HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND HEYDON JJ

IN THE MATTER OF AN APPLICATION BY THE
CHIEF COMMISSIONER OF POLICE (VICTORIA)

APPLICANT/APPELLANT

In the Matter of an Application by the Chief Commissioner of Police (Vic)
[2005] HCA 18
Date of Order: 10 August 2004
Date of Publication of Reasons: 20 April 2005
M49/2004, M50/2004, M102/2004 and M103/2004

ORDER

Matter No M49/2004

1. Application for special leave to appeal dismissed.

2. Applicant to pay the intervener's costs of the application.

Matter No M50/2004

1. Application for special leave to appeal dismissed.

2. Applicant to pay the intervener's costs of the application.

Matter No M102/2004

1. Appeal dismissed.

2. Appellant to pay the intervener's costs of the appeal.

Matter No M103/2004

1. Appeal dismissed.

2. Appellant to pay the intervener's costs of the appeal.

On appeal from the Supreme Court of Victoria

Representation:

F X Costigan QC with G J C Silbert for the applicant/appellant (instructed by Victorian Government Solicitor)

D F R Beach SC with A T Strahan for the Age Company Limited, intervening in all matters (instructed by Minter Ellison Lawyers)

CATCHWORDS

In the Matter of an Application by the Chief Commissioner of Police (Vic)

Practice and procedure – Appeal from order of trial judge to prohibit, for a limited time, the publication of methods and material used by police in murder investigations – Whether appeal to Court of Appeal barred by s 17A(3) of the *Supreme Court Act* 1986 (Vic) – Whether appeal lay as of right, or only by way of leave – Provision of additional written submissions following conclusion of hearing – Proper procedure to be observed.

Procedural fairness – Whether Court of Appeal decided substantive issues without providing the Chief Commissioner of Police sufficient opportunity to present argument.

Constitutional law (Cth) – Appeal to High Court – Manner of conduct of proceedings in Court of Appeal – Elaboration of record by affidavit evidence – Whether affidavit admissible – Whether orders subject to appeal – Whether disjoined from administration of the law – Whether statutory publication prohibition orders sufficiently connected with concluded criminal trials – Whether necessary and appropriate to consider questions.

Words and phrases – "leave to appeal", "appeal as of right", "procedural fairness", "determination", "interlocutory", "in relation to".

Supreme Court Act 1986 (Vic), ss 17A(3), 17A(4)(b), 18, 19.
Crimes Act 1958 (Vic), s 567.

1 GLEESON CJ, McHUGH, GUMMOW, HAYNE AND HEYDON JJ. During two separate and unrelated trials for murder[1] in the Supreme Court of Victoria, evidence was led about the methods by which police had investigated the murders and ultimately obtained admissions by each accused. Although the evidence was given in open court, the police wanted to prevent further publication of these methods. The Chief Commissioner of Police (Victoria) (the present appellant – "the Commissioner") applied in each case for orders, pursuant to s 18 of the *Supreme Court Act* 1986 (Vic), prohibiting publication of the methods that had been used or of any material that would identify some undercover police. In each case, the trial judge made an order prohibiting publication of this information but, contrary to the submissions that had been made by the Commissioner, each order provided that it would remain in force only until a stated day. (The Commissioner had asked that the order be made without any time limit.)

2 In each case, the order was made or repeated in open court and thereafter was entered in the ordinary way. The settled orders indicate that the applications were made on oral application by counsel for the Commissioner, supported by evidence. In each case, counsel for the Director of Public Prosecutions and the accused were present, at least for that part of the applications dealt with in open court and, in one case, counsel for The Age Company Limited ("The Age"), publisher of that newspaper, also was present in open court.

3 In each case, the Commissioner sought to appeal to the Court of Appeal of Victoria. Two notices of appeal were filed, each entitled "In the matter of the Supreme Court Act 1986 s18" and "In the matter of The Queen v [the accused person at whose trial the application had been made]". In each appeal, the Commissioner filed a summons seeking two orders:

(a) that the Commissioner "have leave to appeal, if leave be necessary, against the orders" made by the trial judge;

(b) that the orders made by the trial judge "be continued pending the hearing of this appeal"

and such further or other orders as the Court deemed fit.

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1 *R v Tofilau* and *R v Favata*.

4 The summonses came on for hearing by the Court of Appeal on 9 October 2003, being the day before the orders prohibiting publication were due to expire. The Age sought leave to intervene and, there being no other contradictor, was granted that leave. On 12 February 2004, the Court of Appeal made orders in each case that "[t]he application be dismissed". The authenticated orders of the Court of Appeal in each case recorded that the "application" which was dismissed was the application for leave to appeal.

5 By special leave, the Commissioner appealed to this Court against each of those orders on two grounds: first, that the Court of Appeal erred in failing to hold that the Commissioner had an appeal to the Court of Appeal as of right and, secondly, that the Court of Appeal had denied the Commissioner procedural fairness. Against the possibility that no appeal (whether as of right or by leave) lay to the Court of Appeal against the orders made at first instance, the Commissioner applied for special leave to appeal from those orders. Those applications for special leave were heard at the same time as the appeals.

6 At the conclusion of the hearing, this Court ordered that both appeals and both applications for special leave be dismissed and that the Commissioner pay the intervener's costs of the appeals and the applications. As was said at the time of making the orders, the applications for special leave were dismissed for the reason that there were insufficient prospects of success of an appeal to warrant a grant of special leave. What follows are our reasons for joining in the orders dismissing the appeals.

The orders at first instance

7 Sections 18 and 19 of the *Supreme Court Act* are an example of State legislation, like that considered in *James Hardie & Coy Pty Ltd v Seltsam Pty Ltd*[2], which performs a double function, namely the creation of obligations and imposition of liabilities together with conferral of jurisdiction with reference to them. The occasion for the exercise of such jurisdiction may arise in the course of adjudication of a dispute of which the Court already is seized, here the two trials for murder. Another example is the third party contribution procedure considered in *James Hardie*, the exercise of which founded the appeal to the New South Wales Court of Appeal and then to this Court.

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2 (1998) 196 CLR 53 at 64-65 [22]-[24].

8 Section 18 of the *Supreme Court Act* empowers that Court, "in the circumstances mentioned in section 19", to make a number of different orders. One of those[3] is an order "prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding". Six different circumstances are mentioned in s 19. Only two need be noticed. The Supreme Court may make an order under s 18 "if in its opinion it is necessary to do so in order not to ... (b) prejudice the administration of justice; or (c) endanger the physical safety of any person". An order preventing publication of information derived from a proceeding that would identify a police officer who, at the time of the order, was engaged in some undercover operations may readily be seen to be an order directed to the circumstance identified in s 19(c). By contrast, it may be much more difficult to demonstrate that preventing publication of information about police investigative techniques would be necessary in order not to prejudice the administration of justice.

9 In the present cases, the orders that were made at first instance (although cast in different terms) were directed to preventing publication by print or electronic means of particular investigative techniques that police had used. Those techniques depended upon the use of what were called "scenarios" and both orders prohibited publication of the "details" of those scenarios. In addition, both orders prohibited the publication of names or images of the undercover operatives who gave evidence at trial.

10 It is neither necessary nor appropriate to examine the terms of the orders made at first instance. There was little or no argument in this Court about their terms. It is important, however, to notice that the apparently simple language in which ss 18 and 19 of the *Supreme Court Act* are cast may conceal a number of difficult questions whose resolution, in any particular case, would bear directly upon the way in which an order made under those sections would have to be framed.

11 First, the relevant power given by s 18 is to make an order prohibiting the "publication" of certain matters. Even if, as was done in the orders now under consideration, the order identifies the prohibited act of publication by reference to the methods of publication (here, print or electronic means), what is the reach of that prohibition? Does it extend to publication in law reports, in transcripts of evidence, in notes of evidence made by a solicitor (published to another lawyer)?

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3 s 18(1)(c).

12 Secondly, although there may be little doubt about what is meant by "a report of the whole or any part of a proceeding", what is meant by "any information *derived from* a proceeding"? Is that latter description satisfied if it can be shown that the subject of the publication was a subject dealt with in evidence or argument in the proceeding? Or must the information contained in the report have come to the attention of the publisher (first, only, chiefly) from what was said and done in the proceeding?

13 These are questions the answers to which may both be informed by, and reflect on, what is meant by the various circumstances mentioned in s 19 – most notably the circumstance described as "prejudic[ing] the administration of justice". But they are not questions that were considered in argument and it would therefore be wrong now to attempt to answer them.

14 As noted above, the orders made at first instance expired by effluxion of time. In order to allow the Commissioner to challenge the correctness of those orders, orders were made by single Judges of the Supreme Court extending the operation of the prohibitions until the completion of the Commissioner's proceedings, first in the Court of Appeal, and later in this Court. Again, the terms of those extending orders need not be noticed. But what that course of events demonstrates (if it were not otherwise clear) is that the orders which the Commissioner obtained at first instance were not orders that finally determined any right or obligation.

The Court of Appeal's decision

15 In its reasons, the Court of Appeal did not discuss whether, if an appeal lay to that Court, it lay as of right or only by leave. Rather, the Court addressed the logically prior question whether any appeal lay to the Court of Appeal or was barred by s 17A(3) of the *Supreme Court Act*. Section 17A(3) provided that:

> "Except as provided in Part VI of the **Crimes Act 1958**, an appeal does not lie from a determination of the Trial Division constituted by a Judge made on or in relation to the trial or proposed trial of a person on indictment or presentment."

Were the orders made at first instance "a determination ... made on or in relation to the trial ... of a person on ... presentment"?

16 Although the Court of Appeal examined a number of decisions of this Court[4] and the Supreme Court of Victoria[5] touching upon this question, it did not decide whether s 17A(3) precluded an appeal by the Commissioner against the orders that had been made at first instance. Rather, the Court said[6] that it was prepared to assume, without deciding, that the Commissioner was correct in submitting that the Court had jurisdiction and that it made this assumption "for the purpose of enabling [it] to determine the substantive issue debated before [it] – namely whether the trial judges were in error in making the limited suppression orders which they did". The Court said[7] that it was prepared to take this course because it had "reached a firm and united view upon that issue".

