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:

R & M
Appellants

and

THE INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSIONER
Respondent

RESPONDENT'S ANNOTATED SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUE

2. The issues in the appeal are:

   (a) Are the principles that:

      (i) in a criminal prosecution it is for the Crown to prove its case without the assistance of the accused; and

      (ii) its companion rule that the accused cannot be compelled to give evidence

   relevant to the construction of a statutory power to examine a person who has not been charged with a criminal offence?

   (b) Does Part 6 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) (**IBAC Act**), authorise the IBAC to examine a person who is suspected of, but not charged with, the commission of a criminal offence?

3. The respondent submits the first question should be answered 'no' and the second in the affirmative.

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PART III: SECTION 78B NOTICE

4. The respondent has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* (Cth) and considers that no notice is required to be given.

PART IV: FACTS

5. The respondent agrees with the facts recited by the appellants but adds the following.

6. At paragraph 8 of their submissions, the appellants refer to the Notice of Interim Action issued on behalf of the Chief Commissioner of Police. That is not a document of the IBAC. In his Ruling the Commissioner did not accept that criminal charges were inevitable. He concluded that "all that can reasonably be said at this stage is that it is possible that criminal charges against one or more proposed examinees, including one or both applicants, may at some future stage be brought".[1]

7. On 19 March 2015, following a review of the CCTV footage[2], IBAC was notified of issues concerning the arrest of person A.[3] The notification involved allegations that the respondent considered would, if proven, amount to serious police misconduct, namely allegations of assault of a vulnerable female recently held in custody there (being person A) and of human rights violations to her.[4]

8. On 20 March 2015, in accordance with s 64(1)(c) of the IBAC Act, the respondent commenced an "own motion" investigation into the alleged conduct in respect of person A, as well as into a number of other incidents of alleged unnecessary and/or excessive use of force at Ballarat Police Station in recent years, amounting to human rights violations and of which IBAC had become aware through complaints previously made by other vulnerable women (being persons B, C and D).[5]

9. On or before 1 April 2015, the respondent, having been satisfied of the matters in s 117(1) of the IBAC Act determined to conduct a series of public examinations.[6]

10. On 1 April 2015 the respondent issued, and later served, a witness summons to each of the appellants, together with a confidentiality notice pursuant to s 42 of the IBAC Act and a copy of the Preliminary Information and Directions for

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1 Ruling para 22, AB 8-9.
2 Described in the affidavit of Robert Sutton sworn 8 May 2015 at paras [17(b)(i)]-[17(b)(ii)], AB 113.
3 Affidavit of Robert Sutton sworn 8 May 2015 at para 17, AB 112-113; Ruling para 7, AB 4.
4 Ruling para 7, AB 4.
5 Ruling para 8, AB 5; Affidavit of Alexis Eddy affirmed 15 April 2015 at para 7, AB 69; s 64(1) of the IBAC Act.
6 See "Preliminary information and directions for public examination in Operation Ross", exhibit "ABE-1" to the affidavit of Alexis Eddy affirmed 15 April 2015, AB 71-72; affidavit of Alexis Eddy affirmed 15 April 2015 at para 8, AB 69. There are no written reasons for this decision, which has not been challenged by the appellants.

Public Examination which sets out the scope and purpose of the public examinations,[7] namely to investigate into:

(a) Allegations of serious police personnel misconduct (within the meaning of the IBAC Act) on account of alleged unnecessary and/or excessive use of force towards certain vulnerable persons at Ballarat Police Station.

(b) Whether any human rights have been violated by any such alleged conduct.

(c) The sufficiency and appropriateness of internal reporting by Victoria Police members involved in or associated with such alleged conduct.

(d) The handling by Victoria Police of complaints made by such persons concerning such alleged conduct.[8]

11. On 10 and 12 April 2015 the appellants made submissions, inter alia, that they should not be examined or should not be examined in public. The first appellant made submissions that he should not be examined at all. Further alternative orders were sought including non-publication orders, restrictions upon persons present, and directions pursuant to s 42 of the IBAC Act prohibiting the disclosure of their identity.

