holdings Ltd v Trade Practices Commission (No 2)* (1980) 44 FLR 182; 32 ALR 328.

<sup>39</sup> *NSW Food Authority v Nutricia Australia Pty Ltd* (2008) 72 NSWLR 486 at [129].

<sup>40</sup> In *Environment Protection Authority v Caltex Refinery Co Pty Ltd* (1993) 178 CLR 477, the majority were not persuaded that the compulsory power in question was conferred only for the purpose of investigating a matter, and ceased once a prosecution had commenced. In that statutory context, however, it was apparent that the entity on which the power was conferred had a prosecutorial function. Further, it is acknowledged that Brennan J, in dissent (at 517), considered that the reason for the restrictive construction given in cases such as *Moorehead* (supra) was connected with the right to silence.

<sup>41</sup> See, eg, *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-636, and compare *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at [41]-[42].

contemplated that the activities and powers given to the Commissioner were intended to be undertaken or made available in aid of a prosecution, ie, for the purpose of assisting a prosecution. A30/2021

- 10 77. It is respectfully submitted that the Full Court’s failure to consider the existence of a purposive limitation upon activities and powers led it to misconstrue s 43, which on any view is an important provision bearing on the proper limits of an ICAC investigation. The Full Court held (FC [270]) that the requirement in s 43 that care be taken to avoid prejudice to an accused person would be unnecessary if the Commissioner’s powers automatically came to an end on referral or of the laying of a charge. That, however, subtly misstates the appellant’s contention.
78. In the appellant’s submission, s 43 merely contemplated that notwithstanding that the matter has already been the subject of a relevant referral, the Commissioner may have cause to continue to investigate some aspect of a matter for the purposes of ascertaining whether other issues of corruption or maladministration warrant further action, or whether persons apart from the accused should be the subject of a referral.
79. The section requires that, if the Commission continues to investigate in those circumstances, the Commission and his or her staff must endeavour to avoid, as far as practicable, prejudice to any person affected by the referral or proceedings or who is charged with the offence.
- 20 80. But that does not mean that the Commission can undertake activities or exercise powers (even if they are broadly investigative in character) **for the purposes of** an extant prosecution. Indeed, it is hard to see how conduct for the purpose of a prosecution would not generally be to the prejudice of the accused<sup>42</sup>.
- 30 81. It was conceded before the primary judge, with respect, correctly, and consistently with the extrinsic material, that the prosecution of an offence forms no part of the Commissioner’s functions (PJ [115]). The compulsory powers are each conferred “[f]or the purposes of an investigation into corruption in public administration” (ss 28, 29, 29A, 30, 31). Although s 43 contemplates that an investigation may continue notwithstanding the fact of a referral or the laying of a charge, for the reasons submitted, that does not extend the notion of an investigation so that it encompasses investigating for the very purpose of assisting the Director in connection with a prosecution.

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<sup>42</sup> Section 43 does not speak of “unfair prejudice”, nor, in contrast to cl 3(10), does it speak of “prejudice to the fair trial” of a person.

82. Numerous difficulties and tensions arise if the contrary view is taken. For example, under [A30/2021](#) s 27, it is the Commissioner who must oversee an investigation. Under s 7(2), the Commissioner is not subject to direction by any person. How then does an investigation which extends to investigative activities undertaken for the purpose of a prosecution co-exist with the duties and powers of the Director under the DPP Act? How do the general obligations of secrecy and confidentiality which attend the conduct of an ICAC investigation reconcile with the essentially public nature of a prosecution and the obligation of disclosure attending relevant material produced during any investigation ancillary to the prosecution<sup>43</sup>? These difficulties tend to confirm the purposive limitations contended for by the appellant<sup>44</sup>. If it were clear that the legislature intended that the Commissioner's role would extend to assisting the Director in respect of a prosecution in lieu of the assistance conventionally provided by South Australia Police, no doubt the various competing considerations would have to be resolved by a process of construction. But the presence of such difficulties serves to reinforce, in the absence of a clear statement of legislative intent, that the Parliament did not contemplate the Commissioner's role as so extending.
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83. The approach of the Full Court entails that, if defence gave notice of a witness proposed to be called at trial, the Commissioner would be acting for a proper purpose in aiding the prosecution to understand what that witness will say by compulsorily examining the witness, simply because the examination can be described as "investigative", in a way that would mark a significant alteration to the accusatorial process<sup>45</sup>. Yet, on the other hand, the Full Court seemingly accepted that the assistance which the Commissioner's staff provided to
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<sup>43</sup> The primary judge observed that by reason of the non-involvement of South Australia Police, the appellant lost the benefit of s 10A of the DPP Act (PJ [258]). The Full Court disagreed, but on the apparent premise either that the Commissioner was for these purposes an organ of the State owing a duty of disclosure (FC [183]), or alternatively on the basis that because the ICAC Act contemplates that the Commissioner will be a legal practitioner, it was the legislature's expectation that the Commissioner would make disclosure to the Director (FC [185]). As to the first matter, the authority cited at footnote 71 (*NSW Crime Commission v D150* [2020] NSWSC 811) did not assist because s 15A of the *Director of Public Prosecutions Act 1986* (NSW) expressly referred to Crime Commission officers. As to the second matter, the circumstance that the Commissioner is a lawyer is not probative of the constructional question, which is how (if at all) the confidentiality obligations under the ICAC Act are intended to operate where the Commissioner is assisting the Director in respect of a prosecution.