17 The Court's reasons canvassed a number of considerations of which three can be seen as most important to the conclusion reached. They were, first, what was called[8] "[t]he principle of open justice", secondly, the practical difficulties presented by questions of duration and the scope of effectiveness of the orders sought[9] and, thirdly, what was thought[10] to be the practical ineffectiveness of orders of the kind made to prevent dissemination of the information among "those who move in 'underworld' circles". The Court concluded[11] that, there being no sufficient countervailing factors, there was "no basis for the making of the orders to suppress indefinitely the matters encompassed by the orders made" where indefinite suppression "would be both offensive to principle and almost certainly ineffectual".

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4 For example, *Smith v The Queen* (1994) 181 CLR 338.

5 *R v Kean and Mills* [1985] VR 255; *Victoria Legal Aid v Lewis* [1998] 4 VR 517.

6 *In the Matter of an Application by Chief Commissioner of Police (Vic) for Leave to Appeal* [2004] VSCA 3R at [22].

7 [2004] VSCA 3R at [22].

8 [2004] VSCA 3R at [25].

9 [2004] VSCA 3R at [45].

10 [2004] VSCA 3R at [42]-[43], [46].

11 [2004] VSCA 3R at [47].

18 The Commissioner submitted that it was apparent from the reasons of the Court of Appeal that the Court had decided the substantive issues which the Commissioner had sought to canvass on an appeal to the Court. The burden of the Commissioner's argument in this Court was that she had had no sufficient opportunity to present argument on those substantive issues and, therefore, had been denied procedural fairness.

Filing further submissions and evidence in the Court of Appeal

19 That the Commissioner had wanted a further opportunity to make submissions about the substantive issues was said to be shown by a memorandum which counsel for the Commissioner had sent to the Court of Appeal on 8 December 2003, after the oral argument on 9 October 2003 and before delivery of judgment. (The Court of Appeal had not given leave to file further submissions.) The memorandum said that the Commissioner "seeks the opportunity to file further material directly pertinent to the Application for Leave to Appeal and to make further submissions based on that material and the material already before the Court". It went on to say that the Commissioner did not wish to make any further submissions "in relation to jurisdiction".

20 Two days later, again without leave, the Commissioner filed a further affidavit by the solicitor having the carriage of the matter on behalf of the Commissioner. The deponent deposed to information she had been given by police about the use of investigative techniques, of the kind referred to in the orders made at first instance, in relation to homicides that had occurred in New South Wales, South Australia and Western Australia. With this affidavit, the Commissioner filed further "Supplementary Submissions of the Appellant based on Additional material". Those submissions were said to be limited to the reasons why leave to appeal should be granted and emphasised what were said to be the significance and importance of the issues in the administration of justice in Victoria and elsewhere.

21 On 15 December 2003, The Age filed what was called a "supplementary note" stating that The Age did not wish to make any further submissions on the question of jurisdiction or the application for leave to appeal. The note said that if leave was granted, The Age wanted to make submissions on the substantive issues and to seek leave to cross-appeal.

22 On its face, the course followed appears to depart from, and to be sharply at odds with, orderly procedures for the disposition of matters before an appellate

court. In *R v Theophanous*[12], the Court of Appeal of Victoria had pointed out (not for the first time) that, in an appeal, once argument has been presented at the hearing, leave is necessary before further submissions may be made, and that leave to do so will be granted only in very exceptional circumstances[13]. Yet, without leave, further evidence and further submissions were filed after argument had concluded.

23 Further, the course of events described reveals at least some inexactness of understanding of what issues were to be determined by the Court of Appeal. The Commissioner's contention that she was denied procedural fairness proceeded from the premise (not always clearly identified) that the only issue for debate before the Court of Appeal at the hearing on 9 October 2003 was an issue about that Court's jurisdiction. The reasons subsequently published by the Court of Appeal demonstrate that this was an issue which was agitated. The reasons record[14] that the Commissioner and The Age both submitted, in response to queries raised by the Court of Appeal, that the Court had jurisdiction to entertain the application. But it was not demonstrated that this was the only issue for debate.

What was before the Court of Appeal?

24 There was no evidence or other material to which we were taken that showed that the Court of Appeal confined argument to a question about its jurisdiction. The very abbreviated account of proceedings before the Court of Appeal, given in an affidavit filed in this Court as evidence of what had happened below[15] (there being no transcript of the argument), did not suggest that there was any order made, or anything said in the course of argument, that confined the issues for consideration. Conversely, there was no evidence or material which showed that the Court of Appeal enlarged the proceeding to hear argument as on a full appeal.

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12 (2003) 141 A Crim R 216 at 286 [204].

13 *R v Zhan Yu Zhong* [2003] VSCA 56 at [2]-[4]. See also *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 330 [29].

14 [2004] VSCA 3R at [12], [14].

15 cf *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403 at 410, 416-417, 422-423.

25 Rather, what were before the Court of Appeal, for argument, were the Commissioner's summonses seeking, first, "leave to appeal, if leave be necessary" and, secondly, continuation of the orders made at first instance. This second aspect of the application was overtaken by the extending orders mentioned earlier. (We were told that the Court of Appeal suggested this course but nothing turns on how or why this happened.) The only live issue before the Court of Appeal was that presented by the Commissioner's application for leave to appeal, if leave were necessary.

Appeal to the Court of Appeal as of right?

26 If, as the Court of Appeal assumed in its reasons, s 17A(3) of the *Supreme Court Act* did not preclude an appeal to that Court it was necessary, as the Commissioner's summonses acknowledged, to consider whether an appeal lay as of right or only by leave. Although this question was not mentioned in the Court of Appeal's reasons, those reasons were consistent with the Court assuming that leave was necessary.

27 Whether leave was necessary depended upon the application of s 17A(4)(b). That section provided that an appeal does not lie to the Court of Appeal without the leave of the Judge constituting the Trial Division, or of the Court of Appeal, from a judgment or order in an interlocutory application except in certain cases.

28 In *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)*[16], it was noted that, on its face, s 17A(4)(b) directed attention to the nature of the application as interlocutory rather than to the nature of the order. It was also noted[17] that the Court of Appeal has taken the view that the substitution of the expression "judgment or order in an interlocutory application" for the expression "interlocutory judgment", which was formerly used, involved no change in meaning[18]. The Court of Appeal has therefore since applied to

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16 (2001) 207 CLR 72 at 82 [23].

17 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 82 [23].

18 *Border Auto Wreckers (Wodonga) Pty Ltd v Strathdee* [1997] 2 VR 49; *Little v Victoria* [1998] 4 VR 596.

s 17A(4)(b) the tests adopted in *Licul v Corney*[19]. The correctness of that approach was not challenged in this Court and it is, for that reason, neither necessary nor appropriate to examine it. But it follows inevitably from that understanding of s 17A(4)(b) that, if an appeal lay to the Court of Appeal, it lay only by leave. The orders which were made at first instance did not finally dispose of any rights[20] and none of the exceptions to s 17A(4)(b) was said to be engaged. (In particular, it was not said that these were cases of "granting or refusing an injunction"[21].)

29 It is for these reasons that the first ground of appeal advanced in each case in this Court (that the Court of Appeal erred in failing to hold that the Commissioner had an appeal as of right) failed. It is not necessary to examine what we have called the logically prior question about the operation of s 17A(3). The Court of Appeal having reached no conclusion on that question, we would reserve its consideration for a case in which it was necessary to decide the point.

Want of procedural fairness?

30 Leave to appeal being necessary, if there was an appeal, it was for the party seeking leave, the Commissioner, to demonstrate to the Court of Appeal why leave should be granted. Showing that there was an arguable case of error was a necessary, but not sufficient, step in obtaining leave. Whether or not the Court of Appeal directed counsel's attention in argument to the logically prior question of whether *any* appeal lay, the return of the Commissioner's summonses seeking leave to appeal was the occasion to show an arguable case of error. What arguments were advanced, and what evidence was relied on to found those arguments, was a matter for the party seeking leave. The fact that it was later thought that other arguments might have been advanced, or that other evidence might have been relied on, does not demonstrate any want of procedural fairness.

31 If, as the Court of Appeal concluded[22], there was "no basis for the making of the orders to suppress indefinitely the matters encompassed by the orders", it

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19 (1976) 180 CLR 213. See also *Hall v Nominal Defendant* (1966) 117 CLR 423; *Carr v Finance Corporation of Australia Ltd [No 1]* (1981) 147 CLR 246.

20 *Licul v Corney* (1976) 180 CLR 213 at 225.

21 s 17A(4)(b)(ii).

22 [2004] VSCA 3R at [47].

was open to that Court to conclude that the application for leave to appeal should fail. A conclusion that an order from which leave to appeal is sought is plainly right does not constitute some impermissible foray into issues that would arise only on a grant of leave and the hearing of an appeal. It is no more than an emphatic rejection of one aspect of the argument that must be made in support of a grant of leave.

32 No want of procedural fairness was demonstrated. It is for these reasons that the second ground of appeal failed.

33 Other, larger, questions that might have arisen in the appeals, about whether the orders made at first instance or by the Court of Appeal are within the appellate jurisdiction of this Court conferred by s 73 of the Constitution, were not addressed by counsel. There having been no argument of the points, and their decision being unnecessary for disposing of either the appeals or the applications for special leave, we express no view about them. Nor, given the grounds of appeal to this Court, is it necessary or appropriate to express any view about the reasoning of the Court of Appeal on the substantive questions which the Commissioner sought to agitate in that Court concerning the intersection of the need to administer justice openly and the provisions of ss 18 and 19 of the *Supreme Court Act*.

34 KIRBY J. Four proceedings were commenced in this Court by the Chief Commissioner of Police (Vic) ("the Chief Commissioner"). Ultimately, each of them concerned a complaint that orders made for the non-publication of evidence in criminal trials in the Supreme Court of Victoria were erroneously limited in their duration and should be extended indefinitely. At the conclusion of argument the proceedings were dismissed. I now state my reasons for joining in the Court's orders.

The history of the proceedings

35 Two of the proceedings were heard as appeals[23], pursuant to grants of special leave to appeal[24], from a judgment of the Court of Appeal of the Supreme Court of Victoria[25]. That judgment represented the determination by the Court of Appeal of separate proceedings brought before that Court as purported appeals and, alternatively, summonses for leave to appeal, against orders made by two judges of the Supreme Court (Osborn J[26] and Teague J[27]). Those determinations, in turn, decided applications by the Chief Commissioner for orders prohibiting the publication of evidence in the criminal trials over which those judges presided.

