AB v CD & EF - [2017] VSCA 338

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2017 0082

AB (a pseudonym)	Applicant
v	
CD (a pseudonym)	First Respondent
EF (a pseudonym)	Second Respondent

S APCI 2017 0083

EF (a pseudonym)	Applicant
v	

CD (a pseudonym)	Respondent

S APCI 2017 0087

EF (a pseudonym)	Applicant
v	
CD (a pseudonym)	First Respondent
AB (a pseudonym)	Second Respondent

JUDGES:	FERGUSON CJ, OSBORN and McLEISH JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	4, 5, 6, 7 September 2017
DATE OF JUDGMENT:	21 November 2017
MEDIUM NEUTRAL CITATION:	[2017] VSCA 338
JUDGMENT APPEALED FROM:	[2017] VSC 350 ; [2017] VSC 351 (Ginnane J)

JUDICIAL REVIEW – Public interest immunity – Whether proposed disclosures by Director of Public Prosecutions subject to public interest immunity – Disclosure of identity of police informant to convicted persons – Risk of substantial miscarriage of justice – Whether disclosures capable of providing substantial assistance in challenging convictions – Risk to informant safety – Assurances

of confidentiality by police – Whether distinct public interest in duty of care arising from assurances – Assurances inform public interest in protecting informant safety – Whether error balancing public interests –- No error –*Jarvie v Magistrates Court of Victoria at Brunswick* [1995] 1 VR 84, *Sankey v Whitlam* (1978) CLR 1, *Baini v The Queen* (2012) CLR 469 considered.

COURTS AND JUDGES – Reasons – Whether factual findings open on the evidence – Whether error in finding as to level of risk to informant – Whether error in finding police could take steps to protect informant – No error.

EQUITY – Confidence – Disclosure of identity of police informant – Whether obligation of confidence where disclosure might provide assistance to convicted person in challenging convictions – Iniquity defence – Whether information reveals likelihood of serious misdeed of public importance – Appeal dismissed.

HUMAN RIGHTS – Right to fair hearing – Whether Court required to ensure fair hearing where no notice to affected persons -– Whether any limitation ofCharter rights demonstrably justified – No failure to comply with fair hearing right -–*Charter of Human Rights and Responsibilities Act 2006* ss 6(2)(b), 7(2), 24(1) and 25(2)(b) .

APPEARANCES:	Counsel	Solicitors
For AB	Mr P J Hanks QC with Mr E M Nekvapil and Ms F L Batten	Victorian Government Solicitors Office
For EF	Mr P W Collinson QC with Ms C M Harris	Minter Ellison
For CD	Dr S B McNicol QC with Mr C T Carr and Mr M Hosking	Office of Public Prosecutions

Counsel acting as Amicus Curiae	Mr W B Zichy-Woinarski QC with Ms J Davidson	Russell Kennedy
Counsel intervening on behalf of Commissioner	Ms K M Evans	Victorian Equal Opportunity and Human Rights Commissioner
Counsel intervening on behalf of the Commonwealth Director	Ms R Orr QC with Mr M Wilson	Ms A Pavleka, Commonwealth Solicitor for Public Prosecutions

Introduction

1. EF[1] became a police informer in 2005 and remained an informer until about January 2009. At the time that she was recruited as a police informer, members of Victoria Police assured EF that her identity and role as a police informer would remain confidential. Whilst a police informer EF acted as a barrister for Mr Antonios ('Tony') Mokbel and a number of his associates.

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[1] This judgment has been anonymised by the adoption of a pseudonym in place of the name of the Second Respondent/Cross-applicant.

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2. During the period EF acted as a police informer, Mr Tony Mokbel was convicted of a number of offences as were a number of his associates. Many of the associates pleaded guilty. All but one of them (Mr Zlate Cvetanovski) have served their sentences in prison. Mr Tony Mokbel also remains in prison. He has exhausted his appeal rights.

3. Following the convictions of Mr Tony Mokbel and his associates, a confidential report was prepared by the Hon Murray Kellam QC as the delegate of the Commissioner of the Independent Broad-based Anti-corruption Commission ('the Kellam Report') concerning the handling by Victoria Police of EF. A copy of the Kellam Report was provided to the Victorian Director of Public Prosecutions ('the Director'). The Kellam Report recommended in Recommendation 12 that the Director consider whether any prosecutions had resulted in a miscarriage of justice by reason of evidence having been obtained through breach of legal professional privilege or release by EF of confidential materials. The Director formed the view that his duty of disclosure as a prosecutor required him to inform Mr Tony Mokbel and six of his associates ('the Convicted Individuals') about two matters contained in the Kellam Report: first, that EF had given information to police about the particular Convicted Individual at the same time as she was acting for him (in possible breach of legal professional privilege and/or in breach of her duty of confidentiality); and secondly, that EF had provided information to police about other persons for whom she acted who had then made statements

against particular Convicted Individuals (again in possible breach of legal professional privilege and/or in breach of EF's duty of confidentiality).

4. [*Redacted]. She has lost faith in Victoria Police. Her loss of faith followed the publication of information in the press which she believes identified her as a police informer and which she believes can only have come from within Victoria Police.

5. Having been advised by the Director of the terms in which he proposed to make disclosures to the Convicted Individuals, both the Chief Commissioner of Police ('the Chief Commissioner') and EF sought declarations that the information the Director proposed to disclose is protected by public interest immunity ('the PII proceeding'). They rely, in particular, on the effect that such disclosures would have on the risk of death to EF and her children. EF also brought a separate proceeding against the Director based on alleged breach of confidence ('the breach of confidence proceeding'). In that proceeding, EF sought declaratory relief and a permanent injunction restraining the Director from disclosing the information to the Convicted Individuals.

6. The trial judge dismissed both proceedings. [2] EF and the Chief Commissioner seek leave to appeal from the trial judge's decisions.

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[2] *AB & EF v CD* [2017] VSC 350R ('PII Reasons'); *EF v CD* [2017] VSC 351R ('BOC Reasons').

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7. For the reasons which follow, we would grant EF and the Chief Commissioner leave to appeal in the PII proceeding but we would dismiss the appeals.

8. We would grant EF leave to appeal in the breach of confidence proceeding but we would dismiss that appeal also.

9. In the PII proceeding, the trial judge carefully weighed up the risk to EF's life and to the lives of her children against the public interest in disclosing the information to persons who may have been wrongfully convicted. He came to the view that disclosure of the information was not protected by public interest immunity. We are of the same view.

10. Before proceeding further, we note that both before the trial judge and before this Court, EF's position was that disclosure of the information to one of the Convicted Individuals would result in disclosure to all of them. Consequently, the case was run on the basis that if the information would provide substantial assistance to one of the Convicted Individuals such that it outweighed the risk to EF and her children's lives, then that was all that needed to be established to defeat the claim for public interest immunity.

11. We also note that to ameliorate the effect of the Convicted Individuals not being parties to the proceedings, amici curiae were appointed. The amici curiae appeared before the trial judge and also on the appeal. The Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') also intervened in the PII proceeding [3] and was represented both at first instance and on appeal.

[3] Pursuant to s 40(1) of the *Charter of Human Rights and Responsibilities Act 2006* .

12. Before the appeal commenced, the Commonwealth Director of Public Prosecutions ('the Commonwealth Director') sought leave to intervene. The Commonwealth Director had been provided with a copy of the trial judge's PII Reasons after his judgment was delivered and formed the view that she was obliged to disclose portions of those reasons and the Kellam Report to Mr Tony Mokbel (who was convicted of a Commonwealth offence prosecuted by the Commonwealth Director in 2006). The Commonwealth Director's application for leave to intervene was heard at the commencement of the appeal. We reserved the question of whether leave should be granted and said that we would deal with it in these Reasons. We permitted the Commonwealth Director to address us on the substantive matters she wished to ventilate in the appeal should leave to intervene be granted.

13. In our view, leave to intervene should be granted. The Commonwealth Director is directly affected by this Court's decision. [4] At present, she is in effect constrained in the performance of her duty of disclosure. This is because, were she to disclose the same information to Mr Tony Mokbel as that proposed to be disclosed by the Director, she would undoubtedly be met by applications by the Chief Commissioner and EF that mirror the applications that they made in the PII proceeding against the Director. [5] The Commonwealth Director has a vital interest in the issue of public interest immunity being determined. The 2006 Commonwealth prosecution of Mr Tony Mokbel forms part of the factual matrix in which the issue of public interest immunity is to be determined. As it transpired, the Commonwealth Director was able to assist us to reach our determination with submissions that were not fully presented by any other party or the amici curiae. [6]

[4] *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37, 38–9 [2]–[6] .

[5] Ibid 38–9 [2] .

[6] Ibid 39 [3] .

The trial judge's reasons

14. It will be necessary to refer to and discuss the trial judge's reasons in some detail when we are considering the proposed grounds of appeal. Consequently, in this section of our reasons, we will only provide a brief overview of the trial judge's reasoning.

15. As a preliminary matter the trial judge addressed submissions of VEOHRC going to the question whether the provisions of the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter ') bore on the appropriateness of the court dealing with the public interest immunity issue in the absence of the Convicted Individuals. His Honour concluded that no less restrictive means than appointing amici curiae were reasonably available to protect the

rights of the Convicted Individuals to a fair hearing whilst simultaneously protecting the interests of EF. [7]

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[7] PII Reasons [80].

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16. The trial judge also rejected a contention of the amici curiae that in the absence of the Convicted Individuals the Court lacked jurisdiction to determine whether the proposed disclosures attract public interest immunity or should decline to entertain the claim as a matter of discretion. [8] He held that the Chief Commissioner had acted appropriately in seeking a ruling on the issue. [9]

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[8] Ibid [96] .

[9] Ibid .

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17. So far as the facts are concerned, the trial judge found that EF was willing to become an informer and that Victoria Police was willing to register her as one. [10] He concluded that EF had a mix of motivations for becoming an informer including ill health, feeling trapped in the criminal world of her clients and frustrated with the way criminals used the system, and wanting to be rid of Mr Tony Mokbel and his associates. [11] The trial judge found that Victoria Police assured EF that her identity as a police informer would be kept confidential. [12]

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[10] Ibid [16] .

[11] Ibid [20] .

[12] Ibid [28] .

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18. The trial judge held that the question of whether public interest immunity was attracted and prevented the proposed disclosures by the Director was to be determined by a process of balancing relevant public interests. [13] Essentially, two principal public interests were involved: first, the likely harm to EF and her children together with a possible resulting effect on the flow of information from informers generally; and secondly, the likely assistance that the proposed disclosures would provide to the Convicted Individuals in seeking to challenge their convictions. [14]

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[13] Ibid [138] .

[14] Ibid [244] .

19. In relation to the first public interest, the trial judge found that there is likely to be an attempt on EF's life if the disclosures are made and that the disclosures would increase the risk of that occurring. [15] In the trial judge's opinion, official confirmation of EF's role as an informer 'is a significant development in adding risk.' [16] The trial judge noted that the threats to EF may affect her children and added: 'Victoria Police must take reasonable care for them. Significant steps must be taken to protect her and her children.' [17]

[15] Ibid [209] .

[16] Ibid .

[17] Ibid [210] .

20. At trial, there was medical evidence which was relevant to EF's refusal to enter into the witness protection program. [18] [*Redacted].

[18] Ibid [199]–[208] .

21. In the trial judge's view, the risk of harm occurring to EF from the proposed disclosures might be considered less if the substance of what is to be disclosed is already widely known in relevant circles. [19] The same factor bore on the question whether the proposed disclosures would provide materially new information to the Convicted Individuals. The trial judge reviewed the many press articles that referred to 'Lawyer X' and her role as an informer who provided information to Victoria Police about serious criminals involved in 'Melbourne's gangland war.' He concluded that there had been considerable speculation about whether EF is 'Lawyer X' and distinguished that from the effect that official confirmation of the speculation would bring. [20] In the trial judge's opinion, 'the disclosures will operate as significant confirmatory information that adds to existing information.' [21] In this context, he considered that the steps taken by Mr Tony Mokbel and Mr Cvetanovski seeking access to documents by way of administrative requests 'demonstrate that they do not have, or do not believe they have, sufficient information to seek to commence an appeal.' [22]

[19] Ibid [212] .

[20] Ibid [237] .

[21] Ibid [238] .

[22] Ibid .

22. The trial judge accepted that if EF is publicly named, and particularly if she is harmed, informers or potential informers are less likely to provide information to the police to assist them. [23]

[23] Ibid [243] .

23. In relation to the second public interest identified by the trial judge, he found that the Convicted Individuals may have a number of grounds on which to contend that their convictions involved a substantial miscarriage of justice. He included in the possible grounds the contention that because of the conduct of Victoria Police and EF, the Convicted Individuals did not receive a fair trial because they did not have a member of counsel providing independent advice to them. [24] The trial judge carefully considered the position of each of the Convicted Individuals and came to the conclusion that some of the proposed disclosures might provide substantial assistance to them in challenging their convictions. [25]

[24] Ibid [160] .

[25] Ibid [300]–[306], [322]–[324], [338]–[340], [360]–[362], [376], [393]–[394], [407]–[408] .

24. The trial judge finally concluded that the Charter rights of the persons which may be affected by the outcome of the PII proceeding, and in particular the right to life and the right to a fair hearing, overlapped with the public interests that must be balanced. [26]

[26] Ibid [415] .

25. After balancing the public interests that he had identified, the trial judge concluded that the Director could not be denied the right to make the disclosures. [27] He added:

> The Court however understands, as the Chief Commissioner's counsel indicated would occur, that Victoria Police will endeavour to provide protection to EF and her children once the disclosures that I consider should be permitted occur. [28]

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[27] Ibid .

[28] Ibid [421] .

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26. In the separate breach of confidence proceeding brought by EF, the trial judge held that no obligation of confidence protected the disclosures because the disclosures might provide substantial assistance to the Convicted Individuals to challenge a conviction. [29] Nor would the disclosures be a misuse of the information in those circumstances. [30] Having reached those conclusions (which disposed of the breach of confidence proceeding) the trial judge dealt briefly with other issues that had been raised but which it was not strictly necessary for him to decide. First, the trial judge held that the information that the Director proposes to disclose was not presently in the public domain such as to lose its confidential nature. [31] However, the trial judge formed the view that the proposed disclosures reveal the real likelihood of a serious misdeed of public importance — the disclosures 'would reveal "reasonable grounds to believe" EF and officers of Victoria Police are "implicated in" a serious misdeed of public importance'. [32] The trial judge held that the Director would be entitled to make the disclosures because 'there is no confidence as to the disclosure of an iniquity.' [33] Finally , the trial judge rejected the Director's alternative defence that the public interest meant that the disclosures should be made. After considering the state of relevant authority, the trial judge held that such a defence to a breach of confidence action is not available in Australia. [34]

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[29] BOC Reasons [13].

[30] Ibid .

[31] Ibid [25] .

[32] Ibid [32] .

[33] Ibid [27], [32]–[33] .

[34] Ibid [37] .

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27. The trial judge dismissed both proceedings.

Overview of the proposed grounds of appeal — PII proceeding

28. Both EF and the Chief Commissioner seek leave to appeal in the PII proceeding.

29. EF accepts that the trial judge was correct to resolve the controversy in the PII proceeding by balancing two public interests both of which were of undeniable importance, being:

    (a) the likely harm to EF and her children together with a possible resulting effect on the flow of information from informers generally; and

    (b) the likely assistance that the proposed disclosures would provide to the Convicted Individuals in seeking to challenge their convictions.

30. The Chief Commissioner accepts that the trial judge was correct to identify these matters as relevant but submits that they do not fully encapsulate the critical issues of the public interest.[35]

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[35] Chief Commissioner's proposed ground 2.

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31. Taken together the applicants challenge the outcome of the balancing exercise undertaken by the trial judge on three levels. First, it is submitted that his Honour made specific errors in respect of findings of material facts. Secondly, it is submitted that his Honour failed to have regard to relevant considerations when weighing up the public interest in disclosure. Thirdly, it is submitted that the trial judge erred in his conclusion with respect to the balancing exercise.

(i) Specific errors of fact

32. The asserted errors of fact relate to two aspects of the evidence. First, it is submitted that his Honour erred in his conclusions as to the level of risk of death to EF and her children if disclosures were to take place.[36]

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[36] EF's proposed grounds 1 and 2; Chief Commissioner's proposed ground 1.

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33. Next, it is submitted by EF that the trial judge erred in finding that there was good reason to think that non-disclosure might result in substantial prejudice to the Convicted Individuals in respect of their rights to appeal their convictions.[37] The trial judge ought to have found that by reason of the information concerning conduct of EF already available in the public domain, the proposed disclosures would not provide substantial assistance to the Convicted Individuals in seeking to quash their convictions.[38]

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[37] EF's proposed ground 5.

[38] EF's proposed ground 6.

(ii) Failure to have regard to relevant considerations

34. Insofar as the applicants' case is put on the basis that the trial judge failed to have regard to relevant considerations, the proposed grounds of appeal again go to two aspects of the case. First, it is submitted that the trial judge failed to have regard to the consequences of assurances given to EF by Victoria Police that she would be protected if she informed. The Chief Commissioner submits that this gave rise to a duty of care constituting a distinct element of the public interest.[39] EF submits that the assurances and consequent duty of care bore on the weight to be accorded to the public interest in the avoidance of harm to EF and her children.[40]

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[39] Chief Commissioner's proposed ground 2.

[40] EF's proposed grounds 7 and 8.

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35. Secondly, EF submits that the trial judge failed to have regard to evidence bearing on the question whether disclosure would or might provide substantial assistance to the Convicted Individuals.

(iii) Error in balancing exercise

36. The submission that the trial judge erred in his conclusion with respect to the balancing exercise is put in two ways.[41]

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[41] EF's proposed grounds 3 and 4; Chief Commissioner's proposed ground 3.

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37. First, EF submits that his Honour's reasons demonstrate that he did not in fact balance the relevant considerations.

38. Secondly, both the Chief Commissioner and EF submit that the trial judge should have held that, on the facts of this case (as found by the trial judge), the risk of death or harm to EF and EF's children arising from the proposed disclosures outweighs the public interest in the provision of any assistance the Convicted Individuals might gain from the proposed disclosures in challenging their convictions.

39. Both the Chief Commissioner and EF further submit that, if this Court concludes that the trial judge made specific errors either with respect to findings of material fact or by way of a failure to consider relevant factors, then this Court should undertake the balancing exercise for itself and conclude that public interest immunity should be upheld.

Overview of the proposed grounds of appeal — breach of confidence proceeding

40. In the breach of confidence proceeding, EF makes two complaints. First, EF contends that the trial judge erred in finding that because of his public duty, the Director could not acquire information subject to an obligation of confidence.[42] Secondly, EF contends that the trial judge should have found that the information in the Director's proposed letters did not disclose the real likelihood of the existence of an iniquity.[43]

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[42] EF's breach of confidence proposed ground 1.

[43] EF's breach of confidence proposed grounds 2 and 3.

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41. The Director filed a notice of contention in the breach of confidence appeal challenging the trial judge's finding that EF's role as a police informer had the necessary quality of confidentiality to protect it from disclosure.[44]

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[44] Director's breach of confidence contention ground 1.

