



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: A30/2021
File Title: Bell v. The Queen
Registry: Adelaide
Document filed: Form 27E - Reply
Filing party: Appellant
Date filed: 19 Nov 2021

Important Information

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BETWEEN:

TROY STEPHEN BELL
Appellant

THE QUEEN
Respondent

APPELLANT'S REPLY

10 **I PUBLICATION**

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

II REPLY TO RESPONDENT'S ARGUMENT

Contention that special leave should be revoked

2. The respondent contends that special leave should be revoked because, on 7 October 2021, an Act which amends provisions of the ICAC Act came into force. No suggestion is made, however, that any of the amendments affect the answers to be given to the questions in this appeal. It is also acknowledged by the respondent that there are numerous prosecutions on foot in respect of which the matter has proceeded by way of direct referral of a brief of evidence by the Commissioner to the Director¹. The appellant's solicitors have made inquiries in respect
20 of the persons the subject of those prosecutions². It is apparent in respect of a number of those matters, and to be inferred in respect of the balance, that in those matters the Commissioner's staff, in lieu of South Australia Police, have been involved in assisting the Director with matters arising in connection with the prosecutions.
3. Were this Court to allow the appeal, in whole or in part, the outcome has the potential to affect the future course of the present proceeding and the other criminal proceedings in broadly three ways. First, that outcome may enliven a basis for a permanent stay of the proceedings³. Secondly, it may provide a basis for discretionary exclusion of evidence unlawfully provided to the Director by the Commissioner or his or her staff, or evidence obtained by the involvement of ICAC staff in the course of a prosecution. Thirdly, it may dictate that the future
30 conduct of the prosecution is to be undertaken by the Director only with the assistance of South Australia Police staff and not with the ongoing involvement of ICAC staff. If special leave is revoked, the appellant and the defendants to matters already referred for prosecution prior to the relevant transitional date will face a trial in which the Commissioner would apparently be acting lawfully in exercising powers and functions in aid of the prosecution so long as they can be characterised as investigative (including potentially by examining witnesses including potential non-party witnesses for the defence), yet would not be subject to the direction of the

¹ Affidavit of Andrew John Baker sworn 29 October 2021, filed by the respondent.

² Affidavit of Joseph Robert Henderson affirmed 19 November 2021, filed by the appellant.

³ The respondent indicated that no point would be taken against a re-agitation of the stay question in the event that the Court's judgment in this matter is favourable to the appellant: *Bell v The Queen* [2021] HCA Trans 132.

Director⁴. Accordingly, even if, which is not clear⁵, the legislative amendments are so substantial as to render entirely inapplicable the outcome of this appeal to prosecutions arising from investigations commencing after 25 August 2021⁶, this appeal has significance for a number of criminal prosecutions in South Australia. A30/2021

4. Finally, the issues raised in the appeal are of broader significance in resolving the questions of statutory construction that seem frequently to arise in respect of the complex field of legislation empowering statutory authorities to investigate and deal with serious crime and corruption.
5. *First*, the appeal involves a problem of statutory construction that arises where one part of a statute announces functions in relatively broad terms, another provision confers a limited statutory power that appears to relate to that function⁷, and the question arises whether an act which is argued to fall within the function but is not specifically authorised by the power is permissible (and how, in that context, the Court should deal with a submission that the act is not one which would require positive statutory authority had it been undertaken by another natural person⁸).
6. *Secondly*, the appeal raises the question whether, when identifying the proper scope of an investigative authority's functions, separately from limits arising from the likely effect of the exercise of the power or function upon the balance (presumptively) struck by the accusatorial system of criminal justice⁹, there may be purposive limits (precluding the authority from exercising powers or undertaking functions to assist in the conduct of a prosecution).
7. The empowering legislation for State and federal serious crime and corruption bodies lacks uniformity and is frequently amended, but the decisions of this Court¹⁰ in respect of specific

⁴ It is accepted that there is no property in a witness (RS [59]), but equally a witness may ordinarily decide not to provide a statement to a prosecuting authority.

⁵ The Amending Act (s 31) removes any doubt as to whether the Commissioner or his or her office should directly refer matters to the Director, but it does not follow that the decision of this Court would not inform the operation of the ICAC Act as amended in respect of future matters and, in particular, the extent to which ICAC investigators may properly undertake activities that may be described in functional terms as "investigative" where their *purpose* is to assist in the prosecution of an offence. For instance, the amendments to s 43, which the Full Court considered would have been unnecessary if the appellant's submissions were correct (FC [270]), are limited.

⁶ Amending Act, s 70(1).

