

# HIGH COURT OF AUSTRALIA

FRENCH CJ,  
KIEFEL, BELL, GAGELER, KEANE, NETTLE AND GORDON JJ

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R & ANOR

APPELLANTS

AND

THE INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSIONER

RESPONDENT

*R v Independent Broad-based Anti-corruption Commissioner*

[2016] HCA 8

10 March 2016

M246/2015

## ORDER

1. *Appeal dismissed with costs.*
2. *Order 2 of the orders of French CJ and Keane J made on 13 November 2015 be vacated.*

On appeal from the Supreme Court of Victoria

### Representation

D Grace QC with O P Holdenson QC for the appellants (instructed by Tony Hargreaves & Partners)

R M Niall QC, Solicitor-General for the State of Victoria with E W Woodward SC and J M Davidson for the respondent (instructed by Independent Broad-based Anti-corruption Commission)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



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## CATCHWORDS

### **R v Independent Broad-based Anti-corruption Commissioner**

Statutory interpretation – *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ("IBAC Act") – Investigation by Independent Broad-based Anti-corruption Commission into allegations of assault and human rights violations by officers of Victoria Police – Where appellants were police officers suspected of involvement in alleged assault – Where appellants summoned to give evidence at public examination – Whether power to hold examination under Pt 6 of IBAC Act exercisable in relation to persons who have not been, but may be, charged with offence relating to subject matter of examination.

Statutory interpretation – Common law rights – Whether s 144 of IBAC Act abrogates privilege against self-incrimination.

Words and phrases – "abrogate", "companion principle", "compulsory examination", "police personnel misconduct", "principle of legality", "privilege against self-incrimination".

*Independent Broad-based Anti-corruption Commission Act 2011* (Vic), ss 5, 8, 15, 42, 84(2), 120, 144.



1 FRENCH CJ, KIEFEL, BELL, KEANE, NETTLE AND GORDON JJ. The principal issue in this appeal is whether the power of the Independent Broad-based Anti-corruption Commission ("the IBAC") to hold an examination under Pt 6 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) ("the IBAC Act") is exercisable in relation to persons who have not been, but might subsequently be, charged and put on trial for an offence relating to the subject matter of the examination. Also at issue is whether s 144 of the IBAC Act is effective to abrogate such an examinee's privilege against self-incrimination.

2 The appellants raise no issue as to the competence of the Victorian legislature to enact the provisions in question, or as to whether the exercise of the powers so conferred in the circumstances of this case involves an abuse of power by the IBAC or any other functionary of the executive government of the State. The appeal is confined to questions of statutory construction: the appellants contending that the IBAC Act does not, on its proper construction, authorise an examination, or compel the giving of answers which might tend to incriminate the examinee, where there are reasonable grounds to suspect that the examinee may be guilty of an offence.

3 For the reasons which follow, the appellants' contentions cannot be sustained, and their appeal should be dismissed.

#### Background

4 On 20 March 2015, the IBAC, of its own motion, commenced an investigation into the conduct of certain members of Victoria Police stationed at the Ballarat police station. The investigation, named "Operation Ross", was concerned with whether officers of Victoria Police assaulted a female in a cell at the Ballarat police station on 15 January 2015 as well as with a number of other incidents alleged to have occurred at the Ballarat police station in recent years which might have involved human rights violations in respect of other women.

5 On 1 April 2015, the IBAC, having been satisfied of the matters referred to in s 117(1) of the IBAC Act, issued a witness summons to each of the appellants, requiring them to give evidence in a public examination of their knowledge of matters falling within the scope of Operation Ross. Attached to each witness summons was a document titled "Preliminary Information and Directions for Public Examinations in Operation Ross", which listed the following areas of examination:

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- "1. Allegations of serious police personnel misconduct (within the meaning of the IBAC Act) on account of alleged unnecessary and/or excessive use of force towards certain vulnerable persons at Ballarat Police Station.
2. Whether any human rights have been violated by any such alleged conduct.
3. The sufficiency and appropriateness of internal reporting by Victoria Police members involved in or associated with such alleged conduct.
4. The handling by Victoria Police of complaints made by such persons concerning such alleged conduct."

6 Each appellant was also issued with a confidentiality notice from the IBAC, specifying matters related to the examination which were to be treated as confidential.

7 On 2 April 2015, the appellants were issued with a Notice of Interim Action from Victoria Police, informing them that they had been suspended from duty on the basis that they were reasonably believed to have committed an offence punishable by imprisonment. On 10 April 2015, Victoria Police informed the Secretary of the Police Association on behalf of the appellants that the offence to which the Notice of Interim Action referred was an allegation of assault occurring on 15 January 2015. The Secretary was advised that "[n]o interview will take place until conclusion of the IBAC public hearing".

8 In written submissions, the IBAC Commissioner ("the Commissioner") foreshadowed that he would, if he were permitted to do so, adduce evidence that the Notices of Interim Action were subsequently withdrawn by Victoria Police. As will become apparent, it is not necessary to take this aspect of the matter any further. Whether or not Victoria Police reasonably suspects or has at some earlier time suspected either appellant to have committed an offence is immaterial to the resolution of the question of statutory construction raised by the appellants.