Legal principles — Public Interest Immunity

42. Before turning in greater detail to the proposed grounds of appeal relating to public interest immunity, it is appropriate to say something about the legal framework within which they fall to be understood. The law recognises that the disclosure of information by the State may be prevented in circumstances where that disclosure is contrary to the public interest. Conversely, there may be circumstances where a competing public interest, and in particular the public interest in the administration of justice, requires disclosure of the information despite the public interest which favours the State's immunity from having to make disclosure.

43. The underlying principle was stated by Gibbs ACJ in *Sankey v Whitlam* , in the context of a claim to public interest immunity with respect to the protection of documents in civil litigation:

> The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However the public interest has two aspects which may conflict. These were described by Lord Reid in *Conway v Rimmer* as follows:

> There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies. In other cases, however, as Lord Reid said in *Conway v Rimmer* , 'the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it'. In such cases once the court has decided that 'to order production of the document in evidence would put the interest of the state in jeopardy', it must decline to order production. [45]

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[45] (1978) 142 CLR 1, 38–9 (citations omitted).

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44. In *State of Victoria v Seal Rocks Victoria (Australia) Pty Ltd*, Ormiston JA (with whom Phillips and Buchanan JJA agreed) expressed the principle this way:

> In my opinion, therefore, public interest immunity in a document or other communication is a right by way of an immunity or a privilege which enures in the body politic and indeed in the nation (or relevant polity) as a whole, and not merely in the executive, being designed to protect the operation of the instruments of government at the highest level and for the benefit of the public in general, subject only to a court's reaching a conclusion to the contrary on sound grounds that no other public interest, especially in the administration of justice, should prevail in the particular circumstances. [46]

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[46] (2001) 3 VR 1, 6–7 [17] .

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45. There is a public interest in protecting the identity of police informers. Protection may be necessary to avoid probable harm to the individual if the fact of informing becomes known

and, more fundamentally, protection of the identity of informers is necessary to maintain confidence in the ability of police to protect informers and to facilitate the ongoing use of informers.

46. In *Royal Women's Hospital v Medical Practitioners Board*, Charles JA recorded:

> Public interest immunity is similarly invoked when objection is made by the Director of Public Prosecutions or police officers to the production of documents or the giving of evidence which will reveal the identity of a police informer. The identity of an informer has been protected against disclosure in order to prevent damage to the administration of criminal justice since Eyre CJ laid down the rule in *R v Hardy* [47] in 1794. The rule was reaffirmed in 1846 in *Attorney-General v Briant*. [48] In *D v National Society for the Prevention of Cruelty to Children* ,[49] Lord Diplock said that by the time of *Marks v Beyfus* [50] this had 'hardened into a rule of law.' [51]

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[47] (1794) 24 State Tr 199, 816.

[48] (1846) 15 M & W 169, 184–5 (Pollock, CB).

[49] [1978] AC 171, 218.

[50] (1890) 25 QBD 494, 498, 500.

[51] (2006) 15 VR 22, 46 [102] (citations in original).

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47. The general rule with respect to the immunity of police informers from identification was subject to a specific qualification. An accused will not receive a fair trial if he or she is denied access to information in circumstances where there is good reason to think that the disclosure of such information may be of substantial assistance in answering the prosecution case. In *Ma rks v Beyfus* , Lord Esher MR said:

> … if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail. [52]

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[52] (1890) 25 QBD 494, 498.

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48. Bowen LJ expressed the exception to the general rule as arising when a judge apprehended the strict enforcement of the rule would be likely to cause a miscarriage of justice. [53]

[53] Ibid 500.

49. In *R v Governor of Brixton Prison; Ex parte Osman (No 1)* , Mann LJ said:

> In those cases, which establish a privilege in regard to information leading to the detection of crime, there are observations to the effect that the privilege cannot prevail if the evidence is necessary for the prevent of a miscarriage of justice. No balance is called for. If admission is necessary to prevent miscarriage of justice, balance does not arise. [54]

[54] (1991) 1 WLR 281, 290.

50. Lord Diplock summarised the common law principles in *D v National Society for the Prevention of Cruelty to Children* :

> The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal. By the uniform practice of the judges which by the time of *Marks v Beyfus* had already hardened into a rule of law, the balance has fallen upon the side of non-disclosure *except where upon the trial of a defendant for a criminal offence disclosure of the identity of the informer could help to show that the defendant was innocent of the offence. In that case, and in that case only, the balance falls upon the side of disclosure*. [55]

[55] [1978] AC 171, 218 (emphasis added) (citation omitted).

51. In the same case Lord Simon expressed the public interest considerations underlying the law with respect to police informers as follows:

> Then the law proceeds to recognise that the public interest in the administration of justice is one facet only of a larger public interest — namely, the maintenance of the Queen's peace. Another facet is effective policing. But the police can function effectively only if they receive a flow of intelligence about planned crime or its perpetrators. Such intelligence will not be forthcoming unless informants are assured that their identity will not be divulged. [56] The law therefore recognises here another class of relevant evidence which may — indeed, must — be withheld from forensic investigation — namely, sources of police information. [57] Here, however, the law adds a rider. *The public interest that no innocent man should be convicted of crime is so powerful that it outweighs the general public interest that sources of police information should not be divulged, so that, exceptionally, such evidence must be forthcoming when required to establish innocence in a criminal trial*. [58] It would appear that the balance of public interest has been struck, both in the general rule and in its rider, in such a way as to conduce to the general advantage of society, with the public interest in the administration of justice as potent but not exclusive. [59]

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[56] See Lord Reid in *Conway v Rimmer* [1968] AC 910, 953G–954A .

[57] *Rex v Hardy* (1794) 24 State Tr 199, 808; *Hennessy v Wright* 21 QBD 509, 519 ; *Marks v Beyfus* (1890) 25 QBD 494.

[58] See the citations in *Reg v Lewes Justices, Ex parte Secretary of State for the Home Department* [1973] AC 388, 408A .

[59] *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 232–3 (emphasis added) (citations in original).

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52. In *Cain v Glass (No 2)*, McHugh JA cautioned against reading the terms of these formulations of principle too narrowly. [60]

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[60] (1985) 3 NSWLR 230, 250–1 .

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53. **Following paragraph cited by:**

Zirilli v The Queen (15 January 2021) (McLeish, Emerton and Weinberg JJA)

99. In *Jarvie v Magistrates' Court of Victoria at Brunswick* ,[22] Brooking J set out the test governing the disclosure of the identity of a police informer as follows:

> In dealing with the identity of informers judges have often used words which might be thought to suggest that identity may be disclosed only where it is shown that disclosure will enable the innocence of the accused to be demonstrated. So Lord Esher MR spoke of disclosures being 'necessary or right in order to shew the prisoner's innocence': *Marks v Beyfus*. [23] By way of further examples see what was said by Gibbs ACJ in *Sankey v Whitlam* [24] ('necessary to support the defence of an accused person') and the authorities to which his Honour there referred, including *R v Lewes Justices; Ex parte Home Secretary* [25] ('required to establish innocence'). But, while the court will no doubt allow the identity of an informer to be disclosed only after the most anxious consideration, the expressions I have cited, and other similar words, were in my view not intended to convey that disclosure is warranted only where it is clear that the result must be to demonstrate that the accused is not guilty. So in *Cerr ah v The Queen*,[26] Vincent J, speaking in effect for the court, said:
>
> > It is, in my view, clear that before what appears to be a legitimate claim against the disclosure of the name of a police informer is rejected, the accused must demonstrate that the evidence is at the very least capable of being, if not likely to be, of some real assistance to him in answering the case made out against him. A speculative possibility of the kind for which the present applicant contends would certainly not suffice.
>
> I doubt whether this test is significantly different to that mentioned by Wilson and Dawson JJ and Brennan J in *Alister v The Queen* [27] (a likelihood of the obtaining of material substantially useful to the accused). The test laid down by Vincent J is capable of being applied not only on a trial but also in committal proceedings. I would respectfully suggest that the words 'is at the very least capable of being, if not likely to be, of some real assistance to him' should be understood as requiring it to be demonstrated that there is good reason to think that disclosure of the informer's identity may be of substantial assistance to the defendant in answering the case against him. I should add that I respectfully doubt whether McHugh JA (as he then was) in *Cain v Glass (No 2)* [28] intended to lay down any substantially different test to that which I have attempted to formulate. [29]

via

[29] *Jarvie* [1995] 1 VR 84, 89–90 (citations in original), quoted in *AB (a pseudonym) v CD (a pseudonym) & EF (a pseudonym); EF (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) & AB (a pseudonym)* [2017] VSCA 338, [53] ('*AB v CD & EF*).

In *Jarvie v Magistrates' Court of Victoria at Brunswick* ('*Jarvie*'), Brooking J articulated the test governing the disclosure of the name of a police informer as follows:

> In dealing with the identity of informers judges have often used words which might be thought to suggest that identity may be disclosed only where it is shown that disclosure will enable the innocence of the accused to be demonstrated. So Lord Esher MR spoke of disclosures being 'necessary or right in order to shew the prisoner's innocence': *Marks v Beyfus* . [61] By way of further examples see what was said by Gibbs ACJ in *Sankey v Whitlam* [62] ('necessary to support the defence of an accused person') and the authorities to which his Honour there referred, including *R v Lewes Justices; Ex parte Home Secretary* [63] ('required to establish innocence'). But, while the court will no doubt allow the identity of an informer to be disclosed only after the most anxious consideration, the expressions I have cited, and other similar words, were in my view not intended to convey that disclosure is warranted only where it is clear that the result must be to demonstrate that the accused is not guilty. So in *Cerrah v The Queen*,[64] Vincent J, speaking in effect for the court, said:
>
> > It is, in my view, clear that before what appears to be a legitimate claim against the disclosure of the name of a police informer is rejected, the accused must demonstrate that the evidence is at the very least capable of being, if not likely to be, of some real assistance to him in answering the case made out against him. A speculative possibility of the kind for which the present applicant contends would certainly not suffice.
>
> I doubt whether this test is significantly different to that mentioned by Wilson and Dawson JJ and Brennan J in *Alister v The Queen* [65] (a likelihood of the obtaining of material substantially useful to the accused). The test laid down by Vincent J is capable of being applied not only on a trial but also in committal proceedings. I would respectfully suggest that the words 'is at the very least capable of being, if not likely to be, of some real assistance to him' should be understood as requiring it to be demonstrated that there is good reason to think that disclosure of the informer's identity may be of substantial assistance to the defendant in answering the case against him. I should add that I respectfully doubt whether McHugh JA (as he then was) in *Cain v Glass (No 2)* [66] intended to lay down any substantially different test to that which I have attempted to formulate. [67]

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[61] (1890) 25 QBD 494, 498.

[62] (1978) 142 CLR 1, 42.

[63] [1973] AC 388, 407–8 (Lord Simon of Glaisdale); Lord Simon's observation was also cited by Stephen J in *Sankey v Whitlam* at 62.

[64] Unreported, Full Court, Young CJ, Vincent and Crockett JJ**,** 6 October 1988.

[65] (1984) 154 CLR 404, 438, 456.

[66] (1985) 3 NSWLR 230 .

[67] *Jarvie* [1995] 1 VR 84, 89–90 (citations in original).

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54. This formulation has been applied by the New South Wales Court of Criminal Appeal in *R v Meissner* ,[68] and by the South Australian Court of Criminal Appeal in *R v Mason*. [69] It was followed by this Court in *R v Roberts*. [70] It reflects the underlying burden of proof which lies upon the prosecution in criminal proceedings.

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[68] (1994) 76 A Crim R 81, 87–8 .

[69] (2000) 77 SASR 105, 115–6 [44]–[45] (Bleby J). See also, *Eastman v The Queen* (1997) 76 FCR 9; *Haydon v Magistrates' Court (SA)* (2001) 87 SASR 448; *R v Bandulla* [2 001] VSCA 202; *Gee v Magistrates' Court (SA)* (2004) 89 SASR 534; *Derbas v The Queen* (2012) 221 A Crim R 13. Cf *R v Lodhi* (2006) 65 NSWLR 573.

[70] (2004) 9 VR 295 .

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55. **Following paragraph cited by:**

Zirilli v The Queen (15 January 2021) (McLeish, Emerton and Weinberg JJA)

100. Justice Brooking went on to say: [30]

> The fact that there is good reason to think that disclosure of the informer's identity may be of some slight assistance to the defence is not sufficient to outweigh the public interest in non-disclosure. The balancing process accepts that justice, even criminal justice, is not perfect, or even as perfect as human rules can make it. But once it is demonstrated that there is good reason to think that non-disclosure may result in substantial prejudice to the accused, the balance has been shown to incline in his favour and disclosure should be directed.
>
> It may be suggested that the notion of a balancing of relevant factors pointing in one direction against relevant factors pointing in the other is

not consistent with the proposition that identity must be disclosed if there is good reason to think that disclosure may be of substantial assistance to the defendant, and that the question must always be the general one whether the public interest will be better served by disclosure or non-disclosure. On this approach it might be said that the degree of possible prejudice from nondisclosure to which a given defendant may be required to submit may depend on the strength of the considerations favouring nondisclosure. But it seems to me that the overriding need for a fair trial must mean that in no circumstances can the identity of a witness be withheld from a defendant if there is good reason to think that disclosure may be of substantial assistance to the defendant in combating the case for the prosecution. To say that in such a case no balance is called for is to say that, whatever the strength of the case in favour of nondisclosure, it cannot prevail. But a balancing has still been carried out, and effect has been given to an overriding principle that the 'right' to a fair trial must not be substantially impaired. [31]

via

[30] Ibid 90 (citation in original), quoted in *AB v CD & EF* [2017] VSCA 338, [55] .

Brooking J went on to explain this approach by reference to the concept of competing public interests: [71]

The fact that there is good reason to think that disclosure of the informer's identity may be of some slight assistance to the defence is not sufficient to outweigh the public interest in non-disclosure. The balancing process accepts that justice, even criminal justice, is not perfect, or even as perfect as human rules can make it. But once it is demonstrated that there is good reason to think that non-disclosure may result in substantial prejudice to the accused, the balance has been shown to incline in his favour and disclosure should be directed.

It may be suggested that the notion of a balancing of relevant factors pointing in one direction against relevant factors pointing in the other is not consistent with the proposition that identity must be disclosed if there is good reason to think that disclosure may be of substantial assistance to the defendant, and that the question must always be the general one whether the public interest will be better served by disclosure or non-disclosure. On this approach it might be said that the degree of possible prejudice from non-disclosure to which a given defendant may be required to submit may depend on the strength of the considerations favouring non-disclosure. But it seems to me that the overriding need for a fair trial must mean that in no circumstances can the identity of a witness be withheld from a defendant if there is good reason to think that disclosure may be of substantial assistance to the defendant in combating the case for the prosecution. To say that in

such a case no balance is called for is to say that, whatever the strength of the case in favour of non-disclosure, it cannot prevail. But a balancing has still been carried out, and effect has been given to an overriding principle that the 'right' to a fair trial must not be substantially impaired. [72]

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[71] *Jarvie* [1995] 1 VR 84, 90 (citation in original).

[72] *Alister v The Queen* (1984) 154 CLR 404, 456 (Brennan J); *R v Governor of Brixton Prison; Ex parte Osman* [1991] 1 WLR 281, 288 (Mann LJ); *R v Keane* [1994] 1 WLR 746, 751–2 .

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56. In *R v Keane* , Lord Taylor CJ, delivering the judgment of the Court, referred to the passages from the judgments of Lord Esher in *Marks v Beyfus* [73] and Mann LJ in *R v Governor of Brixton Prison; Ex parte Osman (No 1)* ,[74] which we have set out above, and said:

> We prefer to say that the outcome in the instances given by Lord Esher MR and Mann LJ results from performing the balancing exercise, not from dispensing with it. If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it. [75]

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[73] (1890) 25 QBD 494 .

[74] *R v Governor of Brixton Prison; Ex parte Osman (No 1)* (1991) 1 WLR 281, 290.

[75] *R v Keane* (1994) 2 All ER 478, 484.

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57. We would respectfully take the same conceptual approach although we recognise that a different view may be open. [76] This is not to say, however, that the statements of principle contained in the case law relating to the exception to the rule governing informers' immunity are not of considerable assistance in resolving the balancing exercise which the trial judge was required to undertake.

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[76] See the discussion of McHugh JA in *Cain v Glass (No 2)* (1985) 3 NSWLR 230, 247–8 ; and see *Derbas v The Queen* (2012) 221 A Crim R 13, 20 [27] .

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58. The trial judge was bound to undertake a balancing exercise and apply the approach taken in *Jarvie* [77] and followed in *R v Roberts*. [78]

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[77] [1995] 1 VR 84, 89–90 . See [53] above.

[78] (2004) 9 VR 295, 337 [103] .

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59. **Following paragraph cited by:**

Uniform Evidence Manual (12 June 2024)

> Against that, courts have recognised that public interest immunity should not be upheld, and disclosure is required, where there is good reason to think that disclosure may be of substantial assistance to the accused (Madafferi v The Queen [2021] VSCA 1, [32] ; Jarvie v Magistrates' Court of Victoria [1995] 1 VR 84; AB v CD & EF [2017] VSCA 338, [59]).

Madafferi v The Queen (15 January 2021) (Emerton, Weinberg and Osborn JJA)

> 37. Brooking JA's remarks were taken up by this Court in *AB v CD & EF*, [14] which reformulated the test in the context of criminal appeals as follows:
>
> [T]he test formulated by Brooking J in *Jarvie* may be reformulated as requiring it to be demonstrated that there is good reason to think that disclosure of the informer's identity may be of substantial assistance to the Convicted Individuals in seeking leave to appeal and appealing their convictions. [15]

via

[15] Ibid [59] (Ferguson CJ, Osborn and McLeish JJA) (citations omitted) .

Madafferi v The Queen (15 January 2021) (Emerton, Weinberg and Osborn JJA)

> 41. The Chief Commissioner asked the Court to follow the approach taken by McHugh JA in *Cain v Glass (No 2)* ,[16] in which his Honour held that, having regard to the 'exalted' or 'paramount' position of the rule protecting the anonymity of informers (referred to as the 'informer rule'), there is no need to weigh competing public interests when a claim is made that the name of a police informer should be disclosed. [17] We decline to follow his Honour's decision in that case. Section 130(1) of the *Evidence Act* by its express terms requires the Court to carry out a balancing exercise. Moreover in *AB v CD & EF* (which was not

governed by s 130(1)) , this Court confirmed that the common law authorities did not remove the requirement to carry out the balancing exercise. [18] The High Court upheld this Court's ultimate decision and had no hesitation in affirming that the identity of the informer should be revealed. [19]

via

[18] [2017] VSCA 338 , [59] (Ferguson CJ, Osborn and McLeish JJA) .

In *Cain v Glass (No 2)* , the New South Wales Court of Appeal held that the non-disclosure principle with respect to police informers applies at all stages of criminal proceedings. [79] In the present case, each of the Convicted Individuals has been convicted. In these circumstances, the test formulated by Brooking J in *Jarvie* [80] may be reformulated as requiring it to be demonstrated that there is good reason to think that disclosure of the informer's identity may be of substantial assistance to the Convicted Individuals in seeking leave to appeal and appealing their convictions. [81]

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[79] (1985) 3 NSWLR 230, 250–1 .