36 The orders in issue were made by each judge pursuant to the *Supreme Court Act* 1986 (Vic)[28] ("the Supreme Court Act"). The orders, the duration of which was later extended in the Supreme Court to the hearing and determination of the proceedings in this Court, were each originally subject to expiry on specified dates after the anticipated conclusion of the respective criminal trials. The Chief Commissioner contended that the orders should have been of indefinite duration, subject to liberty to apply in future to terminate their operation. She argued that, in terminating the operation of the orders as they did, the trial judges had erred, justifying appellate correction.

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23 In High Court matters M34 and M35 of 2004.

24 [2004] HCATrans 127 at [553].

25 *In the matter of an application by Chief Commissioner of Police (Vic) for leave to appeal* [2004] VSCA 3R.

26 In *R v Tofilau*, orders originally made on 22 September 2003 by Osborn J in the Supreme Court of Victoria, Trial Division.

27 In *R v Favata*, orders originally made on 23 September 2003 by Teague J in the Supreme Court of Victoria, Trial Division.

28 ss 18 and 19.

37 Concurrent with the appeals from the judgment of the Court of Appeal, which dismissed the proceedings of the Chief Commissioner[29], special leave to appeal to this Court was sought, directly from the orders of the respective trial judges. Those applications were commenced against the possibility that this Court might decide that no appeal lay from the orders of the trial judges to the Court of Appeal (a jurisdictional question determined by the Court of Appeal[30]). Or alternatively, in case a direct appeal proved available and necessary to permit the Chief Commissioner's arguments of substance to be decided by this Court, as it was put, effectively for the first time on the submissions which the Chief Commissioner sought to advance.

38 Before the trial judges, at the time that the Chief Commissioner's respective applications for suppression orders were first made, each of the accused persons was represented. However, there was no representation of either of the accused (who by then had been convicted of murder in each trial) when the Court of Appeal considered the Chief Commissioner's proceedings before it. This Court was told that appeals by the prisoners against their convictions are pending in the Court of Appeal. Those appeals have not been decided. Nothing in these reasons is intended to foreclose any specific complaint of either prisoner concerning the lawfulness of proceedings adopted by police in his case. This Court was informed that the prisoners were aware of these proceedings. However, they did not appear. Nor did they signify a wish to be heard upon the resolution of the issues that the Chief Commissioner asked this Court to decide.

39 The Court of Appeal permitted The Age Company Limited, publisher of *The Age* newspaper in Melbourne ("the Age"), leave to appear before it as an intervener. That Court did so having regard to legal authority and to the fact that there would otherwise be no contradictor to the applications made to the Court of Appeal on behalf of the Chief Commissioner[31]. On the return of the appeals and the applications before this Court, the Age again appeared to contest several of the arguments of the Chief Commissioner. It provided written and oral submissions that helped to refine a number of the issues in the proceedings. It was not a party to the proceedings in this Court. Here too it appeared as an intervener.

40 The hearing of the appeals and applications was expedited. At the conclusion of argument, the Court pronounced orders dismissing the appeals and applications and ordering the Chief Commissioner to pay the costs of the Age.

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29 [2004] VSCA 3R at [48].

30 [2004] VSCA 3R at [14]-[22].

31 [2004] VSCA 3R at [11].

The Court delayed the termination of the operation of the subject orders for a short interval to permit the Chief Commissioner to consider and, if advised, to renew applications to the Trial Division of the Supreme Court for *particular* extensions of the prohibition on the publication of evidence given in the respective trials identifying police operatives in a way that might endanger their safety. However, the attempt of the Chief Commissioner to secure general orders from this Court affording prohibition for an *indefinite* period of publication of evidence that would identify the police methods used in the two trials was rejected[32]. And that was the principal objective of the Chief Commissioner in the courts below, as in this Court.

The background facts

41 The orders in issue in these proceedings concerned (to use a neutral word) evidence given in the prosecution cases brought separately against Mr Alipapa Tofilau and Mr Lorenzo Favata. Each accused was charged with murder. Each of the trials took place in the Supreme Court in September 2003. In each case the trial was by jury. In each, the accused had been the subject of a police operation designed to secure admissions and inculpating evidence. Each accused had been a prime suspect whom police believed to be responsible for the murders in question. However, in each case police had earlier concluded that they did not have sufficient evidence to establish the accused's guilt.

42 Evidence was given in each trial by undercover operatives of the Covert Investigation Unit of Victoria Police. Adapting techniques of police investigation that had earlier been employed successfully in Canada and the United States, a "Cold Case Unit" had been established within the Homicide Squad of the Victoria Police. This unit planned strategies that were designed to win the confidence of the accused persons and thereby to procure confessions as well as evidence concerning the murder in question that, in effect, could only be known by the person who performed, or was involved in, the murder. Securing the confessional and other evidence required the undercover agents to work according to "scenarios" designed and developed to establish the conditions in which either the evidence desired by police would be forthcoming or the suspect was exculpated. It is not necessary for these reasons to describe in detail the methods used.

43 According to evidence tendered for the Chief Commissioner, the methods used to secure the testimony tendered in the trials of Messrs Tofilau and Favata have been deployed in other Victorian cases resulting in six convictions. Three other cases of the same type were said to be awaiting trial in Victorian courts. The methodology was also relevant to undercover police operations in New

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32 [2004] HCATrans 286 at [3065]-[3070].

South Wales and Western Australia. The Chief Commissioner expressed concern that, if the methods and "scenarios" described in the evidence, adduced in open court in the trials of Messrs Tofilau and Favata, became generally known to the public, through reportage of the evidence and counsel's addresses in the subject trials, this would not only diminish the prospects of the successful use of such techniques to clear up unsolved serious crime in the future. It could also endanger the safety of undercover agents, including those presently engaged in covert operations of this kind. By publicity in the general media, knowledge of the new methods would spread in ways less likely to occur than through discussion of the acceptability of such police methods in judicial reasons[33]; legal and academic literature[34]; word of mouth descriptions of the comparatively few spectators who might have attended the Tofilau and Favata trials; or in-prison discussions undermining the effectiveness and safety of the otherwise promising police techniques[35].

44 In each case, therefore (and apparently in other cases in other States where the methods have been deployed), applications were made for suppression orders designed to prevent general reportage of that part of the evidence at the trial, or of addresses concerning such evidence, that would publicise the methods with the consequences that the Chief Commissioner sought to avoid.

45 The first relevant order was made by Osborn J on 22 September 2003 in relation to the trial of Mr Tofilau. It was made following a hearing conducted in part in closed court. The order was in the following terms (omitting the names of specified witnesses):

> "1. [Pursuant to s 18(1) of the Supreme Court Act] [p]ublication by print or electronic means of the following material be prohibited:
>
> (i) photographic or any other images of the undercover operatives;
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> (ii) a report of any part of the proceedings or information derived therefrom which could identify any of the undercover operatives as members of the Victoria Police;

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33 cf *R v Swaffield* (1998) 192 CLR 159; *R v Mentuck* [2001] 3 SCR 442; *R v ONE* [2001] 3 SCR 478.

34 eg Palmer, "Applying *Swaffield*: Covertly Obtained Statements and the Public Policy Discretion", (2004) 28 *Criminal Law Journal* 217; Bronitt, "Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?", (2003) 14 *Public Law Review* 76 at 79; Palmer, "Applying *Swaffield* Part II: Fake gangs and induced confessions", (2005) 29 *Criminal Law Journal* 111.

35 [2004] VSCA 3R at [42].

(iii) the names of the undercover operatives;

(iv) the evidence of the witnesses *** and ***;

(v) the evidence of the witness *** save and except for the fact that a confession was made by the accused to police members on 17 March 2002 but not including any detail of police undercover methodology;

(vi) details of the sixteen scenarios comprising such methodology referred to above which will be given in evidence by the aforementioned witnesses;

(vii) the opening and closing addresses of Counsel insofar as they reveal the methodology disclosed by the abovenamed witnesses in relation to the sixteen scenarios;

(viii) the cross-examination of the informant and any police witnesses as to the methodology referred to above;

(ix) the fact of the use of any of the sixteen scenarios as an investigative tool used by the Victoria Police.

...

3. This order remain in force until 10 October 2003.

..."

46 In the trial of Mr Favata, Teague J on 23 September 2003 made an order in substantially similar terms. Like Osborn J, his Honour declined the Chief Commissioner's request to make the order one having operation for an indefinite time. He too fixed the duration of the order by reference to the anticipated duration of the trial. The orders were later extended whilst the Chief Commissioner's applications and appeals were underway. Such extensions were designed to protect the utility of the proceedings.

The decision of the Court of Appeal

47 In the Court of Appeal the Chief Commissioner challenged the orders so made and specifically their limited periods of operation. In respect of the orders concerning the trial of Mr Tofilau, the proceedings in the Court of Appeal were commenced on 1 October 2003. According to the record, a notice of appeal bearing that date, and a summons of the same day seeking leave to appeal in the alternative, were presented to the Court of Appeal registry together with a supporting affidavit. The affidavit identified confidential evidence presented by police at the trial of Mr Tofilau and the transcript of the closed court proceedings

leading to Osborn J's order. The confidential evidence was produced to the Court registry in a sealed envelope.

48 Similar documentation was presented to the Court of Appeal registry on 7 October 2003 appealing, or applying for leave to appeal, from the order of Teague J concerning the similar evidence in Mr Favata's trial. In each matter, the documentation was intituled by reference to the proceedings between the Queen and the respective accused. The documents nominated the Chief Commissioner as "appellant" and "applicant" respectively and referred to the Supreme Court Act, s 18, under which each application for the subject orders had been made.

49 The appeals and applications in the two cases were heard together by the Court of Appeal on 9 October 2003. It was undisputed that the argument in that Court occupied, in all, an hour and a half.

50 In this Court, the Chief Commissioner was permitted to rely on an affidavit by her solicitor concerning what then followed. This evidence was tendered to establish the complaint which the Chief Commissioner made to this Court concerning an alleged want of procedural fairness, said to have arisen in the course adopted by the Court of Appeal in disposing of the proceedings. It will be necessary to return to the procedure adopted[36]. For the present, it will be assumed that it was permissible and that the evidence is available for consideration by this Court.

