

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY**

No. M246 of 2015

**ON APPEAL FROM THE SUPREME COURT OF VICTORIA
COURT OF APPEAL**

BETWEEN:

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R & M

Appellants

- and -

**THE INDEPENDENT BROAD-BASED ANTI-CORRUPTION
COMMISSIONER**

Respondent

APPELLANTS' REPLY

PART I: CERTIFICATION

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



**PART II: CONCISE REPLY TO THE ARGUMENT OF THE
RESPONDENT**

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2. On 2 April 2015, a Notice of Interim Action was issued by Victoria Police to each of the Appellants.¹ The effect of the Notices was to suspend each of the Appellants. Each of the Notices specified that the Appellant was reasonably believed to have committed an offence punishable by imprisonment. The Respondent has referred to the withdrawal of each of the Notices subsequent to the filing and service of the Appellants' Submissions.²

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¹ AB 26 – 27, AB 52 - 53

² Respondent's Submissions at paras. 41 and 58

3. The suggested import (at para. 41) of such withdrawal is misconceived. It does not evidence or indicate any change of mind on the part of Victoria Police. All it does is allow the Appellants to return to duty whilst the investigation by IBAC continues, which remains as the Primary Investigator.³ Further, the reference to the “investigating context” (at para. 41) fails to take into account that, regardless of the belief held by the investigating officials, any citizen investigated for a crime is entitled to invoke the privilege against self-incrimination.

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4. In the Court of Appeal and on the Application for Special Leave to Appeal, the Respondent placed great reliance on s. 70 of the IBAC Act as indicating an intention on the part of the legislature to compel examination of a person who has been charged with a criminal offence. If that was a correct analysis, then a person not charged, a fortiori, was similarly compellable. The Respondent now appears to eschew that argument.⁴ It is clear on its terms that s. 70 is silent as to whether the IBAC’s powers are affected in relation to the examination of a person charged.

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5. The IBAC Commissioner has clearly formed the belief that each of the Appellants has a “case to answer” in relation to allegations of assault.⁵ He has acknowledged that Victoria Police’s criminal investigation has been deferred to IBAC’s investigation.⁶ Further, IBAC itself is empowered by s. 190 of the IBAC Act to bring criminal proceedings against the Appellants in relation to the subject matter of its investigation, an issue to which scant attention is given in the Respondent’s Submissions.⁷

³ AB 28 and 58

⁴ Respondent’s Submissions at paras. 33 – 37

⁵ Reasons at AB 4 (para. [7]), AB 6 – 7 (para. [12]), AB 8 – 9 (para. [22])

⁶ Reasons at AB 9 (para [22])

⁷ Respondent’s Submissions at para. 47

6. In paragraph 21 of the Respondent's Submissions, the Respondent asserts that the abrogation of the privilege against self-incrimination of a person charged has a broader dimension than that present in relation to a person who has not been charged (but believed or suspected to have committed a criminal offence). That assertion is contrary to the statements of principle made by the High Court of Australia in Reid v Howard.⁸
7. In Reid v Howard, Justice Deane stated the possible effects of compulsory disclosure pre-charge of potentially incriminating material to an officer of the State in civil proceedings. (Such disclosure would clearly breach the companion rule). His Honour stated:
- "Indirect or derivative evidence discovered through those investigations could constitute the basis of public findings in the civil proceedings to the effect that the appellant was guilty of specific acts...Such indirect or derivative evidence could be made available to prosecution authorities and could be used either in the prosecution of the appellant for such specific offences or as a basis for further investigation. In that regard, the prosecution authorities would be neither obliged to desist, nor justified in desisting, from the duties of their office."⁹
8. Further, in the joint judgment of Justices Toohey, Gaudron, McHugh and Gummow, their Honours emphasised that the privilege against self-incrimination protects both the innocent and the guilty,¹⁰ a point not recognised by the Respondent in criticizing the Appellants' Submissions.
9. Section 144 of the IBAC Act would not be devoid of practical utility if the Appellants' construction was accepted. Witnesses to the alleged criminal acts of the Appellants would be compellable and clearly not able to claim the privilege; similarly, any victim of alleged criminal acts. The Appellants' construction would not prevent the ongoing investigation of alleged criminal acts by the IBAC, or any other

⁸ (1995) 184 CLR 1

⁹ (1995) 184 CLR 1 at 7

¹⁰ (1995) 184 CLR 1 at 14

investigation of the culture of a section of Victoria Police, or impede, or detract from, IBAC's role as an integrity body.

10. Section 70 of the IBAC Act clearly allows the IBAC to commence or continue to investigate a matter despite the fact that any proceedings (whether civil or criminal) are on foot, or are commenced, in any court or tribunal, that relate to or are connected with the subject matter of an investigation. The principles enunciated in X7¹¹ make plain that a person charged could not be the subject of compulsory examination under the IBAC Act, but this could not stop the IBAC from continuing to investigate the matter, subject to the protections to the criminal or civil process then underway, pursuant to s. 70(2). The reasoning of the Respondent at paragraph 39 highlights the ability of the IBAC to continue to investigate conduct. In the absence of specific words or necessary intendment, such continued investigation of conduct does not extend to the examination of persons in the position of the Appellants. Such a result is consistent with recent High Court authority.¹²
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- 20 11. In Momcilovic v The Queen (2011) 245 CLR 1, French CJ emphasised that the principle of legality is expressed as a presumption that the legislature does not intend to interfere with common law rights and freedoms except by clear and unequivocal language and that statutes are to be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law.¹³
12. The continued investigation of conduct by the IBAC is consistent with its broader public interest functions including its broad integrity

¹¹ X7 v Australian Crime Commission (2013) 248 CLR 92

¹² See in particular Justice Nettle's statement in CFMEU v Boral Resources (Vic) Pty. Ltd. (2015) 89 ALJR 622 at [62]

¹³ (2011) 245 CLR 1 at para. [43]

functions. The fact that the legislature has not seen fit to amend the IBAC Act, notwithstanding the recent decisions of the High Court of Australia identified in paragraph 26 of the Appellants' Annotated Submissions, is indicative of the legislature's satisfaction that the Act would and should not impact on the accusatorial criminal process, consistent with the principle of legality.

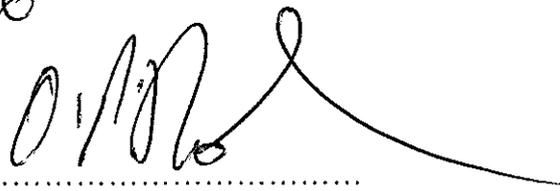
13. In relation to the issue of relief, discussed by the Respondent at paragraph 58, there is no basis for acceding to the Respondent's submission for the matter to be remitted to the Court of Appeal. The rescission of the Notice has no effect on the position of the Appellants. They remain as persons reasonably believed to have committed a criminal offence punishable by imprisonment. The relief sought remains as appropriate as it was prior to the rescission and should be granted if the Appellants are successful.

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Dated: 22 January, 2016



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