[80] [1995] 1 VR 84, 89–90 . See [53] above.

[81] In the case of Mr Tony Mokbel, whose appeal rights are exhausted, the test must be whether disclosure may be of substantial assistance to him in seeking a reference under s 327 of the *Criminal Procedure Act 2009* .

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60. Under s 276(1)(b) and (c) of the *Criminal Procedure Act 2009* , the Court of Appeal must in deciding an appeal set aside a conviction if a substantial miscarriage of justice has occurred.

61. The notion of a miscarriage of justice is a broad one. In *Baini v The Queen* , French CJ, Hayne, Crennan, Kiefel and Bell JJ said:

> No single universally applicable description can be given for what is a 'substantial miscarriage of justice' for the purposes of s 276(1)(b) and (c). [82] The possible kinds of miscarriage of justice with which s 276(1) deals are too numerous and too different to permit prescription of a singular test. The kinds of miscarriage include, but are not limited to, three kinds of case. First, there is the case to which s 276(1)(a) is directed: where the jury have arrived at a result that cannot be supported. Secondly, there is the case where there has been an error or an irregularity in, or in relation to, the trial and the Court of Appeal cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial. Thirdly, there is the case where there has been a serious departure from the prescribed processes for trial. [83] Thi s is not an exhaustive list. Whether there has been a 'substantial miscarriage of justice' ultimately requires a judgment to be made. [84]

[82] Cf *Weiss v The Queen* (2005) 224 CLR 300, 317 [44] in relation to the proviso to the common form criminal appeal provision.

[83] See, eg, *AK v Western Australia* (2008) 232 CLR 438, 456 [55]–[56] ; *Handlen v The Queen* (2011) 245 CLR 282.

[84] *Baini v The Queen* (2012) 246 CLR 469, 479 [26] (citations in original).

62. It follows that the Court's satisfaction that a guilty verdict was inevitable will not necessarily be conclusive of the question whether there has been a substantial miscarriage of justice although it is a matter to be taken into account. Their Honours went on to say:

> This understanding of s 276 accommodates fundamental tenets of the criminal justice system in Australia. It recognises that the prescribed mode of trial was trial by jury. It does so by encompassing, within the expression 'substantial miscarriage of justice', not only an error which possibly affected the result of the trial but also some departures from trial processes (sufficiently described for present purposes as 'serious' departures), whether or not the impact of the departure in issue can be determined. [85]

[85] Ibid 479 [33] .

63. The bases on which the identity of an informer may be relevant to an application for leave to appeal are as broad as the notion of miscarriage of justice. The second and third categories of miscarriage of justice identified in *Baini v The Queen* are informed by the fundamental policy considerations which the courts have identified as underlying the concept of abuse of process in criminal proceedings. In *Moti v The Queen* , French CJ, Gummow, Hayne, Crennan and Kiefel JJ said:

> … as pointed out in the joint reasons of four members of this Court in *Willia ms v Spautz*, two fundamental policy considerations affect abuse of process in criminal proceedings. First, 'the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike'. Secondly, 'unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice'. Public confidence in this context refers to the trust reposed constitutionally in the courts to protect the integrity and fairness of their processes. The concept of abuse of process extends to a use of the courts'

processes in a way that is inconsistent with those fundamental requirements. [86]

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[86] (2011) 245 CLR 456, 478 [57] (citations omitted).

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64. The overriding need for a fair trial which Brooking J referred to arises not only because of the need to ensure that the courts provide such a trial to each individual brought before them but also because the confidence of the public in the third arm of government depends on the courts protecting the integrity of their processes.

65. **Following paragraph cited by:**

Madafferi v The Queen (15 January 2021) (Emerton, Weinberg and Osborn JJA)

> 22. In open submissions in support of the PII application , the Chief Commissioner also outlined the basis for the PII application to be heard in closed court and in the absence of Madafferi and his legal representatives. Relying on *AB v CD & EF* , [3] he submitted that, in an exceptional case, it may be necessary for a court to resolve a question of public interest immunity without notice to a party such as the convicted person, because notice of an application would itself destroy the immunity.

via

[3] *AB (a pseudonym) v CD (a pseudonym) & EF (a pseudonym); EF (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) & AB (a pseudonym)* [2017] VSCA 338, [65] (Ferguson CJ, Osborn and McLeish JJA) (‘*AB v CD & EF*’).

There are five further matters which deserve attention. First, in the circumstances which have arisen, no application was able to be made to the Court prior to conviction in accordance with the principles stated in *R v Ward* [87] and *R v Davis*. [88] Those cases recognise, however, that it may in an exceptional case be necessary for a court to resolve a question of public interest immunity without notice to a party such as the Convicted Individuals, because notice of the proceeding would itself destroy the immunity.

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[87] [1993] 1 WLR 619, 680–1 (‘*Ward*’).

[88] [1993] 1 WLR 613, 616–17 (‘*Davis*’).

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66. Secondly, the fact that the public interest immunity issues raised by this case were not ventilated before the Convicted Individuals were convicted has had a significant practical consequence. It is well established that in an appropriate case the requirement of a fair trial may mean that a claim for public interest immunity leads to the necessity for a prosecution to be withdrawn or for a trial being stayed. In the present case, because the matters giving rise to the claim for public interest immunity were not disclosed to the Director or to the Court before the relevant convictions, that possibility has been lost. As will be apparent from our discussion of the ongoing risk to EF and her children in the circumstances which have now arisen, the failure of the Chief Commissioner to disclose the relevant matters to the Director has given rise to a very difficult and unfortunate situation.

67. Thirdly, the principles relating to the introduction at trial of oral and documentary evidence which is the subject of a claim for public interest immunity are now codified by ss 130 and 131 of the *Evidence Act 2008* .

68. Section 130 is not applicable in the present context because we are not concerned with the question whether information or a document should be admitted into evidence.[89] The question is not whether the Director's proposed disclosure letters or the information to which they refer, should at this stage be admitted into evidence in a court proceeding or in any application in proceedings.

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[89] *Derbas v The Queen* (2012) 221 A Crim R 13, 15 [8] .

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69. In cases to which it applies however, ss 130(1) and (5) resolve the question whether an overall balancing test should be applied to police informers. [90]

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[90] Section 130 of the *Evidence Act 2008* relevantly states:

> **130 Exclusion of evidence of matters of state**
>
> (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.
>
> …
>
> (5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters—
>
> (a) the importance of the information or the document in the proceeding;
>
> (b) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the information or document is an accused or the prosecutor;
>
> (c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;

(d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication;

(e) whether the substance of the information or document has already been published;

(f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is an accused—whether the direction is to be made subject to the condition that the prosecution be stayed.

…

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70. Fourthly, we note that the cases make clear that the question of the public interest once raised is for the court to determine. It is not strictly a question inter partes. It follows that whilst, as the amici curiae submit, it is generally true that the onus of establishing that relief should be granted falls upon the party or parties seeking declarations from a court, we would accept the Chief Commissioner's submission that the issue in the present case is not one on which the Chief Commissioner or EF strictly speaking bear a legal onus of proof. We have already noted the statement of Gibbs ACJ in *Sankey v Whitlam* [91] that it is in all cases the duty of the court to decide whether information will be produced or may be withheld in the public interest. In *Sankey v Whitlam* , Stephen J stated the underlying principle as follows:

> In cases of defence secrets, matters of diplomacy or affairs of government at the highest level, it will often appear readily enough that the balance of public interest is against disclosure. It is in these areas that, even in the absence of any claim to Crown privilege (perhaps because the Crown is not a party and may be unaware of what is afoot), a court, readily recognizing the proffered evidence for what it is, can, as many authorities establish, of its own motion enjoin its disclosure in court. Just as a claim is not essential, neither is it ever conclusive, although, in the areas which I have instanced, the court's acceptance of the claim may often be no more than a matter of form. *It is not conclusive because the function of the court, once it becomes aware of the existence of material to which Crown privilege may apply, is always to determine what shall be done in the light of how best the public interest may be served, how least it will be injured*. [92]

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[91] (1978) 142 CLR 1 .

[92] Ibid 58–9 (emphasis added).

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71. In *R v Ward* ,[93] the Court of Appeal observed that if, in a wholly exceptional case, the prosecution is not prepared to have the issue of public interest immunity determined by a court, the result must inevitably be that the prosecution will have to be abandoned.

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[93] [1993] 1 WLR 619, 681.

72. Fifthly, although the judgment as to the balance of the public interest involves a value judgment based on assessments of fact and degree, it is not a discretionary judgment. Moreover, the members of the appellate court when conducting an appeal by way of rehearing are able to carry out the balancing exercise for themselves. [94]

[94] *State of Victoria v Brazel* (2008) 19 VR 553, 565–7 [36]–[43].

Alleged error of fact — degree of risk to EF

73. The Chief Commissioner's proposed ground 1 of appeal is:

> 1 The trial judge:
>
> 1.1 erred by finding that
>
> (a) 'there is likely to be an attempt on EF's life if the disclosure letters are sent and that [the Director]'s proposed disclosures will increase the risk of that occurring': Reasons at [209]; and
>
> (b) the [the Chief Commissioner] is able to take significant steps to protect EF and EF's children from the risk of death or harm: implicit in Reasons at [210];
>
> 1.2 should have found on the evidence that:
>
> (a) the proposed disclosure would result in an almost certain risk of death to EF; and
>
> (b) there are no significant steps that [the Chief Commissioner] can take to protect EF and EF's children from the risk of death or harm, without EF's cooperation and agreement — which EF refuses, and will continue to refuse, to give.[95]

[95] Proceeding S APCI 2017 0082 — Chief Commissioner's amended application for leave to appeal dated 19 July 2017.

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74. EF's proposed grounds 1 and 2 of appeal also go to the question of risk:

> 1. The primary judge:
>
> 1.1 having found that:
>
> (a) 'there is likely to be an attempt on EF's life if the disclosure letters are sent and that [the Director]'s proposed disclosures will increase the risk of that occurring': Reasons at [209];
>
> (b) 'Although the assessments related to EF' s safety, the threats to EF may affect [EF]'s children. A threat has been made to [EF]'s oldest child': Reasons at [210];
>
> (c) if the proposed disclosures occurred EF would not, for justifiable reasons, enter the Witness Protection Program: Reasons at [185]–[195], [199]–[208], [211];
>
> (d) 'Victoria Police considered that providing protection to [EF] outside the Program would be "unsustainable"': Reasons at [186];
>
> 1.2 erred by finding or alternatively assuming that [the Chief Commissioner] was able to take steps which would protect EF and EF's children once the disclosures occurred: Reasons at [210] and [421].
>
> 2. The primary judge ought to have found that, in the light of EF' s rejection of the Witness Protection Program, there were no steps which could be taken by [the Chief Commissioner] to protect EF and EF's children from the increased risk of death or harm once the disclosures occurred.[96]

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[96] Proceeding S APCI 2017 0087 — EF's application for leave to appeal dated 21 July 2017.

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75. The trial judge made the following intermediate findings of fact concerning risk to EF:

> I accept the police evidence that there is likely to be an attempt on EF's life if the disclosure letters are sent and that the Director's proposed disclosures will increase the risk of that occurring. The evidence came from officers with considerable experience of witness protection and witness risk assessment and I saw no reason to doubt it. There is clear, uncontradicted evidence that official confirmation of her role as a police informer is a significant development in adding risk. The disclosure to any one of the individuals would result in an 'uncontrollable and irreversible release of information'. It is unnecessary to determine whether there was a breach of the rule in *Browne v Dunn* ,[97] even if there was that does not mean that the unchallenged evidence has to be accepted. But, in this instance, I do accept the evidence.
>
> Although the assessments related to EF's safety. The threats to EF may affect her children. A threat has been made to her oldest child. I have taken into account that risk in reaching my conclusion. The *Charter* rights of the child were referred to. The risk to the children makes it clear why, despite my conclusions, Victoria Police must take reasonable care for them. Significant steps must be taken to protect her and her children.
>
> [*Redacted].

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[97] (1893) 6 R 67 .

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76. Some preliminary observations can be made with respect to these findings.

(c) They form the basis of the trial judge's ultimate conclusion summarily stated under the heading 'The balancing process' that:

> EF and her children face the risk of death as a result of the proposed disclosures. [98]

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[98] Ibid [416] .

(d) The intermediate findings as to risk follow an extended analysis of the evidence relating to risk of harm to EF. [99] The evidence included the 'Report of the [Director] in relation to Recommendation 12 of the Kellam Report' in which the Director stated that he had no doubt that official

confirmatory statements and evidence of the kind that existed in the Kellam Report and his own review could lend powerful weight to a decision to take prejudicial action against EF. [100] It further included a risk assessment by Inspector Brooke Hall [101] which was undertaken in two stages: first in April 2016 and then on 29 July 2016 after publicity relating to Mr Rob Karam (an individual convicted of Commonwealth offences for whom EF acted) appeared in the Herald Sun on 26 July 2016. [102]

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[99] Ibid [174]–[196], [199]–[208] .

[100] Ibid [176] .

[101] Ibid [177]–[182] .

[102] Ibid [181] .

(e) Inspector Hall's evidence was that the level of risk to EF was already 'extreme' but that it would be significantly elevated if the proposed disclosures were made.

(f) Inspector Hall's assessment was agreed with by Assistant Commissioner Fontana, [103] who also gave evidence about the significance of information concerning EF coming into the public domain [104] and EF's attitude to the witness protection program.

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[103] Ibid [182] .

[104] Ibid [216] .

> Assistant Commissioner Fontana said that after the publication of the Herald Sun article on 26 July 2016, senior police had numerous contacts with EF about her safety. [*Redacted]. Mr Fontana said that EF's continued actions were detrimental to her safety and believed that she continued regular contact with criminal figures. [105]

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[105] Ibid [228] .

(g) Inspector Hall's assessment was adopted by Detective Superintendent Brigham who also gave evidence concerning difficulties with potential security measures to protect EF. After a case specific consideration of the implications of disclosure to Mr George Peters (one of the Convicted Individuals), Detective Superintendent Brigham expressed the opinion that it was 'almost certain that an attempt would be made on EF's life should her role as a human source be confirmed to Mr Peters'. [106]

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[106] Ibid [183].

(h) [*Redacted]. She described the strategy of plausible denial which she had adopted to minimise the risk of harm both to herself and her family.

(i) The trial judge explicitly accepted the police evidence that the Director's proposed disclosures would increase the likelihood of an attempt on EF's life and would be a significant development in adding risk.

(j) The police assessment of risk was consistent both with the Director's own assessment and EF's evidence that official confirmation of her status as an informer would deprive her of the strategy of plausible denial which she had employed up to that point in time to minimise risk.

77. The trial judge explained that the adoption of a strategy of plausible denial by EF arose in the following circumstances:

> In 2009, Paul Dale, who was a former member of Victoria Police and Rodney Collins were charged with the murder of the Hodsons. In those proceedings, EF was referred to as 'witness F'. She had made covert recordings of conversations with Dale. Victoria Police were extremely concerned about risks to her safety and security if she was called as a prosecution witness. She made a statement and the prosecution intended to call her as a witness about her relationship with Dale and her knowledge of his activities. [*Redacted].
>
> The committal commenced on 10 March 2010 and an application for a suppression order in respect of EF's identity was refused. Then, in April 2010, media outlets published articles that identified 'Witness F' by her name as a witness in the criminal proceeding against Dale and Collins. The articles stated that EF, using her real name, made a statement to Victoria Police, covertly recorded a conversation with Dale, and was to be called as a witness in the committal hearing of the murder charge against him. The committal ultimately did not proceed following the murder of Carl Williams, who was to be a prosecution witness.

> In order to protect EF, Victoria Police and EF have maintained publicly that her sole assistance to police was in the prosecution of Dale concerning the Hodsons' murders. They did so on the assumption that the criminal fraternity would not be concerned about EF assisting police to pursue a former police officer and they appeared to forgive her. When questioned by various criminals following the publication of media articles, she has used bluff and plausible denial as cover. [107]

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[107] Ibid [217]–[219] (citation omitted).

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78. The strategy of plausible denial is reflected in the press articles upon which EF relies in another context as evidence of existing public knowledge of her role. We instance the report contained in *The Australian* newspaper of 2 April 2014:

> Gangland killer Carl Williams suspected a prominent defence lawyer of providing information to police and warned drugs associate Tony Mokbel against using the lawyer in future cases.
>
> The Australian has learned of a confrontation between Williams and the lawyer in which Williams accused the lawyer of lying to him about whether other gangland clients were providing statements to police about his criminal activities.
>
> Yet despite suspecting the lawyer of supplying information to Victoria's Purana taskforce investigating a series of unsolved gangland murders, Williams remained in contact with the lawyer.
>
> Mokbel and his family members ignored Williams's concerns and continued to deal with the lawyer.
>
> It is alleged the lawyer was first registered as a police informant as early as 1996 and helped police until 2010. *The lawyer, who is still registered to practice in Victoria, has denied being a police informant and any wrongdoing.*[108]

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[108] Chip Le Grand, 'Mokbel "told of lawyer informer"', *The Australian*, 2 April 2014, 8 (emphasis added).

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79. It is in this context that the Chief Commissioner submits that the trial judge should have found that the proposed disclosures will result in an almost certain risk of EF's death.

80. In turn, the Chief Commissioner and EF both submit that the trial judge erred in finding (or assuming) that there are significant steps that the Chief Commissioner can take to ameliorate the risk of death to EF and her children.

81. We are not persuaded that the trial judge erred in his findings as to the likelihood of harm to EF and her children for the following reasons:

(k) The trial judge expressly accepted the police evidence as to risk.

(l) The evidence of Detective Superintendent Brigham that it was almost certain that an attempt would be made on EF's life should her role be disclosed to Mr Peters was entirely consistent with the overall conclusion which his Honour drew that official confirmation that EF was a police informer would be a significant development in adding risk to the life of EF and her children.

(m) Whilst Detective Superintendent Brigham expressed the risk of an attempt on EF's life in terms of 'almost certainty', the effect of the police evidence as a whole was accurately summarised by his Honour as being that there is likely to be an attempt on EF's life if the disclosure letters are sent.

(n) The extreme risk postulated by the police evidence was premised on the proposition that EF would not enter witness protection. It was a cumulative prediction of likelihood premised upon a series of assumptions.

(o) Contrary to the submission of the Chief Commissioner, EF herself submits that the trial judge's findings that 'there is likely to be an attempt on EF's life if the disclosure letters are sent and that [the Director]'s proposed disclosures will increase the risk of that occurring' and that 'EF and her children face the risk of death as a result of the proposed disclosures' were the only available findings. [109]

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[109] EF's annotated written case dated 31 August 2017 [17].

(p) There is in strictness a distinction between an almost certain risk of an attempt upon EF's life and almost certain risk of EF's death. The case did not however fall to be decided by analysis of the linguistic differences in the way the witnesses described the risk. Rather, it was for the trial judge to respond to the substantive risk identified by the evidence as a whole. This he did.

(q) It was, in our view, not only open to his Honour but correct to regard the probable increase in risk which would result from the disclosure

of EF's role to the Convicted Individuals as the critical conclusion to be derived from the evidence.

(r) It was the fact that the evidence established that if disclosure occurred it was probable that there would be a significant elevation in what was already an extreme risk, which bore directly upon the ultimate issue which it fell to his Honour to decide.