51 According to the solicitor's affidavit, on 8 December 2003, a memorandum was forwarded by counsel for the Chief Commissioner to the Court of Appeal which, it was said, made it clear that the Chief Commissioner assumed that the issue to be decided by the Court of Appeal was restricted to "the question of jurisdiction". In the submissions signed by counsel, the Chief Commissioner submitted:

> "Nor does [the Chief Commissioner] wish at this stage to make submissions on the substantive issues which will be raised in the Appeal if the Court either assumes jurisdiction or grants leave to appeal. Those substantive issues are complex and may require analysis of interstate and overseas authorities. ... These submissions are limited to the reasons why leave to appeal should be granted".

52 In addition to the foregoing, further affidavits by the solicitor for the Chief Commissioner and by a police witness, each dated 10 December 2003, were filed in the Court of Appeal registry. The further affidavit of the solicitor referred to communications with police undercover units in other States of Australia;

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36 See below at [69]-[72].

confirmed that methods similar to those used in the instant cases were being deployed in those States; and reported "similar concerns to those expressed by Victoria Police, should the media be permitted to reveal details of the technique [of using undercover scenario investigations]". The affidavit also foreshadowed the likelihood that an application would be made to this Court for special leave to appeal should the decision of the Court of Appeal prove adverse to the Chief Commissioner.

53 No foundation, in the Rules of Court or in any leave expressly granted by the Court of Appeal, was cited for the course adopted in filing these supplementary materials. Whether they reached the judges of the Court of Appeal is unknown. They were not specifically referred to in the Court of Appeal's reasons, published when its orders were pronounced. This Court has deprecated such actions in respect of its own hearings[37].

54 Where leave has not been given publicly for supplementary submissions and evidence, the provision of such material to court registries without permission of the court, publicly signified, is a derogation from the principle of the open administration of justice. It should not occur. If new points of importance arise in the case whilst a matter stands for judgment, the proper course (unless statute or court rules permit otherwise) is for the proceeding to be relisted so that an application to enlarge the record can be made and determined in open court. Had that course been followed in the present proceeding, it is likely that the apparent misapprehension on the part of those representing the Chief Commissioner would have been cleared up. The later complaint of procedural unfairness might then have been avoided.

55 In response to the supplementary submission and affidavits of the Chief Commissioner that were served on it, the Age filed its own "supplementary note" in the Court of Appeal registry on 15 December 2003. This signified that it did "not wish to make any further submissions on the question of jurisdiction or the application for leave to appeal". However, the Age indicated that it wished to "make submissions [in the event that leave to appeal were granted] on the substantive issues in the appeal in response to [the affidavits filed by the Chief Commissioner] including [those] sworn on 10 December 2003". The Age also foreshadowed that, in the event that leave to appeal were granted, it would seek leave to cross-appeal for orders that the orders made in each case be limited to the names or photographic or other images of the undercover police operatives

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37 *Stuart v The Queen* (1959) 101 CLR 1 at 10. ("We think we should add that while these reasons were in preparation a communication was made on behalf of the Crown to the Principal Registrar of material said to bear on the prisoner's capacity to understand English. This communication we have entirely ignored and we do not think it ought to have been made.")

involved and reports of any part of the proceedings that would identify those persons. The Chief Commissioner contended that these submissions, on the part of the Age, indicated the expectation of the intervener in the Court of Appeal that leave to appeal would be decided by that Court separately from, and anterior to, the consideration of "the substantive issues in the appeal". That, it was suggested, was what the Chief Commissioner had also anticipated.

56 This is not, however, the way the Court of Appeal decided the proceedings. Its reasons were published and orders made on 12 February 2004. The title sheet to the unanimous decision of the Court (Winneke P, Ormiston and Vincent JJA) discloses the approach. The case is described as "In the matter of an application by Chief Commissioner of Police (Vic) for leave to appeal".

57 After outlining the course of the proceeding and (in general terms) the techniques involved in the activities of the undercover operatives deployed in relation to the respective cases of Messrs Tofilau and Favata[38], the greater part of the reasons of the Court of Appeal was devoted to the preliminary question of whether (as the Chief Commissioner asserted), she was entitled to appeal as of right against the suppression orders; whether (as the Age asserted) the Chief Commissioner required the leave of the Court to appeal; or whether no appeal lay to the Court of Appeal in such a case[39].

58 Ultimately, for reasons that will be described below, the Court of Appeal concluded that it had jurisdiction to determine the Chief Commissioner's proceedings. Without finally resolving the issue whether the Chief Commissioner had an appeal as of right or could appeal only if leave were granted[40], it is clear that the Court of Appeal proceeded to treat the matter as an application for leave. The final order made indicates as much[41]; as does the title to the Court's reasons.

59 Subject to any legislative provisions governing court procedures or any considerations of procedural fairness raised by the course of proceedings, it is common for a court, disposing of leave or special leave, to do so with appropriate consideration of the legal and factual merits of the applicant's case. Where the court reaches a clear view that the applicant's case lacks sufficient merit (and is therefore likely, or bound, to fail if leave were granted), a refusal of leave ordinarily follows. To grant leave in such circumstances would be futile,

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38 [2004] VSCA 3R at [8].

39 [2004] VSCA 3R at [14]-[22].

40 See eg [2004] VSCA 3R at [22].

41 [2004] VSCA 3R at [48]. ("[T]he applications should be dismissed.")

involving pointless costs to the applicant (and any respondent parties) and the public costs involved in an extended appellate hearing.

60 In this case the Court of Appeal said that it was prepared, for the purpose of its disposition, to assume that counsel for the Chief Commissioner was correct in his submissions (which were that the Chief Commissioner had a right of appeal or, at least, to seek leave to appeal). The Court of Appeal said[42]:

> "[W]e are prepared to assume (without deciding) [this] for the purpose of enabling us to determine the substantive issue debated before us – namely whether the trial judges were in error in making the limited suppression orders which they did. We are prepared to do this because we have reached a firm and united view upon that issue."

61 In coming to that view, and giving it effect in the way that it did, in the sequence of events described, the Chief Commissioner submitted that the Court of Appeal had deprived her of procedural fairness. Specifically, it had disposed of the proceedings on the footing that there was an "appeal" without affording the Chief Commissioner the right to present full argument as on the return of an appeal. It had expressly assumed that there was an "appeal"; but it had treated the matter, in effect, as no more than an application for leave to appeal. It had failed to respond to the suggested indications in the initial hearing and the requests in the subsequent communication in December 2003, showing that the Chief Commissioner wished to be heard separately and upon additional materials, before the substantive question was decided. And it had deprived itself (in a matter of importance to the Chief Commissioner, other police and the community) of full argument on a point of large significance for the administration of justice in the particular cases and more generally[43].

62 The Age contested the suggested breach of procedural fairness alleged by the Chief Commissioner. It had consistently submitted to the Court of Appeal that the only entitlement of the Chief Commissioner to engage the jurisdiction of that Court was if leave to appeal were granted. Supported by the summary of the Chief Commissioner's submissions as reproduced in the reasons of the Court of Appeal[44], the Age argued that the "substantive issue" in that Court had been sufficiently identified and addressed in the initial hearing. In so far as the additional submissions and evidence were pressed upon the Court of Appeal

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42 [2004] VSCA 3R at [22].

43 *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481; *Walton v Gardiner* (1993) 177 CLR 378. See also *Attorney-General v Leveller Magazine* [1979] AC 440 at 450, 458, 465, 468.

44 [2004] VSCA 3R at [31].

whilst its judgment was under consideration, it was open to that Court (if it gave any consideration to the material) to conclude that there was nothing new in principle or that no reason had been shown why the Chief Commissioner should be allowed to present new and different materials at such a late stage.

The applicable legislation

63 The relevant provisions of the Supreme Court Act are ss 17, 17A, 18 and 19. So far as applicable, the sections governing the right of appeal to the Court of Appeal provide:

> "17. *Business to be disposed of by Trial Division constituted by a Judge*
>
> (1) The Trial Division constituted by a Judge may hear and determine all matters, whether civil or criminal, not required by or under this or any other Act … to be heard and determined by the Court of Appeal.
>
> (2) Unless otherwise expressly provided by this or any other Act, an appeal lies to the Court of Appeal from any determination of the Trial Division constituted by a Judge.
>
> 17A. *Restrictions on appeals*
>
> (1) An order made by the Trial Division constituted by a Judge –
>
> (a) by consent of the parties; or
>
> (b) as to costs which are in the discretion of the Trial Division –
>
> is not subject to appeal to the Court of Appeal except by leave of the Court of Appeal or by leave of the Judge constituting the Trial Division which made the order.
>
> (2) …
>
> (3) Except as provided in Part VI of the *Crimes Act 1958*, an appeal does not lie from a determination of the Trial Division constituted by a Judge made on or in relation to the trial or proposed trial of a person on indictment or presentment.
>
> (3A) …
>
> (3B) …

(4) An appeal does not lie to the Court of Appeal –

(a) from an order allowing an extension of time for appealing from a judgment; or

(b) without the leave of the Judge constituting the Trial Division or of the Court of Appeal, from a judgment or order in an interlocutory application, being a judgment or order given by the Trial Division constituted by a Judge, except in the following cases –

(i) when the liberty of the subject or the custody of minors is concerned;

(ii) …".

64 The reference in s 17A(3) to Pt VI of the *Crimes Act* 1958 (Vic) ("the Crimes Act") is a reference to the Part of that Act governing "Appeals in criminal cases [and] references on petitions for mercy". By s 567, the Crimes Act provides for a right of appeal in criminal cases. However, the right of appeal so afforded is confined by s 567 (relevantly) to an appeal by "a person convicted on indictment" or presentment. By virtue of the provisions of the Crimes Act, such a person "may appeal under this Part to the Court of Appeal".

65 Four circumstances of appeal are specified in s 567. They are appeal: "against … conviction on any ground of appeal which involves a question of law alone"[45]; upon a certificate where the appeal is against conviction on a ground of appeal "which involves a question of fact alone, or a question of mixed law and fact"[46]; with the leave of the Court of Appeal (notwithstanding the absence of a certificate) on the lastmentioned grounds[47]; and with the leave of the Court of Appeal against sentence unless the sentence is one fixed by law[48]. Provision is also made in Pt VI of the Crimes Act for an appeal against sentence passed on a person convicted of specified serious offences brought in particular cases by the Director of Public Prosecutions[49]. There is no express provision in Pt VI of the Crimes Act permitting a right of appeal against an order made under s 18 of the

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45 Crimes Act, s 567(a).