⁷ In *The Queen v Rolfe* [2021] HCA 38, a question arose as to whether the "core functions of the Police Force" in s 5 of the *Police Administration Act 1978* (NT) were powers or functions in respect of which s 148B of that Act could be engaged. The Court observed that the fact that later provisions of the Act conferred powers and functions tended against a construction that s 5 was intended to confer the same or similar powers or functions (see at [21]). An additional consideration, not present in this case, was that in addition to its location, s 5 was framed in terms of "the Police Force". In the present case, both ss 7 and 36 refer to "the Commissioner".

⁸ In *Rolfe* (at [17]) it was observed that the evident purpose of s 148B was to provide protection from liability where the power exercised or function performed was one of a kind which may result in the commission of a crime or a civil wrong, which may be contrasted with powers or functions of a general character and do not require any "special authority". In this case, even if it could be said that a natural person can, without "special authority", purport to refer a matter to the Director for potential prosecution, such a referral differs from a referral by an office holder who has had the opportunity to exercise evidence-gathering powers.

⁹ *X7 v Australian Crime Commission* (2013) 248 CLR 92.

¹⁰ *Strickland v DPP (Cth)* (2018) 266 CLR 325; *R v IBAC* (2016) 256 CLR 459; *Duncan v Independent Commission Against Corruption* (2015) 256 CLR 83; *Independent Commission Against Corruption v Cuneen* (2015) 256

regimes have nevertheless assisted lower courts in resolving the constructional questions that continue to arise in this ever-developing interface between investigative and prosecutorial activities¹¹. The present appeal will be similarly instructive. A30/2021

Direct referral (question 1)

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8. In support of the contention that s 36(1)(a) is not to be understood as the sole means by which corruption or other matters may be referred for potential prosecution, the respondent advances a submission that 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. It is said, by reference to *Lipohar v The Queen*¹², that “[t]he investigation or partial investigation of a matter that does not have a sufficient territorial [sic] to South Australia and its referral to another polity forms no part of the Commissioner’s functions” (RS [45](a)).
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9. But s 36(1)(a) is concerned with referral and not investigation by the Commissioner, and the submission does not engage with the extra-territorial aspect of the definition of relevant conduct in s 5(5) of the ICAC Act nor the current equivalent of the provision considered in *Lipohar*¹³. In the appellant’s submission, that a provision may have been required to permit referral of a matter and appropriate disclosure to interstate law enforcement agencies does not alter the fact that the same provision contemplates referral to South Australia police (as “the relevant law enforcement body”), which makes it difficult to see that the evident purpose of the provision was to deal with incidental matters outside the investigative scope of ICAC. Indeed, if s 36(1)(a) was required solely to enable the referral of matters not within the Commissioner’s purview, it sits discordantly with s 36(1)(b), the referral power where matters of misconduct or maladministration are to be the subject of potential disciplinary action. Additionally, it may be noted that the same formula of referring a matter to “the relevant law enforcement agency for further investigation and potential prosecution” is used in the context of the “reviewer” in Schedule 4 to the Act. It is most unlikely that the evident purpose of that provision was to facilitate referral of non-corruption matters or matters otherwise outside the ambit of the ICAC Act.

CLR 1; *Lee v The Queen* (2014) 253 CLR 455; *Lee v NSW Crime Commission* (2013) 251 CLR 196; *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Australian Crime Commission v Stoddart* (2011) 244 CLR 554; *Hogan v Australian Crime Commission* (2010) 240 CLR 651; *Gedeon v Commissioner of NSW Crime Commission* (2008) 236 CLR 120; *Z v NSW Crime Commission* (2007) 231 CLR 75; *Dalton v NSW Crime Commission* (2006) 227 CLR 490; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 569; *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625.

¹¹ See, eg, *DPP v Jaunay* [2020] SASCFC 25 [149] – [162]; *Stenner v Corruption and Crime Commission* [2019] QCA 202 [65] – [72], [122] – [127]; *NS v Scott* [2017] QCA 237 [12] – [14], [21] – [39]; *McDonald v R*; *Maitland v R* (2016) 93 NSWLR 736 [27], [83] – [94]; *A v Maughan* (2016) 50 WAR 263 [27] – [65], [68], [77], [161] – [163], [169] – [170]; *Medich v R* [2015] NSWCCA 281 [108] – [115]; *R v Seller & McCarthy* [2015] NSWCCA 76 [63] – [68], [146] – [154], [167] – [169], [198] – [209], [229] – [231].

¹² (1999) 200 CLR 485.

¹³ Section 5G of the *Criminal Law Consolidation Act 1935* (SA).