12. The respondent determined not to reverse or alter his decision to examine the appellants, and to do so publicly, and gave written reasons.[9] The respondent did not determine the applications for alternative orders, leaving those applications "to the delegate to deal with at a convenient time."[10]

PART V: APPLICABLE STATUTES AND REGULATIONS

13. The relevant statutory provisions are as follows:

(a) Sections 4(1) (definition of "corrupt conduct") 5, 15(2)(b) and (6)(e), 42, 44, 60(2), 64(1), 70, 84, 116, 117, 144-148, 159, 162, 165 of the IBAC Act;

(b) Section 125 of the *Victoria Police Act 2013* (Vic) (**Victoria Police Act**);

(c) Sections 5 and 159 of the *Criminal Procedure Act 2009* (Vic);

(d) Section 22(1)(a) of the *Public Prosecutions Act 1994* (Vic); and

(e) Part 3.10 of the *Evidence Act 2008* (Vic) (**Evidence Act**) (to the extent that the IBAC Act defines "privilege" by reference to the privileges provided for in Part 3.10 of that Act).

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7 Appellants' submissions at para 7; affidavits of the first and second appellant sworn 15 April 2015 at para 2, AB 83 and 97.

8 "Preliminary information and directions for public examination in Operation Ross", exhibit "ABE-1" to the affidavit of Alexis Eddy sworn 15 April 2015, AB 71-72. See also Ruling at para 2, AB 2.

9 Ruling at paras 30-32, AB 11-12.

10 Ruling at para 33, AB 12.

PART VI: ARGUMENT

Introduction and Summary

14. The appellants' submission can be encapsulated in the following proposition: the IBAC Act, and in particular ss 115 and 120, as a matter of construction, do not permit the examination of a person who is "reasonably believed to have committed an offence".[11] Accordingly, so it is said, the appellants are not compellable witnesses before the IBAC on the basis that they are the subject of an investigation which involves allegations of criminality.[12]

15. As is implicit in the appellants' submissions, the argument has no foundation in the text of the IBAC Act. It rests entirely on an implication based on the principle of legality: that, in the absence of a clear statutory provision to the contrary, the Crown is to prove its case, and the companion principle that an accused person is not a compellable witness applies.

16. The appellants' construction should be rejected because it misstates the relevant rights and interests that arise in respect of a person who has not been charged and which the principle of legality would protect. And, to the extent that rights of persons who are suspected but not charged are protected by the principle of legality, they have clearly been abrogated. In this respect, the appellants' construction:

    (a) is inconsistent with the express provisions, including the express abrogation of the privilege against self-incrimination and s 70 which allows an investigation to continue after charge, and the scheme of the IBAC Act as a whole;

    (b) creates an exception to the investigation and examination powers that is of uncertain and ambulatory width; and

    (c) is incompatible with the purpose for which the powers are conferred to investigate and expose corruption and police personnel misconduct with the express conferral of important powers of compulsory examination

The "companion rule" and persons charged with an offence

17. The appellants seek to extend the reasoning in *X7 v Australian Crime Commission (X7)*[13], which concerned a person being examined after charge, to a person who has not yet been charged.

18. When powers of compulsory investigation are sought to be exercised against a person who has been charged with a criminal offence three principles are engaged: two of them find reflection in the process of construction and one is substantive. The first two are that it is for the Crown to prove its case without the assistance of the accused and its companion rule that the accused cannot be

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11 Appellants' submissions at paras 8, 27 and 35.
12 Appellants' submissions at para 32.
13 (2013) 248 CLR 92 at 136.

compelled to give evidence.[14] The substantive point is that considered in *Hammond v Commonwealth*;[15] that is, that compulsory powers cannot be exercised in a way that involves a contempt of court.