46 Crimes Act, s 567(b).

47 Crimes Act, s 567(c).

48 Crimes Act, s 567(d).

49 Crimes Act, s 567A.

Supreme Court Act where the order is made in relation to any criminal proceeding.

66 The provisions of the Supreme Court Act governing orders prohibiting publication of evidence are relevantly as follows:

"18. *Power to close proceedings to the public*

(1) The Court may in the circumstances mentioned in section 19 –

(a) order that the whole or any part of a proceeding be heard in closed court; or

(b) order that only persons or classes of persons specified by it may be present during the whole or any part of a proceeding; or

(c) make an order prohibiting the publication of a report of the whole or any part of a proceeding or of any information derived from a proceeding.

(2) This section applies to any proceeding, whether civil or criminal.

(3) …

(4) A person must not contravene an order made … under this section.

Penalty: 1000 penalty units or imprisonment for 3 months.

19. *Circumstances in which order may be made under section 18*

The Court may make an order under section 18 if in its opinion it is necessary to do so in order not to –

(a) endanger the national or international security of Australia; or

(b) prejudice the administration of justice; or

(c) endanger the physical safety of any person;

…".

The resulting issues

67 Against this background of the history of the proceedings, the arguments of the parties and the applicable legislation, the following issues arise for consideration by this Court:

(1) *The constitutional issues*: Are the appeals or applications by the Chief Commissioner competent, in accordance with the Constitution, to engage the appellate jurisdiction and power of this Court?

(2) *The appeal hearing issue*: If so, did the Court of Appeal err in failing or omitting to conclude that the Chief Commissioner had an appeal to it as of right against the orders respectively made in the Trial Division of the Supreme Court by Osborn J and Teague J? Did the Court of Appeal err in failing or omitting to hear such appeals as required by law?

(3) *The procedural fairness issue*: Did the Court of Appeal err in failing to accord procedural fairness (natural justice) to the Chief Commissioner when it disposed of the substance of her proposed appeal as an application for leave to appeal without affording a full opportunity to her to present evidence and argument in support of her contentions?

(4) *The direct approach issue*: Having regard to the answers to the foregoing, is special leave required and should it be granted to the Chief Commissioner, to appeal directly to this Court from the orders of the judges in the Trial Division of the Supreme Court of Victoria? Should any time default in that regard be cured so as to permit special leave to be granted and the appeals to be disposed of on their merits?

Three constitutional questions

68 *Questions of jurisdiction and power*: In the course of argument in this Court a number of constitutional questions were raised by the Court that had either not been noticed, or not sufficiently identified[50], prior to the hearing. It is necessary to mention these questions although the Court had only limited submissions upon them. This is because they concern the jurisdiction and powers of this Court in the present proceedings. Although neither the Chief Commissioner nor the Age argued a want of jurisdiction – indeed each asserted that jurisdiction existed – it is the first rule of every court, where a real question is raised as to its jurisdiction and powers (or as to the exercise thereof), that the court must satisfy itself that the jurisdiction exists and that the powers may be exercised.

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50 With appropriate notices under the *Judiciary Act* 1903 (Cth), s 78B.

69 *Reception of evidence as to the proceedings*: One of the constitutional questions has already been mentioned in passing. It can be disposed of with relative ease. It concerns the admissibility in this Court of affidavits read on behalf of the Chief Commissioner, designed to show what occurred in the Court of Appeal as relevant to the suggested unfairness of that Court's action in proceeding to dispose of the substance of the Commissioner's submissions.

70 This Court has held[51], and recently reaffirmed[52], that the "appeals" provided for in s 73 of the Constitution are strict appeals. They require the exercise by this Court of its appellate jurisdiction based on the record of the court from which the appeal comes[53]. Upon this footing, this Court has refused to permit fresh evidence to be tendered once the appellate jurisdiction of the Court is engaged. Opinions have been expressed that have questioned this holding[54]. However, the authority of the Court was not questioned in these proceedings. It should be taken to apply to them.

71 Is the affidavit that describes the conduct of the proceedings in the courts below new evidence in the sense forbidden by the foregoing authority? Or does it represent nothing more than an attempt to express and describe the record of the earlier proceedings in a way equivalent to a *verbatim* elaborated transcript of what took place when those proceedings were before the Supreme Court of Victoria? Some intermediate appellate and trial courts have *verbatim* transcripts of argument in all or most cases. Where these exist it is relatively easy to examine the way in which a case was presented. Such transcripts are commonly treated as part of the record.[55] As such, they would be available to this Court to assist in an otherwise admissible complaint of procedural unfairness.

72 Evidence beyond the record, to supplement the transcript as recorded by the official shorthand writer has been received by this Court in cases where the record is imperfect or incomplete: see *Government Insurance Office of NSW v*

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51 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 85, 87, 107-110, 112-113; *Mickelberg v The Queen* (1989) 167 CLR 259 at 265-271, 274-275, 297-298.

52 *Eastman v The Queen* (2000) 203 CLR 1 at 12-13 [17], 26 [78], 35 [111], 63 [190], 97 [290].

53 *Mickelberg* (1989) 167 CLR 259; *Eastman* (2000) 203 CLR 1.

54 *Eastman* (2000) 203 CLR 1 at 93 [276]-[277], 123 [369]-[370]; *Mickelberg* (1989) 167 CLR 259 at 282-284, 288.

55 cf *Craig v South Australia* (1995) 184 CLR 136 at 180-183.

Fredrichberg[56]. This approach was noted, without disapproval, in *Eastman v The Queen*[57]. As finally tendered, I do not regard the substance of the affidavit of the solicitor for the Chief Commissioner, concerning what occurred in the Court of Appeal, as understood by that solicitor, as offending against the established constitutional rule. It permissibly elaborates the record. But it must be read with the rest of the record, including the statements in the Court of Appeal's reasons concerning the matters that were submitted to that Court during argument on the hearing.

73 *Procedural fairness and a superior court*: A second question raised by this Court during argument is whether, in the exercise of the appellate jurisdiction of this Court, it is open to a party to challenge a judgment or orders of a State Supreme Court on grounds that contend that those orders are affected by procedural unfairness and liable to be set aside on that basis.

74 Traditionally, the judges of superior courts, such as a State Supreme Court, were not liable to the prerogative remedies addressed to inferior courts on the basis that they had acted outside their jurisdiction by failing to observe the requirement of procedural fairness[58]. A possible question was raised as to whether that limitation controlled the appellate jurisdiction of this Court in such a way as to exclude relief for procedural unfairness on the part of a superior court of record, such as the Supreme Court of Victoria.

75 This issue was not argued at any length. That was because there was no party with an interest to do so. However, it is sufficient to say that the appellate jurisdiction of this Court, deriving as it does from the Constitution, should be given the widest possible ambit to cure injustices, procedural as well as substantive, in a Supreme Court as in other courts without distinction. This

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56 (1968) 118 CLR 403 at 410, 416-417, 422-423.

57 (2000) 203 CLR 1 at 59 [182], 90 fn 354.

58 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 399; *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 at 241; cf *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 393. It has long been established that the constitutional writs provided for in s 75(v) of the Constitution may be issued to officers of the Commonwealth who are also superior court judges in courts created by the Parliament, where they exceed jurisdiction. See the *Tramways Case [No 1]* (1914) 18 CLR 54 at 62, 66-67, 82-83, 86. Such writs do not, however, apply to a judge of a State court exercising federal jurisdiction vested in that court: *R v Murray and Cormie; Ex parte The Commonwealth* (1916) 22 CLR 437 at 452-453, 464, 471.

Court has previously assumed as much.[59] I will do so for the purpose of these proceedings.

76 *Engaging a constitutional "appeal"*: Thirdly, and more troubling, is a point also raised by the Court during argument concerning whether the subject judgment and order of the Court of Appeal (and the orders of the trial judges) in the Supreme Court of Victoria in this case are "judgments … [or] orders" within s 73 of the Constitution. And whether the controversy tendered by the appeals of the Chief Commissioner to this Court and her applications for special leave tender a "matter" apt for determination by this Court in the exercise of the judicial power of the Commonwealth.

77 The difficulty in this third constitutional point is highlighted by the fact that the application of the Chief Commissioner, both in the Trial Division of the Supreme Court and in the Court of Appeal, had no contesting party in the ordinary sense. The Age provided a contradictor for some of the contentions of the Chief Commissioner. But the Age's interest was focused, naturally enough, on the potential effect of any over-wide suppression order upon the exercise of its newspaper's asserted right to report the particular criminal trials and to discuss matters of general significance arising from them.

78 As such, the Age was only peripherally concerned in the issue of the jurisdiction of the Court of Appeal. It did not have a general brief, or possibly the standing, to advance all of the public interest considerations that were presented by the Chief Commissioner's applications. Perhaps significantly, by the time the Court of Appeal came to deliver its reasons, and to pronounce its judgment and orders, the parties initially named in the title to the process that originally invoked that Court's jurisdiction (namely the Queen and the two accused persons by then convicted prisoners) were omitted. Nor was the Age named as a party. Being content with the order of the Court of Appeal, it did not seek to exercise a party's rights in this Court. It did not seek to appeal or cross-appeal. It did not need to. It was satisfied with the Court of Appeal's dispositions. It therefore remained an intervener.

79 The cardinal rule for the exercise of the judicial power of the Commonwealth was stated by this Court in its early days in *In re Judiciary and Navigation Acts*[60]. It was not questioned in these proceedings. The Court there

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59 *Pantorno v The Queen* (1989) 166 CLR 466 at 476, 483 (setting aside a decision of the Supreme Court of Victoria (Court of Criminal Appeal) on the grounds that the Court erred in law by failing to accord the accused procedural fairness). See also *R v Lewis* (1988) 165 CLR 12 at 16-17.

60 (1921) 29 CLR 257.

refused to give an advisory opinion on whether various sections and schedules of the *Navigation Act* 1912 (Cth) were valid enactments of the Federal Parliament. It established the rule that the legislature[61]:

> "cannot authorize this Court to make a declaration of the law divorced from any attempt to administer that law. … [W]e can find nothing in Chapter III of the Constitution to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved".