9 On 10 April 2015, written submissions were delivered to the IBAC on behalf of the second appellant, in which it was submitted that the public examinations in Operation Ross should be held in private, or alternatively that the second appellant's examination should be held in private. On 12 April 2015,

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written submissions were delivered to the IBAC on behalf of the first appellant, in which it was submitted that the first appellant could not be compelled to give evidence, or alternatively that the first appellant's examination should be held in private. On 15 April 2015, the Commissioner delivered reasons for his decision rejecting the appellants' submissions<sup>1</sup>.

10 On 16 April 2015, the appellants commenced judicial review proceedings in the Supreme Court of Victoria. The appellants had applied to the Court on 15 April 2015 for an interlocutory injunction restraining the Commissioner from proceeding with the public examinations; but on 17 April 2015, the Commissioner determined to adjourn the public examinations and, as a result, interlocutory orders were not required. Before discussing the reasons for the failure of the appellants' appeal, it is convenient to refer to the provisions of the IBAC Act which bear upon the issues agitated by the appellants.

#### The IBAC Act

11 The objects of the IBAC Act, as set out in s 8, are, among other things, to:

- "(a) provide for the identification, investigation and exposure of –
- ...
- (ii) police personnel misconduct;
- (b) assist in the prevention of –
- ...
- (ii) police personnel misconduct;
- (c) facilitate the education of the public sector and the community about the detrimental effects of ... police personnel misconduct on public administration and the community and the ways in which ... police personnel misconduct can be prevented;

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1 The Commissioner's reasons for dismissing the submissions were revised on 17 April 2015.

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- (d) assist in improving the capacity of the public sector to prevent ... police personnel misconduct;
- (e) provide for the IBAC to assess police personnel conduct."

12 The expression "police personnel misconduct" is defined by s 5 to mean relevantly:

"in relation to a public officer who is a police officer ... conduct which constitutes an offence punishable by imprisonment; or ... conduct which is likely to bring Victoria Police into disrepute or diminish public confidence in it; or ... disgraceful or improper conduct".

13 Sections 12 and 14 establish the IBAC as consisting of one Commissioner appointed in accordance with s 20.

14 Section 15 sets out the functions of the IBAC, including:

"(2) ...

- (b) to identify, expose and investigate police personnel misconduct;

...

(3) ...

- (c) to hold examinations;
- (d) to make referrals to other persons or bodies.

...

(5) ... education and prevention functions for the purpose of achieving the objects of this Act."

15 Section 41 permits the IBAC to provide or disclose information acquired by it to a number of persons or bodies, including State, Territory and Commonwealth prosecutorial bodies such as Directors of Public Prosecutions, and law enforcement agencies such as Victoria Police.

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16 Section 42 authorises the IBAC to issue a confidentiality notice in respect  
of an investigation to a person, if, during the investigation, the IBAC considers  
on reasonable grounds that the disclosure of a restricted matter would be likely to  
prejudice "the fair trial of a person who has been, or may be, charged with an  
offence"<sup>2</sup>.

17 Section 64 relevantly permits the IBAC to conduct an investigation in  
accordance with its police personnel conduct investigative functions, either on a  
complaint made to it, or on its own motion.

18 Section 70(1) enables the IBAC to commence or continue an investigation  
despite the fact that civil or criminal proceedings are on foot which are connected  
to the subject matter of the investigation. Section 70(2) requires that, if the  
IBAC becomes aware of such proceedings, it must take all reasonable steps to  
ensure that the investigation does not prejudice those proceedings.

19 Section 74 provides that the IBAC may refer to a prosecutorial body, such  
as the Director of Public Prosecutions, any matter which it considers is relevant  
to the performance of the prosecutorial duties and functions of that body.

20 Section 84(2) provides that, for the purpose of an investigation into,  
among other things, conduct by a police officer which constitutes an offence  
punishable by imprisonment, the IBAC may direct any police officer to give to it  
any relevant information, produce any relevant document, or answer any relevant  
question.

21 Part 6 of the IBAC Act deals with examinations by the IBAC.  
Section 115 provides that "[f]or the purposes of an investigation, the IBAC may  
hold an examination."

22 Section 116 provides that, in holding an examination, the IBAC is not  
bound by the rules of evidence and may regulate the procedure of the  
examination as it considers appropriate.

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2 IBAC Act, s 42(1)(c).

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23 Section 117 provides that examinations are to be held in private unless the  
IBAC considers that, among other conditions, there are "exceptional  
circumstances"<sup>3</sup>.

24 Section 120 empowers the IBAC to issue a witness summons to a person  
to give evidence.

25 Section 144(1) abrogates the privilege against self-incrimination in respect  
of persons who have been summoned to give evidence:

"A person is not excused from answering a question or giving information  
or from producing a document or other thing in accordance with a witness  
summons, on the ground that the answer to the question, the information,  
or the production of the document or other thing, might tend to  
incriminate the person or make the person liable to a penalty."