82. The Chief Commissioner and EF take specific issue with the trial judge's observation at [210] of his PII Reasons that significant steps must be taken to protect EF and her children.

83. To similar effect, as we have noted, the trial judge stated at the conclusion of his judgment:

> The Court however understands, as the Chief Commissioner's counsel indicated would occur, that Victoria Police will endeavour to provide protection to EF and her children once the disclosures that I consider should be permitted occur. [110]

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[110] PII Reasons [421].

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84. The latter statement appears to be founded upon the following passage in the Chief Commissioner's final written submission to the trial judge:

> Of course, Victoria Police will do what it can, but there are very significant, perhaps insuperable, difficulties presented by the unique challenge of protecting EF from the numerous sources of risk identified in the evidence — in circumstances (detailed in AC Fontana's affidavits) where EF has refused to enter witness protection.

85. The Chief Commissioner submits that the trial judge erred in finding (or assuming) that there are significant steps that the Chief Commissioner can take to ameliorate the risk of death to EF and her children. [111]

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[111] Chief Commissioner's written case dated 19 July 2017 [17].

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86. EF submits that the only available finding was that there were no effective steps which could be taken by the Chief Commissioner to protect EF against the likely attempts on her life, or to protect her children from the risks to their safety if the disclosure letters were sent.

87. We accept that the evidence did not satisfactorily demonstrate particular practical steps that could be taken to protect EF and her children on a sustainable basis if she continues to refuse to enter witness protection.

88. Inspector Hall's risk assessment of April 2016, which was made on the assumption that EF did not enter witness protection, dealt with the treatments available to minimise the risk to EF by way of the following summary:

> Historic treatments used by [EF] to practice face to face denial of assisting police and remaining in contact with underworld figures in order to allay suspicion will no longer be viable.
>
> The most effective treatment is for the OPP not to write to these … criminals. [112]
>
> Notify [EF] well in advance that the letters are to be sent.
>
> There are no treatments if letter is sent given [EF] refuses to participate in witness protection.

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[112] That is, the Convicted Individuals together with one other.

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89. [*Redacted].

90. [*Redacted].

91. As the trial judge recorded, [113] EF submitted that the police evidence did not establish that Victoria Police would be able to protect her if she did not enter the witness protection program. More particularly, it was submitted that Detective Superintendent Brigham said only that negotiations were ongoing with respect to non-program assistance to her. Assistant Commissioner Fontana stated that Victoria Police always tried to accommodate alternative measures, while adding:

> But it is not a good — it's really unsustainable in a lot of ways and I've lived through this with the Hodson murders because they were witnesses of the Corruption Division [that] I was in charge of for many years and we tried to provide alternative assistance. [114]

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[113] PII Reasons [195].

[114] Ibid .

92. The submission of EF recorded by the trial judge that the evidence did not establish Victoria Police would be able to protect her was responsive to the evidence but the submission now advanced that the evidence established that Victoria Police would *not* be able to protect EF goes a material step further.

93. In this regard EF and the Chief Commissioner submit that the trial judge relevantly found it was reasonable for EF to continue to refuse to enter witness protection. We do not take his Honour's findings to go that far. [*Redacted]. But this falls short of a finding that, on the whole of the evidence, it would necessarily remain objectively reasonable for her not to do so in the future.

94. EF also points to the trial judge's reference to the rule in *Browne v Dunn* [115] in [209] of his PII Reasons, quoted above. [116] It is submitted that this refers to the submission of EF recorded at [194] of the PII Reasons:[117]

> EF submitted that it was not open for the Director to contest the truthfulness of her evidence that she would not enter the Program as her evidence had not been challenged in cross-examination. Nor had she been asked whether she would agree to any alternative program. She relied on the rule in *Browne v Dunn*. [118]

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[115] (1893) 6 R 67 .

[116] See [75] above.

[117] Citation in original.

[118] (1894) 6 R 67 .

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95. The sense in which his Honour makes reference to the ruling in *Browne v Dunn* in [209] of his PII Reasons is (as counsel for EF conceded during the course of argument before this Court) far from clear. The paragraph in which it is found is concerned to express an overall conclusion with respect to the risk to EF by reference to the police evidence. Insofar as the earlier submission concerning EF's evidence is concerned, we accept that his Honour proceeded on the basis that EF's evidence as to her intention was truthful, but that does not amount to a finding that in future it will remain reasonable for EF to refuse to enter the witness protection program.

96. On the whole of the evidence, it is difficult to come to any conclusion other than that expressed by the members of Victoria Police that, in the first instance, other negotiated measures may be able to be explored but that ultimately witness protection offers the only

long term sustainable protection to EF and her children. In turn, it is difficult to conclude other than that it may become unreasonable for EF not to enter into the witness protection program.

97. In any event, however, we do not accept that the police evidence supported the conclusion that no significant steps can be taken to protect EF. Rather, it supported the conclusion that significant steps can be taken to protect EF in the short term and that, if she enters into the witness protection program, significant steps to protect EF can be taken on a sustainable long term basis.

98. In so saying, we accept that EF has legitimate reasons for distrusting Victoria Police and that the process of negotiation with respect to her ongoing protection may prove a difficult one. This however is not to conclude that there are no significant steps which are open to be taken by Victoria Police.

99. EF's distrust of Victoria Police arises in no small part from the fact that when she first met with members of Victoria Police to discuss her potential role, she was told that she would never be revealed as an informer nor called as a witness and that information she provided would be disseminated within Victoria Police without identifying her as a source. [119]

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[119] PII Reasons [23].

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100. EF gave evidence that on 30 March 2014 she was advised by a journalist to the effect 'I am going to publish an article tomorrow naming you as a police informer', and 'I know the names of your handlers and I know your registered number.' In an affidavit tendered to the trial judge, EF stated further:

> During the course of the telephone conversation with Mr Dowsley on 30 March 2014, or a subsequent telephone call the following day (in which I was in the presence of Detective Inspector Ian Campbell), Mr Dowsley said words to me to the effect *'my source is a senior Victorian police officer'*.
>
> Mr Dowsley also asserted facts about my informing during those calls. For example he told [me] that he knew my registered number was '[REDACTED]'. At that time, I did not know that this was the case. My registered number should only have been known to Victoria Police.
>
> He also said words to the effect that *'the police have produced in excess of 5,500 IRs (information reports)'* in relation to information provided by me. At that time, I did not know this was the case.
>
> The information that Mr Dowsley conveyed to me must have been leaked by a Victoria Police source. I did not confirm or admit any of the matters put to me by Mr Dowsley.

> In the week following publication of Mr Dowsley's article, there was discussion during a radio segment (involving John Sylvester and broadcast on 3AW) about the story. Information was discussed during the broadcast that I had not disclosed to any person (not even the medical practitioners who were treating me at the time). I believe this information must have been disclosed to journalists by a member of Victoria Police.[120]

[120] Emphasis in original.

101. This evidence was not challenged in cross-examination.

102. In turn, it may be accepted that EF does not trust Victoria Police as an institution but this distrust cannot sensibly be regarded as necessarily determinative of all her future actions. It cannot be assumed or concluded that members of Victoria Police will be unable to deal with EF in a secure and protective manner in the future nor that measures cannot be negotiated which can provide for her ongoing protection despite the difficulties which EF's history may present to those negotiations.

103. Whatever may be said concerning EF's evidence as to her present intentions, her evidence amounts to no more than evidence of her present state of mind. In our view, the trial judge was correct to assess the risk to EF and her children by reference to the police evidence which both indicated the possibility of different types of protection and emphasised the extreme risk to EF if she does not progress into the witness protection program.

104. We are not persuaded that his Honour made any material error in his findings as to the risk to EF and her children. His Honour's conclusions were not contrary to 'incontrovertible facts or uncontested testimony'. Nor were they 'glaringly improbable' or 'contrary to compelling inference'. [121]

[121] *Robinson Helicopter Company Inc v McDermott* (2016) 90 ALJR 679, 686–7 [43]

Failure to consider relevant consideration — No substantial assistance to the Convicted Individuals

105. Proposed grounds of appeal 5 and 6 on behalf of EF are as follows:

> 5 The primary judge erred by failing to consider that:

5.1 the disclosures proposed by [the Director] were no more than the following (relevantly):

> The matter which I wish to disclose to you is that the material contained in the Kellam Report could be interpreted to mean that at or about a time when X was your legal representative in relation to charges for which you were later convicted or to which you later pleaded guilty, X was also providing information to Victoria Police about you, in possible breach of legal professional privilege and/or in breach of a duty of confidentiality.
>
> Further, I wish to disclose to you that some material contained in the Kellam Report could also be interpreted to mean that certain persons who made statements against you, in the matters for which you were convicted or to which you pleaded guilty, may have been legally represented by X at or about the same time that X was providing information to Victoria Police about those persons, in possible breach of legal professional privilege and/or in breach of a duty of confidentiality.

5.2 the proposed disclosure letters would therefore serve no purpose other than to prompt the Individuals to consider exercising their legal rights (for example, by making an application for production of documents by [the Chief Commissioner] under s 317 of the *Criminal Procedure Act* or an application to the Victorian Attorney-General for a petition of mercy against conviction pursuant to s 327 of the *Criminal Procedure Act*);

5.3 however, information already available in the public domain was sufficient to alert the Individuals to the conduct of EF, and [the Director] submitted that EF's role as an informer must now be taken as generally known among the criminal underworld: Reasons at [213];

5.4 therefore, the proposed disclosures would not provide any substantial assistance to the Individuals in

seeking to quash their convictions but would merely increase the risk of death or harm to EF and EF's children.

6 The primary judge ought to have found that, by reason of the information concerning the conduct of EF already available in the public domain, the proposed disclosures would not provide substantial assistance to the Individuals in seeking to quash their convictions.[122]

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[122] Proceeding S APCI 2017 0087 — EF's application for leave to appeal dated 21 July 2017.

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106. In the course of his judgment, the trial judge relevantly gave detailed consideration first to the content of the notions of legal professional privilege and the duty of confidentiality owed by a lawyer to his or her client.[123] He went on to explore the ways in which EF's conduct might in principle provide a basis for the Convicted Individuals to challenge their convictions.[124] In this respect he had the benefit of careful submissions made on behalf of the Chief Commissioner for the assistance of the Court. The Chief Commissioner submitted that the Convicted Individuals might in principle argue that:

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[123] PII Reasons [97]–[126].

[124] Ibid [139]–[162].

(s) justice had not been seen to be done in circumstances where EF had acted for one or other of them despite a conflict of interest. [125] Refere nce was made to the decision in *R v Szabo* ;[126]

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[125] Ibid [140].

[126] [2000] 2 Qd R 214 .

(t) there had been a fundamental departure from the concept of a fair trial insofar as defence counsel was not independent from the prosecution.[127] Reference was made to the decision in *Lee v The Queen*. [128] In that case, the prosecution had been given access to transcripts of a

compulsory examination of the accused in circumstances where such access was not authorised by the legislation providing for the compulsory examination. The High Court said:

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[127] PII Reasons [141]–[144].

[128] (2014) 253 CLR 455 .

> These appeals do not fall to be decided by reference to whether there can be shown to be some 'practical unfairness' in the conduct of the appellants' defence affecting the result of the trial. *This is a case concerning the very nature of a criminal trial and its requirements in our system of criminal justice.* The appellants' trial was altered in a fundamental respect by the prosecution having the appellants' evidence before the Commission in its possession. [129]

(u) an abuse of process had eventuated because executive misconduct had occurred which would undermine public confidence in the criminal justice system and bring it into disrepute.[130] Reference was made to *Warren v Attorney-General for Jersey* ;[131] and

(v) there had been a failure by the prosecution to disclose information to the Convicted Individuals which should have been disclosed if they were to have had a fair trial. [132]

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[129] Ibid 470 [43] (emphasis added by trial judge in PII Reasons [141]).

[130] PII Reasons [145]–[153].

[131] [2012] 1 AC 22, 32 [26] (Lord Dyson). Reference was also made to *R v Maxwell* [2011] 1 WLR 1837; *Moti v The Queen* (2011) 245 CLR 456; *Wilson v The Queen* [2015] NZSC 189; *J B v The Queen [No 2]* [2016] NSWCCA 67; and *R v Grant* [2006] QB 60.

[132] PII Reasons [154].

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107. The Director made submissions referring to the provisions of s 276 of the *Criminal Procedure Act 2009* . The Director identified six potential bases for the convictions in issue to be challenged. [133]

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[133] Ibid [156] .

(w) EF may have been actuated by ulterior motives when acting for clients. The conduct of a lawyer for an accused may cause a miscarriage of justice, for instance a lawyer's conduct may improperly produce a plea of guilty. [134]

[134] Eg *R v KCH* (2001) 124 A Crim R 233, 239 [33] ; *Meissner v The Queen* (1995) 184 CLR 132, 141–2 .

(x) There may be a perception that EF was actuated by ulterior motives and this may give rise to a perception that justice has not been done. A court may conclude that if apprised of the relevant facts it would have restrained EF from acting for the Convicted Individuals. EF had acted concurrently as an informer against, and lawyer for, the same persons and in so doing had breached both her duties of loyalty and confidence. [135]

[135] Eg *R v Smith* (1975) 61 Cr App R 128, 130–1 ; *R v Szabo* [2000] 2 Qd R 214 .

(y) Victoria Police and EF may be said to have acted in a way that resulted in a fundamental shift in the accusatorial nature of the criminal proceedings against the Convicted Individuals. Reference was made to the decision of the High Court in *Lee v The Queen*. [136]

[136] (2014) 253 CLR 455 .

(z) Criminal proceedings may be permanently stayed as an abuse of process if police deliberately and improperly obtain privileged information from an accused. [137]

(aa) Improper conduct in securing the extradition of one of the Convicted Individuals may have given rise to an abuse of process and a permanent stay of proceedings. [138]

(bb) The failure of the Crown to disclose relevant information to the accused may have given rise to a miscarriage of justice. [139]

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[137] Eg *R v Grant* [2006] QB 60; but see PII Reasons [152] and following.

[138] *Moti v The Queen* (2011) 245 CLR 456.

[139] *Mallard v The Queen* (2005) 224 CLR 125, 133 [17] (Gummow, Hayne, Callinan and Heydon JJ). See also *Kev v The Queen* [2015] VSCA 36 [68] ; *R v Farquharson* (2009) 26 VR 410, 464 [211]–[212] . *DPP (Cth) v Galloway (a pseudonym)* (2014) 46 VR 809, 830 [89] ; *R v Seller; R v McCarthy* (2015) 89 NSWLR 155, 196–7 [242] .

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108. The Director further submitted that, where proceedings constituted an abuse of process as a result of police misconduct, a convicted person's rights of appeal against conviction will not necessarily be impaired by the fact of a plea of guilty. [140]

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[140] PII Reasons [157].

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109. EF submitted that the potential basis of any submission that there was a miscarriage of justice had not been clearly identified and that where pleas of guilty had been entered the Convicted Individuals would face substantial problems in seeking to have these set aside.

110. As his Honour noted, the amici curiae also made extensive submissions about the impact of EF's conduct on the proper administration of justice.

111. Ultimately, his Honour expressed the following conclusion concerning the bases on which the seven Convicted Individuals might, in principle, seek to challenge their convictions:

> The parties' and Amici's submissions which I have summarised demonstrate that the seven named persons may have a number of grounds on which to contend that their convictions involved a substantial miscarriage of justice. The possible grounds include that because of the conduct of Victoria Police and EF, they did not receive a trial as required by the criminal justice system and that the trials involved an abuse of process, because … their legal counsel did not provide independent advice. The requirements of a fair trial include that counsel will provide independent advice to a client and will not have separate obligations to the police who have brought the prosecution.
>
> In *Nudd v The Queen* , Gleeson CJ when considering whether trial counsel's alleged incompetence amounted to a miscarriage of justice, [said] that 'the concepts of justice, and miscarriage of justice, bear two aspects: outcome

and process. They are different, but related'. [141] In the same case, Kirby J elaborated on the importance placed by the Courts on adherence to procedure stated:

> as a matter of principle, neither the criminal appeal legislation nor the law generally confine attention solely to pragmatic consequences. The law is concerned with principles and with the appearance of justice in the conduct of trials. This concern derives from the long experience of the law that substantive justice is heavily dependent upon (and often flows from) observance of proper procedures and the conduct of hearings untainted by relevant unfairness. [142]

The public interest in fair trials, in appearance and in fact, is relevant to the primary issue in this proceeding. The Court must protect that public interest. Maintaining the rule of law and public confidence in the rule of law requires that courts and agencies of the state and members of the legal profession associated with criminal proceedings ensure that criminal trial procedures are preserved and respected.[143]

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[141] *Nudd v The Queen* (2006) 80 ALJR 614, 617 [3] (Gleeson CJ).

[142] Ibid 634, [90] (Kirby J).

[143] PII Reasons [160]–[162] (citations in original).

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112. No direct challenge was made to these conclusions in this Court. In our view, looked at in the broad, EF's conduct raised questions first as to whether the Convicted Individuals received independent advice and representation as required by law, and secondly, whether the prosecution was unfairly advantaged and/or had access to evidence and information which was improperly obtained in ways which gave rise to a miscarriage of justice.

113. **Following paragraph cited by:**

Arico v The Queen (21 March 2022) (Beach JA)

> 10. In his written submissions on the review,[14] the applicant contended that the documents sought in paragraph 1(a) of the s 317 request go to the question of whether the applicant's legal representative was a police informer who provided information to Victoria Police about current and /or former clients, including the applicant. He submitted that, as this Court recognised in *AB v CD* ,[15] if proven, the fact that Mr Acquaro provided information to Victoria Police about the applicant or others 'may give rise to a series of different conceptual bases for challenge to

the convictions in issue'. [16] The applicant contended that those conceptual bases are reflected in particulars (a) to (c) of his proposed ground of appeal.

via

[16] Ibid [113].

As the submissions of the Director and the Chief Commissioner make clear, these questions may give rise to a series of different conceptual bases for challenge to the convictions in issue.

114. The trial judge went on, after considering a series of matters going to issues of the public interest, to consider further the assistance of the proposed disclosures to the seven Convicted Individuals.[144] His Honour reached separate conclusions based on the evidence relating to EF's role with respect to each of the Convicted Individuals. The detailed fact responsive nature of his analyses is illustrated by his conclusions concerning Mr Peters.

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[144] Ibid [246]–[408].

While EF was registered as a police informer, Peters was her client. Thereafter, she appeared for him on the Landslip and Matchless charges. She provided information to police about him before his arrest including the general location of the Strathmore drug laboratory. That led to his arrest. She acted as his lawyer on the day of his arrest when he ultimately agreed to assist police. She also appeared for him in relation to the Posse charges. He was entitled to receive independent legal advice about his options before he decided to plead guilty, but he did not receive it.

The facts agreed to by EF are that while acting for Peters in respect of Operations Landslip and Matchless, she was a police informer and between October 2005 and April 2006 provided information to Victoria Police about his activities relating to matters other than the Landslip and Matchless matters, with which he had already been charged. That information was used by Victoria Police to obtain evidence that resulted in Peters' arrest on 22 April 2006 and charges arising from Operation Posse. For instance EF provided information to Victoria Police that assisted in locating the clandestine drug laboratory in Strathmore. She then spoke to him after his arrest and appeared for him on two occasions, once in respect of the Posse charges, and once in respect of the Matchless charges.