80 In *Mellifont v Attorney-General (Q)*[62], this Court, in the joint reasons[63], pointed out that the foregoing passage contains two critical concepts:

> "One is the notion of an abstract question of law not involving the right or duty of any body or person; the second is the making of a declaration of law divorced or dissociated from any attempt to administer it".

81 These possible problems of a constitutional character were likewise not fully argued. In the absence of such argument, I am unconvinced that they present a barrier to the exercise of the appellate jurisdiction of this Court. There is no doubt that, subject to the Constitution, the courts below made orders which, pursuant to the Supreme Court Act were binding according to their terms until set aside or terminated. Each of the orders, whilst they remained in force, could give rise in case of breach to proceedings for a penalty and, possibly, for prosecution for contempt of court.

82 Provision for the orders made is expressly envisaged by ss 18 and 19 of the Supreme Court Act. The Chief Commissioner was a proper person to enliven the jurisdiction of the Supreme Court of Victoria to make such orders, having regard to the terms of s 19, especially pars (b) and (c). The orders were sought in connection with two extant criminal trials, involving named accused and identified witnesses. I do not believe that the determination of the Chief Commissioner's appeal involves a decision on an abstract question of law devoid of the right or duty of the bodies and persons to whom the orders under s 18 of the Supreme Court Act were addressed. Far from being divorced or dissociated from the attempt to administer the law, the orders are closely connected with the administration of criminal justice in two criminal trials.

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61 (1921) 29 CLR 257 at 266-267.

62 (1991) 173 CLR 289 at 303.

63 Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.

83 In particular, the protection of the identity of undercover police agents who gave evidence in the trials is a legitimate and a highly practical and important purpose of the administration of criminal justice. In this way, the possible constitutional difficulty presented during argument is answered sufficiently to permit the remaining questions to be decided in these proceedings. The appearance of the Age, as intervener, and the breadth and assistance of the arguments presented by the Age helped, in part, to overcome possible constitutional problems that might have arisen had the proceedings in this Court progressed entirely *ex parte*.

84 This resolution of the constitutional questions, by reference to the close interrelationship of the judgment and orders made by the courts below and the substantive trials of the accused persons is also relevant to the jurisdiction of the Court of Appeal. It gives emphasis to the essential connection between the suppression orders in issue and the criminal trials to which those orders related.

The jurisdiction of the Court of Appeal

85 *Determining jurisdiction*: Determining the jurisdiction of the Court of Appeal was potentially important in these proceedings. If the Chief Commissioner required leave to appeal (as the Age asserted) that fact would affect the character of the hearing and the conduct of the hearing and the manner of its disposition.

86 There was no contest that the respective trial judges had the jurisdiction and power to hear and determine the applications made by the Chief Commissioner that the hearing of part of the proceedings before them, in the respective criminal trials of Messrs Tofilau and Favata, should take place in closed court[64]. Likewise, it was not disputed that the judges had the jurisdiction and power to make orders prohibiting the publication of a report "of the whole or any part of a proceeding or of any information derived from a proceeding"[65].

87 Subject to what follows, the orders made were not within the categories expressly identified in the Supreme Court Act as requiring leave to appeal from the Court of Appeal or from the judge constituting the Trial Division[66]. Nor were the orders within the categories in respect of which it is provided that an appeal does not lie at all to the Court of Appeal[67]. In one trial, the Chief Commissioner

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64 Supreme Court Act, ss 17(1) and 18(1)(a).

65 Supreme Court Act, ss 17(1) and 18(1)(c).

66 Supreme Court Act, s 17A(1), (2), (3A) and (4)(b).

67 Supreme Court Act, s 17A(4)(a) and (6).

had requested the trial judge to reserve the orders "for the consideration of the Court of Appeal"[68]. However, the trial judge refused this request, considering that it was his duty to decide the matter for himself[69]. A similar request was not made before the other judge.

88 *Appeal as of right?*: The Chief Commissioner's argument that a *right* of appeal to the Court of Appeal existed in this case depended, in part, upon the language of s 17(2) of the Supreme Court Act; in part, upon the history and suggested purpose of the appeal provisions in that Act; and, in part, on considerations of general principle concerning the wide interpretation of the powers conferred by statute on courts of general jurisdiction, such as the Supreme Court[70].

89 In essence, the Chief Commissioner submitted that the suppression orders made by the judges in the Trial Division were distinct and *sui generis*. They were made in the exercise of the Supreme Court's powers, expressly conferred on it by the Parliament of Victoria[71]. Although the conferral of such powers envisaged a "proceeding, whether civil or criminal", that was already before the Court[72] the order could (as in the present cases) be sought and obtained by a non-party in defence of the statutory interests nominated[73]. In this way, such orders stood apart from the "proceeding" in question. They were not interlocutory to such proceedings in the normal sense.

90 There is no doubt that s 17(2) of the Supreme Court Act would permit an appeal from the "determination" of the Trial Division constituted by a judge under s 18 of the Supreme Court Act, subject to the opening words of that sub-section ("unless otherwise expressly provided by this or any other Act"). As this Court unanimously held in *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)*[74], the choice of the word "determination"

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68 Supreme Court Act, s 17B(2).

69 Transcript of argument *R v Tofilau*, 22 September 2003 at 5-6, 15 per Osborn J.

70 See eg *Electric Light and Power Supply Corporation Ltd v Electricity Commission of NSW* (1956) 94 CLR 554 at 560. See also *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 78 [11], 91 [53].

71 Supreme Court Act ss 18(1) and 19.

72 Supreme Court Act s 18(2).

73 Supreme Court Act s 19.

74 (2001) 207 CLR 72.

in s 17(1) of the Supreme Court Act was clearly intended to embrace "a wide variety of judicial decisions"[75]. All of the considerations mentioned in *Roy Morgan* support the proposition that *prima facie* a "determination", in the form of an order under s 18 of the Supreme Court Act, potentially engages the appellate jurisdiction of the Court of Appeal, subject only to express exclusions.

91 The history of the amendments to the appeal provisions in the Supreme Court Act were set out, as they stood to that date, in this Court's decision in *Smith v The Queen*[76]. As was decided in that case, so in this. The critical words are the words of exception. The crucial question is not whether the "determination" of the primary judge enlivens an appellate right. It is whether the express exclusions take the case out of the category of appeal as of right, obliging consideration of whether an appeal lies by leave or not at all.

92 It follows that the important words in the present case are those that qualify the facility provided by s 17(2) of the Supreme Court Act ("unless otherwise expressly provided by this or any other Act") and the words appearing in s 17A(3) (excluding appeal "from a determination of the Trial Division constituted by a Judge made on or in relation to the trial or proposed trial of a person on indictment or presentment"). In the latter case, the only appeal that lies to the Court of Appeal (except as otherwise expressly provided) is that provided in Pt VI of the Crimes Act.

93 In *Smith*, this Court held that the provision which is now s 17A(3) excluded an appeal by the Crown against an order permanently staying a criminal prosecution. The reason for the language of exclusion in the provision was explained in the joint reasons in that case[77]:

> "[I]t can hardly be assumed that [the Court] would have concluded that the Crown had a right of appeal against any ruling made against it at or before the trial – a right not shared by an accused – merely because it had no right of appeal under Pt VI of the *Crimes Act*. It would appear that s 14(3)

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75 (2001) 207 CLR 72 at 78 [10], 87 [38]; cf *The Commonwealth v Bank of NSW* (1949) 79 CLR 497 at 625; [1950] AC 235 at 294 and *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221 at 228; [1969] 1 AC 590 at 630 where the width of the word "decision" in s 74 of the Constitution is described.

76 (1994) 181 CLR 338 at 344-345. See also [2004] VSCA 3R at [14]-[17]. The words now appearing in s 17A(2) were then in s 42(2) of the Supreme Court Act, with reference to "the Full Court" in the place of "the Court of Appeal", as now appearing.

77 (1994) 181 CLR 338 at 346 per Mason CJ, Dawson, Gaudron and McHugh JJ.

was intended to avoid the fragmentation of criminal trials by appeals brought from rulings before or during the course of a trial, whilst allowing appeals where there was a conviction … ."

94 The same consideration applies to these proceedings to explain the relevantly identical terms of s 17A(3) of the Supreme Court Act as now appearing. There is no reason to give those words a construction different from that provided by this Court in *Smith*. There is every reason to give them the same construction.

95 The ambit of the exclusion stated in s 17A(3) is a deliberately wide one. The scope of the word "determination" has already been mentioned. Equally important is the adjectival clause of place ("made on or in relation to the trial or proposed trial"). All that is required to engage s 17A(3) is that the "determination" in question was made "in relation to" a criminal trial to which Pt VI of the Crimes Act applies. As the Court of Appeal correctly pointed out in these proceedings, the posited connection to the trial appearing in those words is very broad. In the context of criminal trials, the legislative policy is explained by the longstanding resistance of the courts to interlocutory appeals that interrupt the course of criminal proceedings[78].

96 The foregoing is also the approach that the Court of Appeal has taken in decisions after *Smith* and prior to this one[79]. Moreover, as the Court of Appeal observed in the present case, it is what is required by the clear language of the express exclusion stated in s 17A(3) of the Supreme Court Act as explained in *Smith*. Nothing in *Roy Morgan* suggests a different conclusion. It is impossible to conclude that the provision of s 17A(3) of the Supreme Court Act is other than an "express provision" within s 17(2) excluding an appeal as of right from the "determinations" made by the judges of the Trial Division in this case.

97 *Appeal by leave?*: This conclusion excludes the operation of the general provision of s 17(2) otherwise affording an appeal as of right in cases of this kind. It leaves only the question whether, notwithstanding such express provision, appeals "in relation to" a trial, or proposed trial, of a person on

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78 [2004] VSCA 3R at [16]-[17]. See also *Barton v The Queen* (1980) 147 CLR 75 at 108; *Sankey v Whitlam* (1978) 142 CLR 1 at 25-26, 82; *R v Elliott* (1996) 185 CLR 250 at 257.

79 See eg *Victoria Legal Aid v Lewis* [1998] 4 VR 517. The Chief Commissioner argued that *Lewis* was wrongly decided having regard to the fact that s 17(2) of the Supreme Court Act was inserted in 1984 to provide a right of appeal where none had previously existed; cf *Fernandez v DPP* (2002) 5 VR 374 at 380. This Court did not consider this argument persuasive in *Smith* (1994) 181 CLR 338 at 345.

indictment or presentment as provided in Pt VI of the Crimes Act[80], might be brought from the orders of the trial judges made under s 18 of the Supreme Court Act by leave of the Court of Appeal.