26 Section 144(2) provides a limited "use immunity", relevantly in the  
following terms:

"Any answer, information, document or thing that might tend to  
incriminate the person or make the person liable to a penalty is not  
admissible in evidence against the person before any court or person  
acting judicially, except in proceedings for –

- (a) perjury or giving false information; or
- (b) an offence against this Act; or
- ...
- (f) a disciplinary process or action."

27 Part 7 of the IBAC Act contains provisions relating to the IBAC's powers  
with respect to recommendations, actions and reports. Sections 162(5) and  
165(5) prohibit the IBAC from including in its reports any information which  
would prejudice any criminal investigation or proceedings or other legal  
proceedings of which it is aware. Sections 162(6) and 165(6) provide relevantly  
that the IBAC is prohibited from including in its reports a statement that a

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3 IBAC Act, s 117(1)(a).

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specified person is guilty, or has committed, is committing or is about to commit any criminal offence or disciplinary offence, or a recommendation that a specified person be prosecuted for such an offence.

28 While the IBAC is an agency constituted to maintain the integrity and probity of the police service, s 190 provides that the IBAC may bring proceedings "for an offence in relation to any matter arising out of an IBAC investigation". The appellants focused on this provision, arguing that the "use immunity" provided in s 144(2) of the IBAC Act may be illusory, given that the IBAC itself is empowered to bring proceedings against people such as the appellants so that an examiner may become the prosecutor, who would have the benefit of information derived through examination. No doubt this observation was made with an eye to the decision of this Court in *Lee v The Queen*<sup>4</sup>, but that case turned upon the non-observance of statutory provisions directed to preserving the forensic balance between the prosecution and the accused protected by the common law. No such issue arises in this case.

#### The proceedings at first instance

29 The appellants applied to the Supreme Court of Victoria for orders in the nature of certiorari and prohibition for the purpose of preventing the IBAC from examining the appellants. Alternatively, they sought to prevent the IBAC from holding the examinations in public. The alternative claim was unsuccessful both at trial and in the Court of Appeal. It is not in issue before this Court.

30 The appellants' principal argument was that the IBAC Act could not be construed as permitting the compulsory examination of a person reasonably suspected of a crime because that "would effect a fundamental alteration to the process of criminal justice"<sup>5</sup> by requiring that person to assist in his or her own prosecution.

31 The primary judge (Riordan J) rejected this argument. His Honour held that because the appellants had not yet been charged with an offence, the process

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4 (2014) 253 CLR 455; [2014] HCA 20.

5 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 140 [118]; see also at 117-118 [41], 137 [105], 138 [109]; [2013] HCA 29.

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of criminal justice had not commenced and the entitlement of each appellant to decline to assist the prosecution had not been engaged<sup>6</sup>.

32 His Honour also held that the IBAC Act had abrogated each appellant's privilege against self-incrimination even though each appellant might subsequently be charged with an offence. His Honour reasoned that the purpose of abrogating the privilege is to compel an examinee to give evidence in circumstances in which the answer might incriminate him or her, and to interpret s 144 of the IBAC Act as not requiring an examinee to answer where the answer may incriminate the examinee would be to deprive the section of its intended operation<sup>7</sup>.

#### The Court of Appeal

33 The Court of Appeal of the Supreme Court of Victoria (Priest, Beach and Kaye JJA) refused the appellants leave to appeal.

34 Their Honours rejected an argument that Pt 6 of the IBAC Act had no operation in relation to persons who might have been involved in criminal conduct in respect of the matters under investigation. In this regard, their Honours were of the view that "an examination, under Part 6, must ordinarily involve an inquiry into potentially criminal conduct" so that the IBAC Act "intended that the persons, who might be examined, include persons who might have been implicated in that conduct."<sup>8</sup>

35 Their Honours also rejected the appellants' submission that the privilege against self-incrimination was abrogated by s 144 only in respect of persons whose criminality is either wholly unknown or not under investigation<sup>9</sup>.

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6 *R v Independent Broad-based Anti-corruption Commissioner* [2015] VSC 374 at [62]-[63].

7 *R v Independent Broad-based Anti-corruption Commissioner* [2015] VSC 374 at [81].

8 *R v Independent Broad-based Anti-corruption Commissioner* [2015] VSCA 271 at [37].

9 *R v Independent Broad-based Anti-corruption Commissioner* [2015] VSCA 271 at [35].

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### The appellants' submissions

36 The appellants' sole ground of appeal to this Court<sup>10</sup> was that the Court of Appeal erred in failing to hold that Pt 6 of the IBAC Act did not authorise their examination. As noted above, this ground of appeal was advanced solely as a matter of statutory construction. The appellants sought to develop this ground in two ways: first, it was said to justify the quashing of the Commissioner's decision to examine the appellants on the basis that they were not compellable to attend or answer any questions at the examination; and secondly, it was said that the Commissioner should be prohibited from examining them in connection with the subject matter of Operation Ross on the ground that answers dealing with that subject might tend to incriminate them.