<sup>44</sup> The difficulties in reconciling the very different regimes entailed by an ICAC investigation and a public prosecution were manifested in the instant case in the manner catalogued by the primary judge (PJ [24], [111], [211]). Witnesses may have been given the impression they were obliged to assist, and communications by the Commissioner's staff sent a misleading message respecting the confidentiality of dealings with the prosecution (PJ [258]).

<sup>45</sup> With very limited exceptions relating to alibi witnesses and expert evidence, the prosecution has no power to require disclosure of or test the nature of a defence case ahead of the closing of its case.



the Director by undertaking the filing and serving of proceedings and documents, they acted *ultra vires*, because those acts are not “investigative” (FC [309], [314]).

84. The result is that the Commissioner’s staff are acting properly in procuring witness statements from prosecution witnesses, but acting beyond power in filing and serving them. It is submitted that the incongruity of this result supports the contention that the Full Court erred in adopting a merely functional and not purposive consideration of the limits of the Commissioner’s role.

***Question 3(a): disclosure of examination transcripts***

- 10 85. Non-communication directions were made in respect of the compulsory examinations of the appellant’s wife and the reluctant witnesses Shelton and Fox pursuant to cl 3 of Schedule 2 to the ICAC Act (FC [55]-[58]).
86. These directions were required by virtue of cl 3(10) if the failure to do so might prejudice the fair trial of a person who may be charged with an offence, and that is the basis upon which the Full Court asserted that the directions were made (FC [230]).
87. The Full Court accepted, as was common ground, that where a non-communication direction was extant, disclosure could not be made of the subject matter of the direction pursuant to general exceptions to confidentiality, or other general provisions in the ICAC Act (FC [246]-[247]). On any view, therefore, a variation or cancellation of the direction was necessary before the contents of those examinations could be disclosed.
- 20 88. Variations were made in April 2017 in terms which continued to prohibit communication of the content or details of the investigation except to the Director or staff identified in the variation or nominated by the Director from time to time (PJ [151], [158], [172]). This was stated as being necessary to allow the outcome of the investigation to be referred to the Director so that it might be properly considered by him and his office (PJ [151]).
89. Question 3(a) asks whether providing the statements for the Director’s use in the prosecution was unlawful. The appellant submits that it was because, *first*, the variations were not, in terms, so broad, and did not in terms authorise what ensued, which was that the materials were then filed in Court and used as a means of securing witness statements from examinees (PJ [152], [161]-[169], [196]-[200]).



90. *Secondly*, and in any case, for reasons submitted in respect of question 1, any purpose of [A30/2021](#) facilitating a prosecution by the Director upon a direct referral from the Commissioner was contrary to the scheme of the ICAC Act.

91. *Thirdly*, if, properly construed, the variations were intended to facilitate use by the prosecution including by way of disclosure, that would amount to an effective cancellation of the non-communication direction. In this respect, it is difficult to see that if, as the Full Court held, the direction had been necessary to avoid a risk of prejudice to the appellant's fair trial when it was made, that risk did not exist in April 2017 (cf. FC [232]).

10 92. *Further*, given the importance of the protective purposes served by the non-communication regime<sup>46</sup>, and having regard to the curial process set out in cl 3(13) and (14) that applies where a person has been charged with an offence, a variation which would purport to have the effect of making the material generally available for use in a prosecution is inconsistent with the legislative scheme<sup>47</sup>.

## VII ORDERS SOUGHT

93. Appeal allowed.

94. Set aside the answers given by the Full Court to the questions of law reserved (1), (2) and (3)(a)-(d) and in lieu thereof order that each question be answered "yes".

## VIII ESTIMATE OF ORAL ARGUMENT

20 95. The appellant estimates that he will require approximately 1.5 hours to present his oral argument.

Date: 1 October 2021



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<sup>46</sup> A matter emphasised in *Lee v R* (2014) 253 CLR 455.

<sup>47</sup> *Chief Examiner v Brown* (2013) 44 VR 741 at [87], [90], [105]-[106].

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

A30/2021

**No. A30 of 2021**

**BETWEEN:**

**TROY STEPHEN BELL**

Appellant

and

**THE QUEEN**

Respondent

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**ANNEXURE TO APPELLANT'S SUBMISSIONS**

**(Practice Direction No 1 of 2019 – Item 3)**

**LIST OF STATUTORY PROVISIONS REFERRED TO IN SUBMISSIONS**

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1. *Independent Commissioner Against Corruption Act 2012* (SA), ss 3, 4, 7, 23, 24, 29, 36, 43, 54 and 56 (as at 4 September 2017 to 30 June 2020)
2. *Director of Public Prosecutions Act 1991* (SA), ss 4, 6, 7, 10, 10A, 11 (as at 5 August 2012 to 14 December 2017)
3. *Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Act 2021* (SA), passed 23 September 2021, though yet to receive formal assent
- 30 4. *Summary Offences Act 1921* (SA), ss 75 – 82 and 104 (as at 18 July 2017 to 9 October 2017)
5. *Criminal Procedure Act 1921* (SA), s 106 (current)
6. *Police Act 1988* (SA), s 5 (current)
7. *Australian Crime Commission Act 2002* (Cth), s 24A (as at 25 November 2010)
8. *Major Crime (Investigative Powers) Act 2004* (Vic) (No 23), s 43