19. *X7* confirmed that where a person is charged with a criminal offence the rights or interests that are liable to be affected by a compulsory examination, and which must be squarely confronted by parliament if they are to be removed, are not limited to the privilege against self-incrimination but extend to the rights that attach to the criminal process. It requires a manifestation that the legislature has turned its mind to whether to abrogate or curtail the protections that attach to the judicial process.[16] Abrogation of the former does not necessarily connote abrogation or alteration of the latter.

20. That reasoning and the three principles on which it is based are not directly applicable in the construction of statutory powers that are exercised before a charge is laid.

21. Abrogation of the privilege against self-incrimination of a person charged has a broader dimension in that it has the tendency to alter the process in which the prosecution bears the onus of proof and its companion principle.[17] That additional dimension is not present in relation to a person who has not been charged: the only issue is whether the Act has evinced an intention to abrogate the privilege against self-incrimination. This reflects the relevant aspect of the right to silence that attaches to a person that has not been charged with an offence.[18]

22. Before charge, the relevant right or interest is the privilege against self-incrimination only, being the privilege that permits a person to remain silent in response to questions of investigating officials.[19]

23. None of the recognised pre-charge immunities prevent the question from being asked, and such a prohibition is not part of Australia's "general system of law". The privileges and immunities that make up the so-called "right to silence" are distinct and differ in scope and rationale.[20] The House of Lords has recognised that the rule that persons facing trial should not be compelled to undergo inquisition by the prosecution or the court has different origins and motives and has no application prior to the laying of charges.[21]

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14 *X7* (2013) 248 CLR 92 at 136 [102] (Hayne and Bell JJ), 153 [159] (Kiefel J) and 118 [42] (French CJ and Crennan J, who describe the rule as "the specific immunity of an accused at trial from being compelled to give evidence or to answer questions").

15 (1982) 152 CLR 188.

16 *X7* (2013) 248 CLR 92 at 153 [158] (Kiefel J).

17 *X7* (2013) 248 CLR 92 at 118 [42] (French CJ and Crennan J), 142 [124] (Hayne and Bell JJ), 153 [159] (Kiefel J).

18 *Lee v NSW Crime Commission* (2013) 251 CLR 196 at 248 [125] (Crennan J) and313 [318] (Gageler and Keane JJ).

19 *X7* (2013) 248 CLR 92 at 117-118 [41] (French CJ and Crennan J), 138 [109] (Hayne and Bell JJ).

20 *R v Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1, 30-32; *X7* (2013) 248 CLR 92 at 117 [40] (French CJ and Crennan J); *R. v Hertfordshire County Council ex parte Green Environmental Industries Ltd* [2000] 2 AC 412 at 419.

21 *R. v Hertfordshire County Council ex parte Green Environmental Industries Ltd* [2000] 2 AC 412 at 419. The rationale for the companion rule is also identified in *CFMEU v Boral Resources (Vic) Ltd* (2015) 320 ALR 448; (2015) 89ALJR 622; [2015] HCA 21 at [62] (Nettle J).

24. Whether or not the privilege against self-incrimination is abrogated in a context where trial rights are not directly engaged turns on whether parliament has used sufficiently clear language directed to that privilege. Abrogating the privilege against self-incrimination in respect of a person who has not been charged does not alter the accusatory judicial process. It brings about a different change to that considered by the Court in *X7* and *Lee v New South Wales Crime Commission.*[22]

25. That is not to say that issues may not arise respecting the use and dissemination of material obtained under compulsion. In *Lee v The Queen*, the Court observed that the privilege against self-incrimination may be lost but the fundamental principles that the Crown must prove its case and the accused person is not required to testify remain.[23] As *Lee v The Queen* demonstrates, the continued application of those principles may have consequences for the exercise of powers as to the use and dissemination of information. However, the extent to which legislation alters fundamental precepts is a question of construction and exercises of powers in a given case are subject to judicial review.