37 The appellants argued that the Court of Appeal erred in drawing a distinction between persons who have been charged with a criminal offence, and those who are "of interest" or "suspected" of being involved in the commission of a criminal offence. It was argued that "suspects" or people "of interest" are in the same position, so far as compulsory examination is concerned, as persons already subject to the process of criminal justice. Anticipating the objection that this construction of the IBAC Act would substantially deprive it of any practical operation, the appellants argued that, if the extension for which they argued were to be accepted, the IBAC Act would not be nullified. It was said that the IBAC Act would still have work to do in relation to the examination of persons who are not reasonably believed to have been involved in criminal conduct.

38 The appellants also submitted that the language of s 144 of the IBAC Act does not compel the conclusion that the privilege against self-incrimination has been abrogated in respect of persons not yet charged with a criminal offence. They argued that s 144 of the IBAC Act would not be denied practical utility if this construction were accepted because witnesses to the alleged criminal acts of the appellants, as well as any victim of those acts, would not be able to claim the privilege.

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<sup>10</sup> The appellants appeal to this Court pursuant to special leave granted on 13 November 2015 by French CJ and Keane J.

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### The Commissioner's submissions

39 The Commissioner submitted that the limitation of the IBAC's powers of compulsory examination for which the appellants contend has no foundation in the text of the IBAC Act, is not supported by any recognised principle of statutory construction, and is both uncertain in its scope and incompatible with the purpose for which power is conferred on it to investigate and expose police misconduct. In relation to s 144, it was submitted that the section evinces a clear intention to abrogate the privilege in respect of examinees.

### Compulsory examination

40 The appellants sought to invoke, as the first step in their argument, the principle of statutory construction known as the principle of legality<sup>11</sup>, whereby common law rights are to be regarded as abrogated by statute only by the use of language which manifests a clear intention to do so. The principle of legality means that common law rights will not be taken by a court to have been displaced by legislation save where the intention to do so is "expressed with irresistible clearness"<sup>12</sup>.

41 The appellants argued that this Court's decision in *X7 v Australian Crime Commission*<sup>13</sup> illustrated the operation of the principle of legality in a way which was significant for the outcome of this case. But in *X7* the decision turned on the circumstance that the person to be compulsorily examined under the *Australian Crime Commission Act 2002* (Cth) ("the ACC Act") had been charged with an offence and was, as a result, subject to the accusatorial judicial process. The majority held that the ACC Act did not authorise the compulsory examination of a person charged with an offence about the circumstances of the offence while

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11 See, eg, *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ; [2004] HCA 40; *Momcilovic v The Queen* (2011) 245 CLR 1 at 46-47 [43] per French CJ; [2011] HCA 34.

12 *United States v Fisher* 6 US 358 at 390 (1805); *Potter v Minahan* (1908) 7 CLR 277 at 304; [1908] HCA 63; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 153 [158] per Kiefel J.

13 (2013) 248 CLR 92.

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his trial was pending<sup>14</sup>. In their Honours' view, the accused's defence would inevitably be prejudiced if he were required to answer questions about the subject matter of the charge<sup>15</sup>; and the ACC Act had not, by express words or necessary intendment, effected such an alteration to the process of criminal justice<sup>16</sup>. As Hayne and Bell JJ said<sup>17</sup>:

"To hold that the general words of the relevant provisions of the ACC Act authorise compulsory examination of a person charged with an indictable Commonwealth offence about the subject matter of the offence charged would thus depart in a marked degree from the 'general system of law'."

42 Kiefel J, the other member of the majority, explained that the rule that "an accused person cannot be required to testify to the commission of the offence charged" is a companion to the fundamental principle of the common law that the onus of proof of a criminal charge rests upon the prosecution<sup>18</sup>. The appellants sought to invoke the companion principle in this case, but this was misconceived.

43 The companion principle is, as its name suggests, an adjunct to the rights of an accused person within the system of criminal justice. Its application depends upon the judicial process having been engaged because it is an aspect of that process<sup>19</sup>. Thus, in *X7*, the joint reasons of Hayne and Bell JJ made it clear that the companion principle protects the position of "a person charged with, but not yet tried for" a criminal offence<sup>20</sup>.

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14 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 127 [70]-[71], 152-153 [157].

15 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 127 [71].

16 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 127 [71], 153 [159]-[160].

17 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 132 [87].

18 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 153 [159].

19 *R v Hertfordshire County Council; Ex parte Green Environmental Industries Ltd* [2000] 2 AC 412 at 419.

20 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 127 [70]-[71].

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44 In *Lee v The Queen*<sup>21</sup>, this Court affirmed the fundamental principle of the common law that it is for the prosecution to prove the guilt of an accused person as "an aspect of the accusatorial nature of a criminal trial in our system of criminal justice"<sup>22</sup>. The Court went on to say<sup>23</sup>:

"The companion rule to the fundamental principle is that an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof"<sup>24</sup>.