98 The answer to that question is also governed by the express provision "otherwise" in the Supreme Court Act which provides that, subject to two exceptions not presently relevant, no appeal lies from an "order in an interlocutory application" within s 17A(4) of that Act without the leave of the judge constituting the Trial Division or of the Court of Appeal. By its terms, s 18 of the Supreme Court Act envisages the making of "orders". But are the subject orders "interlocutory" in the sense used in s 17A(4)? And if they are interlocutory within the meaning of that sub-section, is it open to the Chief Commissioner to apply for leave to appeal against those orders notwithstanding that they fall within the exclusionary provision of s 17A(3)?

99 In *Salter Rex & Co v Ghosh*[81], Lord Denning MR remarked that the answer to the question whether an order was "final" or "interlocutory" was so uncertain that "the only thing for practitioners to do is to look up the practice books and see what has been decided on the point". Where a new case arises, he cautioned, judges must do "the best we can with it". There was in his Lordship's opinion "no other way".

100 In the case books, a dispute existed as to whether, for the purpose of this classification, the court looked at the practical consequences of the determination in question or at the nature of the application made and its legal effect. This Court has preferred the latter approach[82]. In *Licul v Corney*[83] Gibbs J, although dissenting in the result, accurately described the approach to be taken[84]:

> "The distinction between final and interlocutory judgments is not always easy to draw and there has been disagreement as to the test by which the question whether a judgment is final or interlocutory is to be determined. One view … is that the test depends on the nature of the application made

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80 ss 567, 567A.

81 [1971] 2 QB 597 at 601; cf *Dousi v Colgate Palmolive Pty Ltd* (1987) 9 NSWLR 374 at 375.

82 *Carr v Finance Corporation of Australia Ltd [No 1]* (1981) 147 CLR 246 at 248, 254, 256-257; *Sanofi v Parke Davis Pty Ltd [No 1]* (1982) 149 CLR 147 at 153.

83 (1976) 180 CLR 213.

84 (1976) 180 CLR 213 at 225.

> to the Court. The other view which, since *Hall v Nominal Defendant*[85] should, I think, be regarded as established in Australia, depends on the nature of the order made; the test is: Does the judgment or order, as made, finally dispose of the rights of the parties?"

101 In the present case, the order made under s 18 of the Supreme Court Act did not finally dispose of the Chief Commissioner's rights, on new and different evidence, to apply again for an order under s 18. When attention is paid to the legal effect and classification of the order sought, such order was therefore interlocutory. The fact that the Chief Commissioner was not a party to the original criminal proceedings, although the proceedings were brought "in relation to the trial or proposed trial of a person on indictment or presentment", also assists in that classification.

102 The Chief Commissioner's applications obviously "relate[d] to" the trials of Messrs Tofilau and Favata. Initially they were so described in the documentation filed by her solicitors. They did not finally resolve the rights of the parties to those proceedings. They did not even finally dispose of the rights of the Chief Commissioner to the order she sought, a fact demonstrated by the numerous supplementary applications made whilst the present proceedings were progressing through the courts.

103 Even if the orders are interlocutory, and therefore fall within s 17A(4), it is not clear from the text of the provision whether it is still open to the Chief Commissioner to apply for leave to appeal under that section notwithstanding that the orders are also caught by s 17A(3). The relationship between ss 17A(3) and 17A(4) was not addressed by the parties in their submissions. I therefore proceed on the assumption, without deciding the point, that even if an order is excluded by s 17A(3), an appeal by leave under s 17A(4) may still be available in the alternative.

104 *Conclusion: leave required*: It follows that the correct construction of the Supreme Court Act and the Court of Appeal's own reasoning ought to have led it to a conclusion that an appeal against the orders of the trial judges lay to it, but only by leave. Obviously enough, this is what, by its ultimate disposition, the Court of Appeal eventually concluded. It dismissed the "applications", that is, for leave. It made no order in relation to the purported "appeals" which, by inference, it decided were not available to the Chief Commissioner as of right.

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85 (1966) 117 CLR 423.

105 It might have been preferable for the Court of Appeal to have resolved the point expressly in its reasons instead of leaving its conclusion to inference[86]. The course that it took, and some of its consequential reasons, led the Chief Commissioner to believe that the Court accepted the existence of a right of appeal which it then proceeded to determine, as such, without a further hearing of such appeal because it had "reached a firm and united view upon that issue"[87]. However, in law, leave was required. The order made, the substantial reasoning and the title to the Court of Appeal's reasons and order all sufficiently indicate that that was its final conclusion. In so concluding, the Court of Appeal did not err. No occasion therefore arises on this ground for this Court to correct its order.

Procedural fairness and the substantive disposition

106 *Establishing the alleged unfairness*: The foregoing conclusion has consequences for the Chief Commissioner's argument that the course adopted by the Court of Appeal in disposing of the proceedings before it by reference to "the substantive issue debated before us"[88], involved a breach of the requirements of procedural fairness.

107 If the legal character of the proceedings before the Court of Appeal was, as I would hold, applications by the Chief Commissioner upon summonses for leave to appeal against the duration of the orders made by the trial judges under s 18 of the Supreme Court Act, it was proper and orthodox for the Court of Appeal to consider the substantive determination of the applications made by the trial judges in deciding those summonses. Such considerations are commonly given weight in disposing of leave applications. Although the special leave jurisdiction of this Court is somewhat different, and raises distinct and national considerations[89] (and typically now follows distinct procedures) it is very common for this Court, in exercising its special leave powers, to give consideration to the substantive merits of the applicant's argument, although alone they will not suffice to attract leave[90].

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86 *Cuthbertson v Hobart Corporation* (1921) 30 CLR 16 at 25; *Witness v Marsden* (2000) 49 NSWLR 429 at 448 per Heydon JA.

87 [2004] VSCA 3R at [22].

88 [2004] VSCA 3R at [22].

89 See *Judiciary Act* 1903 (Cth), s 35A.

90 See eg *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594 at 602.

108 It is a serious matter to contend that a court, such as the Court of Appeal of a Supreme Court of a State, has denied a party procedural fairness. The evidentiary burden of establishing that complaint rests on the litigant who makes it. Occasionally, a mistake or oversight will be proved warranting relief on those grounds. But before giving such relief, it is necessary that the foundation be established. In the present case, even when the affidavit material tendered to enlarge the record is considered, the complaint of unfairness in the procedures adopted by the Court of Appeal is not shown. At the most, what appears to have happened is that an assumption was made, amongst those representing the Chief Commissioner, that the Court of Appeal would adopt a two-stage approach to the hearing and invite the parties to return with added submissions on "the substantive issue". For several reasons, that assumption was not, and is not, justified in these proceedings.

109 *The focus on jurisdiction*: First, the attention of the Court of Appeal to the jurisdictional issue ought to have alerted those representing the Chief Commissioner to the possibility that one outcome could be a rejection of the asserted right to appeal and a holding that, at most, the Chief Commissioner had the alternative entitlement asserted by her summonses, namely the right to seek leave to appeal.

110 In the ordinary course of appellate litigation before a court as busy as the Court of Appeal of Victoria, it would be common for the Court to dispose, in the one hearing, of both a jurisdictional question and, if leave were required, the leave question. A well-represented litigant, such as the Chief Commissioner, would have to be prepared for that eventuality. If a different or special course of hearings was proposed or desired, it would have been necessary to make an application for such a course in the clearest of terms, supported by good reasons. The record and evidence before this Court fall far short of demonstrating that any such request was made, certainly before the post-hearing supplementary submission and evidence transmitted to the Court of Appeal registry in December 2003.

111 *Submissions on the substantive question*: Secondly, it is clear from the reasons of the Court of Appeal that, during the oral hearing, the Chief Commissioner and the Age each addressed detailed submissions to the substantive question relating to the "continued suppression from public disclosure of the use of a technique to secure admissions from suspected persons"[91]. The Court of Appeal set out, in summary form, the nature of those submissions. As recorded, they were addressed to the utility, success and effectiveness of the police techniques adopted; the use being made of them by police in Victoria and other Australian States; the suggested diminution in their

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91 [2004] VSCA 3R at [31].

utility once publicity was given to what had happened; and the special risks to which the undercover operatives were exposed given that the subjects of the operations were suspected murderers[92].

112 It was not disputed that such submissions had been made or that the submissions had not referred to the decisions of the Supreme Court of Canada in *R v Mentuck*[93] and *R v ONE*[94], examined in the Court of Appeal's reasons[95]. The close similarity of the issues considered in the Canadian cases and the police methods the subject of the Chief Commissioner's applications, made it inevitable (especially in an appeal requiring leave) that attention would be addressed by the Court of Appeal to such evidence as was available to show the similarities and differences of the Canadian situation. The factual features of the techniques were bound to be evaluated, as was the difference potentially presented by the reliance of the Canadian court on the provisions of the *Canadian Charter of Rights and Freedoms*, a matter expressly referred to by the Court of Appeal[96].

113 *Expedition and economy of proceedings*: Thirdly, an obviously relevant consideration was the urgency of a speedy decision in the proceedings. The case had come before the Court of Appeal, as later this Court, with a high measure of expedition. So much was required by the nature of the proceedings which potentially affected the rights and interests of the accused and people in a like position but also affected the public interest. It was chiefly the public's interest in the open conduct of court proceedings, specifically in criminal trials, that had caused the decisions of both judges in the Trial Division to limit the duration of their orders, initially to the expected hearing of each trial.

114 The clear authority of this Court[97], of other final courts[98] and of other Australian courts[99] lays consistent emphasis on the fact that the principle of open

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92 [2004] VSCA 3R at [31].

93 [2001] 3 SCR 442.

94 [2001] 3 SCR 478.

95 [2004] VSCA 3R at [24], [44].

96 [2004] VSCA 3R at [44] fn 38.

97 *Russell v Russell* (1976) 134 CLR 495 at 520.