26. In the present appeal, neither of the appellants has been charged with a criminal offence. Accordingly, there is no occasion to determine whether, properly construed, the IBAC Act allows for compulsory examination of a person charged. Nor is there any challenge to any power that has been, or may be, exercised in relation to the use to which any material obtained under compulsion may be put in the future. There is no longer any challenge to the decision to hold examinations in public.[24] In this regard, the respondent has made a decision to examine the appellants and has expressly reserved to the delegate who will undertake the examination other powers, including those under s 42 of the IBAC Act.

27. There is a further aspect that diminishes the impact of the principle of legality in the present context. There can be no doubt that Parliament has turned its mind to the abrogation of the privilege against self-incrimination for the purpose of ensuring that IBAC has information that is relevant to the investigation of corruption and police misconduct. A clear purpose of the IBAC Act is to allow the investigation through the use of compulsorily acquired information, notwithstanding what would otherwise be a claim for privilege. In s 144 of the IBAC Act, the Parliament has squarely confronted and abrogated the right to silence in aid of the investigative process. Having expressly abrogated the right, it is wrong to start with the contrary presumption that it did not intend to do so.[25]

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22 (2013) 251 CLR 196.

23 *Lee v The Queen* (2014) 253 CLR 455 at 466-67 [32]-[33].

24 A challenge to the decision to hold the examination in public was rejected by the Court of Appeal and special leave was not sought in respect of that aspect of the decision.

25 *Lee v NSW Crime Commission* (2013) 251 CLR 196 at 310 [314] (Gageler and Keane JJ).

Application of the principle of legality

The express provisions

28. The IBAC Act expressly abrogates the privilege against self-incrimination and journalist privilege.[26] Other forms of privilege, which are defined by reference to the Evidence Act and public interest immunity, are the subject of a specific regime which involves a claim being made and then determined by the Supreme Court.[27] Importantly, ss 135, 136 and 146(2) require a person to answer a summons but provides for a process by which privilege may be determined by the Supreme Court. That process has no application to the privilege against self-incrimination, which is expressly abrogated.

29. In the present case, the immunities or privileges at issue are those of all persons not to answer any question (whether incriminatory or not) and not to answer a question if it would incriminate them, and of persons suspected of an offence not to be compelled to answer questions in respect of that offence. Those privileges are expressly abrogated by ss 84 and 144 of the IBAC Act.

30. Section 84 of the IBAC Act provides that in respect of an investigation in respect of a possible breach of discipline involving corrupt conduct or police personnel conduct of a police officer, the IBAC may, amongst other things, direct the police officer to answer any relevant question.

31. Pursuant to s 125(1)(b) of the Victoria Police Act, failure to comply with a direction of the IBAC under s 84 of the IBAC Act is a breach of discipline. Section 84 thus abrogates the privilege against self-incrimination in relation to penalties.[28]

32. Section 144 expressly abrogates the privilege in respect of both penalties and criminal offences in respect of the persons to whom the section applies. Plainly, s 144(1) operates on the premise that the person would otherwise be entitled to claim the privilege; it overcomes that privilege but renders the answers inadmissible before any court or person acting judicially.

33. The privileges that apply pre-charge are an entitlement to stay silent in response to the questions of investigating officials.[29] The privilege against self-incrimination does not render a person non-compellable, rather it permits a person to refuse to answer a question if the answer to the question may show that the person has committed a crime with which he may be charged and the answer may place him or her in a real and appreciable danger of conviction.[30] Section 144 directly confronts the rights of a person who is suspected but not charged by

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26 IBAC Act, ss 144 and 145; cf s 6A and 6DD of the *Royal Commissions Act 1902* (Cth), considered by the Court in *Sorby v The Commonwealth* (1983) 152 CLR 281.

27 IBAC Act, ss 146-148.

28 See *Police Service Board v Morris & Martin* (1985) 156 CLR 397, which concerned reg 95A(7) of the *Police Regulations 1958* (Vic).