45 These observations were set in the context of a discussion of the "balance struck between the power of the State to prosecute and the position of an individual who *stands accused*."<sup>25</sup>

46 Most recently, in *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd*<sup>26</sup>, French CJ, Kiefel, Bell, Gageler and Keane JJ referred to this passage from *Lee v The Queen*, and went on to say that the companion principle:

"is an 'aspect of the accusatorial nature of a criminal trial in our system of criminal justice' whereby an accused person cannot be compelled to assist

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21 (2014) 253 CLR 455 at 467 [32].

22 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 119-120 [46], 136 [101]-[102], 142-143 [124], 153 [159]-[160]; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 261 [159]; [2013] HCA 39.

23 (2014) 253 CLR 455 at 467 [33].

24 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 212-213 [20], 248-249 [125], 261 [159], 265-266 [175].

25 (2014) 253 CLR 455 at 466-467 [32] (emphasis added).

26 (2015) 89 ALJR 622 at 629-630 [36]-[37]; 320 ALR 448 at 455; [2015] HCA 21.

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the prosecution to make its case<sup>27</sup>. The companion principle is a 'companion' of criminal *trials*". (emphasis in original)

47 In the same case, Nettle J said<sup>28</sup>:

"The fundamental principle of the criminal justice system that the onus of proof beyond reasonable doubt rests on the Crown, and its companion rule that the accused cannot be required to assist in proof of the offence charged, are now conceived of as expressions of the basic accusatorial nature of the criminal justice system."

48 In the present case, the companion principle is not engaged because the appellants have not been charged; and there is no prosecution pending. The appellants urge the Court to extend the principle. For a number of reasons, that suggestion should not be accepted. First, to reformulate the principle as the appellants urge would be to extend its operation beyond the rationale identified in the authorities, namely, the protection of the forensic balance between prosecution and accused in the judicial process as it has evolved in the common law.

49 Secondly, the appellants' formulation of the terms of the extension for which they argued varied over the course of their submissions: the variety of expression is eloquent of uncertainty as to the basis for, and operation of, the extension. In this regard, the appellants' formulation shifted from "persons reasonably believed to have committed a criminal offence", to "a person the specific subject of an investigation", to "a person reasonably suspected of having committed a criminal offence".

50 A third difficulty, related to the second, is that to urge that the companion principle be extended to terminate the examination of a person reasonably suspected of an offence invites a query as to the person by whom the requisite suspicion is to be held, whether an officer of the IBAC, or an officer of Victoria Police, or some other executive functionary, or a court before which the issue arises. Different functionaries, having access to different bodies of information,

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27 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 528; [1993] HCA 74.

28 *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 89 ALJR 622 at 633 [61]; 320 ALR 448 at 460 (footnote omitted).

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may have different views upon the issue. The practical operation of the principle so extended would be unstable, in that the quality of suspicion could be expected to vary over the stages of consideration of the information relevant to the issue as more information becomes available to whichever functionary is called upon to address the issue.

51 Fourthly, to apply the companion principle in anticipation of the commencement of criminal proceedings would be to fetter the pursuit and exposure of a lack of probity within the police force, which is the object of the IBAC Act. The subject matter of the IBAC's investigations covers a range of conduct, only some of which may constitute a criminal offence. Upon the appellants' construction, the IBAC, while investigating conduct of an examinee, might uncover information that makes a certain person a suspect in relation to a criminal offence, at which point the examination would have to cease, leaving issues which may affect the public interest unexplored.

52 It may also be noted here that the appellants were, at one stage of the hearing, disposed to argue that s 120 of the IBAC Act should be construed as if the reference to "a person" did not include "a person whom the IBAC suspects of having committed an offence". No principle of statutory construction warrants the addition of these words to limit the operation of the statutory text. Further, if accepted, this argument would have the surprising consequence that an examination directed to conduct which might fall short of a criminal offence, but which nevertheless amounts to police personnel misconduct, could not proceed. As was observed by Gleeson CJ in *Theophanous v The Commonwealth*<sup>29</sup> of the need to maintain standards of probity in the conduct of public affairs, "[n]othing could be more central to good government." The appellants' proposed construction would deny the IBAC access to precisely the kind of information about matters of grave public interest that may bear upon the discharge of its functions from the very people who are likely to have that information and who may be the only people who do. This would tend to frustrate the statutory objective of identifying and reporting on police misconduct.

#### Section 144

53 Section 144 operates on the premise that, in its absence, an examinee would be entitled to claim the privilege against self-incrimination. If s 144 did

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<sup>29</sup> (2006) 225 CLR 101 at 115 [10]; [2006] HCA 18.

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not apply in relation to a person reasonably suspected of having committed an offence, it would have no work to do. In this regard, it is to be borne in mind that the privilege against self-incrimination can only be claimed by a person whose answer is apt to incriminate him or her. Thus, in *Sorby v The Commonwealth*<sup>30</sup>, Gibbs CJ referred to *R v Boyes*<sup>31</sup>, where it was said:

"to entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer."

54 There can be no doubt that the provisions of the IBAC Act demonstrate that the legislature adverted to the possibility that the exercise of the powers conferred by the IBAC Act might effect a curtailment of the privilege against self-incrimination. Thus, s 42 expressly serves to prevent prejudice to a person who "may be ... charged with an offence".