The evidence suggests that EF's [motive for her] conduct in providing information about Peters was to rid herself of the Mokbels, as she understood that he might assist the police to prosecute them.

Peters pleaded guilty and may have received a lesser sentence because he assisted police. But his plea and assistance to police occurred in the context of his understanding that EF, as his lawyer, was acting solely in his interests. That was not the case.

In providing information to Police about a client that led to him being arrested on further charges, EF arguably breached her professional duties to him including her duty of loyalty. In speaking with him after his arrest, when he may have perceived her to be acting as his lawyer, and then appearing for him on two occasions, she arguably also breached her professional duties and obligations because of her conflict of interest.

Peters' case demonstrates the complexity of the issues that arise because of the dual role that EF played. Although he pleaded guilty and assisted police, he did so, it would appear, on the assumption that EF had been representing his interests and was able to provide him with independent advice. He might use the disclosure and other material that he might subsequently obtain to establish that EF had played a double role as his lawyer and as a police informer against him.

The dual role EF played might assist Peters in having his convictions set aside, despite his plea of guilty. He was not given independent advice and EF was obliged to inform him of anything that might assist him. The Director's disclosures may therefore provide him with substantial assistance in establishing that the proceedings against him involved an abuse of process because of the invasion of his right to have his legal representative act solely in his best interests and not assist the prosecution. Those arguments might assist him establish that a miscarriage of justice had occurred.[145]

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[145] Ibid [300]–[306].

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115. No challenge is made to these findings relating to Mr Peters or with respect to the findings made in relation to each of the other Convicted Individuals. [146] Rather, it is submitted that the net effect of the Director's letter will not be to convey substantial assistance to the Convicted Individuals because of the information already in the public domain relating to EF's activity as an informer.

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[146] Those findings distinguished between the respective applicability of the first and second paragraphs of the proposed disclosure letter quoted in EF's PII proposed ground 5.1 set out at [105] above. In some cases only the second paragraph was found to be applicable.

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116. The trial judge carefully summarised the evidence as to the extent of public knowledge that EF was a police informer at PII Reasons [212]–[236]. The three principal sources of public knowledge identified in evidence were press reports,[147] proceedings taken by Mr Karam, [148] and a freedom of information ('FOI') request made on behalf of Mr Tony Mokbel. [149]

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[147] PII Reasons [215]–[229].

[148] Ibid [230]–[233].

[149] Ibid [234].

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117. After canvassing this evidence, the trial judge concluded:

> The evidence is that there has been considerable speculation about whether EF is 'Lawyer X'. However, speculation or assertions that people know something, not least something intended to be secret, is some distance from the effect that official confirmation of that speculation brings. The evidence also is that once any one of the seven named persons is informed by the Director's disclosure letter that EF has been a police informer, that it is likely that the information will become known to the other six and more widely.
>
> I consider that Tony Mokbel's and Cvetanovski's actions demonstrate that they do not have, or do not believe they have, sufficient information to seek to commence an appeal. The disclosures will operate as significant confirmatory information that adds to existing information. To this point, EF has been able to maintain denial. The information available from the Karam proceeding does not confirm EF's role. [150]

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[150] Ibid [237]–[238].

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118. It is convenient first to dispose of the contention that the trial judge failed to have regard to the question whether the proposed disclosures would give the Convicted Individuals substantial assistance having regard to what is already known in the public domain. A careful reading of his Honour's PII Reasons makes clear that he did address this issue, including what (if anything) flowed from the evidence relating to the proceeding brought by Mr Karam and the FOI request made on behalf of Mr Tony Mokbel.

119. The underlying question remains however whether the evidence as a whole was such that this Court should reject his Honour's conclusions at [237] and [238] quoted above. [151] A threshold premise of EF's argument on this point was that the Director's letter should be characterised as doing no more than providing a preliminary invitation to further enquiry.

[151] See [117] above.

120. There are two difficulties with this proposition. First, the Director has indicated that he is now both willing to provide and desirous of providing further and more detailed disclosures to each of the Convicted Individuals. If this Court were to conclude that the draft letter which provoked this proceeding was not justified only because it does not further particularise EF's conduct, then this conclusion would not resolve the underlying controversy between the parties in EF's favour. Nor would making a declaration with respect to the form of the letter produce an outcome of any finality.

121. Secondly, and more fundamentally, we do not accept that the proposed letters of disclosure can be characterised in the way EF submits. More particularly, they have the critical characteristic of officially confirming EF's status as a registered informer and alerting the Convicted Individuals to the real possibility that this fact may bear on their rights with respect to their convictions either because EF informed against them whilst acting for them or because she provided information in her capacity as the legal representative of other persons in a way which have may affected the integrity of the prosecution case.

122. In our view, his Honour's conclusions at [237] and [238] accord squarely with the weight of the evidence. In particular, the evidence as a whole supported the conclusion that the proposed disclosures will operate as significant confirmatory information that adds to existing information. His Honour's conclusions were not contrary to 'incontrovertible facts or uncontested testimony'. Nor were they 'glaringly improbable' or 'contrary to compelling inference'. [152]

[152] *Robinson Helicopter Company Inc v McDermott* (2016) 90 ALJR 679, 686–7 [43]

123. Indeed, we do not see how the proposed letters could be regarded as other than significant confirmation of the status of EF and inferentially disclose the Director's view that that status may bear on the propriety of the convictions of the Convicted Individuals. More particularly, as the Director submitted, the material in the public domain does not currently establish both when and in respect of whom EF acted as an informer. EF has hitherto been able to adopt a strategy of admitting that she acted as an informer against Mr Paul Dale, whilst denying that she acted as an informer with respect to her clients including a number of the Convicted Individuals.

124. There was, of course, no direct evidence of the knowledge or state of mind of the Convicted Individuals concerning EF's conduct. It seems to us that, once the trial judge concluded that the material which it was proposed to disclose was properly to be disclosed by the Director as potentially providing a proper basis for challenge to convictions for serious criminal offences, then speculation as to what the Convicted Individuals know or believe in consequence of

press reports and rumour cannot be a proper basis for concluding that the proposed disclosures will not be of substantial assistance to the Convicted Individuals.

125. Further, as the argument was put to this Court on behalf of EF, the Court was asked to assume that mere knowledge that EF was a registered police informer at the time she acted for Convicted Individuals or other persons who provided evidence against the Convicted Individuals, would be sufficient to enliven an awareness of the Convicted Individuals' potential rights.

126. We do not make this assumption. As the trial judge concluded, it was proper to advise a number of the Convicted Individuals that EF had informed against them personally and to alert the Convicted Individuals with respect to EF's role in providing information as an informer whilst acting for other persons who made statements concerning the conduct of the Convicted Individuals. The analysis which we have quoted with respect to Mr Peters demonstrates the potential complexity of these issues. The potential bases upon which the Convicted Individuals might seek to challenge their convictions goes substantially beyond the mere fact that EF was a registered informer at the time she had a direct or indirect involvement with their convictions.

127. For completeness, it is necessary to say something about the arguments addressed by reference to the actions of Mr Karam and Mr Tony Mokbel. The trial judge's PII Reasons, including his conclusion at [238], make clear that he did consider both Mr Tony Mokbel's FOI application and the information available concerning the Karam proceeding.

128. The trial judge summarised the information relating to the Karam proceeding as follows:

> The other relevant evidence of knowledge of EF in the public domain concerned Rob Karam's actions. Karam is serving a prison sentence following conviction for Commonwealth drug offences. On 11 July 2016, the Director received a letter from Garde-Wilson Lawyers acting on behalf of Karam, requesting information about the Director's response to the Kellam Report recommendations. The Director's office replied stating that it had not reviewed Mr Karam's case as the Commonwealth Director of Public Prosecutions had been the prosecutor and suggested that inquiries be directed to that office.
>
> On 22 July 2016, Garde-Wilson Lawyers acting on behalf of Mr Karam filed in the Court of Appeal an application for an extension of time to file a notice of application to appeal; an application for leave to appeal; two applications under s 317 of the *Criminal Procedure Act 2009* ; and affidavits of Mr Karim (sic) and Ms Garde-Wilson.
>
> In Mr Karam's affidavit he stated that he was aware of the true name and identity of 'Lawyer X', but he did not state the real name of 'Lawyer X'. He said that he first met her in 2001 and she represented him in a number of proceedings. He also alleged that 'Lawyer X' had engaged in wrongful conduct including suggesting that he engage in seemingly unlawful conduct. He said that he now knows that 'Lawyer X' was a registered informer. He believes that when acting for him in his criminal trials she made forensic decisions aimed at protecting herself as a police informer, rather than in his best interests. He considers that due to EF's role that he did not receive a fair trial.

Ms Zarah Garde-Wilson, Karam's lawyer, made an affidavit, which was also exhibited to the Director's affidavit in which she stated that 'Lawyer X's' identity was common knowledge within the legal fraternity and that she was aware of 'Lawyer X's' true identity.[153]

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[153] PII Reasons [230]–[233].

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129. Further information concerning the current position of the applications made by Mr Karam was provided to this Court by senior counsel appearing for the Commonwealth Director. Each remains at a preliminary stage.

130. It is sufficient for present purposes to say that the fact that Mr Karam had sought further information concerning the activities of EF pursuant to the provisions of the *Criminal Procedure Act 2009* did not compel the conclusion that the Convicted Individuals whose position is now in issue would not benefit from the proposed disclosures. Each of the Convicted Individuals has a different case history from that of Mr Karam and the fact of Mr Karam's proceeding does not displace the obvious advantage which official confirmation of EF's status in the terms proposed by the Director will convey to the Convicted Individuals.

131. Likewise, evidence that Mr Karam has arrived at a certain state of mind with respect to EF does not establish that the Convicted Individuals share that state of mind. In an affidavit affirmed on 30 July 2016 and filed in this Court, Mr Karam deposed as follows:

> I believe I have not received a fair trial because:
>
> (a) the person whom I engaged to provide legal advice throughout the process of investigation and during the pre-trial and trial processes was a registered informer who had divided loyalties and did not give me advice in accordance with my best interests;
>
> (b) information and evidence used in trials against me was obtained from me by duplicitous conduct at various stages of the investigative process, which duplicity involved both Lawyer X and Victoria Police;
>
> (c) information which was reported to the AFP and Victoria Police was intended by Lawyer X to advance her own interests and specifically designed to inculpate me, including by acting as an agent provocateur whilst giving advice about the legality of my conduct;
>
> (d) information which was imparted by Lawyer X in confidence and legally privileged was unfairly used in the investigation and as evidence in the later trials against me;

(e) the details and strategy of my defence and the defence of my co-accused was unfairly and improperly passed on to the State;

(f) the State was complicit in the breaches of the duties of loyalty and of confidence which I expected from my lawyer who I now believe was acting as an agent of the State whilst purporting to act as my agent against the State.

132. It cannot be inferred that the Convicted Individuals currently hold the same beliefs as Mr Karam with respect to their own convictions. When Mr Karam's affidavit is read as a whole, it is plain that his asserted state of mind is said to have been arrived at in the context of the particular facts of his case.[154] For the reasons stated by the trial judge, the probability is that the Convicted Individuals do not currently hold Mr Karam's beliefs. [155]

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[154] For completeness, we note that the Commonwealth Director advised this Court that the facts asserted in Mr Karam's affidavit are contested in material part.

[155] See [117] above.

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133. Insofar as Mr Tony Mokbel is concerned, we see no error in the trial judge's conclusion that the making of an FOI application supports the inference that Mr Tony Mokbel does not believe that he currently has sufficient information to found an application for a reference under s 327 of the *Criminal Procedure Act 2009* in respect of the matters prosecuted by the Director.

134. Lastly, before leaving the question of substantial assistance, it is appropriate to note EF's submission that six Convicted Individuals who have pleaded guilty to charges in respect of which the Director now proposes to make disclosure, will face a very high hurdle in seeking to have their convictions overturned. EF's written case properly concedes[156] that the possibility of successful application on behalf of these individuals cannot be excluded in the light of High Court authority. [157]

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[156] See EF's annotated written case dated 31 August 2017, n 65.

[157] *X7 v Australian Crime Commission* (2013) 248 CLR 92; *Lee v The Queen* (2014) 253 CLR 455; *Meissner v The Queen* (1995) 184 CLR 133, 141–2 .

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135. In our view, the trial judge was correct to conclude with respect to this aspect of the matter as he did:[158]

> There is an additional matter that concerns most of the seven persons. With the exception of Cvetanovski, all of them eventually pleaded guilty. EF submitted that a conviction following a plea of guilty can only be overturned in exceptional circumstances, for example where the accused did not appreciate the nature of the charge, or did not intend to admit that he was guilty of it; or upon the admitted facts, the applicant could not in law have been convicted of the offence charged. [159] While that is true, there is a duty on legal practitioners and others associated with prosecutions not to do anything that corrupts or subverts the administration of justice. Even a conviction following a guilty plea can be quashed by application of that principle. [160]

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[158] PII Reasons [299] (citations in original).

[159] *R v Reed* [2003] VSCA 95 [2] , *R v Mokbel* ('Change of Pleas') (2012) 35 VR 156, 176–7 [261]–[264] .

[160] *R v KCH* (2001) 124 A Crim R 233.

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136. Accordingly, we would reject the proposed substantial assistance grounds of appeal.

The consequences of the assurances given to EF by Victoria Police

137. The Chief Commissioner's proposed ground 2 of appeal is:

> 2 The trial judge:
>
> 2.1 correctly identified matters that are required, and permitted, to be weighed in determining whether the public interest prevented [the Director] from disclosing EF's identity as a police informer: 'on the one hand the likely harm to EF and her children and the possible resulting effect on the flow of information … and on the other hand the likely assistance that the proposed disclosure would provide to the seven named persons in quashing their convictions': Reasons at [244];
>
> 2.2 erred in failing to consider whether, on the facts of this case, there was an additional public interest factor that weighed against disclosure and was supported by analogous authority: the public interest in the State adhering to the duty it had assumed to protect the life of

EF and her children by not disclosing EF's identify as a police informer: Reasons at [165]–[166], [244], [420]; and

2.3 should have held that, on the facts of this case, the public interest identified in paragraph 2.2 above weighed against disclosure, in addition to the factors identified in paragraph 2.1 above, notwithstanding the absence of any direct authority to that effect.[161]

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[161] Proceeding S APCI 2017 0082 — Chief Commissioner's amended application for leave to appeal dated 19 July 2017.

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138. EF's proposed grounds 7 and 8 are as follows:

7. Having found that [the Chief Commissioner] assured EF that EF's identity as a police informer would be kept confidential (Reasons at [28]), the primary judge erred in failing to consider that there was a powerful public interest in non-disclosure arising from the duty of the State to protect its citizens from harm.

8. The primary judge ought to have held that, on the facts of this case, the public interest factor identified in paragraph 7 above outweighed any assistance that the proposed disclosures would provide to the Individuals in quashing their convictions.[162]

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[162] Proceeding S APCI 2017 0087 — EF's application for leave to appeal dated 21 July 2017.

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139. In the course of his PII Reasons, the trial judge summarised the evidence concerning the assurances that were given to EF to the effect that her identity as a police informer would be kept confidential. Indeed, the first parts of his PII Reasons, following the introduction and a summary of the relief claimed, address the following topics, 'How EF became an informer', 'Why EF became an informer', and 'Victoria Police assurances of confidentiality to EF'.[163]

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[163] PII Reasons [12]–[28].

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140. After referring in some detail to the evidence of EF, his Honour found at PII Reasons [28]: 'I accept EF's evidence that Victoria Police assured her that her identity as a police informer would be kept confidential.'

141. Ultimately, as we have noted, the trial judge expressed his conclusions at PII Reasons [416] as to the factors favouring non-disclosure in terms which expressly identified the fact that EF received assurances of confidentiality. The terms of this conclusory statement bear repeating in this context:

> Disclosure of information about her role will also breach the assurances of confidentiality that police officers acting on behalf of the State gave to her. [164]

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[164] Ibid [416].

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142. In our view, there can be no doubt that his Honour did take the fact of police assurances given on behalf of the State into account when weighing the factors telling against disclosure in the balance of the public interest.

143. The proposed grounds of appeal relating to the assurances given to EF agitate three related contentions.

144. First, the Chief Commissioner and EF submit that as a result of the assurances given to EF, the State assumed a duty of care to EF which itself supports a discrete consideration of the public interest.

145. Secondly, the Chief Commissioner and EF submit that the trial judge erred in failing to consider the powerful public interest in non-disclosure which is said to arise from this duty.

146. Thirdly, the Chief Commissioner submits that this public interest in itself outweighs any public interest in making the proposed disclosures to the Convicted Individuals.

147. The Chief Commissioner relies on a series of English authorities in which the courts have recognised a duty of care owed by police officers to private individuals following the giving of assurances of confidentiality to informers. [165] We would accept for the purposes of the argument (without purporting to finally decide) that the Chief Commissioner and members of Victoria Police charged with making decisions concerning EF do owe her a private duty of care both to take reasonable steps to keep her activity as an informer confidential and to protect her personal safety and that of her children.

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[165] *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464, 482–3 (Hirst LJ, quoting the judgment of Laws J below), 486–7 (Ward LJ); *An Informer v A Chief Constable* [2013] QB 579, 591–2 [60], 592 [62], 597 [82] (Toulson LJ), 599 [101],

600 [103], 601 [112]–[114] (Arden LJ), 614 [179]–[180] (Pill LJ); *Van Colle v Chief Constable of Hertfordshire Police* [2009] 1 AC 225, 282 [120] (Lord Brown), cf Lord Bingham at 261 [44] ; *Michael v Chief Constable of South Wales Police* [2015] AC 1732, 1751–2 [47], 1754 [67] (Lord Toulson JSC with whom Lord Neuberger, Lord Mance, Lord Reed and Lord Hodge JJSC agreed), cf Baroness Hale at 1785–6 [197]–[198] .

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148. Such a duty could not of course displace the duty of investigating police to disclose relevant material to the Director. [166] Nor could it govern the Director's duty to disclose relevant matters to the Court.

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[166] *Sullivan v Moody* (2001) 207 CLR 562, 574 [30], 582 [60] .

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149. As we see it, however, the real force of both EF's case and the Chief Commissioner's case derives in any event from the evidence that, even if reasonable steps are taken by Victoria Police to protect EF's personal safety in the event that her role is disclosed, she is at extreme risk of harm unless she enters the witness protection program.

150. In turn, the notion of the public interest being engaged is more fundamental than a private duty of care owed by the police to take reasonable steps.

151. The public interest necessarily supports the ongoing protection of EF and her children as members of the public who are now threatened with criminal violence as a result of EF providing information in reliance upon assurances of confidentiality.

152. The public interest is also engaged by the fact that if EF suffers harm she will be seen as having done so because she became an informer and Victoria Police failed to fulfil assurances of confidentiality and consequential protection.

153. The trial judge recognised these interests but, for reasons which are themselves the subject of challenge, did not find them conclusive.