29 *X7* (2013) 248 CLR 92 at 138 [109] (Hayne and Bell JJ); *Lee v NSW Crime Commission* (2013) 251 CLR 196 at 313 [318] (Gageler and Keane JJ).

30 *Sorby v The Commonwealth* (1983) 152 CLR 281 at 288-289 (Gibbs CJ).

removing the excuse that a person would otherwise enjoy under the common law. Whether it extends to a person charged with an offence does not fall for decision.

34. On the appellants' construction a person suspected of having committed a criminal offence would not be compellable and there would be no occasion for s 144 to operate. Unlike in *X7* where the provisions had work to do notwithstanding that they did not apply to persons charged with an offence, on the appellants' construction s 144 would be devoid of any practical utility. Before the Court of Appeal the appellants submitted that s 144 would operate in respect of persons "whose criminality is either entirely unknown, or is not the subject of a criminal investigation".[31]

35. Given the purpose of s 144 is to allow the obtaining of incriminating material for the purpose of the investigation, there is no reason why Parliament would be interested in facilitating the obtaining of evidence of criminality that had nothing to do with the investigation at hand. The very point of s 144 is to allow IBAC to add to the pool of material that may be relevant to the investigation of police misconduct while giving specific protection to the "principal matter" covered by the privilege; namely, the possibility that the witness will convict himself out of his own mouth.[32]

36. As a matter of power, there are a range of provisions that constrain the dissemination and use of material obtained under examination. They include:

(a) That, absent exceptional circumstances, examinations are in private and access restricted and the IBAC may regulate the procedure of examinations as it considers appropriate;[33]

(b) That the IBAC may issue confidentiality notices preventing publication of "restricted matters", which includes evidence before IBAC;[34]

(c) Restrictions on the content of special reports under s 162, which prevent the IBAC from including any information that would prejudice criminal investigations, criminal proceedings or other legal proceedings;[35]

(d) That, where the IBAC is or becomes aware of legal proceedings that relate to matter under investigation, the IBAC may continue with the investigation but must take all reasonable steps to ensure that the conduct of the investigation does not prejudice those proceedings;[36] and

(e) That incriminating evidence is subject to a use immunity rendering any answer inadmissible in evidence against the person before any court or person acting judicially.[37]

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31 *R v Independent Broad-based Anti-corruption Commissioner* [2105] VSCA 271 at [35].
32 *Hamilton v Oades* (1989) 166 CLR 486 at 496 (Mason CJ).
33 IBAC Act, ss 116 and 117.
34 IBAC Act, ss 42 and 44.
35 IBAC Act, s 162.
36 IBAC Act, s 70.
37 IBAC Act, s 144(2).

37. The provision for these matters, when coupled with the express abrogation of the privilege, makes it improbable in the extreme that persons the subject of the investigation would not be compellable.

The width of the exception

38. The appellants' submissions shift in identifying the persons who would fall outside the ambit of s 115: from "persons reasonably believed to have committed a criminal offence" at paragraph 27 to "a person the specific subject of an investigation" at paragraphs 30 and 32 to "persons reasonably suspected of having committed a criminal offence" at paragraph 44.

39. However the proposed exception to s 115 is defined, the appellants' construction is, given the statutory context, unworkable and improbable. First, the focus of an investigation is on *conduct*, not necessarily on specific persons. At the time of commencing an investigation, IBAC may have identified conduct that warrants inquiry, but not the identity of any particular person suspected of having engaged in that conduct. Further, it might not be until an examination of a particular witness has commenced that he or she becomes a suspect in relation to a criminal offence. On the appellants' construction, such a person would then cease to be compellable.

40. Such a construction would be extremely difficult for investigating authorities to administer and for courts to enforce. It has the potential to be particularly difficult in relation to police.

(a) First, it may readily be the case that the only witnesses to police misconduct apart from the victim will be members of the force. In respect of an investigation into police misconduct, the IBAC Act plainly abrogates the privilege in relation to penalties.[38] Whether an officer on duty may simply be a witness, the subject of potential disciplinary offences or even criminal offences may change over the course of an investigation.