55 To say, as the appellants do, that s 144 could have an operation in respect of an examinee whose criminality is entirely unknown or is not the subject of an investigation is to give little weight to the evident purpose of Pt 6 of the IBAC Act, which is to obtain material not presently available to it in order to advance the objective of maintaining public confidence in the police force. In the nature of things, such information may be expected to include information which may be incriminating of the examinee.

56 It is also to be borne in mind here that the appellants are duty-bound to give an account of their conduct in the course of their duties by reason of their membership of a disciplined police force<sup>32</sup>. That duty is reinforced in respect of investigations by the IBAC by s 84(2) of the IBAC Act. Where such a duty exists, it is not difficult to discern an intention to abrogate the privilege against

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30 (1983) 152 CLR 281 at 289; [1983] HCA 10. See also *In re Westinghouse Uranium Contract* [1978] AC 547 at 612, 627, 647.

31 (1861) 1 B & S 311 at 329-330 [121 ER 730 at 738].

32 *Police Service Board v Morris* (1985) 156 CLR 397; [1985] HCA 9, which concerned reg 95A(7) of the Police Regulations 1957 (Vic).

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*Keane* J  
*Nettle* J  
*Gordon* J

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self-incrimination where allegations of police misconduct are to be examined. In *Police Service Board v Morris*<sup>33</sup>, Brennan J said:

"The effectiveness of the police in protecting the community rests heavily upon the community's confidence in the integrity of the members of the police force ... The purpose of police discipline is the maintenance of public confidence in the police force, of the self-esteem of police officers and of efficiency. ... To permit, under a claim of privilege, a subordinate officer to refuse to give an account of his activities whilst on duty when an account is required by his superior officer would subvert the discipline of the police force."

57 These observations have special force where the full circumstances of the misconduct of concern can be expected usually to be such as to be peculiarly within the knowledge of the police officers concerned<sup>34</sup>.

#### Orders

58 The Court of Appeal was right to refuse leave to appeal. The appeal to this Court should be dismissed.

59 The appellants should pay the Commissioner's costs of and incidental to the appeal.

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33 (1985) 156 CLR 397 at 412.

34 See *Mortimer v Brown* (1970) 122 CLR 493 at 496; [1970] HCA 4.

60 GAGELER J. The main purpose of the IBAC Act is expressed to be to establish the IBAC<sup>35</sup>. The first of its expressed objects is to "provide for the identification, investigation and exposure of ... serious corrupt conduct ... and ... police personnel misconduct"<sup>36</sup>. Having established the IBAC<sup>37</sup>, the IBAC Act pursues that object by conferring on the IBAC express functions "to identify, expose and investigate serious corrupt conduct" and "to identify, expose and investigate police personnel misconduct"<sup>38</sup>.

61 For the purposes of the IBAC Act, "corrupt conduct" is defined so as always to be "conduct that would, if the facts were found proved beyond reasonable doubt at a trial, constitute a relevant offence"<sup>39</sup>: either an indictable offence against a statute or a common law offence of bribing a public official or of perverting or attempting to pervert the course of justice<sup>40</sup>. The expression "police personnel misconduct" is defined to include conduct on the part of a police officer which constitutes an offence punishable by imprisonment<sup>41</sup>.

62 The IBAC is empowered to conduct an investigation in accordance with its corrupt conduct investigative functions<sup>42</sup>, only if "it is reasonably satisfied that the conduct is serious corrupt conduct"<sup>43</sup>. It is empowered to conduct an investigation in accordance with its police personnel conduct investigative functions<sup>44</sup> without being subject to any similar limitation.

63 For the purposes of an investigation, the IBAC is empowered to hold an examination<sup>45</sup>. For the purposes of an examination, the IBAC can summon "a

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35 Section 1(1).

36 Section 8(a).

37 Sections 1(1) and 12.

38 Section 15(2).

39 Section 4(1).

40 Section 3(1), "relevant offence".

41 Section 5, "police personnel misconduct".

42 Section 60(1).

43 Section 60(2).

44 Section 64(1).

45 Section 115.

person" to attend before it to give evidence<sup>46</sup>, and an IBAC Officer<sup>47</sup> authorised to do so may examine the person on oath or affirmation in accordance with the summons<sup>48</sup>.

64 After conducting an investigation, the IBAC is permitted to take a range of actions<sup>49</sup>. Those actions include referring the matter under investigation to a prosecutorial body<sup>50</sup> and providing or disclosing to that body information the IBAC has in relation to the matter referred<sup>51</sup>. The actions open to the IBAC also include the IBAC itself bringing proceedings for an offence in relation to any matter arising out of the investigation<sup>52</sup>.

65 Addressing the common law presumption that a statutory power to investigate an offence ends when a prosecution of that offence begins<sup>53</sup>, the IBAC Act expressly provides that the IBAC may commence or continue to investigate a matter despite the fact that criminal proceedings are on foot, or are commenced, in any court that relate to the matter the subject of investigation<sup>54</sup>. Addressing the risk that the conduct of an investigation might prejudice concurrent criminal proceedings, the IBAC Act expressly obliges the IBAC to take all reasonable steps to ensure that does not occur<sup>55</sup>.