154. Insofar as the argument relating to private duty of care is concerned, that argument was put at first instance as reinforcing or informing the public interest in the protection of the life and safety of EF and her children. It was not put as somehow creating a further distinct public interest. As it was put to the trial judge, the Chief Commissioner's submission was that the foundation of the private duty of care is the conclusion that the public interest in holding the State to the responsibility it has assumed is to be regarded as overcoming the public interest which would otherwise exist in not imposing a duty of care upon police officers. This may be seen in the discussion of public interest in the judgment of Pill LJ in *An Informer v A Chief Constable*. [167]

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[167] [2013] QB 59, 613–7 [174]–[193] .

155. In turn, it was submitted that the public interest reflected in the private duty of care could not be adequately vindicated in the present case by the potential availability of damages if that duty is breached.

156. In our view, his Honour's reasons were responsive to the way the argument was put to him, namely that the case law with respect to a private duty of care confirms that there is a public interest in compliance by police with assurances given to members of the public. Moreover, the better view is that the fact that assurances were given to EF emphasises and informs the public interest which exists in protecting EF's life and personal safety as an informer. Conversely, the private duty of care which is agitated on behalf of the applicants is not of itself of a public character.

157. It follows that his Honour was correct to have regard to the fact of the assurances given to EF in his ultimate summary of the relevant considerations to be balanced in the public interest but the private duty of care to which the Chief Commissioner and EF now refer did not require recognition as constituting an independent public interest.

158. If, however, we are wrong in these conclusions and a private duty of care is to be weighed in the balance of the public interest as a discrete consideration, then, as a matter of principle, it cannot be regarded as requiring countervailing considerations of the public interest to be given lesser weight. It is simply a factor to be placed in the balance.

159. We come then to the challenges made to the way in which the trial judge undertook the balancing of the public interest. But before doing so it is necessary to say something about the arguments raised with respect to the Charter .

The Charter

160. Two sets of submissions were made in respect of the Charter . First, VEOHRC made submissions related to the application of the Charter to the conduct of the appeal proceeding itself. [168] Secondly, the Chief Commissioner, the Director and the amici curiae made submissions based on the Charter directed to the substantive question whether the proposed disclosures were subject to public interest immunity.

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[168] At the trial, VEOHRC also made submissions on the substantive public interest immunity question. On appeal, however, its submissions were expressly limited to the s 6 (2)(b) question discussed in the following paragraphs.

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161. VEOHRC submitted that, by operation of s 6(2)(b) of the Charter , this Court was obliged to ensure that the appeal proceeding was itself consistent with the Convicted Individuals' rights under the Charter , even though the Convicted Individuals were not formally parties to it. Specifically, VEOHRC submitted that this Court was required to be satisfied that a fair hearing of the public interest immunity claim could take place without notice to the Convicted Individuals of the applications for leave to appeal.

162. None of the other parties made submissions in response to the VEOHRC submissions.

163. VEOHRC relied on authorities to the effect that, for the purposes of s 6(2)(b) , courts have 'functions' in respect of the rights in ss 24(1) and 25(2)(b) , [169] such that they are obliged to apply and enforce these rights when acting in a judicial capacity. [170] Section 24(1) deals with the right to a fair hearing [171] and s 25(2)(b) with the right of criminal defendants to have adequate time and facilities to prepare their defence and to communicate with their chosen lawyer or advisor. [172]

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[169] *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 [34] ('*Matsoukatidou*'); *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237, 247 [52] ('*De Simone*'), cited in *Slaveski v Smith* (2012) 34 VR 206, 221 [54] n 27, and followed in respect of s 24 in *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 81 [247] (Tate JA) ('*Taha*'); *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221, 258–9 [166]–[167] ('*Sanding*').

[170] VEOHRC also submitted that the right in s 8(3) was applicable via s 6(2)(b) , as supplementary to ss 24(1) and 25(2)(b) : *Matsoukatidou* [2017] VSC 61 [40] ; *Re Lifestyle Communities Ltd (No 3)* (2009) 31 VAR 286, 318 [142] .

[171] Section 24(1) provides: 'A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing'.

[172] Section 25(2)(b) provides that a 'person charged with a criminal offence is entitled without discrimination to … have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her'.

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164. VEOHRC urged the Court to accept that the Convicted Individuals had rights under both ss 24 (1) and s 25(2)(b) in respect of the appeal proceeding despite their not being parties to it. It submitted that a person's right to a fair hearing under s 24(1) would be engaged whenever a court or tribunal hears either a civil proceeding in their absence if that person's interests are directly affected by the proceeding, or whenever the proceeding is an aspect of the process commenced by the bringing of criminal charges against that person.

165. VEOHRC submitted that the appeal proceeding was both a civil proceeding in which the Convicted Individuals' interests were directly affected, and an aspect of the processes by which the Convicted Individuals were convicted (and may appeal), so that the s 24(1) fair hearing rights of the Convicted Individuals were engaged. It submitted that the right in s 25(2) (b) , as one of the minimum guarantees in respect of criminal proceedings, was an aspect of the right to a fair hearing in criminal proceedings and was therefore engaged for the same reasons.

166. VEOHRC submitted that, although the right to a fair hearing is unqualified in the sense that the courts cannot in any circumstances condone hearings that are unfair, what is required to

satisfy the right may vary from case to case. The question to be answered was whether, as a whole, the appeal proceeding would be fair to the Convicted Individuals, so as to comply with their rights under ss 24(1) and 25(2)(b) . VEOHRC submitted that the correct method for determining this question is through the application of the general limitations provision in s 7 (2) of the Charter .[173]

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[173] Section 7 provides:

> **7 Human rights – what they are and when they may be limited**
>
> (1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.
>
> (2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
>
> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and
>
> (c) the nature and extent of the limitation; and
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
>
> (3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

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167. Section 7(2) of the Charter applies to determine whether limits on Charter rights are demonstrably justifiable. However, VEOHRC submitted that the application of s 7(2) to fair hearing rights would not be a means of permitting the Court to conduct something less than a fair hearing. Rather, it would determine whether, in the circumstances, the hearing would be fair despite the Convicted Individuals having no notice of it and therefore being unable to prepare for and participate in it, through legal representation or otherwise.

168. We agree with VEOHRC's submission that the Charter requires us to be satisfied that this proceeding was conducted in accordance with the applicable Charter rights of the Convicted Individuals. For the reasons that follow, it is not necessary to identify what those rights are in this case.

169. Section 6 of the Charter deals with its application. Subsection 6(2)(b) states that the Charter ap plies to 'courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3'. Division 3 of pt 3 includes statutory interpretation and declarations of inconsistent interpretation. Part 2 sets out the Charter rights and the general limitations provision. Because of the reference to pt 2 in s 6(2)(b) , which does not appear in the corresponding provisions on the application of the Charter to Parliament in s 6(2)(a) or to

public authorities in s 6(2)(c) , the provision has been interpreted as requiring courts and tribunals to enforce Charter rights directly even when acting in a judicial capacity. [174] By contrast, courts and tribunals are public authorities for the purposes of the Charter only when acting in an administrative capacity.

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[174] *De Simone* (2009) 25 VR 237, 247 [51]–[52] .

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170. The rights in ss 24(1) and 25(2)(b) , as rights that relate to court or tribunal proceedings, are some of those which are capable of direct application and enforcement by courts and tribunals. [175]

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[175] Ibid ; see, eg, *Matsoukatidou* [2017] VSC 61 [34] ; *Taha* (2013) 49 VR 1, 81 [247] (Tate JA); *Sanding* (2011) 36 VR 221, 258–9 [166]–[167] .

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171. The outcome of the appeal proceeding will unquestionably affect the interests of the Convicted Individuals directly, because it will determine whether they are to have access to information that may bear on their convictions. As such, the Convicted Individuals would have been joined as parties to the appeal proceeding were that possible without pre-empting its outcome and so rendering the proceeding futile. We are prepared to assume, in those circumstances, that their interests include the right to a fair hearing under s 24(1) and a right to adequate time and facilities to prepare a defence under s 25(2)(b) . We make those assumptions, without deciding the point, on the basis that it is arguable that the appeal proceeding is an aspect of the ‘deciding’ of a criminal charge for the purposes of s 24(1) and that the preparation of a ‘defence’ for the purposes of s 25(2)(b) extends to the preparation of a case for appellate or other relief following conviction.

172. The rights of the Convicted Individuals, as so assumed, were limited because the proceeding took place without notice to or direct participation by them, in a significant departure from ordinary court processes, so raising the possibility that the hearing was not fair under s 24(1) . As a result, the Convicted Individuals had no facilities with which to prepare for the proceeding, through communication with legal representatives or otherwise, such that their assumed rights in s 25(2)(b) were likewise limited.

173. However, to say that the rights were limited is not to say that the appeal proceeding involved an unfair hearing. Rather, having come to the conclusion that the Charter rights, as assumed, have been limited, it is then necessary to consider whether the limitations are demonstrably justified under s 7(2) of the Charter . [176] If so, there is no failure by the Court to comply with s 6(2)(b) .

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[176] *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 434 [80] .

174. The relevant considerations under s 7(2) are as follows:

(cc)The nature of the rights (s 7(2)(a)): As discussed below in a different context, the right to a fair hearing in s 24(1) , which is one manifestation of a right long recognised at common law,[177] is fundamental to the proper functioning of the criminal justice system and in upholding the rule of law in a democratic society. Included as an aspect of s 24(1) , in criminal proceedings, are the minimum guarantees protected in s 25(2), including s 25(2)(b) .

[177] *R v McFarlane; ex parte O'Flanagan* (1923) 32 CLR 518, 541–2, cited in *Re an application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 424–5 [39] and *Tomasevic v Travaglini* (2007) 17 VR 100, 113 [68] .

(dd) The importance of the purpose of the limitation (s 7(2)(b)): The purpose of the limitations was to enable this Court to determine the substantive question whether the disclosures proposed by the Director to be made to the Convicted Individuals are subject to public interest immunity. VEOHRC submitted that the purpose of the limitations here was to protect the public interest considerations and the rights of EF and her children.

(ee) The nature and extent of the limitation (s 7(2)(c)): As VEOHRC submitted, the limitations on ss 24(1) and 25(2)(b) were significant. As we have said, the appeal proceeding involves the determination of a matter in which the interests of the Convicted Individuals will be directly affected, and which will be heard without notification to them and in their absence. However, the limitations were moderated to some extent by the appointment of the amici curiae to represent the interests of the Convicted Individuals.

(ff) The relationship between the limitation and its purpose (s 7(2)(d)): Had the Convicted Individuals been notified of the applications for leave to appeal or involved as parties to them, that would have rendered the proceeding futile. As the Court has been able to determine the substantive question in this

proceeding, the relevant limitations on Charter rights achieved their purpose.

(gg) Any less restrictive means reasonably available to achieve the purpose (s 7(2)(e)): VEOHRC accepted, and we agree, that no means of giving notice to the Convicted Individuals was available that would have been effective while allowing the Court to engage in determining the substantive issue.

175. VEOHRC submitted that this may have been an example of one of the 'very few cases indeed' in which the substantive question regarding the proposed disclosures was required to be determined in the absence of the Convicted Individuals and without notice to them. [178]

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[178] *R v H* [2004] 2 AC 134, 156 [37] : this case was concerned with whether the procedure for determining public interest immunity claims was compatible with defendants' rights under the *Human Rights Act 1998* (UK).

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176. We agree that the applications for leave to appeal needed to be decided without notice to the Convicted Individuals. Such a course is not lightly undertaken but the courts are regularly faced with the need to decide cases having regard to issues of confidentiality. Unusually, in this case it was plain that no alternative course was open other than to proceed without notice to the Convicted Individuals, while seeking to ensure that arguments in their interest were advanced, as far as possible, by the amici curiae. Weighing up the considerations set out above, we conclude that the conduct of the appeal proceeding was compatible with the Convicted Individuals' assumed rights under ss 24(1) and 25(2)(b) of the Charter , because the limitations on those rights were demonstrably justified under s 7(2) .

177. We now turn to the second set of submissions on the Charter , made by the Chief Commissioner, the Director, and the amici curiae. As already explained, these submissions were directed to the substantive public interest immunity question.

178. The Chief Commissioner submitted that s 38 of the Charter makes it unlawful for public authorities, including the Director, [179] to act incompatibly with Charter rights or to make decisions without giving proper consideration to Charter rights. The Chief Commissioner submitted that the proposed disclosures would not be compatible with EF's Charter right to life as contained in s 9 unless they were justified in accordance with s 7(2) and that they were not so justified.

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[179] *Momcilovic v The Queen* (2011) 245 CLR 1, 78–9 [126]–[128] (Gummow J).

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179. The amici curiae, on the other hand, relied on the Convicted Individuals' rights to liberty and to a fair hearing in ss 21 and 24 of the Charter respectively, and submitted that EF's right to life could not be invoked to destroy these competing rights.

180. The Director submitted that s 38 was irrelevant as the Chief Commissioner did not seek to challenge the Director's decision to make the proposed disclosures, but rather sought a declaration that the proposed disclosures were subject to public interest immunity. The Director further submitted that, even if the Chief Commissioner had sought to challenge the Director's decision itself, such disclosure decisions are taken in the exercise of a prosecutorial discretion and, as such, are not reviewable. [180]

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[180] *Barton v The Queen* (1980) 147 CLR 75, 90–6 (Gibbs ACJ and Mason J); *Maxwell v The Queen* (1996) 184 CLR 501, 513 (Dawson and McHugh JJ), 534 (Gaudron and Gummow JJ); *R v Apostolides* (1984) 154 CLR 563, 575 ; *Cannon v Tahche* (2002) 5 VR 317, 340–2 [59]–[60] .

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181. The submissions of the Chief Commissioner and amici curiae should be rejected.

182. The Director's submission as to the relevance of s 38 has force. Section 39(1) of the Charter st ates:

> If, otherwise than because of this Charter , a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter .

183. The basis on which it was argued that s 39(1) was enlivened in the present case was as a result of the public interest immunity claim. But the fact that prosecutorial disclosures may be subject to public interest immunity claims, which must be determined by a court, does not open the door to review for rights compatibility under s 38 of the Charter . The declaration was not being sought on the ground that the Director's decision to disclose was unlawful. Nor was such an argument advanced at trial. It cannot be permitted now. Accordingly, s 39(1) is not satisfied and no party has standing to seek relief or a remedy on the basis of failure to comply with s 38 .

184. It is not necessary to consider the extent to which prosecutorial disclosure decisions are open to review by the courts, if at all, and we do not do so. It suffices to say that the authorities relied on by the Director recognise that prosecutorial decisions may be subject to the courts' duty to prevent an abuse of process or an unfair trial. [181]

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[181] Ibid .

185. Other than by reference to ss 38 and 39(1) of the Charter , dealt with above, none of the parties suggested a basis on which Charter rights fell to be considered as factors in the balance when determining the public interest immunity question.

186. In any event, from a practical perspective, the considerations raised by reference to Charter rig hts — the risk of death or other serious harm to EF and her children and the fair trial and liberty rights of the Convicted Individuals — already fall to be balanced in determining where the public interest lies. There is no reason to think that analysis of those factors under the framework of the Charter would produce any outcome in the public interest balance different to that which we reach below.

The balancing of relevant considerations of the public interest

187. The Chief Commissioner's proposed ground 3 of appeal is as follows:

> 3. The trial judge erred by holding that the public interest did not prevent the proposed disclosure: Reasons at [419]–[420]; and should have held that the public interest does not prevent the proposed disclosure.[182]

[182] Proceeding S APCI 2017 0082 — Chief Commissioner's amended application for leave to appeal dated 19 July 2017.

188. EF's proposed grounds 3 and 4 of appeal are:

> 3. The primary judge:
>
> 3.1 having found that 'the public interests to be balanced in determining whether public interest immunity applies to [the Director]'s proposed disclosures are on the one hand the likely harm to [EF] and [EF]'s children and the possible resulting effect on the flow of information from other informers as sources of information and on the other hand the likely assistance that the proposed disclosures would provide to the seven named persons in quashing their convictions': Reasons at [244];
>
> 3.2 erred by failing to engage in such a balancing exercise and instead according absolute weight to the consideration that the proposed disclosures might provide substantial assistance to the seven individuals (the Individuals) in challenging their convictions: Reasons at [416]–[420].

4. The primary judge ought to have held that, on the facts of this case, the risk of death or harm to EF and EF's children arising from the proposed disclosures outweighed any assistance the Individuals might gain from the proposed disclosures in challenging their convictions.[183]

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[183] Proceeding S APCI 2017 0087 — EF's application for leave to appeal dated 21 July 2017.

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189. At the conclusion of his PII Reasons, the trial judge dealt with the balancing process which he was required to undertake as follows:

> I will next consider the factors that I consider are important in the balancing process to determine if public interest immunity applies to the Director's proposed disclosures.
>
> The Director's proposed disclosure is to seven named individuals. Accordingly, as I made clear throughout the hearing, I did not consider it appropriate to, and have not, considered the significance of EF's actions in providing information to police about other persons.
>
> There is of course no evidence of what at least five of the seven persons would have done if they had known of EF's dual role. It may be unlikely that Peters, Ahec, Bednarski and Khoder will take any legal steps as a result of the disclosures the Director proposes. However, it appears that Cvetanovski and Tony Mokbel may well have.
>
> Six of the seven persons pleaded guilty and in some cases, for instance Tony Mokbel, they were convicted of very serious crimes. There has been no argument suggesting that the seven persons were not guilty of the charges with which they were convicted and no miscarriages of justice were identified by the Director. However, the seven were not notified of these proceedings and I cannot make any assumption about whether they would have been found guilty of the crimes to which they pleaded guilty, or in the case of Cvetanovski, who was convicted after pleading not guilty, if they had been able to raise issues arising from EF's dual roles.
>
> Peters, Bednarski and Khoder provided prosecution evidence in connection with other proceedings.
>
> The public interest immunity issue concerns unusual facts. Key institutions of the State differ in their opinion as what actions should be taken. EF's conduct appears to be unprecedented and raises grave issues about its effect on the integrity of the criminal justice system. No party could refer to a similar case.

The Charter rights referred to previously and, to which I have had regard, overlap with the conflicting public interests that must be balanced, in particular the right to life and the right to a fair hearing.

EF and her children face the risk of death as a result of the proposed disclosures. A purpose of the criminal law is to protect human life, not least that of innocent children. In most circumstances, the compelling police evidence of the risks confronting EF and her children would be decisive. Disclosure of information about her role will also breach the assurances of confidentiality that police officers acting on behalf of the State gave to her. There is also the likely 'chilling' effect of the proposed disclosures on potential informers.

A reasonable person with knowledge of these facts might well wonder what end of justice is achieved or advanced by making the proposed disclosures to persons like Peters, Ahec, Tony and Milad Mokbel, Bednarski, Khoder or Cvetanovski, whose conduct in many instances seems to be of the most serious criminal kind and likely to have caused great harm to the community. Why should they be provided with information which may well not assist them or which they may not wish to take advantage of, particularly when the consequence may be the murder of EF and harm to her children?

The only answer to that question is that a fundamental feature of our community is that all persons, whatever crime they have committed, are entitled to independent legal advice and counsel and an opportunity for a fair trial if they contest the charges or to be properly represented if they plead guilty. There is a strong public interest in ensuring that a lawyer's breach of duty and obligations do not undermine the fairness of a trial, or the negotiation of a plea of guilty. The knowledge of EF's role might have assisted the seven persons in a criminal trial if they had pleaded not guilty or in a plea.