(b) Secondly, whether a person is a "suspect" or is "reasonably believed" to have committed an offence is a state of mind that can change during the course of an investigation, and upon which different officers may have different views. In this respect, the appellants' construction would be a significant impediment to the investigation of offences, as it would preclude, for example, the questioning of persons who, while suspected, may in fact be innocent and have important information that would assist police.

41. In the present case, the appellants seek to impute a standard of belief or suspicion on the part of IBAC based in part on the Notice of Interim Action issued by the Chief Commissioner and the reasons of the IBAC Commissioner that charges are "possible". It is an unlikely construction that the power of the IBAC would depend on the state of mind of members of the police as to whether an offence has been committed. Moreover, such a state of mind may change over time; for

[38] IBAC Act, s 144.

example, the Notice of Interim Action may be withdrawn or a different view of the facts taken. Whereas the laying of a charge is a definite act, which has legal consequences, the same cannot be said for a state of mind as to whether a person has or has not committed an offence. That is all the more so in an investigatory context, where the facts are likely to emerge or have a different complexion over the course of the investigation.[39]

Context

42. The operation of the principle of legality will depend upon the context, including purpose.[40] The cases illustrate that the readiness with which the courts will conclude that a privilege has been abrogated will vary depending upon the particular immunity and underlying principle affected.[41]

43. The purpose for which an inquiry is undertaken is relevant to the construction of the powers of inquiry and whether a privilege or immunity has been abrogated.[42]

44. The starting point is that the IBAC Act confers powers of compulsory examination in respect of investigations into corrupt conduct and police personnel misconduct. The IBAC is not primarily concerned with the accusatorial process of criminal justice: its task is broader and serves different public interests than the investigation and prosecution of criminal offences. Its mandate is to ensure high standards of probity in the conduct of public affairs by public officials and members of police. As noted by Gleeson CJ in *Theophanous v Commonwealth* "nothing could be more central to good government".[43]

45. The attempt to draw analogies between the IBAC and the various crime commissions considered by the Court in *X7, Lee v NSW Crime Commission,* and *Hamdan v Callanan* is unhelpful. The principal, if not sole, purpose of crime commissions is to investigate criminal offences and uncover evidence to support criminal prosecutions. They fall squarely within the criminal justice system. In contrast, the IBAC is an integrity commission, with important oversight roles in respect of public service officers and bodies, and in respect of police officers.

46. The IBAC's functions in relation to police personnel conduct are particularly broad, and replace the role of the Office of Police Integrity.[44] In addition to its educative and prevention roles, its functions include to identify, expose, and investigate police personnel misconduct, to ensure that the highest ethical and professional standards are maintained by police officers and to ensure that police officers have regard to the human rights set out in the *Charter of Human Rights*

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39 *National Companies and Securities Commission v News Corporation Ltd (*1984) 156 CLR 296 at 323-324.

40 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 328-329 [19] (Gleeson CJ).

41 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341-343 (Mason ACJ, Wilson and Dawson JJ).

42 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 (Mason ACJ, Wilson and Dawson JJ); *Police Service Board v Morris & Martin* (1985) 156 CLR 397 at 404 (Gibbs CJ) and 409 (Wilson and Dawson JJ); *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 317 ALR 279 at [64].

43 (2006) 225 CLR 101 at 115 (Gleeson CJ).