66 Addressing the common law privilege against self-incrimination of a person summoned to give evidence to the IBAC, the IBAC Act expressly abrogates the privilege<sup>56</sup>, and goes on to provide for the person to have direct use

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46 Section 120(1)(a).

47 Defined in s 3(1), "IBAC Officer".

48 Section 132(2)(a)-(c).

49 Section 164.

50 Sections 164(1)(a) and 74.

51 Sections 164(1)(a) and 77.

52 Sections 164(2) and 190.

53 *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 at 316-317 [325]; [2013] HCA 39.

54 Section 70(1).

55 Section 70(2).

56 Section 144(1).

immunity: an incriminatory answer is not admissible against the person except in specified proceedings<sup>57</sup>. The specified proceedings do not include proceedings for an offence constituted by conduct which constitutes the subject-matter of the IBAC's investigation. The consequence is that, on the face of the IBAC Act, a person examined before the IBAC in the course of an investigation is not immune from answering a question relevant to the offence constituted by conduct which constitutes the subject-matter of the investigation. The person's answer to the question can be used by the IBAC for the purpose of the investigation, but the answer cannot be admitted against him or her in any prosecution for that offence.

67 Addressing more generally the risk that the disclosure of evidence given to the IBAC during an investigation might prejudice the fairness of the trial of a person in an existing or future prosecution, the IBAC Act expressly empowers the IBAC to issue a confidentiality notice restricting disclosure of that evidence<sup>58</sup>. A precondition for the issuing of such a confidentiality notice is that the IBAC "considers on reasonable grounds that the disclosure ... would be likely to prejudice ... the fair trial of a person who has been, or may be, charged with an offence"<sup>59</sup>.

68 The argument of the appellants is that there is yet another principle or presumption of the common law which stands in the way of the IBAC examining a person about the offence constituted by conduct which constitutes the subject-matter of an investigation, and which the IBAC Act fails to address. It is the recently formulated "companion rule" to the common law principle that the prosecution bears the onus of proving criminal guilt: that the prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof<sup>60</sup>. The companion rule would be reduced to an empty formality, the appellants argue, were it to operate only after the prosecution of an offence had commenced. That is because evidence compulsorily obtained from an accused person is capable of being used to assist in the prosecution of that person in precisely the same way whether that evidence is obtained before or after the prosecution has commenced. For it to have meaningful content, the companion rule must therefore operate during the investigation of an offence in the same way that it operates during the prosecution of that offence.

69 The appellants' essential point might be thought to be illustrated by the facts of the case in which the companion rule was adopted. There the evidence

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57 Section 144(2).

58 Section 42.

59 Section 42(1)(c).

60 *Lee v The Queen* (2014) 253 CLR 455 at 467 [33]; [2014] HCA 20.

which was found to have come into the hands of the prosecution in "breach of the principle of the common law"<sup>61</sup> had been obtained in compulsory examinations conducted before the persons examined had been prosecuted<sup>62</sup>.

70 Because it fails in its terms to address the companion rule, the appellants argue, the IBAC Act has to be read as having no operation to permit the IBAC to summon or examine a person whose own potentially criminal conduct is under investigation. The argument, if good, must apply in the same way to an investigation into corrupt conduct as it does to an investigation into police personnel misconduct constituted by conduct which constitutes an offence punishable by imprisonment.

71 How the companion rule, operating as a common law principle of interpretation in Victoria, might relate to the human right recognised under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) of a person charged with a criminal offence "not to be compelled to testify against himself or herself or to confess guilt"<sup>63</sup> was not explored in argument and is best left to another day. Questions of legislative compliance with a human right are, of course, concerned with the substantive operation of the applicable legislation as distinct from being focused merely on the form or manner of expression of that legislation. And a human right is not absolute; it is subject to such reasonable limits imposed by law as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom<sup>64</sup>.

72 Nor was any attention given in argument to how the detailed statement of compatibility, laid before the Houses of the Victorian Parliament in respect of the Bill for the IBAC Act as required by the *Charter of Human Rights and Responsibilities Act*<sup>65</sup>, might bear on the construction of the IBAC Act in light of the common law principle. The statement of compatibility appears to have drawn on concepts familiar within European human rights jurisprudence in recognising that the IBAC Act would have imposed an unjustified limit on the exercise of the human right of a person charged with a criminal offence not to be compelled to testify against himself or herself or to confess guilt were the IBAC Act to have permitted the tendering in evidence in a subsequent prosecution of answers obtained under compulsion before the commencement of the

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61 *Lee v The Queen* (2014) 253 CLR 455 at 471 [46].

62 *Lee v The Queen* (2014) 253 CLR 455 at 459 [2], [6].