The Court, having found that some of the proposed disclosures are supported by evidence and might provide substantial assistance to the seven named persons in challenging their convictions, cannot deny the Director the right to make those disclosures.

I do not pretend that this conclusion answers the question that I have suggested a reasonable person might ask, but I consider that the public interests in our nation' s rule of law and system of criminal justice requires this outcome. The public interests to be balanced in determining whether public interest immunity applies lead to this conclusion.

The Court however understands, as the Chief Commissioner's counsel indicated would occur, that Victoria Police will endeavour to provide protection to EF and her children once the disclosures that I consider should be permitted occur.[184]

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[184] PII Reasons [409]–[421] (citation omitted).

190. It is first submitted on behalf of the Chief Commissioner that these reasons do not disclose a balancing process at all. Rather, it is submitted that they demonstrate that the trial judge regarded the public interest in the right to a fair trial as necessarily overwhelming all other considerations of the public interest. We do not accept this submission. When his Honour's reasons are read as a whole, it is plain that he went to considerable lengths to articulate the factual basis of the risk of harm to EF and her children and was fully cognisant of its significance and of the dimensions of that risk as they affect the public interest.

191. The critical facts weighing against disclosure were identified by his Honour in [416] of his PII Reasons, namely the risk of death to EF and her children, the fact that disclosure would breach assurances of confidentiality given by members of Victoria Police on behalf of the State to EF, and the likely chilling effect of the proposed disclosures on potential informers. We do not consider that the suggested duty of care to take reasonable steps to protect EF's anonymity adds in any material way to these considerations.

192. We would reject the submission advanced by senior counsel on behalf of the Director that EF's position as a lawyer was sufficiently exceptional to mean that disclosure of her role would have no general 'chilling effect' upon informers generally.

193. There was no error on the trial judge's part in accepting Assistant Commissioner Fontana's evidence as to the probable 'chilling' effects of the proposed disclosures by the Director and the further probable adverse consequential effects if EF or her children were harmed or killed.[185]

[185] Ibid [239]–[243].

194. On the other hand, there was good reason to think that disclosure of EF's identity as an informer in the manner proposed may be of substantial assistance to the Convicted Individuals in challenging their convictions by way of appeal. Each of the Convicted Individuals has been convicted of serious criminal offences. Two of them remain in custody serving substantial sentences of imprisonment.

195. His Honour's conclusion in respect of the public interest in ensuring that the Convicted Individuals have received fair trials is supported by the general common law principles governing public interest immunity. As Brennan J said in *Alister v The Queen*: [186]

> It is of the essence of a free society that a balance is struck between the security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty. But in the long run the safety of a democracy rests upon the common commitment of its citizens to the safeguarding of each man's liberty, and the balance must tilt that way. [187]

[186] (1984) 154 CLR 404, 456 (citation in original).

[187] Cf *Sankey v Whitlam* (1978) 142 CLR 1, 42, 61–2 .

196. Likewise, the case law which recognises the specific public interest in preserving the immunity from identification of police informers has long recognised an exception where the interests of justice require otherwise. As Lord Simon put it in *D v National Society for the Prevention of Cruelty to Children* : [188]

> The public interest that no innocent man should be convicted of crime is so powerful that it outweighs the general public interest that sources of police information should not be divulged, so that, exceptionally, such evidence must be forthcoming when required to establish innocence in a criminal trial. [189]

[188] [1978] AC 171, 232–3 (citation in original).

[189] See the citations in *Reg v Lewes Justices, Ex parte Secretary of State for the Home Department* [1973] AC 388, 408A .

197. To similar effect, Brooking J spoke in *Jarvie* of the 'overriding need for a fair trial'. [190]

[190] [1995] 1 VR 84, 90.

198. In the English case of *R v Patel* ,[191] the Court of Appeal when considering the implications of the revelation of informer misconduct for numerous convictions adopted the following statement by Roch LJ in *R v Hickey*:

> This court is not concerned with the guilt or innocence of the appellants, but only with the safety of their convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distracted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened.

[191] [2001] EWCA Crim 2505 [53] (citation omitted).

199. **Following paragraph cited by:**

Karam v The King (14 December 2023) (BEACH, McLEISH and KENNEDY JJA)

187. The applicant submits that the central concern of an allegation of an abuse of process is the effect of the conduct in question on the public's confidence in the administration of justice. [175]

via

[175] *Rogers v The Queen* (1994) 181 CLR 251, 286 (McHugh J); *Moti v The Queen* (2011) 245 CLR 456, 478 [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Moti*'); *AB v CD* [2017] VSCA 338 [199] (Ferguson CJ, Osborn and McLeish JJA) .

As we have noted, two relevant fundamental policy considerations have been identified by the High Court in the context of the notion of abuse of process in criminal proceedings. First, the court must ensure its processes are used fairly by the State if it is to ensure the administration of justice in any particular case. Secondly, unless it does so, public confidence in the courts as the third arm of government will be affected because such confidence depends on maintaining the integrity and fairness of the court's processes. [192]

[192] *Williams v Spautz* (1992) 174 CLR 509; *Moti v The Queen* (2011) 245 CLR 456.

200. In our view, the same fundamental considerations of policy underlie the established exception to the public interest immunity of police informers and mean that his Honour was correct to conclude that the public interest in disclosure outweighs that favouring immunity in the present case.

201. We have reached our conclusion accepting the full force of the police evidence as to risk including that of Detective Superintendent Brigham.

202. There are four subsidiary matters which require specific consideration.

203. First, we would come to the same conclusion as to the balancing exercise even if we are wrong in the view that we have expressed concerning the private duty owed to EF as a result of the assurances given to her. Even if such a duty is regarded as constituting or reflecting a separate and distinct element of the public interest, we would come to the same overall conclusion.

204. Secondly, we agree with the trial judge that it is unnecessary to have regard to the possibility that EF's conduct may have given rise to the basis for a challenge to the convictions of a number of persons other than the Convicted Individuals. The trial judge's conclusions were founded in part upon considered conclusions that the disclosures proposed may offer substantial assistance to each of the Convicted Individuals in the circumstances of their particular cases. That issue was not separately raised or capable of being resolved with respect to other parties on the evidence before the Court.

205. Likewise, his Honour was correct to reject the proposition that the need for investigation of misconduct by a legal practitioner and police officers was a further independent public interest to be placed in the balance in the present case. Such matters are capable of administrative investigation without disclosures of the kind proposed by the Director. [193] On the other hand, disclosures are necessary if the rights of the Convicted Individuals to a fair trial are to be adequately protected.

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[193] PII Reasons [245].

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206. Next, the amici curiae submit that no declaratory relief of the type sought could properly be granted in the absence of the Convicted Individuals as parties to the proceeding. The appointment of the amici curiae was the trial judge's best attempt to protect the interests of the Convicted Individuals. Nonetheless, their capacity to represent their clients was necessarily constrained by their inability to obtain instructions. The amici curiae submitted that, in the absence of the Convicted Individuals, the trial judge ought to have found that the Court did not have jurisdiction to grant the relief sought or should have exercised his discretion not to hear the claim.

207. The amici curiae submitted that the power to grant declaratory relief is confined by the limits of judicial power, which involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process. [194] As such, they submitted, judicial power cannot be exercised unless it proceeds '(subject to limited exceptions) … by way of open and public inquiry, which involves the application of the rules of natural justice'. [195]

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[194] See *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Bass*') and the cases cited therein at n 110, especially *Harris v Caladine* (1991) 172 CLR 84, 150 (Gaudron J) ('*Harris*').

[195] *Harris* (1991) 172 CLR 84, 150 (Gaudron J).

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208. It follows, the amici curiae submitted, that the judicial process required that the Convicted Individuals be given an opportunity to present their evidence and challenge the evidence led against them. [196]

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[196] *Bass* (1999) 198 CLR 334, 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

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209. Further, the amici curiae submitted that the fact that the Chief Commissioner and EF disagree with the Director's opinion that he has a duty to make the proposed disclosures is insufficient to give rise to a legal controversy that would permit the declaratory relief sought by the Chief Commissioner and EF. They contended that the parties did not include any of the persons whose rights will be directly affected by the relief, that is, the Convicted Individuals.

210. The amici curiae further submitted that the authorities relied on by the trial judge did not establish that he had jurisdiction, because they involved matters heard in the absence of an accused prior to that accused's trial and/or conviction. [197] In that context, the issue was whether material should be withheld and whether an accused could have a fair trial if that course was taken. There was said to be no analogy to the present case, where the trials have been conducted and the prosecutor subsequently seeks to disclose, rather than to withhold, the material in question.

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[197] *The Queen on the application of WV v Crown Prosecution Service* [2011] EWHC 2480 (Admin); *Ward* [1993] 1 WLR 619; *Davis* [1993] 1 WLR 613.

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211. The amici curiae's submissions on jurisdiction must be rejected. As the trial judge found, there is no doubt that he had, and this Court has, jurisdiction to determine the issue raised.[198] The issue raised in this proceeding is whether the proposed disclosures are subject to public interest immunity. The Chief Commissioner and EF each has an interest in resisting disclosure of material identifying EF as a police informer. The Director has an obvious interest in the determination of the extent of his duty of disclosure. It is not to the point that, if the issue had arisen at trial, the Convicted Individuals would have been parties to the proceeding. There remains an issue of public interest immunity between parties having a clear interest in its resolution. Such an issue is properly determined by this Court in the exercise of its unlimited jurisdiction as the superior court of Victoria. [199]

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[198] PII Reasons [88]–[96].

[199] *Constitution Act 1975* s 85(1).

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212. The absence of the Convicted Individuals, as persons having an interest of a kind that would ordinarily entitle them to be parties, does not deprive the Court of jurisdiction. The consequences of their absence, including the fact that evidence could not be advanced or tested by reference to their instructions, might at most bear on the Court's discretion whether to grant declaratory relief. But for the reasons given in respect of the Charter arguments, this was a case where it was proper to proceed in the absence of persons who had an interest in the proceeding. The large question of public importance in issue was appropriately approached in the manner in which the proceeding has been conducted.

213. Finally, we note that it was submitted by the amici curiae that the evidence shows EF acted in 'conscious disregard' of her professional obligations and that this circumstance affected the balance of the public interest. There was a substantial body of evidence not only from EF but also from her clinical psychologist as to the state of mind in which she came to act as she did. This included a letter to Assistant Commissioner Fontana dated 30 June 2015 setting out EF's side of the story and quoted in full at [19] of the PII Reasons. We do not propose to analyse this evidence. The public interest is distinct from the private rights and wrongs of EF' s conduct. The protection of EF and her children from harm, and the protection of the integrity of the informer system, raise very significant issues of the public interest whatever view is taken of EF's professional conduct. There will be many cases where informers are criminals whose conduct raises serious questions concerning bad character. Nonetheless, in the ordinary case, public interest immunity will protect their anonymity as police informers. We do not regard EF's conduct as in any way disentitling her from raising the matters upon which she seeks to rely.

Conclusion with respect to public interest immunity

214. For the above reasons, we would grant leave to appeal with respect to the PII proceedings but dismiss the appeals.

Breach of confidence proceeding — Obligation of confidence

215. It will be recalled that, by the breach of confidence proceeding, EF sought to restrain the Director from disclosing her role as a police informer, on the basis that Victoria Police owed her obligations of confidence in respect of that information, pursuant to which the Director, as knowing recipient of the information, was likewise bound. The trial judge rejected the claim. As mentioned earlier in these reasons, three issues are agitated in relation to the breach of confidence proceeding. The first two are sought to be raised by EF. The third is the subject of a notice of contention filed by the Director.

216. The first issue is whether the trial judge erred in finding that, because of his public duty, the Director could not acquire information subject to an obligation of confidence. The trial judge acknowledged that the identity of police informers may be protected by virtue of equitable obligations of confidence. [200] However, he accepted the Director's submission that the Director could not acquire information subject to an obligation of confidence such that he would be prevented from disclosing it when he had a public duty to do so. The trial judge held that, if disclosure of the informer's identity might provide substantial assistance to a person to challenge a conviction, no obligation of confidence could protect that fact from disclosure. [201]

[200] BOC Reasons [10], citing *Chief Commissioner of Police v The Herald & Weekly Times Pty Ltd* [2014] VSC 156R [19].

[201] BOC Reasons [13]–[15], citing *A v Hayden* (1984) 156 CLR 532, 595 (Deane J), *WV v Crown Prosecution Service* [2011] EWHC 2480 (Admin) [24] ; *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171, 218 (Lord Diplock).

217. EF referred to the finding of the trial judge that the Director had a statutory basis for not disclosing EF's role as a police informer in s 416 of the *Criminal Procedure Act 2009* . EF fastened on sub-s (2) which provides that nothing in that Act requires the prosecution to disclose to the accused 'material which the prosecution is required or permitted to withhold under this or any other Act or any rule of law'. EF submitted that s 416(2) operated to limit the duty of disclosure, including by reference to obligations of confidence.

218. That submission should be rejected. Section 416(2) is a limitation on the obligations of disclosure in the *Criminal Procedure Act 2009* . The prosecutorial obligation of disclosure with which this case is concerned arises under the general law. [202] As such, s 416(2) says nothing about it. Moreover, s 416(1) provides that nothing in the Act 'derogates from a duty otherwise imposed on the prosecution to disclose to the accused material relevant to a charge'. This confirms that s 416(2) does not operate to limit the obligation of disclosure.

[202] *R (Nunn) v Chief Constable of Suffolk Police* [2015] AC 225, 246–7 [30]–[35] .

219. Further, the trial judge did not rely on s 416(2) in reaching his conclusion that the prosecutorial obligation of disclosure was not limited by obligations of confidence in circumstances where disclosure to a person might provide substantial assistance in challenging a conviction. That conclusion was instead based on general law considerations, consistently with s 416(1) .

220. To the extent that EF sought in this context to submit that there was no reason why the prosecutorial obligation of disclosure would override the obligation of confidence in this context, that submission must also fail. The trial judge was correct to find that any obligation of confidence owed by Victoria Police to EF was qualified, at least, in that if the information in question was not subject to public interest immunity it could be required to be disclosed. In light of the conclusions reached earlier in these reasons, the fact that Victoria Police had assured EF that her identity as an informer would be kept confidential is a factor in the balancing exercise to be undertaken, but not an overriding consideration — quite to the contrary, in circumstances where the finding is that disclosure may provide substantial assistance to a person challenging a conviction.

221. This ground therefore fails.

Breach of confidence proceeding — Iniquity defence

222. The remaining proposed grounds of appeal in the breach of confidence proceeding concern a defence to the breach of confidence claim which the trial judge upheld, whereby the subject matter of the confidence was an 'iniquity'. The trial judge held that the proposed disclosures would 'reveal the real likelihood of a serious misdeed of public importance' on the part of EF and Victoria Police. [203]

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[203] BOC Reasons [32]. The expression is that of Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 456.

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223. EF took issue with this finding on the basis that the letters proposed to be sent did no more than refer to what 'some material' in the Kellam Report 'could be interpreted to mean', and to the related 'possible breach' of legal professional privilege and duty of confidentiality.

224. In light of the fact that we have upheld the trial judge's conclusion that an obligation of confidence did not arise, it is not strictly necessary to consider these grounds. However, our consideration of the content and import of the proposed disclosures earlier in these reasons makes it clear that we would reject them in any event. In particular, the proposed disclosures would officially confirm EF's status as a registered informer and the real possibility that this might bear on the recipients' convictions, either because EF informed against them while acting for them or because she provided information when acting for others in a way that may have affected the integrity of the prosecution case. [204] This amply qualifies as disclosing a real likelihood of a serious misdeed of public importance, as the trial judge held.

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[204] See [121] above.

Breach of confidence proceeding — Quality of confidentiality

225. It is again not strictly necessary to consider the Director's notice of contention in respect of the breach of confidence proceeding. However, we shall deal with it briefly.

226. By his notice of contention, the Director submitted that the trial judge erred in holding that EF's role as a police informer had the necessary quality of confidentiality potentially to attract an obligation of confidence. The Director submitted that the trial judge ought to have held that the information lacked that quality because it was already in the public domain.

227. The Director contended that the question was not whether there had been official confirmation that EF was a police informer, but whether that information was accessible without such confirmation. [205] It was submitted that the trial judge had conflated these two issues and

incorrectly applied the analysis he had employed in the PII proceeding when deciding what kind of assistance disclosure might provide, in order to determine in the breach of confidence proceeding whether the information was capable of attracting an obligation of confidence.

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[205] The Director relied on *Franchi v Franchi* [1967] RPC 149, in which information in a Belgian patent application was held not to be confidential in the United Kingdom, and *Australian Football League v The Age Co Ltd (No 2)* (2006) 15 VR 419, 428 [39] , citing *Johns v Australian Securities Commission* (1993) 178 CLR 408, 461–2 .

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228. We are not persuaded that the trial judge conflated the issues in the manner suggested. Inherent in the trial judge's finding, in the breach of confidence proceeding, that the proposed disclosures would involve official confirmation of EF's role as a police informer, is a conclusion that this role is not currently known. It is true that the trial judge stated that this particular information (official confirmation) is not presently in the public domain, [206] but taken in context we consider that he must be taken to have found that the information that was not in the public domain was the information that EF was a police informer in respect of the Convicted Individuals.

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[206] BOC Reasons [25].

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229. In any event, for the reasons we have already given, we consider that the material in the public domain does not currently establish when and in respect of whom EF acted as an informer. [207] In other words, that information is not at present 'accessible' within the meaning of the authorities upon which the Director relies.

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[207] See [123] above.

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230. For these reasons, we would not have upheld the notice of contention, had it been necessary to decide the point.

Conclusion with respect to breach of confidence proceeding

231. We would grant leave to appeal with respect to the breach of confidence proceeding, but we would dismiss the appeal.

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Cited by:

Uniform Evidence Manual [2023] JCV Uniform_Evidence_Manual (12 June 2024)

> Against that, courts have recognised that public interest immunity should not be upheld, and disclosure is required, where there is good reason to think that disclosure may be of substantial assistance to the accused (Madafferi v The Queen [2021] VSCA 1, [32] ; Jarvie v Magistrates' Court of Victoria [1995] 1 VR 84; AB v CD & EF [2017] VSCA 338, [59]).