44 See cl 4 in the schedule to the IBAC Act.

and Responsibilities Act 2006 (Vic). While police personnel misconduct is defined to include "conduct which constitutes an offence punishable by imprisonment", it also includes conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it, and disgraceful or improper conduct.[45] There are broad recommendation powers.[46] In the present case, the subject matter of the investigation covers a range of conduct, only some of which is capable of constituting a criminal offence.[47]

47. Investigations by IBAC may identify and expose criminal conduct, and may ultimately result in the referral of matters to law enforcement agencies or prosecutorial authorities. They may even result in the IBAC conducting its own prosecution, although this is not a principal function of the IBAC.[48]

48. In relation to corrupt conduct, IBAC's functions are limited to the identification, exposure and investigation of serious corrupt conduct,[49] which, by definition, is "conduct that would, if the facts were found proved beyond reasonable doubt at a trial, constitute a relevant offence".[50]

49. However, this does not detract from IBAC's role as an integrity body. IBAC's identification and exposure function does not involve any criminal standard of proof or limit it to evidence admissible in a criminal trial. Indeed, IBAC is expressly prohibited from including in a report a statement as to a finding or opinion of guilt of a criminal or disciplinary offence, or that a person should be prosecuted for such an offence.[51]

50. As the present case demonstrates, the question of whether an offence has been committed may be either incidental to, or a small component of, the conduct that is subject to investigation. The present investigation includes broad allegations of misconduct, internal reporting and the handling of complaints, which extend beyond what might constitute criminal assault. The appellants' submissions would deny to IBAC information about these broader matters from the only persons who are likely to have relevant evidence. Denying the capacity to compulsorily examine all relevant witnesses, including those who may be suspected of criminal conduct, would frustrate the statutory purpose of identifying and reporting on corruption and police misconduct.

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45 IBAC Act, s 5.

46 IBAC Act, s 159.

47 For example, there are also allegations of human rights breaches, which, while serious, would not amount to a criminal offence. For example: failing to provide drinking water thereby resulting in person A drinking out of the toilet; strip searching person A in the presence of male officers; failing to provide appropriate treatment following the deployment of capsicum spray; and leaving person A in wet clothes. See the affidavit of Robert Sutton at para [17], AB 113-114.

48 IBAC Act, s 190. However, the Director of Public Prosecutions would be required to file an indictment: see s 22(1)(a) of the *Public Prosecutions Act 1994* (Vic) and ss 5 and 159 of the *Criminal Procedure Act 2009* (Vic).

49 Sections 15(2) and 60(2) of the IBAC Act.

50 IBAC Act, s 4(1) (definition of corrupt conduct).

51 Sections 162(6) and 165(6) prohibit such statements in reports. Section 159(2) requires that recommendations not contained in a report must be made in private.

51. The fact that a body with broader public interest functions may also be investigating criminal offences does not preclude a conclusion that the privilege against self-incrimination has been impliedly abrogated.[52]

52. The obligation to answer questions (including, in appropriate cases, in public) is imposed to ensure the full investigation in the public interest of matters involving corruption and police conduct which lie peculiarly within the knowledge of persons who cannot reasonably be expected to make their knowledge available otherwise than under a statutory obligation.[53] Further, in appropriate cases, conducting examinations in public as part of the investigation will be integral to IBAC's functions of exposing police personnel misconduct and providing information to members of police personnel and the community about police personnel conduct, including the detrimental effect of police personnel misconduct and ways in which to assist in preventing police personnel misconduct.[54]

53. The importance of allowing a full examination of the exercise of police powers underpins the abrogation of the privilege in respect of penalties and informs the construction of s 144 of the IBAC Act. In *Police Service Board v Morris*,[55] Wilson, Dawson and Brennan JJ highlighted the importance of maintaining a disciplined police force and of the internal police disciplinary process, in considering whether the privilege against self-incrimination was abrogated by the obligation to obey a lawful order, where the order given was to give an account of the officer's conduct in the course of his duties. Here, the appellants have given statements in relation to the events of the night as part of their duties, which implicates the person incarcerated in the watch house cell in potential criminal conduct.[56] In circumstances where there is a duty to give an account of the course of duty, it is easier to discern an intention to abrogate the privilege in respect of allegations of police misconduct.