63 Section 25(2)(k) of the *Charter of Human Rights and Responsibilities Act*.

64 Section 7(2) of the *Charter of Human Rights and Responsibilities Act*.

65 Section 28 of the *Charter of Human Rights and Responsibilities Act*.

prosecution<sup>66</sup>. The statement of compatibility explained the balance struck in the IBAC Act to be compatible with that human right in part by reference to the express abrogation of the privilege against self-incrimination having the purpose "to assist the IBAC in its function as a truth-seeking body that is able to undertake full and proper investigations", and in part by reference to the inclusion of the provision conferring direct use immunity operating to prevent self-incriminating answers obtained in an examination from becoming evidence in a prosecution for the offence under investigation<sup>67</sup>. The statement of compatibility went on to note that, subject to the limitation on the tendering of evidence imposed by that direct use immunity, "[i]f it were the case that self-incriminating information obtained from a person was disclosed in accordance with the [IBAC Act], for example to the Chief Commissioner of Police, it would be a matter for the police to determine what use is made of that information"<sup>68</sup>.

73 The answer to the appellants' argument based on the companion rule, in my opinion, is that given by the Victorian Court of Appeal<sup>69</sup>. That answer is that, whatever the temporal operation of the companion rule might be, the IBAC Act manifests an unmistakable legislative intention that a person summoned and examined might be a person whose corrupt conduct or criminal police personnel misconduct is the subject-matter of the investigation.

74 The exclusion of a person whose corrupt conduct or criminal police personnel misconduct is the subject-matter of an investigation from the reference to "a person" who might be summoned and examined in the course of an examination conducted for the purpose of that investigation is not only unjustified by the unqualified statutory language. Such exclusion would undermine the principal statutory purpose of the IBAC Act by compromising the attainment of the express object of providing for the identification, investigation and exposure of serious corrupt conduct and police personnel misconduct. It is in the nature of an investigatory function that the investigator will seek to ascertain the truth about the subject-matter of the investigation and for that

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66 *Eg Beghal v Director of Public Prosecutions* [2016] AC 88 at 120 [68] explaining *Saunders v United Kingdom* (1996) 23 EHRR 313.

67 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 19 April 2012 at 1783; Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 3 May 2012 at 2466.

68 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 19 April 2012 at 1783; Victoria, Legislative Council, *Parliamentary Debates* (Hansard), 3 May 2012 at 2466.

69 *R v Independent Broad-based Anti-corruption Commissioner* [2015] VSCA 271 at [26]-[40].

purpose will follow leads presented by evidence as it unfolds. It is in the nature of serious corrupt conduct and police personnel misconduct that the involvement of individuals in the conduct which forms the subject-matter of the investigation will often be hidden unless and until exposed. The appellants' construction would confine the IBAC to the essentially prosecutorial function of assembling evidence from other persons who were or might have been witnesses to the criminal conduct of identified individuals. Although not accommodated anywhere within the highly prescriptive scheme of the IBAC Act, the appellants' construction would then presumably require the IBAC to stop taking evidence from those witnesses at any time that it might begin to emerge that they too might have been involved in the conduct under investigation.

75 The exclusion of a person whose corrupt conduct or criminal police personnel misconduct is the subject-matter of the investigation would, moreover, reduce to nonsense the IBAC Act's solemn abrogation of the privilege against self-incrimination and with it the consequent conferral of direct use immunity. The purpose of the abrogation of the privilege against self-incrimination, to adopt the explanation in the statement of compatibility, is to assist the IBAC as a truth-seeking body to undertake a full and proper investigation. Were a person whose potentially criminal conduct is the subject of investigation excluded from being summoned or examined for the purpose of the investigation, the privilege against self-incrimination that is abrogated would have no scope for application to answers given about the very conduct that is under investigation. The abrogation of the privilege against self-incrimination would instead be reduced in its application to such self-incrimination as might occur peripherally to the course of an examination. The answers required to be given would be those which expose potentially criminal conduct at the fringe of the subject-matter of the investigation. A rational legislative basis for abrogating the privilege and conferring direct use immunity only in respect of evidence peripheral to the purpose of the examination would be difficult to discern.

76 Legislation is sometimes harsh. It is rarely incoherent. It should not be reduced to incoherence by judicial construction. An interpretative technique which involves examining a complex and prescriptive legislative scheme designed to comply with identified substantive human rights norms in order to determine whether, and if so to what extent, that legislative scheme might butt up against a free-standing common law principle is inherently problematic. The technique is even more problematic if the common law principle lacks precise definition yet demands legislative perspicacity and acuity if it is not to create of its own force an exception to the scheme that is spelt out in the statutory language.

77 Be that as it may, any common law principle or presumption of interpretation must surely have reached the limit of its operation where its

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application to read down legislation plain on its face would frustrate an object of that legislation<sup>70</sup> or render means by which the legislation sets out to achieve that object inoperative or nonsensical<sup>71</sup>. The appellants' invocation of the companion rule to read down the IBAC Act would do both.

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For these reasons, I join in the orders proposed in the joint reasons for judgment dismissing the appeal with costs.

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**70** Eg *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 563 [43]; [2002] HCA 49.

**71** Eg *Coco v The Queen* (1994) 179 CLR 427 at 438, 446; [1994] HCA 15.