Charter of Human Rights Bench Book [2023] JCV Charter_of_Human_Rights (24 April 2024)

> In rare cases, the Court has accepted that the right to a fair hearing was limited, but that this did not mean that the proceeding involved an unfair hearing as the limitation was justified under s 7(2). In AB v CD and EF, EF appealed a decision not to restrain the proposed disclosure of her identity as a police informant to certain convicted persons (the 'Convicted Individuals') where EF had also acted as a barrister to the Convicted Individuals. The Convicted Individuals were not parties to the proceedings, but the Court agreed that it nonetheless needed to be satisfied that the proceeding was conducted in accordance with their Charter rights. The Court accepted, without deciding the point, that those rights included rights under ss 24(1) and 25(2)(b). Those rights were limited because the proceeding took place without notice to or direct participation by the Convicted Individuals. The Court agreed that the proceedings needed to be decided without notice to the Convicted Individuals, and that the limitation of their rights was justified under s 7(2) because no alternative course was open other than to appoint amici curiae to ensure that arguments in their interest were advanced. 1263

Charter of Human Rights Bench Book [2023] JCV Charter_of_Human_Rights (24 April 2024)

> In rare cases, the Court has accepted that the right to a fair hearing was limited, but that this did not mean that the proceeding involved an unfair hearing as the limitation was justified under s 7(2). In AB v CD and EF, EF appealed a decision not to restrain the proposed disclosure of her identity as a police informant to certain convicted persons (the 'Convicted Individuals') where EF had also acted as a barrister to the Convicted Individuals. The Convicted Individuals were not parties to the proceedings, but the Court agreed that it nonetheless needed to be satisfied that the proceeding was conducted in accordance with their Charter rights. The Court accepted, without deciding the point, that those rights included rights under ss 24(1) and 25(2)(b). Those rights were limited because the proceeding took place without notice to or direct participation by the Convicted Individuals. The Court agreed that the proceedings needed to be decided without notice to the Convicted Individuals, and that the limitation of their rights was justified under s 7(2) because no alternative course was open other than to appoint amici curiae to ensure that arguments in their interest were advanced. 1263

> *via*
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> AB v CD and EF [2017] VSCA 338 [160]–[176] .

Commonwealth of Australia v De Pyle [2024] FCAFC 43 (26 March 2024) (O'Callaghan, Raper and Button JJ)

> 54. Further, in our view, her Honour erred in finding that "[o]nce the confidentiality of the content of [20] and [22] of the Applicant's Concise Statement has been lost, there is no necessity, nor utility, in protecting the Commonwealth's plea in response". That finding

amounts to saying that because an allegation is in the public domain, then public confirmation of whether or not that allegation is right or wrong cannot be protected. Brigadier Ryan gave (confidential) evidence about the potentially damaging effect of public confirmation of certain ADF procedures. And, as the Commonwealth submitted, "a government's response to something cannot in any way be conflated with the mere allegation about something". See, too, *AB v CD* [2017] VSCA 338 at [117]-[130] (Ferguson CJ, Osborn and McLeish JJA) . The submission concerning the distinct significance of the Commonwealth's *response* to allegations was raised before, but not addressed by, the primary judge.

Karam v The King [2023] VSCA 318 (14 December 2023) (BEACH, McLEISH and KENNEDY JJA)

187. The applicant submits that the central concern of an allegation of an abuse of process is the effect of the conduct in question on the public's confidence in the administration of justice. [175]

via

[175] *Rogers v The Queen* (1994) 181 CLR 251, 286 (McHugh J); *Moti v The Queen* (2011) 245 CLR 456, 478 [57] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Moti*'); *AB v CD* [2017] VSCA 338 [199] (Ferguson CJ, Osborn and McLeish JJA) .

Karam v The King [2022] VSC 808 (21 December 2022) (Osborn JA)

420. More generally, Victoria Police sought to conceal Ms Gobbo's identity as an informer on an ongoing basis for the reasons canvassed by the Court of Appeal in *AB v CD & EF*.719F [720]

via

[720] [2017] VSCA 338 (Ferguson CJ, Osborn and McLeish JJA) .

Paul Redmond Mullett v Christine Nixon [2022] VSCA 174 (23 August 2022) (Ferguson CJ; Beach and McLeish JJA)

53. Self-evidently, there could be no valid complaint about any of the respondents failing to discover, disclose or produce documents that post-date judgment. Nevertheless, the applicant seeks to rely on these documents as fresh evidence for the purpose of showing that the documents identified in the first 59 entries of the table of fresh evidence existed and should have been disclosed by the respondents prior to trial. Additionally, some of the post-trial documents are relied upon by the applicant to support an alleged motive that the respondents (and, in particular, the fifth respondent) might have had to prevent the disclosure of documents which were in truth discoverable. The motive suggested by the applicant was that some of the documents refer to the activities of Ms Gobbo, a matter which the fifth respondent was actively seeking to suppress at the time of trial in *AB v CD* [49] and related proceedings. [50]

via

[50] See further, *AB v CD* [2017] VSCA 338 ; *AB v CD* [2019] VSCA 28.

Arico v The Queen [2022] VSCA 35 (21 March 2022) (Beach JA)

10. In his written submissions on the review,[14] the applicant contended that the documents sought in paragraph 1(a) of the s 317 request go to the question of whether the applicant's

legal representative was a police informer who provided information to Victoria Police about current and/or former clients, including the applicant. He submitted that, as this Court recognised in *AB v CD* , [15] if proven, the fact that Mr Acquaro provided information to Victoria Police about the applicant or others 'may give rise to a series of different conceptual bases for challenge to the convictions in issue'. [16] The applicant contended that those conceptual bases are reflected in particulars (a) to (c) of his proposed ground of appeal.

Arico v The Queen [2022] VSCA 35 (21 March 2022) (Beach JA)

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via

[15] [2017] VSCA 338 .

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via

[16] Ibid [113] .

Mokbel v The Queen [2021] VSCA 366 (21 December 2021) (Beach JA)

11. The Chief Commissioner submitted that the information contained in the confidential affidavit and the confidential submissions was 'of the highest sensitivity'. It was submitted that this Court is 'well equipped to study and rule on them' and that the circumstances did not justify 'the extraordinary step' of granting the parties' legal representatives access to them. The Chief Commissioner described this case as 'extraordinary because of the nature of the statutory provision at issue and the risk of death or serious injury that would result from disclosure'. I interpolate that this is a submission that has been made and not been found to be dispositive in the Chief Commissioner's favour in a number of proceedings in this Court involving Lawyer X and the Royal Commission into the Management of Police Informants. [8]

via

[8] See, for example, *AB v CD* [2017] VSCA 338 ; *AB v CD* [2019] VSCA 28; and *Chief Commissioner of Victoria Police v Chairperson of the Royal Commission into the Management of Police Informants* [2020] VSCA 214.

Arico v The Queen [2021] VSCA 353 (15 December 2021) (PEDLEY JR)

23. The applicant's written case summarises the factual background to his second and subsequent application for leave to appeal in relation to Mr Acquaro's role as a police informer: [11]

> Joseph 'Pino' Acquaro acted for the applicant in respect of numerous legal matters (including criminal, immigration, property and taxation matters) from 2006 until 2016.
>
> The applicant was arrested and charged on 5 March 2015 in respect of the present matters. He immediately instructed Mr Acquaro to act on his behalf, and Mr Acquaro attended upon him at the Melbourne Custody Centre that evening.
>
> Over the course of the following 12 months, the applicant provided instructions to Mr Acquaro and obtained advice from him in respect of the present matters. Mr Acquaro made all forensic and strategic decisions in respect of the applicant's defence until Mr Acquaro's untimely death.
>
> Mr Acquaro's clients (including the applicant) were transferred to Condello Lawyers Pty Ltd on around 1 July 2015, upon that firm commencing trading. The firm's principal had previously been employed as a solicitor at Mr Acquaro's firm, and Mr Acquaro remained involved in the matter as a consultant (including instructing at the applicant's committal hearing in October 2015). At all times, the matter was run as per the strategy which had been devised by Mr Acquaro.
>
> On 15 March 2016, Mr Acquaro was fatally shot outside the Gelobar Café in Lygon Street, Brunswick East. Vincenzo Crupi has been charged with his murder. The applicant understands that Victoria Police seized Mr Acquaro's computer as part of that homicide investigation.
>
> In November 2016, the applicant was represented at his County Court trial by Anthony Condello (who had previously been employed by Mr Acquaro).
>
> On 21 November 2017, the Court of Appeal delivered judgment in *AB v CD* [2017] VSCA 338 in respect of registered police informer Nicola Gobbo. The Chief Commissioner, who was represented in that case, did not inform this Court or the applicant that Joseph Acquaro had also operated as a police informer. It is not presently known whether the prosecution was aware of that matter. The Court of Appeal heard the applicant's proposed appeal on 8 February 2018, and refused the applicant leave to appeal against his conviction on 24 May 2018.
>
> On 5 November 2018 the High Court delivered judgment in *AB (a pseudonym) v CD (a pseudonym)* (2018) 93 ALJR 59 in respect of Nicola Gobbo. This was the very month in which the High Court refused the applicant special leave to appeal his convictions (on 14 November 2018). The Chief Commissioner of Police (who was one of the parties to that case) did not inform the High Court or the applicant that Joseph Acquaro had also been a police informer. It is not presently known whether the prosecution was aware of that matter.

> The applicant was not granted leave to appear at the Royal Commission into the Management of Police Informants, in circumstances where he did not have significant involvement with Nicola Gobbo.
>
> On 15 January 2021, it was revealed that Mr Acquaro had also been a police informer. This information was revealed in the Court of Appeal's decision in *Madafferi v The Queen* [2021] VSCA 1, wherein this Court rejected the Chief Commissioner's claim of public interest immunity. Inter alia, the Court's judgment established that there was a series of contacts between Mr Acquaro and police in 2008, and a second series of contacts in the first half of 2014 (when, it is noted, Witness A approached the police and the police investigation in the present matter commenced). On both occasions Mr Acquaro provided information to police about at least one client, and on both occasions he was assessed for suitability as a registered police informer. He was never formally approved as registered police informer, but was given a human source registration number.

Gatto v Australian Broadcasting Corporation [2021] VSC 83 (26 February 2021) (Keogh J)

56. In the judgment 'gangland' is used to describe criminal activity investigated by the Victoria Police Purana Taskforce in the mid-2000s, and by Ms Gobbo in her letter referring to the gangland war. [24] The term 'underworld' was also used by Ms Gobbo in her letter , [25] and b y Inspector Hall in evidence set out above. Neither term was used in the judgment referring to Mr Gatto.

via

[24] *AB & EF v CD* (n 22).

Gatto v Australian Broadcasting Corporation [2021] VSC 83 (26 February 2021) (Keogh J)

57. Ginnane J's judgment, rejecting the application by the Chief Commissioner of Police and Ms Gobbo to restrain disclosure of the information, was delivered on 19 June 2017. The Chief Commissioner and Ms Gobbo prosecuted unsuccessful appeals from that judgment before the Court of Appeal [26] and the High Court. [27] The effect of orders made in the High Court, and subsequently in the Court of Appeal, was that from 3 December 2018 the disclosure proceeding was able to be published and reported, and that from February 2019 Ms Gobbo's identity was no longer suppressed.

via

[26] *AB & EF v CD* [2017] VSCA 338 .

Zirilli v The Queen [2021] VSCA 2 (15 January 2021) (McLeish, Emerton and Weinberg JJA)

99. In *Jarvie v Magistrates' Court of Victoria at Brunswick* ,[22] Brooking J set out the test governing the disclosure of the identity of a police informer as follows:

> In dealing with the identity of informers judges have often used words which might be thought to suggest that identity may be disclosed only where it is shown that disclosure will enable the innocence of the accused to be demonstrated. So Lord Esher MR spoke of disclosures being 'necessary or right in order to shew the prisoner's innocence': *Marks v Beyfus*. [23] By way of further examples see what was said by Gibbs ACJ

in *Sankey v Whitlam* [24] ('necessary to support the defence of an accused person') and the authorities to which his Honour there referred, including *R v Lewes Justices; Ex parte Home Secretary* [25] ('required to establish innocence'). But, while the court will no doubt allow the identity of an informer to be disclosed only after the most anxious consideration, the expressions I have cited, and other similar words, were in my view not intended to convey that disclosure is warranted only where it is clear that the result must be to demonstrate that the accused is not guilty. So in *Cerr ah v The Queen*,[26] Vincent J, speaking in effect for the court, said:

> It is, in my view, clear that before what appears to be a legitimate claim against the disclosure of the name of a police informer is rejected, the accused must demonstrate that the evidence is at the very least capable of being, if not likely to be, of some real assistance to him in answering the case made out against him. A speculative possibility of the kind for which the present applicant contends would certainly not suffice.

I doubt whether this test is significantly different to that mentioned by Wilson and Dawson JJ and Brennan J in *Alister v The Queen* [27] (a likelihood of the obtaining of material substantially useful to the accused). The test laid down by Vincent J is capable of being applied not only on a trial but also in committal proceedings. I would respectfully suggest that the words 'is at the very least capable of being, if not likely to be, of some real assistance to him' should be understood as requiring it to be demonstrated that there is good reason to think that disclosure of the informer's identity may be of substantial assistance to the defendant in answering the case against him. I should add that I respectfully doubt whether McHugh JA (as he then was) in *Cain v Glass (No 2)* [28] intended to lay down any substantially different test to that which I have attempted to formulate. [29]

via

[29] *Jarvie* [1995] 1 VR 84, 89–90 (citations in original), quoted in *AB (a pseudonym) v CD (a pseudonym) & EF (a pseudonym); EF (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) & AB (a pseudonym)* [2017] VSCA 338, [53] ('*AB v CD & EF*).

Zirilli v The Queen [2021] VSCA 2 (15 January 2021) (McLeish, Emerton and Weinberg JJA)

100. Justice Brooking went on to say: [30]

> The fact that there is good reason to think that disclosure of the informer's identity may be of some slight assistance to the defence is not sufficient to outweigh the public interest in non-disclosure. The balancing process accepts that justice, even criminal justice, is not perfect, or even as perfect as human rules can make it. But once it is demonstrated that there is good reason to think that non-disclosure may result in substantial prejudice to the accused, the balance has been shown to incline in his favour and disclosure should be directed.
>
> It may be suggested that the notion of a balancing of relevant factors pointing in one direction against relevant factors pointing in the other is not consistent with the proposition that identity must be disclosed if there is good reason to think that disclosure may be of substantial assistance to the defendant, and that the question must always be the general one whether the public interest will be better served by disclosure or non-

> disclosure. On this approach it might be said that the degree of possible prejudice from nondisclosure to which a given defendant may be required to submit may depend on the strength of the considerations favouring nondisclosure. But it seems to me that the overriding need for a fair trial must mean that in no circumstances can the identity of a witness be withheld from a defendant if there is good reason to think that disclosure may be of substantial assistance to the defendant in combating the case for the prosecution. To say that in such a case no balance is called for is to say that, whatever the strength of the case in favour of nondisclosure, it cannot prevail. But a balancing has still been carried out, and effect has been given to an overriding principle that the 'right' to a fair trial must not be substantially impaired. [31]

via

[30] Ibid 90 (citation in original), quoted in *AB v CD & EF* [2017] VSCA 338, [55] .

Madafferi v The Queen [2021] VSCA 1 (15 January 2021) (Emerton, Weinberg and Osborn JJA)

22. In open submissions in support of the PII application , the Chief Commissioner also outlined the basis for the PII application to be heard in closed court and in the absence of Madafferi and his legal representatives. Relying on *AB v CD & EF* , [3] he submitted that, in an exceptional case, it may be necessary for a court to resolve a question of public interest immunity without notice to a party such as the convicted person, because notice of an application would itself destroy the immunity.

Madafferi v The Queen [2021] VSCA 1 (15 January 2021) (Emerton, Weinberg and Osborn JJA)

37. Brooking JA's remarks were taken up by this Court in *AB v CD & EF,* [14] which reformulated the test in the context of criminal appeals as follows:

> [T]he test formulated by Brooking J in *Jarvie* may be reformulated as requiring it to be demonstrated that there is good reason to think that disclosure of the informer's identity may be of substantial assistance to the Convicted Individuals in seeking leave to appeal and appealing their convictions. [15]

Madafferi v The Queen [2021] VSCA 1 (15 January 2021) (Emerton, Weinberg and Osborn JJA)

39. The Chief Commissioner therefore submits that the reformulated test expressed in *AB v CD & EF* means that 'substantial assistance' must be shown (at a minimum) before an informer's identity becomes susceptible to disclosure. This may be contrasted with the interpretation advanced by the amici, which requires disclosure once the possibility of substantial assistance has been met.

Madafferi v The Queen [2021] VSCA 1 (15 January 2021) (Emerton, Weinberg and Osborn JJA)

41. The Chief Commissioner asked the Court to follow the approach taken by McHugh JA in *Cai n v Glass (No 2)* ,[16] in which his Honour held that, having regard to the 'exalted' or 'paramount' position of the rule protecting the anonymity of informers (referred to as the 'informer rule'), there is no need to weigh competing public interests when a claim is made that the name of a police informer should be disclosed. [17] We decline to follow his Honour' s decision in that case. Section 130(1) of the *Evidence Act* by its express terms requires the Court to carry out a balancing exercise. Moreover in *AB v CD & EF* (which was not governed

by s 130(1)) , this Court confirmed that the common law authorities did not remove the requirement to carry out the balancing exercise. [18] The High Court upheld this Court's ultimate decision and had no hesitation in affirming that the identity of the informer should be revealed. [19]

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via

[3] *AB (a pseudonym) v CD (a pseudonym) & EF (a pseudonym); EF (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) & AB (a pseudonym)* [2017] VSCA 338, [65] (Ferguso n CJ, Osborn and McLeish JJA) ('*AB v CD & EF*').

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via

[18] [2017] VSCA 338 , [59] (Ferguson CJ, Osborn and McLeish JJA) .

Visser v DPP (Cth) [2020] VSCA 327 (18 December 2020) (McLeish, Emerton and Osborn JJA)

14. Victoria Police strenuously resisted disclosure of any material that might reveal Ms Gobbo's identity on the ground of public interest immunity, but were unsuccessful, first before a judge in the Trial Division, [6] then in this Court [7] and finally in the High Court of Australia. [8]

via

[7] *AB (a pseudonym) v CD (a pseudonym) & EF (a pseudonym)* [2017] VSCA 338 .

Visser v DPP (Cth) [2020] VSCA 327 (18 December 2020) (McLeish, Emerton and Osborn JJA)

87. We move to consider whether the appellant would or could have been successful in excluding evidence of the bill of lading, or more broadly the evidence of detection of the 'tomato tins' container, as a result of the information that Ms Gobbo provided to Victoria Police. In what follows in respect of this issue and ground 1 in general, we assume in the appellant's favour that any issues of public interest immunity would have been resolved or dealt with in such a way that the appellant, or at least a lawyer acting on his behalf, would have had the information in question and known that Ms Gobbo was its source. [48]

via

[48] *AB v CD & EF* [2017] VSCA 338 [65]–[72] (Ferguson CJ, Osborn and McLeish JJA) . See also *R* v *Ward* [1993] 1 WLR 619, 646–8, 680–1 (Glidewell, Nolan and Steyn LJJ).

AB (a pseudonym) v CD (a pseudonym) and EF (a pseudonym) [2019] VSCA 28 (21 February 2019) (Ferguson CJ, Beach and McLeish JJA)

2. Proceedings were commenced in the Trial Division by AB and EF seeking to prevent CD from sending any letters. CD's case was that he (and later, she) was under a duty as the Director of Public Prosecutions to disclose information contained in an IBAC report about EF's activities in relation to her former clients. AB and EF were unsuccessful at trial [1] and again on appeal to this Court. [2] While the High Court initially granted AB and EF special leave to appeal from this Court's decision, after full written arguments and the receipt of additional evidence, tendered in order to clarify the relevant facts that had been the foundation of the grant of special leave, the High Court ultimately revoked its grant of special leave. [3]

via

[2] *AB v CD & EF* [2017] VSCA 338 .