54. As Brennan J emphasised:[57]

> The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the police force, upon their assiduous performance of duty and upon the judicious exercise of their powers. Internal disciplinary authority over members of the police force is a means – the primary and usual means – of ensuring that individual police officers do not jeopardize public confidence by their conduct, nor neglect the performance of their police duty, nor abuse their powers. The purpose of police discipline is the maintenance of public confidence in the police force, of the self-esteem of police officers and of efficiency. It cannot be thought that the Police Regulations intend a police officer to be able to cloak with his silence activities that are prejudicial to the achievement of these purposes. To permit, under a claim of privilege, a subordinate officer to refuse to give an account of his

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52 See *Reg. v Hertfordshire County Council ex parte Green Environmental Industries Ltd* [2000] 2 AC 412.

53 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 (Mason ACJ, Wilson and Dawson JJ).

54 Section 15(2)(b) and (6)(e) of the IBAC Act

55 *Police Service Board v Morris & Martin* (1985) 156 CLR 397.

56 AB 118-119.

57 *Police Service Board v Morris & Martin* (1985) 156 CLR 397 at 412 (Brennan J).

activities whilst on duty when an account is required by his superior officer would subvert the discipline of the police force.

55. The observations of Kitto J in *Mortimer v Brown* in respect of company officers that erecting a shield of privilege would "render the provision[s] relatively valueless in the very cases which call most loudly for investigation"[58] can be paraphrased to apply to the investigation of police conduct. Indeed the factors relevant to examination of company officers and bankrupts apply with greater force to police officers who have knowledge of the matters under investigation and who are under a duty to reveal information acquired in the course of duty.[59]

56. The cases concerning bankrupts and company officers[60] do have a particular historical pedigree and relate to examinations within a court process rather than by the Executive, however they should also be seen as an expression of the principle that much depends on the language and character of the provision and the purpose which it is designed to achieve.[61] With directors and bankrupts there will often be the problem of concealment by the only persons who have relevant knowledge. The same necessarily holds true in allegations of police wrongdoing or corruption in government. A full investigation will frequently involve consideration of evidence tending to incriminate individuals.

57. An interpretation of the IBAC Act that would preclude the IBAC from asking questions of persons suspected or reasonably believed to have committed a criminal offence would seriously frustrate the broad integrity functions of the IBAC.

Relief

58. The appellants seek orders in the form of prohibition and certiorari.[62] In some measure they rely on the Notice of Interim Action as the basis for their immunity from compulsory examination.[63] While, the appellants submit that the suspension of the appellants remains in force, the respondent does not accept that to be the case and would, if in a position to do so, adduce evidence that the Notice has been rescinded, the appellants have returned to duty and, to that extent, there has been a change in the factual matrix since special leave was granted and the appellants filed their submissions. This Court is precluded from receiving fresh evidence on appeal.[64] In the circumstances, if the appellants are successful in overturning the reasoning of the primary judge and the Court of Appeal and prevail in their construction of the IBAC Act, the appropriate course would be to allow the appeal and for the matter to be remitted to the Court of Appeal to determine the current factual position of the appellants.

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58 (1970) 122 CLR 493 at 496 (Kitto J).

59 *Police Service Board v Morris & Martin* (1985) 156 CLR 397 at 413 (Brennan J).

60 *Hamilton v Oades* (1989) 166 CLR 486; *Rees v Kratzman* (1965) 114 CLR 63; and *Mortimer v Brown* (1970) 122 CLR 493.

61 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 (Mason ACJ, Wilson and Dawson JJ).

62 AB 286.

63 Appellants' submissions at para 8.

64 *Eastman v The Queen* (2000) 203 CLR 1 at 10-11 (Gleeson CJ), 26 (Gaudron J), 51 (McHugh J), 65 (Gummow J) and 97 (Hayne J).

PART VII: ESTIMATE OF TIME FOR ORAL ARGUMENT

59. It is estimated that a period of 2 hours will be required for the presentation of the respondent's oral argument.

Dated: 15 January 2016

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