10. At RS [45](c), the respondent submits that because s 54(2)(b) permits a person engaged in the administration of the Act to disclose information “for the purposes of referring a matter in accordance with this Act to a law enforcement agency, inquiry agency, public authority or public officer”, this supports the Full Court’s construction because the Director meets the definition of a “public officer” and it “contemplates a referral not accounted for by s 36(1) providing a further indication that s 36(1) is not exhaustive”. Respectfully, this argument, which was not advanced below, is misconceived. The appellant’s argument is not that s 36(1) is exhaustive of every species of referral, but that s 36(1)(a) is exhaustive of the power to refer for *potential prosecution*, and that where the Act contemplates a matter being referred, it does so by express provision. In that regard, it is important to appreciate that the Act elsewhere contemplates, following the receipt of complaints or reports, referral by the Office of Public Integrity of matters that raise an issue apart from corruption, misconduct or maladministration to an “inquiry agency, public authority or public officer”, and in a context which is clearly not related to potential prosecution: see ss 7(1)(c), 17(c), 20(1), 23(1)(c) and 24(3).
11. At RS [45](e), the respondent submits that direct referral of a matter to the DPP would not offend *Johns v Australian Securities Commission*¹⁴ because “[t]he 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)”. The respondent also submits that because the Commissioner is a natural person holding an office any reliance on observations in *Williams v The Commonwealth*¹⁵ is inapposite. The former submission assumes the answer to the question in issue, namely whether the statute impliedly authorises referral by the Commissioner to the Director. As to the latter, it is accepted that the position is not on all fours with *Williams*, but the point sought to be made by the appellant is simply that in construing the powers and functions of a statutory office-holder or public body it is inconclusive to observe that a natural person could do the act the validity of which is in question when the act would then bear a different complexion. It is also not sufficient simply to proceed on the basis that if an act does not involve compulsion or a coercive effect it need not be the subject of a power. For example, in *Balog v Independent Commission against Corruption*¹⁶, it was held that the Commission was not entitled to state a finding of a particular kind in a report, even though the expression of a finding obviously involved no compulsion and in fact had no immediate legal consequence. That declaratory relief may be available in respect of acts or conduct by public officers or bodies which could not be the subject of *certiorari* shows that broader conceptions of authority are relevant.
12. The respondent submits at RS [46] that the reference in s 43 to a referral of a matter “for prosecution or investigation and prosecution” supports a construction that there must be a separate power or function of referral for prosecution (apart from the referral power in

¹⁴ (1993) 178 CLR 408.

¹⁵ (2012) 248 CLR 156.

¹⁶ (1990) 169 CLR 625.

s 36(1)(a)). This reads too much into the language of s 43, which does not necessarily contemplate (direct) referral for prosecution *by the Commissioner*. It describes actions and events without assuming they are undertaken by the Commissioner (it includes “the charging of a person with an offence”, which is accepted not to be a function of the Commissioner). A30/2021

Involvement of ICAC in assisting the conduct of a prosecution (questions 3(b), (c) and (d))

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13. Section 43 is not, contrary to the respondent’s submission at RS [54], a complete answer to a purposive constraint on the Commissioner’s powers and functions. Rather, consistently with there being a purposive constraint (ie. that the powers are not conferred for the purpose of assisting a prosecution), it supplies an additional protection, which is that even if powers are exercised for other proper purposes, every effort should be made to avoid prejudice to a person who is the subject of a prosecution.
14. At RS [55] the respondent submits that on its construction, whereby the Director may be assisted by ICAC staff in conducting a prosecution, the circumstance that the Director is dependent on the Commissioner’s co-operation is no different to a prosecution where the investigative agency is not SAPOL. This overlooks that directions given, or guidelines furnished, under s 11 of the DPP Act would bind those investigative agencies but do not bind the Commissioner (by dint of s 7(2) of the ICAC Act).
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15. The submission at RS [56] that the Commissioner’s voluntary co-operation with the Director would be consistent with the primary object of the Commissioner’s Office involves a significant extrapolation of s 3(2) of the ICAC Act. Adopting that kind of approach could equally lead to the argument that the Director would be acting consistently with the primary object of the DPP Act if he or she were to act at the behest of the Commissioner. The better construction is that they are each to act independently of direction because the Commissioner will have no involvement in assisting in a prosecution and the Director no involvement in an ICAC investigation.

Use of examination transcripts (question 3(a))

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16. The respondent contends that once communication of evidence given in an examination is permitted including by variation of a non-communication order the use of that information by the recipient is constrained only by s 54(3) (RS [62](i)). Respectfully, that fails to recognise that the regime in Schedule 2 clause 3 is independent of the more general default provisions contained in s 54 (see, eg, FC [246]-[247]).

Date: 19 November 2021


M E Shaw QC

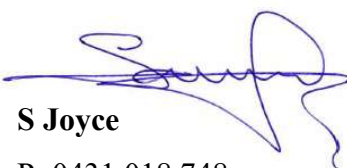
P: 0412 076 482

E: marieshawqc@gmail.com


B J Doyle QC

P: (08) 8212 6022

E: bdoyle@hansonchambers.com.au



S Joyce

P: 0431 018 748

E: sjoyce@frankmoranchambers.com.au