98 *Scott v Scott* [1913] AC 417 at 435-437; *R v Mentuck* [2001] 3 SCR 442 at 472-473.

justice is deeply entrenched in our law. It is not an absolute principle. Subject to the Constitution, it may be modified by legislation, such as that enacted in the form of the Supreme Court Act, ss 18 and 19. But the resolution of claims for the closure of courts during criminal trials (even the exclusion from part of them of counsel for the accused where the accused is also absent)[100] and limitations imposed by judicial orders on reportage of proceedings conducted in open court remain wholly exceptional in this country. The determination of their extent and lawfulness was a matter requiring prompt judicial decision in these proceedings. On the face of things, it was not a matter that could be allowed to proceed languidly in a series of interlocutory steps, if that could be avoided. This was so particularly because, pending final resolution and contrary to the initial orders of each of the judges in the Trial Division of the Supreme Court, the restriction on publication had been extended whilst the proceedings were still current. The character of the proceedings, therefore, added to the necessity on the part of those representing the Chief Commissioner to make completely clear any request that was made for a staged timetable of hearings different from the course that might otherwise be observed. No such request was proved.

115 *Avoiding futile orders*: Fourthly, it was inevitable, and proper, that, in resolving an application for leave, the Court of Appeal would turn its attention to the utility of permitting an appeal. Such considerations caused the Court of Appeal, in disposing of the applications, to address the "immense practical difficulties" presented by the arguments of the Chief Commissioner "whether considered in terms of duration [or] scope of effectiveness" of the orders sought[101].

116 It is common in disposing of an application for leave (or special leave) for the appellate court to consider whether the provision of the relief sought would

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99 *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 476-477 ("*Police Tribunal Case*"); *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 55.

100 In the trial of Mr Tofilau, counsel for the Chief Commissioner asked to be heard in the absence of the defendant and counsel for the defence. The accused's counsel did not oppose that course but he had earlier indicated that he opposed "suppression of the methodology" and "of all publicity", which he described as "inconceivable". See transcript *R v Tofilau*, 22 September 2003 at 7. In the trial of Mr Favata, his counsel likewise announced that he was "instructed to oppose any ban on reporting these matters that would amount to a ban on reporting the activities of the undercover police officers". He did not oppose an order protecting their names. See transcript, *R v Favata*, 23 September 2003 at 369.

101 [2004] VSCA 3R at [45].

be futile because of changing circumstances, whether of law or fact. The impossibility of ensuring that a mandatory order will be complied with has for a very long time been a factor that courts take into account when deciding whether injunctive orders should be made[102]. In the state of the record and evidence placed before it, there was no error on the part of the Court of Appeal in considering such matters.

117 The possibility, indeed likelihood, that such considerations would be given attention ought to have been obvious to those representing the Chief Commissioner. Given the public reportage of North American cases concerning police methods in some ways similar to those used in the present case, the availability of such information on the internet, and the presumed discussion of the techniques used in trials and within Australian prisons, it was inevitable that the Chief Commissioner would have to face, on a leave application, considerations such as those that weighed in the reasons of the Court of Appeal[103]:

> "[T]he idea that an order of the kind sought in these cases could be thought to be effective to stop the passing on of information [including the use of methods of the kind here employed] is, if we may say so, fatuous, for the threat of punishment for contempt of such orders, even if that involved an order for imprisonment, would be of little deterrent effect on persons serving extensive terms for murder or their colleagues"[104].

118 The Court of Appeal was clearly, and properly, open to argument concerning the need for specific and long-term protection of the identity of the undercover operatives, a course not disputed by the Age below or in this Court[105]. However, the Age rightly directed the Court's attention to the public interest, amongst other things, in community discussion of the tactics used by police[106].

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102 [2004] VSCA 3R at [45] citing *Attorney-General v Colney Hatch Lunatic Asylum* (1868) LR 4 Ch App 146 at 154 per Lord Hatherley LC.

103 [2004] VSCA 3R at [42].

104 See also the comment of the Court of Appeal [2004] VSCA 3R at [42] fn 36. In her submissions, the Chief Commissioner argued that she had wished to provide further evidence to the Supreme Court on the methodology used, particularly the fact that the "targets were chosen with great care, and not from the prison population".

105 See eg *Marks v Beyfus* (1890) 25 QBD 494 at 498; *Cain v Glass (No 2)* (1985) 3 NSWLR 230 at 242-243, 247-248 (in relation to the identity of police informants).

106 [2004] VSCA 3R at [24] citing *Mentuck* [2001] 3 SCR 442 at [50]. Inevitably many cases have been decided at trial and on appeal in Australia concerning

(Footnote continues on next page)

Potentially, that interest would be inhibited by an unrestricted or long-term prohibition on publication such as the Chief Commissioner was seeking and the trial judges had refused.

119 It is not sufficient for the assurance of open justice in this country that the doors of a court should be unlocked. Fair and accurate reports of what occurs in courtrooms is an essential attribute of the administration of justice in Australia[107]. To the extent that the Supreme Court Act ss 18 and 19 impinge upon these essential features of the Australian court system, the exercise of the powers there provided must take the principle of open justice into close account. The Court of Appeal and the primary judges were correct to so decide. Those representing the Chief Commissioner must have known that those considerations would be weighed in determining summonses for leave to appeal, if that became essential, as it did.

120 *Tendering impermissible submissions*: Fifthly, the belated attempt on the part of the Chief Commissioner to enlarge the record by communicating, apparently without leave, additional submissions and evidence whilst the proceedings were under consideration by the Court of Appeal does not alter the foregoing conclusion. The Court would have been entitled to ignore the unsolicited materials. Alternatively, it would have been open to regard them as adding nothing of substance for the leave application to the submissions previously put. If additional evidence was thought to be essential, beyond that which had been placed before the trial judges when the subject orders were sought (or the Court of Appeal when the matters were argued there), it would also have been open to the Court of Appeal to ask itself why it should act upon such additional material as to problems said to have arisen for police in North America. That material did not amount to "fresh evidence". The failure to tender it, at first instance or earlier, was unexplained.

121 *Procedural considerations*: Sixthly, it is possible that the mistaken expectation amongst those representing the Chief Commissioner arose because of the usual procedure of this Court in now generally hearing separately special leave applications and the appeal pursuant to special leave, where such leave is

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"[s]ubterfuge, ruses and tricks … employed by police, acting in the public interest": see *Swaffield* (1998) 192 CLR 159 at 220 [155]; cf *R v Heaney and Welsh* [1998] 4 VR 636 at 647; *Vale* (2001) 120 A Crim R 322 at 335-336 [52], 337 [56]. See also *Roba* (2000) 110 A Crim R 245 at 251; *Dewhirst* (2001) 122 A Crim R 403 at 408 [26]; *Binning v Lehman* (2002) 133 A Crim R 294; *R v Chimirri* (2002) 136 A Crim R 381; *R v Juric* (2002) 4 VR 411 at 443-444 [54].

107 *Police Tribunal Case* (1986) 5 NSWLR 465 at 476-477; *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58 at 62.

granted. The practice of intermediate courts in Australia varies. But it is not uncommon for that practice to follow the course that was observed by this Court in earlier times when leave considerations were often telescoped into the hearing of substantive appeals. If there was any doubt at all, and if it was considered important, it was the duty of those representing the Chief Commissioner to clear up the doubt. Even after the Court of Appeal pronounced its orders, and before those orders were formalised, it would have been open to the Chief Commissioner to approach the Court of Appeal in open court, to suggest a misapprehension as to the procedures that would be followed, and to request vacation of the orders so that any outstanding matters of substance could be argued[108]. No such application was made. One inference available is that any such application would have been rebuffed summarily given the way the proceedings had been argued, as apparently understood by the Court of Appeal itself and as understood by the Age.

122 *Conclusion: no procedural unfairness*: The Chief Commissioner has not established that the Court of Appeal failed to accord her procedural fairness. That complaint should be rejected.

The applications from the primary orders

123 Having regard to the conclusion that an appeal lay from the orders made by the respective trial judges under the Supreme Court Act, s 18, by leave of the Court of Appeal and not as of right, the disposition of the summonses for leave to appeal brought the orders so made into the Court of Appeal for its determination. Having correctly treated the proceedings as it did, as "applications" (that is, for leave), the disposition by the Court of Appeal of those applications obviates the necessity, or appropriateness, of this Court's granting special leave to appeal directly from the orders of the trial judges.

124 The proceedings having been decided regularly within the hierarchy of the Supreme Court of Victoria, the proper way to bring them before this Court, if at all, was by the procedure of appeal by special leave[109]. That procedure having been invoked, special leave having been granted and the appeal from that order heard and decided, it would be inappropriate for this Court to permit a separate appeal from the orders of the trial judges.

125 The only conceivable argument for permitting such a course would be if it was shown that a serious injustice had occurred, for whatever reason, because of

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108 *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 215-216.

109 *Judiciary Act* 1903 (Cth), s 35(1)(a).

the failure of the Court of Appeal to permit the Chief Commissioner to advance, as on a substantive appeal, all of the arguments that she wished to offer in support of correction of the primary orders and substitution of orders under the Supreme Court Act, s 18, of indefinite duration.

126 It was made clear that the Chief Commissioner attached great importance to her applications and to the suggested need to protect from media coverage and discussion in Australia the techniques and "scenarios" used in securing the convictions of Messrs Tofilau and Favata. That is why I have taken pains to explain the police concerns and to outline the Chief Commissioner's arguments. It is possible that disclosure and discussion of the subject methods in the media (if it occurred) would, as a practical matter, come to much wider notice than would occur through discussion in law reports, academic journals, word of mouth and prison gossip. Necessarily, the determination of the present proceedings could not foreclose either the amendment of the duration of the previous orders (for the protection of the identity of the undercover operatives) or the making of new and different orders in these or other cases, based on new and different evidence and argument. That is the nature of interlocutory orders of such a kind.

127 However, nothing was put to this Court that warranted a conclusion different from that of the Court of Appeal. On the basis of the materials in the record, it was open to the trial judges to refuse orders of indefinite duration designed to prevent publication of the police methods disclosed in open court in the trials of the two accused. Deciding in the way the trial judges did was consonant with the legal principles applicable to the exercise of the powers afforded by the Supreme Court Act, s 18. Assuming that this Court might, in a wholly exceptional case, in order to repair a serious injustice, grant special leave to appeal from the orders of a trial judge in circumstances such as this, the present were not exceptional cases of such a kind. That is why the applications were refused.

Orders

128 The orders of the Court were pronounced at the conclusion of argument on 10 August 2004. The foregoing are my reasons for joining in those orders.